A FRIENDLY 'BUY-BACK' NOT ALWAYS A 'SALE' THAT REQUIRES A WRITTEN AGREEMENT TO BE VALID

Loggenberg and Others v Maree (286/17) [2018] ZASCA 24 (23 March 2018)

The facts in this judgment tells a story of A, in an attempt to assist his friend B, that bought B's property in an execution sale with the understanding that B will buy it back shortly after, when his finances improve. A subsequently sold the property to C and B approached the Court for assistance. A argued that the buy-back was a sale agreement of land and was invalid as it was agreed to orally. He was thus free to sell to C. The Court found that it rather resembled an oral agreement for the benefit of a third (stipulatio alteri) and a written recordal was not necessary.

The Judgment can be viewed here.

FACTS

The Loggenberg family live on the farm Weltevreden in the Free State. The farm was previously owned by the Anton Loggenberg Familie Trust (the Family Trust), but was subsequently transferred to one Maree, formerly a close friend of Mr Loggenberg.

The action from which this appeal arises is an attempt by Mr Loggenberg, his wife and son, in their capacities as trustees of the Chacoranja Trust (the Trust), to compel Mr Maree to transfer Weltevreden back to the Trust.

Mr Loggenberg was insolvent when the Family Trust was created in 1997 to protect the family's interests. He continued farming operations on the farm through two close corporations. In 2007 the debts of the Family Trust and one of the close corporations were consolidated and re-financed by a loan to the Family Trust of some R2.3 million by clients of Maree's business. In 2010 when the close corporation was liquidated it was discovered that the Family Trust was indebted to it in an amount of R442,480.00. The liquidators obtained judgment for this amount and Mr Maree bought the farm at the subsequent sale in execution in October 2011. The circumstances of the sale to Mr Maree are relevant and are as below.

After taking advice from Mr Maree, Mr Loggenberg and Mr Maree entered into a contract for the benefit of a third party with an oral agreement to the effect that Mr Maree would purchase Weltevreden at the sale in execution for the benefit of a new trust to be created to protect the interests of Mr Loggenberg and his family. Although Mr Maree would become the registered owner of the farm, Mr Loggenberg and his family would continue to reside on Weltevreden and Mr Loggenberg would continue his farming activities. Once the

new trust was established, Weltevreden would be re-transferred to it against payment to Mr Maree of the costs he had incurred in acquiring and obtaining registration of the farm in his name, and repayment of the loan to the clients of Maree's business. Mr Maree would arrange the finance through an investment arm of his business. It was said to be an implied or tacit term that he would not encumber or sell Weltevreden without entering into negotiations with the Trust concerning implementation of the oral agreement.

In accordance with the oral agreement, Mr Maree bought Weltevreden for R500,000.00 on behalf of the trust to be created. The Chacoranja Trust was established in May 2012. Mr Loggenberg, his wife and Mr Maree were the initial appointed trustees and in May 2016, Mr Maree resigned as trustee.

It was alleged that the Trust accepted the benefit conferred by the oral agreement and that at the beginning of 2013, Mr Maree was informed that the Trust anticipated shortly thereafter to be in a position to pay the necessary amounts to procure transfer of Weltevreden in its favour. However, it was alleged that Mr Maree breached his obligations under the oral agreement by selling Weltevreden to a third party for R5.2 million.

Summons was issued in June 2016. Prior to the action being instituted, Mr Loggenberg and the Trust obtained an interdict against Mr Maree preventing him from transferring Weltevreden to a third party who had purchased it for R5.2 million.

The response to the summons was a notice of exception on the basis that it did not disclose a cause of action. Maree raised three arguments in support of the exception. First, he contended that the agreement alleged was an alienation of land in the form of a sale, and invalid because it was not incorporated in a deed of alienation as required by section 2 of the Alienation of Land Act 68 of 1981 (the Act). Second, he alleged that the agreement was void for vagueness, both because it embodied an agreement to agree on matters such as the terms of the transfer and financing arrangements, and because in the absence of agreement on such matters the agreement was incurably vague. Third, and in anticipation of an argument being raised that the common law should be developed to render agreements to agree enforceable in law, he argued that this was not an appropriate development of the common law.

The exception was upheld in the Bloemfontein High Court. The present matter is an appeal against that finding.

HELD:

- The Court *a quo* held that the Family Trust's claim did not sustain a cause of action because it envisaged a resale of the farm to the Trust against payment to Mr Maree

of certain costs, together with the outstanding loan of the Family Trust. The oral agreement to this effect was accordingly void as it did not comply with section 2(1) of the Act (which reads that: *"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority"*).

- The Court also upheld the exception on the ground of vagueness and held that the so-called agreement to negotiate to conclude a further agreement was also void (again for non-compliance with the Act).

What is the correct construction of the agreement between the parties?

- The Act defines 'alienate' as meaning 'sale, exchange or donation'. It was not suggested that this transaction was either an exchange or a donation, which left only a sale. This being an exception, the excipient (Maree) had to persuade the Court *a quo* that, on every reasonable interpretation of the oral agreement, the sale of Weltevreden to the Trust was contemplated.

- A contract of sale is a consensual agreement by which one of the contracting parties (the seller) binds itself to the other (the buyer) to exchange a thing for a definite sum of money (the price) which the buyer promises to pay to the seller. The essentials of the contract are agreement upon the *merx* (the thing sold), the price and the obligation of the seller to deliver the *merx* to the buyer.

- The relationship between Mr Loggenberg and Mr Maree cannot be described as being one of buyer and seller. Neither can the relationship between the Trust and Mr Maree be so described. Instead, the oral agreement as pleaded is based solely on the relationship between Mr Loggenberg and Mr Maree. This is buttressed by the following allegations in the particulars of claim. The Loggenberg family was in financial difficulty. Mr Maree agreed to purchase Weltevreden on behalf of a trust to be formed and register the farm in his name until the trust could acquire ownership of it. The Loggenberg family would continue to live and farm on Weltevreden. After its establishment, the trust would be entitled to transfer of Weltevreden upon reimbursement of Mr Maree's costs incurred in acquiring the farm (there is no hint of profit or payment for his services) and payment of the amount owed to the clients of Maree's business. Mr Maree would not be entitled to encumber or sell the farm without negotiations concerning implementation of the oral agreement.

- Further, it was alleged that at the sale in execution Mr Maree and Mr Loggenberg informed members of the public that Mr Maree was buying Weltevreden on behalf of the Loggenberg family and they were asked not to push up the bids. In accordance with the oral agreement, Mr Maree bought Weltevreden for R500,000.00 whereas its market value was R1 million. The Trust was established in 2012 and Mr Maree (unlike a seller) and Mr Loggenberg became trustees. Pursuant to a meeting in 2013 at which Mr Loggenberg informed Mr Maree that the Trust would be in a position to repay the purchase price and costs which Mr Maree had incurred in acquiring Weltevreden, on 27 March 2013 and 8 April 2013 amounts, each of R1 million, were paid into the trust account of Maree's business for the acquisition of Weltevreden by the Trust.

- Reasonably interpreted, the allegations are capable of sustaining a cause of action that Mr Maree bought Weltevreden on behalf of the Trust and took transfer thereof into his own name, with an undertaking to transfer the farm to the Trust when called upon to do so, upon reimbursement of his costs and payment of the loan by the Family Trust to Maree & Bernard Attorneys. So interpreted, the oral agreement does not constitute a sale of Weltevreden to the Trust. This is not new. More than a century ago in *White v Collins*, the nature of such a claim was explained as follows:

  'If A buys a property on behalf of B from C and takes transfer into his own name with a promise to B to transfer it to him when called upon, B has an actio in personam to compel A to transfer the property to him.'

- This statement was approved in a minority judgment in *Du Plessis v Nel*, that a promise by A to hold freehold property registered in her name in trust for B is a contract to deliver such property on demand, and is not a contract of sale of fixed property as contemplated in the Transvaal Transfer Duty Proclamation 8 of 1902. And the Supreme Court of Appeal endorsed this subsequently in the matter of *Dadabhay v Dadabhay & another*. (In the latter case, the appellant and the respondent entered into an oral agreement in terms of which the respondent agreed to buy an erf from the Community Development Board on behalf of and as nominee for the appellant, but refused to transfer it when called upon to do so. A defence based on section 1(1) of the General Law Amendment Act 68 of 1957 was dismissed. This Court held that the oral agreement was neither a contract of sale nor a cession in respect of an interest in land; and that the word 'nominee' may well have been used in the relevant oral agreement to denote that the respondent would act as a trustee in buying the property and thus would thereafter sign all documents, when called upon by the appellant to do so, in order that it could be registered in her name.)

- Maree submitted in this regard that unlike *Dadabhay*, the acquisition of Weltevreden by the Trust against payment of the price to be determined and financed, was nothing other than a sale; that the Trust did not even exist at the time of the stipulation in its favour; and that all it allegedly acquired on acceptance of the stipulation was the right to purchase the farm at a price to be determined and financed. This submission was however unsound. A typical *stipulatio alteri* or contract for the benefit of a third party is a contract concluded between A and B for the benefit of a third party C, who by accepting the benefit becomes a party to that contract so that it is A and C who are bound to each other. Such a contract has been recognised as enforceable in relation to a company not yet formed. So, nothing turns on the fact that the Trust was not in existence when the oral agreement was concluded. It appears that the agreement was a fairly typical *stipulatio alteri*. Once the Trust was established, by accepting the benefit of the oral agreement, it could obtain the right Mr Loggenberg contracted for, i.e. the transfer of Weltevreden. And since the oral agreement was capable of being construed to be other than as a sale, it would not be prohibited by section 2(1) of the Act.

It is a different matter whether the oral agreement can be proved and whether the Trust indeed accepted the benefit of that agreement. These are matters for trial. The Supreme Court of Appeal therefore remitted the matter to the High Court for trial.

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