

Revenue—Transfer duty—Payment of—Transfer Duty Act 40 of 1949—Liability of purchaser to pay transfer duty where sale of immovable property subject to unfulfilled suspensive condition— Whether purchaser acquires ius in personam ad rem acquirendam where sale subject to unfulfilled suspensive condition—Pending fulfilment of condition, contract is inchoate and its operation suspended—As purchaser cannot demand transfer, he does not acquire right to obtain dominium of land—On proper construction of s 2(1) of Act, word 'acquired' not including purchase of property under contract of sale which is subject to unfulfilled suspensive condition—Such purchaser therefore not liable to pay transfer duty.

E The plaintiff had claimed against the defendant payment of transfer duty under the Transfer Duty Act 40 of 1949 (the Act) arising out of two transactions for the purchase of two farms. In the first transaction the purchaser was the defendant or his nominee; in the second transaction the purchaser was the defendant in his personal capacity or in his representative capacity as trustee of a trust. Both properties were eventually transferred directly from the sellers to the trust. It was common cause that the trust was liable to pay and had in fact paid the transfer duty in respect of both transactions. The defendant denied liability and pleaded, *inter alia*, that both transactions had been subject to suspensive conditions, neither of which had been fulfilled in relation to him, and that he had therefore not 'acquired' either property in terms of s 2(1) of the Act.

F The plaintiff accepted to the defendant's plea as disclosing no defence. The exception was based in essence on the ground that, by entering into the contracts, the defendant had acquired a *ius in personam ad rem acquirendam* respect of each farm; that there had been no cancellations in terms of s 5(2) of the Act, and that, in consequence, the defendant did not have a valid defence to the claims. The plaintiff argued that the contracts were sales, even though the conditions remained unfulfilled. It was submitted that as the parties were not entitled to rescile from the contracts pending the fulfilment of the conditions, the defendant had acquired each property and was obliged to pay transfer duty.

H Held, that, although the word 'acquire' is not defined in the Act, it has been construed to mean the acquisition of a right to acquire the ownership of property. (At 479F.)

Held, further, as to whether a purchaser acquired a *ius in personam ad rem acquirendam* where the sale was subject to an unfulfilled suspensive condition, that, pending fulfilment of the condition, the contract was inchoate and its operation was suspended; as the purchaser could not demand transfer, he had not acquired a right to obtain the *dominium* of the land. (At 479G and 480B.)

I Held, further, that since, in terms of s 5(2) of the Act, no transfer duty is payable if a transaction is dissolved by the operation of a resolutive condition, there seemed to be no logical reason why the Legislature should require the purchaser to pay duty where the contract fails due to an unfulfilled suspensive condition, but not where it lapses because of the fulfilment of a resolutive condition. (At 480B/C-D.) The exception was accordingly dismissed.

J The following decided cases were referred to in the judgment of the Court: *Barclays National Bank v Thompson* 1989 (1) SA 547 (A)

- A *Commissioner for Inland Revenue v Collins* 1992 (3) SA 698 (A)
Commissioner for Inland Revenue v Freddie's Consolidated Mines Ltd 1957 (1) SA 306 (A)
De Leeuw Family Trust and Others v Commissioner for Inland Revenue 1993 (3) SA 345 (A)
Dharmpal Transport (Pty) Ltd v Dharmpal 1956 (1) SA 700 (A)
Provident Land Trust Ltd v Union Government (Minister of Mines) 1911 AD 615
B *Secretary for Inland Revenue v Hantzenburg* 1966 (1) SA 405 (A)
Tuckers Land and Development Corporation (Pty) Ltd v Strydom 1984 (1) SA 1 (A)
Van Thiel's Wire Industries (Pty) Ltd v Commissioner for Inland Revenue 1954 (4) SA 69 (D).

C Exception to the defendant's plea. The nature of the exception appears from the reasons for judgment.

A J Lang for the excipient (plaintiff).

M J Lowe for the respondent (defendant).

J T Whitehead for the third parties.

Cur adv vult.

Postea (23 September 1993).

E **Melunsky J:** This litigation concerns in the main the liability of a purchaser of immovable property to pay transfer duty under the Transfer Duty Act 40 of 1949 ('the Act') where the sale is subject to an unfulfilled suspensive condition. The matter comes before me by way of exception at the instance of the plaintiff.

F There are two claims. The first arises out of the sale of a farm known as 'De Poort'. This contract was concluded as long ago as 6 May 1982. The seller was a certain Pretorius, the purchaser was the defendant or his nominee, and the purchase price was R250 000. The farm was transferred directly to the D J Viljoen Trust (the trust) which was registered on 14 September 1983. The date of transfer into the name of the trust does not appear from the pleadings.

G The second claim relates to the purchase of the farm 'Uile Fontyn' on 31 October 1984. The seller was J J van Lingen, the purchaser the defendant in his personal capacity or in his representative capacity as trustee of the trust, and the purchase price was R349 972 based on R151,76 per hectare. It was only on 19 March 1986 that the trust was nominated as the purchaser in terms of a written addendum, which also provided for the purchase price to be adjusted to R351 431.

H The plaintiff, alleging that the defendant was liable to pay transfer duty on both sales, claimed the said duty together with interest from the defendant in terms of s 2(1) and s 3(1) of the Act. (It was common cause that the trust had acquired the properties and was therefore liable to pay—and, as I was informed during argument, had indeed paid—transfer duty in respect of both transactions.)

I The defendant pleaded that each sale was subject to a suspensive condition, and that it was a tacit term of each contract that the defendant would fall away as purchaser once his nominee accepted nomination as the buyer and, in turn, was accepted by the seller. It was further pleaded that the defendant did not implement his personal interest in either sale

A as each sale was cancelled when the trust accepted nomination as purchaser and was accepted as such by the seller. The defendant contended that a cancellation or dissolution of his obligation occurred in respect of each sale in terms of s 5(2)(a) of the Act.

B It may be noted that the defendant joined two third parties, both of whom were firms of attorneys, and who allegedly represented him and advised him of the 'hereregte implikasies' of the said sales. He claims that, if he is liable to the plaintiff, he is entitled to recover from the third parties whatever amounts he is obliged to pay in respect of transfer duty and interest as a result of the third parties' alleged failure to furnish him with the correct advice. The third parties filed pleas to the plaintiff's particulars of claim and to the third party notice. These pleas were not the subject of exception and need not be referred to. It merely needs to be stated that the third parties were represented by counsel at the hearing.

C The plaintiff's exception is directed solely at the defendant's plea, D which, the plaintiff contends, discloses no defence. The notice of exception is a remarkable document. It sets out sections of the Act verbatim and contains extensive quotations from certain authorities. It is in the nature of a written argument and certainly does not comply with Rule 23(3) of the Uniform Rules of Court, which requires the grounds of exception to be clearly and concisely stated. As no objection was taken to the form of the notice, nothing further need to be said about it. In essence the exception was based on the ground that, by entering into the contract, the defendant acquired the *ius in personam ad rem acquirendam* in respect of each farm; that there were no cancellations in terms of s 5(2) of the Act; and that, in consequence, the defendant did not have F a valid defence to the claims.

G On the day before the hearing of the exception, the defendant gave notice of his intention to amend the plea. The proposed amendments:

- (1) incorporated averments to the effect that the respective suspensive conditions were not fulfilled 'insofar as the defendant was concerned'; and
- (2) specifically alleged that the defendant had not acquired the right to acquire ownership (which I will call the main defences) and, in the alternative, relied upon a cancellation or dissolution of the defendant's obligations in terms of s 5(2)(a) of the Act (the alternative defences).

H At the hearing, the application to amend the plea as aforesaid was sought and granted, there being no objection to the proposed amendment by counsel for the plaintiff or by counsel for the third parties.

I The main defences were based on the argument that the defendant had not 'acquired' either property in terms of s 2(1) of the Act as each contract was subject to an unfulfilled suspensive condition. The condition in respect of the earlier contract is contained in clause 10, which provides that the sale is subject to the granting of a first bond of R75 000 to the purchaser. Clause 15 of the later contract provides that the sale is subject to the Minister of Agriculture and Fisheries granting his consent to the sub-division of the property. In this respect the defendant pleaded:

A 'It was within the contemplation of the parties that the said approval might be subject to the conditions imposed by the Minister and that effect would have to be given to such conditions. In the premises it was a tacit term of the contract that in the event of the Minister acquiring (sic) a sub-division to be consolidated with or linked to adjoining land owned either by the defendant or by the D J Viljoen trust, transfer of B the land would be given to the owner of the land in respect of which consolidation or linking was to take place.

C When the Minister's said approval was granted, it became necessary to transfer the property to the trust in order to give effect to the permit granted by him. In the premises defendant was not entitled himself to take transfer of the property and accordingly the suspensive condition referred to was not fulfilled insofar as the defendant was concerned.' Argument by all counsel was directed very largely to the main D defences. Indeed little, if anything, was said about the alternative.

E Relying, *inter alia*, on *Tuckers Land and Development Corporation (Pty) Ltd v Srydom* 1984 (1) SA 1 (A), counsel for the plaintiff argued that the contracts in issue in this case were sales, although the conditions remained unfulfilled. He submitted that as the parties were not entitled to resile therefrom pending the fulfilment of the conditions, the defendant had acquired each property and was therefore obliged to pay transfer duty. He also placed reliance on the judgment of Buchanan J in *Provident Land Trust Ltd v Union Government (Minister of Mines)* 1911 AD 615 at 630-1 and on the definition of 'date of acquisition' in the Act.

F It is necessary to view these arguments in the light of the interpretation of the word 'acquired' in s 2(1) in the context in which it is used in the Act. The word is not defined in the Act, but it has been construed to mean the acquisition of a right to acquire the ownership of property (see *Commissioner for Inland Revenue v Fredries Consolidated Mines Ltd* 1957 (1) SA 306 (A) at 311B-C and *Secretary for Inland Revenue v Hartsenburg* 1966 (1) SA 405 (A) at 409A-B).

G The question that remains, however, is whether the purchaser acquires the *ius in personam ad rem acquirendam* where the sale is subject to an unfulfilled suspensive condition. The matter was raised, but not decided, by Botha JA in *Commissioner for Inland Revenue v Collins* 1992 (3) SA 698 (A) at 710C-F. But in *De Leeuw Family Trust and Others v Commissioner for Inland Revenue* 1993 (3) SA 345 (A), Joubert ACJ said the following at 356B-D:

H 'What is required by s 2(1) is that the acquirer acquired a right to obtain the *dominium* of the land.

I Furthermore it is important to bear in mind when an unconditional right vests in the holder thereof. It is trite law to draw a distinction between *dies cedit*, ie the time has come when the right is due or owing, and *dies venit*, ie the time of enjoyment of the right has arrived, so that possession, delivery or transfer of its subject-matter may be claimed. *Voet* 36.2.1; *Jewish Colonial Trust Ltd v Nathan* 1940 AD 163 at 176. In the case of a conditional right or interest no vested right is acquired prior to fulfilment of the condition.'

J The above-quoted passage—and especially the last sentence thereof—largely disposes of counsel for the plaintiff's arguments, but as

A the learned Judge's remarks concerning a conditional right of interest are *obiter*, I consider it advisable to deal with counsel's submissions more fully. Counsel's reference to the nature of a conditional transaction does not advance his argument. Nor is it of significance that a conditional transaction may be termed a sale. What is of importance, in my view, is the fact that, pending fulfilment of the condition, the contract is inchoate and its operation is suspended. As the purchaser cannot demand transfer he has not, in the words of Joubert ACJ *supra*, 'acquired a right to obtain the *dominium* of the land'.

B It is also important to note that in terms of s 5(2) of the Act no transfer duty is payable if a transaction is dissolved by the operation of a resolutive condition (save only to the extent that the seller is paid and retains any consideration). There seems to be no logical reason why the Legislature should require the purchaser to pay duty where the contract falls due to an unfulfilled suspensive condition but not where it lapses because of the fulfilment of a resolutive condition. In the *Provident Land Trust Ltd* case *supra* Lord De Villiers CJ, with reference to a similar provision relating to a 'dissolving' condition in the Cape Act 5 of 1884, said (at 624):

'There is no similar provision in the Act in regard to the happening of a suspensive condition, and the reason must be because, until such happening, there is no contract of sale and consequently no duty is payable.'

E Nor do I accept counsel's submission that I should rely on the judgment of Buchanan J in the aforementioned case. His was a dissenting judgment and, depending as it does on the interpretation of ss 6 and 7 of Act 5 of 1884 (C), does not afford a great deal of assistance in this matter. I add that I prefer the reasoning in the majority judgments which accord with the view expressed by Joubert ACJ in *De Leeff's* case *supra*.

F Counsel for the plaintiff also argued that the definition of 'date of acquisition' in the Act makes it plain that transfer duty becomes payable within six months of the date of the transaction, whether the transaction is conditional or not. According to the definition the 'date of acquisition' is the case of acquisition of property by way of a transaction is

G the date on which the transaction was entered into, irrespective of whether the transaction was conditional or not or was entered into on behalf of a company already registered or still to be registered

H It is quite clear, however, that the definition does not support counsel's argument. It merely fixes the date when duty becomes payable for the purposes of s 3(1) (cf *Van Thiel's Wire Industries (Pty) Ltd v Commissioner for Inland Revenue* 1954 (4) SA 69 (D) at 75G-H).

I On a proper construction of s 2(1) of the Act, I am satisfied that the word 'acquired' does not include the purchase of property under a contract of sale which is subject to an unfulfilled suspensive condition. Counsel for the plaintiff did not dispute that, on the basis of the averments contained in the defendant's plea, the conditions referred to in the two contracts were not fulfilled. For the purposes of the exception the attack on the defendant's main defence must therefore fail.

J The remaining question is whether, in the circumstances of this case, it is necessary for me to deal with the alternative defence. The notice of

A exception concludes with a paragraph that reads: 'in the premises, A defendant's plea ought to be dismissed with costs'. Whether this statement can be termed a prayer for relief need not be decided: for the defendant raised no objection thereto and there is no suggestion that he was prejudiced.

B It is permissible to except to a separate and independent defence raised in a plea. In this event the offending portions may be excised. It should be observed, however, that an exception to part of a plea will be upheld and the separate defence struck out only if it will obviate the leading of unnecessary evidence at the trial (see *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553F-I).

C In the present matter the alternative defences appear, on the face of it, to be separate and self-contained, but I am by no means certain that they are not inextricably bound up with the main defences. This is especially so in the case of the plea to the second claim. Nor am I satisfied that an exception to the alternative defences will, if upheld, result in less evidence being led at the trial. It is, however, unnecessary to decide these matters. For the plaintiff has requested that the entire plea should be dismissed. He clearly cannot succeed in claiming this relief as at least part of the plea—the main defences—are sound in law. Consequently I cannot dismiss the plea even if the alternative defences are bad (cf *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) at 705B-D). There was no application to strike out those portions of the plea which are allegedly offensive, and I do not consider it to be the Court's function to excise parts of a plea in the absence of a substantive application therefor.

F It follows that the exception cannot succeed. It is ordered that the exception be dismissed and that the plaintiff be directed to pay the costs of the defendant and the third party in relation to the exception.

Excipient's (Plaintiff's) Attorneys: *Whitesides*. Respondent's (Defendant's) Attorneys: *Wheeldon Rushmere & Cole*.