Weinerlein Appellant v Goch Buildings Ltd Respondents
1925 AD 282

Appellate Division, BLOEMFONTEIN – CAPE TOWN.

1924. October 22. 1925. January 12.

DE VILLIERS, J.A.; KOTZ, J.A.; WESSELS, J.A.

Flynote

Contract. --- Written agreement. --- Rectification. --- Mutual mistake. --- Transfer Duty Proclamation, 1902 (T.), section 30.

Headnote

A contract of sale of fixed property required to be in writing by section 30 of the Transvaal Transfer Duty Proclamation of 1902 can be rectified to conform to a prior verbal contract, the terms of which it was the intention of both parties to insert in the written instrument.
Buslcby v Guardian Assurance Co. 1916 AD 488 and *Jolly v Herman's Executors* (1903, T.S. 515), distinguished.
The decision of the Witwatersrand Local Division in *Weinerlein v Goch. Buildings Ltd.,* confirmed.

Case Information

Appeal from a decision of the Witwatersrand Local Division (STRATFORD, J.).
The facts sufficiently appear from the judgment of DE VILLIERS, J.A.

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J. van Hoytema, K.C. (with him *P. Millin*), for the appellant to give right to rectification it is always necessary to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified and that such contract is inaccurately represented in the instrument. See Halsbury's *Laws of England* (vol. XXI., p. 21, para. 39) and *Mackenzie v Coulson* (L.R. 8 Eq. 368 at p. 375). But sec. 30 of Proclamation 8 of 1902 (Transvaal) requires a written contract and consequently the rectification cannot be granted on an oral agreement.

Rectification implies that the document must be set aside altogether and a new document substituted, though both can be effected in one action. See *van der Byl v van der Byl* (16 C.S.C. at p. 348). There is a clear distinction between merely correcting an error in a document and rectification. Our law requires *restitutio in integrum* in the case of rectification. See *Caithness v Fowlds* (1910 EDL at p 264, 267).

[KOTZ, J.A.: How can it be said that the Legislature contemplated that a statute passed with the object of preventing fraud should be used as an instrument of fraud?]

The doctrine of enrichment can be given full effect without rectification by having the contract set aside. See *van der Byl's* case *(supra).*

For the distinction between a clerical and other errors see Halsbury's *Laws of England* (XXI, para. 25).

The appellant has a *locus poenitentiae* after the contract has been set aside.

[WESSELS, J.A.: Was not the plea sufficient to cover the *exceptio doli?*]

In view of the possibility of the *exceptio* being covered I will only deal with the exception to the counterclaim.

As to the necessity for the proof of an antecedent contract see *Port Elizabeth Harbour Board v Mackie Dunn & Co.* (14 C.S.C at p. 479); *Van Rensburg v Rice* (1914 EDL at p 228); *Bushby v Guardian Assurance Co., Ltd.* (1915 WLD at p 71, and 1916 AD at p 492).

Sec. 30 must be given effect to. See *Wilken v Kohler (supra),* (1913 AD at p 141-145 and 151).

[WESSELS, J.A.: Has not the Court power to say that there has been a misdescription of the *corpus*?]

Not unless the mistake appears *ex facie* the document. See *Jolly v Herman's Executors* (1903 TS at p 522-3, 528 and 530).

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The cases on the Statute of Frauds in England are distinguishable because sec. 4 does not render contracts which are not in writing void. The section has been held to constitute nothing more than a

rule of evidence, whereas sec. 30 of the Proclamation expressly renders contracts which are not in writing of no force or effect. See *Montrase Diamond Mining Co. v Dyer* (1912 TPD at p 5); *Coronel v Kaufman* 1920 TPD 207; *Johnson v Bragge* (1901, 1 Ch at p. 36). See *Gloss v Hulbert* (3 Am. Rep. 418).

The proper remedy would have been by *restitutio in integrum* or one of the *condictiones.* See Sohm on *The Institutes of Roman Law* (Ledlie's Translation (3rd ed.), p. 410).

S.S. Taylor, K.C. (with him *G.A. Mulligan*), for the respondent: The *eiceptio doli* can be set up on the pleadings as they stand.

The *error* in this case is not *in substantia* but merely error in expression. The doctrine of rectification apart from the point raised by the wording of the Proclamation applies to its fullest extent to error in expression.

Rectification does not appear to have been dealt with by the old authorities. It is quite different from *restitutio in integrum.* By rectification the Court places on record what the parties have failed to place on record, whereas *restitutio* places the parties in the same position as they were before the document was put into writing.

The first reference to rectification in the S.A reports is *Saayman v le Grange* (1879, Buch. 10). Since that time the Courts have recognised the existence of the doctrine and decisions in the Courts of Equity in England have been relied upon. Rectification in its truest sense was not granted in *van der Byl v van der Byl (supra).* The real ground of the action was innocent misrepresentation and not material error. That was the reason for the reference to *restitutio in integrum.* The doctrine was accepted in its ordinary form in *Quin v Goldschmidt* (1910 TPD at p 164); *Port Elizabeth Harbour Board v Mackie Dunn & Co. (supra); Schneider and London v Chapman* 1917 TPD 497 at p. 502). In *Bushby v Guardian Assurance Co.* (1915 WLD at p 71), BRISTOWE, J., said that there must be a prior agreement, and relied on *Fowler v Fowler (4* de G. and J. at p. 265), but that case does not decide that a prior valid agreement is essential. See *Abrahamson v Paarl*

Roller Flour Mills, Ltd. (1921 CPD at p 807) as to the interpretation similar in terms to the Proclamation. The Proclamation was not intended to interfere with the operation of the well established doctrine of rectification; otherwise the Legislature would have said so. This argument has appealed to Courts in England. For the origin of the doctrine in England see Story on *Equity Jurisprudence* (vol. 1, p. 151, sec. 152); *Henkle v Loyal Exchange Assurance Co.* (1 Vesey, Snr, 318 and 27 ER 1056); *Simpson v Vaughan* (2 Atkins 31 and 26 ER 4:15); *Fowler v Fowler* (4 de G and J. 250 and 45 ER 97); *Bentley v Mackay* (4 de G. F and J. 279 and 45 ER 1191). The expression prior agreement or contract was never used in the earlier cases. The antiquity of the rule appears from *Bonhote v Henderson* (1895, 1 Ch. 742 at p. 748). The words prior agreement do not appear in the earlier cases. See *Tucker v Bennett* (38 Ch at p. 15). The English Courts draw the same distinction between rescission for unilateral mistake and rectification or restitution when the mistake is mutual as was drawn in *Bushby's* case *(supra).* See *Collen Bros. v Country Council of Dublin and Others* (1908, Ir.R. 1 Ch. 503).

If it was held in *Mackenzie v Coulson (supra)* that a binding concluded agreement was necessary it was not in accordance with the rule laid down. The *dictum* of JAMES, V.C., in that case should not be followed, if that was what he meant.

I agree that it is necessary to prove a *concursus aninmorum* in regard to some portion of the contract, but it is not necessary to prove that there was an actual contract. See *Goldblatt v Fremantle* (1920 AD at p 128). If the parties had agreed to have the contract in writing apart from the provisions of the Proclamation, according to the argument on behalf of the appellants, there could have been no rectification. The principle is the same whether the parties made writing essential or the Legislature.

Craddock Bros. v Hunt (1923, 2 Ch. 136) and *United States v Motor Trucks, Ltd.* (1924 AC 196 and 39 TLR 723 at p. 728) show that the English Courts held that the Legislature did not intend the Statute of Frauds, sec. 4 to interfere with the doctrine of rectification. The Courts have refused to be persuaded not to give rectification when it has been shown that the essential prior *consensus* was not in the form which the Legislature provided should be enforceable.

The distinction between a void contract and one that is unenforseable

is immaterial for this purpose, because no legal result flows from either.

The Courts have adopted the doctrine of rectification in defiance of the rule that oral evidence is not admissible to vary a written document because they do not think that it opens the door to fraud. Sec. 30 of the Proclamation should not be allowed to have greater effect than the rule under which oral evidence is admitted to give effect to equitable jurisdiction.

Mulligan following on the same side. See the analogous case under the Fines and Recoveries Act of 1833 interpreted in *Meeking v Meeking* (1917, 1 Ch. 77 at p. 82). Even if the section deals with a conveyance and not a contract the force of the argument remains.

Millin, in reply: *Meeking v Meeking (supra)* is not applicable as there is no doubt that a deed of transfer can be rectified from the contract of sale. That is clear from *Bankes v Small* (36 Ch. 716) referred to in *Meeking's* case.

If is too late to give a new construction to sec. 30 in view of the decision in *Wilken v Kohler.* The section has been held to mean that unless the intention of the parties appears from the document it must be held not to have been manifested at all.

That appellant has the right to resile appears from *Jolly's* case.

The effect of the rectification is tantamount to compelling appellant to enter into a contract and such compulsion would be in conflict with *Jolly's* case (*supra* at p. 522).

Sec. 30 is different in effect from sec. 4 of the English Statute of Frauds. It was held in *Wilken v Kohler (supra)* that part performance has no effect under sec. 30.

Cur. adv. vult.

Postea (January 12).

DE VILLIERS, J.A.: This is an appeal from a judgment of STRATFORD, J., in the Witwatersrand Local Division dismissing exceptions to defendant's plea and claim in reconvention. The facts which for the purposes of the exceptions must be taken as alleged, as set forth in the pleadings are somewhat complicated, but they are sufficiently summarised for my purposes in the judgment under appeal and are as follows: The plaintiffs and defendant are owners of adjoining properties. On defendant's stand No. 859 certain

buildings are erected which plaintiffs complain encroach upon their property, stand No. 857; they therefore claim the value of the ground so appropriated and damages. The defence is that both parties received their respective properties in pursuance of contracts concluded with one Goch, the predecessor in title of both; that Goch verbally agreed to sell to the defendant the land on which the building then stood; that the buildings were in fact built – and have continued to remain upon – portion of stand No. 857; that when the contract was put into writing the description of the land sold was, in mutual and justifiable error, described as stand No. 859, whereas it should have been described as the land on which the buildings actually stood, and this should have included the portion of stand No. 857 which the plaintiffs now claim as their property and as wrongfully occupied by defendant's buildings. Similarly, it is alleged that when Goch subsequently sold the adjoining property to plaintiffs, the verbal agreement was that the latter should receive only such portion of stand No. 857 which was not occupied by the existing buildings, already sold to defendant, but that by mutual mistake the written agreement was not drawn up in conformity with the pre-existing verbal one inasmuch as again the land sold was wrongly described. The defendant has take cession from Goch of all rights to rectification or otherwise he may have against the plaintiffs, and now claims rectification of both the written agreements that Goch made as well as of the transfer deeds. The exception to defendant's plea is that the same discloses no defence to the action, and the exception to the claim in reconvention is that it discloses no cause of action. The exceptions are based upon the provisions of sec. 30 of the Transfer Duty Proclamation of 1902, which reads as follows: "No contract of sale of fixed property shall be of any force or effect unless if be in writing and signed by the parties thereto or by their agents duly authorised in writing." In the court below the argument advanced in support of the exceptions was that the Courts of South Africa have adopted and applied the English doctrine of law as to rectification of written documents, and that it has been laid down by V. C. JAMES in *Mackenzie v Coulson* (1869, 8 Eq. C at p. 875), that: "It is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument." That this view was adopted by the Witwatersrand

Local Division in *Bushby v Guardian Assurance Co.* (1915 WLD at p 71) and by this Court in the appeal (1916 AD at p 492); and that as sec. 30 makes the prior verbal agreement null and void there is no concluded contract antecedent to the written agreement which can be invoked or rectified. This argument is disposed of by the consideration that, in order to enable a Court of law to reform the writing so as to conform to the terms of an agreement in most cases antecedently arrived at by the parties, there is no necessity that the antecedent agreement should be a binding contract between the parties enforceable by action. To satisfy the rule in *Mackenzie's* case it is sufficient if the parties have arrived at a *consensus ad idem* in the shape of an agreement, the terms of which they, either of their own accord or to comply with the requirements of the law, subsequently embody in a formal instrument. It seems self-evident that, upon satisfactory proof of the terms of the agreement the instrument should, in the language of Story in his *Equity Jurisprudence* (13th ed., vol. 1, sec. 152), be made to conform to the precise intention of the parties. As far back as 1749 Lord HARDWICKE laid down the following: "No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that should be rectified." *(Henkle v Royal Assurance Co.,* 1 Ves. 314). This has since been followed in numerous cases. In *Saay'nan v le Grange* (1879 B at p 12) the late Baron DE VILLIERS is reported to have said: "I have not met with this peculiar form of action to rectify an error in a title-deed in any of the Roman or Roman-Dutch authorities, but it is continually occurring in this Colony. The action to rectify transfer is purely a matter of equity and the Courts of Equity in England have decided that in analogous cases the Statute of Limitations does not run until the discovery of the error. I think the Court should in a case of this nature be guided by the decisions of the Courts of Equity in England." And DWYER, J., in the same case said: "I think the fact that actions to amend transfers are not to be found in the old Roman and Roman-Dutch authorities, only shows how much better transfers were made in the days of the Romans and Dutch than in the present time." Counsel for the respondent stated they have not been able to find any authority in our law dealing with the rectification of documents.

But there is no dearth of authority on the subject. Our law proceeds upon the same broad principle as the English law. (van Leeuwen, Cen. For., Part 2, Lib. 1 C 29 No. 15.) *Semper veritati errorem cedere oportet,* says Faber in his Code 4.16 def. 10, the mistake must yield to the truth. " In contracts regard must be had rather to the truth of the matter *(rei veritas)* than to what has been written," is laid down in C. 4.22. L. 1; and Gothofredus notes: "for there may be mistake in the writing."(Cf. C. 4.50. L. 5 and L. 6.) This rule, Gothofredus de reg. jur. 92, points out, applies not only to simulated agreements but to mistakes. In D. 1.18. L. 6, sec. 1, it is said: *veritas rerum erroribus gestarum non vitiatur.* Gothofredus in a note to this passage points out that the President of the Province is directed to do what is right upon satisfactory proof. D. 18.1 L 9, sec. 1, shows that a mistake about a name is of no consequence as long as parties agree about the person, and in C. 6.23 L 4, it is said of a mistake in the name by a testator: *error hujusmodi nihil offcit veritati.* And in a note to C. 8.54 L 10 Gothofredus says: *veritas instrumenti narrationi praefertur.* There is also ample authority for the proposition that an error in computation even in a judgment can be corrected without the necessity of an appeal. (D. 49.9 L 1, sec. 1; C. 2.5 L 1). The language of the Code is significant: "It has often been laid down that an error in computation which has been made in one contract or in more than one, does not prejudice the truth" *(veritali non afferre prae judicium).* From the above it is clear that the Romans did not allow the true agreement between the parties to be prejudiced by a slip of the pen or other inaccurate expression.

But on appeal a further argument was advanced by Mr. *van Hoytema,* whose untimely death, cutting short a career of great promise in an even more responsible sphere, this Court deeply deplores. Dealing with the counterclaim (the same reasoning applies to the plea), he urged that the defendant claims on a document which *ex confesso* does not set out the true intent of the parties, and that, in view of sec. 30, there is no binding agreement between them. To seek to bind the plaintiffs to such a contract (so the argument runs) it is not a sufficient compliance with the section to show that there is a writing signed by both parties, unless each term of the antecedent verbal agreement has been embodied in the writing. In the absence of such a term in the instrument the plaintiff cannot be

said to have agreed to that term because he has not agreed to it in writing. It was said that the claim of the defendant involves as a first step the setting aside of the writing on the ground of mistake and then proof of the real agreement between the parties and approval of the document as

corrected, and that the only case the defendant has is for relief to be restored to its previous position.

In my opinion, this argument cannot be supported. By putting the agreement in writing and signing it the parties have complied with the provisions of sec. 30. So far, therefore, as that section is concerned, the agreement stands. And as is clear from the authorities quoted above there is no necessity to set it aside if it happens to contain some mistake (Perezius, C. 4.21.11). All that is to be done is, upon proper proof, to correct the mistake, so as to reproduce in writing the real agreement between the parties. If that were not so, the contract would have to be set aside in the case of every slip of the pen or any mistake of omission or of commission, however trivial. Counsel for the appellants himself hesitated to go so far.

We were pressed with the decision of the Transvaal Supreme Court in the case of *Jolly v Herman's Executors*. *1903 TS 515* in which it was laid down that there is no *vinculw,n juris* between the parties to a mineral contract as long as the contract has not been notarily executed and duly registered in accordance with the Volksraad Besluit. It was urged that *Jolly's* case gives a person a right to resile as long as the provisions of the Volksraad Besluit have not been complied with and that the plaintiffs have a similar right in the present case. The decision in *Jolly's* case has been approved by this Court in the case of *Wilken v Kohler* (19,13, A.D. 135). But there is nothing inconsistent in this view of sec. 30 with the decision in *Jolly's* case. No doubt sec. 30 gives either party the right to refuse to complete the agreement before it has been put into writing and signed, but there is nothing in the section to compel the same conclusion where the agreement has been reduced to writing and signed. The two cases differ *toto caelo.* In the one case there is no contract between the parties, who are free to go on with the contract or not as they please. In the other there is a concluded contract between them, *contractus absolutus et perfectus est.* (C. 4.21.17; C.4.38. 15; Faber C. 4.16. 14; Perezius C. 4.21.10). If may of course be said that the agreement when reformed

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is not the agreement signed by the parties. But in reforming the agreement, as was pointed out by counsel for the respondent, all the Court does is to allow to be put in writing what both parties intended to be put in writing and erroneously thought they had. Faber ad. C. 416 def. 14, supports the decision in *Jolly's* case, but he is equally emphatic that the mistake should be corrected, so long as third parties Ve are not injured thereby WESSELS, J.A.: I agree with the judgment of my brother DE VILLIERS. I shall not repeat the facts or that aspect of the case with which he has dealt, but merely wish to deal with the matter from another angle.

Mr. *van Hoytema's* argument amounts to this: The Court can look to no other contract of sale of fixed property than the written contract which the Ordinance requires. The whole contract may be set aside on the ground of fraud or mistake and the parties restored as much as possible to their former position, but the written contract is sacrasanct --- the Court cannot introduce, alter or take away a term. If, therefore, a mistake has been made, the Court has no jurisdiction to rectify the mistake. I must admit that there is some force in the argument, and if this Court is obliged to interpret the section in the strict and narrow sense contended for, then it might be compelled to adopt the view advanced by Mr. *van Hoytema.* I do not think, however, that the civil law or the Roman-Dutch law recognises such a strict construction. From the earliest times the Roman law has set its face against a person benefitting himself by his own fraud or by a mutual mistake even if

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the strict interpretation of the law seems at first blush to give him that right. It is true that the maxim "*qui suo jure utitur nominem laedat*" applies to our law, but a claimant cannot avail himself of a right which he obtained fraudulently or under a mutual error.

Suppasing we were to interpret sec. 30 in the strictest possible sense, then according to the *summum jus* of that section the part of the buildings on stand 857 belongs to the plaintiffs, but even so the civil law would not have allowed the defendants to claim removal of the buildings or damages, because such claim could have been met by the *exceptio doli* ---the plaintiffs knew when they negotiated the sale that this part of the building had already been sold to the defendants and that they did not intend to buy the ground upon which that part of the building rests. The *exceptio dolti* would not, according to the civil law, destroy the *summum jus* of the plaintiffs but it would nullify the exercise of it. The commentators put it thus: As a general proposition your claim may be supported by a strict interpretation of the law, but it cannot be supported in this particular case against your particular adversary, because to do so would be inequitable and unjust, for it would allow you, under the cloak of the law, to put forward a fraudulent claim "*ne cui dolus suus per occasionem juris civilis contra naturalem aequitatem prosit … hinc exceptioni tunc locum esse cum*

justa est, id est jure comparata, persecutio, sed iniqua adversus eum cum quo agitur." (*Donellus De Jure Civ. Bk.* 22, c. 6, n. 3, vol. 5 p. 1509-10.

Vinnius puts it thus: "(*saeps accidit*) *ut actio qua quis experitur, summo jure teneat sed iniqua sit adversus eum cum quo agitur,*" *ad Inst.* 4.13, I.

In order to succeed in this *exceptio doli* the excipient need not prove actual fraud; the exception lies whenever the Court regards it as a fraudulent act to rely on your *summmum jus* when you know full well that your claim is founded on mutual error, " *dum dolo facit, quicumque id, quod quaque exceptione elidi potest, petit. Voet* 44.4, I, D. 44.4.2.5.

It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our

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Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, dates back to remote antiquity and is embodied in the maxim "*summum jus ab aequitate dissidens jus non est*."

It is therefore quite clear that even if we accept the argument of Mr. *van Hoytema,* the defendants could plead the *exceptio doli* and rely on the mutual error to repel the plaintiffs' claim for the value of the ground occupied by the part of the building and damages.

Can the defendants go one step further and demand a rectification of the transfers?

The Roman law did not know of the transfer of property by registration: that is an innovation of the Roman-Dutch law.

The object of our law of registration of transfers is that a person shall hold his title in accordance with what is found upon the register. It is, therefore, contrary to the policy of our law that where a person can repel his adversary by the *exceptio doli* because he has an unassailable equitable right to the property and yet cannot have his right reflected upon the register. This seems to me a very strong reason for interpreting the words contract of sale of fixed property "in a case such as this to mean the actual agreement of the parties when they expressed their *consensus ad idem.* The policy of our registration laws with regard to fixed property requires the true contract under which the land is held to be reflected on the register. All, therefore, that sec. 30 says in effect is that the Courts will not recognise any contract of sale as a legal act unless it is in writing, but once the contract is in writing the Court will not allow it to be used as an engine of fraud to extort from an adversary what the claimant knows that he never was entitled to and in order to prevent this it will cause the written contract and the register to be rectified. I think this right is an inherent right of our courts and is well within their traditional equitable jurisdiction. I agree, therefore, that the appeal must be dismissed with costs.

Judgment

KOTZ, J.A.: Sec. 30 of the Transvaal Proclamation of 1902 lays down that "no contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties

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thereto or their agents duly authorised in writing." A written contract of sale was executed in the present case, and a deed of transfer was passed and registered in consequence of such contract. The written contract and transfer deed were intended to embody a previous verbal agreement between the parties, and to convey to the plaintiffs the property agreed to he sold. These documents were signed and executed by Goch, the predecessor of the defendants, and by the plaintiffs, in the belief that they contained the verbal agreement. This was due to a mutual mistake of fact, and did not represent the actual agreement between the parties. The question is whether, under the circumstances, the written instruments can be rectified on the ground of the said mistake. In the court below an exception was taken to the claim for rectification, but was, after due consideration, dismissed with costs.

It was said that the written agreement and transfer which are sought to be rectified contain the actual terms of the contract; and that, while the Court may set the contract aside if it be proved to have been obtained by fraud, the Court cannot alter or vary the written contract, for that would be acting contrary to the provision of the statute. The argument is that, if a rectification be decreed, the Court would in effect be enforcing a verbal contract in regard to the sale of fixed property, which is expressly declared to be of no effect. But a contention of this kind does not appear to me to be sound. It is admitted that the Court can, on proof of fraud, if established, set aside the entire

written contract of sale. That being so, I should have thought that it likewise follows that, in order to prevent one of the parties taking an unfair or fraudulent advantage of the other, the Court can, upon the same ground of fraud, rectify the mistake in the written instruments, if it is satisfied that these instruments do not in some material respect contain the actual intention of the parties. To hold otherwise would be to allow the stautory provision, which was obviously introduced to prevent fraud, to be used in the promotion of fraud. In the present instance the plaintiffs are claiming something from the defendants to which they are not entitled. They are in fact enriching themselves to the detriment of the defendants. This our law does not permit, and it will come to the assistance of the party prejudiced thereby. The doctrine of rectification of a written instrument is fully recognised in our South African practice, which grants restitution

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or relief upon any just ground. In *Saayman v le Grange* (1879, Buch. 12) DE VILLIERS, C.J., states that he has not met with the peculiar form of action to rectify an error in a title-deed in any Roman or Roman-Dutch authorities, which, he adds, is purely a matter of equity; and that in his opinion the Court should, in a case of this nature, be guided by the decisions of the Courts of Equity in England. The Court accordingly in *Saayman's* case held that the error in the transfer deed must be rectified. In the earlier case of *Mills and Sons v Benjamin Bros.* (1876, Buch. at 121) the same learned judge observed: "Now it is quite true that this Court is a Court of Equity only so far is it is consistent with the principles of the Roman-Dutch law." This qualification is of importance, for equity can not and does not override a clear provision of our law. Our common law, based to a great extent on the civil law, contains many an equitable principle; but equity, as distinct from and opposed to the law, does not prevail with us. Equitable principles are only of force in so far as they have become authoritatively incorporated and recognised as rules of positive law. It is true that the Roman jurist lays down *in omnibus sed valde maxime in jure aequitas spectanda sit* (*Dig.* 50.17.90); but, as Bronckhorst and other civilians, who have written special commentaries on this particular title, point out where the law in a particular instance is clear it must be observed, although it may seen to be contrary to considerations of equity. Hence it is a maxim with the commentators that *non omne quod licitum honestum est.*

Although we may not find any mention in the Roman and Roman-Dutch jurists of the precise case of a rectification of a title-deed, the doctrine of rectification of a written instrument was not unknown in those legal systems, and it was in all probability introduced into English equity by the ecclesiastical chancellors, most of whom were well versed in the principles of the Corpus Juris. In Dutch practice the revision and rectification of an account (recollement van rekening) was well known and matter of frequent occurence. We find an illustration of this in *Holl. Cons.,* vol. 1, *Cons.* 33 at p. 34. The ground on which such a revision with a view to rectification of the account was sought, is error in calculation or computation. The Dutch practice,

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as we may gather from the books, was based on the Code 2.5. *de errore calculi,* which contains the following statement: "It is laid down that a mistake in computation existing in a contract cannot prejudice the truth. Hence it is an established rule that accounts, which have already been examined can be subjected to a revision, where the matter has not been terminated by a judgment or a settlement. And similarly, if a sum has been promised in the belief that it is due, when it is indeed not owing, a *condictio* will he for relief against such promise or obligation."

The above passage occurring in the Code is of importance, for it states the later development of equitable doctrines incorporated into the law, and originally introduced by the praetor in the form of an *exceptio doli.* Gaius (*Corn.* 4, 116) and Ulpian (*Dig.* 44.4.2. 3 of Code 8.33.2) both put the case of a person binding himself by a promise by stipulation to pay a given sum of money to the stipulator, on the understanding that the latter will make or advance him a loan. The loan is, however, not made, and the stipulator, notwithstanding this, sues on the stipulation, which in strict law he should be entitled to do. But it was held to be inequitable and fraudulent on his part to endeavour thus to recover, and hence the defendant was allowed to show that the reason or inducement for the stipulation had failed, and to protect himself by an equitable defence in the shape of an *evceptio doli.* The doctrine of equity, however, did not stop there. It continued to develop; and as no man was allowed to enrich or benefit himself at the expense of another, an equitable remedy of recovering back or of restitution was afforded, where money had been paid which was not due, and the like, as we may gather from the various *condictiones* treated of in the Digest (12 *tit.* 4 to *tit.* 7), and of which we find a concise summary given by Grotius in his Introduction, Bk. 3 Ch. 30. Equity was even further recognised in the law, for the remedy by a *condictio* was extended, so that besides the recovery of property or money already delivered or paid, an obligation itself could be *condicted,* as Ulpian tells us in Digest 12.7.1. And hence the

statement in the Code, above referred to, reminds us that a remedy by means of a *condictio* will be available for relief against the promise or obligation. And the Code here also tells us that a contract and an account can be revised or rectified on the ground of error, which can not prevail against the truth.

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We have thus the principle recognised that a contract, like an account, can be revised or rectified on the ground of mistake. This is based on equitable considerations, which have been adopted and become part of the civil law. And similarly we see the influence of equity in the adoption of the well-settled rule, both in the jurisprudence of Rome and of the Netherlands, that no one is allowed to draw a profit or enrich himself at the expense of another. It may be, as suggested by DWYER, J. in *Saayman's* case *(supra),* that the absence of mention or of judicial decision on the subject of the rectification of a title-deed in Dutch jurisprudence is due to the circumstance that deeds were drawn with scrupulous accuracy by Dutch conveyancers; but that does not indicate that, if a case for rectification of a title-deed had arisen, a Dutch Court would not have granted relief. The practice in regard to "recollement van rekening," or revision of account rendered, and the passage in the Code above set out, on which this practice rests, fully recognise the principle of the rectification of a contract or written instrument. I have already observed that the rectification of a written document, on good cause shown, is a well-settled rule with us in South Africa; and it is derived, whence most equitable rules have originated, from the *Corpus Juris.* To allow the plaintiffs, who are the present appellants to succeed in this matter, will be to permit them to continue to enjoy a benefit to which in law they are not entitled, to the prejudice of the defendants. It would operate in fraud of the latter's rights. I think that on the pleadings the exception was rightly disallowed by the court below, and I, therefore, agree that the appeal should be dismissed with costs.

Appeal accordingly dismissed.

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