THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 143/08

In the matter between:

LEGATOR McKENNA INC	**FIRST APPELLANT**
M H G McKENNA	**SECOND APPELLANT**
And	
CLARE VERONICA SHEA	**FIRST RESPONDENT**
JAMIE ERSKINE	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT (NATAL PROVINCIAL DIVISION)	**THIRD RESPONDENT**
THE REGISTRAR OF DEEDS (PIETERMARITZBURG)	**FOURTH RESPONDENT**
ABSA BANK LIMITED	**FIFTH RESPONDENT**

Neutral citation: *Legator McKenna Inc v Shea* (143/2008) [2008] ZASCA 144 (27 November 2008)

CORAM:	**HARMS ADP, BRAND, CLOETE, PONNAN JJA *et* LEACH AJA**
HEARD:	**17 NOVEMBER 2008**
DELIVERED:	**27 NOVEMBER 2008**
CORRECTED:	

SUMMARY: Act 66 of 1965 – sale of estate property by *curator bonis* prior to issue of letters of curatorship under s 72 of the Act – subsequent transfer of property pursuant to sale – abstract theory of transfer – validity of real agreement notwithstanding invalidity of sale – non-availability of

enrichment claim.

ORDER

On appeal from: High Court, Durban (Motala AJ)
sitting as court of first instance

1. The appeal is upheld with costs, including the costs of two counsel where employed.
2. The order of the court a quo is set aside and substituted with the following:
'The plaintiff's claim 1 is dismissed with costs.'

JUDGMENT

BRAND JA (Harms ADP, Cloete, Ponnan JJA *et* Leach AJ A concurring)

[1] The first appellant, Legator McKenna Inc, is an incorporated firm of attorneys in Durban. The second appellant, Mr Michael McKenna ('McKenna'), is an attorney in that firm. On 8 March 2002 McKenna was appointed as *curator bonis* to the estate of the first respondent, Ms Clare Shea ('Shea'), by order of the Durban High Court. The reason for his appointment was that Shea had been found incapable of managing her own affairs as a result of brain injuries she sustained in a motor vehicle accident on 5 February 2002. At the time, Shea was the registered owner of a house in Berea, Durban. On 22 April 2002 McKenna, in his capacity as *curator bonis,* purported to sell the house to a married couple, Mr and Mrs Erskine ('the Erskines') – who are the joint second respondents in these proceedings – for R540 000. The reason why I refer to the transaction as 'a purported sale' will soon appear. In the interest of brevity and without prejudicing any issues, however, I will henceforth refer to the transaction simply as 'a sale'. Pursuant to the sale, the house was subsequently transferred to the Erskines by registration in the Pietermaritzburg Deeds Office.

[2] Contrary to medical expectations, so it seems, Shea then recovered from the consequences of her brain injuries, to the extent that the Durban

High Court declared her capable of managing her own affairs. This happened on 10 March 2003. Slightly more than a year later she instituted an action in the same court for the return of her house, which eventually led to the present proceedings. The first three defendants in the action were the two appellants and the Erskines. Other defendants, who abided the decision of the court, were the Master of the High Court, the Registrar of Deeds and the bondholder over the house who advanced the purchase price to the Erskines. Litigation thus proceeded between Shea, the two appellants and the Erskines.

[3] Shea's main claim in the action, referred to as claim 1, was essentially, as I have indicated, that the transfer of her house to the Erskines be declared invalid and that the house be returned to her against repayment of the purchase price. I shall return later in more detail to the cause of action advanced in support of this claim. Broadly stated, however, she contended that the contract of sale between McKenna and the Erskines, which gave rise to the transfer, was invalid in that it was concluded by McKenna before the Master had issued him with letters of curatorship in terms of s 72(1)(d) of the Administration of Estates Act 66 of 1965 ('the Act').

[4] Shea also formulated two claims for damages, claims 2 and 3, against the two appellants; one in addition, and the other in the alternative, to her main claim. These claims are not material to the appeal. Of some consequence, however, albeit indirectly, is a conditional third party claim by the Erskines against the two appellants. It is formulated on the supposition that Shea would be successful in her claim for return of the house. In this event, the Erskines claimed damages from the appellants in the amount of about R1,7 million, for the loss they would allegedly suffer through McKenna's breach of an implied warranty that he was authorised to sell Shea's house.

[5] At the commencement of the trial the parties asked the court a quo (Motala AJ) to order a separation of issues. In terms of the separation order the issues relating to Shea's main claim for return of the house were to be decided first. The remaining issues concerning Shea's two claims for damages, as well as the Erskine's conditional third party claim, stood over for

later determination. The parties also agreed that the issues surrounding the main claim were to be decided on the factual basis set out in a document entitled 'Admitted Facts' and the supporting documents attached thereto. Despite an additional term of the agreement that any party would be free to lead further evidence, no-one elected to do so at the trial.

[6] In the event, the preliminary issues were decided in favour of Shea. Hence the court a quo declared the contract of sale concluded between McKenna and the Erskines both illegal and void, and directed the Registrar of Deeds to cancel the registration of transfer of the house to the Erskines, against repayment of the purchase price by Shea. In addition, the two appellants and the Erskines were ordered, jointly and severally, to pay the costs of the preliminary proceedings. The two appellants then sought and obtained the court a quo's leave to appeal to this court. The Erskines, on the other hand, sought no such leave. That is why they were joined as joint second respondents on appeal. On the face of it, the court a quo's order seems to have an immediate impact on the Erskines only. But in the light of the outstanding issues, and particularly the Erskine's conditional third party claim for damages against the appellants, it is apparent that the appellants have a very real interest in the outcome of the appeal.

[7] Central to an appreciation of the issues on appeal is the sequence of material events. Resulting from the way in which the facts were presented at the trial, these events were not in dispute. A convenient date to start the sequence is 8 March 2002. That, as we know, was the date upon which McKenna was appointed as *curator bonis* to Shea's estate. On 27 March 2002, he instructed Wakefields Estate Agents, who had valued Shea's house at R525 000, to find a purchaser for R550 000. On 19 April 2002, Wakefields presented him with an offer, signed by the Erskines, for R520 000 which they increased at McKenna's request to R540 000. On 22 April 2002 McKenna signed the amended offer as seller. Alongside his signature he wrote the word 'curator' and below all that he added, again in his own handwriting and in parenthesis '(subject to approval of Master of High Court)'.

[8] On 3 June 2002 the Master issued McKenna with letters of curatorship in terms of s 72(1)(d) of the Act. At first sight the sale of the house by McKenna before he obtained his letters of curatorship appears to have occurred with unseemly haste. One's instinctive reaction is that, as an attorney, he should have known better than to do so. But his reasons for doing so appear from the documents attached to the 'Admitted Facts'. Essentially they amounted to this: while the house was Shea's only asset worthy of note, she had a number of pressing debts. Some of these debts, such as the insurance premiums and rates and taxes on the house, could be avoided by the sale. Others, like the premiums on her life policies and her children's school fees, were in need of urgent settlement from the proceeds of the sale. In the circumstances, McKenna obviously thought that it was in Shea's best interests to sell the house as soon as possible. What McKenna also knew was that Shea had herself attempted to sell the house for the greater part of the previous year for R500 000, but that she had been unsuccessful in obtaining a buyer at that price. He therefore considered R540 000 a good price.

[9] To complete the chronological picture: on 17 July 2002 the Master granted his consent for the sale of Shea's house. Transfer to the Erskines was registered in the Deeds Office on 27 July 2002. In both the power of attorney authorising the transfer, signed by McKenna, as well as the transfer deed itself, the *causa* for the transfer is described as a sale which was concluded between McKenna and the Erskines on 22 April 2002.

[10] The court a quo's reasons as to why, on these facts, Shea was entitled to the return of the house can be summarised thus:

- The agreement between McKenna and the Erskines was illegal and invalid because it was concluded at a time when McKenna had not yet received his letters of curatorship. In consequence, so the court held, the sale constituted a contravention of s 71(1) of the Administration of Estates Act and indeed rendered McKenna guilty of a criminal offence under s 102(1)(g) of the Act.

- Because the agreement of sale, which formed the *causa* of the transfer to the Erskines, was invalid, Shea was entitled to the return of her property.
- The jurisprudential basis for the return of the property to her is dependent upon whether or not ownership passed notwithstanding the void underlying *causa* for transfer.
- If ownership did not pass, Shea had a real right to vindicate the property as owner.
- If, on the other hand, ownership did pass to the Erskines, Shea had a personal right to claim the return of the property from them – as immediate parties to the transaction – on the basis of the *condictio ob turpem vel iniustam causam*.

[11] The appellants' answers to the court a quo's line of reasoning were manifold. First among these was the contention that the court a quo erred in finding that the sale agreement, which led to the transfer, constituted a contravention of s 71(1) of the Act. In considering this contention, it seems appropriate to start with the wording of s 71(1). In so far as relevant, the section provides:

'(1) No person who has been . . . appointed . . . as provided in section *seventy two* shall take care of or administer any property belonging to the minor or other person concerned, or carry on any business or undertaking of the minor or other person, unless he is authorized to do so under letters of tutorship or curatorship as the case may be, granted . . . under this Act . . ..'

[12] Section 72, to which reference is made in s 71(1), covers a wide range of tutors and curators for minors and other persons. The position of a *curator bonis*, like McKenna, who was appointed by order of court, is governed by s 72(1)(d). It provides as follows:

'(1) The Master shall . . . on the written application of any person-

(d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or curator . . .

grant letters of tutorship or curatorship, as the case may be, to such person.'

To complete the legislative matrix, there is s 102(1)(g) of the Act. It provides inter alia that:

'Any person who . . . contravenes or fails to comply with the provisions of section . . . 71 . . . shall be guilty of an offence and liable on conviction . . . to a fine or to imprisonment for a period not exceeding twelve months.'

[13] The appellants' contention that the agreement of sale between McKenna and the Erskines did not contravene s 71(1) was based on the premise that it was not a final agreement, but conditional upon the Master's approval of the transaction. As the factual basis for this premise they relied, of course, on the words 'subject to approval of Master of High Court' which McKenna inserted below his signature on the Deed of Sale when he purported to accept the Erskines' offer on 22 April 2002. Because of this condition, so the argument went, the sale would only become final and binding if and when the Master's approval to the transaction had been obtained. And, so the argument proceeded, because the Master would never give his approval to a transaction unless and until he had issued letters of curatorship to the *curator bonis,* the agreement would, as a matter of course, only become final and binding after the requirement of s 71(1) had been fulfilled. This, so the appellants argued, is exactly what eventually happened. The Master only gave his approval to the sale on 17 July 2002. Then and only then did the sale become binding. But by then McKenna's letters of a curatorship had been issued. Thus, the appellants' argument concluded, nothing was done by McKenna which could in any way impact on the property of Shea before his letters of curatorship had been issued.

[14] The court a quo considered this line of argument and found it wanting. The flaw in the argument, so the court held, was that the sale was entered into by McKenna was not conditional, but from the outset final and enforceable. The court's reasoning behind this conclusion went as follows: The Master's consent to the transaction was required by s 80(1) of the Act. The 'condition' imposed by McKenna was therefore already implied by law. Since it was not an additional requirement, it could not in itself render the agreement conditional.

[15] I do not agree with the court a quo's reasoning. First, I am not aware of any rule that a contract cannot be rendered subject to compliance with a

condition imposed by statute. In fact, I can think of many examples which would support a contention to the contrary. But be that as it may, as I see it, the Master's consent was not directly required by s 80(1). According to this section: '*no curator shall alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorised thereto by the [High] Court or by the Master*'. In terms of s 80(2) the Master's jurisdiction to grant permission under s 80(1) is, however, limited to immovable property of which the value does not exceed the amount determined by the Minister of Justice in the Government Gazette. At all relevant times that amount was fixed at R100 000 (see GN 2333 in GG 15 308 of 1 December 1993). Because the value of Shea's house exceeded that amount, the Master had no authority to authorise the sale under s 80(1). McKenna required the permission of the High Court. That permission had, however, been granted beforehand in terms of para 2(g) of the order appointing McKenna as *curator bonis* to the estate of Shea, but subject to the following proviso in para 6 of the order:

'The powers conferred upon the *curator bonis* in terms of paragraphs (a) to (j) of paragraph 2 hereof shall be exercised subject to the approval of the Master of the High Court.'

[16] McKenna was therefore obliged to acquire the Master's consent to the transaction, not because of s 80(1) of the Act, but because of the provisions of the court order. Thus understood, no reason has been suggested – and I can think of none – why McKenna could not competently make his acceptance of the Erskine's offer subject to the condition that there be compliance with a requirement imposed by the order from which he derived his authority to sell the property. On the contrary, because the offerors could not be expected to have been aware of the terms of the court order, it was necessary for McKenna to add this condition. Absent such condition, he ran the risk of personal liability on the basis of an implied warranty of authority if the Master's consent could ultimately not be obtained.

[17] The words inserted by McKenna would therefore render any agreement between him and the Erskines subject to the suspensive condition

of the Master's approval. The question that immediately arises is whether in these circumstances a conditional agreement of sale had been concluded between McKenna and the Erskines, or whether there was no agreement at all. What gives rise to the question is of course the trite principle that a binding contract can only be brought about by an acceptance which corresponds with the offer in all material aspects. 'Yes, but' does not signify agreement. At best it is a counter-offer (see eg *Jones v Reynolds* 1913 AD 366 at 370-371; *Pretoria East Builders CC v Basson* 2004 (6) SA 15 (SCA) para 9; R H Christie *The Law of Contract in South Africa* 5 ed at 62-3 and the cases there cited). Since the Erskines offered an unconditional agreement while McKenna agreed to a conditional one, I think the difference between offer and acceptance is clear. It follows that in my view McKenna did not accept the offer by the Erskines, even though they may all have thought that he did. As a matter of law, this purported acceptance constituted no more than a counter-offer.

[18] An inevitable consequence of these conclusions is that a valid agreement of sale could only come into existence if the Erskines subsequently accepted McKenna's counter-offer. It was contended in argument that the Erskines did so when they executed the conveyancing documents. Apart from the fact that it does not appear from the agreed facts what conveyancing documents, if any, the Erskines had executed, I have a more fundamental difficulty with this contention. It arises from the requirement in s 2(1) of the Alienation of Land Act 68 of 1981, namely that a sale of land can only be valid if contained in a written deed of alienation, signed by both parties or their agents acting on their authority. Although the execution of conveyancing documents could conceivably constitute an implied acceptance by conduct, such acceptance would not satisfy the requirements of this Act. That much was expressly held in *Jackson v Weilbach's Executrix* 1907 TS 212. In that case there was no written agreement of sale. Nonetheless it was argued that the declarations signed by both the purchaser and the seller for transfer duty purposes constituted a written agreement within the meaning of s 30 of Proc 8 of 1902, which was the predecessor to s 2(1). To this argument Innes CJ gave the following answer (at 216):

'But do these declarations of purchaser and seller constitute such a contract? In form they certainly do not; the declaration of the seller is not an offer, and the declaration of the purchaser is not an acceptance. Nor is there anything to show that the parties, when they signed these declarations, intended to enter into any contract. The declarations were signed for revenue purposes, and they purport not to embody a contract constituted in terms of the documents themselves, but to record that a prior contract had been entered into at a date therein mentioned.'
(See also eg *Van Zyl v Potgieter* 1944 TPD 294 at 296; *Meyer v Kirner* 1974 (4) SA 90 (N) at 102D-H.)

[19] The finding that the purported sale between McKenna and the Erskines was never properly concluded, renders it unnecessary to decide whether a conditional agreement of sale, subject to the approval of the Master, would constitute a contravention of s 71(1) of the Administration of Estates Act. The appellants' argument that it did not rested on the proposition that such agreement was in fact aimed at compliance, as opposed to a contravention, of the section. Moreover, so the argument went, an agreement subject to such condition would never put the estate of the ward at risk of an alienation without the sanction of the Master. On a proper construction of s 71(1), so it was argued, the acts of administration and taking care of the ward's property that are prohibited by the section must be confined to transactions involving a risk of prejudice to the estate of the ward. If it were otherwise, so it was argued, appointed curators would commit a crime if, prior to the issue of their letters of curatorship, they performed an act in the interest of their wards in circumstances where everybody else would qualify as a *negotiorum gestor.* (As to these circumstances, see eg *Standard Bank Financial Services Ltd v Taylam (Pty) Ltd* 1979 (2) SA 383 (C); Daniel Visser *Unjustified Enrichment* 136.) Even though these arguments may have merit, they relate to an issue which, for the reasons I have given, requires no determination in this case and I would therefore prefer not to commit myself either way.

[20] This brings me to the next enquiry. Should the transfer of the house to the Erskines be regarded as valid despite the invalidity of the underlying sale which was the *causa* for the transfer? The appellants' contention that it

should, was rooted in the assumption that the abstract theory – as opposed to the causal theory – of transfer has been adopted as part of our law. According to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction such as, in this case, the contract of sale. The causal theory, on the other hand, requires a valid underlying legal transaction or *iusta causa* as a prerequisite for the valid transfer of ownership (see eg *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) 301H-302H, Van der Merwe, *Sakereg,* 2 ed at 305-306). With regard to the transfer of movables our courts, including this court, have long ago opted for the abstract theory in preference to the causal theory (see eg *Commissioner of Customs and Excise v Randles Brothers and Hudson Ltd* 1941 AD 369 at 398-9; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) para 17).

[21] Some uncertainty remained, however, with regard to the transfer of immovable property. In the High Courts that uncertainty has been eliminated in a number of recent decisions where it was accepted that the abstract system applies to movables and immovables alike (see eg *Brits v Eaton NO* 1984 (4) SA 728 (T) at 735E; *Klerck NO v Van Zyl and Maritz NNO and Related Cases* 1989 (4) SA 263 (SE) 273D-274C; *Kriel v Terblanche NO* 2002 (6) SA 132 (NC) paras 28-49). These decisions are supported by academic authors advancing well-reasoned arguments (see eg D L Carey-Miller *The Acquisition and Protection of Ownership* 128-130 and 168; C G van der Merwe *Sakereg op cit* at 305-310; C G van der Merwe and J M Pienaar *2002 Annual Survey* 466 at 481; Silberberg and Schoeman's *The Law of Property*, 5 ed (by Badenhorst, Pienaar and Mostert, 76). In view of this body of authority I believe that the time has come for this court to add its stamp of approval to the viewpoint that the abstract theory of transfer applies to immovable property as well.

[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property, is effected by registration of transfer in the Deeds Office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential

elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (see eg *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) at 922E-F; *Dreyer and Another NNO v AXZS Industries (Pty) Ltd (supra)* para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement (see eg *Preller v Jordaan* 1956 (1) SA 483 (A) 496; *Klerck NO v Van Zyl and Maritz NNO (supra)* 274A-B; Silberberg and Schoeman *op cit,* 79-80).

[23] The court a quo found that in this case ownership did not pass because of two defects in the real agreement. The first defect, so the court held, was that McKenna's intention to transfer ownership had been motivated by the mistaken belief that he had entered into a valid agreement of sale. In support of this finding the court referred to the power of attorney to pass transfer signed by McKenna, as well as the deed of transfer itself where the sale agreement of 22 April 2002 was cited as the *causa* for McKenna's intention to transfer the property. In this light, so the court held, it cannot be inferred that McKenna intended to transfer the property even if the sale agreement turned out to be null and void. In the same way as the court a quo, I also believe that McKenna – as well as the Erskines, for that matter – probably thought that the sale agreement of 22 April 2002 was valid and enforceable. And, albeit for different reasons, I also share the court a quo's view that the parties were mistaken in that belief. But I do not agree that a mistake of that kind could in itself render the real agreement void. If that were the position, we would effectively revert to the causal theory of transfer which we have jettisoned in favour of the abstract theory. I say that because I believe that very few parties (if any) to real agreements would deliberately give and receive transfer pursuant to an underlying transaction which, to their knowledge, is void. If a mistaken belief of this kind – whether unilateral or common – were therefore to render the real agreement invalid, there would not be much left of the abstract theory of transfer.

[24] In any event, a mistaken assumption about the validity of the underlying *causa* constitutes a mistake in motive. With regard to mistakes of this kind, it was said in *Van Reenen Steel (Pty) Ltd v Smith NO* 2002 (4) SA 264 (SCA) para 9:

'A party cannot vitiate a contract based upon a mistaken motive relating to an existing fact, even if the motive is common, unless the contract is made dependent upon the motive, or if the requirements for a misrepresentation are present.'

And in *African Realty Trust Ltd v Holmes* 1922 AD 389 at 403 it was said:

'But, as a Court, we are after all not concerned with the motives which actuated the parties in entering into the contract, except insofar as they were expressly made part and parcel of the contract or are part of the contract by clear implication.'

In consequence, I find that McKenna's mistake about the validity of the sale had no effect on the effectiveness of the real agreement.

[25] The second defect in the real agreement found by the court a quo essentially resulted from the following reasoning: The legislature's intention, so the court held, was to visit a sale agreement in contravention of s 71(1) with invalidity. Since that intention cannot be circumvented by application of the abstract theory of transfer, the original non-compliance with s 71(1) could not be cured by a real agreement. I do not agree with this line of reasoning. For purposes of the argument, I assume, without deciding, that the legislature intended any transaction in contravention of s 71(1) to be void. On this assumption a sale concluded by a curator without letters of curatorship would be invalid; so would a real agreement; and transfer by a curator without letters of curatorship would therefore not pass ownership to the transferee (cf *Mngadi NO v Ntuli* 1981 (3) SA 478 (D); D L Carey- Miller *op cit* at 164). But in this case McKenna had received his letters of curatorship before he concluded the real agreement. This means that he was properly authorised to enter into that agreement when he did so. The real agreement therefore did not contravene s 71(1). The fact that McKenna lacked authority when he purported to enter into the prior agreement of sale, is of no consequence. In view of the abstract theory, it did not affect the validity of the real agreement (se eg *Kriel v Terblanche NO* 2002 (6) SA 132 (NC) para 46). To transpose McKenna's lack of authority when he concluded the sale to the real

agreement is to ignore the implications of the abstract theory. I therefore hold the view that the house was validly transferred to the Erskines. In consequence I conclude that the court a quo erred in upholding Shea's claim for the restoration of her property on the basis of the *rei vindicatio*.

[26] As I have said earlier, the court a quo further held that even if ownership had duly passed to the Erskines, Shea was entitled to reclaim the house from them on the basis of the *condictio ob turpem vel iniustam causam*. Because of that finding, the court held that a defence based on what has become known as the 'rule in *Wilken v Kohler*', was not available to the appellants. Succinctly stated, the rule provides that, if both parties to an invalid agreement had performed in full, neither party can recover his or her performance purely on the basis that the agreement was invalid. The 'rule' has its origin in an *obiter dictum* by Innes JA in *Wilken v Kohler* 1913 AD 135. In context, Innes JA was dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. In the course of his judgment he then stated (at 144) *obiter*, as it turned out, that:

'It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose, for example, an . . . [oral] agreement of sale of fixed property . . ., a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that . . . it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out.'

[27] This *obiter* statement has been criticised in *CD Development Co (East Rand)(Pty) Ltd v Novick* 1979 (2) SA 546 (C) at 550F-553G and by academic authors as a departure from the accepted approach to enrichment liability (see eg De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3 ed 189; De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5 ed Vol 1 326). Nonetheless it was referred to with apparent approval by this court in *Wilkens NO v Bester* 1997 (3) SA 347 (SCA) at 362F and endorsed

by the legislature, specifically with reference to contracts of the sale of land, invalid for non-compliance with formalities, in s 28(2) of the Alienation of Land Act 68 of 1981. I shall return to this section. But, outside the sphere of cases concerning the sale of land, the debate whether the rule in *Wilken v Kohler* represents good law, continues (see eg Visser *op cit* 468; Eiselen en Pienaar *Unjustified Enrichment – A Casebook* 2ed at 157; Wille's *Principles of South African Law* 9 ed (General editor Francois du Bois) sv 'Unjustified Enrichment' 1068).

[28] Those who support the rule in *Wilken v Kohler* find justification for its existence in the consideration that where both parties have performed in accordance with the provisions of an agreement, albeit unenforceable, the purpose of the transaction has been achieved and that there is therefore no reason to interfere with the existing state of affairs. The underlying consideration of policy seems to be that those who received exactly what they bargained for should not be allowed to escape the consequences of a bad bargain by means of an enrichment action which is intended to be an equitable remedy (see eg Helen Scott *Unjust Enrichment by Transfer in South African Law: Unjust Factors or Absence of Legal Ground?* Doctoral thesis Oxford 2005 296 *et seq*; J C Sonnekus '*Is die Ongegronde van Afgesproke Prestasie Steeds Verryking?'* 2008 *TSAR* 605 at 610-612; Daniel Visser *op cit* 469-470). In the light of this explanation, which I find persuasive, I believe the time has come for this court to express its unequivocal approval of the *Wilken v Kohler* rule. Moreover, although on the facts of *Wilken v Kohler* Innes JA was dealing with an agreement which he described as void (at 142) for non-compliance with statutory formalities, I can see no reason why the rule should not apply in a case where, despite the non-existence of any agreement, the parties' intention has been achieved. In both cases the *condictio indebiti* would normally be available because the transfer was motivated by a mistaken belief relating to the validity or the existence of the underlying agreement. And in both cases *Wilken v Kohler* would constitute an exception to the *condictio indebiti* for the same reason, ie that the purpose of the transaction had been achieved.

[29] From the 'achieved purpose' analysis it is clear, however, that the *Wilken v Kohler* rule cannot apply where the purpose of the transaction is prohibited by law. The law cannot preserve a transaction which it has prohibited. It follows that a defence based on that rule is not available against a claim brought under the *condictio ob turpem vel in iustam causam*. That much was expressly held by this court in *Afrisure CC v Watson NO* [2008] ZASCA 89 para 49 (see also *M C C Bazaar v Harris & Jones (Pty) Ltd* 1954 (3) SA 158 (T) at 162F; Daniel Visser *op cit* 415 note 1 and 470).

[30] The court a quo therefore rightly departed from the premise that if Shea could rely on the *condictio ob turpem vel in iustam causam,* the *Wilken v Kohler* defence would not be available to the appellants. The question is thus whether Shea could rely on that *condictio*. I think not. Illegality of the underlying transaction is an essential element of the *condictio ob turpem vel in iustam causam*. That much is trite (see eg *Afrisure (supra)* para 5). On the facts I have found, McKenna did not enter into any illegal agreement. He either entered into an agreement which was invalid for lack of compliance with the formalities prescribed by s 2(1) of the Alienation of Land Act 68 of 1981 – because the Erskines accepted his counter-offer by implication, but not in writing – or – in the absence of an implied acceptance – he entered into no agreement at all. In the event of the former, the situation is governed by s 28(2) of that Act which provides:

'Any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full terms of the deed of alienation or contract and the land in question had been transferred to the alienee.'

[31] If, on the other hand, no agreement of sale came into existence because there was not even an implied acceptance of McKenna's counter-offer, the principle, in accordance with *Wilken v Kohler*, is that if both parties to an invalid or purported agreement have performed in full, neither party can recover where the lawful purpose of their transaction, common to them both, has been achieved. In either event, Shea could not succeed with an

enrichment claim. It follows that, in my view, the court a quo erred in finding that Shea was entitled to return of the house.

[32] In consequence it is ordered that:

(1) The appeal is upheld with costs, including the costs of two counsel where employed.

(2) The order of the court a quo is set aside and substituted with the following:

'The plaintiff's claim 1 is dismissed with costs.'

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

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