

SOUTH AFRICA / JUDGMENT

Blumenthal v Harris (344/85)

[1987] ZASCA 58 (27 May 1987)

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COURT

Supreme Court of Appeal

BEFORE

Joubert, Smalberger, Nestadt, Nicholas, Boshoff

CASE / FILE NUMBER

344/85

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344/85/AV

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between: CYRIL J.F. BLUMENTHAL Appellant AND CHARLES J. HARRIS Respondent

CORAM: JOUBERT, SMALBERGER, NESTADT, JJA, NICHOLAS et BOSHOFF, AJJA

HEARD: 5 May 1987

DELIVERED: 27 May 1987

JUDGMENT NICHOLAS, AJA

Bonnie Doon Township Extension No. 10 in East London was established on land owned by Dr C J F Blumenthal

in

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in accordance with General Plan No. 3245/1969 which was approved by the Surveyor-General on 11 March 1970. The township is about 4 hectares in extent and slopes down to the Nahoon River on the East. It comprises some 17 erven, including erf 386, on which Blumenthal and his wife have their residence.

Erven in the township were offered at an auction sale held in 1972, but no effective sales resulted.

At about this time the Blumenthals became aware of problems in the layout of the township as it affected erf 386. They requested Mr Eddy, of the* land-surveying firm of Manley, Eddy & Abbott, to suggest a solution, and in June 1973 Eddy submitted a "Sketch Plan showing proposed

subdivisions 3 subdivisions of Erven 386, 387 and 388 Bonnie Doon Township Extension No. 10 ..."
The following is a reproduction of part of the sketch plan.⁴ This will be referred to as Ex B. (The letters A, B, C, D, E and F were not on the original sketch plan. They have been added for purposes of reference). As they are represented on the general plan, erf 387 comprises both "Portion 1 of 387" and "Rem 387" which appear on Ex B; and erf 388 comprises both "Portion 1 of 388" and "Rem 388" which appear on Ex B.

The Blumenthals' problems were twofold. (i) Erf 386 depended almost entirely for its water supply on the two reservoirs indicated on Portion 1 of 387, which reservoirs received

their water from the run-off from the roof of the Blumenthals' home. They wanted the land on which the reservoirs were si-

tuated to fall within the boundaries of erf 386. (ii)

erf The boundary between erf 387 and 386 was too close to

their dwelling, behind which they wanted additional space

for

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for new servants' quarters.

The solution which Eddy proposed was:

(i) to subdivide erf 387 into Portion 1 of 387 and Rem 387;

(ii) to subdivide erf 388 into Portion 1 of 388 and Rem 388;

(iii) to consolidate Portion 1 of 387 with erf 386; and

(iv) to consolidate Portion 1 of 388 with Rem 387.

If only steps (i) and (iii) were taken, the remnant of erf 387 would, in Eddy's professional opinion, not be available erf, because the area available for the erection of buildings would not be sufficient or suitable. The reason appears from Ex B. There is indicated on the plan "Existing sewer servitude", which marks

the

6 the position of a sewerage pipeline crossing erven 387 and

388. Buildings could not be erected across the servitude; they could not be erected between the pipeline and the Nahoon River because of the very steep terrain; and the remaining area between Willasdale Place and the pipeline was inadequate. It was accordingly necessary to consolidate "Portion 1 of 388" with "Rem 387". Blumenthal approved the proposal and asked Eddy to do what was necessary to carry it into effect. Eddy submitted an application for subdivision, together with a copy of his sketch plan, to the East London Municipality, which then transmitted it to the Director of Local Government in Cape Town. The latter approved

it sub-

ject

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ject to conditions, which would have included a condition

that the consolidations take place, and conditions relating to the provision of services. Eddy then made the necessary survey and framed the diagrams, six in number, which were required. These were submitted to the Surveyor General, who returned them with his approval signified thereon. In his records the Surveyor-General made appropriate notes in pencil on the general plan and on the approved diagrams, and made a pertinent entry on a noting sheet.

The subdivisions were not registered in the deeds regis-

try. In order to avoid incurring unnecessary conveyancing

costs, subdivisions would not normally in a case such as this be re-registered until the first transfer of the erven concerned. It is provided in ss. (7) of s. 46 of the Deeds Registries Act, No 47 of 1937,

that

8 that where a general plan has been registered in terms of ss (1) it shall not be necessary, where a whole erf is transferred, to produce a diagram thereof, provided that where a diagram has not been produced, a reference shall be made to the general plan in the relevant deed of transfer. Where, however, a subdivision of an erf has been approved, a diagram of the erf approved by the Surveyor-General must be lodged with the transfer deed conveying the subdivision for filing with the first transfer of the erf. (See Jones, Conveyancing in South Africa, 3rd ed. p. 237).

At about this time, all erven in East London were renumbered by the Surveyor-General. They were given consecutive numbers instead of numbers in sets for each individual

township 9 township. Thus erf 387 was renumbered erf 10022 East London; and erf 388 was renumbered erf 10023 East London. Under cover of a letter dated 6 September 1974, Eddy sent to Blumenthal copies of the approved diagrams in duplicate for safe-keeping; a signed copy of a letter dated 19 November 1973 from the Director of Local Government together with conditions imposed in connection with the subdivisions; and Manley, Eddy & Abbott's account for the survey.

Towards the end of 1979, the Blumenthals decided to offer a number of erven for sale by auction by W E Midlane & Co (Pty) Ltd. ("Midlanes").

They again called for Eddy's professional services. He prepared a schedule of the areas and descriptions of the

properties 10 properties in the township which were to be offered for sale. They included erf No 388 (Rem) (erf 10023 (Rem) East London), the area of which was 1601 square metres. Eddy located the beacons (or pegs) of the erven concerned, and knocked in stakes next to the pegs. Under his

direction lines of sight between pegs were cut with bush knives through the dense vegetation which covered the erven. The stakes were provided with orange flags and surrounded by white-washed stones, so that the boundaries of the erven concerned could be located by potential purchasers.

On a copy of a locality plan of the township which had been obtained from the East London municipality, Mr. Midlane, the auctioneer, indicated the plots to be sold, which

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which were heavily outlined, and on which were shown both the original erf numbers and the East London erf numbers. Among the lots concerned was 388 (10023), but what was depicted was the remainder of 388 - the area of Portion 1 of 388, which was not marked as such, fell outside the boundaries of 388 as outlined. At the foot of the sketch were shown the numbers of the plots to be sold and their respective areas which had been taken from Eddy's schedule. Copies of Midlane's sketch and Eddy's schedule were distributed to interested persons. The sketch will be referred to as Ex L. At the sale, which was held on 5 December 1979, Midlane drew particular attention to the pipeline servitude and pointed out that the shape and size of erf 388

(10023) 12

(10023) differed from what was shown on previous locality plans of the township. Only one erf was sold as a result of the auction, namely erf 383 (10018). The Blumenthals then asked Midlane and other estate agents to act as agents for the sale of the remaining erven on offer. For this purpose the flags, the white-washed stones, and the cleared lines between pegs were kept until eventually all the erven were sold. At the beginning of June 1980, Mr. Charles Harris was introduced to the Blumenthals by Mrs. Dreycott of Midlanes. An appointment was made for a meeting at the plot and Mr. and Mrs. Harris were shown around by Mrs. Blumenthal.

On 9 June 1980 Mrs. Dreycott submitted an offer by

Harris 13 Harris to purchase "Erf No 10023 East London" for R12500. This was accepted by Blumenthal on the following day. (Subsequently a new offer document was substituted in which the purchase price was R12000 and the purchaser undertook to pay the agent's commission of R500.) Thereafter, and in pursuance of a provision to that effect in the offer document, a deed of sale was drafted by Blumenthal's attorneys, Messrs Drake, Flemmer, Orsmond & Vermaak. It was signed by Harris on 29 June 1980 and by Blumenthal on the following day. In due course transfer was passed.

At the end of May 1982 Mrs Blumenthal, having received a re-port from her gardener, went to the site, on which build-ings were being erected on behalf of Harris. At that time

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the builders were busy with the servants' quarters, and she saw they partly encroached across the line A-B on Ex B. She saw that a gang of workmen were clearing a line through the vegetation on erf 387. There was a creosoted pole in fresh concrete at point F. Harris arrived on the scene. When she protested that he was encroaching on her land, he told her that the creosoted pole marked the correct boundary peg. Blumenthal's attorneys then wrote a letter to Harris dated 3 June 1982, advising him of Blumenthal's contention "...that the property which he sold to you is Remainder Erf 10023 and that in error you have been transferred the property formerly described as Erf 388."

They stated that Blumenthal would in due course proceed in the Supreme Court for an appropriate order, and they advised further

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further that should Harris persist in continuing building operations which encroached on Blumenthal's property, steps would be taken to obtain an interdict pendente lite.

On 4 January 1983, Blumenthal caused a summons to be issued out of the East London Circuit Local Division of the Supreme Court in which he claimed as against Harris inter alia

"1. (a) Rectification of the deed of transfer ... by deleting the description of the immovable property transferred, and by substituting therefor the following description:

'Remainder Erf 10023 East London (Bonnie Doon Town Extension No 10) Municipality and Division of East London Measuring 1601 square metres.'

2. (a) An order directing that Defendant remove

the buildings which encroach upon the portion of immovable property which lies between

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tween Remainder Erf 10023 East London and Erf 20703 East London and which is marked ABF on the diagram ... which is described as Portion of Erf 10023 ..."

The allegations in the particulars of claim which re-late to these prayers are the following:

"3. (a) In terms of a written agreement of sale

signed by Defendant on 29 June 1980 and by Plaintiff on 30 June 1980 Plaintiff sold to Defendant certain undeveloped immovable property in East London for a purchase price of R12 000,00, the parties having previously signed and completed a written offer and acceptance in respect thereof.

(b) Copies of the said written agreement and the said offer and acceptance are attached (c) The said written agreement was entered into at East London, within the area of jurisdic-tion of this Honourable Court.

4. (a) At all times material hereto Plaintiff in-tended to sell and Defendant intended to purchase

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purchase the immovable property which is shown on the attached locality plan An-nexure "C" as ABCDE and which is fully and properly described as:

'The remainder of erf 10023 situate in the municipality and division of East London Measuring 1601 square metres'. (b) The said immovable property sold by the Plaintiff and purchased by the Defendant comprised the original erf 10023 (formerly erf 388) less portion ABF shown on the locality plan annexure "C". 5. (a) By mutual error common to both parties

(i) the written offer and acceptance an-nexure "B" incorrectly describes the immovable property purchased and sold as

'Erf No. 10023 East London'; (ii) the written agreement of sale annexure "A" incorrectly describes the immovable property purchased and sold as

'Erf 10023 East London (Bonnie Doon Township Extension No. 10) Municipality and Divi-sion of East London Measuring: 1601 square metres

AS

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As will more fully appear on reference to General Plan No. 3245/69 (T.P. 7879) approved by the Surveyor General on 11th March 1970'.

(b) Plaintiff signed the said written agreement of sale annexure "A" and the said written offer and acceptance annexure "B" in the reasonable and bona fide but mistaken belief that the description of the property contained therein accurately set out the property which Plaintiff intended to sell and which Defendant intended to purchase. 6. (a) In pursuance of the said written agreement

of sale annexure "A" Plaintiff in due course passed transfer of the said immovable property to Defendant, a copy of the said deed of transfer being annexed and marked "D".

(b) In perpetuation of the aforesaid mutual

error common to both parties the said deed of transfer annexure "D" incorrectly describes the immovable property transferred as Erf 10023 and not as the remainder of Erf 10023, with the result that the property shown on the locality plan annexure "C" as

AFBCDE

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AFBCDE was transferred to Defendant, instead of the property shown as ABCDE.

(c) Plaintiff passed transfer of the said immovable property to Defendant in the bona fide and reasonable but mistaken belief that the description of the property contained in the deed of transfer annexure "D" accurately described the property which Plaintiff intended to sell and transfer, and which Defendant intended to purchase and in respect of which he intended to take transfer. 7. In all the premises Plaintiff is entitled

to rectification of the written deed of sale annexure "A", the offer and acceptance annexure "B" and the deed of transfer annexure "D" but Defendant has failed and refused to accede to the rectification thereof, despite demand.

8. (a) Plaintiff is the owner of the immovable

property known as Portion of Erf 10023 and shown as ABF on the locality plan annexure "C". (b) Defendant has erected certain walls and

outbuildings on Plaintiff's said immovable

property

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property in breach of Plaintiff's rights of ownership, and he has wrongfully failed and refused to remove the said walls and outbuildings, despite demand. (c) In the premises Plaintiff is entitled to

an order requiring Defendant to remove the said walls and outbuildings."

The essence of the defence was set out in the following

paragraphs of the plea:

"2. (b) The Defendant denies:

- (i) that the parties at any stage orally agreed on the material terms of the agreement and in particular denies that the parties orally agreed on the precise boundaries of the immovable property to be purchased and sold; (ii) that the parties intended that the

immovable property to be purchased and sold was to comprise the area shown on the said locality plan, annexure "C" as A B C D E (the Plaintiff's description of which is not admitted by the Defendant);

(iii)

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(iii) that the immovable property purchased and sold did not include the portion shown on the said locality plan, annexure "C". as A B F; (iv) that the description of the area A B C D E referred to in sub-paragraph (ii) above is the description which should be contained in any Title Deed; (v) that the description of the immovable property purchased and sold set out in the written offer and acceptance, annexure "B" and the written agreement of sale, annexure "A", viz., 'Erf No. 10023 East London', is incorrect or that there was any error on the part of the parties whether as alleged or at all; (vi) that the Plaintiff signed the written agreement of sale, annexure "A" or the written offer and acceptance, annexure "B" under a mistaken belief as to the description of the property referred to therein, whether as alleged or at all. (c) The Defendant pleads that the Plaintiff in-

tended to sell and that the Defendant intended to purchase the immovable property shown on

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the locality plan annexure "C" as A F B C D E and that the written offer and acceptance annexure "A" correctly described the property purchased and sold as 'Erf 10023 East London.' 3.(d) The Defendant further denies that the Plaintiff passed transfer of the said immovable property to the Defendant under a mistaken belief as to the description of the property contained in the deed of transfer, whether as alleged or at all, and pleads the deed of transfer correctly describes the property which the Plaintiff intended to sell and transfer and which the Defendant intended to purchase and in respect of which he intended to take transfer."

(The points A B C D E and F referred to in the pleadings and in the evidence at the trial, correspond with points A B C D E and F which have been marked on Ex B above).

The trial, which began on 1 March 1985, was heard by JENNETT J. On 10 July 1985 the learned judge handed down

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a judgment in which he made an order absolving the defendant from the instance with costs. Thereafter leave was granted to the plaintiff to appeal to this Court, and it was directed that the costs of the application for leave to appeal be costs in the appeal. Altogether twelve witnesses were called at the trial, and their evidence was wide-ranging. It will not however be necessary for me to deal with all of the evidence, because the crucial matter is what took place at the meeting between the Blumenthals and the Harrises at the property in early June 1980, shortly before the contract of sale was concluded. In regard to this the vital witnesses were Mrs Blumenthal and Harris. Dr Blumenthal and Mrs Harris were also present but

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the parts which they took were minor.

Mrs Blumenthal, who is a registered medical practitioner, said in her evidence that Mrs Dreycott of Midlanes telephoned her at the beginning of June 1980, and said that she had a buyer for erf 10023. An appointment was made and the Blumenthals met Mr and Mrs Harris at the plot. The flags marking the pegs were still in position and the boundaries which had been cut through the bush were still visible. She showed the plot to the Harrises. She first indicated points A and E, and then they proceeded through erf 386 down to the river, passing the sewerage line (the position of which she pointed out) on the way. The Harrises asked whether erf 387 was for sale and where its boundaries were.

She 25 She replied that it was not for sale, and explained why. She indicated points B and C and the extent of the frontage of erf 388 on the Nahoon River, which was of great interest to the Harrises. They proceeded back to points A and E via D. About an hour was spent in looking at the plot. The meeting concluded with Harris saying that he would like to make an offer and Mrs Blumenthal replying that he should do so through Mrs Dreycott. There was no discussion at all as to the triangular piece of ground represented by the letters ABF.

In concluding her evidence in chief she said that the averment in Harris's plea that she intended to sell him the original unsubdivided erf 388 was not true; that she had at no time any intention to sell the whole erf; and that she

would

25 A

would not have sold the whole erf if anyone had offered to buy it.

The following are extracts from the record of her

cross-examination:

"(Mr Harris) says that while you were up looking at the pegs you told him that you and your husband had thought of taking portion of Lot 388 off and he said to you that he wanted to buy the property as it stood.

That is not true; we had already finalised all that in 1974; this was 1980. Well you hadn't finalised it in the sense that you had never registered the sub-divisions, had you? That was a technicality in our minds. We were only selling the new sub-division.

Now you had made up your mind that you weren't going to sell Lot 387 in your lifetime?

That is true.

So that the sub-division of Lot 387 wasn't of immediate importance to you and your husband? These three sub-divisions were a fait accompli in our minds.

Mr

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MR HURT: So did you not tell Mr Harris while you were discussing, taking him round the site, that there were sub-divisions that would have to be registered in relation to this property when the property was trans-

ferred to him? No, M'Lord, that had nothing to do with Mr Harris. That you had rearranged the layout of 387 and 388? No, we didn't discuss that.

And Mr Harris says that one of the reasons why he didn't want 388 with the triangular section cut off was because it cuts the road frontage down of that property, 388, to the little section that is AE on EXHIBIT A.

Did he speak to you about that? No, whenever we discussed the little triangular section. We did discuss his narrow entrance. And what was said in connection with that? --Well we suggested it was adequate and it was a more secure sort of road frontage, to have a small road frontage.

And he says that he said to you while you were standing near their car that he wanted to make an offer for the property but he wanted

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wanted to buy the whole property, the whole of 388. Can you remember that? No, that can't be

true.

In

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In his evidence, Harris said that he owned a petrol service station which also did motor vehicle repairs. He was interested in acquiring a property on the Nahoon River. He heard of the auction sale at the end of 1979, but for various reasons he did not attend it. A few weeks later he discussed the township with Wes Midlane, who told him that there were three lots (including 387 and 388) which bordered on the river. Midlane gave him a copy of a diagram which was similar to Ex L. Thereafter Harris visited the scene on a number of occasions, and "picked up some of the beacons". (Later in his evidence he said that he located all the pegs except for one down at the river front.)

At the beginning of June 1980, Harris and his wife

visited

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visited the scene in the company of Midlane, who explained that he had, for the purpose of the auction, drawn in a line from A to B on the original locality plan, but that as far as he knew the plot was still a full 388. They discussed the renumbering of the plots, including the renumbering of 388 as 10023. On 9 June 1980, Harris and his wife met the Blumenthals at the scene in pursuance of an appointment made through Mrs Dreycott. They walked around the erf, starting at point B and proceeding to point C. Referring to the copy of Ex L, he said to Mrs Blumenthal that he saw there was a piece which had been marked off and that he would like to purchase the complete plot as it stands without anything cut

off

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off. Asked what her reply was, Harris said:

"She never told me it was registered; she never said they were definitely cutting it off. The way she spoke was sort of to the effect that they would like to take it off. There were never any definites."

From C they went to point D and then to E and A.

At A, Mrs Blumenthal said:

"... well that is where the peg is for the piece they would like to cut off - and I went over to F and said to her - but this is where the peg is for the full 388, the piece that I would like ... again she said that they would like to cut it off, that they would like to take it off, but not, as I say, in the same terms as that negative I got for 387."

As they were leaving after the inspection, Harris again said to Mrs Blumenthal, "I still want to buy that full plot ..."

There

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There was no reply. His evidence in chief concluded as follows:

"Did you ever have an intention to purchase a piece of land less than the whole Plot 10023? Not at all; not at all."

He said that while he and his wife were driving back to town, he told his wife "that the Blumenthals had mentioned that they were wanting to take that piece off but as far as I was concerned I would like them to leave it on."

Mrs Harris also gave evidence about that discussion.

She said:

"Then we left, and driving back to town Charles spoke about the fact that Mr and Mrs Blumenthal wanted to retain a piece of the ground, but that ... he wanted the whole plot 10023."

and later, in her evidence,

"Charles

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"Charles was very adamant that he wanted 10023."

As JENNET J pointed out in his judgment, the decision of the case turned essentially upon what occurred at this meeting which immediately preceded the making of the offer. He said that the question was by no means an easy one and it had caused him much deliberation. In regard to the credibility of the Blumenthals, the learned judge said:

"Both plaintiff and his wife impressed me as honest and upright persons. I do not believe that either of them told the Court anything other than what he or she believed to be the truth."

He mentioned only one ground of possible criticism of Mrs

Blumenthal:

"I ... find it a little surprising that

after

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after the efforts to achieve clarity at the auction sale as to what was being sold that Mrs Blumenthal should state that at her meeting with defendant no mention whatsoever was made of the rearrangement of the areas of the two erven 387 and 388 (erf 10023) but she may be reconstructing her evidence as to the meeting"

I do not agree. There was no occasion for Mrs Blumenthal to tell Harris the history of the subdivision. She was pointing out on the ground the boundaries of the land which was for sale: there was no room for misunderstanding as there might have been at the auction sale.

In regard to the credibility of the Harrises, JENNETJ said:

"Mrs Harris was a most convincing witness and I have no reason to think that she testified to anything other than what she

believed

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believed to be the truth. Defendant was also a good witness as far as his demeanour was concerned. I did occasionally get an impression of glibness about his evidence but certainly there was nothing in the manner he gave his evidence to suggest that his evidence was false."

The learned judge appears to have considered that it was in the evidence of Mrs Harris that the way out of the im-passe created by the irreconcilably conflicting versions of Mrs Blumenthal and Harris was to be found. He said that -

"...vital evidence which I find it im-possible to reject, is the evidence of defendant's wife that after the meeting and on their way to town defendant said to her that he wanted to buy the whole of erf 10023. On Mrs Blumenthal's version of what happened at the meeting there was no basis for defendant ever to have said anything like that but such a statement of intent is consistent with defendant's version."

While

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While there is no question as to the veracity of Mrs Harris, the learned trial judge in my opinion regarded her evidence as having a cogency which it did not possess. It was given nearly 5 years after the meeting. Human memory is inherently and notoriously liable to error. One knows that after a long interval people are less likely to be complete and accurate in their account than they are after a short interval. It is a matter of common experience that during the stage of storage in the memory, perceived information may be modified or added to by subsequent information. This case is obviously a matter of considerable importance to the Harrises, and they must have discussed it frequently between themselves. After so many years, Mrs Harris's origi-

nal

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nal perceptions may well have been overlaid or replaced by what was said in subsequent discussions. Nor did her evidence as recorded show that her memory was all that good. She could remember nothing of any conversation she had had

of any conversation with Mrs Blumenthal, or between Mrs Blumenthal and Harris.

She did not remember going to visit the property with Midlane. And it is not acceptable that she could, after the long

lapse of time, have had an independent or unaided recollection of the number 10023.

JENNETT J said in his judgment,

"Concerning exactly what was said between defendant and Mrs Blumenthal, and it is their conversation which goes to the root of the matter, there is ... a conflict between

them 37

them and on the evidence I find it im-

possible to say that Mrs Blumenthal's

version is more probable than that of defendant."

I am of a different opinion. In my view Harris's evidence, where it conflicts with that of Mrs Blumenthal, is inherently so improbable that it cannot reasonably be true.

Having regard to the history of the subdivision, it cannot be true that - more than 6 years after everything had been done which was necessary for subdivision except for the

last step of registration, at a time when the subdivision had been

shown on Ex L, and after the auctioneer had explained what had taken place. - Mrs Blumenthal would say that "they would like to take it off" or that "they had thought of

taking it off". The subdivision was not a feminine whim,

but

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but a hard necessity dictated by what was required for erf 386 and what was necessary to the viability of erf 387 (which incidentally was regarded as the most desirable of the riverside erven). Nor can it be true that if Harris told Mrs Blumenthal that he wished to purchase the whole plot, she would either have failed to respond or would have made the non-committal responses to which Harris testified. It is clear from the record of her evidence that she is a forthright person, of firm ideas, who does not mince her words. It is plain that the Blumenthals would not have considered selling the whole of erf 388 as it was represented on the general plan - the

subdivision

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subdivision of 388 was not an end in itself, but was consequential upon the subdivision of erf 387, which was made primarily to ensure the water supply of erf 386. Plainly Mrs Blumenthal's response would have been in clear and emphatic terms, leaving no room for any doubt: the abandonment of the subdivision of erf 388 was not negotiable.

It is not without significance that it was not put to Mrs Blumenthal in cross-examination that Harris would say that he indicated the position of peg F and said "that's where the peg is for the full 388, the piece that I would like". It is a reasonable inference that he did not tell this to his legal representative in consultation, and this would suggest in turn that it was a fabrication. That is

supported

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supported by the fact that on the occasion when Mrs Blumenthal protested that he was encroaching, he pointed to the erected pole as marking the correct boundary peg, but apparently did not remind her, as he would have done if it were true, that he had pointed out this peg at the June meeting. In addition to the gross inherent improbability of Harris's story, there are other matters which are pertinent to the question whether Harris could have thought that he was buying Lot 388 as represented on the general plan.

Harris had known since January 1980 that what the Blumenthals were offering for sale was erf 388 (10023) as represented on Ex L. This was the piece of land whose boundaries were pointed out to him by Mrs Blumenthal at

their

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their meeting in June 1980. Harris says that he intended to make an offer for the original erf. Yet he made no enquiries as to the asking price for the whole erf. He could hardly have believed that a higher price than that for the remainder of erf 388 would not be demanded. After all, Portion 1 of 388 was 410 square metres in extent which was a quarter of the area of the remainder of 388. Moreover, Harris took no steps to ensure that his offer to buy was for the whole erf. He signed an offer to purchase simply "Erf No 10023 - EAST LONDON" even though he must have known, on his story, that that was ambiguous: it might refer to the erf as shown on the general plan, or to the erf as represented on Ex L.

Finally

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Finally there is the matter of the architects' plan. After the sale, Harris appointed architects to design a house to be erected on the plot. They drew three sets of plans and in each instance the site plan reflected the subdivided erf. Harris rejected the first set of plans solely on the grounds of expense. He approved the second and third sets of plans. The inference to be drawn from this is that Harris accepted that he had bought the subdivided erf. In his evidence, however, Harris said that he did not give the architects any site diagrams: they asked for diagrams

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but he told them he did not have any. He no longer possessed a copy of Ex L, and had no idea when he had lost it. The architects got the site diagram "from the municipality somewhere", but he was not too sure. He himself had got a copy of the correct diagram showing the full 10023 from the Allied Building Society, which was the bondholder. He repeatedly pointed out to the architects that they were using an incorrect diagram, but they persisted in doing so.

This is not a credible story. It is in the highest degree unlikely that he would have left it to the architects to forage for information about the boundaries of the building

plot. He had been in possession of Ex L. He easily obtained

a correct diagram from the Allied Building Society, but

he did not give a copy to the architects even when

he

44 he knew, on his story, that they were using an incorrect diagram. Although he told them that their site plan was incorrect, they persisted in using it. His explanation for not

insisting that they use a correct site plan was a lame one:

"And it is quite clear from the site diagrams, on the architects' plans that the area with a narrow frontage had been used to the pur-

pose of designing your house. That is

correct.

Didn't you say to the architects - why don't

we use the additional area on top for build-

ing? At the time they didn't want to

particularly listen to me because they were the architects; at the same time I thought - well, if that is the way they want to carry on with it we would be quite happy to use that all as flat play area."

In all the circumstances, Harris's story that he

intended to buy the whole of erf 10023 should have been re-

jected

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jected by the trial court. In consequence, and in the

regard light of JENNETT J's credibility finding in to Mrs Blumenthal,

her evidence that the parties had a common intention respectively to buy and sell the land, within the points A B C D E, which she pointed out, and which was represented on Ex L, should have been accepted.

The result is that the appeal must succeed.

The following order is made:

(a) The appeal is upheld with costs. (b) The order of the trial court is set aside and the following is substituted therefor:

"An order is granted

1.(a) rectifying the deed of transfer being an-

nexure D to the particulars of claim by deleting the description of the immovable property transferred, and by substituting

therefor

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therefor the following description: 'Remainder Erf 10023 East London (Bonnie Doon Township Extension No 10) Municipality and Division of East London Measuring 1601 square metres.'

(b) directing that Defendant remove the build-ings which encroach upon the portion of immovable property which lies between Re-mainder Erf 10023 East London and Erf 20703 East London and which is marked ABF on the diagram annexure C to the particulars of claim and which is described as Portion 1 of Erf 10023 and, in default of compliance therewith by 1 December 1987,

(c) an order directing the Deputy Sheriff,

East London, to take all steps necessary to remove the said encroachment at Defendant's cost and for his account.

2. Directing the Defendant to pay the costs of suit with interest thereon at the rate of 11% per annum from 14 days of taxation to the date of payment."

JOUBERT, JA

SMALBERGER, JAH C NICHOLAS, AJA NESTADT, JA Concur

BOSHOFF, AJA

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