

SOUTH AFRICA / JUDGMENT

Bondev Midrand (Pty) Ltd v Ndlovu and Others (47619/2014) [2016] ZAGPPHC 137 (7 March 2016)

[2016] ZAGPPHC 137

COURT

North Gauteng High Court, Pretoria

BEFORE

K La M Manamela

CASE / FILE NUMBER

47619/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 47619/2014

DATE:

7/3/2016

Not

reportable

Not

of interest to other judges

Revised

In

the matter between:

BONDEV
MIDRAND (PTY)
LTD Applicant
and
MATSHEDISO
NDLOVU First
Respondent
MOMPATI
NEYBEZELA
BAIPHETHI Second
Respondent
THE
REGISTRAR OF DEEDS,
PRETORIA Third
Respondent
NQABA
GUARANTEE SPV (PTY)
LTD Fourth
Respondent
DATE
OF HEARING: 15 FEBRUARY 2016
DATE
OF JUDGMENT: 07 MARCH 2016

JUDGMENT

MANAMELA AJ

Introduction

and brief relevant background

- [1] The appellant, a property developer, sold Erf [...] Midstream Estate Extension 31 Township, Registration Division J.R., Province of Gauteng (the property) to the first and second respondents (the respondents) on 30 October 2009 for R499 000.[1] Transfer of the title to the property took place on 31 March 2010.[2]
- [2] The property was at all material times an empty piece of land or stand. The sale agreement and title deed contain a term or condition relating to the time or period within which the respondents were required to erect a building on the property. I will henceforth refer to this term or condition as the building-period condition. The building-period condition is contained in clause 10 of the sale agreement, which reads as follows:

“10.1 The PURCHASER undertakes to erect the buildings on the PROPERTY to the reasonable satisfaction of the SELLER within EIGHTEEN (18) months of date of proclamation, failing which the SELLER shall be entitled (but not obliged) to claim that the PROPERTY be retransferred to the SELLER at the cost of the PURCHASER against repayment of the original purchase price to the PURCHASER, interest free.

10.2 The PURCHASER shall not within the said period sell or transfer the property without the SELLER’S written consent.”[3]

[I added the underlining for emphasis]

[3] The title deed also contains the building-period condition, but with a slight variation as to the commencement date of the building

period. Instead of referring to the date of proclamation (as in the sale agreement), the title deed refers to a specific date. It reads as follows in the material part:

“B SUBJECT to the following condition imposed and enforceable by BONDEV MIDRAND (PROPRIETARY) LIMITED (Registration Number: 2000/027600/07), namely:

The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (EIGHTEEN) months from 7 December, 2007, failing which the Transferor will be entitled, but not obliged to claim that the property is transferred to the Transferor at the cost of the Transferee against payment by the Transferor of the original purchase price, interest free. The Transferee shall not within the said period sell or transfer the property without the Transferor’s written consent. This period can be extended at the discretion of the Developer.”[4]

[4] Evident from the above, is the fact that the building-period condition expired around 07 June 2009. This was 18 months from 07 December 2007.[5] Be that as it may, this was clearly even before the sale agreement was concluded or transfer took place.[6] The applicant and respondents (jointly, the parties) extended the building period by agreement concluded on 12 March 2010 (the extension agreement).[7]

[5] The extension agreement was subject to terms or conditions (in the form of “undertakings”, “acknowledgements”

and “understandings” by the respondents), as follows:

“... hereby acknowledge that I am aware that:

1. The original building period namely 18 (EIGHTEEN) months after proclamation expired on 30 June 2009
2. Bondev is entitled to purchase the stand back, at the original selling price which Bondev sold the stand for.
3. There are Aesthetical rules for Midstream Estate.

4. The constuction [sic] period is 9 months.
5. Extra levies will be imposed by the Midstream H.O.A should the original building period be exceeded.”

I undertake to:

1. Immediately proceed with the preparation of building plans and lodge building plans within 45 calender days hereof at the Aesthetical Committee.
2. Appoint a building contractor within 80 days hereof.
3. Supply Bondev with a monthly building programme within 80 days hereof.
4. Complete construction within 12 months hereof.

I understand that this agreement does not negate or affect:

1. Bondev’s rights in terms of the original Offer to Purchase and the Title Deed.
2. The decision of the Home Owners Association to charge an extra levy.”[8]

Applicant’s

submissions

- [6] The applicant contends that the respondents did not comply with the building-period condition, as stipulated, in the sale agreement and extension agreement due to their persistent failure to erect a building on the property. Consequently, the applicant seeks an order for the re-transfer of the property against refund of the purchase price paid by the respondents, but without interest. This is in terms of the sale agreement and also contained in the title deed, as stated above.[9]
- [7] The applicant further submits that the building-period condition is not unique to the respondents and was in fact imposed on all buyers of property in the Midstream Township comprising 60 townships and approximately 4500 residential stands.[10] The condition is a *lex commissoria*[11] ensuring retransfer of the property back to the applicant as a developer in order to, among others, ensure safety and security of the entire establishment, which has own shopping centres and schools.[12] Evidently, the application is opposed by the respondents.

Respondents’ defences and counterclaim (and analysis thereof)

- [8] The respondents did not only oppose the application, but also launched counterapplications. The initial counterapplication was

technical in nature and for the dismissal of the main application due to issues relating to service of the applicant's papers.[13] This counterapplication was withdrawn by agreement between the parties.[14] The subsequent counterapplication was for the applicant to be directed "to consent to and to perform all ancillary and incidental duties required to give consent to a validly concluded written offer concluded by the Respondents and presented to it for the requisite

consent", and costs of the counterapplication.[15] Both, the main application and counterapplication were heard on 15 February 2016, when I reserved this judgment.

[9] The respondents' answer to the founding papers is incorporated in the counterapplication. The counterapplication is also opposed by the applicant. Although not crafted in the most elegant of ways, I understand the relief sought in terms of the counterapplication to be a mandamus or final interdictory relief. Apart from what is stated above,[16] the respondents seek various reliefs in terms of the counterapplication and raise several defences in opposition of the relief sought by the applicant in the main application. All these are not phrased in the alternative and therefore, the result is endless

contradictions. Therefore, I will make use of subheadings to improve presentation.

Waiver of rights to enforce building-period condition

[10] The respondents contend that the appellant waived its rights to enforce the building-period condition at the time the agreement was concluded on 30 October 2009. By then, the submission goes, the 18 months' period from date of proclamation, being 07 December 2007[17] had elapsed. Taking the merit of the submission at face value for a moment, the submission is however not reconcilable with the purpose and import of the extension agreement[18] entered into by the parties. The respondents could be said to be the ones that waived its rights in terms of the sale agreement, not the other way round. I will deal with this further below.

Date of proclamation and impossibility of performance

[11] The respondents submit that they were all along unaware of the date of proclamation until when they were busy with preparation of their papers in these proceedings. They further submit that, because no date of proclamation was fixed in the sale agreement, performance in respect of the building-period condition, was impossible. I hasten to point out that there is no merit in this submission. When the property was transferred, which is the only stage from which the respondents could have complied with the building-period condition, the title deed clearly stipulated that the building period was 18 months from 07 December 2007. [19] It also doesn't make any difference whether or not the respondents were unaware of the condition relating to date of proclamation, because of the subsequent events.

[12] A slight variation of the above submission by the respondents is that, the building-period condition was impossible to comply with, as the respondents only took transfer on 31 March 2010, when the building period had already elapsed. However, this submission is incorrect. The building period had already been extended on 12 March 2010 before the property was

transferred on 31 March 2010. The corollary of this is that, the respondents actually had a choice to stop the transfer or resile from the sale agreement, if they were unhappy with the date of proclamation revealed in the transfer documents, assuming such would have constituted a valid reason for doing so under the circumstances. There was in fact an earlier opportunity, just before the extension agreement was concluded, to resile from or rectify the sale agreement. It is common cause that the respondents did neither.

Express, implied or tacit agreement to extensions of the building-period

[13] The respondents submit in this regard that, there was a further extension other than the extension in terms of the extension

agreement (of 12 March 2012) when the building period was extended from 12 March 2010 by another 12 months. The origin of this

submission is the following. The extension agreement contained a condition that the Midstream Homeowners Association (Midstream HOA) will impose penalties in the form of extra levies, should the respondents not construct a building on the property within the period of extension. The respondents argue that, since the extra levies were imposed by Midstream HOA and paid by them (i.e. the respondents), there is therefore compliance with this new extension agreement.

[20] This submission was also belaboured by counsel for the respondents, Mr MC Makgato, at the hearing of this matter. I find no merit in this argument. The respondents did not show that the applicant charged or received the penalty levies or any levies at all, from payment made by the respondents. The Midstream HOA is clearly another entity, with which the respondents have a relationship complementary, but not the same, to the one with the applicant. Therefore, the respondents should take the issue of payment of the extra levies or penalties up with the Midstream HOA, to the extent that, they feel legally entitled to.

[14] Still on the issue of penalty levies, Mr Makgato, on behalf of the respondents, could not provide a direct response to my question

whether or not the imposition of penalties was the only condition or term of the extension agreement. It clearly was not. As set out above there were other conditions.[21] Chief, amongst these, was the erection of a building or dwelling on the property. This requirement was staggered in progressive steps or phases in the extension agreement. For example, it required the immediate preparation of building plans; lodgement of building plans within 45 calendar days to the Aesthetical Committee; completion of construction within 12 months.[22] It is common cause that upon the expiry of the period of 12 months stipulated in the extension agreement, the respondents had not

erected a building on the property. The respondents do not dispute this. In fact they admit that they had not met the building-period

condition, but somewhat allege a further agreement with the applicant.[23] I deal with the latter contention next.

[15] Considering the respondents' conduct to constitute a breach of the agreement, the applicant demanded compliance with the building-period condition through a letter dated 23 October 2013.[24] The respondents responded through an electronic mail on 12 November 2013. They admitted the delay but explained that this was mainly due to financial problems on their part. They undertook to start building by January 2014.[25]

[16] A certain Mr. Gert Jansen van Vuuren (Mr. Jansen van Vuuren) of the applicant responded to the electronic mail from the respondents. Mr. Jansen van Vuuren requested the respondents to keep him "abreast of the developments of [sic] this property".[26] The respondents argue that this amounted to another extension agreement. They submit that they complied with the terms of this

extension agreement by keeping the respondent or Jansen van Vuuren informed of the progress.

[27] Mr NJ Horn, counsel for the applicant, submitted that, even if Mr Jansen van Vuuren's communication could be accepted as another extension, the respondents failed to provide any updates or information as to progress, over a long period. I agree. On the respondents' own version, they have actually not kept the applicants abreast of developments or kept their undertakings

particularly to start building in January 2014.

[17] Further, Mr Makgato for the respondents, could not give a clear answer, if anything, to my question whether or not the alleged

extension by Mr Jansen van Vuuren was indefinite or open-ended. But, there is no other logical conclusion possible here, than that there was no further extension precipitated by Mr Jansen Van Vuuren's electronic mail. At most, Mr Van Vuuren was merely been receptive or even empathetic of the respondents' plight.

Requirements of building laws and regulations

[18] The respondents further raised other defences based on building laws and regulations, and how these affected the non-erection of a dwelling on the property. They submit that they could not build without approved plans for fear of consequences of non-compliance

with the applicable laws or regulations. Clearly, this does not avail the respondents. The respondents cannot delay or fail to submit, for approval, the required plans to the municipal authority and turn around to use this failure or delay as a defence against contractual claims by the applicant. Compliance with building laws and regulations is attendant requirement of erection of a dwelling on the property. It has always been foreseeable that for the respondents to erect a dwelling on the property, they have to do so, in compliance with applicable laws.

Counterapplication (Offers from prospective purchasers and consent by the applicant)

[19] Of relevance to the counterapplication, the respondents submit that they had an offer from prospective purchasers in respect of the property. They argue that despite the offers, the applicant refused to consent to the sale.[28] They further submit in this regard that they are still receiving offers from interested purchasers, but the applicant unreasonably

withholds consent to the sale, despite demand. They consequently ask this court to grant mandatory interdict in terms of which the applicant is compelled to consent to the offers. No further details, as to the amounts or terms and conditions of such offers, including how these offers will navigate the expired building-period condition, are proffered by the respondents. I don't find this surprising. It is really doubtful that purchasers will be interested, unless the applicant not only consent to the sale, but agrees to extend the building period, as well. These are matters within the prerogative of the applicant.

Applicable legal principles

[20] I am indebted to counsel for the authorities cited in their heads of argument[29] on some of the issues discussed hereunder.

[21] I have already comprehensively dealt with and ruled against the existence of a further extension agreement (allegedly by Mr Jansen van Vuuren of the applicant), apart from the extension agreement of 12 March 2010. I deal next with the other defences under separate subheadings below, although I have already dealt with some aspects hereof.

[22] It should be remembered that the respondents argue that the applicant has lost the right to enforce the building-period condition, due the lapse in time. In *Mahabeer v Sharma NO and Another*[30] which also dealt with sale of land, the following was said by the court regarding waiver of a right:

"Apart from the law relating to prescription, there is no principle of South African law of which I am aware that justifies a conclusion that a right may be lost through mere delay to enforce it and no reason exists for holding otherwise in the case of the right to cancel an agreement."[31]

[23] I agree with the above dicta in *Mahabeer*. Therefore, I consider the defence of waiver not to be meritorious. Besides, even if the principle was to the contrary, there is no evidence establishing waiver by the applicant. The respondents bore the necessary onus in this regard.[32] Available evidence clearly paints a picture, so to say, of a developer quite resolute to enforce its rights.

[24] The further defence by the respondents is one of existence of impossibility of performance, due to the building-period condition of 18 months from the date of proclamation, being 7 December 2007 having elapsed by the time the sale agreement was concluded. As indicated above,[33] this is defeated by the terms of the extension agreement, which are clearly under no attack from the respondents. The respondents acknowledged the date of proclamation in the extension agreement.[34]

[25] However, the lapse in the building period does not assist the respondents as they remain in mora of the condition, through which their title to the property is limited.[35] In the unreported decision of this division in *Bondev Developments (Pty) Ltd v Mosikare and Others*,[36] Du Plessis J held that, that the period for construction of a building had expired does not mean that there is no longer a building

time limit. It means that when the purchaser took transfer he was already in mora in respect of the obligation to build, the learned judge continued.[37] I agree. Therefore, I find in this regard that there was no impossibility of performance which excused the respondents from complying with the building-period condition or which, as submitted by the respondents, avoided the contract between the parties.

[26] Therefore, I find no merit in any of the defences put forward by the respondents against the applicant's claim for retransfer.

Offers from prospective purchasers and consent by the applicant

[27] This subheading constitutes the crux of the counterapplication. The respondents submitted that they had received an offer to purchase the property, in respect of which the respondent withheld consent. This offer has since expired. Therefore, if anything there is nothing for the applicant to consider in this regard.

[28] The respondents further allege that, they "are still receiving offers from other interested buyers who make the offer on condition that the applicant consents to the sale".[38] There is no proof of these offers or their further details, even if one was to consider their review warranted, which is actually not. This court cannot be expected to direct a party to consent to something which is completely unknown or has not materialised.

Conclusion

[29] Be that as it may, the respondents have no right to compel the applicant to consent to the offers made save where the respondent is conducting itself contrary to the law. Therefore, the respondents have failed to establish a right or clear right, which is one of the requirements for an interdict.

[30] Also, as submitted by Mr Horn for the applicant, the respondents, to the extent that they may be so advised, can apply for the removal of the restrictive condition. This clearly constitutes an alternative remedy to the one currently sought by the respondents. The counterapplication also fails to meet this requirement. Therefore, there is no need to deal with the rest of the submissions and requirements.

[31] The respondents are clearly in breach of the agreement with the applicant. Therefore, the applicant is entitled to exercise the option for a re-transfer of the property back from the respondents. The rest of the relief sought, including as to costs, is ancillary, although it is in terms of the agreement between the parties. The order will also make provision for a possibility that there may be lack of cooperation or compliance by the respondents.

[32] In the result, the following order is made:

1. the first and second respondents are ordered to take the necessary steps reasonably required for the re-transfer of Erf [...] Midstream Estate Extension 31 Township, Registration Division J.R., Province of Gauteng; measuring 900 (nine hundred) square metres and held by Deed of Transfer T019046/2010 (the property) to the applicant;
2. the first and second respondents are to bear the costs associated with the order in 1 hereof;
3. the applicant is to pay to the first and second respondents the amount of R499 000.00 (four hundred and ninety nine thousand rand) against transfer of the property in terms of the order in 1 hereof;
4. the first and second respondents are directed to sign all documents and take all steps reasonably required to give effect to the order in 1 hereof, within a period of 7 days from date of such request by the applicant and/or on behalf of the applicant.
5. should the first and second respondents refuse and/or fail and/or neglect to sign the relevant documents to give effect to the order in 1 and 4 hereof, then the Sheriff or Deputy Sheriff of this court is authorised and directed to sign all necessary documents on their behalf for the transfer of the property against payment of the amount of R499 000.00 (four hundred and ninety nine thousand rand), less costs payable to the Sheriff; transfer fees; clearance fees at the local authority and the relevant Homeowners Association in respect of the transfer or the fourth respondent, to discharge any indebtedness in respect of the bond secured over the property.
6. the applicant is entitled to have this order registered by the third respondent.
7. the orders in 1 to 6 hereof are without prejudice to the rights of the fourth respondent as bondholder over the property.
8. the first and second respondents are ordered to pay costs of this application.
9. the counterapplication by the first and second respondents is dismissed with costs.

K. La M. MANAMELA

Acting Judge of the High Court

07-March-2016

APPEARANCES:

For the Applicant : Adv. NJ Horn

Instructed by : Tim du Toit & CO. Inc, Pretoria

For the 1st and 2nd Respondents : Adv. MC Makgato

Instructed by : Maduna Olifant Attorneys, Johannesburg

c/o Maphoso Mokoena Inc, Pretoria

[1] See par 10 of the founding affidavit on indexed p 8; annexure “B2” (i.e. a copy of the sale agreement/offer to purchase) on p 16 onwards.

[2] See par 12 of the founding affidavit on indexed p 8; annexure “B3” (i.e. a copy of the title deed) on p 20 onwards.

[3] See par 14 of the founding affidavit on indexed pp 8-9; annexure “B2” on indexed p 18.

[4] See par 14 of the founding affidavit on indexed p 9; annexure “B3” on p 22.

[5] In the founding papers and the extension agreement referred to in pars 4 and 5 below, the date of expiry of the building-period

condition is said to have been 30 June 2009, which is clearly an inadvertent error. However, nothing turns on the materiality, if any, of this.

[6] See par 1 above.

[7] See pars 16-21 of the founding affidavit on indexed pp 10-11; annexure “B5” on p 41.

[8] Ibid.

[9] See pars 2-3 above.

[10] See pars 5-9 of the opposing affidavit to the counterapplication on indexed pp 233-234.

[11] A *lex commissoria* is explained as follows in Du Bois F (ed) Wille’s Principles of South African Law 9th ed (Juta Cape Town 2007) at p 860: “...the creditor may cancel the contract if ‘time was of the essence of the contract’, or was made so by a notice of rescission. Time is of the essence when the parties expressly or impliedly agreed that default of performance by the day fixed would entitle the other party to cancel the contract. An express clause to this effect is known as a *lex commissoria*.” [the aforesaid is quoted without references]

[12] See pars 8-9 of the opposing affidavit to the counterapplication on indexed p 234.

[13] In terms of the initial counterclaim, the respondents contended that the sheriff only served the notice of motion, without the rest of the papers and relied on the sheriff’s return in this regard. This counterapplication was later withdrawn by agreement, with each party responsible for its own costs. See indexed pp 47 - 67.

- [14] Ibid.
- [15] See indexed pp 68-69.
- [16] See par 8 above.
- [17] The respondents inadvertently refer to 14 November 2007 [on indexed p 75]. See indexed p 25 and par 3 above.
- [18] See pars 4 and 5 above.
- [19] See par 3 above.
- [20] The submission, with respect, confuses the different role-players herein. Levies are paid to the Midstream Homeowners Association of which the respondents are automatic members as owners of the property. Equally, there are also payments made to the Ekurhuleni Metropolitan Council in the form of rates and taxes. The applicant as the developer has a different role from the aforesaid two organisations. See the unreported decision by Gildenhuys J of 22 February 2006 in this division of Lodhi 2 Property Investments CC and another v Bondev Developments (Pty) Ltd, case number 8878/2005 at par 12.
- [21] See par 5 above.
- [22] Ibid.
- [23] See pars 15 - 16 of the affidavit in support of the counterapplication on indexed pp 76-77; annexure "MN3" - "MN5" on pp 99-144.
- [24] See par 20 of the affidavit in support of the counterapplication on indexed p 78; annexure "B6" on pp 42-43.
- [25] See pars 21-22 of the affidavit in support of the counterapplication on indexed pp 78-79; annexure "B7" on p 44.
- [26] See par 22 of the affidavit in support of the counterapplication on indexed p 79; annexure "B7" on p 44.
- [27] See par 23 of the affidavit in support of the counterapplication on indexed pp 79-80.
- [28] See annexure "MN14" to the counterclaim on indexed pp 161-164.
- [29] Supplementary heads of argument were handed up by counsel on behalf of the respondents at the hearing of this matter.
- [30] 1985 (3) SA 729 (A).
- [31] Mahabeer v Sharma NO and Another at 736D-F.
- [32] See Hepner v Roodepoort-Maraiburg Town Council 1962

- (4) SA 772 (A) 778E relying on and confirming older authorities.
- [33] See par 12 above.
- [34] The respondents acknowledged that “The original building period namely 18 (EIGHTEEN) months after proclamation expired on 30 June 2009”. See par 5 above.
- [35] See the unreported decision of this division in Bondev Developments (Pty) Ltd v Mosikare and Others, Case Number: 50391/08 on par 17 on p by Du Plessis J on 22 April 2010.
- [36] Bondev Developments (Pty) Ltd v Mosikare and Others on par 17. This decision was deviating from an earlier decision, also of this division, by Fabricius AJ (as he then was) in Bondev Developments (Pty) Ltd v Plenty Properties 60 (Pty) and Others, Case Number: 43602/08 delivered on 01 December 2009. I had an opportunity of reviewing both decisions for purposes of a decision of this division I handed down on 21 September 2015 in the matter of Bondev Midrand (Pty) Ltd v Letsholo and Others, Case Number: 59/2014.
- [37] See Mosikare at second para from above on p 8.
- [38] See par 40 of the founding affidavit to the counterapplication on indexed p 85.

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