

SOUTH AFRICA / JUDGMENT

Booyesen v Warren-Smith (CA 154/2011)

[2013] ZAECHGHC 28 (28 March 2013)

[2013] ZAECHGHC 28**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Goosen, Beshe, Smith

CASE / FILE NUMBER

CA 154/2011

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, GRAHAMSTOWN

CASE NO: CA 154/2011

In the matter between

GAY BOOYSENAppellant

And

GEOFFREY LESTER WARREN-SMITHRespondent

JUDGMENT

GOOSEN, J.

This appeal is directed against the trial court's order granting to the respondent rectification of a written agreement of sale concluded between the parties in respect of an immovable property situated in Morgan Bay, Eastern Cape. The parties entered into the agreement during May 2003. Pursuant to the agreement, the appellant paid the purchase price and costs associated with the transfer of the property but the respondent refused to pass transfer to the appellant. The appellant instituted action seeking an order compelling the respondent to sign all documents and to take all steps necessary to effect the registration of transfer of the property in the appellant's name. The respondent alleged in his plea that the deed of sale does not correctly reflect the common intention of the parties as it existed at the time that the deed of sale was concluded, asserting that the true purpose for which the agreement was concluded was to enable the appellant to assist her daughter and son-in-law to purchase the property which was to be used to uplift the local community of Morgan Bay by way of the development of an agricultural village and tourist attraction on the property. The respondent alleged that this special condition relating

to the use of the property and that relating to the transfer of the property into the name of the appellant's son-in-law, Bosazza, was not incorporated into the written agreement as a result of a common error between the parties occasioned by the bona fide but mistaken belief that the cordial relations which existed at the time of conclusion of the sale would persist and that the appellant would honour her obligations in this regard. The respondent also filed a counter-claim, based on these allegations, in which he claimed rectification of the agreement to incorporate a term setting out the special conditions attaching to the sale of the property.

An exception to the respondent's plea and counter-claim was taken on the basis that the condition to be inserted into the agreement would constitute an alienation of land which was void and unenforceable by reason of it not having been incorporated in a written deed of alienation. The exception was dismissed by Jansen J. Thereafter the matter came to trial before Pickering J, who dismissed the appellant's claim with costs and granted an order in terms of the respondent's counter-claim rectifying the agreement. It is against this order that the appellant appeals with leave of the court a quo.

The appellant does not, on appeal, seek to challenge the judgment of the court a quo dismissing her claim with costs. She seeks only to set aside the order granting rectification.

The judgment of the court a quo sets out the evidence tendered at trial in great detail. In evaluating the evidence the court made clear and definitive credibility findings in respect of the witnesses who testified, the effect of which was to find that the version of events presented by the respondent was to be accepted and that of the appellant rejected. The court a quo accordingly based its application of the legal principles applicable to the question of rectification of an agreement, upon the facts as found to be proved by the respondent.

It was not contended on appeal that the trial court erred or misdirected itself in any manner in respect of its findings of fact or in respect of the credibility findings made. Apart from a few factual findings which were sought to be challenged, the appeal was prosecuted on the basis that the trial court had erred in its application of the principles relating to rectification having regard to the findings of fact and that the trial court had erred in granting rectification in terms not pleaded by the respondent, thereby impermissibly devising a contract for the parties.

The factual background may be briefly set out as follows: Bosazza was married to the appellant's daughter Maryna. From about 1994 he and his wife were living on a small farm owned by his mother. They met another couple who were at the time establishing a caravan park at Morgan Bay. When they visited this couple on an occasion, Bosazza saw a property which he believed would be suitable for growing vegetables. He discussed the matter with the defendant, the owner of the property. An agreement was concluded between them permitting Bozassa and his wife and family to occupy the property. Using funds obtained from his mother, Bosazza built a house and workshop on the property. The appellant too provided him with funds which enabled him to install an irrigation system. In time a vegetable garden was developed and Bozassa commenced supplying the local hotel as well as nearby East London with vegetables.

Bosazza and his wife developed a broader vision for the development of the property which was set out in a document. This vision, which envisaged the development of an agricultural project which would involve the local community and would seek to encourage members of the community to start their own vegetable gardens in an effort to foster self-sufficiency, was discussed with their friends, who were operating the caravan park, and with the respondent. The respondent came to share the vision for the development of the property.

During 2001, and after Bosazza had completed building his house on the property, he entered into negotiations with the defendant to purchase the property. A purchase price of R250 000.00 was agreed. At the time Bosazza did not have funds available and was not able to raise finance. During a visit to Morgan Bay by the appellant and her husband, Bosazza discussed his plans for the development of the property with her. He outlined his vision for a community upliftment project which would create sustainable employment opportunities for the local community. The appellant offered to purchase the property for her daughter and son-in-law so as to secure their investment in the property. According to Bosazza, it was agreed that the property would be transferred to himself and his wife Maryna and that the appellant would in due course be recompensed for payment of the purchase price. Bosazza took no further part in the negotiations with the respondent having agreed the purchase price. The agreement of sale was concluded between the appellant and respondent. It did not contain the condition relating to the development of the property and its transfer to Bosazza and his wife.

As fate would have it Bosazza and his wife encountered marital problems which resulted, in 2005, in their separation. This was followed by protracted and hostile divorce proceedings, which were only finalised in 2009 when Bosazza was awarded custody of the four children born of the marriage. This litigation resulted in deterioration in his relationship with the appellant.

The deed of sale incorporated a clause relating to the subdivision of a portion of the property which the respondent wished to retain. The clause provided that the sale was subject to the condition that approval of the proposed subdivision be obtained within a period of six months from the date of signature and further provided that the appellant could, in her discretion, extend the period. Bosazza consulted with his attorney and established that the time period within which approval for the subdivision was to be obtained had long expired the agreement of sale had lapsed. He accordingly negotiated with the respondent and, in September 2006, the deed of sale was amended by deleting the clause. This occurred at a time when he and his wife were separated and when she was still living on the property. According to Bosazza he and his wife had agreed that they would proceed with the purchase

of the property and its envisaged development.

What followed thereafter gave rise to the dispute between the parties. At the end of 2006 or early in 2007 the appellant convened a meeting attended by Bosazza and his parents. At this meeting the appellant announced that she had changed her mind in relation to the purchase of the property and that she intended to keep it for herself. The meeting became acrimonious and Bosazza's parents walked out of the meeting.

It is unnecessary to recount all of the evidence relating to the outline of events set out above. That evidence, as I have already indicated, is set out in detail in the judgment of the court a quo. It is necessary only to set out briefly the evidence of the respondent relating to the conclusion of the agreement of sale. His evidence corroborated that of Bosazza. He confirmed that he had discussed the vision for the development of the property with Bosazza and his wife and that he shared such vision. He was aware that Bosazza could not raise the purchase price on which they had reached agreement. He was told by Bosazza that the appellant would support him in the purchase of the property. The respondent explained this to his attorney and also explained what was envisaged for the property. Correspondence from his attorney addressed to the surveyors dealing with the subdivision of the property, confirms that the appellant was financing the sale and that the actual beneficial owners of the property would be Bosazza and his partners. Although the respondent had no dealings with the

appellant in the conclusion of the deed of sale he, throughout, intended to sell the property for the purpose of its development as envisaged by Bosazza and that he understood that the appellant was purchasing the property in order to assist Bosazza and her daughter in acquiring the property for such development. He was not aware of what the arrangement was between Bosazza and the appellant. The intention was however that the property, acquired by the appellant, would be transferred to Bosazza, either into an entity involving Bosazza or to his family. In any event it was intended that Bosazza and his wife Maryna would have the beneficial use of the property.

The appellant's case was that she and her husband had visited Morgan Bay in 2003 and that they were interested in purchasing property for themselves. They decided that rather than do so they should purchase the respondent's property in order to secure a future for their daughter and her children. Her husband therefore negotiated the purchase with the respondent. She denied that there had been agreement between herself and Bosazza regarding the purchase of the property for him and her daughter. She denied too that there had been any discussion about the plans for the development of the property and the upliftment of the local community. She claimed to have no knowledge of these plans. After the breakdown in the marriage relationship between Bosazza and her daughter, Bosazza allegedly demanded a one-third share of the property and made certain threats in this regard. She denied that it had ever been agreed that the property would be transferred to Bosazza.

As indicated at the outset, the court a quo, made clear credibility findings in respect of the witnesses who testified. The correctness of these findings was not challenged on appeal and accordingly these findings are to be accepted. Furthermore, the trial court based its findings of fact upon an assessment of the respective versions of the parties which were irreconcilable and mutually destructive, applying the well known test set out in *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) as approved by the Supreme Court of Appeal in *Baring Eiendomme Bpk v Roux* [2001] 1 All SA 399 (SCA).

In considering the probabilities in respect of the appellant's alleged lack of knowledge of her daughter and son-in-law's vision for the development of the property, the court found that the probabilities were overwhelmingly against her version. The court also found that the appellant

was at pains to distance herself from any suggestion that she may have known what was intended with the development of the property. The trial court found that the only plausible inference to be drawn from the appellant's statement that she had changed her mind and decided to keep the property, a statement to this effect was recorded in minutes of the meeting held between the appellant, Bosazza and his parents which the appellant produced, was that the appellant was aware of the underlying oral agreement governing the written agreement and that her original intention had been to give effect to such oral agreement. The trial court went on to find that the probabilities were overwhelmingly to the effect that it was only when the marital relationship between Bosazza and her daughter broke down that the appellant became concerned to ensure that Bosazza

should not benefit from the purchase of the property. Significantly, the trial court drew an adverse inference from the appellant's

failure to call her daughter Maryna as a witness to the fact that appellant had no knowledge of the development plans and that it was never intended that the property be transferred to Bosazza and Maryna. The trial court, having regard to its assessment of the credibility of the witnesses and having given consideration to the probabilities and the evidence contradicting that of the appellant accordingly rejected the appellant's version. This was not challenged on appeal.

This court therefore is bound by the trial court's findings of fact and its assessment of the credibility of the witnesses.

Two critical things flow from this. The first is that it is to be accepted that the trial court correctly found that there was in existence an underlying oral agreement between the appellant, Bosazza and the respondent which reflected a common intention between the parties to the contract that the defendant's property was to be purchased for the beneficial use of the property by Bosazza and Maryna and that property was to be utilised for the purpose of a community upliftment project in accordance with the vision for the property outlined by Bosazza and Maryna. The second is that the agreement of sale concluded between the parties does not, as a matter of fact, reflect the common intention that existed between the parties at the time that the agreement was concluded.

It was not suggested on appeal that the court a quo had misdirected itself in respect of the legal principles relating to the rectification of an agreement. What is in issue is whether the trial court correctly applied these to the facts of the matter.

In this regard appellant's counsel argued that the claim for rectification as pleaded by the respondent did not meet the requirements and is irreconcilable with the evidence. Reference was made in this regard to the fact that the rectification as pleaded sought transfer of the property to Bosazza only whereas the evidence showed an oral agreement, to which the respondent was not a party, that the property should be transferred to Bosazza and Maryna jointly. It was further argued that the rectification as claimed sought insertion of a special condition relating to the conclusion of a joint venture between Bosazza, respondent and representatives of the Morgan Bay community for the purposes of establishing a cultural village on the property, tourist

accommodation and a centre for sustainable agricultural training. The evidence did not support this and the court a quo found only that the property be developed for the benefit of the local community. Reference was also made to the fact that an order was sought requiring Bosazza to subdivide a portion of the property to be retained by the appellant in lieu of payment of the purchase price, a term similarly not supported by the evidence. It was argued that the effect of the order granted by the court a quo was, having regard to the discrepancy between the pleaded rectification and the evidence, to devise a contract on behalf of the parties. In doing so, it was submitted, that court had erred in its application of the legal principles applicable to the matter.

In regard to the first aspect, the trial court's finding, based on the facts established at trial was that the evidence established that it was never the intention of appellant and respondent that the property would be passed to appellant unconditionally. The court found that the respondent's intentions, which related both to the transfer of the property to Bosazza and Maryna and to the development of the property for the benefit of the local community, were conveyed to appellant and that she was prepared to enter into the agreement on that basis. This finding of fact is to be accepted. Accordingly it is to be accepted that the existence of such common intention as between appellant and respondent at the time of the conclusion of the agreement was proved by the respondent.

Insofar as the further aspect relating to the discrepancy between the terms pleaded and the evidence is concerned, the court approached the matter on the basis of the extent of the common intention which it found was established by the evidence. The evidence did not establish that it was the common intention of the respondent and appellant that a joint venture, in the terms pleaded, be established, or that it was the common intention that a portion of the property be subdivided and retained by the appellant in lieu of payment. This does not detract from the common intention that was found to have existed at the time of conclusion of the agreement, nor does it preclude rectification in accordance with the true common intention established by the evidence. The learned judge in the court below referred to the English head note of *Akasia Road Surfacing (Pty) Ltd v Shoredits Holdings Ltd* 2002 (3) SA 346 (SCA) in this regard. The passage in the judgment, upon which the head note is based, appears at paragraph 14 and reads:

In ieder geval, al sou 'n ooreenkoms dat die aanleg deur die respondente volgens plan voltooi sou word vaag wees sou dit nie in die weg gestaan het van 'n aanspraak op die rektifikasie van die knotrak deur die appellante as verweerders nie. Rektifikasie van 'n kontrak het ten doel om 'n skriftelike document in ooreenstemming te bring met die ware bedoeling van die kontrakterende partye welke bedoeling hulle vanweë'n gemeenskaplike fout nagelaat he tom korrek op skrif te stel. Indien daardie ware bedoeling vaag is mag dit die geldigheid van die gerektifiseerde kontrak affekteer maar nie 'n verweerder se aanspraak op rektifikasie van die kontrak nie. Die reg is immers nie dat effek gegee sal word aan 'n skriftelike document wat die ooreenkoms tussen die partye verkeerdelik weergee op grond daarvan dat die verkeerde skriftelike weergawe wel 'n geldige kontrak daarstel terwyl dit waarop die partye werklik ooreengekom het nie 'n geldige kontrak daar kon stel nie.

[22] What follows this passage is the court's assessment of an argument, also raised in this appeal, that the terms in which the contract was sought to be rectified were vague. In this appeal the appellant argued that since the respondent cannot express the term sought to be introduced in sufficiently clear words he cannot effectively contend that it represents the clear common intention of the parties.

[23] The court in *Akasia* (supra at par. 15 – 16) dealt with the issue as follows:

Die respondente het nietemin aanvanklik betoog dat indien die werklike ooreenkoms tussen die partye, welke ooreenkoms hulle vanweë 'n fout nie korrek op skrif gestel het nie, vaag is, die ooreenkoms nie gerektifiseer kon word nie.

Reference was then made to the passage in *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H-1148A, upon which reliance was placed in this matter, and stated (at par 16),

Om te sê dat die partye se ooreenkoms of gemeenskaplike bedoeling 'clear and unmistakable' moet wees is iets heel anders as om te sê dat dit wat duidelik deur die partye ooreengekom is ook opsigself duidelik genoeg moet wees om regtens afdwingbaar te wees.

And further,

Indien wat na beweerding ooreengekom is vaag maar duidelik uitgespel word is daar geen vaagheid in die aangevraagde wysiging nie maar wel in die beweerde ooreenkoms, wat, soos reeds aangetoon, nie in die weg kan staan van 'n aanspraak op rektifikasie deur die appellante as verweerders nie.

[24] This is the situation in this matter. The evidence as found by the trial court established the common intention as being 'clear and unmistakable'. Such vagueness as existed related to the mechanisms by which effect would be given to what had been agreed. The trial court referred to the loose talk about the joint venture and to the fact that the respondent was not aware of or party to the arrangement whereby appellant would be recompensed for payment of the purchase price.

[25] The further submission, namely that the court a quo effectively devised a contract for the parties is without merit. The argument loses sight of the fact that a court when called upon to effect rectification of an agreement is essentially concerned with determining the consensus of the parties to the agreement. This, as noted by Davis J in *Shoprite Checkers (Pty) Ltd Bumpers Schwarmas CC and Others* 2002 (6) SA 202 (C) at 215G prompts consideration of the concept of bona fides. The court there remarked, at 216A-B, that:

To rely on the strict written words of a contract and to ignore an underlying oral agreement which not only shaped the written agreement but which forms part of the essential consensus would be to enforce the very antithesis of integrity and good faith in contractual arrangements.¹

[26] In *Brits v Van Heerden* 2001(3) SA 257 (C) Knoll J said, at 283B, that:

[A]lthough this court may have no broad general equitable jurisdiction and cases must be decided on general principles of law, the equity is to be found in the remedy of rectification which has been expanded over the years to give full meaning to the basic principle on which it operates and that is that rectification may be granted where the written memorial does not reflect the true consensus of the parties.

[27] In this instance the trial court, having determined the “true consensus” of the parties, albeit in terms different but not inconsistent with those pleaded in the claim for rectification, was entitled in the exercise of its equitable jurisdiction to remedy the defect in the written agreement by granting rectification in terms which gave expression to that “true consensus”. In doing so the court was not devising a contract on behalf of the parties. I have already dealt with the further question as to whether vagueness in the contract as rectified is a bar to granting rectification.

[28] It follows from what has been set out above that the appeal cannot succeed. I would therefore make the following order:

The appeal is dismissed with costs.

G. GOOSEN

JUDGE OF THE HIGH COURT

BESHE, J.

I agree. The appeal is dismissed with costs.

N. G. BESHE

SMITH, J.

I agree.

J. SMITH

Appearances:

For the Appellant: Mr. De Bruyn

Instructed by Dold & Stone

For the Respondent: Mr. S. H. Cole

Instructed by Neville Borman & Botha

Delivered 28 March 2013

1The judgment was set aside on appeal in Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others 2003

- (5) SA 354 (SCA) on the facts. Marais JA, in a concurring judgment dealing with an issue not germane to the present matter, specifically drew attention to the fact that no controversial legal principle was involved in the matter on appeal.
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