

SOUTH AFRICA / JUDGMENT

Cooper N O and Another v Curro Heights Properties (Pty) Ltd (1300/2021) [2023] ZASCA 66; 2023 (5) SA 402 (SCA) (16 May 2023) [2023] ZASCA 66

COURT

Supreme Court of Appeal

BEFORE

Zondi, Mocumie, Mothle, Meyer, Molefe

CASE / FILE NUMBER

1300/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1300/2021

In the matter between:

CHAVONNES BADENHORST ST CLAIR COOPER N O FIRST APPELLANT

SUMIYA ABDOOL GAFAAF KHAMMISA N O SECOND

APPELLANT

and

CURRO HEIGHTS PROPERTIES (PTY) LTD RESPONDENT

Neutral Citation: Cooper N O and Another v Curro Heights Properties (Pty) Ltd (1300/2022) [2023] ZASCA 66 (16 May 2023)

Coram: ZONDI, MOCUMIE, MOTHLE, MEYER and MOLEFE JJA

Heard: 2 March 2023

Delivered: 16 May 2023

Summary: Sale of land – Validity of – formalities – Alienation of Land Act 68 of 1981 – section 2(1) – requires the whole contract, all its material terms, to be reduced to writing and signed

- material terms not confined to the essentialia of a contract of sale, viz, the parties, merx and pretium – whether a term constitutes a material term is determined with reference to its effect on the rights and obligations of the parties – subdivision in this instance constitutes material term – failure to reduce such material term to writing signed by or on behalf of parties results in non-compliance with s 2(1) - effect of – contract null and void
- Contract – Validity of - lack of consensus between the parties in respect of the merx – effect of – contract null and void.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Goliath DJP sitting as a court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and in its place is substituted the following:

‘(a) The written sale of land agreement concluded between the parties on 14 November 2016 and its addendum concluded on 18 April 2017, are declared void ab initio due to non-compliance with section 2(1) of the Alienation of Land Act 68 of 1981 and for want of consensus between them in respect of the merx.

(b) The respondent is to pay the applicants’ costs.’

Meyer JA (Zondi, Mocumie, Mothle and Molefe JJA concurring):

- [1] This appeal concerns the crisp issue whether a written sale of land agreement is null and void ab initio due to non-compliance with s 2(1) of the Alienation of Land Act 68 of 1981 (the Act) and for want of consensus between the parties in respect of the merx.
- [2] The appeal is against the whole judgment and order of the Western Cape Division of the High Court, Cape Town (the high court) delivered on 18 August 2021. The first and second appellants, Mr Chavonnes Badenhorst St Clair Cooper and Ms Sumiya Abdool Gafaaf Khammisa N N O, are the joint liquidators (the liquidators) of Nomic 151 (Pty) Ltd (in liquidation) (Nomic). The respondent is Curro Heights Properties (Pty) Ltd (Curro), its sole director being Mr Rhett Molyneux (Mr Molyneux).
- [3] The liquidators and Curro concluded a written sale of land agreement in terms whereof the liquidators sold certain land that fell into the estate of Nomic to Curro as part of the winding up of Nomic’s affairs. The liquidators sought certain declaratory relief from the high court, inter alia a declarator that the agreement is invalid for non-compliance with s 2(1) of the Act or for want of consensus in respect of the merx (the subject-matter of the sale). Having found that the agreement complied with s 2(1) of the Act, that there was such consensus and that it was not validly cancelled, Goliath DJP dismissed the application and did not make any order as to costs. The appeal is with leave of the high court.

- [4] The land in question is unimproved erven described as erven 19548, 19563, 19564 and 19565 in the district of Mossel Bay, Western Cape (the erven). Erf 19565 is a private 'ring road' that provides access to various erven, including other subdivided erven that do not fall within the estate of Nomic. Curro sought to purchase the land with the aim of subdividing and developing them into residential erven.
- [5] On 8 April 2016, a written sale of land agreement was concluded between the liquidators and Curro (its name at that time was K2015420767/07 (Southern Africa) (Pty) Ltd), represented by Mr Molyneux, in terms whereof the liquidators sold the land to Curro at a purchase price of R5.5 million plus value added tax (VAT). The merx was recorded to be 'Road Portion of Erf 19555 Mossel Bay with extent of approximately 4 816 m²' (the ring road), 'Erf 1948 Mossel Bay being 3 600m²', 'Erf 19563 being 1.99 Ha' and 'Erf 19564 Mossel Bay being 7378 m²'. After the written sale of land agreement had been concluded, it was realised that the measurement of the ring road was incorrectly recorded. The parties accordingly concluded a written addendum to the written sale of land agreement wherein the measurement of the ring road was rectified to '9045 Square Metres'. However, the parties did not realise that the written sale of land agreement also erroneously recorded the ring road's erf number as '19555' instead of '19565'. As a result of Curro's failure to make payment of the deposit, the written sale of land agreement was cancelled (the cancelled agreement).
- [6] On 14 November 2016, the liquidators and Curro, represented by Mr Molyneux, concluded yet another written sale of land agreement in terms whereof the same land was sold to Curro for a purchase price of R4.5 million plus VAT (the agreement). It contemplated for the liquidators to receive expeditious payment of the whole purchase price and the passing of ownership of the land to Curro. A deposit of 10% of the purchase consideration, R450 000, was payable within three days after signature of the agreement and the balance of the purchase price was payable against registration of transfer of the land into the name of Curro. Transfer was to be given 'as soon as possible but not after 16 JANUARY 2017'. The same erroneous recordal of the ring road's erf number crept into the agreement, although this time its measurement was correctly recorded. The parties are ad idem that their common intention was to refer to erf '19565' and not to '19555'. By Curro's own admission, the liquidators 'never intended to sell Erf 19555 and [Curro] also did not intend to purchase this erf. The [liquidators] intended to sell Erf 19565 which is the property that fell into the estate of Nomic that had to be wound up'.
- [7] This makes perfect sense because '[l]iquidation proceedings are strictly proceedings to constitute a concursus creditorum. The liquidation process continues until the company's affairs have been finally wound up, and the company is dissolved'.^[1] Nomic had been placed in liquidation as far back as 26 June 2012 and the liquidators were appointed in March 2013. Yet, by November 2016 the liquidators had not yet fulfilled their statutory obligations to finally wind up its affairs for it to be dissolved.

- [8] The difficulties with the sale of the land to Curro commenced soon after the conclusion of the agreement. Curro failed to pay the R450 000 deposit within three days of the signature date. After payment of the deposit had been demanded by the liquidators on 12 December 2016, and before any steps had been taken by them to cancel the agreement, Curro remedied its breach and paid the deposit. However, the passing of ownership to Curro could no longer occur on or before 16 January 2017 as agreed to in clause 4 of the agreement. The liquidators were willing to salvage the sale to enable them to finally wind up the affairs of Nomic and cause its demise. The parties, therefore, concluded a written addendum to the agreement on 18 April 2017 (the addendum) in terms whereof clause 4 of the agreement was amended to read that '[t]ransfer shall be given and taken as soon as possible'.
- [9] It was only during the process of preparing the transfer documents that the erroneous recordal of the ring road's erf number was detected. At the behest of the liquidators, a second addendum was prepared to correct the erroneous recordal of the ring road's erf number. It was signed by the liquidators on 3 May 2017 and sent by their attorneys to Mr Molyneux for his signature on behalf of Curro. Mr Molyneux responded by email on 5 June 2017, stating essentially that due to investigations that he did on the preceding Friday (some months after the agreement had been concluded) he realised that erf 19565 extends into the adjacent Nurture Park development and that, that part of the erf would also vest in Curro if effect is given to the sale. He accordingly suggested that that part of the ring road be excluded from the sale and that erf 19565 be subdivided. He asked how the 'impasse' should be 'rectified'.
- [10] The liquidators were still willing to attempt to salvage the sale in order to cause the demise of Nomic. Negotiations ensued between the parties in respect of the subdivision of the ring road with a view of ensuring that effect could be given to the sale. The negotiations might or might not have resulted in an informal arrangement or even an oral agreement, but no formal written agreement or addendum was ever concluded and signed by or on behalf of the parties.
- [11] No subdivision materialised during the next few years. On 1 November 2019, almost three years after the agreement had been concluded, the liquidators, through their attorneys, in writing made it clear to Curro that they would no longer entertain any further indulgences in respect of the subdivision of the ring road and they demanded signature of the necessary documents to allow ownership of the land to pass to Curro. Curro did not accede to the liquidators' demand. By letter dated 10 March 2020, the liquidators called upon Curro to remedy its breach within 21 days. This was not done and by email dated 31 August 2020, they advised Curro that they had cancelled the agreement insofar as it had ever been valid. On 10 September 2020, the liquidators initiated the application under consideration to enable them to lawfully sell the land to a third-party buyer and finally wind up Nomic's affairs for it to be dissolved.

[12] This brings me to the declarator that the agreement is void for want of consensus in respect of the merx at the time of its conclusion. One of the essentialia of any contract of sale is the merx. On the one hand, the liquidators intended to sell the whole of erf 19565, which is the property that fell into the estate of Nomic. On the other, Mr Molyneux on behalf of Curro stated in the answering affidavit that Curro never intended to purchase that part of erf 19565 that extends into Nurture Park. On the probabilities, however, it would appear that at the time of the

conclusion

of the agreement both the liquidators and Curro intended to sell and buy the whole of erf 19565. It was only after the

conclusion

of the agreement – due to the investigations that Mr Molyneux undertook – that Curro, on Friday 2 June 2020, realised that the part of erf 19565 (the ring road) that extends into Nurture Park would also vest in Curro if effect is given to the agreement.

[13] But, it must be acknowledged that '[m]otion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts' and, '[u]nless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities'. [2] Even if I were to accept that Curro's version is improbable in certain respects, the matter is to be decided without the benefit of oral evidence. I, therefore, have to accept the facts alleged in Curro's answering affidavit 'unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers'. A 'finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of the evidence'. [3] The test in that regard is 'a stringent one not easily satisfied'. [4] The rationale for its stringency is this:

'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.' [5]

[14] That stringent test has not been satisfied in this instance. I conclude, therefore, that the agreement is null and void ab initio for want of consensus in respect of the merx at the time of its conclusion. A plea of rectification thus does not avail Curro. This is so, because rectification of a written agreement is a remedy available to parties in instances where an agreement reduced to writing, through a mistake common to the parties, does not reflect the true intention of the contracting parties. 'It is not the agreement between the parties which ... is rectified. The Court has no power to alter it. To do so would be to amend their common intention and in effect to devise a fresh pact for them. That is their exclusive prerogative. All

that the Court ever touches is the document’.[6] The onus is on a party seeking rectification to show, on the balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out in the agreement.[7]

[15] Next, the declarator that the agreement is of no force or effect for non-compliance with s 2(1) of the Act. The section reads thus:

‘No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.’

The result of non-compliance with s 2(1), is ‘that the agreement concerned is of no force or effect. This means that it is void ab initio and cannot confer a right of action’.[8]

[16] Section 2(1) requires the whole contract of sale – its material terms – to be reduced to writing signed by or on behalf of the parties. The material terms of the contract are not confined to those prescribing the essentialia of a contract of sale, namely the parties to the contract, the merx and the pretium. Generally speaking, these terms, and especially the essentialia, must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, and also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral consensus between the parties.[9] Whether a term constitutes a material term is determined with reference to its effect on the rights and obligations of the parties.[10] It has been held that subdivision materially affects the rights and obligations of the parties to a contract in a given case.[11]

[17] This is such a case, inter alia, for the following reasons: First, there is no express reference to a subdivision in the agreement or the addendum and the possibility of a subdivision of the ring road was only raised for the first time by Mr Molyneux on 5 June 2017, some six months after the agreement had been signed. Even if the negotiations that ensued thereafter resulted in a subsequent informal agreement having been reached regarding subdivision of the ring road, then, of course, there would be non-compliance with s 2(1) in that the whole contract is not in writing and signed by or on behalf of the parties.[12] The consequence of this is that the contract of sale is null and void.

[18] Second, the agreement and the addendum bestowed rights on the liquidators to receive expeditious payment of the whole purchase price and the passing of ownership of the land to Curro. Third, which of the parties would have carried the obligation to cause the subdivision to be effected and the liability for the costs thereof? Fourth, what would have been the rights and obligations of the parties in the event of the subdivision not having been approved?

[19] Fifth, if that part of the ring road that runs into Nurture Park was subdivided from the remainder of the ring road, ownership of which would have passed to Curro, then ownership of the part that runs into Nurture Park would have remained in the estate of

Nomic, unless the liquidators would have been able to alienate it, which possibility is speculative and would otherwise not have been the case. The whole of the land, including the ring road - erf 19565 - fell into the estate of Nomic and had to be sold as part of the process of winding up its affairs for its demise to result.

[20] I conclude, therefore, that the agreement and the addendum concluded between the parties are null and void ab initio also due to non-compliance with s 2(1) of the Alienation of Land Act.

‘(a) The written sale of land agreement concluded between the parties on 14 November 2016 and its addendum concluded on 18 April 2017, are declared void ab initio due to non-compliance with section 2(1) of the Alienation of Land Act 68 of 1981 and for want of consensus between them in respect of the merx.

(b) The respondent is to pay the applicants’ costs.’

P A MEYER

JUDGE OF APPEAL

Appearances

For the applicant: L N Wessels Instructed by: Sandenbergh Nel Haggard, Bellville Spangenberg Zietsman Bloem Inc, Bloemfontein For the respondent: R Molyneux in person, with leave of the high court

[1] Lutchman N O and Others v African Global Holdings (Pty) Ltd [2022] ZASCA 66; [2022] 3 All SA 35 (SCA); 2022 (4) SA 529 (SCA) para 29.

[2] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; [2009] 2 All SA 243 (SCA); 2009 (2) SA 277 (SCA) para 26.

[3] Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd [2016] ZASCA 119; [2016] 4 All SA 311 (SCA); 2017 (2) SA 1 (SCA) para 36.

[4] Mathewson and Another v Van Niekerk and Others [2012] ZASCA 12 para 7.

[5] The well-known dictum of Megarry J in John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John [1970] 1 Ch 345; [1969] 2 All ER 274.

[6] Spiller and Others v Lawrence [1976] 1 All SA 553 (N); 1976 (1) SA 307 (N) at 310E-F.

[7] Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd [2004] 2 All SA 366 (SCA); 2004 (6) SA 29 (SCA) para 21.

[8] Johnston v Leal 1980

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- (3) SA 927 (A) (Johnston) at 939A. This Court in *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd* [2009] ZASCA 102; 2010 (2) SA 400 (SCA); [2010] 1 All SA 291 (SCA) (Rockbreakers) para 6 held that Johnston ‘summed up the legal effect of the predecessor to s 2(1), which was materially in the same terms’.
- [9] Johnstone fn 9 above at 937G-938C.
- [10] Rockbreakers fn 9 above para 8.
- [11] Ibid.
- [12] Johnston fn 9 above at 939G-H.
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