

SOUTH AFRICA / JUDGMENT

Goldex 16 (Pty) Ltd v Capper NO and Others (24218/2013) [2017] ZAGPJHC 305 (18 October 2017) [2017] ZAGPJHC 305

COURT

South Gauteng High Court, Johannesburg

BEFORE

M du P Van der Nest

CASE / FILE NUMBER

24218/2013

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case

No. 24218/2013

Not

reportable

Not

of interest to other judges

Revised

18/10/2017

In

the matter between:

GOLDEX
16 (PTY)
LTD Plaintiff
and
DENE
CAPPER
N.O. First
Defendant
DENE
CAPPER Second
Defendant
IPROTECT
TRUSTEES (PTY)
LTD Third
Defendant

JUDGMENT

VAN DER NEST, AJ:

1 The plaintiff seeks payment from the first, alternatively the second defendant of the amount of R1 450 000 together with

interest in the amount of R461 370.23, together with further interest calculated on the aggregate amount of R1 911 370.23,

from 1 May 2016 to date of payment at a rate equal to the prime overdraft rate charged by Absa Ltd to its most favoured customers in respect of unsecured overdraft facilities.

2 The claims arise out of a written agreement of sale concluded between the plaintiff and Des Property Trust (“the trust”)

on 24 January 2013 (“the sale agreement”). The first and third defendants were trustees of the trust. The second defendant is the same person as the first defendant, but sued in his personal capacity and not as trustee.

3 In terms of the sale agreement:

3.1 The plaintiff sold to the trust “a real right of extension” which was a defined portion measuring 1203m² of a right to be reserved by the plaintiff upon the opening of a sectional title register to erect and complete a further building or buildings on common property, indicated on plans referred to in the sale agreement (“the property”).

3.2 The trust undertook, within one year from the date of transfer, to erect and complete certain buildings strictly in accordance with specified building plans and specifications.

3.3 The trust was entitled to resell or transfer the right of extension prior to construction of the buildings on condition that the written consent of the plaintiff is obtained.

3.4 The trust was obliged to ensure that any contractor appointed by it to erect and complete the buildings and landscaping, would comply with specified plans and design specification as determined by the plaintiff’s preferred architect, and with the provisions of certain design manuals attached to the sale agreement.

3.5 Clause 12 of the sale agreement provides:

“CAPACITY OF PURCHASER

12.1 Should the purchaser be a company, a close corporation or an existing trust, the signatory hereto warrants and binds himself in his personal capacity by virtue of his signature hereto –

12.1.1 that he is duly authorised to enter into this agreement on behalf of the company, close corporation or trust;

12.1.2 that the company, close corporation or trust is lawfully entitled to acquire and take transfer of the property;

12.1.3 that all conditions have been complied with in order to make this agreement binding on the company, close corporation or trust; and

12.1.4 that the company, close corporation or trust will duly and punctually comply with all its obligations in terms of this agreement.

12.2 Should the signatory for the purchaser act as trustee for a company or close corporation to be formed, such signatory by his signature hereto –

12.2.1 undertakes to procure that the company or close corporation for which he is acting as trustee will be duly incorporated within the 3(three) months from the date of signature hereof and that it will adopt and ratify this agreement in order that it becomes legally binding upon it; and

12.2.2 binds himself as surety for and co-principal in solidum with such company or close corporation for the due and punctual performance by it of all its obligations in terms of this agreement, under express renunciation of the benefits of exclusion and division.

12.3 In the event that clause 12.2 is not fulfilled, the signatory hereto shall be deemed to have acted in his personal capacity and shall be deemed to be the purchaser in terms of this agreement.”

4 The sale agreement was signed by the second defendant.

5 It is immediately apparent that there is a difference relating to the personal liability of the signatory to the sale agreement in

the case where the purchaser is a company or close corporation to be formed, versus the situation where the purchaser is a trust. In the case of the purchaser being a company or close corporation to be formed then, in accordance with clause 12.3 of the agreement of sale, the signatory is deemed to have acted in his personal capacity and shall be deemed to be the purchaser in terms of the agreement. In addition, in such a case clause 12.2.2 provides that the signatory will be a surety.

6 However, neither of these two mechanisms applies when the purchaser is a trust. Clause 12.1 regulates the position where the purchaser is a trust and the two mechanisms apply to clause 12.2 only, and not to clause 12.1.

7 Therefore, where the purchaser is a company or close corporation to be formed then clause 12.3 creates the mechanism for the signatory to become the substitute purchaser in his own right, whereas this mechanism does not exist in the case where the purchaser is an existing trust – as applies in the present case.

THE CLAIM AGAINST THE FIRST AND THIRD DEFENDANTS

8 The following facts became common cause between the parties.

8.1 The first and third defendants were the joint trustees of the trust.

8.2 The trust was registered in terms of the Trust Property Control Act 57 of 1988.

8.3 In terms of the deed of trust,

8.3.1 the board of trustees would at all times be not less than two trustees, save that the board of trustees should always consist of at least one person who would qualify as an independent trustee;

8.3.2 if at any time there were fewer than two trustees in office, the remaining trustee would during that time act only to fulfil the vacancy in the office;

8.3.3 the trustees were provided with powers to acquire immovable property.

8.4 No written authority was provided, as required by the trust deed, to the second defendant to enter into the sale agreement on behalf of the trust.

8.5 In terms of the sale agreement the purchase price was to be secured by means of a guarantee to be provided within 60 days of the

fulfilment of certain suspensive conditions.

8.6 The trust failed to deliver the required guarantee and was in breach of the sale agreement.

9 The first and third defendants, being the trustees of the trust, denied that the trust was bound by the sale agreement on the basis that the second defendant was not given the authority to enter into the sale agreement on behalf of the trust.

10 In terms of section 25(4) of the Sectional Titles Act 95 of 1986, a real right of extension is deemed to be a right to immovable property capable of being mortgaged.

11 Section 2 of the Alienation of Land Act 68 of 1981 provides:

“(1) No alienation of land after the commencement of the section shall, subject to the provision 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.”

12 “Land” is defined in the Alienation of Land Act to include any right to claim transfer of land. It was submitted on behalf of the defendants, and not challenged by the plaintiff, that the alienation of a real right of extension must comply with the provisions of section 2(1) of the Alienation of Land Act.

“It is a fundamental rule of trust law, which this court recently restated in Nieuwoudt & Another v Vrystaat Mielies (Edms) Bpk, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts. The rule derives from the nature of the trustees’ joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly. Professor Tony Honore’s authoritative historical exposition has shown that the joint action

requirement was already being enforced as early as 1848. It has thus formed the basis of trust law in this country for well over a century and a half.”

14 Where a trust has more than one trustee, any alienation of land entered into by that trust would require the signature of all the trustees. In the absence of authority in the trust deed, in respect of a trust with more than one trustee, a trustee is regarded as an agent as intended in section 2(1) of the Alienation of Land Act, and would require the written authority of the other trustees to conclude a deed of alienation on behalf of the trust. In the absence of written authorisation a deed of alienation concluded by such a trustee would not be in accordance with the provisions of section 2(1) of the Alienation of Land Act and would be of no force and effect.[2]

15 The trust deed in this matter does not authorise the second defendant to enter into agreements for the alienation of land and there is no indication that he had any authority (as an agent) to enter into the agreement of sale on behalf of the trust.

16 The first and third defendants accordingly correctly argued that the sale agreement is of no force and effect. The plaintiff’s counsel did not argue to the contrary. The consequence is that the claim against the first and third defendants, as trustees for the trust, must be dismissed with costs.

THE CLAIM AGAINST THE SECOND DEFENDANT IN HIS PERSONAL CAPACITY

17 The claim against the second defendant is based on clause 12 of the sale agreement. The plaintiff in its Particulars of Claim describes this clause 12.1 as a “suretyship clause” (even though only clause 12.2.2 expressly refers to a suretyship, but it does not apply to the claim) and pleads, *inter alia*, the following:

“6.6 The parties agreed that the second defendant would be bound in his personal capacity with the first defendant and third defendant for all obligations arising out of the sale agreement by virtue of his signature to the agreement (‘the suretyship clause’)

(clause 12.1)”

18 The plaintiff relies specifically on clauses 12.1.1 to 12.1.4 of the sale agreement (in para 6.7 of the Particulars of Claim) and,

correctly, does not rely expressly on clauses 12.2.2 and 12.3.

19 The plaintiff’s main claim against the second defendant is pleaded as follows:

“22. By virtue of the contents of sub-paragraphs 6.6 and 6.7 above and in particular clause 12 of the agreement, the second defendant, bound himself as surety and co-principal debtor in solidum for the repayment on demand of all amounts which the first and third defendants may now or at any time owe to the plaintiff.

22A In the premises, and in terms of the sale agreement, the second defendant is indebted to the plaintiff in respect of all amounts due and payable by the first and/or third defendants in terms of the sale agreement to the extent that any such amounts are not paid by the first and/or third defendants.”

20 The plaintiff advances an alternative claim against the second defendant, in the following terms:

“22B In the alternative to paragraphs 22 and 22A above, the plaintiff pleads as follows:-

22B.1 that the plaintiff repeats the contents of sub-paragraph 6.7 above including sub-sub-paragraphs 6.7.1 to 6.7.4;

22B.2 that it was an express, alternatively implied, alternatively tacit condition of the warranties referred to in paragraph 6.7 above that if the purchaser was not bound by the agreement as a consequence of the non-fulfilment of one or more of such warranties, then the second defendant would be liable to fulfil or to ensure the fulfilment of all and any obligations that would have rested on the purchaser had it been bound by the agreement;

22B.3 that it was a further expressed, alternatively implied, alternatively tacit term of the aforesaid warranties that, in the event that the agreement was binding on the purchaser but the purchaser failed to comply with any of its obligations in terms of thereof, then the second defendant would be personally liable to comply with all and any such obligations; and

22B.4 that the first and third defendants have failed to comply with the obligations imposed by the agreement as pleaded above.

22C In the premises, if it is found that the first and third defendants in their capacities as trustees of the Des Property Trust are not bound by the agreement, the second defendant is indebted to the plaintiff in respect of all amounts claimed herein from the first and third defendants as if the second defendant was the purchaser of the real right.

22D Furthermore, if it is found that the first and third defendants are bound by the agreement then the second defendant is liable to the plaintiff in respect of all amounts claimed herein from the first and third defendants to the extent that any such amounts remain unpaid by the first and third defendants.

22E The plaintiff tenders, in the event that the amounts claimed are paid by the second defendant, to transfer the real right, at the second defendant’s cost and at his option, to the second defendant, to the first and third defendants in their capacities as trustees of Des Property Trust or to such other person or entity as the second defendant may nominate.”

21 Clause 12.1 of the agreement of sale amounts to a warranty by the second defendant that he was duly authorised to enter into the

agreement on behalf of the trust, that all conditions have been complied with by the trust in order to make the agreement binding and that the trust would duly and punctually comply with all its obligations in terms of the agreement.

22 On the common cause facts the second defendant is in breach of these obligations.

23 It is convenient to deal first with the discrete claims advanced in paragraphs 22B.2 and 22B.3 of the Particulars of Claim. In these paragraphs the plaintiff contends for terms of the sale agreement which would render the second defendant liable personally to fulfil the obligations of the purchaser under the sale agreement (i.e. the trust, which would lead to the second defendant being obliged to purchase the property.

24 As pointed out earlier this remedy is specifically stated in the agreement at clause 12.3 to apply where the signatory acts as trustee for a company or close corporation to be formed but does not apply where the signatory acts, as in the present instance, as representing an existing trust. The express term contended for by the plaintiff is not to be found in the agreement and the implied or tacit term contended for is inconsistent with clause 12.3 and the structure of the agreement which expressly provides for such rights in circumstances other than those applicable to a signatory representing a trust. Accordingly, I find that the relief based on the claims in paragraphs 22B.2 and 22B.3 of the Particulars of Claim has not been established.

25 The relief founded on paragraph 22D of the Particulars of Claim has also not been established as this assumes a finding that the first and third defendants are indeed bound by the agreement. As stated above the sale agreement is void and the first and third defendants are not bound by it. Accordingly, the relief in paragraph 22D cannot be granted.

26 The plaintiff has also not established the main claim pleaded in paragraphs 22 and 22A of the Particulars of Claim. In paragraph 22 the plaintiff seeks payment from the second defendant, in his alleged capacity as surety and co-principal debtor in solidum for repayment of all amounts which the first and third defendants may owe the plaintiff. In that the agreement of sale is void the first and third defendants are not indebted to the plaintiff in the amount claimed. It follows that there is no principal debt owed by the first and third defendants in respect of which the second defendant can be held liable as a surety. Accordingly, the main claim has not been established.

27 The only basis for liability that remains is that stated in paragraph 22C of the Particulars of Claim. The basis of this liability assumes that the trust is not bound by the sale agreement, and that the second defendant is liable for the amounts claimed from

the first and third defendants “as if the second defendant was the purchaser of the real right”.

28 This claim confuses and conflates the rights against a signatory of the sale agreement under 12.1 with the rights against such signatory under clauses 12.2 and 12.3. Had the second defendant signed as trustee for a company or close corporation to be formed then, in accordance with 12.3, the second defendant could have been “deemed to be the purchaser in terms of this agreement”. No equivalent right exists where the signatory represents an existing trust and there is no basis

upon which the second defendant can be deemed to be the purchaser or, expressed in the language of paragraph 22.C of the particulars of claim to be regarded “as if the second defendant was the purchaser of the real right”.

29 The rights that the plaintiff has against the second defendant are those against a warrantor or guarantor of the facts stated in

clause 12.1.1 to 12.4 of the sale agreement. In the event of breach the plaintiff’s election would be to either require the second defendant to fulfil his obligations under clauses 12.1.1 to 12.1.4 of the sale agreement or to claim damages for his failure to fulfil them.

30 Expressed differently, the plaintiff could have required the second defendant to ensure that he was duly authorised, to ensure that the trust was lawfully entitled to acquire and take transfer of the property, to ensure that all conditions were complied with to

make the agreement binding and to ensure that the trust duly and punctually complied with all obligations in terms of the agreement.

In this way the plaintiff would be obtaining specific performance of the obligations that the second defendant personally assumed.

31 This, however, is not the relief pursued by the plaintiff. Instead the plaintiff pursues a claim only for payment and although

this would be the end result of the second defendant complying with all his obligations the fact remains that it is common cause that the second defendant was not properly authorised and that the agreement of sale is, and remains, void.

32 What the plaintiff thus seeks to do is to treat the second defendant as if he were the purchaser under the agreement whilst clause 12.3 does not entitle the plaintiff to do so, and seeks payment from the second defendant of the purchase price on the basis of clause 12.1 putting him in the position “as if he were the purchaser” - whilst no part of clause 12.1.1 to 12.1.4 creates this consequence or has this effect.

33 It appears that, in truth, the plaintiff is seeking payment from the second defendant of the purchase price and interest as damages, arising out of the second defendant’s breach of clauses 12.1.1 to 12.1.4 of the sale agreement – without ever specifically stating in the Particulars of Claim that it is indeed claiming damages from the second defendant.

34 During argument counsel for the defendants argued that the plaintiff’s claim was not stated to be a claim for damages, did not contain the essential elements for a claim for damages and was not cognisable as a claim for damages.

35 The plaintiff’s counsel argued that the plaintiff sues the second defendant on the basis of his breach of the warranties provided by him in clause 12.1 of the sale agreement. The plaintiff’s counsel argues that the plaintiff is entitled to be placed in the position that it would have occupied had the facts warranted by the second defendant been true.[3] It is argued that the

plaintiff seeks to place itself in this position by claiming the full amount of the purchase price together with such interest as would have been payable in terms of the agreement of sale had the trust been bound by it. Further, it is argued that the plaintiff tenders transfer of the property to the second defendant in mitigation of its loss.

36 The plaintiff thus submits that the claim is for a breach of warranty is a claim for damages, even though the quantum may be identical to what would have been payable by the trust had it been bound by the agreement of sale.[4]

37 The plaintiff's counsel argued that although the word "damages" does not appear in the particulars of plaintiff's claim but that it is a well-established principle that pleadings are for the court and not the court for the pleadings and that a court will not have regard to the precise wording of the pleadings but to consider what the substantial issues between the parties are.[5]

38 The plaintiff's counsel argued for a less formal approach and that if it is reasonably clear what a defendant is being sued for then, in the absence of prejudice, technical objections would not be upheld.[6]

39 There is much to be said for the defendants' contention that the plaintiff's claim has not been brought as a claim for damages. The claim that the second defendant be treated "as if he were the purchaser" is not readily identifiable as a damages claim and reads more like a claim for specific performance. Indeed, had it been phrased specifically as a damages claim the second defendant may, for example, have wished to plead and rely upon the plaintiff's

duty to mitigate its damages. When the plaintiff tendered to transfer the property to the second defendant it did not plead that this was to mitigate its damages.

40 However, it is clear that the plaintiff relies upon the second defendant's breach of its warranty obligations and the question is whether, whether it be styled as a claim for damages or not, the plaintiff has established an entitlement to be paid the amount reflected by the purchase price together with interest. Having regard to the fact that the agreement of sale is void and that the second defendant was not a purchaser of the property in his own right, the only basis that can possibly exist on the pleadings for an entitlement to this amount can be a claim for damages as a consequence of the breach of warranty.

41 Notwithstanding reservations, I will accordingly consider that the claim in paragraph 22C is nonetheless a claim for damages, albeit poorly pleaded, and that the issue to be decided is whether the plaintiff has proved damages of an amount equivalent to the purchase price together with interest, as a consequence of the second defendant's proven breach of the warranties in clause 12.1.1 to clause 12.1.4 of the sale agreement.

42 For the reasons that follow I find that the plaintiff has failed to prove damages in the amounts claimed, nor has it proved any other amount of damages and there is no evidence upon which an award for damages can be determined. The essential problem is that there is no evidence as to the value of the property. There is no evidence that it has in fact been sold by the plaintiff and, if so, at what price. The indications are that it remains owned by the plaintiff. There is no evidence

led that the property had no value at the time of the second defendant's breach of the sale agreement, or at any time thereafter. Of course, if it had no value then tender of transfer would in any event not mitigate any loss.

43 What the plaintiff was required to show for purposes of a damages claim, was the difference between the agreed selling price of the property and its market value – the so called “market value measure”. Although not an inflexible rule, the time for determining the market value is ordinarily at the time of the breach of the agreement. In this case the issue of the right time for determining market value is academic due to the plaintiff's failure to put up evidence of market value at any time, whether it be the time of the breach or any other time as may have been suggested to be more appropriate.

44

In *The Law of Damages*,^[7] the authors deal with the assessment of damages arising out of a breach of contract in a contract of sale in the following terms:

“In a contract of sale, for example, the purchaser or seller is entitled to the difference between the purchase price and the value of the thing sold, this value being established by means of the ruling market-price of similar goods or, if there is no market price, the price which similar goods would fetch on resale or for which they may be bought, according to the case. In exceptional cases the unfavourable consequences of this method may be avoided.”

45 The authors point out that where a person intends to claim damages by relying on a method different from the market price rule then that party bears the onus of proving the absence of a market or that the measure is inappropriate.^[8]

46 In *Visagie v Gerrits & Another, Van Reenen J* stated^[9] the following:

“[d]at dit die oogmerk van ‘n toekenning van ‘n skadebedrag by kontrakbreuk is om die blaamlose party in die vermoënsposisie te plaas waarin hy of sy sou gewees het indien die kontrak volvoer was (sien Novick v Benjamim 1972 (2) SA 842 (A) te 860A; Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A) te 875B-C en dat waar kontrakbreuk uit ‘n versuim om ‘n saak ingevolge ‘n koopkontrak te lewer bestaan, die skadebedrag gewoonlik die nadelige verskil is, indien enige, tussen die ooreengekome koopprys en die markwaarde daarvan (sien Whitfield v Phillips & Another 1957 (3) SA 318 (A) te 324 H; Novick v Benjamin (supra) te 860B-C; Katzenellenbogen Ltd v Mullin (supra) te 879H-880A.”

47 In *Whitfield v Phillips & Another* the Appellate Division stated^[10] the following:

“As a rule the damages for non-delivery of land, in a case in which the buyer has rescinded the sale, are to be measured by the excess of the value of the land over the contract price at the time of the rescission.”

48 In *Katzenellenbogen Ltd v Mullin*^[11] the Appellate Division stated^[12] the following:

“Where, as in this case, the contract is one of purchase and sale of a marketable commodity which is broken by non-performance, the extent of the innocent party’s loss is ordinarily established by applying the market value measure. ‘That is the general, working rule by which loss or damage is ordinarily measured, the adverse difference in prices being regarded as representing the loss or damage that the parties usually contemplate is likely to ensue on such a breach.’ See Novick v Benjamin supra per Trollip JA at p860C-D.

In my opinion, therefore, the circumstances of this indicate that the market value measure would, prima facie at any rate, have been the normal and appropriate yardstick to employ in determining the extent of defendant’s loss. If, as in this case, a litigant seeks to avail himself of a measure other than the normal one, the onus rests on him to satisfy the court that the measure contended for is the appropriate one to employ in all the circumstances of the case.”

49 The plaintiff argued that the failure to determine the value of the property is overcome by the tender to transfer it to the second defendant. I do not consider that making the tender results in the plaintiff discharging its onus to show why the ordinary market value measure should not be adopted.

50 The second defendant is not the purchaser of the property and an obligation that he acquire the property as a consequence of a tender (whether judicially ordered or not) would be an unusual approach. Counsel was unable to identify any precedent where a non-purchaser was compelled to acquire land from a seller, without a written agreement and for an unspecified amount, so as to either determine or mitigate the seller’s damages. By contrast, the ordinary market value measure could have been adopted without difficulty and there is no indication that it would have caused hardship for the plaintiff or that it lead to any injustice.

51 The plaintiff’s counsel argued that although the tender involved the transfer of land, that no written agreement would be required between the plaintiff and the second defendant, as long as the transfer takes place on the basis of a legal causa.[13] Furthermore, counsel submitted that no value need be attached to the tender, and that transfer duty would be payable by the second defendant in terms of section 2 of the Transfer Duty Act 40 of 1949 and that in accordance with section 5(1)(b) of that Act the value can be such value “as declared by the second defendant”.

52 I do not find it necessary to decide whether in fact the land could be alienated in this manner without a written agreement, or whether it would be free to the second defendant in the event of such a tender to declare whatever value he wished in respect of the land or, indeed, whether anomalies will arise if the second defendant were to acquire the land forming part of the scheme contemplated in the sale agreement and whether the second defendant would, or would not, have any of the building and design obligations that the trust would have had under the otherwise void sale agreement. The reason why I do not make a finding on these issues is that the ordinary market value measure would have disposed of potential anomalies that may arise as a consequence of the proposed tender. Had the plaintiff simply determined the market value of the property and deducted it from the selling price, then it would have arrived at its damages in a standard manner instead of resorting to a mechanism filled with, at least, potential anomalies.

For these reasons the plaintiff has not discharged its onus to show why the standard methodology was not appropriate.

53 The effect is that the plaintiff has failed to prove its damages against the second defendant. It may be contended that the appropriate order should be one of absolution from the instance instead of dismissal of the claim. The way the issues unfolded in the hearing militates against such an order. After the parties had submitted heads of argument I called for further heads of argument dealing, inter alia, with the impact of the tender in relation to the plaintiff's claim. The issue of the market value measure was raised specifically by the second defendant who argued that the plaintiff had failed to adopt the market value measure, and that it should have done so. The plaintiff's position was not that it wished to take any steps to remedy this defect, instead it argued that there was no defect in its approach and that the tender was a complete answer to the plaintiff's argument that it should have adopted the market value measure. The issue was thus squarely raised in the hearing and the plaintiff made an election to persist with the tender, and to claim payment of the full amount of the purchase price plus interest. In all the circumstances I am satisfied that the second defendant is entitled to dismissal of the action – even though the outcome is unfortunate because he is in breach of his obligations.

54 Accordingly I make the following order.

1. The plaintiff's claim against the first and third defendants is dismissed with costs, such costs to include the costs of senior counsel where senior counsel was employed.
2. The plaintiff's claim against the second defendant is dismissed with costs, such costs to include senior counsel where senior counsel was employed.

M du P VAN DER NEST, SC

ACTING JUDGE OF THE HIGH COURT

For the Plaintiff: G F Porteous

Instructed by: Jordaan & Wolberg

For the Defendants: N Redman SC

Instructed by: Savage Hurter Louw & Uys Inc

Date argued: 15 April 2017

Judgment

delivered: 18 October 2017

[1] 2005 (2) SA 77 (SCA) at para [15].

[2] See *Thorpe & Others v Trittenwein & Another* 2007 (2) SA 172 (SCA).

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- [3] See *Victoria Falls & Transvaal Power Company Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22.
- [4] See *Lushaka Investments (Pty) Ltd v JHI Properties (Pty) Ltd* 2016 JDR 0795 (GJ) at paras 31-32, although this dealt with a claim for agent's commission where a claim for commission and a claim for damages can typically be for the same amount.
- [5] *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) and *LAWSA Vol.3, Part 1, 2nd Ed*, para 155, fn 12.
- [6] In this regard the plaintiff relied on *LAWSA, Vol.3, Part 1, 2nd Ed*, para 55, fn12.
- [7] Visser & Potgieter, *The Law of Damages*, 3rd Ed, at p357.
- [8] Supra at p359 and the authorities referred to at fn 84 on that page.
- [9] At 2000 (3) SA 670 (C) at 678 I – 679B.
- [10] 1957 (3) SA 318 (A) at 324H.
- [11] 1977 (4) SA 855A.
- [12] at 879H.
- [13] Plaintiff's counsel referred to Silverberg & Schoeman's, *The Law of Property*, 5th Ed. at p220ff to identify the requirements for transfer, being that the land had to be capable of being held in private ownership, that the transferor and transferee must have legal capacity to effect a valid transfer and that the transferor must have the intention to transfer the land and the transferee the intention to receive transfer of it.
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