

SOUTH AFRICA / JUDGMENT

Hill and Another v Magnolia Ridge Properties (Pty) Ltd and Another (14030/08) [2009] ZAKZDHC 5 (1 April 2009) [2009] ZAKZDHC 5

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Wallis

CASE / FILE NUMBER

14030/08

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION

DURBAN

CASE NO.14030/08

In the matter between

ANTHONY HOWARD SARGEANT HIL L First Applicant

STEVEN JOHN HEAN Second Applicant

and

MAGNOLIA RIDGE PROPERTIES (PTY) LTD

First Respondent

M P LUTGE INC. Second Respondent

J U D G M E N T

Delivered on 1 April 2009

WALLIS J.

- [1] On the 1 August 2005 the applicants concluded an agreement with the first respondent in terms of which they jointly purchased a section in a development known as “Point Bay” to be constructed on behalf of the first respondent. The development was to consist of up to ten commercial sections and sixty-seven residential sections. The purchase price was R1 960 000.00 plus VAT and the applicants paid a deposit of R335 160.00. This application concerns the fate of that deposit.
- [2] Clause 3.1 in the Conditions of Sale deals with the first respondent’s obligations in regard to the completion of the unit, which is defined as meaning the section and an undivided share in the common property in the scheme. The clause reads as follows:

“The SELLER hereby undertakes to procure that the SECTION is erected substantially in accordance with the PLAN and is sufficiently

complete for beneficial occupation by the DATE OF POSSESSION, provided the PURCHASER has paid or duly secured the Total Consideration referred to in 1.8 of the CONTRACT OF SALE.”

The date of possession is defined in clause 1.1.9 of the Conditions
as meaning:

“The date specified in 1.13 of the CONTRACT OF SALE or, if applicable, the later date as specified by the SELLER in terms of the provisions of 4.2.1 of the CONDITIONS OF SALE as the date by which the SECTION is sufficiently complete for beneficial

occupation.”

The effect of these provisions is to link the date upon which unit is sufficiently complete for beneficial occupation to the date of possession.

- [3] In clause 1.13 of the agreement itself the date of possession is said to be:

“Within 30 (thirty) days of the completion of the building but not before 31 August 2007.”

In turn that is said to be subject to clause 4.2 of the Conditions of Sale. On its plain meaning therefore the date of possession of the unit will not be before 31 August 2007, but may be after that date depending upon when the building is complete. Once the building is complete the date of possession will follow within thirty days.

- [4] Whilst the provisions of the contract referred to thus far speak of a date of possession the relevant clause in the Conditions of Sale is clause 4, which deals with the occupation date. I assume for the present as it was not suggested otherwise in the course of argument, that possession and occupation are used interchangeably, although as will appear later that may not necessarily be the case. The relevant portions of clause 4 read as follows:

“4.1 The SELLER hereby undertakes to use its best endeavours to give to the PURCHASER beneficial occupation of the SECTION by the date stipulated in 1.13 of the CONTRACT OF SALE, provided the PURCHASER has paid or duly secured the Total Consideration referred to in 1.7 of the CONTRACT OF SALE.

4.2 If, however, the SELLER is of the opinion that, for whatever reason, the SECTION will not be sufficiently complete for beneficial occupation by the DATE OF POSSESSION specified in 1.13 of the CONTRACT OF SALE, then:

4.2.1 the SELLER shall notify the PURCHASER of such fact at least 30 (thirty) days before such date. In such event the PURCHASER shall accept possession, occupation and use of the SECTION on the date the SELLER notifies him in writing that the SECTION will be sufficiently complete for beneficial occupation, and such subsequent date shall be deemed for all purposes to be the DATE OF POSSESSION; and

4.2.2 if the SECTION is not sufficiently complete for beneficial occupation within 6 (SIX) calendar months after the date specified in 1.13 of the CONTRACT OF SALE, the PURCHASER shall have the right on notice to the SELLER to resile from this CONTRACT. In such event the PURCHASER shall be entitled to receive a refund of an amount equal to the aggregate of all payments made by the PURCHASER in respect of the Total Consideration referred to in 1.8 of the CONTRACT OF SALE.”

In terms of clause 4.5 the right of the purchasers to take occupation is made dependent upon the total consideration having been paid or secured in full. If the section is sufficiently complete for beneficial occupation before that date then possession and occupation of the section is only to be given to the purchasers once the price has been secured.

[5] The case advanced by the applicants is set out in the affidavit of the first applicant who says in clause 7.3 thereof that:

“In terms of clause 4.2.2, read with clause 1.18, we were entitled to cancel the agreement in the event that the section was not sufficiently completed for beneficial occupation within six months of 31 August 2007.”

Building upon that foundation the first applicant alleges that the property was not completed for beneficial occupation within six months of 31 August 2007 and accordingly the applicants elected to resile from the agreement in terms of clause 4.2.2, which is quoted above. On that basis repayment of the deposit was claimed. As the stance adopted by the first respondent was that the applicants were not entitled to resile from the agreement under clause 4.2.2 and that the first respondent had lawfully cancelled the agreement on other grounds, it contends that the deposit is forfeit to it in terms of the provisions of clause 12.4.1 of the agreement. The second respondent, which is the firm of conveyancers with whom the deposit has been lodged, indicated an intention to pay the deposit over to the first respondent and declined to give any undertaking not to do so. In the result the applicants brought these proceedings seeking to interdict such payment pending the outcome of an action to be instituted by them for repayment of the deposit.

Their entitlement to that relief depends upon their entitlement to resile from the contract under clause 4.2.2. Mr Finnigan who appeared for the applicants accepted that if they were not so entitled then, either on the grounds contained in their letter or on the basis that the attempt to resile constituted a repudiation of the agreement that

had been accepted by the first respondent, the first respondent had properly cancelled the agreement. On that basis I understood

him to accept that the applicants could not obtain the relief that they seek outside the framework of their contentions under clause

4.2.2.

[6] The critical words in clause 4.2.2 are “within 6 (SIX) calendar months after the date specified in 1.13 of the CONTRACT OF SALE”. The applicants contend that the only date specified in clause 1.13 is 31 August 2007. The date of possession that is established by clause 1.13 is an uncertain date that will occur after the completion of the building, but will not occur prior to 31 August 2007. Accordingly, so they contend that is not a date specified in clause 1.13.

[7] The applicants make the point that the date of possession is a date within thirty days of the completion of the building and that in terms of clause 3.1 the section is to be sufficiently complete for beneficial occupation by the date of possession. That being so, they argue that the date of the completion of the building and the date upon which the sections are to be sufficiently complete for beneficial occupation are necessarily the same. However if that

is so no circumstances could arise in which clause 4.2.2 would operate. That is because once the date of possession was reached the section would necessarily be sufficiently complete for beneficial occupation. If it was not then the building would not be complete and the date of possession would not have arrived. Accordingly they argue that the date referred to in clause 4.2.2 must be some other date and 31 August 2007 is the only alternative

[8] The last point made in support of this argument is that clause 4.1, which deals with the Sellers undertaking to use its best endeavours to give the purchasers beneficial occupation of the section, also ties that undertaking to “the date stipulated in 1.13 of the CONTRACT OF SALE”, and not to the date of possession. This is in contrast to the preamble to clause 4.2, which refers to “the DATE OF POSSESSION specified in 1.13 of the CONTRACT OF

SALE”. It is submitted that the change of language used in clauses 4.1 and 4.2.2, in circumstances where the contract could readily have referred to the date of possession thereby obviating any confusion, is a clear indication in favour of the applicants’

contention. It seems to me, however, that this is something of a two-edged sword in view of the fact that clause 1.13 is part of the printed conditions and it would accordingly have been equally simple, had that been the intention, for clauses 4.1 and 4.2.2 to refer to 31 August 2007 instead of the potentially confusing reference to a date stipulated or specified in 1.13 of the Contract of Sale.

[9] The argument on behalf of the applicants is heavily dependent on the proposition that because the date of possession under clause 1.13 is a date that occurs after the completion of the building it necessarily follows that once the date of possession has arrived the purchasers will be in a position to take beneficial occupation of their section. In my view, however, that is fallacious when one has regard to the provisions of the agreement as a whole. Were it correct there would be no sense in the seller undertaking to procure that the section is sufficiently complete for beneficial occupation by the date of possession. That necessarily contemplates that on the date of possession the section may not be sufficiently complete for beneficial occupation. In clause 5.1 the purchaser expressly acknowledges that on the date of possession work on the “SCHEME”, which is the sectional title scheme known as Point Bay, may be incomplete. The purchasers therefore

agreed that they and any other person claiming occupation and use through them might suffer inconvenience from building operations and from noise and dust resulting therefrom. All of this is consistent with the building itself being complete but with work

being necessary in order to render the different units fit for beneficial occupation. That would particularly be the case with the commercial units the nature of which, as emerges from 9.2 of the Conditions of Sale, had not yet been determined. It would obviously make a difference to completion of those units whether they were to be used as restaurants, offices or for shopping purposes. It is entirely conceivable that substantial work would have to be done on those units after the building was complete but before they would be ready for beneficial occupation. It seems to me that the same is true of the residential units. I can understand entirely that they might have been completely constructed without having been finished internally in accordance with the schedule of finishes set out in annexure “B” to the Contract. If a purchaser had stipulated for ducted air-conditioning throughout the unit it is difficult to see how the unit could be available for beneficial occupation when that had not yet been installed. However it would be equally difficult to say that the building was incomplete because ducted air-conditioning had not been installed in certain units.

[10] I mention all these not because any of them necessarily applied to the applicants’ unit but because they demonstrate quite clearly that in drafting these standard conditions of contract it was contemplated that the date of beneficial occupation might be different from the date of possession. However, from that latter date, absent any special provision, the purchaser would bear the risk in and to the unit in terms of clause 5.3 and would be liable for the payment of all services in terms of clause 5.2.10 and for the payment of levies in terms of clause 6.1.

[11] It is understandable against this background that the agreement made provision for the eventuality that the unit might not be ready for beneficial occupation by the date of possession. The undertaking given in clause 4.1 is an undertaking by the seller to use its best endeavours to give the purchaser beneficial occupation of the section by the date stipulated in 1.13 of the Contract of Sale. That undertaking cannot be turned into a guarantee that beneficial occupation will in fact be possible by the specified date and it appears to qualify

what is stated in clause 3.1. It is, as it says, an undertaking by the seller to use its best endeavours to procure that position. If nothing had been done to secure that this was so there could be a breach of obligation. But if the seller did use its best endeavours, but they failed to achieve

the desired result, that does not constitute a breach of the seller's obligations under clause 4.1.

- [12] That construction of clause 4.1 is reinforced by the opening words of clause 4.2 which expressly contemplate that the seller may form the opinion that the section will not be sufficiently complete for beneficial occupation by the date of possession. The seller is entitled under those circumstances to give notice to the purchaser of that fact thirty days before "such date", which can only be a reference to the date of possession specified in clause 1.13 of the Contract of Sale. If such notice is given the purchaser then becomes obliged to accept possession, occupation and use of the section on a later date to be notified in writing by the seller when the section will be sufficiently complete for beneficial occupation.

Where that occurs the subsequent date is then deemed to be the date of possession.

- [13] Plainly under clause 4.2.1 the contemplation is that the date of possession has arrived but that the unit is not yet ready for beneficial occupation. In those circumstances the seller is entitled by notice to extend the date of possession to a later date when it is in a position to give beneficial occupation. That later date then becomes for all purposes under the agreement the date of possession. Accordingly the effect of such notice is to postpone the assumption by the purchaser of the obligation to pay levies or to pay for services and also postpones the passing of risk in and to the unit.
- [14] Clause 4.2.2 finds its home in that situation. Firstly it is joined to clause 4.2.1 by the conjunction "and". That shows that it is a provision that operates in the circumstances set out in the preamble to clause 4.2 namely the situation where beneficial occupation cannot be given by the date of possession. In that situation the purchaser is given some protection against the date of occupation being indefinitely delayed. That protection lies in the purchaser's entitlement to resile from the contract if not given beneficial occupation within six months after the date

specified in 1.13 of the Contract of Sale.

- [15] If the reference in clause 4.1 to the date stipulated in 1.13 of the Contract of Sale and the reference in clause 4.2.2 to the date specified in 1.3 of the Contract of Sale are construed as being references to the date that will become the date of possession on completion of the building then these clauses make sense. The purchaser must wait until the building is complete before the date of possession can arrive. The seller binds itself to use its best endeavours to secure that on the date of possession the unit that is the subject of the contract will be in a condition where the purchaser can be given beneficial occupation. However, if that is not possible the date of possession can be extended until a later date

when beneficial occupation can be given and during the extended period the purchaser is relieved of the obligations that would otherwise have arisen once the date of possession arrived. The purchaser is protected against undue delay in securing beneficial

occupation once the building has been completed by its entitlement under clause 4.2.2 to resile from the sale if six months or more goes by after the date of possession. That in turn is consistent with the similar right to resile from the transaction if the sectional title register is not opened within six calendar months after the completion of the building (clause 8.2).

[16] By contrast, if the references in clauses 4.1 and 4.2 to the date stipulated or specified in 1.13 of the Contract of Sale are taken to be references to 31 August 2007, as contended by the applicants, the contract becomes internally incoherent. It would mean that the undertaking by the seller in clause 4.1 was an undertaking to use its best endeavours to give beneficial occupation of the section by no later than the first possible date upon which it could be obliged to give possession. Not only is that an unbusinesslike proposition but it is in conflict with the provisions of clause 3.1 of the agreement. Under that clause the seller undertakes to procure that the section will be sufficiently complete for beneficial

occupation by the date of possession. Accordingly if the date of possession is delayed, because the completion of the building is delayed, to a date after 31 August 2007 the undertaking in clause 3.1 will be wholly contrary to the undertaking in relation to the same matter in clause 4.1. That cannot be so. Nor can it be so – and it was not suggested otherwise – that the parties ever contemplated that beneficial occupation of the unit could be given before the building was complete in the sense in which that expression is used in clause 1.13 of the Contract of Sale. The entire tenor of the agreement is that beneficial occupation will either be coterminous with the date of completion of the building or will be subsequent to it.

[17] In those circumstances the argument based upon the use of the words “the date stipulated in 1.13” and “the date specified in 1.13” as being intended to convey something other than the date of the possession, described in clause 1.13 cannot be sustained. At best for the applicants there is a notional argument that clause 1.13 refers to two dates namely the date of possession which is an uncertain date, and 31 August 2007, which is a fixed date. A consideration of the contract as a whole, in my view, inevitably leads to the conclusion that it is the former date that is intended. The latter date, as clause 1.13 makes clear, is merely an indication of the earliest possible date on which possession may be given. It is not an indication of when the purchaser will obtain occupation of their units nor is it a baseline date from which that latter date can be determined.

[18] Mr Finnigan did contend that even if on the face of the contract the interpretation put forward by the applicants was improper that could be disturbed by a consideration of admissible evidence. He accordingly contended that in the light of that possibility the construction on which the applicants rely is a feasible construction, which might be adopted after the hearing of evidence. As the applicants are only seeking interim relief he argued that this sufficed to establish a *prima facie* case and that the balance of convenience lay in

favour of his clients.

- [19] There are two difficulties with this argument. The first is that it is nowhere suggested in the affidavits that any evidence is or could be material to the construction of clause 4.2.2. The approach by the applicants was that on its plain language the clause referred to 31 August 2007 and not to the less determinate date of possession. They did not suggest that there was any information *de hors* the contract itself and the facts that do emerge from the papers that could affect the construction of the clause.
- [20] The second difficulty is that even were I to assume in favour of the applicants that there is some faint possibility that the leading of evidence could disturb what seems to me clearly to be the proper interpretation of clause 4.2.2, this could do no more than to shift the focus of the enquiry for present purposes to the balance of convenience. Here the only argument advanced by the applicants is that if the deposit is allowed to leave the trust account of the second respondent there is some risk that the first respondent may go into liquidation and they may be unable to recover these amounts. However no evidence was advanced to suggest that this is a real and substantial risk. On behalf of the first respondent Mr Steyn says that the first respondent is a fairly large development company and that even if the deposit is paid over to it at this stage the applicants will recover that amount if they are successful in the action that I am told has already been instituted. That statement is reinforced by the fact that the local authority has authorised the first respondent to permit beneficial occupation to be taken of three levels of flats in the building as well as the shell of the retail stores and there is no indication that the first respondent is in precarious financial circumstances. As Holmes JA pointed out in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 383 (D) at E-F, in deciding whether to grant an interdict the court usually has to consider the prospects of success and the balance of convenience. The stronger the prospects of success the less need for that balance to favour the applicant and conversely

the weaker the prospects of success the greater the need for the balance of convenience to favour the applicant. In this case my own view is that the interpretation of the contract contended for by the applicants is erroneous. Even accepting that the language of the contract does pose some difficulties and paying heed to Mr Finnigan's contention that there is a possibility that admissible oral evidence might lead to a construction of clause 4.2.2 that favours the applicants, the applicants' prospects of success seem to me slender. On the balance of convenience I accept that there is always a risk that if funds are paid over to a developer it may subsequently occur that the developer falls upon hard times, is liquidated and is unable to refund that money. However, there is no evidence in this case that this is anything beyond a notional possibility in the present circumstances. The evidence before me is that the first respondent is a substantial developer well able to meet any obligation to refund the deposit or any part thereof to the applicants.

- [20] The end result is that the applicants have failed to make out a case for the grant of the interim interdict that they seek. On my interpretation of the contract they had no right to resile from the contract and their doing so flows from an erroneous construction of clause

4.2.2. However, even if I give the applicants the benefit of the doubt in this regard and matters are not as clear as I think they are in regard to the question of construction, the position is that the applicants have shown no more than a weak prima facie case in support of their claim to an interdict. As the balance of convenience is no more than evenly balanced their claim to an interdict must fail.

[21] Accordingly the application is dismissed with costs.

DATE OF HEARING

24 MARCH 2009

DATE OF JUDGMENT

1 APRIL 2009

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