

SOUTH AFRICA / JUDGMENT

IFJ Properties (Pty) Ltd v Osthus (26670/2009) [2012] ZAWCHC 348 (9 November 2012)

[2012] ZAWCHC 348

COURT

Western Cape High Court, Cape Town

BEFORE

Dlodlo

CASE / FILE NUMBER

26670/2009

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IN THE HIGH COURT

OF SOUTH AFRICA

(WESTERN CAPE

HIGH COURT, CAPE TOWN)

CASE NO.

26670/2009

In the matter

between:

IFJ PROPERTIES

(PTY) LIMITED

.....PLAINTIFF

And

JARL OSTHUS

.....DEFENDANT

JUDGMENT

DELIVERED-ON FRIDAY, 09 NOVEMBER 2012

DLODLO, J

[1] The Plaintiff in the present matter instituted action for the following relief:

- (a) Payment of the purchase price of RL6m; (b) Interests a tempore morae at the rate of 15.5% from 23 October 2009 to date of payment; (c) Costs of suit. The Plaintiff alleged that it was at all relevant times the lessee in terms of an agreement with the Municipality of Cape Town,

of a dwelling known as 8 Fleur Park, Gordon's Bay. It was further alleged that the Plaintiff, in December 2008, sold its interest in the dwelling to the Defendant in terms of a written agreement and that it assigned its interest in the lease to the same Defendant. Copies of the Agreement of Sale and the Deed of Sale and the Deed of Assignment relating to this agreement are attached to the Particulars of Claim as Annexures "PCI" and "PC2" respectively. It is important to mention that the Defendant denied the allegations regarding the conclusion of these agreements.

- [2] The Defendant pleaded that the particulars of the Plaintiff, its address, clauses 16.3 and 16.4, addendum A and the Plaintiff's particulars in respect of Annexure "A", as well as the place and date of the Defendant's signature; and the signature of a witness, were not contained in the Deed of Sale when it was signed by the Defendant. All these particulars were allegedly inserted into the Plaintiff's offer to purchase after the Defendant

had signed it and that the Defendant did not sign the offer to purchase after the insertions had been done. These facts, however,

were common cause during the trial, such that this Court hardly needs to make any determination in this regard. In truth it was also common cause that the parties did purport to enter into the said agreement and that they were *ad idem* regarding the terms of the purported agreements.

EVIDENCE

- [3] The first witness called by the Plaintiff was one Donovan Clive Gysman (the Regional Head Cape Town and Acting Regional Head Eastern Region Department Property Management Directorate Finance of the Municipality of Cape Town). This witness was subpoenaed *duces tecum* to produce certain documentation at this hearing. Document 1 in the bundle was confirmed by Mr Gysman as an agreement between Gordon's Bay Municipality and Concor and Fleur Holiday Homes. The Municipality is referred to as the lessor, the Concor and Fleur are therein referred to collectively as the lessee. The lease agreement *inter alia* provides thus:

"the lessor, hereby lets to the lessee who hires from the lessor a certain piece of vacant land more fully depicted on the sketch plan marked X. " There is a further provision in the agreement that "any buildings and improvements which the lessee might erect on the leased property except buildings and improvements which are of immovable nature shall remain the sole property of the lessee until such time that such buildings and vetated improvements are handed over to the sub-lessees after which date the said buildings and related improvements will remain the property of the sub-lessees.

- [4] Mr Gysman confirmed that the agreement was that there would be demountable homes which would vest in the sub-lessees; the immovable property on which such demountable homes are erected would remain the property of the Municipality. Clause 4 of the agreement provides that:

“The leased site may be used exclusively for demountable holiday homes erected according to the requirements of the Municipality and for no other purpose. No other structures may be erected on the site without prior written consent of the lessor. ” . .

The Agreement confirmed by Mr Gysman also: states that the lessee may sell his demountable home to whoever subject to consent of the lessor,, the Municipality. The lease between the City of Cape Town, Concor Western Cape and Fleur Holiday Homes Ltd terminated and the City became owner of the property excluding the demountable homes. Mr Gysman' was closely cross-examined as to the nature of number 8 Fleur Park, Gordon's Bay. He testified that the house is made of bricks and mortar and has a foundation. He testified that the City of Cape Town became the successor in title of the Gordon's Bay Municipality.

[5] Peter John Leramer testified that he is an estate agent and have been such since 1992. According to his testimony Mr Osthus (the Defendant) was an old client of his. He met Mr Osthus through a mutual friend also from Norway. Mr Lemmer sold the property to Mr Osthus in the harbor Island which is an adjacent development. It is Mr Lemmer's evidence that Mr Osthus is a speculant and was always looking for properties to purchase. Mr Lemmer told the Court that he showed the current property to Mr Osthus but he then went back to Norway but remained in contact with Mr Lemmer via'e-mail. Mr Lemfner sent Mr Osthus more detailed . v . information. It is Mr Lemmer's testimony that Mr Osthus had quite a few. questions.' Seeing that Mr Lemmer's knowledge of the property Was not that much he referred the. questions to Mr Du Plessis as the signer or the seller. Mr Du Plessis answered all the questions also via e-mail and Mr Lemmer forwarded the whole e-mail on to Mr Osthus. He attached a blank contract and asked Mr Osthus to fill in the buyer's details and fax same back. Mr Lemmer subsequently sent ,the signed, contract and the addendum of the assignment thereto, to Mr Osthus. Occupation was to be given on 31 March 2008.

[6] Mr Lemmer testified that he thought that he called, Mr Du Plessis (on the same day) and the form, was duly completed. According to Mr Lemmer Mr Du Plessis came out . and signed the .original contract which Mr Lemmer then e-mailed ars a whole to Mr Osthus'

attorney with the request for proof of funds. Mr Lemmer testified that he also sent a copy directly to Mr Osthus or that it may be that the latter's. attorney passed it on to him. Mr Lemmer testified about and confirmed numerous correspondences between himself and Mr Osthus and/or the latter's attorneys. Such correspondence is essentially by way of e-mails. An • application had to be instituted against the City Council to compel them to sign consent to the lease agreement but this was eventually achieved. In Mr Lemmer's testimony Mr Osthus was hundred percent understanding that he was taking over a lease.

[7] Describing number 8 Fleur Park Mr Lemmer said the following:

“...from my architectural background the original structure of the house is only 110 millimeter wide, so it cannot be brick and mortar as--the previous witness said. It's clearly plastered concretet. panels which the panels was (sic) put down and the original structure M?as completed. Yes, subsequently other structure was added onto it, but my understanding

was always it's a lease contract he is taking over there is no

foundations, It just looked like concrete panels which was (sic) put down. Obviously there is a roof structure on. Yes, it 's not something that you can just pick up and put it on a wagon,, but I believe from the technical requirements they planned it not to have foundations, but it. was sort of like, passed as leased land. Your structure is very temporary. You must be able to remove it at. the end of ‘the lease. ”

Mr Lemmer testified that Mr Osthus subsequently , bought another house in the same development, .Under .cross-examination Mi* Lemmer was closely asked about the type of contract he used. He testified that the original contract is his. default contract. He was unsure about documentation needed and fie found it easy to use his standard contract.

[8] Mr Grobbelaar pertinently put the following question to Mr Lemmer:

“Now I want to know why you didn 't type in there — if it was a lease that's being sold\ why didn't you say “the lease over the property” that is being sold? ”

Mr Lemmer answered and stated that “it's honestly the first time I sold a leasehold property. ” The series of e-mails were dealt with rather extensively in cross-examination. The question of movability of the structure sold

was discussed at length in the cross-examination of Mr Lemmer. In Mr Lemmer's testimony Mr Osthus knew very well that he was buying a leasehold.

[9] Isak Frederick Jacobus Du Plessis confirmed Mr Lemmer's evidence that a leasehold was sold to Mr Osthus. Mr Du Plessis is a building contractor. He testified about the structure and said that:

“ ...it's a prefab construction which is manufactured in a factory in pre-fabricated modules which would then get assembled on site. It is positioned on a slab which is on the soil, with no foundations. It is completely removable and demountable. There are: however, extensions to the house... ” He testified that an additional .bedroom was added including a bathroom. In his description Mr Du Plessis emphasized that the house in question has a veranda added which has paving or brick as a floor, which again can be lifted and taken away. It has got.normal poles that could be taken out and moved away, Mr . Du Plessis purchased the property from Mr Rothman and he knew that he was acquiring the right to a lease agreement which would, give him rights to that property and the structure itself would belong to him but that the land is rented from the Council.

[10] Asked if there was any doubt in his mind that the purchaser or prospective purchaser knew that this was leased land, Mr Du Plessis replied that he had no doubts in his mind, at all. He testified that he signed the agreement on 1 December 2008 after Mr Osthus had already signed. Asked if he can remember the sequence of signatures, Mr Du Plessis responded as follows:

“...my background is property? development. We own and manage various property portfolios. I wanted this to be done in writing, the whole agreement, purely because we were hoping not to end up like we are in today where we have to say somebody said so and somebody else said something else and the price was agreed as this and it would be paid then. And I did not want to sign any documentation until it was signed by the purchaser and. agreed by the conditions...” He testified also about the deed of assignment. It is Mr Du Plessis’ evidence that Mr Osthus. understood exactly that all he was buying from him was access to a lease agreement and the right to either break that house down when it expires or onward sell it again.

[11] Mr Du Plessis was asked what he was going to do with the room that was built on and the bathroom. He answered thus:

“...if I take the bricks apart carefully, okay, and slowly chop all the cement off it, I can pick them up on a truck, I can take them anywhere else on another piece of land, I can mix some more mortar. Put them back together, repaint it, and there you go.” He reiterated that there are no foundations — it is on a platform, it is on a slab, it is demountable. It was put to Mr Du Plessis that Mr Osthus would testify that it was not his intention to buy a movable property when, he entered into the written

agreement. Mr Du Plessis answered that he had no comment on that. [12] The only witness for the Defendant was Jart Osthus. He testified that he is not a South African, but is a Norwegian. He told the Court that he fell in love with South Africa ten years ago and he visits South Africa two months a year. He testified that he bought a plot from Mr. Lemmer some years ago and that was in the Harbour Island. He bought other properties in this Country through Mr Peter Lemmer whom he described as his main agent. Mr Osthus testified that he lived at the flat just opposite house number 8 Fleur Park and he viewed this house almost every day and thought it was a wonderful place. He had his morning and afternoon walks past those houses and fell in love with the house. Mr Osthus was introduced to this house by Mr Lemmer and he had a look at the house. He even went inside the house. He was interested in house 8 Fleur Park. He then went back to Norway. Even when he was home in Norway he remained interested in house 8 Fleur Park and even had pictures of the house. [13] He admitted that paperwork was sent over to him by way of e-mail and was prepared to make an offer. Asked what he intended to buy Mr Osthus said he intended to buy a house he saw, a beachfront house at Fleur Park house number 8. Asked if he knew that the house stood on a leasehold, he answered that he was told the land is leased by the Municipality and that was his advantage because then he would pay a low . lease every month to the Municipality. Mr Osthus told the Court that it was not his intention to buy the lease, but rather to buy the house, that structure on the beach. He admitted that he signed both deed of sale as well as an assignment thereto. Mr Osthus dealt at length as well with communication by way of e-mails between himself and Mr Lemmer.: Mr Osthus was asked if anybody told him that he

was buying a lease of the land. He answered as follows:

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“...they told that: you're buying a house and you're paying a lease to the Municipality for the land because it stands on leased land and I tried then I remember that because I had the same system, in Norway, you buy a cabin or you buy a house on leased land and you pay a lease to the farmer or to the owner or to the Municipality, exactly the same.. Ja, that's how it is. Okay, I felt comfortable with that.” [14] When cross-examined on this Mr Osthus stated he was aware that he was buying a cottage or the house and that it is on leased land. He added that that is also the way you buy the house in Norway

- you buy the structure, the property and that belongs to you but the land does not belong to the buyer. He emphasizes that is what he knew. Further questions took the following format: Question: “And that was your perception of what would happen here. You would buy number 8, the cottage would, become yours but the land would remain the property of the

lessor, the City Council. That is how you understood. Answer: “That is how I understood it, M’lord, and I was happy to utilize the land in front of the cottage and use the land around the cottage and it was not.. belonging to mine...” Question: f’... When you purchased number 8 you knew that you were buying the property but not the land? ” Answer: “I knew that I was buying the property, M’lord, and the land belonged to the Municipality, I had to pay a certain amount - I think it was roughly R1 000per month to the Municipality for renting their land. ”

[15] When asked about the assignment, Mr Osthus testified that he was not used to all these terms and stuff when he read it but was aware that there has to be sort of a paper to be approved by the Municipality. He added that he definitely was prepared to and he really wanted to have. that specific property put into his name. On the assignment the questioning went as follows: Question: “...You agreed that the assignment had to be done into your name. from IFJ Properties into your name. the lease had to be assigned to you. You knew that? ” Answer: Question; “...and you were happy with thatx with the document reflecting that the assignment document? ” Answer: “Yes, I biew that, you know, I need to fill out that document in order to have that process going. He emphasized that he knew there was a lease. He knew that the seller leased the property form the City of Cape Town. He also knew that in order to get the house into his name the lease has to be transferred. He told the Court he did not want to pay any money before he had the lease transferred into his name.

[16] He agreed that as at 27 January (I think 2009) he was still keen to. go ahead with the transaction and he still thought it was right - if. only he could get his finances right. Asked if he considered himself bound by the contract even though he had certain doubt, Mr Osthus responded that he had doubt about what to do. Mr Osthus was questioned as follows towards the end of cross-examination: Question: uSo you couldn’t do both deals, you had to take the one or the other and you preferred the property of Mr Venter, is that right? ” Answer: “That } s right ” Question: “And then you decided — you asked or got legal advice that the deal with IFJ Properties was not legal and therefore you decided to get out of — to try to get out of the deal with IFJ Properties. Is that right? ” Answer: “Yes, I got the information or legal advice from my attorney that that contract was not, you btow\ validy it was not — could get out of it. ”

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Answer:

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“Yes, I got the information or legal advice from my attorney that that contract was not, you btow\ validy it was not — could get out of it. ”

DISCUSSION [17] It remains important to mention that it was conceded on behalf of the Plaintiff that, if the Agreement of Sale between the parties did constitute a deed of alienation of land as contemplated in section 2

- (1) of Act 68 of 1981., the deed was invalid and unenforceable. I hope to return to the provisions of the relevant section in this regard in due course. The sole dispute in the instant matter turns on the question of whether the Agreement of Sale was a deed of alienation of land as contemplated in Section 2 (1) of the Alienation of Land Act 68 of 1981. Mr Grobbelaar submitted that the Agreement of Sale in casu amounts to an alienation of land and must therefore be a written agreement as provided for by Section 2 (1) of the alienation of Land Act 68 of 1981. Perhaps I must now set out the provisions of this particular section infra. Section 2 (1) of the Alienation of Land Act provides as follows: “2. Formalities in respect of alienation of land: (1)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. ” [18] The land is defined to mean any portion of the earth’s surface and any structure permanently attached to the soil. Such structure accedes to the soil by accession and it is then part and parcel of land in question and as such does not exist apart from the land. See: The Alienation of Land by PJ Aronstam (1st Edition 1985), pages 3 and 4; Alienation of Land by Theo De Jager (1st edition 1980) page 54; and Formalities in respect of contracts of sale of Land' Act by PM Wulfsohn [1980] page 88. Mr Grobbelaar

relied heavily on the description of the property clause in the - Agreement of Sale. This description reads: “the following immovable property: PROPERTY: 3 Bedroom House on leasehold portion 8 of Erf 526 IN EXTENT: 225m2 (house) also known as: 8 Fleur Park Gordons Bay (Hereinafter referred to as the “Property” We know from the evidence adduced in the instant matter that what was sold or purported to be sold was a demountable house. The description in the Agreement of Sale is clearly misleading. It could have been described, better. I shall return to this later on.

- [19] Mr Grobbelaar drew my attention to clause 10 of the same agreement in terms of which the agreement cannot be varied unless the variations are - reduced to writing under the hands of the parties to the Deed of Sale. He contended that there is no evidence that the parties varied the Deed by agreement. He also contended that there is also no action or prayer for rectification of the agreement and that the Plaintiff must abide with the written agreement in the form it is in. According to Mr Grobbelaar even if the Court should decide that the house is not land itself what was sold was an interest in land. [20] Another aspect of

importance is that the Defendant denied that the Plaintiff was at all relevant times the lessee in terms of an agreement of lease with the City of Cape town and he also denied that the Plaintiff performed fully in terms of the agreement. In Mr Grobbelaar's submission the plaintiff alleges and Mr Gysman testified that it derived its rights as lessee from a Deed of Assignment between the Plaintiff and Louwtjie Rothman Goodwood CC but that Assignment was only signed by the City on 12 July. 2010. Therefore in Mr Grobbelaar's contention the Plaintiff had no rights on the land which he could transfer to the Defendant at the time of entering into the Deed of Sale or when he purported to do so in September 2009. Mr Grobbelaar asked me to dismiss the action with costs in that in his submissions no valid Deed of Sale came into existence between the parties. [21] It may be helpful to recall that Mr Gysman, who was under subpoena *..duces tecum*, handed in copies of certain agreements which are contained in Bundle "A". From these it is clear that the initial agreement concluded on 13 February 1988 between the erstwhile Gordon's Bay Municipality (referred to in the agreement as "the lessor") on the one hand and Concor. Western Cape (Pty) Ltd and Fleur Holiday Homes (Pty) Ltd, jointly and severally (referred to in the agreement as "the lessee") on the other hand. In terms of this agreement: The lessor let the vacant land on which the relevant 78 dwellings were later constructed to the lessee; the lessee, had to complete a development of the property in accordance with certain plans which were no longer available. The development entailed, *inter alia*, the erection of 78 demountable homes on the property (which were to be sold to sub-lessees). Clause 5 (a) of the agreement provided that the agreements, unless otherwise terminated, would be for a period of five years, calculated from the date of possession. Clause 5 (c) provided, *inter alia*, that, on expiry of the lease, all improvements which are of an immovable nature, but excluding the 78 demountable units which would remain *..the sole property of the sub-lessee*, would vest in the lessor. The second agreement produced was the lease agreement, dated 1 May 1987, in terms of which Site No 8 was leased by Fleur/Concor to one LJ Rothman. The witness could not find any agreement

reflecting the substitution of the City council for Fleur/Concor, or the acquisition by Rothman of Dwelling No 8, but this must have occurred because the witness produced an agreement in terms of which the Council, as lessor, consented to the assignment of the lease by LJ Rothman to Louwtjie Rothman Goodwood CC, while it is known that Rothman sold "Fleur Vakansie Huis Nr 8" to the Plaintiff in terms of a deed of sale, dated 24 February 2006, a copy of which is included in Bundle "B". It is common cause that assignment of the lease was effected by Louwtjie Rothman Goodwood CC to the Plaintiff, although no agreement could be found which evidenced this assignment. IS THE DWELLING MOVABLE OR IMMOVABLE? [22] It was contended on behalf of the Defendant during the trial that the whole of the dwelling became an immovable structure, whereas the Plaintiff conceded that the bedroom and bathroom, which were added to the house during the Rothman era, as well as a braai place, were of an immovable nature. An inspection *in loco* was conducted, but it is contended on behalf of the Plaintiff that the movability or not of the structure is not an issue which the Court has to determine. I, however, shall return to this aspect later on in this judgment. It was clear from the evidence of Mr Du Plessis that he

intended to and did sell the dwelling and not the leased land on which it is situated to the Defendant. It is equally clear from the evidence of the Defendant that he intended to buy what he saw, namely the particular house at No 8 Fleur Park. He knew that the land is leased by the Municipality and it was not his intention to buy the lease itself.. This is (according to the Defendant) a familiar concept in Norway to buy a cottage on somebody's land which is leasehold. He testified that there you buy the cottage but the land still remains the property of the owner. The Defendant made it clear in his testimony that his perception was that the cottage would become his and that the land would remain the property of the lessor, the City Council. It is common cause that the City of Cape Town was not a party to the agreement and did not purport to sell the property occupied by the cottage to the Defendant. [23] Earlier on in this judgment it was pointed out that the question for determination is whether the purchase of the "immovable"

structure on the land in question constituted an alienation of land. Christie, The Law of Contract in SA (5th edition) page 113 gives the following telling exposition: "Subject to this definition, the word "land" should be given its ordinary meaning. This includes not only the soil but buildings and anything else permanently attached to it, but it does not necessarily follow that such fixtures must be classed, as land when considered separately from the soil to which they are attached. To regard the sale of a building for demolition and removal or the sale of standing crops for reaping and removal, as a sale of land would be a straining of language, and if the legislature had intended to include such sales it could have made its intention clear by using the words "immovable property" instead of "land". " De Wet & Van Wyk, Kontrakreg (5th edition) Volume 1 page 317 defines "ground" for purposes of section 2 (1) of the Alienation of Land Act as follows: "Wat grond is, is min of meer duidelik, naamlik 'n deel van die oppervlakte van die aarde." A seller need not be the owner of the object of the sale in order to conclude a valid agreement of sale. He does, however, warrant that somebody else with a better right will not deprive him of the subject matter of the sale. See De Wet & Van Wyk, Kontrakregte & Handelsreg page 329. Mr Smit submitted that an untenable situation will arise should it be held that the sale of an immovable object constitute a sale of land as contemplated in this subsection. In Mr Smith's contention that will mean that the sale of, for instance, the trees in a cultivated forest, crops on land, a windmill which becomes immovable, immovable factory machinery, usable items in a mined house etc. have to comply with the provisions of this subsection. I agree. This cannot have been the intention of the legislature when the provisions of section 2 (1) of the Alienation of Land Act presently under consideration were enacted. [24] One must always bear in mind the historical imperatives when a determination of this nature is being made. Originally as fully described supra the Municipality of Gordon's Bay never wanted to part ways with the land in question. However, clearly there was a need to allow people, to temporarily use the surface of this land for which the Municipality did not have immediate need to use. That is the reason why demountable dwellings became the way forward. It is perhaps fitting to record hereunder the observations made and agreed to by the legal representatives in an inspection in loco which was held at 8 Fleur Park Gordon's Bay on 7 June 2012 at 1 lh30. I document the observations hereunder: VERANDA

- [25] It is recorded that the western side of the property was extended with the construction material which consists of aluminum and glass panels, a bricked floor, an outside braai constructed from brick and mortar, with a corrugated iron roof. THE ORIGINAL CONSTRUCTION
- [26] The original construction consists of precast panels, both inside and outside and is divided into two bedrooms, a bathroom and an open plan kitchen and living area. The previous veranda was also enclosed with the extension on the western side of property and is now part and parcel of the living area adjacent to the open living area. THE SOUTHERN SIDE OF THE PROPERTY
- [27] Adjacent to the original construction of the southern side of the property was extended by adding a further bedroom and .en suite bathroom, as well as a storage room with a sliding garage door. This extension, i.e. the southern side of the property is constructed from bricks and mortar. GENERAL
- [28] The living area and bathroom have tiled floors, whilst the bathroom in the original construction has wall tiling approximately shoulder height whilst the en suite bathroom in the southern section is tiled from floor to ceiling. The bedrooms are carpeted on what purports to be a cement/concrete floor. It also appears that the floor tiles are. attached to a cement/concrete floor. The ceilings throughout the property consist of rhino board. The property is fully electrified and all electricity wiring is imbedded in the walls. The kitchen and bathrooms are connected to the municipal water supply and there are two flush toilets, a bath and two showers. [29] A closer examination of the house in question shows that the structure was never meant to be a permanent fixture. However, the additions are so markedly different that one would be excused to think that it had been forgotten that this was after all a demountable house. Importantly, Mr Osthus, the Defendant, knew very well about these demountable houses situated on this leasehold. He was no stranger to Gordon's Bay and. particularly to the establishment. Currently he owns a similar kind of house in the same establishment. Amongst the questions he asked per an e-mail was how much is payable for transfer purposes. The question was answered that nothing is payable for transfer purposes. This looks very insignificant but it is very much telling that indeed what he bought was the dwelling on leasehold. Land was never in issue at all I have no hesitation in making a finding which I hereby make, namely that the sale under consideration in the instant matter did not constitute a "sale of land" which fell foul of the provisions of section 2(1) of the Alienation-of Land Act. Accordingly the Defendant's defence(s) must fail. What is apparent is that Mr Osthus who was fully aware of the agreement he signed in terms whereof he purchased house number 8 Fleur Park, Gordons Bay, became interested in another house in the same development. He clearly could not afford to buy both houses. He then resorted to some endeavours to get out of the agreement he signed first. Thus far he also admitted in cross-examination by Mr Smit. ORDER
- [30] In the circumstances I make the following order:

- (a) An agreement (and a deed of assignment) entered into by the Plaintiff and the Defendant in this matter in December 2008 in terms whereof the former sold its interest in the dwelling (No. 8 Fleur Park, Gordons Bay) to the latter is and remains valid.
- (b) The Defendant is hereby ordered to pay the purchase price amounting to R1.6 million of the aforesaid agreement plus interest at the rate of 15, 5% calculated as from 23 October 2009 to date of payment.
- (c) The Defendant shall also pay the Plaintiff's costs of suit herein. DLODLO, J

DISCUSSION

[17] It remains important to mention that it was conceded on behalf of the Plaintiff that, if the Agreement of Sale between the parties did constitute a deed of alienation of land as contemplated in section 2

- (1) of Act 68 of 1981., the deed was invalid and unenforceable. I hope to return to the provisions of the relevant section in this regard in due course. The sole dispute in the instant matter turns on the question of whether the Agreement of Sale was a deed of alienation of land as contemplated in Section 2 (1) of the Alienation of Land Act 68 of 1981. Mr Grobbelaar submitted that the Agreement of Sale in casu amounts to an alienation of land and must therefore be a written agreement as provided for by Section 2 (1) of the alienation of Land Act 68 of 1981. Perhaps I must now set out the provisions of this particular section *infra*. Section 2 (1) of the Alienation of Land Act provides as follows:

“2. Formalities in respect of alienation of land:

(1) 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. ”

[18] The land is defined to mean any portion of the earth's surface and any structure permanently attached to the soil. Such structure accedes to the soil by accession and it is then part and parcel of land in question and as such does not exist apart from the land. See: The Alienation of Land by PJ Aronstam (1st Edition 1985), pages 3 and 4; Alienation of Land by Theo De Jager (1st edition 1980) page 54; and Formalities in respect of contracts of sale of Land' Act by PM Wulfsohn [1980] page 88. Mr Grobbelaar

relied heavily on the description of the property clause in the - Agreement of Sale. This description reads:

“the following immovable property:

PROPERTY: 3 Bedroom House on leasehold portion 8 of Erf 526 IN EXTENT: 225m2 (house) also known as: 8 Fleur Park Gordons

Bay (Hereinafter referred to as the “Property”

We know from the evidence adduced in the instant matter that what was sold or purported to be sold was a demountable house. The description in the Agreement of Sale is clearly misleading. It could have been described, better. I shall return to this later on.

- [19] Mr Grobbelaar drew my attention to clause 10 of the same agreement in terms of which the agreement cannot be varied unless the variations are - reduced to writing under the hands of the parties to the Deed of Sale. He contended that there is no evidence that the parties varied the Deed by agreement. He also contended that there is also no action or prayer for rectification of the agreement and that the Plaintiff must abide with the written agreement in the form it is in. According to Mr Grobbelaar even if the Court should decide that the house is not land itself what was sold was an interest in land.
- [20] Another aspect of importance is that the Defendant denied that the Plaintiff was at all relevant times the lessee in terms of an agreement of lease with the City of Cape town and he also denied that the Plaintiff performed fully in terms of the agreement. In Mr Grobbelaar's submission the plaintiff alleges and Mr Gysman testified that it derived its rights as lessee from a Deed of Assignment between the Plaintiff and Louwtjie Rothman Goodwood CC but that Assignment was only signed by the City on 12 July. 2010. Therefore i^Mr GroBbelaar's contention the Plaintiff had no rights on the land which he could transfer to the Defendant at the time of entering into the Deed of Sale or when he purported to do so in September 2009. Mr Grobbelaar asked me to dismiss the action with costs in that in his .submissions no valid Deed of Sale came into existence between the parties.
- [21] It may be helpful to recall that Mr Gysman, who was under subpoena ..duces tecum, handed in copies of certain agreements which are contained in Bundle "A". From these it is clear that the initial agreement .concluded on 13 February 1988 between the erstwhile Gordon's Bay Municipality (referred to in the agreement as "the lessor") on the one hand and Concor. Western Cape (Pty) Ltd and Fleur Holiday Homes (Pty) Ltd, jointly and severally (referred to in the agreement as athe lessee") on the other hand. In terms of this agreement:

The lessor let the vacant land on which the relevant 78 dwellings were later constructed to the lessee; the lessee, had to complete a development of the property in accordance with certain plans which were no longer available. The development entailed, inter alia, the erection of 78 demountable homes on the property (which were to be sold to sub-lessees). Clause 5 (a) of the agreement provided that the agreements, unless otherwise terminated, would be for a period of five years, calculated from the date of possession. Clause 5 (c) provided, inter alia, that, on expiry of the lease, all improvements which are of an immovable nature, but excluding the 78 demountable units which would remain ..the sole property of the sub-lessee, would vest in the lessor. The second agreement produced was the lease agreement, dated 1 May 1987, in terms of which Site No 8 was leased by Fleur/Concor to one LJ Rothman. The witness could not find any agreement

reflecting the substitution of the City council for Fleur/Concor, or the acquisition by Rothman of Dwelling No 8, but this must have occurred because the witness produced an agreement in terms of which the Council, as lessor, consented to the assignment of the lease by LJ Rothman to Louwtjie Rothman Goodwood CC, while it is known that Rothman sold "Fleur Vakansie Huis Nr 8" to the Plaintiff in terms of a deed of sale, dated 24 February 2006, a copy of which is included in Bundle "B". It is common cause that assignment of the lease was effected by Louwtjie Rothman Goodwood CC to the Plaintiff, although no agreement could be found which evidenced this assignment.

IS THE DWELLING MOVABLE OR IMMOVABLE?

[22] It was contended on behalf of the Defendant during the trial that the whole of the dwelling became an immovable structure, whereas the Plaintiff conceded that the bedroom and bathroom, which were added to the house during the Rothman era, as well as a braai place, were of an immovable nature. An inspection in loco was conducted, but it is contended on behalf of the Plaintiff that the movability or not of the structure is not an issue which the Court has to determine. I, however, shall return to this aspect later on in this judgment. It was clear from the evidence of Mr Du Plessis that he intended to and did sell the dwelling and not the leased land on which it is situated to the Defendant. It is equally clear from the evidence of the Defendant that he intended to buy what he saw, namely the particular house at No 8 Fleur Park. He knew that the land is leased by the Municipality and it was not his intention to buy the lease itself. This is (according to the Defendant) a familiar concept in Norway to buy a cottage on somebody's land which is leasehold. He testified that there you buy the cottage but the land still remains the property of the owner. The Defendant made it clear in his

testimony that his perception was that the cottage would become his and that the land would remain the property of the lessor, the City Council. It is common cause that the City of Cape Town was not a party to the agreement and did not purport to sell the property occupied by the cottage to the Defendant.

[23] Earlier on in this judgment it was pointed out that the question for determination is whether the purchase of the "immovable"

structure on the land in question constituted an alienation of land. Christie, The Law of Contract in SA (5th edition) page 113 gives the following telling exposition:

"Subject to this definition, the word "land" should be given its ordinary, meaning. This includes not only the soil but buildings and anything else permanently attached to it, but it does not necessarily follow that such fixtures must be classed, as land when considered separately from the soil to which they are attached. To regard the sale of a building for demolition and removal or the sale of standing crops for reaping and removal, as a sale of land would be a straining of language, and if the legislature had intended to include such sales it could have made its intention clear by using the words "immovable property" instead of "land". "

De Wet & Van Wyk, Kontrakreg (5th edition) Volume 1 page 317 defines “ground” for purposes of section 2 (1) of the Alienation of Land Act as follows:

“Wat grond is, is min of meer duidelik, naamlik ‘n deel. van die oppervlakte van die aarde. ”

A seller need not be the owner of the object of the sale in order to conclude a valid agreement of sale. He does, however, warrant that somebody else with a better right will not deprive him of the subject matter of the sale. See De Wet & Van Wyk, Kontrakregte & Handelsreg page 329. Mr Smit submitted that an untenable situation will arise should it be held that the sale of an immovable object constitute a sale of land as contemplated in this subsection. In Mr Smith's contention that will mean that the sale of, for instance, the trees in a cultivated forest, crops on land, a windmill which becomes immovable, immovable factory machinery, usable items in a mined house etc. have to comply with the provisions of this subsection. I agree. This cannot have been the intention of the legislature when the provisions of section 2 (1) of the Alienation of Land Act presently under consideration were enacted.

[24] One must always bear in mind the historical imperatives when a determination of this nature is being made. Originally as fully described supra the Municipality of Gordon's Bay never wanted to part ways with the land in question. However, clearly there was a need to allow people, to temporarily use the surface of this land for which the Municipality did not have immediate need to use. That is the reason why demountable dwellings became the way forward. It is perhaps fitting to record hereunder the observations made and agreed to by the legal representatives in an inspection in loco which was held at 8 Fleur Park Gordon's Bay on 7 June 2012 at 1 lh30. I document the observations hereunder:

VERANDA

[25] It is recorded that the western side of the property was extended with the construction material which consists of aluminum and glass panels, a bricked floor, an outside braai constructed from brick and mortar, with a corrugated iron roof.

THE ORIGINAL CONSTRUCTION

[26] The original construction consists of precast panels, both inside and outside and is divided into two bedrooms, a bathroom and an open plan kitchen and living area. The previous veranda was also enclosed with the extension on the western side of property and is now part and parcel of the living area adjacent to the open living area.

THE SOUTHERN SIDE OF THE PROPERTY

[27] Adjacent to the original construction of the southern side of the property was extended by adding a further bedroom and en suite bathroom, as well as a storage room with a sliding garage door. This extension, i.e. the southern side of the property is constructed from bricks and mortar.

GENERAL

- [28] The living area and bathroom have tiled floors, whilst the bathroom in the original construction has wall tiling approximately shoulder height whilst the en suite bathroom in the southern section is tiled from floor to ceiling. The bedrooms are carpeted on what purports to be a cement/concrete floor. It also appears that the floor tiles are attached to a cement/concrete floor. The ceilings throughout the property consist of rhino board. The property is fully electrified and all electricity wiring is imbedded in the walls. The kitchen and bathrooms are connected to the municipal water supply and there are two flush toilets, a bath and two showers.
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ORDER

- [30] In the circumstances I make the following order:
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