

SOUTH AFRICA / JUDGMENT

La-opta (Pty) Ltd v Bartlett (17320/09) [2010] ZAWCHC 57 (25 March 2010)

[2010] ZAWCHC 57

COURT

Western Cape High Court, Cape Town

BEFORE

Zondi

CASE / FILE NUMBER

17320/09

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IN

THE HIGH COURT OF SOUTH AFRICA (EASTERN CIRCUIT LOCAL DIVISION)

CASE

NO: 17320/09

In the matter between: LA-OPTA
 (PROPRIETARY) LIMITED Plaintiff
 and
 JOHN
 HENRY BARTLETT Defendant

JUDGMENT

DELIVERED ON 25 MARCH 2010

ZONDI, J INTRODUCTION

- [1] In this matter the plaintiff sues for rectification of the deed of sale it concluded with the defendant on 30 December 2006, an order compelling the defendant to register transfer of unit 9 of Jodila Woonstelle sectional title scheme situated on erf 12528 Mossel Bay ("the property") into the name of the plaintiff against payment of the purchase price and costs.
- [2] What the plaintiff seeks to have rectified in the deed of sale is the description of the property. The deed of sale describes the property as follows:

"erf nommer: 12528 Mosselbaai Straatadres: Montaguestraat 72, Mosselbaai."

- [3] It is common cause that the correct description of the defendant's property is "Dee/ no 9 en tuin 1 gelee in die Deeltitelskema Jodilahof, Montaguestraat Mosselbaar.

Pleadings

- [4] In its particulars of claim the plaintiff sets out the bases for its cause of action. It alleges inter alia, the following:

"6. Die skriftelike koopkontrak reflekteer nie die gemeenskaplike bedoeling van die partye behoorlik nie.

7. Die foute wat gemaak is in die opstel van die koopkontrak was die gevoig van 'n bona fide en 'n gemeenskaplike fout tussen die partye sowel as die eindomsagent. Die koopkontrak staan gerektifiseer te word in die volgende opsigte:

7.1 Die eiendomsbeskrywing, waar dit in die aanhef tot die kontrak aan die bokant van bladsy 2 verskyn, moes geleses het "Deel nommer 9 en Tuin nommer 1 in die Deeltitelskema SS 469/1997 bekend as Jodilahof, Montaguestraat,

Mosselbaai en soos beskryf en aangedui op deeltitelplan nommer SS469/1997.

7.2 Die bedrag van R2,200,000.00, waar dit in klousule 1(b) verskyn, moet gerektifiseer word om te lees "R2,400,000.00",

7.3 Deur die datum van 15 Januarie 2006, waar dit in klousule 6(a) verskyn, moet gerektifiseer word om te lees "15 Januarie 2007".

8. Die Eiser bet die Verweerder versoek om toe te stem tot die rektifikasie van die kontrak om die gemeenskaplike bedoeling van die partye korek te weerspieel maar die Verweerder versuim om sodanige toestemming te verskaf."

- [5] In his plea the defendant denies, inter alia that the contract should be rectified. He contends that the wrong description of the property was not as a result of the parties'

common mistake. In the alternative the defendant alleges that the deed of sale was cancelled because of the plaintiffs repudiation. In the further alternative the defendant pleads that the plaintiff exercised an election to not continue with the transaction on the basis that the property was registered as a sectional title and finally, in the further alternative the defendant avers that the deed of sale lapsed because the suspensive condition to which it was subject, was not timeously fulfilled.

- [6] The parties are in agreement that clause 1(b) of the deed of sale should be rectified to read "R2 400 000-00" instead of "R2 200 000-00" and that the date of complying with suspensive conditions set out in clause 6(a) be 15 January 2007 instead of 15 January 2006.

The Evidence

- [7] Mr Johannes Jacobus Lombard, the plaintiffs representative was the first witness to be called by the plaintiff.
- [8] The plaintiff wanted to buy a house in the old Mossel Bay town and to this end during December 2006 Mr Lombard contacted Jeanette Le Roux ("Le Roux"), an estate agent, who was marketing the defendant's property. Le Roux was at that stage employed by Homenet Trio.
- [9] In due course Le Roux took Mr Lombard to the defendant's property to view it. Mr Lombard was happy with the house. Le Roux prepared an offer to purchase which Mr Lombard signed on 30 December 2006. The plaintiffs initial offer of R2 500 000-00 on the property was rejected by the defendant but the parties eventually agreed on R2 700 000-00. The defendant signed the offer to purchase on 1 January 2007.
- [10] Some few days later Mr Lombard became aware that the description of the property was incorrect. It was not a full title as indicated on the deed of sale but was a sectional title known as Unit 9 of Jodila Woonstelle scheme situated at erf 12528 Mossel Bay.
- [11] Mr Lombard immediately contacted the defendant and confronted him regarding the discrepancy in the property description. The defendant told Mr Lombard that when he signed the contract he was not aware that there was a sectional title scheme on the erf. The parties agreed to resolve the issue on the basis that the defendant would have the property removed from the sectional title scheme and convert it into a full title. Mr Lombard suggested to the defendant that he use Mr Francios Van Der Walt for that purpose. Mr Francios Van Der Walt is a land surveyor who prepared a sectional plan for the scheme.
- [12] In the meantime Mr Lombard instructed his attorney of record, Mr Ras to prepare an addendum to the deed of sale to rectify the property description so as to describe it as a unit in the sectional title scheme. Clause 2(a) of the addendum provides as follows:

"2. In uitvoering van die partye se doelstelling en in besonder die Koper se bereidwilligheid on die voormelde aanbod aan die Verkoper te gemaak het teen gemelde prys, sal die Verkoper verplig wees om op sy eie koste en risiko aansoek tot die betrokke owerheid en ander nodige instellings, indien enige, te rig ten einde:

- (a) die eiendom soos deur die koper begerig is om aan te koop, uit die gemelde Deeltitelskema uitgesny te kry en daarvan losgemaak te word, ewe asof dit in die eerste instansie nie deel van sodanige deeltitelskema gevorm hetnie..."

Clause 3 states as follows:

"Indien, desnieteenstaande alle redelike nodige en wenslike stape daartoe deur die Verkoper geneem en/of gelaat neem, die Verkoper nie daartoe suksesvol mag wees on die handeling soos vermeldin klousule 2(a) tot en met (d) hierbo te kan volvoer nie, kom die partye ooreen dat die gemelde Koopkontrak steeds nie sal verval nie, maar dat:

- (a) die Koper dan geregtig sal wees om by wyse van skriftelike kennisgewing daartoe aandie Verkoper, sy bereidwilligheid om die aankope te doen, aan te pas en te verander sodat hy dan die gemelde Deeltiteleenheid met die Uitsluitlike Gebruiksgebeid soos tans daaraan gekoppel soos waarna hierintevore verwys word, sal in koop aanneem en transport daarvan volvoering van bepalinge van die Koopkontrak sal aanvaar, en;
- (b) dan wel teen sodanige, moontlike, vermindere prys as waartoe die partye dan onderling mag ooreenkom en;
- (c) verleen die Verkoper hiermee die onherroeplike en uitsluitlike Opsig en Reg van Eerste Weiering, aan die Koper om sodanige Deeltiteleenheid met diese Uitsluitlike Gebruiksgebied dan steeds reggeldiglik in terme van die gemelde Koopkontrak aan te koop teen sodanige nuutonderhandelde

koopprys of teen sodanige koopprys as waartoe die Verkoper op daardie stadim moontlik, skritelik, van 'n bona fide voornemende derde party as koper mag beskik."

- [13] Mr Lombard forwarded the addendum to Le Roux for her to present to the defendant for signature. The defendant refused to sign the addendum.
- [14] Clause 3 made provision for what would happen if the defendant did not succeed in having the status of the property converted. It provided that the plaintiff could by means of a written notice declare his willingness to buy the property as a sectional title unit and in which case a reduced price would be negotiated.
- [15] When Mr Lombard subsequently asked the defendant about progress regarding the removal of the property from the sectional title scheme the defendant told him that he had instructed his attorney, Mr Deacon to get the process underway and had contacted owners of other units for their consent to the subdivision.
- [16] In an attempt to resolve the problem regarding the property description in or about May 2007 Le Roux prepared a new offer to purchase which she forwarded to Mr Lombard. Mr Lombard signed the offer to purchase and faxed it back to Le Roux on or about 17 May 2007.
- [17] In terms of the new offer to purchase the defendant undertook the responsibility of subdividing and converting the status of the property at his own costs but the purchase price would be reduced to R2 670 000-00. The plaintiff offered to assume the responsibility of having the property converted into a full title because it realised that the defendant was dragging his feet.
- [18] In particular the new offer to purchase had the following special conditions:

"16. Spesiale Voorwaarde

16.1 Die koop is uitdruklik onderhewig daaraan dit die koper op sy eie onkoste en binne 'n redelike tyd vanaf datum van aanvaarding hiervan, toestemming sal bekom om die hierbyverkoopte eiendom uit die bestaande Deeltitelskema onthef te kry ten einde die verkoopte

eiendom as 'n afsonderlik gekarteerde voltitelerf in naam van die koper te kan laat transporter; en

16.2 Dat, sou die koper nie suksesvol hierin wees nie, hierdie koop nie summier en/of outomaties sal verval nie, maar sal die koper dan in sy uitsluitlike diskresie geregtig wees om met hierdie koop voort te gaan ewe asof hy in die eerste instansie die Deeltiteleenheid soos beskryf in die aanhef hiertoe van die verkoper wens aan te gekoop het en dan transport daarvan uit krag van hierdie koopakte op dieselfde terme en voorwaardes as wat hierin vervat word, te neem en in sy naam te laat passer."

[19] Clause 16.2 of the offer to purchase was inserted to ensure that the sale did not depend on the successful conversion of the property from being a sectional title to a full title. In other words the plaintiff would still buy the property as a sectional title if it became impossible to convert its status.

[20] The defendant refused to either sign the new offer to purchase of May 2007 or agree to a rectification of the original contract.

[21] Mr Lombard denied the allegation by the defendant in its plea that the plaintiff lost interest in the property when it discovered that it was not a full title. He stated that it was always the plaintiffs intention to buy the property irrespective of its form as its intention was to buy the "Kliphuis" referring to the house on the property. When the plaintiffs attorneys wrote to the defendant on 12 September 2009 demanding rectification of the original contract, the defendant, by a letter dated 25 September 2007, advised the plaintiffs attorneys as follows:

"Verkoping : DrJH Bartlett / La-Opta (Edms) Bpk

1. Ons verwys na bogemelde aangelentheid en u skrywe gedateer 12 September 2007 aan Dr Bartlett.
2. Ons vind dit nie nodig op hierdie stadium om op u skrywe te antwoord nie en behou ons regte ten opsigte daarvan voor.
3. Ons is van mening dat die ooreenkoms van meets af nietig was as gevolg van die verkeerde eiendomsbeskrywing en kan ons verder nie akkoord gaan met u houding dat rektifikasie heirin geregverdig of moontlik is nie veral verder in die lig van onder andere u klient se telefoniese gesprek met myself daaromtrent nie.
4. Ons instruksies is gevolglik om u mee te deel dat u klient se eis hiermee gerepudieer word en sal verdere aksies verdedig word."

[22] The plaintiff conceded that it did not pay the deposit nor did it apply for a loan as required by the deed of sale but blamed its failure on the contract which incorrectly described the property. It was Mr Lombard's understanding that the bank would not have financed the transaction in which the property was incorrectly described.

- [23] The plaintiff called Le Roux as its second witness. She was the defendant's estate agent. She marketed the defendant's property. The defendant did not inform her that the property was a sectional title unit. When she prepared the deed of sale she used the street address of the property in order to establish its description. According to her chart 72 Montagu Street, Mossel Bay was also known as erf 12528 Mossel Bay.
- [24] After preparing the deed of sale Le Roux took it to the plaintiff for signature and thereafter presented it to the defendant for signature. She asked the defendant to carefully go through the contract before signing it and she spent almost an hour with him explaining the terms of the contract to the defendant. After carefully reading the contract the defendant signed it without querying the manner in which the property was described.
- [25] Le Roux became aware for the first time that the description of the property in the contract was incorrect when Mr Lombard telephonically brought it to her attention on or about 3 January 2007. She denied the suggestion by the defendant that Mr Lombard lost interest in the property after becoming aware that the property was a sectional title unit. It was her impression that Mr Lombard never lost interest in the property. He wanted the sale to succeed. He was mainly interested in the Kliphuis.
- [26] After Le Roux became aware of the correct status of the property she on 4 January 2007 wrote to the defendant's transferring attorneys advising them as follows:
- "Soos telefonies bespreek het ek uitgevind dat die eiendom eintlik 'n deeltitel eiendom is. Die Verkoper is bereid om deur die proses te gaan om die eiendom eie title te maak en die Koper klink nog steeds genee om die eiendom te koop indien dit sou geskied.
- Ek sal dit op prys stel indien jy nog vandag die Addendum kan opstel sodat ek dit gou moontlik geteken kan kry."
- [27] Some few days later Le Roux received an addendum from the defendant and which to her knowledge she forwarded to the plaintiff or its attorney, Mr Ras. She later received another addendum from Mr Ras which she in turn forwarded to the defendant for signature and to which neither the defendant nor his attorneys reacted.
- [28] Le Roux prepared another deed of sale when Mr Lombard informed her that the plaintiff had decided to buy the property as a sectional title in view of the defendant's delay in converting the property from a sectional title to a full title. She then sent it to the defendant for signature. The defendant did not sign it.
- [29] The third witness for the plaintiff was Mrs Martha Johanna Bezuidenhout. She is in the home loans section of Absa bank, Rustenburg branch. During September 2007 the plaintiff had a meeting with Mr Lombard at Brits Absa branch where the plaintiff has a bank account. Mr Lombard needed a loan to purchase the property. He gave her a May 2007 offer to purchase. The plaintiff qualified for a 100% loan because of creditworthiness of Mr Lombard. She further testified that it is the policy of Absa to not approve applications for finance unless the property, in respect of which finance is sought, is properly described.

- [30] The above were only witnesses for the plaintiff.
- [31] The defendant testified that he was aware at the time of sale that the property was a sectional title unit but did not inform either Le Roux or the plaintiff as he had not considered it important. He was not aware that the property was incorrectly described in the deed of sale. He did not pay attention to its description when he read the deed of sale. He also confirmed that Le Roux telephoned him in early January 2007 and wanted to know why he had not informed her that the property was a sectional title unit and also told him that Mr Lombard was angry and he wanted to discuss the matter with him.
- [32] The defendant thereafter arranged a meeting with Mr Lombard. At the meeting Mr Lombard informed him that he did not want to buy the property as a sectional title unit and wanted to know if the defendant was prepared to change it into a full title. Mr Lombard explained to him what the process would entail and suggested to him that Mr Francios Van Der Walt, a land surveyor be used for that purpose. The defendant did not have any objection to the suggestion.
- [33] The defendant contacted Mr Van Der Walt and asked him whether it was possible to convert the status of the property and the cost which would be involved. He thereafter reported to Mr Lombard what Van Der Walt had told him. In order to get the process underway the defendant sent the sectional title plan to his attorney, Mr Deacon to enable him to instruct Mr Van Der Walt to do the necessary. In the meantime the defendant contacted the trustees of the Jodila Woonstelle to obtain their consent to the conversion of the property. But he was unable to immediately obtain the consent of all the trustees as some of them were overseas.
- [34] The defendant testified that the addendum which was prepared and sent by Mr Deacon to Le Roux was never brought to his attention before these proceedings. The only addendum he received from Le Roux is the one which was prepared by Mr Ras on behalf of Mr Lombard. The purpose of the addendum was to rectify the description of the property in the original deed of sale.
- [35] The defendant refused to sign the addendum because of clause 3(a) and (b) and the fact that the addendum made provision for the reduction of the purchase price if the process to have the property converted into a full title failed. When the defendant contacted Le Roux to ascertain from her what the reduced purchase price would have been she informed him that Mr Lombard offered between R2.2 to R2.3 million. His request for a definite written offer from Le Roux fell on deaf ears.
- [36] Nothing further occurred on the addendum. On 17 May 2007 Le Roux sent the defendant a new offer to purchase which had been signed by Mr Lombard.
- [37] The defendant refused to sign the new offer to purchase because it made provision in clause 16.2 that the plaintiff would have the discretion to continue with the purchase should the conversion into full title not be successful.

- [38] At that stage the defendant decided to withdraw his property from the market as he realised that the process to have the property converted was getting too complicated and the indications were that it was not going to succeed and the plaintiffs attempt to have the problem resolved did not assist him either because each time he received an amended offer from the plaintiff it contained special conditions which were not favourable to the defendant. The defendant telephoned Le Roux and informed her of his decision to remove his house from the market.
- [39] It was his impression that Mr Lombard did not want to purchase the property as a sectional title unit. The defendant stated that if Mr Lombard was prepared to buy the property as a sectional title unit he would have requested the defendant to agree to an amendment of its description of the property to which the defendant would have consented.
- [40] The defendant confirmed that Mr Lombard was not angry when he informed him that it had come to his attention that the property was a sectional title unit and not a full title and besides what was conveyed to him by Le Roux regarding Mr Lombard's disinterest in the property, the defendant did not get the impression that Mr Lombard did not want to buy the property if it was a sectional title unit. He stated that his impression was that Mr Lombard was still interested in buying the property irrespective of its description but he wanted to do so on his own terms.
- [41] He rejected the suggestion that his refusal to sign the new offer to purchase prepared by Le Roux and Ras was an indication that he was no longer interested to sell the property to the plaintiff.
- [42] The defendant stated that he was not concerned about the plaintiffs failure to pay a deposit within the period as set out in clause 1 (a) of the deed of sale. The main concern for the parties was to have the property description corrected.
- [43] The last witness for the defendant was Mr Abraham Preller Deacon of Rauch-Gertenbach Inc. His firm was appointed transferring attorneys in the deed of sale.
- [44] Deacon testified that on 4 January 2007 Le Roux informed him that the property description in the deed of sale was incorrect and she asked him to prepare an addendum to rectify the situation. As requested Deacon prepared an addendum which he later forwarded to Le Roux. But he never got it back from Le Roux.
- [45] Deacon stated that he was instructed by the defendant to have the status of the property converted from being a sectional title unit to a full title. For this purpose he instructed the land surveyor, Mr Van Der Walt to get the process underway.

Statement of the Issues

- [46] The question is whether the plaintiff has succeeded to make out a case for rectification of the deed of sale.

Legal Principles

- [47] A party who seeks rectification of the contract must allege that a contract which was entered into does not reflect the true intention of the parties due to the common mistake and what the true intention was (*Strydom v Coach Motors (Edms) Bpk* 1975
- (4) SA 838 (T) at 840h). The only common error which can be rectified is when the agreement as recorded fails to reflect the common intention of the parties. *Offit Enterprises (Pty) Ltd and Others v Knysna Development Co (Pty) Ltd and Others* 1987
- (4) SA 24 (C) at 27H.)
- [48] The specific moment in time for the determination of the common mistake and the true intention of the parties, is the moment the agreement was entered into and the agreement becomes rectified as at that moment.
- [49] This is so because rectification, once granted operates *ex tunc*. As Nienaber JA observed in *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001
- (4) SA 1315 (SCA) at para 33:
- "Rectification does not alter the terms of the agreement; it perfects the written memorial so as to accord with what the parties actually had in mind...
- Having been rectified with retroactive effect, the agreement is deemed to have so provided at the time of its conclusion".
- [50] It enables effect to be given to the parties actual agreement (*Intercontinental Exports (Pty) Ltd v Fowles* 1999
- (2) SA 1045 (SCA) para. 11)
- [51] It is clear that the details regarding the description of the property in the contract were provided by Le Roux from her own sources and without a prior reference to the defendant. There is no reason to reject the defendant's evidence that he did not notice the mistake when he signed the agreement.
- [52] I will also accept Le Roux's evidence that she was not aware of the mistake until it was brought by Mr Lombard to her attention. I also accept Mr Lombard's evidence that he became aware of the correct status of the property subsequent to the conclusion of the agreement.
- [53] In the contract the property is described as an erf instead of as a sectional title unit. This was a mistake which the plaintiff seeks to be corrected. The question is whether the property identified in the agreement as the *res vendita* is in fact the property that the parties intended to sell to each other when they concluded the agreement.

- [54] If at the time of conclusion of sale both parties possessed the same intention with regard to the subject matter but the contract failed to reflect their common intention in regard thereto the contract must be rectified to express the correct intention of the parties.
- [55] Mr Coetsee, who appeared for the plaintiff, submitted that the contract had to be rectified in that the evidence presented shows that at all times the plaintiff intended to buy a sectional title unit.
- [56] In this regard Mr Coetsee referred to various attempts made by the plaintiff to have the contract amended so as to reflect a correct description of the property and which he submitted demonstrate an unequivocal intention on the part of the plaintiff to buy a sectional title unit not a full title property as indicated in the contract. I disagree with Mr Coetsee's contention.
- [57] There is no doubt in my mind that when the defendant signed the deed of sale he knew exactly what he intended to sell. His intention was to sell a sectional title unit. He had no illusion about what he owned. He knew he did not own a full title property. That being the case it can never be said that when the defendant signed the deed of sale he was mistaken as to the identity of what he intended to sell.
- [58] As regards what the plaintiff intended to buy when it signed the agreement, there is no doubt that Mr Lombard's intention was to buy the property as described in the deed of sale. Mr Lombard of the plaintiff clearly intended to buy the property as a full title.
- [59] That Mr Lombard intended to buy the full title property is demonstrated by his reaction the moment he discovered that the property was a sectional title unit. He reacted with shock and immediately confronted the defendant about the discovery. This goes to show that his primary intention was to acquire a full title property and it is for this reason that he persuaded the defendant to have the status of the property converted.
- [60] The parties failed to agree on the method by which the error in the description of the res vendita was to be rectified. The plaintiff wanted to have the problem rectified on its own terms which were not acceptable to the defendant.
- [61] In light of the conclusion I have reached, it is unnecessary to consider other defences raised by Mr Joubert on behalf of the defendant. In the circumstances I find that the plaintiff has failed to prove that both parties had intended to sell to each other a sectional title unit when they concluded the contract and that the contract's failure to express that intention was due to the mistake.

Order

- [62] In the result the plaintiff's claim is dismissed with costs.

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