

SOUTH AFRICA / JUDGMENT

**Philmatt (Pty) Ltd. v Mosselbank
Developments CC (323/94) [1995] ZASCA 154;
1996 (2) SA 15 (SCA); [1996] 1 All SA 296 (A);
[1996] 1 All SA 296 (A) (29 November 1995)
[1995] ZASCA 154**

COURT

Supreme Court of Appeal

BEFORE

Hefer, F H Grosskopf, Van Coller

CASE / FILE NUMBER

323/94

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Case no: 323/94

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

PHILMATT (PTY) LIMITED Appellant

MOSELBANK DEVELOPMENTS CC Respondent

Coram: HEFER, F H GROSSKOPF JJA et VAN COLLER AJA

Heard: 21 August 1995 Delivered: 29 November 1995

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JUDGMENT F H GROSSKOPF JA: The appellant launched an application in the Cape of Good Hope Provincial Division, seeking an order for the provisional winding-up of the respondent, a close corporation, on the grounds that it was unable to pay its debts, as provided in s 68(c) of the Close Corporation Act 69 of 1984, or alternatively, that it was just and equitable in terms of s 68(d) that the respondent be wound up. The court a quo (Hodes AJ) dismissed the application with costs, but granted the appellant leave to appeal to this court.

During 1991 the respondent purchased certain erf 184, Paternoster, situated in the municipality of Vredenburg - Saldanha ("the Paternoster property") with a view to develop it into a township comprising 72 erven. On 8 April 1992 the respondent entered into a written deed of sale ("the deed of sale") with Wale Street Industrial Finance Limited ("Wale Street"), or its nominee, in terms whereof the respondent sold to Wale Street, or its nominee,

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23 of the proposed erven ("the 23 erven") for R18 639 per erf. A certain Esaias Frederick Snyman ("Snyman"), who was the sole member of the respondent at the time, concluded the sale and signed the deed of sale on behalf of the respondent. Snyman, acting on behalf of the respondent and others, entered into a further agreement with Wale Street ("the finance agreement"). The finance agreement was signed by Snyman on 8 May 1992. It provided inter alia for the appointment of Wale Street as the "sole agent" to raise finance in the sum of R2,8 million during the period 1 April to 31 December 1992 to pay for the purchase price of the Paternoster property and the development of the proposed township. It is common cause that Wale Street raised a sum of R135 000 on 8 April 1992, which is incidentally the date upon which the deed of sale was signed. Wale Street also provided other financial assistance before the finance agreement was eventually signed on 8 May 1992, but the total amount raised never came near R2,8 million.

On 29 October 1993 Wale Street nominated the appellant in writing as the purchaser in terms of the deed of sale, and the appellant accepted

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such nomination ("the nomination agreement"). The appellant thereupon tendered performance of its obligations in terms of the deed of sale and demanded transfer of the 23 erven into its name. The respondent's reaction was that neither Wale Street nor its nominee was entitled to claim transfer of the 23 erven inasmuch as Wale Street had failed to honour its obligations in terms of the finance agreement.

The appellant then launched an urgent application in December 1993 seeking an interim interdict restraining the respondent from alienating any of the 23 erven. The respondent consented to the granting of such order, pending the determination of an action which the appellant had to institute on or before 31 January 1994. The appellant duly instituted the action, but before the respondent's plea could be filed the appellant applied on 23 March 1994 by way of an urgent application for the provisional winding-up of the respondent.

It is common cause that if the respondent were obliged to transfer the 23 erven into the appellant's name at a price of R18 639,00 each (which according to the respondent represented the cost price of each erf, without

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making provision for any development costs), the respondent would indeed be unable to pay its debts, as provided in s 68(c) of Act 69 of 1984. Judging only by the terms of the deed of sale, read with the nomination agreement, the respondent appears to be obliged, subject to due performance by the appellant, to transfer the 23 erven into its name. In the court a quo the respondent's opposition to the appellant's application for a provisional winding-up order rested mainly on two legs: first, that the respondent was entitled to rectification of the deed of sale which, if granted, would have had the effect of relieving the respondent of its obligation to transfer the 23 erven to the appellant; secondly, that the deed of sale was of no force or effect in

terms of s 2(1) of the Alienation of Land Act 68 of 1981 ("the Act") inasmuch as a material term of the agreement between the respondent and Wale Street had not been reduced to writing.

The court a quo rejected the respondent's claim to rectification on the strength of certain dicta in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 291, and *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 254, to the

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effect that rectification cannot be raised against an innocent third party such as the appellant. The respondent accepted this finding of the court a quo, and the

question of rectification is accordingly not an issue any more.

The second leg of the respondent's argument was based on s 2(1)

of the Act which provides as follows:

"No alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

The sale of the 23 erven was clearly an "alienation" of "land" as defined in the Act. All the material terms of such alienation therefore had to be contained in the signed "deed of alienation" (ie the deed of sale).

It is necessary to refer briefly to the evidence in order to determine whether there were any alleged material terms of the alienation which were not contained in the deed of sale. Seeing that the proceedings in the court a quo were on notice of motion and that disputes of fact have arisen on the affidavits, the general rule, as laid down in *Plascon - Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623(A) at 634 H-I, applies, viz that the matter

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should be resolved on the basis of the facts averred in the appellant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent. In my view this is clearly not a case where the allegations of the respondent are so far-fetched or untenable that the court would be justified in rejecting them merely on the papers.

The only two deponents who have personal knowledge of the negotiations preceding the conclusion of the deed of sale and the finance agreement, and who would know whether any prior or contemporaneous oral terms of the deed of sale were agreed upon, are Snyman, who acted throughout on behalf of the respondent, and one Leon Stefan van der Westhuizen ("van der Westhuizen"), who negotiated on behalf of Wale Street. At the time when they deposed to their respective affidavits Snyman had ceased to be a member of the respondent, while van der Westhuizen had no further interest in Wale Street.

Snyman made the following allegations in his affidavit with regard to a contemporaneous oral term ("the oral term") which formed part of the agreement concluded between the respondent and Wale Street:

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"Ek bevestig spesifiek dat dit deurentyd deur die ooreenkoms tussen myself en Wale Street Finance Limited was dat hulle 23 erwe teen kosprys kon kry onderhewig daaraan dat hulle die nodige finansiering kon kry vir die aankoop van die grond en vir die finansiering van die dienste. (Dit wil se die hele projek in geheel). Hulle kon nie die finansiering bekom nie en die ooreenkoms net gevolglik nie tot stand gekom nie."

Snyman further confirmed the following statement by one Anthony Robert

Murris, who deposed to the answering affidavit on behalf of the respondent:

"Dit was 'n uitdruklike term van die ooreenkoms dat die koopkontrak slegs werking sou he indien Wale Street die finansiering sou bekom."

Van der Westhuizen specifically denied that there had been any such oral agreement. The court a quo pointed out that although the appellant was well aware of the serious dispute of fact which arose on the affidavits, it chose to argue the matter on the papers and not to apply for the matter to be referred to oral evidence. In the circumstances the general rule in *Plascon -Evans, supra*, applies, with the result that the respondent's version has to be accepted as correct for purposes of this case.

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The court a quo found that it was clear from the affidavits filed on behalf of the respondent that the deed of sale was not intended to be the exclusive memorial of the whole of the agreement between Wale Street and the respondent, but that it recorded only part of a larger and partly oral agreement. It was held that the evidence showed that it was an express oral term of this larger contemporaneous agreement that the deed of sale was subject to a suspensive condition, namely that the respondent's obligation to perform would only come into operation once Wale Street had procured the necessary finance for the purchase of the Paternoster property and the financing of the services.

The court a quo referred to certain passages in the judgment of this court in *Johnston v Leal* 1980(3) SA 927(A) dealing with the so-called "parol evidence" or "integration" rule, and concluded that the deed of sale in the present case did not constitute an integration of the whole agreement, but only a partial integration, and that the integration rule therefore did not prevent the admission of extrinsic evidence relating to the oral term.

The court a quo further held that the oral term was a material term¹⁰

of the sale and that failure to incorporate it in the deed of sale resulted in the sale being void in terms of s 2(1) of the Act. The court a quo concluded that the respondent was therefore not bound to transfer the 23 erven into the appellant's name at the agreed price, which would otherwise have rendered the respondent insolvent. The appellant's application for liquidation was accordingly dismissed with costs.

In this court the appellant submitted that the respondent is in law precluded from relying on extrinsic evidence relating to the oral term for the following reasons. It was contended in the first place that the admission of such extrinsic evidence would have the effect of transgressing the so-called parol evidence rule; secondly, that it would undermine the policy underlying s 2(1) of the Act, which seeks to prevent uncertainty and disputes concerning the contents of contracts for the alienation of land; thirdly, that the provisions of clause 9 of the deed of sale, in terms whereof Wale Street acknowledged that the deed of sale constituted the whole agreement between the respondent and itself, precludes the respondent from tendering evidence to contradict or qualify

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the provisions of the deed of sale; fourthly, that the respondent is estopped from proving the oral term which would have the effect of avoiding the sale. I shall deal with these submissions seriatim.

The appellant's first argument was that the parol evidence rule prevents the admission of extrinsic evidence. This rule was formulated as follows by Watermeyer JA in *Union Government v Vianini Ferro-Concrete*

Pipes (Pty) Ltd 1941 AD 43 at 47:

"Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."

(See *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel* 1975(3) SA 16(A) at 26A-D; *Rielly v Seligson and Clare Ltd* 1977(1) SA

626(A) at 637C-D.) After pointing out that several writers on the law of evidence hold the view that these rules are not strictly rules of evidence the

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learned judge proceeded as follows at 47:

"Whatever may be the correct view as to the precise nature of the rules, it is clear that they do not prevent a party from setting up the case that the contract is not a presently enforceable contract inasmuch as it is conditional upon the happening of some event which has not occurred." It follows that the integration rule does not preclude extrinsic

evidence of a prior or contemporaneous oral agreement that the written contract shall not take effect except in a certain contingency. That much appears from the second passage from *Union Government v Vianini Ferro-Concrete Pipes*, supra, quoted above, and from the following remarks of Innes CJ in *Stiglingh v Theron* 1907 TS 998 at 1003:

"But, again, evidence is admissible of a separate oral agreement constituting a condition precedent to the attachment of any liability under the written instrument. This is an exception to the general principle, more apparent than real, because such evidence does not essentially tend to vary the document. Accepting its terms as they stand, it aims at suspending its operation. If the suspension fails or ceases, then admittedly the contract takes effect in accordance with its ordinary meaning."

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(See also *Aymard v Webster* 1910 TPD 123 at 129; *Johnston v Leal*, supra, at 938H and 946H). It remains problematical, however, to determine in what circumstances this exception to the parol evidence rule would apply, and when extrinsic evidence of a suspensive condition would be admissible. (See *Thiart v Kraukamp* 1967(3) SA 219(T) at 224A-226E; Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed 309-312.)

It is not necessary, however, to decide whether the extrinsic evidence should be admissible on this basis, inasmuch as there is another and more compelling reason for allowing the evidence of the oral term in the present case. The object of the respondent in seeking to adduce this extrinsic evidence was not to incorporate the suspensive condition as a term of the deed of sale, and then to enforce such term by relying on *Wale Street's* failure to comply with the suspensive condition. Nor did the respondent seek to contradict, alter, add to or vary the terms of the deed of sale as such. The respondent merely wished to introduce the extrinsic evidence in order to establish the existence of a material oral term which was not incorporated in the deed of sale, and to show

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that the deed of sale therefore did not constitute a valid and enforceable deed of alienation in terms of s 2(1) of the Act. See in this regard *Johnston v Leal*, supra, at 942H-943G, and more particularly at 943B-C where Corbett JA said that the aim and effect of the integration rule -

"is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract." (Emphasis added.)

The learned judge further concluded at 943F-G:

"To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered:" (Emphasis added.)

The object of the respondent was certainly not to redefine the terms of the deed of sale, or to enforce the deed of sale as altered; on the contrary, the respondent sought to establish that the deed of sale was invalid and unenforceable. The admission of the extrinsic evidence in these circumstances

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does not seem to me to be contrary to the parol evidence rule. In fact, in *Johnston v Leal*, supra, at 945E-946E the learned judge referred to a so-called qualification of the integration rule which relates to the validity of the

transaction, and concluded (at 946E) that -

"the parol evidence, or integration, rule does not preclude the court from enquiring into the true content of the transaction in order to determine the validity thereof...."

The learned judge found support for this qualification of the integration rule inter alia in the following general statement by Hoffmann South African Law of Evidence 2nd ed at 215 (which statement is repeated and extended in the 4th ed of Hoffmann and Zeffertt's The South African Law of Evidence at 300):

"The fact that a transaction has been embodied in a document does not preclude a party from attacking its validity. For example, evidence may be adduced to prove that it was induced by fraud, duress or misrepresentation, or that it is void for mistake, illegality or failure to comply with the terms of a statute." (Emphasis added)

The respondent sought to introduce the extrinsic evidence with exactly that object in mind, viz to show that the deed of sale was void for failure to comply

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with s 2(1) of the Act, inasmuch as it did not incorporate a material term of the sale. (A term "suspending the whole contract pending fulfilment of a condition" was held to constitute "a material term of the contract" (see *Johnston v Leal*, supra at 937G-938A, and cases there referred to.))

I am of the view, therefore, that the parol evidence or integration rule does not prevent the respondent from adducing the extrinsic evidence.

The second reason advanced by the appellant why the extrinsic evidence should be disallowed, is that it would be contrary to s 2(1) of the Act

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