

SOUTH AFRICA / JUDGMENT

Supreme Ontwikkelings Bk and Others v Perold N.O. and Others (36416/2011) [2015] ZAGPPHC 347 (14 May 2015)

[2015] ZAGPPHC 347

COURT

North Gauteng High Court, Pretoria

BEFORE

C Pretorius

CASE / FILE NUMBER

36416/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

number: 36416/2011

Date:

14 May 2015

Reportable

Not

of interest to other judges

In

the matter between:

SUPREME

ONTWIKKELINGS

BK.....FIRST

PLAINTIFF

TOWER

CITY TRADING 340

BK.....SECOND

PLAINTIFF

HENRI

LAMPRECHT PRETORIUS

N.O.....THIRD

PLAINTIFF

TJARDA

PRETORIUS

N.O.....FOURTH

PLAINTIFF

MATTHYS
CHRISTIAAN PRETORIUS
N.O.....FIFTH
PLAINTIFF
MARCO
GAGIANO.....SIXTH
PLAINTIFF
ALAIN
MARCEL LEON JOSEPH
HOCEPIED.....SEVENTH
PLAINTIFF
BARBARA
ALICE
HOCEPIED.....EIGHTH
PLAINTIFF
CASPER
JOHAN HENDRIK
BOTH.....NINETH
PLAINTIFF
TUKANI
PROPERTY (EDMS)
BPK.....TENTH
PLAINTIFF
LUCAS
JOHANNES
NEL.....ELEVENTH
PLAINTIFF
LUCAS
JOHANNES
NEL.....TWELVETH
PLAINTIFF
BAREND
JOHANNES GYSBERTUS CRONJE.....THIRTEENTH
PLAINTIFF
BERINA
CRONJE.....FOURTEENTH
PLAINTIFF
WAPADRAND
COUNTRY
ESTATES.....FIFTEENTH
PLAINTIFF
And
MARIE-JOSè
KATRIEN PEROLD
N.O.....FIRST
DEFENDANT
JAN HENDRIK NEL
N.O.....SECOND
DEFENDANT
IZAK ABRAHAM
PEROLD

N.O.....THIRD
DEFENDANT
JOINTSHELF
1198 (EDMS)
BPK.....FOURTH
DEFENDANT

JUDGMENT

PRETORIUS J,

[1] The plaintiffs instituted action against the defendants for a declaratory order setting out:

“ 1. *EIS 1*:

‘n Verklarende Bevel dat:

1.1 Die Perold-Dykor Trust versuim het om te voldoen aan die huisreëls van Wapadrand Country Estates (Edms) Bpk;

1.2 Die Perold-Dykor Trust en hulle verteenwoordigers se vrye onbelemmerde toegang oor die geregistreerde reg van weg serwituut oor Gedeelte 348, Gedeelte 349, Gedeelte 350, Gedeelte 351 en Gedeelte 352 verbeur word tot en met

1.3 Voldoening aan die huisreëls van die Wapadrand Country Estates (Edms) Bpk;

1.4 Alternatiewelik dat die Perold-Dykor Trust verplig word om aan die huisreëls van Wapadrand Country Estates (Edms) Bpk te voldoen en daaraan gebonde is.

2. *EIS 2: ALTERNATIEWELIK TOT EIS 1 HIERBO*

2.1 Dat die Perold-Dykor Trust die volgende bedrae aan die Vyftiende Eiser betaal:

2.1.1 R14 764.44

2.1.2 R15 264.44

2.2 Dat die Vierde Verweerder die volgende bedrag aan die Vyftiende Eiser betaal:

2.2.1 R15 873.76”

[2] In Limine:

A pre-trial minute dated 26 March 2015 indicated that the parties had agreed that the court should first deal with the various points in limine that the defendants raised. It was agreed in terms of Rule 33(4) that these points in limine would be dealt with separately. The matter was subsequently heard and it was decided that the court has to adjudicate the points in limine as separate from the other issues in terms of Rule 33(4). The points in limine which were raised is:

1. “Geskiloplossingsprosedures: Arbitrasie: Erwe 230 en 231

Geskiloplossingsprosedures: Arbitrasie: Gedeeltes 348 tot en met 352.”

2. “Eisers voeg nie kontrakterende party: Oorspronklik erwe 230 en 231

Versuim deur die Eisers tot voeging van Cornelius Jacobus De Villiers in sy persoonlike hoedanigheid en die La Rochelle Trust as eie entiteit.”

[3] The onus to start is on the defendants to prove the points in limine.

[4] The first point in limine relates to whether the court should deal with this action or whether the matter must be referred to alternative dispute resolution

procedures, which according to the defendant includes arbitration. The defendant alleges that according to the sale agreement the dispute should be adjudicated through arbitration or by a referee in connection with erven 230 and 231. These erven were bought by the first plaintiff on 26 November 2001 and subsequently sold to the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th plaintiffs.

[5] The defendants allege that all the subsequent owners who bought from the first plaintiff are bound to all the terms as agreed in the sales agreement between the first plaintiff and the defendants.

[6] The same agreement applies, according to the defendants, to erven 348, 349, 350, 351 and 352 which was sold on 21 September 2001 to Mr Corne Jacobus de Villiers in his personal capacity, alternatively he acted on behalf of the La Rochelle Family Trust. In this instance neither Mr de Villiers nor the La Rochelle Family Trust are owners of these erven anymore.

[7] The second point in limine deals with the non-joinder of the original owner of erven 230 and 231, which, according to the defendants, is Mr PA Reinecke, who

entered into the original agreements either in his personal capacity or as representative of the first plaintiff. According to the defendants the plaintiffs had to join Mr CJ de Villiers and the La Rochelle Family Trust. He or the La Rochelle Family Trust were the original owners at portions 348, 349, 350 and 351. Erven 348, 349 and 350 are owned by the first and second plaintiffs and portion 351 is owned by the Denver Trust of which the 3rd, 4th and 5th plaintiffs are the trustees.

[8] Background to Dispute:

The main dispute in this matter relates to so-called “house rules” of the Wapadrand Country Estate, which is the collective name for the development on the above erven. The portion belonging to the defendants has the collective name of Faerie Glen Country Estate. The gate and road which form the basis of the dispute gives access both to the residents of Wapadrand Country Estate and the residents of Faerie Glen Country Estate. The defendants rely on the house rules which formed part of the sales agreement to the first owners, whilst the plaintiffs deny that these house rules apply. According to the plaintiffs the house rules, which were adopted at a meeting of all owners on 31 March 2003, are the current house rules and these house rules may and can be amended.

- [9] The defendants chose to call Ms Perold, who is the first defendant, as a witness. Ms Perold is the widow of Mr Perold who set up the Perold Dykor Trust (the “Trust”). He initially divided the estate into erven. He sold the relevant erven either as seller in his personal capacity or as representative of the Trust. Ms Perold is a trustee of the Perold Dykor Trust, as well as the beneficiary of the Trust. She is currently living on portions 432 and 409. The Trust owns portion 352 and the triangle where the gate to the estate is situated. There is a notarially executed servitude on the access road to all the properties. Ms Perold’s evidence is that she has to drive through all the properties of the estate to reach her home. The development is surrounded by a wall with a gate which can be opened and closed by a remote control. This road and gate are the cause of the present litigation, due to outstanding levies not being paid by the defendants for using their gate and the road.
- [10] At present, it is common cause that the first plaintiff is the registered owner of portion 348, the second plaintiff is the registered owner of portions 349 and 350 and the Denver Trust is the owner of portion 351. The 6th plaintiff is the registered owner of portion 352, whilst the 7th and 8th plaintiffs are the owners of portion 1 of Erf 665, the 9th plaintiff is the owner of portion 2 of Erf 665, the 10th plaintiff is the owner of portion 3 of Erf 665. Portion 4 of Erf 665 is owned by the 11th and 12th plaintiffs and the 13th and 14th plaintiffs are the owners of portion 5 of Erf 665.
- [11] The 4th defendant and the Perold Dykor Trust are the registered owners respectively of portion 408 and 409, and the Perold Dykor Trust is the owner of portion 432.
- [12] At present there is a dispute as to which house rules are applicable and whether they are applicable to the defendants.
- [13] It is thus clear from Ms Perold’s evidence that the alternative dispute resolution the defendant is relying on is contained in the sale agreements entered into by the Dykor Perold Trust with the original owners of the erven in question. There is no indication that either Mr de Villiers or the La Rochelle Trust are owners of any of these erven. The agreements entered into by Mr de Villiers in his personal capacity or as a representative of the La Rochelle Trust cannot be used in the present action as neither has been cited as a party, nor are they owners of these properties. Mr de Villiers and the La Rochelle Trust has no interest in the present dispute.
- [14] On 28 January 2006 a meeting was held of the Wapadrand Country Estates (Pty) Ltd which neither Mr Reinecke nor Mr de Villiers attended in their personal capacity or as representatives of Supreme Wonings (Pty) Ltd or La Rochelle Trust respectively. Both the late Mr Perold and Ms Perold attended the meeting which dealt with the gate at Wapadrand Estate. It was agreed at the meeting that all the residents of the Faerie Glen Country Estate would pay a R70 per month levy.

- [15] Mr de Villiers does not own any property on the estate neither does the La Rochelle Trust. Therefor they have no interest in the matter. I find that the plaintiffs correctly did not cite either of the two. Mr Reinecke, similarly, has no personal interest in the matter, but represents the first plaintiff. I find that, in these circumstances, it was not necessary to join Mr Reinecke in his personal capacity.
- [16] Ms Perold conceded that the court will have to decide which house rules are applicable to come to a decision, when examined by counsel for the plaintiff.
- [17] No basis was laid for the admission of hearsay evidence regarding the late Mr Perold and the evidence tendered by Ms Perold as to what the late Mr Perold told her, is not taken into consideration at all when adjudicating the case.
- [18] In the present case the action was instituted on 4 August 2011. All pleadings were served and filed on 22 November 2011. At the first pre-trial held on 19 October 2012 no mention was made of special plea or points in limine. A pre-trial meeting was held on 26 March 2015 where the defendants indicated for the first time that the matter should have been referred to an umpire, although they did not deal with this in their original pleadings. They pleaded to the amended particulars of claim on 10 April 2015 and only raised the above-mentioned points in limine on 10 April 2015. The court finds that these points in limine were raised as an after-thought, although the court has to deal with them. There is no explanation as to why it took the defendants a further three weeks to formally address these points in limine.
- [19] In the present instance the problem is that although the defendants allege that the matter should be dealt with in terms of the house rules there is a dispute as to which house rules are applicable. An umpire will not be able to issue a declaratory order in regards to which house rules should be followed, this will have to be determined by a court.
- [20] In *Universiteit van Stellenbosch v JA Louw (Edms) Bkp 1983(4) SA 321 AD Galgut JA* held at para 21:
- “...It can now be regarded as well settled that a foreign jurisdiction or arbitration clause does not exclude the court’s jurisdiction.*

Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the

protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings. That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question...”

- [21] This sets out a two stage enquiry where the court first has to decide whether the points in limine should be upheld and whether the court should enforce the clause. The difficulty in the present case is that the court will first have to decide which set of house rules applies to the present case.

[22] Furthermore Galgut JA set out at para 26:

“...In each given case much will depend upon its own particular facts and circumstances as well as the stage at which and the manner in which the issue of enforcement of the clause in question is raised.” (Court’s emphasis)

[23] In the unreported case in this division, Vhembe District Municipality v NW Civils Contractors CC, Case no.: A08/2014 (27 February 2015) the full court held at para 28 and 29:

“[28] I agree with Respondent’s Counsel’s submission that the Appellant acquiesced to the jurisdiction of the High Court and that it does not avail it on appeal to attempt to place the Court’s jurisdiction in issue by relying on the contractual procedures for mediation and arbitration. It is correct, as submitted by Counsel for the Respondent, that the Appellant only raises the issue of the availability of contractual remedies of mediation and/or arbitration after having

participated fully in the proceedings in the High Court, after the shoe pinched. (Court’s emphasis)

[29] The issue of mediation and/or arbitration was not raised by the Appellant in the Court a quo as a special plea. It was raised in the body of its plea and argued as a point in limine. After the dismissal of the point in limine the Appellant never challenged the jurisdiction of the High Court to hear the case on the merits. My view is that the issue of mediation and/or arbitration should have been raised and argued as a special plea in order to oust the jurisdiction of the Court a quo.” (Court’s emphasis)

[24] In the present case the issues of mediation and non-joinder were raised as points in limine. There was no special plea as set out in the Stellenbosch case (supra).

[25] The umpire cannot decide which house rules to apply. Ms Perold conceded that only the High Court has jurisdiction to decide which house rules are applicable. There is no evidence before court of the house rules which formed part of the sale agreements, apart from the sale agreement between Mr Perold, in his personal capacity, and Supreme Ontwikkelings BK where portions 230 and 231 were sold to Supreme Ontwikkelings BK.

[26] It is quite clear from Ms Perold’s evidence that all the house rules do not correspond and that a decision will have to be made to decide which house rules are applicable. Had the defendants raised the points in limine or filed a special plea in 2011, 2012, 2013 or 2014, it could be said that it was reasonable, but they waited until five days before trial to raise these questions. They partook three years in the present case by pleading, attending pre-trial meetings and then five days before trial the defendants raise the points in limine. In any event it is quite clear that a court will have to decide which house rules apply as an arbitrator or umpire cannot do so. This point in limine can thus not succeed as the arbitrator or umpire cannot determine which house rules should be used. The plaintiffs had the right to accept that the defendants acquiesced to the jurisdiction of the High Court under these circumstances.

[27] The complaint that the plaintiffs did not join Mr de Villiers or the La Rochelle Trust cannot be entertained. They do not own property on the estate at all. The same applies to Mr Reinecke, he has acted as the representative of the first plaintiff and has no personal interest in the matter.

[28] I have considered the evidence, the pleas and all the arguments, as well as the authorities carefully. I find that there are no merit in both the points in limine.

[29] Therefor the following order is made:

1. The two points in limine are dismissed;
2. The defendants to pay the costs;
3. The main action is postponed sine die.

Judge C Pretorius

Case number : 36416/2011

Matter heard on : 20 – 22 April 2015

For the Plaintiffs : Adv. T Strydom SC

Instructed by : Ehlers Fakude Ingelyf

For the Defendants : Adv. W Scheepers

Instructed by: Couzyn Hertzog & Horak

Date of Judgment : 14 May 2015

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