

SOUTH AFRICA / JUDGMENT

Thompson v City Council of Municipality of Port Elizabeth (518/87) [1989] ZASCA 86; [1989] 4 All SA 865 (AD) (27 July 1989)

[1989] ZASCA 86

COURT

Supreme Court of Appeal

BEFORE

Hoexter, Botha, Steyn, Eksteen, Nicholas

CASE / FILE NUMBER

518/87

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BASIL GOLDIE THOMPSON

and

THE CITY COUNCIL OF THE MUNICIPALITY OF PORT ELIZABETH

Case No. 518/87

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:-

BASIL GOLDIE THOMPSON Appellant and THE CITY COUNCIL OF THE MUNICIPALITY OF PORT ELIZABETH Respondent

CORAM: HOEXTER, BOTHA, STEYN, EKSTEEN, JJA et NICHOLAS, AJA

HEARD: 12 May 1989

DELIVERED: 27 July 1989

JUDGMENT

HOEXTER, JA 2 HOEXTER, JA, In the Magistrate's Court for the district of Port Elizabeth the respondent sued the appellant for payment of R54,11, interest thereon at the rate of 15% per annum a tempore morae, and costs. The appellant resisted the action and by agreement between the parties the issues were submitted to the magistrate by way of a stated case. The magistrate gave judgment as prayed in favour of the respondent; and the appellant noted an appeal against the whole of the magistrate's judgment to the Court a quo. The Court a quo dismissed the appeal with costs. With leave of the Court below the appellant appeals to this Court. Extension 9 of Theescombe Township ("the township") is situated within the Municipality and Division of Port

Eli-zabeth. The appellant is the registered owner of an erf ("erf 1413") in the township. Subsections (1), (2) and (3) of sec 14A of the since repealed Cape Ordinance 33 of 1934, as amended

("the

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("the Townships Ordinance") read as follows:-

"14. A.(1) The Administrator may in granting an application for the establish-ment of a township, the subdivision of an estate or the making of a minor subdivision, in addition to any other conditions impose a con-dition in respect of all or any of the erven therein requiring the erection thereon within a period specified in such condition (here-inafter referred to as 'the specified period') of buildings of a valuation of not less than an amount likewise specified (hereinafter referred to as the 'specified valuation') .

(2) If a condition imposed in respect of an erf in terms of subsection (1) is not complied with, the owner of such erf shall be liable to pay to the local authority in respect of every rate which is levied by it, which becomes due and payable during the year in which the specified period expires and any year thereafter and which could lawfully have been as-sessed and recovered on buildings of the specified valuation, had they been erected on such erf, a penalty

equal

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equal to the amount of such rate; provided that:-

(a) (b)

(3) The provisions of the ordinance applicable to the local authority and relating to the date on which rates become due and payable, the collection and recovery of rates (including the institution of legal proceedings), the interest payable on arrear rates, the issue of any certificate required for the transfer of immovable property, and the seizure and lease or sale of immovable property in respect of which rates have not been paid, shall mutatis mutandis apply in respect of the amount of the penalty referred to in subsection (2) as if it were a rate."

With reference to the above three subsections it was provided

by subsection (4) that:-

"... 'owner' in relation to an erf means the person in whose name such erf is registered in the Deeds Registry and, in the case of an erf not yet transferred by the township owner, means such township owner "

The

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The township was approved by the Administrator on

17 July 1972. In the Official Gazette for the Province of the Cape of Good Hope dated 7 February 1975 the township was notified as an approved township in terms of sec 20(6) of the Townships Ordinance. In granting the application for the establishment of the township the Administrator in terms of sec 14A(1) of the Townships Ordinance imposed a condition

("the condition") in respect of a number of erven (including erf 1413) in the township. The condition, as set out in the stated case, is in the following terms:-

"Geboue van 'n waardasie van nie minder as R7 000 nie, sal op hierdie erf opgerig word binne 'n tydperk van nie meer as 8 jaar van die datum waarop die goedkeuring van die dorp ingevolge Artikel 20(6) van die Dorpe Ordonnansie, 1934 (Ordonnansie nr 33 van 1934) bekend gemaak word, of nie meer as 3 jaar van die datum van die eerste oordrag van sodanige erf na bekendmaking van sodanige goedkeuring nie, watter tydperk ookal die eerste verstryk. Die eienaar sal in enige

verkoopakte

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verkoopakte ten opsigte van genoemde erwe, die bestaan van die genoemde voorwaarde bekend maak."

In terms of sec 3(1)(t) of the Deeds Registries Act, No 47

of 1937, it is the duty of the Registrar of Deeds to -

"...register general plans of erven or of subdivisions of land, open registers of the erven or subdivisions of land shown on such general plans, and record the conditions upon which erven or sub-divisions have been laid out or established."

Pursuant to sec 3(1)(t) of Act 47 of 1937 the Registrar of Deeds duly registered the township and recorded the condition.

Subsequent to the notification of the approval of

the township the township developer on 8 June 1976 gave transfer of erf 1413 to the first buyer thereof. In terms of the condition the obligation to erect on erf 1413 buildings of a valuation of not less than R7 000 ("the obligation")

tion")

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tion") accordingly arose on 8 June 1979. The obligation had not been performed prior to the action. In due course the first buyer of erf 1413 transferred it to one Van Eck. On 14 July 1982 Van Eck and the appellant concluded a written contract of sale ("the deed of sale") in terms whereof Van Eck sold erf 1413 to the appellant on certain terms and conditions. The eighth clause of the deed of sale contained the following provision:-

"CONDITIONS OF TITLE The property is sold in terms of the description thereof in the existing Transfer Deed and subject to all the conditions and servitudes mentioned therein."

The appellant took transfer of erf 1413 from Van Eck on 26 August 1982. The conditions subject to which transfer was given to the appellant are cited in paragraphs A and B of the Deed of Transfer. Paragraphs A and B, insofar

as

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as their contents are relevant to the present appeal, read

as follows:-

"A. SUBJECT to the conditions referred to in Deed of Transfer No. 11420 dated the 8th July 1949.

B. SUBJECT FURTHER to the following conditions contained in Deed of Transfer Nr. 16515 dated the 8th June 1976 imposed by the Administrator of the Cape Province in terms of Ordinance No. 33 of 1934 by the approval of the Theescombe Township Extension No. 9, namely:-

(1)

(2)

(3) Hierdie erf mag alleenlik gebruik word vir sulke doeleindes wat deur die dorpsaanlegskema van die plaas-like owerheid toegelaat word en onderworpe aan die voorwaardes en beperkings wat in die skema bepaal word."

In the stated case it was an agreed fact that when the appellant concluded the deed of sale and when thereafter he took transfer of erf 1413 he had been unaware of the

condition

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condition. In the Court below the parties were agreed as to what the Magistrate had been called upon to decide, and what the issue was on appeal. The judgment of the Court below was delivered by KANNEMEYER, J with the concurrence of ZIETSMAN, J. In the course of his judgment KANNEMEYER, J described the issue as being -

" whether the appellant as a subsequent purchaser of the erf was bound by the condition referred to even though he did not have knowledge of its existence either at the time of entering into the agreement of sale or at the time of the registration of property in his name."

In the action instituted by the respondent against the appellant the respondent sought payment inter alia of the penalty prescribed in sec 14A(2) of the Townships Ordinance. It is common cause that if, notwithstanding his ignorance of the existence of the condition when he acquired erf 1413, the appellant is

bound

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bound by the condition, then the magistrate correctly granted judgment in the respondent's favour, and the appeal must fail.

Sec 14A(1) of the Townships Ordinance empowered

the Administrator, when granting an application for the establishment of a township, to impose a condition requiring the erection on erven therein of buildings of a specified valuation within a specified period. Having exercised that power in the instant case the Administrator went somewhat further and subjoined to the condition a tailpiece

("the addendum") in the following terms:-

"Die eienaar sal in enige verkoopakte ten opsigte van genoemde erwe, die bestaan van genoemde voorwaarde bekend maak."

Both in the Court below and in this Court one of the conten-

tions advanced on behalf of the appellant was that the deed of sale did not comply with the terms of the addendum. This

contention

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contention was rejected by the Court a quo. In this con-

nection KANNEMEYER, J observed:-

"All that is required is that the owner should make the condition known (bekendmaak) in any deed of sale. He did this in the instant case by reference to the conditions mentioned in the Deed of Transfer which, in its turn, stated that the property is subject inter alia to the conditions and limitations specified in the relevant approved township conditions. The appellant's attention was, in my view, directed to these conditions, the nature of which he could have ascertained." (My emphasis.)

The assertion in the above-quoted excerpt that the relevant deed of transfer states that erf 1413 is subject to the conditions specified in the "approved township conditions", is, with respect, not correct. The Deed of Transfer says that erf 1413 is subject to the conditions and limitations imposed in the local authority's town-planning scheme. For the sake of convenience I quote again here the relevant portions of paragraph B of the Deed of Transfer:-

"Hierdie

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"Hierdie erf mag alleenlik gebruik word vir sulke doeleindes wat deur die dorpsaanlegskema van die plaaslike owerheid toegelaat word en onderworpe aan die voorwaardes en beperkings wat in die skema bepaal word."

Brief mention should also be made of the following. The Court below dealt with the addendum to the conditions on the footing that the "owner" therein mentioned was the registered owner of erf 1413 who sold it to the appellant. In argument before us counsel for the appellant contended that the "owner" in the addendum was indeed Van Eck, while counsel for the respondent argued that "owner" in the addendum was a reference simply to the original township owner. Whether "owner" in the addendum is to be construed as meaning Van Eck or the township developer cannot be decided without reference to the township conditions of establishment. Counsel informed us that the latter contain no definition of "eienaar". As I view the issue in the

present

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present appeal, however, it is unnecessary to express any firm opinion as to the ambit of the word "eienaar" in the addendum to the condition. For purposes of argument I shall assume in favour of the appellant that it imports a reference to Van Eck. For the reasons already stated Van Eck did not make known to the appellant in the deed of sale the existence of the condition. The gist of the argument on behalf of the appellant was the following. The condition does no more than to invest the respondent with a personal right against the registered owner of erf 1413, and in consequence the penalty provision in sec 14A(2) of the Townships Ordinance is effectual only against a purchaser with actual knowledge of the condition. KANNEMEYER, J considered it unnecessary to embark upon an

inquiry

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inquiry into the precise juridical nature of the rights and obligations created by the condition. In the course of his judgment the learned Judge observed that:-

"the imposition of the condition and the recovery of the penalty are authorised by the competent legislative authority and accordingly the nature of the rights and obligations created by sec 14A becomes irrelevant."

For the reasons that follow the above approach seems to me, with respect, to be the correct one to adopt.

Relying on decisions such as *Administrator, Cape*

Province v Ruyteplaats Estates (Pty) Ltd 1952(1) 541 (A) at 555 and *Cohen v Verwoerdburg Town Council* 1983(1) SA 334(A) at 350 E/G, counsel for the appellant stressed that the imposition of conditions of establishment is not the equivalent of legislation. Here one is concerned, however, not so much with the juristic nature of the process whereby conditions

of

15 of establishment are imposed as with the direct legal con-

sequences of such imposition. It is not suggested that

the provisions of sec 14A are repugnant to any Act of Par-

liament, and, since the Townships Ordinance was duly passed

and enacted, it has statutory force within the Cape Province.

See: *Middelburg Municipality v Gertzen* 1914 AD 544 at 550. Accordingly the condition imposed by the Administrator in

terms of sec 14A(1) has the force of law and the penal

sanction provided in sec 14A(2) is enforceable at law. In these circumstances any closer analysis of the precise nature of the rights and duties created by sec 14A, read with the conditions of establishment, is superfluous. The respondent has a right, conferred and protected by law, entitling it to claim payment from the owner of erf 1413 of a penalty in the event of the breach of the condition.

It remains to consider whether, in the event of

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a breach of the condition, the liability of the erf-owner to pay the penalty is an absolute one, or whether it is dependent upon the actual knowledge of the existence of the condition on the part of the erf-owner at the time of his acquisition of the erf. For the reasons briefly stated hereunder I consider that the liability of the owner of the erf to pay the penalty is in no way dependent upon his knowledge or ignorance of the existence of the condition. The provisions of sec 14A(1) and (2) do not expressly state that the owner's liability to pay the penalty is dependent upon his knowledge of the existence of the condition which has been breached; nor do these provisions carry any such necessary implication. That this is so is hardly surprising. Since the fundamental purpose of conditions of establishment is to ensure orderly urban development (see *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty)*

Ltd

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Ltd 1978(2) SA 872 (A) at 888G/H) it is difficult to believe that the provincial legislature would ever have entertained so fanciful an intention. On behalf of the appellant it was nevertheless submitted that, whatever the true legislative intent behind sec 14A might be, a liability contingent upon the erf-owner's actual knowledge of the existence of the condition had been imported into the instant case by the terms of the addendum. The meaning to be assigned to the words of the addendum apart, it seems to me to be open to some doubt whether in terms of sec 14A the Administrator is at all empowered to affix to a condition contemplated by that subsection an additional provision in terms such as are set forth in the addendum. However that may be, it is clear, I think, that the addendum cannot have the effect for which counsel for the appellant contends. The addendum

seeks

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seeks to burden the seller of an affected erf under a deed of sale with a duty of disclosure in regard to the existence of the condition; it does not purport to make the buyer's liability to pay the penalty contingent upon the latter's actual knowledge that the condition exists. The incongruous results which would flow from the postulate of actual knowledge of the condition as a prerequisite for liability to pay the penalty readily suggest themselves, and they were fully explored during argument. A single example will here suffice. In the addendum the direction that the existence of the condition be made known to a transferee is addressed solely to an owner who sells any of the affected erven under a deed of sale. However, title to an affected erf may be acquired just as well by inheritance or donation as by a contract of sale. The appellant's contention would seem to involve the following

anomaly:

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anomaly: if a deed of sale were silent as to the existence of the condition the buyer who was ignorant thereof has a good defence to the local authority's claim for payment of the penalty; but such ignorance would not avail the transferee of an affected erf who acquired title to the erf as an heir or as a donee. In my opinion the appellant did not have a good defence to the respondent's claim for payment of the penalty, and the Court a quo rightly dismissed the appeal against the Magistrate's ruling in favour of the respondent. In order to avoid any possible misunderstanding I should add the following. Mention has already been made of the fact that notification of the township as an approved township in terms of sec 20(6) of the Townships Ordinance was given in the Official Gazette on 7 February

1975. During argument this Court wished to examine the terms of such noti-

fication

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fication. Counsel on both sides laboured under the mis-apprehension that notification had been given in the Official Gazette at some date prior to 31 December 1972; and accordingly their search for the relevant Official Gazette proved unavailing. At the end of argument in this Court the parties were given leave (a) to file supplementary heads of argument dealing with the meaning to be assigned to the word "eienaar" in the addendum; and (b) to file with the Registrar of this Court a certified copy of the relevant Official Gazette. We are indebted to counsel for the supplementary written arguments placed before us. A certified copy of the relevant Official Gazette was duly filed with the Registrar under cover of a letter by the respondent's Bloemfontein attorneys. Appended to the certified copy of the Official Gazette were copies of further documents relating to the township. In considering the merits of the appeal we have not had recourse to such

further 21 further documents.

The appeal is dismissed with costs.

G G HOEXTER, JA

BOTHA, JA) NICHOLAS, AJA)

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