

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

Case number: 0041888/16

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>24/11/2017</u> DATE	 SIGNATURE

In the matter between:

DR R C MAMATHUBA

APPLICANT

AND

A W G NISCH

RESPONDENT

JUDGMENT

GOODMAN, AJ:

1. This matter relates to the validity of an agreement of sale of land concluded between the applicant, as buyer, and the respondent, as seller.
2. The sale agreement at issue was concluded on 29 June 2015, and related to the property described, in clause 2.1, as "*Portion 2 and the Remainder of Holding 44,*

Kyalami A/H, City of Johannesburg, Gauteng Province". Its material terms were as follows:

- 2.1. The applicant undertook to pay a purchase price of R5 500 000.00, excluding VAT, in respect of the property within 15 days of fulfilment of all suspensive conditions.
 - 2.2. He also undertook to pay a deposit of R300 000.00, to be paid in four equal tranches, with the last instalment due on 1 December 2015.
 - 2.3. The sale was subject to the suspensive condition that the applicant would secure cash or obtain a loan in an amount of R5 200 000.00 within 6 months of the date of signature of the agreement or such extended period as the respondent in writing allowed.
 - 2.4. If the suspensive condition was not fulfilled, the agreement would lapse and be of no force and effect. Clause 7.1.4 provided that, in that event, the respondent would be entitled to retain the deposit paid, and all interest accrued on it, as damages.
3. Attached to the sale agreement was a diagram that set out the proposed subdivision of the property. It recorded the extent, position and boundaries of each proposed subdivided portion. The diagram is not expressly referred to in the sale agreement, but it (and the sub-divisions marked on it) have been initialled by each of the parties and the applicant accepts that it formed part of the sale agreement that he signed.
 4. It is common cause that at the time that the sale agreement was concluded, the City Council had approved the application for the subdivision of the property and the Surveyor General had approved the subdivisional diagrams, but that no certificate of subdivision had been issued by the Deeds Office.
 5. Subsequently, the parties concluded a written addendum to the sale agreement that varied its terms. In terms of the addendum, the property to be purchased was the full extent of Holding 55 Kyalami (and not the subdivided portions of it) and the purchase price was increased to R8 250 000.00. The suspensive condition was amended to provide that the agreement would lapse if the applicant failed to secure cash or a loan in an amount of R7 950 000.00. The period for fulfilment of the suspensive condition was not extended. The remaining terms of the sale remained

the same. (The applicant initially disputed that he had signed the addendum but did not persist with that complaint in reply or before me. It is in any event not borne out on the face of the document.)

6. In the event, the applicant did not secure the funding required and the suspensive condition was not fulfilled. The respondent has retained the deposit paid to him. The applicant contends that he is not entitled to do so because the sale agreement was void *ab initio*. He seeks to have it declared as such, and to have the deposit repaid to him as a consequence.

The grounds of the alleged invalidity

7. In his founding papers, the respondent alleged that the sale agreement is invalid on two separate grounds:
 - 7.1. First, he claims that the respondent misrepresented the property to be sold, in that he did not specify that it had not yet been subdivided. That misrepresentation is so material, he claims, that it vitiated both the sale agreement and the subsequent addendum.
 - 7.2. Second, he contends that the sale agreement is invalid under section 2(1) of the Alienation of Land Act 68 of 1981 because it fails adequately to describe the property to be sold. His complaints were that (a) the sale agreement did not state that the property had not yet been subdivided, and (b) in any event, because the subdivision had not yet been effected, the property was not capable of being sold per the agreement. Again, the applicant argued that because the initial agreement was void, it could not be rectified or rendered valid by the subsequent Addendum.
8. At the hearing of the matter, the applicant's representative sought to add another ground of complaint, namely that subdivision of the property had to be undertaken in accordance with section 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 ("the Agricultural Land Act"), and that there was no evidence of compliance with its terms prior to the conclusion of the sale agreement.
9. In my view, however, the applicant is not entitled to rely on this ground of objection. He did not put compliance with the Agricultural Land Act in issue in his papers, and the parties have accordingly not pleaded whether the land in question falls within the

remit of that Act, whether section 3(e)(i) applies and whether its requirements were met.¹ The Agricultural Land Act simply did not form an aspect of the case the respondent was called to meet, and it entails factual enquiries that were not ventilated on the papers. It is not an issue that I can permissibly determine.

10. Finally, the applicant contended that even if the sale agreement was validly concluded, the respondent is not entitled to retain the deposit paid under it because the respondent has not complied with section 19(1) of the Alienation of Land Act, which requires a party to provide notice of any breach of contract and an opportunity to rectify before cancelling an agreement for the sale of land.²
11. Against that background, I turn to address each of the applicant's complaints in turn.

The alleged misrepresentation

12. The applicant's complaint as to misrepresentation is that he could not have known, from the terms of the sale agreement, that the property he sought to purchase had not yet been formally subdivided at the time that he concluded the sale agreement.
13. To be actionable, a misrepresentation must have been material and induced the claimant to have concluded the agreement in question. The pertinent question is thus whether the applicant had been misled as to the status of the subdivision at the time that he entered into the sale agreement and whether he concluded the agreement in reliance on that misrepresentation.
14. On a conspectus of the facts, it seems to me that the applicant must have been aware that the subdivision of the property had not yet been registered at the time that he signed the agreement in question. That appears from two documents:

¹ The Constitutional Court has confirmed that it is a question of fact whether land is properly classified as agricultural land within the meaning of the Agricultural Land Act: see *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) para 62.

² Section 19(1) states:

"No seller is, by reason of any breach of contract on the part of the purchaser, entitled -
 (a) to enforce any provision of the contract for the acceleration of the payment of any instalment of the purchase price or any other penalty stipulation in the contract;
 (b) to terminate the contract; or
 (c) to institute an action for damages,
 unless he has by letter informed the purchaser of the breach of contract concerned and made demand to the purchaser to rectify the breach of contract in question, and the purchaser has failed to comply with such demand."

- 14.1. First, the diagram attached to the sale agreement and initialled by the applicant records the “*proposed*” subdivisions of the property, implying that they had not yet, at the date of signature, been finalised. The respondent has offered no explanation for his signature of that diagram if he was indeed unaware that the subdivision had not yet been registered.
- 14.2. Second, on 7 December 2017, the respondent sent an email recording the applicant’s intention to purchase the whole property (including portion 1) and suggesting that he buy it as a single piece of land to save on costs and administration. He then advised the applicant that “*the Holding 55 subdivisions are registered at council . . . This means that once the property is in your name you can, at any time, register the individual subdivisions at the Deeds Office*”. The clear implication was that the subdivision of the property had not yet been registered at the Deeds Office. In response, the applicant did not express concern or surprise at that fact. Instead, he agreed to buying the property as a single piece of land. That is consistent with his already knowing that the subdivision had not been effected on the title deeds before the sale.
15. I thus find that, on the probabilities, the applicant was not misled as to the status of the subdivision of the property.
16. But even if the applicant had been misled as to the status of the subdivision, he was aware by no later than 7 December 2015 that the subdivision had not yet been registered and decided nevertheless to enter into the addendum, thus electing to enforce the sale agreement rather than to rescind it. Having done so, he cannot now seek to escape his obligations under the sale agreement, as amended.³
17. I accordingly find that the sale agreement is not invalid for misrepresentation by the respondent.

The description of the property in the sale agreement

18. In the alternative, the applicant contended that the sale agreement is invalid because it sold properties that did not yet exist and which were, moreover, inadequately

³

See, in this regard, *Bowditch v Peel and Magill* 1921 AD 561 at 572–573.

described in the sale agreement (because it failed to specify that the subdivided portions had not yet been registered).

19. Section 2(1) of the Alienation of Land Act requires that any sale of land must be by way of written agreement which, inter alia, describes the land to be sold sufficiently that it can be ascertained by reference to the provisions of the contract alone.⁴ An agreement that fails adequately to describe the property is generally invalid from inception, and cannot be rectified.⁵ It means that if the applicant's objection in this regard is well founded, both the sale agreement and the addendum will be invalid.
20. However, in my view, the objection is without merit. A subdivision need not be registered in order for the subdivided property to be capable of transfer.⁶ That is because the property in question exists in fact and can be sold.⁷ Congruent with that, regulation 32 to the Regulations to the Deeds Registries Act 47 of 1937⁸ provides that property may be sold provided there is an approved diagram of it. The registration certificate is merely proof of the subdivision; it does not give effect to it.⁹
21. In the present case, the Surveyor General had approved the subdivisional diagram and the properties were consequently capable of being sold, even in the absence of the subdivision having been registered with the Deeds Office. The applicant's claim that the property did not yet exist because the subdivision had not been registered is misplaced.
22. I also do not accept that the property at issue was inadequately described in the sale agreement. The Alienation of Land Act requires merely that the *res vendita* is identified without resort to the parties or extrinsic evidence. In this case, the description of the property in clause 2.1 considered together with the attached diagram provided adequate certainty in this regard. I am satisfied that the parties were *ad idem* as to the property sold, and that this was capable of objective and independent determination from the content of the agreement.

⁴ *Clements v Simpson* 1971 (3) SA 1 at 7; [1971] 3 All SA 196 (A); *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) at 999.

⁵ Since the failure properly to describe the property generally indicates that there has not been proper agreement between the parties. See *Magwaza v Heenan* 1979 (2) SA 1019 (A); *Headermans (Vryburg) (Pty) Limited v Ping Bai* 1997 (3) SA 1004 (SCA) at 1010.

⁶ *Pesic and Another v Wetdan W38 CC and Others* 2006 (5) SA 445 (W) paras 28-30.

⁷ *Hamilton-Browning v Denis Barker Trust* 2001 (4) SA 1131 (N) at 1139E.

⁸ Published in GNR.474 of 29 March 1963.

⁹ *Pesic* para 28.

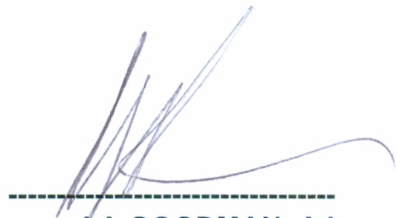
23. In the circumstances, I find that the sale agreement was valid. It follows that the addendum is not tainted by any invalidity and was also validly concluded.

Section 19 of the Alienation of Land Act

24. Once that is so, the sale agreement failed only by virtue of the non-fulfilment of the suspensive condition. The effect was that the agreement lapsed.
25. Clause 7.1.4 of the sale agreement permitted the respondent, by agreement, to retain the deposit even if the sale agreement lapsed. The applicant contended before me that the respondent was required to invoke and adhere to the requirements of section 19 of the Alienation of Land Act before he could rely on that clause.
26. But in my view, that is incorrect. Section 19 stipulates certain requirements that must be fulfilled before a seller cancels a land sale for breach of contract. But in this case, no breach of contract was alleged. Rather, the agreement failed to come into operation because the suspensive conditions were not met. In those circumstances, section 19 simply did not apply.

Conclusion

27. For all these reasons, I find that the applicant has failed to advance any basis for invalidating the sale agreement *ab initio* or for overcoming the respondent's entitlement to retain the deposit where the suspensive conditions to the sale agreement were not fulfilled.
28. I accordingly make the following order:
- (a) The application is dismissed with costs.



A GOODMAN, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Attorney for the Applicant: Mr KP Masenya
Counsel for the Respondent: Adv CJ Smit
Date of hearing: 14 November 2017
Date of Judgment: 24 November 2017