



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 97/10

In the matter between:

EXDEV (PTY) LTD
RODNEY WOLMER

First Appellant
Second Appellant

v

PEKUDEI INVESTMENTS (PTY) LTD

Respondent

Neutral citation: *Exdev v Pekudei Investments* (97/2010) [2010] ZASCA 170
(1 December 2010).

Coram: Heher, Cachalia, Leach JJA, R Pillay and Ebrahim AJJA

Heard: 16 November 2010

Delivered: 1 December 2010

Summary: Sale of immovable property – requirements of s 2(1) of Act 68 of 1981 – parties agreed of the size of office unit sold but leaving it to the seller to determine shape and location of the unit in a building being developed – sale valid.

Contract sale and option two distinct and divisible contracts despite being concluded at the same time and recorded in the same document.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Ntsebeza AJ sitting as court of first instance).

The following order is made:

1. The appeal is dismissed with costs.
2. The order of the court a quo is altered to read as follows:
 - ‘(a) The exception is upheld, with costs.
 - (b) The words “and 3.3 to 3.3.4 below” in para 3.2 of the plea are struck out.
 - (c) Paragraph 3.3 of the plea is struck out.’

JUDGMENT

LEACH JA (Heher and Cachalia concurring):

[1] Section 2(1) of the Alienation of Land Act 68 of 1981, which visits nullity upon a sale of immovable property ‘unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority’ was designed to promote certainty and to avoid disputes, litigation and possible malpractice. Unfortunately history has proved it to be fertile ground for litigation, the law reports being replete with decisions concerning the validity of deeds of sale of land. Consequently, it has been remarked that the section has failed to achieve its objectives, and it has indeed correctly been observed that reading

between the lines the section is often abused, in particular 'by unscrupulous sellers who regret having sold the property at the price they did and then try to rescind the contract because of non-compliance with the technical formality requirements of the Act'.¹ This comment is not without substance, but it may be somewhat unfair. Human nature being what it is, there may well have been many more disputes arising out of the sale of land had no formalities been required and, as Innes J observed in *Wilken v Kohler* 1913 AD 135 at 142, whether such a provision 'does not create as great hardships as it prevents, is a matter upon which opinions may well differ'.

[2] Be that as it may, this is another case in which a seller of immovable property alleges that the sale is void for non-compliance with the section. Like many of the reported decisions dealing with the section, the case turns on whether the description of the property sold (the *res vendita*) and the purchase price, both of which are material terms of a sale, have been adequately set out. The court a quo, on exception, determined that the written agreement upon which the respondent had sued the appellants for damages complied with the requirements of s 2(1) and that the sale was valid and enforceable, but granted the appellants leave to appeal to this court. For convenience I shall refer to the appellants as 'the first and second defendants' and to the respondent as 'the plaintiff'.

[3] At the heart of the dispute lies a letter dated 15 June 2005 addressed by plaintiff to the defendants which reads as follows;

'Dear Sirs

SUITES 207, 8 AND 9

1. We address you to clearly record our agreement.
2. (First defendant) is purchasing from us the units described as Sections 21, 22 and 23 Twindale measuring 260 square meters together with eight parking bays numbered 4 (double bay) 5 (double bay) 6 (double bay) and open parking bays

¹ See Lotz and Nagel's comment on *JR 209 Investments (Pty) Ltd & another v Pine Villa Country Estate (Pty) Ltd* 2009 (4) SA 302 (SCA) : 2010 (43) De Jure 169 at 174.

- 15 and 16 and an undivided share in the common property for R2 178,000.
3. (First defendant) is intending to replace Twindale with a new building comprising offices and apartments. We confirm that you will irrevocably provide us with an office unit (at the same price for which sections 21, 22 and 23 were sold to you) of the same size and with a similar number of parking bays (8). In addition to this (first defendant) also grants an option to (the plaintiff) to purchase up to a further 140 square meters at the market price prevailing when the new building is completed.
 4. We have been advised by (second defendant) that the replacement building will be erected within two years of getting the necessary rezoning rights. Accordingly, if the replacement building is not erected within thirty months of getting the necessary rezoning rights then (second defendant) personally is liable to provide us with a similar office of identical size in a similar building in a similar area for the same purchase price.
 5. Kindly confirm that the foregoing correctly records our agreement by signing where indicated below and returning the signed document to us.
 6. It is recorded that (first defendant) is entitled to nominate a third party to be the purchaser of the space to be acquired.'

[4] Acting in both his personal capacity and as representative of the first defendant, a company with limited liability, the second defendant indicated his acceptance of these terms by signing at the foot of the document. As is readily apparent, the document embraced a number of agreements, namely:

- The plaintiff's sale to the first defendant of sections 21, 22 and 23 of Twindale, together with eight parking bays and an undivided share in the common property, at a purchase price of R2,178m – as set out in clause 2.
- The first defendant's sale to the plaintiff of an office unit of 260 m² together with eight parking bays, in the building it intended to build at Twindale at the same purchase price of R2,178m – as set out in clause 3.
- An option extended by the first defendant to the plaintiff to sell it a further 140 m² in the new building 'at the market price prevailing when the new building is completed' – as also set out in clause 3.

- In the event of the necessary rezoning for the proposed development not being forthcoming, the second defendant's sale to the plaintiff of a similar office of identical size at the same price – as set out in clause 4.

[5] It is common cause that pursuant to clause 2 of the agreement, the plaintiff sold and transferred sections 21, 22 and 23 at Twindale, the eight parking bays and the undivided share of the community property to the first defendant. It is also common cause that the necessary rezoning for the development was effected during November 2006. However, the transactions envisaged in clause 3 of the agreement appear not to have come about and, in September 2008, the plaintiff instituted action against the defendants, alleging that the sale in clause 3 (viz the sale of office unit of 260 m² in the new building and eight parking bays) had been cancelled as a result of their repudiation of the agreement, causing it to suffer damages in the sum of R5,62m being the difference between the value of the property purchased and the price of R2,178m it would have been obliged to pay for it.

[6] On pleading to this claim, the defendants denied being liable for the alleged damages. While they admitted that the sale in clause 2 had been effected and that the rezoning envisaged in clause 4 had taken place, they denied having repudiated the agreement or that the plaintiff had suffered damage. In addition, they specifically pleaded that the agreement was:

- '3.3.1 void for vagueness of the description of the properties mentioned in clauses 3 and/or 4 . . . and/or
- 3.3.2 void for vagueness for stipulating the purchase price of the option in clause 3 . . . to be the market price; and/or
- 3.3.3 of no force or effect due to non-compliance with the formalities of writing and signature prescribed by section 2(1) of the Alienation of Land Act 68 of 1981 on account of the vagueness of the description of the properties mentioned in clauses 3 and/or 4 . . . ; and/or
- 3.3.4 of no force or effect due to non-compliance with the formalities of writing and signature prescribed by section 2(1) of the Alienation of Land Act 68 of 1981 on

account of stipulating the purchase price of the option in clause 3 . . . to be the market price.'

[7] To this the plaintiff filed an exception, contending that the defence in paragraph 3.3 of the plea viz that the contract was of no force or effect, was unsustainable. In this way the matter came before the court a quo, which was called to decide the simple issue whether the terms of the sale sued upon complied with the requirements of s 2(1).

[8] The judgment of the court a quo is as confused as it is confusing. The judge who heard the matter appears to have regarded the plea as an exception to the claim and the plaintiff's exception to the plea to thus be an exception to an exception. Then, after having concluded that he was not confident that the plaintiff's exception should succeed, he stated that he had to find 'a practical way of dealing with this matter in a way which should work for both parties' and proceeded to uphold the exception. However, in paragraphs 2 and 3 of his order, he went on to grant the successful plaintiff, against whose claim exception had not been taken, leave to amend its particulars of claim; and the defendants, whose plea he had found to be excipiable, leave to plead to the claim if the plaintiff did so amend or, if it did not, to either file such other pleading as they should deem fit or to amend their plea. It is this order which is the subject of this appeal.

[9] Although in their plea the defendants relied upon the alleged invalidity of all the agreements referred to in clauses 3 and 4 of the letter of 15 June 2005 as a defence to the enforceability of the sale contained in clause 3, I did not understand them to persist in their contention that the alleged invalidity of the second defendant's conditional sale to the plaintiff of a similar office contained in clause 4 visited invalidity upon the sale in clause 3. The defendant's argument, however, was that both the sale and the option set out in clause 3 were part of a single unitary contract so that, if the property or the price in either the sale or the

option were not adequately described, the entire agreement failed and neither the sale nor the option would be enforceable. As against that, the plaintiff argued that the option was separate and divisible from the sale and that, even if the option was invalid (which it denied) the sale would not be affected and would remain effective. It is to this issue that I first turn.

[10] At the outset it must be remembered that there is a distinction between the severance of a portion of a contract, eg on grounds of vagueness or illegality, and recognising that a contract may contain several distinct and separate agreements divisible from each other. As was explained in Wessels *The Law of Contract in South Africa* 2 ed vol 1 para 1615:

'It is often loosely said that a contract is divisible or separable where, though in form there is only one contract, in reality there are several distinct agreements entered into at the same time. There is, however, a clear distinction between this class of contract and a divisible or separable contract.

If the obligation is divisible in the material or physical sense, there is only one contract, though the subject matter may consist of several parts considered as one whole. The contract is entire, but the object of the obligation is separable into homogeneous parts. If, however, there are several distinct obligations, we are not dealing with a divisible or separable contract at all, but with a collection of separate contracts embodied in one single writing or agreement.

Thus, the sale of a quantity of coal to be delivered by instalments of so many tons is, as a rule, an entire contract in which the obligation is divisible. In such a case it may be the intention of the parties that a default on the part of the seller in delivering, or on the part of the purchaser in accepting, one instalment will not justify a cancellation of the contract (*Simpson v Crippin*, 1872, 8 LRQB 14: 42 LJQB 28: 27 LT 546). On the other hand, the sale of Stichus and Pamphilus for 100 and 200 aurei respectively is in reality an independent sale of Stichus for 100 and of Pamphilus for 200 aurei (D. 45.1.29.pr.).'

[11] Where there is a sale 'of several distinct and separate items and a price is fixed to each, the contract as a rule, will be held to be composed of several agreements'.² Furthermore, the nature of the performance required under a

² Wessels op cit para 1618.

contract can be of decisive importance, and a contract is usually divisible where it makes provision for separate or distinctive performances.³ Thus in *Middleton v Carr* 1949 (2) SA 374 (A) at 391 Schreiner JA, in concluding that an undertaking by a husband to pay his estranged wife a substantial sum of money was severable from a collusive agreement for divorce, said:

‘But the fact that the two agreements were made at the same time does not provide sufficient reason for treating them as in fact one agreement; to reach that conclusion it would be necessary to find some express or implied interlocking of their terms.’

[12] In *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) the parties had concluded a written contract of employment which also included an option that entitled the appellant to purchase shares in a company still to be founded when its shares became available. This court concluded that the share option constituted the consideration or reward extended to the appellant for carrying out a specific mandate which it was contemplated he would complete prior to commencing employment with the respondent, and was quite distinct from his duties under the employment contract. It therefore held that although the share option and the employment contract were both ‘contained in the same agreement and were linked in a practical sense, juristically they were separate agreements, with independent sets of reciprocal rights and obligations.’⁴

[13] In the present case, the sale of the office unit, which gave rise to a set of reciprocal rights and duties, was wholly independent and separate from the option extended to the plaintiff to purchase a further and additional portion of the building, which gave rise to a different set of rights and obligations. The two agreements related to two different and separate units of property in respect of which different prices were fixed. The terms of the two agreements were in no way entwined or interlocked, either expressly or by necessary implication. On purchasing the office unit, the plaintiff was under no obligation to exercise its

³ See eg *Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (A) at 429F-I and *Du Plooy v Sasol Bedryf (Edms) Bpk* 1988 (1) SA 438 (A).

⁴ Per Corbett JA at 23D-E.

rights under the option to purchase the additional 140 m². It had the discretion to do so if it so wished. Thus although both the sale of the office unit and the option to buy a further portion of the building were contained in the same document, the rights and obligations arising from each were completely separate from each other.

[14] In these circumstances, I have no hesitation in concluding that the sale and the option in clause 3 of the agreement are separate, divisible and independent contracts. That being so, it is unnecessary to consider whether the option was invalid in order to determine the validity of the sale of the office unit or to determine that the purchase price referred to in the option viz 'the market price prevailing' visited nullity upon the option, as the defendants contend. The sole issue then is whether the sale in clause 3 should be regarded as invalid due to the alleged vagueness of the description of the *res vendita*.

[15] It is now well settled that, in regard to the description of the property, the test for determining whether s 2(1) has been complied with is whether the land alienated can be identified from the contract itself without resorting to evidence from the parties regarding their negotiations and their consensus. In arguing that the description of the property contained in clause 3 is too vague to be enforceable, counsel for the defendants emphasised that there was no plan of the proposed development and that the selection of the unit had been vested in the sole discretion of the first defendant which, apart from being obliged to ensure its floor size was 260 m², had the sole discretion to determine its shape, its position on any floor and its situation in the building. As the subject of the sale was only a portion of the new building, so defendants' counsel argued, it was therefore necessary to set out the precise dimensions of the office unit, its shape, the height of its walls, its precise situation in the building (viz on what floor it was to be and in what direction it would face) as well as details in regard to the style of architecture to be used in the construction of the building (eg modern or Victorian) or else the unit could not be identified from the terms of the contract

itself. He conceded that the effect of his argument was that all the information that would be derived from an accurate three dimensional plan would have to be set out in order to satisfy the requirements of s 2(1).

[16] This argument flies in the face of the now well established principle that the section does not require 'a faultless description of the property sold couched in meticulously accurate terms'.⁵ In cases such as this there are two broad categories of contract: first, those where the document itself sufficiently describes the property to enable identification on the ground; second, those where it appears from the contract that the parties intended that either the buyer or the seller should choose the *res vendita* from a genus or class. In *Clements v Simpson* 1971 (3) SA 1 (A) at 7-8, Holmes JA stated the following in regard to the latter category:

'For example, if a dog breeder says to a prospective purchaser, "I offer you the pick of this litter for R100", and the buyer accepts, no further *consensus* is required. There is a valid sale; and the buyer may choose his pup. Or, in regard to land, a prospective buyer might offer in writing to buy, and a specified price, one out of several sites in a township, the buyer to select the particular site. The seller accepts in writing. That is a valid sale as far as the *res vendita* is concerned, for the *res* is ascertainable or identifiable on the unilateral selection of the buyer.'

[17] The facts in *Clements v Simpson* provide a useful illustration of a case in which the contract is not to be regarded as being void due to the selection of the property having been entrusted to one of the parties. The deed of sale related to a section of a property which the seller was to sub-divide from the property as a whole. The area of this sub-divided property was agreed at 4 000 square feet and the general location was fixed, but the shape was to be determined by the seller and, until he did so, the land sold could not be identified on the ground. This did not prevent this court from concluding that there had been a valid sale.

⁵ Per Watermeyer CJ in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989, regularly cited with approval in this court: see eg *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd* 2009 (4) SA 302 (SCA) para 19.

In doing so, Holmes JA said:⁶

‘(H)ere the intention of the parties, as gathered from the language of their contract, was not to enable identification of the land sold by reference to description; it was to be identifiable only after the seller had decided upon the lay-out and shape and sub-division of a site conforming to certain specified requirements. It is in my view a clear example of the second category mentioned earlier. The *consensus* of the parties was complete. All that was needed for performance was the intended unilateral act of the seller in the matter of shape and sub-division. The fact that survey was required for that purpose cannot affect the question’

[18] This decision has been regularly followed in this court, most recently in *JR 209 Investments (Pty) Ltd v Pine Villa Country Estate (Pty) Ltd* 2009 (4) SA 302 (SCA), a decision which is particularly instructive. The contract envisaged the purchaser establishing a township on a piece of land that it intended to purchase from a private company whose sole director, Mr Oberem, lived in a homestead on the property. It was agreed that Oberem would continue to live in the homestead on an erf which, after sub-division, would be between 5 000 m² and 5 653 m² in extent and which would be transferred into Oberem’s name as soon as sub-division had been effected. By necessary implication, the purchaser had the right to determine the precise shape and the size of the erf, subject of course to it being within the range of size agreed upon and upon such determination being bona fide. The argument that the description of the *res vendita* was inadequate was rejected.

[19] These principles, and the illustrative effect thereof provided by the decisions in *Clements v Simpson* and the *JR 209 Investments* case in particular, effectively dispose of the appellants’ contention in the present case. The size of the unit had been determined – it had to be 260 m². Apart from the fact that it had to be positioned within the new building that the defendants were constructing a Twindale, the parties were agreed that the precise shape and position in the building was something to be left to the bona fide discretion of the first defendant.

⁶ At 9A-B.

The consensus of the parties was complete and all that was needed was for the seller to determine the shape and precise situation within the new building of the unit of the agreed size. This clearly fell within the second class of category mentioned in *Clements v Simpson* and constituted an adequate description of the property sold. The exception to the defence that the sale was unenforceable for lack of compliance with s 2(1) was correctly taken and the appeal must fail.

[20] It was argued by the defendants that the case was not ripe for exception as evidence of surrounding circumstances might throw a different light on the validity of the sale. This misses the point. This is not a case in which external evidence might cure a possible deficiency. The exception raises a substantive question of law, and the contract is to be construed without reference to the parties' negotiations and consensus. Doing so, the sale in question clearly complies with s 2(1) and is valid and enforceable. This goes to the very root of the defendants' plea that the sale is unenforceable, a plea which is therefore bad in law.

[21] Due to the manner in which the plea was formulated, the appropriate order would be to strike out those allegations in the plea in which the defendants allege that the sale is unenforceable. As doing so will remove a separate and self-contained defence which is legally unsound, no purpose would be served by allowing the defendants leave to amend.

[22] Unfortunately, there are a few further issues which must be mentioned. The first is the grant of leave to appeal to this court. As is apparent from what I have said, this matter fell to be determined by the application of well-known legal principles to a simple set of facts. It is a matter of no complexity, and it was wholly inappropriate for the court a quo to have directed the appeal to be heard by this court whose time ought rather to be taken up dealing with matters of greater complexity and difficulty truly deserving of its attention – see eg *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* 2003 (5) SA 354 (SCA)

para 23 and *S v Monyane & others* 2008 (1) SACR 543 (SCA) para 28.

[23] Secondly, it is necessary to comment on the undue delays that have afflicted the progress of this matter. Despite the simplicity of the issues raised, it took more than nine months after the exception had been argued on 19 February 2009 before judgment was delivered on 25 September 2009. As appears from correspondence handed in and incorporated into the record by consent, this delay occurred despite the plaintiff's attorney having addressed enquiries as to when the judgment was likely to be delivered, first to the Judge President of the division after three months had elapsed and, subsequently, to the Deputy Judge President after the passing of another three months. Then, after the application for leave to appeal had been argued on 16 October 2009, it took more than three months until judgment was delivered on 2 February 2010. In this latter judgment the acting judge explained that he had been delayed by waiting for copies of certain judgments to be forwarded to him by counsel for the plaintiff, but that is not an acceptable explanation as the judgments concerned had all been reported.

[24] Justice delayed is justice denied. The object of an exception is to deal with a case in an expeditious manner, and a delay of some nine months in producing a judgment on such a simple matter of no complexity is at first blush wholly unacceptable – as is the delay of three months in producing a judgment on a simple application for leave to appeal – all of which led to it taking a full calendar year from when the exception was argued until leave to appeal was granted: and this in a matter in which both judgments could have been delivered almost immediately.

[25] The Chief Justice is reported to have recently deprecated the number of reserved judgments as well as the delays taken by Judges to deliver their judgments, which he found to be 'utterly unacceptable', and to have remarked as long as such delays existed judges could not avoid the accusation that the justice

system had failed to deliver on its promise of access to justice.⁷ These observations are justified. Judges are employed to give judgments. They owe it not only to the litigants who appear before them but to the public at large to do so expeditiously, and the administration of justice will fall into disrepute if they fail in that regard. The delays that occurred in this case are cause for concern.

[26] Turning to the form of the order, the appeal against the exception being upheld must be dismissed. However, as I have indicated, the contents of paragraphs 2 and 3 of the order of the court a quo are illogical and they must be set aside. In addition, having succeeded in its exception, the plaintiff ought to have been awarded the costs and there was no reason for the court a quo to have reserved those costs as it did.

[27] In the result the following order is made:

- 1 The appeal is dismissed with costs.
- 2 The order of the court a quo is altered to read as follows:
 - ‘(a) The exception is upheld, with costs.
 - (b) The words “and 3.3 to 3.3.4 below” in para 3.2 of the plea are struck out.
 - (c) Paragraph 3.3 of the plea is struck out.’

L E LEACH
JUDGE OF APPEAL

R PILLAY AJA

[28] I have read the judgment of Leach JA. I agree with my learned colleague’s conclusion and in general with his reasoning. I can hardly quarrel with the proposition that justice delayed is justice denied. Whilst stopping short of

⁷ www.news24.com/SouthAfrica/News/Ngobo-SA-courts-need-reform-20101113.

criticising the trial judge for such delays as may have been occasioned in the matter, he nonetheless expresses some disquiet about those delays. As regrettable as these delays might be, it is apparent from his judgment, that we clearly do not know what the true causes of the delay in this instance were – hence his comment that the delay is ‘at first blush unacceptable’ (para 24). The delay is either acceptable or it is not. Whether it is, depends on all of the facts, which, as Leach JA appears to accept, we simply do not have. Consequently it would be wrong for us to speculate as to such causes and apportion blame to the trial judge, absent a proper factual foundation to do so. Sitting as a court of appeal and being bound by the record, we should be slow to have regard to what may be contained in documents or reports that do not constitute part of that record. Whilst what the Chief Justice may have stated – if accurately reported – is to be lauded, it is unclear to me on what basis we can have regard to what he reportedly may have said in holding the trial judge responsible for the delays. I would thus prefer not to associate myself with the observations expressed in paragraphs 23, 24 and 25 of Leach JA’s judgment.

R. PILLAY

ACTING JUDGE OF APPEAL

EBRAHIM AJA

[29] I have read the judgment of my colleague Leach JA and concur in the conclusion he has reached on the merits of the appeal and the process of reasoning by which he arrives at that conclusion. I would accordingly agree with the order proposed.

[30] On the matter extraneous to the merits, that of ‘undue delays that have afflicted the progress of this matter, despite the simplicity of the issues raised’, whilst I agree, in general, that a delay in handing down a judgment expeditiously

is likely to create in the minds of litigants and the public at large, the perception of a dereliction of duty and responsibility on the part of the judge concerned, whoever he or she happens to be, I am firmly of the view that, in the present matter, such criticism is unwarranted. The simple state of affairs in this case is that we do not have before us an explanation for the delay from the judge concerned so that, in the absence thereof, a critical expose in the judgment of a failure to act timeously leads unnecessarily and unfairly to the creation of the public mindset already referred to concerning the judge seized with this matter in the court a quo. I think such criticism is undue and should not be encouraged. To that end, I dissociate myself from the critical comments in paragraphs 23, 24 and 25 of the judgment.

S EBRAHIM

ACTING JUDGE OF APPEAL

APPEARANCES

APPELLANTS:	H H Steyn Instructed by Jordaan & Wolberg Attorneys, Johannesburg E G Cooper Majiedt Inc, Bloemfontein
RESPONDENT:	J Peter SC

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