

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

25/06/2012

Case no: 29235/2009

In the matter between:

YONDA INVESTMENTS CC PLAINTIFF

AND

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
25/06/2012	
Date	Signature

FREDERICH ROHR FIRST DEFENDANT
ANNAS ELIZABETH ROHR SECOND DEFENDANT

JUDGMENT

Baqwa J

Parties

[1] 1.1. The plaintiff is Yonda Investment CC a close corporation registered in terms of the Close Corporation Act and which operates as a property development company.

1.2. The first defendant is Friedrich Rohr is an adult male employed by the South African National Parks Board and the second defendant was the wife of the first defendant at the time of the transaction which has given rise to the proceedings.

Background

- [2] This action arises out of a written deed of sale which was entered into by the plaintiff represented by one Tania Erasmus and first defendant on 25 June 2008 at Skukuza ("Annexure A").

2.1. In terms of that agreement plaintiff sold to the defendant the immovable property known as Residential Unit number 11 in sectional title scheme known as Wild Fig.

2.2. The purchase price was the sum of four hundred and seventy five thousand rand (R475 000-00) of which first defendant was to pay a deposit of R5000-00.

The evidence

- [3] The plaintiff called the evidence of four witnesses, namely Mrs Tracy den Dunnen, Mr Christian Steyn, Mr George Clark and Mrs Tanya Erasmus.

3.1. Tracy den Dunnen (Mrs den Dunnen) is the wife of Mr Martin den Dunnen, the sole member of the plaintiff. She is employed at Sugar Creek Trading but performs sales and administrative duties for the plaintiff. Tanya Erasmus is an employee of plaintiff and she reports to Mrs den Dunnen. Mrs den Dunnen was not present at the signing of the contract Annexure A. She however verified the correctness thereafter and attached her signature as her witness. She was questioned at length about the impropriety of what she had done, namely, to sign as witness when she had in fact not been present when

the contract was signed. She admitted acting out of ignorance but denied having an intention to act fraudulently.

3.2. The next witness was Mr Christian Steyn who is an attorney, notary and conveyancer of some 37 years experience practising as such. He is currently an appraiser for the district of Phalaborwa. He is also an Estate Agent and it is in that capacity that he performs property evaluations. He evaluated unit 11 and came to the conclusion that the price at which it had been sold to a third party (R425 000-00) had been a fair value in terms of the current market prices. He did not present any expert report to demonstrate the empirical data on which he relied and counsel for the defendant put it to him that his evidence could not be relied upon because though he was presented as an expert witness his evidence was not supported by any empirical data.

3.3. The third witness was Mr George Clark who had acted as plaintiff's attorney and who had assisted him in the acquisition of the property which was about to be developed as the Wild Fig Development Project. Mr Clark had even drawn up the pro forma contractual document which was utilised in producing annexure A.

3.4. The last witness for the plaintiff was Tanya Erasmus who had introduced first defendant to the Wild Fig Development. They had discussed this development at a social function they attended at Skukza. She was a friend of the first defendant and they had been friends for about four years. She knew that first defendant was married. The day after the social function, Mrs Erasmus was accompanied by her husband to first defendant's house. After explaining some of the clauses in annexure A to him, first defendant signed the contract.

3.5. Only the first defendant was called as a witness for the defendants. He admitted signing annexure A but said he was under the impression that he was making an investment against which he only stood to lose only the R5000-00 which he had invested.

The pleadings

- [4] The plaintiff initially sued out summons against the defendants for specific performance of an alleged sale of immovable property contract requesting an order to compel the defendants to take possession of the sectional title unit number 11 in the development Wild Fig.

The plaintiff amended the cause of action set out in the summons to that of a request for payment of R45 000-00 in damages calculated as a result of a lesser purchase price for the sectional title unit number 11, R39 000-00 in damages calculated as occupational rent for the months December 2008 to November 2009 (later reduced by R6 000-00 to R33 000-00) and R4 258-00 in damages calculated as levies for the months December 2008 to November 2009.

- [5] In its particulars of claim, plaintiff avers that plaintiff, represented by Tanya Erasmus entered into an agreement. First defendant admits this averment but submits that the admission pleaded was no more than to record the agreement annexure A. Defendant's counsel submits that first defendant was not admitting that the agreement was valid and enforceable.

5.1. The plaintiff further states in the particulars of claim that the second defendant consented in writing to the conclusion of the agreement annexure A which first defendant denies.

5.2. In the alternative, plaintiff states that in the event it is found that second defendant did not have consent in writing for the conclusion of the agreement annexure A, plaintiff did not know or could not have reasonably known that first defendant did not have consent in terms of the provision of section 15(9)(a) of the Matrimonial Property Act 88 of 1984 ("the Act") and that the agreement should be deemed to have been entered into with consent in terms of section 15(2) of the Act.

5.3. First defendant denies having had consent from second defendant and goes further to plead that the alleged agreement (annexure A) does not constitute an enforceable agreement. The defendants go on to re-iterate this denial of a binding agreement in their response to plaintiff's pre-trial questions.

5.4. All in all the defendants denial has the effect of putting in issue all the elements of the contract annexure A.

[6] As indicated above, the plaintiff's cause of action is based on a written deed of sale entered into on 25 June 2006.

6.1. One of the grounds on which defendant contests the validity thereof is that at the time of the agreement was entered into plaintiff was not the owner of the immovable property which was the subject of the sale. Put conversely, a seller who is not the owner of the **merx**, or one who does not have the owner's authority to transfer ownership, cannot sell that **merx**, to the purchaser.

See Adler v Bloemfontein Town Council (1894 O.V.S) 11 CLJ 69;
Peters Flaman and CO v Kokstad Municipality 1919 A.D 427

6.2. Unit 11, the object of this trial is explicitly alleged by the plaintiff to form part of the Remainder of Portion 1 of Erf 52 Hoedspruit Township Registration K.T Northern Province.

6.3. The plaintiff only became owner of the land known as Remainder of Portion 1 of Erf 52 Hoedspruit Township Registration K.T Northern Province ("the **merx**") upon registration of Deeds of Transfer T91415/2006 ON 25 July 2006.

6.4. Plaintiff's attorney, Mr Clark, who was a witness and who had assisted with the development "scheme" from the onset could not remember the date of the transfer. He could therefore not deny that the transfer took place on 25 July 2006.

6.5. The plaintiff's employee Tanya Erasmus did not have any knowledge of the date of transfer and she could therefore also not contest 25 July 2006 as the date of transfer.

6.6. The plaintiff also failed to call the sole member of the plaintiff to clarify the question of ownership. He was present in court but left before the proceedings were concluded.

6.7 First defendant's evidence was that the land, Remainder of Portion 1 of Erf 52 Hoedspruit Township Registration Division K.T Northern Province, was officially registered by the Registrar of Deeds by the Deed of Transfer T91415/2006 on 25 July 2006 in the name of the plaintiff. This evidence was not disputed under cross examination.

6.8. The law regarding a failure to cross examine on a pertinent point is quite clear: when a party to proceedings elects not to cross examine another on key issues in dispute, that party failing to cross examine cannot later challenge the party's version and argue that it is not to be accepted.

6.9. This principle of law was again re-stated by the Constitutional Court in the matter of

President of the RSA v South African Rugby Football Union 2000(1) SA 1 (CC) at par [58]-[78] where the following was specifically written with reference to the relevant authorities:-

"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the challenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in Commonwealth jurisdiction.

[63] The precise nature of the imputation should be made clear to witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed;

And

[65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike..... that being so, the rule needs to be observed scrupulously."

[10] The agreement annexure A is also challenged by the first defendant on the basis of the Alienation of Land Act 68 of 1981. Section 2 of the Alienation of Land Act 68 of 1981 states that no alienation of land (including a unit in a sectional title scheme) shall be of any force and effect if not contained in a written deed of alienation signed by the parties thereto or by its agents acting on their written authority. It is common cause that annexure A (the agreement) was not signed by the plaintiff. It was signed by Tanya Erasmus on behalf of the plaintiff. There is no evidence that she was provided with any written authority to sign an agreement on behalf of the seller..

[11] In addressing this issue, counsel for the plaintiff submitted that the written authority could be contained in a formal power of attorney on an informal document. In my view this submission is not sustainable because according to the evidence of Tanya Erasmus the question of authority was never discussed with Martin den Dunnen the sole

member of the plaintiff. The question of authority, written or unwritten, signed or unsigned never arose neither was it presented as evidence.

- [12] To be able to “act on” the written authority, the agent must be aware of its existence and that it is in writing- he need not have it in his possession when signing the deed of alienation not need to have seen. If at any stage

(Sugden v Beaconsfield Dairies (Pty) Ltd 1963(2) SA 174(E) 184 E-F; National Board (Pretoria) (Pty) Ltd v Swanepoel 1975(1) SA 904 (W) at 910F-911C)”

See Practitioners Guide to the Alienation of Land Act, 2nd edition by A.D.J Van Rensburg and SH Treisman (pp59-60).

It was the evidence of Tanya Erasmus that she had never discussed such granting of authority with Martin den Dunnen. She could therefore not be aware of something that was non-existent.

Consent in terms of the Matrimonial Property Act

- [13] Section 15(1) and (2) of the Matrimonial Property Act of 1984 prohibit a spouse married in community of property from entering as a purchaser into a contract defined in the Alienation of Land Act 68 of 1981 without the written consent of the other spouse.

**See Visser v Hull and Others 2010(1) SA 521(C)
Kotze NO v Oosthuizen 1988(3) SA 578(C)
Pretorius v Pretorius and Another 1948(1) SA 250 (A)
Bopape and Another v Moloto 2000(1) SA 383(T)**

This was yet another point of attack on the validity of Annexure A by the first defendant.

[14] In this regard the evidence established the following:

14.1. That the second defendant did not sign the document Annexure "A".

14.2. That at the time the first defendant signed Annexure "A" the first defendant and the second defendant were married in community of property.

14.3. That the second defendant never gave written consent to the first defendant to sign annexure "A".

14.4. That at the time first defendant signed annexure "A", Tanya Erasmus, who was the plaintiff's employee and who signed annexure "A" on behalf of plaintiff was aware for a period of no less than four(4) years that the first defendant and second defendant were married.

14.5. That annexure "A" refers to the sale of immovable property namely unit 11 in a sectional title scheme.

Plaintiff's onus

[15] For the plaintiff to be successful with its claim against the defendants, it had to prove that annexure "A" is a binding and enforceable sale of immovable property. For the agreement to be enforceable it must comply with the statutory requirements applicable to the sale of immovable property.

[16] Section 2 of the Alienation of Land Act 68 of 1998 states that no alienation of land (including sectional title scheme) shall be of any force and effect unless contained in a written deed of alienation signed by the parties thereto or by its agents acting on their written authority. Annexure "A" was signed on behalf of plaintiff by Tanya Erasmus who had no written authority from seller.

[17] For the agreement annexure "A" to comply with the provisions of section 15(1) and (2)(g) of the Matrimonial Property Act 88 of 1984, the plaintiff would have to prove that the plaintiff and/or Tina Erasmus did

not know and could not have reasonably known that the transaction was being entered into contrary to the aforementioned provisions. No evidence in support of this contention was placed before the court. On the contrary, Tina Erasmus confirmed having known about defendants' marriage for a period of four(4) years.

- [18] In the premises, annexure "A" complied with neither the Alienation of Land Act nor the Matrimonial Property Act and the plaintiff has failed to discharge the onus placed upon it.

Amount claimed

- [19] Plaintiff is claiming the sum of R89 158-80 from the defendants which is made up as follows:

19.1. R45 000-00 being the difference between the purchase price in terms of the agreement and the price at which the unit was sold to the third party.

19.2. Occupational rent for the period December 2008 to November 2009 in the sum of R39 900-00.

19.3. Levies for the period December 2008 to November 2009 being the sum of R 4 258.80.

Difference in purchase price

- [20] The plaintiff called attorney Steyn to prove the quantum of its damages and explain the claim for R 45 000-00. Attorney Steyn profited himself as an expert in that he was not only an attorney, notary and conveyancer for a period of about 37 years but also an Estate Agent and property evaluator for about 20 years. He testified about how he instructed his secretary to do searches by "drawing deeds office records". He thereafter compared the information obtained with information he obtained from his practice as an appraiser in Phalaborwa. He presented no reports nor did he present any empirical

data on which he based his opinion. Defendant's counsel challenged his evidence as not meeting the requirements of an expert witness. I am inclined to accept that whilst the evidence of attorney Steyn was presented in an honest manner, the absence of a report and empirical data to support his opinion causes his evidence to fall short of that required for an expert witness. I accordingly find the proof tendered by the plaintiff in this regard to have been inadequate.

Occupational rent

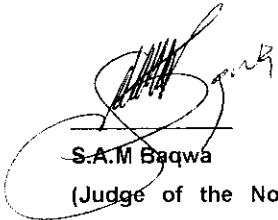
- [21] Annexure A stipulated the date of occupation as June 2008. It is however common cause that first defendant could not take occupation as at that date because construction had not been completed at that time.
- [22] Through plaintiff claims occupational rent no evidence was placed before court to prove that the defendants were ever presented with any written notice stipulating on what date occupation could be obtained. It appeared from the evidence of attorney Clark that defendants would not have been granted occupational rights because they had not furnished a guarantee for the total purchase price. Physical occupation of the unit therefore appears to have been of academic interest. The fact is, the defendants were never provided with keys to access to the "unit".
- [23] In my view, it was essential to put the defendants **in mora** by giving them notice that the unit was ready for occupation and thereafter to serve them with the relevant invoices. This was never done and in the absence of these essential step. The claim of the plaintiff lacks the necessary basis in fact and in law.

The levies

- [24] Section 37 of the Sectional Titles Act 95 of 1986 authorises a body corporate to raise levies by levying contributions on owners. Section 37(2) stipulates that the liability for contributions accrues from the passing of a resolution to that effect by the trustees. It was the evidence of Mrs den Dunnen that a body corporate had been established for the Wild Fig Development. In the circumstances plaintiff was not the correct party to sue for levies because it lacked the necessary **locus standi** to recover levies. Levies could only be raised and levied by a properly constituted and registered body corporate as stipulated by law.
- [25] No evidence was tendered that any decision by a properly constituted body corporate had been taken to raise levies. There was also no evidence that such a resolution of a body corporate was ever conveyed to the defendants.
- [26] In the circumstances, the plaintiff also failed to prove this claim.
- [27] For the reasons stated above, I find that the plaintiff failed to prove that a binding and enforceable agreement was entered into between itself and the defendants. Further, plaintiff failed to prove the quantum of its alleged claim
- [28] Regarding costs, the plaintiff knew or ought to have known that when it purported to sell immovable property to the defendant without the said property having been registered in its name was not lawful. It is also quite significant that the sole member of the plaintiff did not find it necessary to testify in court in this regard. I therefore find that an appropriate costs order has to be made into this regard.
- [29] In the result the following order is made:

29.1. The plaintiff's claim is dismissed.

29.2. The plaintiff is ordered to pay costs on an attorney and own client scale.



S.A.M Baqwa
(Judge of the North
Gauteng High Court)