

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3762/2010

In the matter between:-

<u>ALLAN AUBREY VAN ZYL N.O.</u>	First Plaintiff
<u>DENISE VAN ZYL N.O.</u>	Second Plaintiff
<u>RENÉ DEON DU PLESSIS N.O.</u>	Third Plaintiff

and

<u>HENDRIKA WILHELMINA HOFFMANN N.O.</u>	First Defendant
<u>ANNA MARIA CATHARINA HOFFMANN N.O.</u>	Second Defendant
<u>JOACHIM WILHELM STOLL HOFFMANN N.O.</u>	Third Defendant
<u>ERNST DANIËL HEINRICH HOFFMANN N.O.</u>	Fourth Defendant

<u>HEARD ON:</u>	8 & 9 MAY 2012
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<u>JUDGMENT BY:</u>	DAFFUE, J
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<u>DELIVERED:</u>	22 JUNE 2012
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INTRODUCTION

[1] The three plaintiffs are trustees of the Orthodoc Trust with registration number TMP2760. The four defendants are the trustees of the Hoffland Trust with registration number IT1684/1996. I shall refer to the parties as plaintiff and defendant respectively. Plaintiff is represented by Adv. Wessels SC and defendant by Adv. Porteous.

- [2] Plaintiff claims damages from defendant the amount of R1 020 761.10, alternatively the amount of R833 081.20 in respect of alleged breach of contract. The action is defended by defendant who filed two special pleas and pleaded over in respect of the merits. No replication was filed by plaintiff.

ARGUMENTS IN RESPECT OF SPECIAL PLEAS

- [3] On the first day of the hearing and after some time was spent to enable the parties to prepare a document containing agreed and/or common cause facts, I was requested to rule that defendants' two special pleas be adjudicated first. I adhered to the request. I was furthermore informed that there was no agreement between the parties whether the facts agreed upon could or should be considered by me for purposes of adjudication of the special pleas. The parties agreed not to lead any evidence and I was requested to adjudicate the special pleas based on the pleadings as they stand. At the close of the first day and after hearing argument the matter was adjourned to the next day. Mr. Porteous indicated prior to the adjournment that he was considering an amendment and therefore I did not prepare a judgment.

- [4] When we resumed the next day Mr. Porteous informed me that he had reconsidered the issue and abandoned the two special pleas. The only issue to be considered was costs pertaining to this aspect of the case. He requested me to reserve costs until the end of the trial whilst Mr. Wessels argued that I would not at a later stage be in any better position in order to exercise my discretion pertaining to costs and that I should grant costs against defendant bearing in mind that much of the previous day was to be regarded as wasted. I wish to point out at this stage that the first two hours of the first day was spent by the parties on trying to reach an agreement pertaining to which facts could be agreed upon and that argument in respect of the special pleas started just after 11h30 only. Mr. Porteous indicated that much of his argument and the case law referred to will be helpful in my adjudication of the matter on the merits and that most of the day could not be regarded as wasted. I reserved judgment in respect of the costs pertaining to the two special pleas for later adjudication when the merits are eventually and finally adjudicated.

SEPARATION OF ISSUES AND FURTHER DEVELOPMENTS

[5] The document pertaining to the agreed and common cause facts prepared by the parties was eventually handed in by agreement and marked exhibit "A". As requested I ordered a separation of issues in accordance with Rule 33(4) to the effect that, save for the quantum of plaintiffs' claim, all other facts in dispute on the pleadings were to be adjudicated upon. I also ruled that although document bundles were handed in by agreement by both parties, the documents contained therein would not constitute evidence unless the parties agree as such pertaining to specific documents contained therein and save those recorded and agreed to in exhibit "A".

[6] Mr. Wessels closed plaintiff's case without leading any evidence whereupon Mr. Porteous applied for absolution from the instance. It struck Mr. Wessels that he might have made a mistake in closing his case without leading evidence particularly pertaining to causality and as explained by him he initially thought that this would be dealt with as an integral part of quantum and not as part of the merits. He intimated that he needed to re-open plaintiff's case in order to lead evidence pertaining to certain issues, but after an adjournment I was informed that the parties agreed that certain facts be admitted

in order to avoid leading evidence in that regard.

- [7] The following was then recorded as an admission and on the basis that Mr. Wessels did not proceed with an application to re-open his case:

“It is common cause that building costs escalated during the period from August 2007 when the property was registered in the name of the trustees of the Orthodox Trust until the time when action was instituted, being 28 July 2010.”

- [8] Upon recording the admission Mr. Wessels proceeded with his argument to which Mr. Porteous replied. I shall deal with the arguments in due course.

**BACKGROUND WITH REFERENCE TO THE PLEADINGS AND
THE AGREED AND/OR COMMON CAUSE FACTS**

- [9] In October 2005 defendant applied for subdivision of Portion 1 of the Farm Morgenzon 339, district Bloemfontein in terms of the provisions of section 20 of the Townships Ordinance, 9 of 1969. The application was conditionally recommended by the

Mangaung Local Municipality and on or about 16 November 2006 approved by the Free State Province subject to certain conditions, including those imposed by the municipality. The one relevant condition imposed was that existing link roads between the proposed development and the A53 provincial road be upgraded. Ednau Avenue, in particular, is one such road.

[10] On 5 October 2006 first plaintiff, not a trustee at the time, purportedly entered into a Deed of Sale with defendant on behalf of the trustees of the Orthodox trust in terms whereof one of the plots forming part of the subdivided property, being Plot 26, was purchased.

[11] On 29 August 2007 Plot 26 was transferred in the name of the trustees for the time being of the Orthodox Trust. The transfer was duly authorised by all the trustees of both trusts. Plaintiff settled the purchase price in full.

[12] On 14 August 2007 a further agreement was purportedly entered into between the parties in terms whereof defendant agreed to erect certain structures and to instruct a surveyor to

prepare sectional title plans to enable the parties to arrange for the opening of a sectional title register on or before 31 December 2007. An amount of R7 000.00 was paid by plaintiff to defendant in order to comply with its contractual obligations. First plaintiff signed the agreement, his only authorisation being a resolution in general terms dated 25 August 2005.

- [13] Ednau Avenue has to date hereof not been upgraded as contemplated and provided for in the aforesaid conditions. It is alleged by plaintiff that as a consequence of the failure to upgrade Ednau Avenue plaintiff may not legally occupy the property purchased and/or that the municipality could not, cannot or will not approve building plans to enable plaintiff to erect a dwelling house on the property. This is not only denied by defendant in its plea, but the contrary appears from the agreed facts. Plaintiff never submitted building plans for approval, but by May 2010 three dwelling houses had been completed on other plots forming part of the subdivided property and certificates of completion had been issued by the municipality in respect thereof. This is contrary to the view of one Rautenbach of the municipality in an e mail message to

plaintiff's attorneys dated 10 February 2010. A certain Herbst took the municipality to Court at the end of 2010 when it failed to approve his building plans in respect of a dwelling house to be erected on a plot purchased by him, the outcome of which was that relief was granted to him by agreement.

[14] It is plaintiff's case that it was entitled to cancel the agreement of 14 August 2007 and to claim the amount of R7 000,00 paid which contract was interrelated to the rights afforded to it in terms of the Deed of Sale. It also claims damages pertaining to defendant's breach of contract based on the difference between the purchase price of the property and the value thereof together with loss of interest on the amount invested, alternatively an amount equal to the escalation of building costs from 1 October 2007 to 30 September 2010 insofar as plaintiff was not allowed to build at an earlier stage when it intended to build.

[15] Although defendant abandoned the two special pleas the allegations contained therein are also incorporated in the plea on the merits. Defendant denies in particular that plaintiff's right to legally occupy the purchased property, including the right to

erect a dwelling house thereon, was subject to the conditions imposed upon it by the Free State Province and in particular the upgrading of Ednau Avenue. Pertaining to upgrading of Ednau Avenue, it is defendant's case that the existing roadway for Ednau Avenue is incorrectly positioned relative to the road reserve and that it has been prevented from upgrading Ednau Avenue by the municipality. The effect of defendant's plea in this regard is that immediately upon registration of transfer plaintiff became entitled to submit building plans for the erection of a dwelling house, that such plans, if in compliance with the Building Standards Act, 103 of 1977 and the requirements of any other applicable law, would be approved, and that a certificate of occupancy would have been issued upon completion of the buildings.

- [16] Pertaining to the signing of the Deed of Sale by first plaintiff, it is defendant's case that insofar as no allegation is made by plaintiff that the signatory was authorised in writing by the other trustees, the Deed of Sale is invalid *ab initio* for want of compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981.

[17] It is finally denied that plaintiff has suffered any damages due to the alleged breach of contract and in respect of the agreement of 14 August 2007, it is defendant's case that plaintiff was not entitled to cancel the agreement.

LEGAL PRINCIPLES APPLICABLE TO APPLICATIONS FOR AN ABSOLUTION OF THE INSTANCE

[18] Harms JA dealt with the test for absolution formulated in **CLAUDE NEON LIGHTS (SA) LTD v DANIEL** 1976 (4) SA 403 (A) at 409 G – H as follows:

“This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff... As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one... Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice.” (Emphasis added)

See GORDON LLOYD PAGE & ASSOCIATES v RIVERA AND ANOTHER [2000] 4 ALL SA 241 (A) at 243 B.

[19] For the sake of completeness the well-known test set out in CLAUDE NEON LIGHTS *loc cit* is in the following terms:

“... when absolution from the instance is sought at the close of plaintiff’s case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff.”

[20] Insofar as documentary evidence is concerned and in particular the proper interpretation thereof, the following principle has been laid down:

“Where the plaintiff’s evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that a reasonable man might give to the document and the interpretation that he ought to give to it tends to disappear.

Nevertheless, even in such cases the trial Court should normally refuse absolution unless the proper interpretation appears to be beyond question.” (Emphasis added)

See **GAFOOR v UNIE VERSEKERINGSADVISEURS (EDMS) BPK** 1961 (1) SA 335 (AD) at 340 B – C.

- [21] Hattingh J found that the test to be applied in determining the question whether the defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently, whether a reasonable Court can find in favour of the plaintiff. The plaintiff’s evidence should consequently at the absolution stage hold a reasonable possibility of success for him and should the Court be uncertain whether the plaintiff’s evidence has satisfied this test, absolution ought to be refused. Where the claim is based on a document of which the interpretation is in dispute, the interpretation on which the defendant relies should be established beyond reasonable doubt before his application for absolution can succeed. See **BUILD-A-BRICK BK EN 'N ANDER v ESKOM** 1996 (1) SA 115 (O) at 123 A – E. See also **ROSHERVILLE VEHICLE SERVICES (EDMS) BPK v**

BLOEMFONTEINSE PLAASLIKE OORGANGSRAAD 1998

(2) SA 289 (O) at 293 D – H and Schmidt C W H, **Law of Evidence**, loose leave edition, p. 3-16 to 3-18.

[22] I am mindful of the fact that as a rule a Court refusing absolution at the close of the plaintiff's case should avoid an unnecessary discussion of the evidence and I shall consider this in my further discussion.

THE ARGUMENTS

[23] Mr. Porteous attacked the validity of the Deed of Sale and consequently plaintiff's right to claim damages flowing from an invalid transaction. He referred to the pleadings and the defence that there was non-compliance with section 2(1) of the Alienation of Land Act, 68 of 1981 (the "Land Act") in that first plaintiff only signed the document and the other trustees did not authorise the transaction in writing or otherwise. The resolution of 25 August 2005 signed by two trustees is of a general nature and in his submission not proof of authority as required by the Land Act. Section 28(2) of the Land Act provides that any alienation of land which does not comply with section 2(1) of the

Act shall in all respects be valid *ab initio* if the alienee has performed in full and registration of transfer has taken place. I am not prepared to find at this stage of the proceedings that, based on an interpretation of the resolution or the Land Act, defendant's interpretation is beyond doubt or question.

[24] It was also submitted that the common cause facts show that the aforesaid resolution is the only authority relied upon by plaintiff. A reading of the document makes it clear that the trustees abrogated their duties and functions in favour of first plaintiff who was not even a trustee at the time. The trust was nothing but first plaintiff's *alter ego* and the validity of the transaction was accordingly attacked based on common law principles. This issue is not properly pleaded and I am of the view that it would be prejudicial to plaintiff to consider it at this stage of the proceedings. In any event the submission is again based on an interpretation of the resolution and the same principles apply as stated above.

[25] Mr. Porteous submitted that plaintiff has made out no case for damages insofar as no evidence was led in support of its averments that building plans could or would not be approved if

submitted and that plaintiff would not be able to validly occupy the dwelling house once erected. It is a fact that plaintiff never submitted building plans, but at this stage of the proceedings we know from the correspondence between plaintiff's attorneys and the municipality, and the e mail of 10 February 2010 in particular, that the municipality was not inclined to issue an occupation certificate. The author of the e mail, Rautenbach, is (or was) the Manager: By-laws and Litigation of the municipality and apparently a senior employee. I accept that at least two occupation certificates were indeed issued to others earlier, but it is not certain under what circumstances. These were issued in January 2009 and March 2009 respectively, while plaintiff claims in the alternative damages based on escalation of building costs from 1 October 2007 to 30 September 2010. I bear in mind that plaintiff received transfer on 29 August 2007. The first occupation certificates were issued about 18 months later.

- [26] Mr. Porteous urged me to find that nothing prevented plaintiff to submit building plans immediately after registration of transfer, to ensure that the plans are approved, to build and to obtain an

occupation certificate. If the municipality refused to co-operate, plaintiff could take legal action like Herbst and would have been successful. He submitted that the conditions imposed could not be relied upon by plaintiff as it was a matter between defendant and the authorities. There is much to be said for the argument that these conditions are not “any other applicable law” referred to in section 7 (1)(a) of the Building Standards Act and that the municipality would have no discretion than to approve building plans in compliance with this Act. Again, this is matter for interpretation and the same principles as enunciated above apply. See *inter alia* the judgment of Kruger J of the Free State High Court in **KOTZE NO v HALDON ESTATES (PTY) LTD & OTHERS** – unreported, case no 2475/2010, delivered on 23 September 2010; **TRUE MOTIVES 84 (PTY) LTD v MAHDI & ANOTHER** 2009 (4) SA 153 (SCA) at para 19 & further and **MUNICIPALITY OF STELLENBOSCH v SHELF-LINE 104 (PTY) LTD** [2012] 1 ALL SA 441 (SCA) at para 20 where the SCA stated the following pertaining to township development:

“The development process is, of course, also designed to protect the persons who will be acquiring property in the development and

will become its residents and users of its amenities.....”

[27] In following the advice evident from the case law dealing with applications for absolution from the instance, the proper approach is to give the benefit of doubt to the plaintiff and consequently the defendant must fail. There is no reason why costs should not follow the event. It is recorded for taxation purposes that such costs are those occasioned by the hearing of the matter on the 9th May 2012.

ORDER

[28] The following order is issued:

1. Defendant’s application for absolution from the instance is dismissed with costs.

J.P. DAFFUE, J

On behalf of plaintiff:

Adv. M.H. Wessels SC
Instructed by:
Mr. J.H. Conradie
Rossouws Attorneys
Bloemfontein

On behalf of defendant:

Adv. G.F. Porteous
Instructed by:
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