IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 6109/2010

In the matter between:

STRANGPROP (PTY) LTD	Plaintiff
and	
ESSOP MOHAMED VASRIAWA	First Defendant
THE REGISTRAR OF DEEDS KWAZULU-NATAL	Second Defendant

JUDGMENT

SEEGOBIN J

[1] The first defendant ("the defendant") has excepted to the plaintiff's particulars of claim "*as the alternative claims do not disclose causes of action sustainable in law*". The defendant contends that the plaintiff is not entitled to any relief in the absence of a claim by the defendant for the demolition of the structure.

[2] The plaintiff's claims have their origins in a "Memorandum of Agreement" "(the agreement") in terms of which the plaintiff purchased Erf 2664 Broadlands, Mount Edgecombe ("the property") from the defendant for the sum of R6 250 000,00 (six million two hundred and fifty thousand Rand). Upon the signing of the agreement a deposit of R500 000,00 (five hundred thousand Rand) was to be paid and held in trust by the conveyancer.

[3] The relief sought by the plaintiff in the main claim is the following:

"9.

In the premises, it is proper that this Honourable Court issue adeclarator declaring that:

9.1 The agreement evidenced by Annexure 'A' has not lapsed due to non-fulfillment of the suspensive conditions set for the in clauses 6.1.1 and 6.1.2 of Annexure 'A';

9.2 Ownership of the property is deemed to be vested in the Plaintiff pursuant to clause 7.1 of Annexure 'A' alternatively the Plaintiff is entitled to registration of the property upon payment of the agreed purchase price."

[4] In the first alternative claim the relief sought is the following:

"18.

In the premises, the Plaintiff is entitled to:

18.1 occupation of the premises constituted by the completed premises, together with reasonable access thereto, subject to payment by the Plaintiff to the First Defendant of any damages sustained by the First Defendant arising from the encroachment, together with a *solatium*;

18.2 continue such occupation in perpetuity;

18.3 a declaratory as follows:

It is declared that the First Defendant is not entitled to the removal from Erf 2664, Broadlands, Mount Edgecombe of the encroachment erected thereon by the Plaintiff, subject to payment by the Plaintiff to the First Defendant of such damages [including a *solatium*] as the parties may agree or the Court determine to be payable."

[5] In the second alternative claim the following relief is claimed:

"22

In the premises, the Plaintiff is entitled to orders, upon compliance by the Plaintiff with the orders referred to in paragraph 18 of the Alternative Claim:

22.1 ordering the First Defendant to transfer the property described as Erf 2664 Broadlands, Mount Edgecombe to the Plaintiff;

22.2 directing the Second Defendant, upon due compliance with his requirements to register the said property in the name of the Plaintiff;

22.3 ordering the Plaintiff to pay all the costs consequent upon transfer of the property aforesaid;

22.4 directing the First Defendant to sign all necessary papers and do all necessary things to cause the transfer aforesaid to be effected, and failing which directing the Deputy Sheriff for the area in which the property is situate to sign all necessary papers and do all necessary things to effect the transfer aforesaid

23.

Alternatively to the orders referred to in paragraph 22, and in the event of it being held that the Plaintiff is not entitled to transfer [but only in that event], then and in that event the Plaintiff is entitled to orders as follows:

23.1 an order that the encroachment aforesaid be registered against the Title Deed over the property at the expense of the Plaintiff, and subject to:

a) an amended plan of the property approved by the Surveyor-General being prepared;

b) due approval of the Second Defendant and compliance with his requirements;

23.2 alternatively to sub-paragraph 23.1, an order that a servitude be registered in the offices of the Second Defendant over the property [as defined] in favour of the dominant tenement, namely Erf 2663 Broadlands, Mount Edgecombe granting a praedial servitude in perpetuity of a right of way over and on the encroachment aforesaid in terms of section 76 of the Deeds Registries Act 47 of 1937 (as amended) subject to all the costs of registration of such servitude being paid by the Plaintiff."

[6] Clause 5.5 of the agreement reads as follows:

"The balance of the purchase price shall be paid in cash on registration of transfer, and shall be secured by the issue of a bank guarantee, on behalf of the STRANGPROP [the plaintiff], in a form acceptable to VARIAWA [the defendant]"

[7] Clause 6 of the agreement contains a suspensive condition which stipulates:

"6.1 The coming into effect of this agreement is entirely conditional on Strangprop meeting both the following suspensive conditions, that:

6.1.1 on or before 15 December 2009 Strangprop is granted, in writing, a loan, secured by a mortgage bond, from any financial institution for the balance of the purchase price of R5 750 000;

6.1.2 STRANGPROP delivers the guarantee referred to in 5.5 above to the CONVEYANCERS within 45 days of the date of grant of the loan referred to in 6.1.1 above.

6.2 Should STRANGPROP fail to meet either condition detailed in 6.1.1 or 6.1.2 above within the specified time limits, this agreement shall lapse."

[8] Clause 7 of the agreement deals with issues relating to the passing of risk, ownership and occupation. In terms of Clause 7.1 it was agreed that the risk and

ownership in the property shall pass to the plaintiff on the date of occupation, from which date the property shall be at the sole risk of the plaintiff, which shall thereafter be liable for all expenses relating to the property such as rates, insurance, maintenance and the like. Clause 7.3 records that the plaintiff may take occupation on 15 January 2010, against payment of occupational interest of R39 000,00 (thirty nine thousand Rand) per month payable in advance from the date of occupation.

[9] The passing of ownership on date of occupation in terms of Clause 7.1 (which is claimed by the plaintiff) seems to be dependent on whether the agreement was still in effect or not. The issue is whether or not ownership still passes even where the suspensive conditions detailed in Clauses 6.1.1 and 6.1.2 were not fulfilled within the specified time. The defendant takes the view that non-compliance by the plaintiff of the suspensive conditions has caused the agreement to lapse.

[10] It is common cause that the plaintiff took occupation on 14 January 2010. It is also common cause that the plaintiff, with the defendant's knowledge and consent, commenced construction of a building on two (2) sites, namely, the property in question and another property already owned by the plaintiff or by an associate company of the plaintiff. The plaintiff claims that regardless of whether or not the court finds that it fulfilled the suspensive conditions recorded in Clauses 6.1 and 6.2 of the agreement, since the defendant allowed it to take occupation and permitted the construction to take place, the plaintiff is "*deemed*" to be the owner of the property *alternatively* it is entitled to require the defendant to register the property in its name upon payment of the purchase price stipulated in the agreement.

[11] The plaintiff contends that the provisions of Clause 7.1 should be read to mean that on taking occupation the plaintiff was "*deemed"* to be the owner of the property even though the word *"deemed"* was not used in the text of the clause. It was submitted that the use of the word in the context of Clause 7.1 provides a reasonable meaning to the use of the word "*ownership*". It was further submitted that when the defendant permitted the occupation and commencement of the construction, the defendant essentially waived the provisions of the suspensive conditions contained in Clause 6 of the agreement. The plaintiff avers that it is thus entitled to lead evidence in the trial on the issue of waiver.

GENERAL PRINCIPLES

[12] In*Dendy v University of Witswatersrand, Johannesburg and Others*[1] the Court stated that:

> "It is settled law that for the purpose of deciding an exception the court takes the facts alleged in the pleading excepted to as being correct. Also see *Fosev Minister of Safety and Security*[2]."

[13] In*Christian Lawyers' Association v National Minister of Health and Others*[3] 2004 (10) BCLR 1086 (T), the Court explained as follows:

> "In order to determine whether the particulars of claim disclose a cause of action, one must determine whether the allegations contained in the particulars of claim, if proven, would entitle the plaintiff to the relief sought by the plaintiff as prayed for in such particulars of claim. To determine whether the allegations in the particulars of claim support the relief prayed for therein, the allegations must be presumed to be true. Accordingly the test is whether the allegations or statements in the particulars of claim, read together with the correct position of the law, support the relief."

[14] The Supreme Court of Appeal in *Vermeulen v Goose Valley Investments (Pty) Ltd*[4]emphasised that in terms of the law an exception succeeds only where *ex facie* it is evident that '*the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim **is** (not may be) bad in law*.'

[15] Rule 23(3) of the Uniform Rules prescribes that whenever an exception is taken to any pleading the grounds upon which the exception is founded shall be clearly and concisely stated.

[16] In*Francis v Sharp and Others*[5] Erasmus J prefaced his evaluation of an exception with the following general observations:

1*Dendy v University of Witswaterand, Johannesburg and Others* 2005 (9) BCLR 901 (W) at para 31.
2*Fose v Minister of Safety and Security* 1997 (7) BCLR (CC) at para 73.
3*Christian Lawyers' Association v National Minister of Health and Others* 2004 (T) BCLR 1086 (T) at 1098.
4*Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 para 7.
5*Francis v Sharp and Others* 2004 (3) SA 230 (CPD) at 237D-I.

- An exception ought to make out a very clear, strong case in order to succeed, except where it raises a substantive question of law the resolution of which may settle the dispute between the parties;

- Because courts are reluctant to decide upon exceptions based on the interpretation of contracts, the excipient must persuade the Court that on every reasonable interpretation no cause of action is disclosed (also see *Lewis v Oneante (Pty) Ltd and Another* 1992 (4) SA 811 (A) 817F);

- Where a commercial document has been executed by the parties with the clear intention that it have commercial operation, it should not lightly be held to be ineffective (also see *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514E-F).

[17] The Court in *Sun Packaging (Pty) Ltd v Vreulink*[6] discussed the basic principles relating to the interpretation of a contract. The intention of the parties, gleaned from the language used and read in its proper context in light of admissible evidence, is the paramount consideration. Evidence relating to background facts is always admissible for the exercise as it provides the '*genesis of the transaction'*; the '*factual matrix*.' Evidence of surrounding circumstances is admissible only in so far as it is necessary to clear up any uncertainty and ambiguity in the agreement. The Court in *Davenport Corner Tea Room (Pty) Ltd v Joubert*[7] noted that an exception may be attacked by illustrating that the contract as pleaded could reasonably possibly have an interpretation adverse to the excipient, if there is ambiguity. However this argument cannot be used to repel an exception that has merit. The Appellate Division in *Sun Packaging*[8] approved the reasoning in *Davenport* that there must be '*more than a notional or remote possibility'* holding that:

> "The mere notional possibility that evidence of surrounding circumstances may influence the interpretation of a contract does not necessarily operate to debar a Court from deciding the issue on exception. The contention that such evidence exists must be examined with care."

6*Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) at 184A-E.
7*Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) at 716A.
8*Sun Packaging* supra at 184E.

[18] In*Pete's Warehousing and Sales CC v Bowsink Investments CC*[9] the Court considered the situation where an appellant sought to rely on an implied term of the contract. The Court referred to the Appellate Division finding in *LanificioVaram SA v MasurelFils(Pty) Ltd*[10] and formulated the following test:

> "The test at the exception stage is whether the trial Court could reasonably imply the term alleged…where the term contended for would, as a matter of law, otherwise be implied, the test is whether the agreement can reasonably be interpreted as not excluding that term."

ONUS

[19] The*onus* lies on the defendant as excipient to show that the meaning attributed to the provisions of Clause 7.1 of the agreement, namely that ownership, as between the plaintiff and the defendant, is "*deemed*" to vest in the plaintiff, cannot be a possible interpretation. If there is any uncertainty attaching to the plaintiff's intentions set forth in the particulars of claim, an exception cannot be upheld on any of the constructions maintained[11].

ISSUE OF *"DEEMED"* OWNERSHIP

[20] Mr*Tobias*, who appeared on behalf of the plaintiff, argued that since transfer of ownership of immovable property can only be effected by registration, whether the use of the word *"ownership"* in Clause 7.1 renders the clause nugatory or should one endeavor to give it a meaning.

[21] It seems to me that one cannot look at the word "*ownership*" in isolation as it appears in Clause 7.1 of the agreement. It falls to be interpreted in light of the contract as a whole and in light of its nature and purpose. By using the word "*ownership*" in the context of Clause 7.1, the parties must have, albeit impliedly,intended that on occupation, the plaintiff would become the owner, hence

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9*Pete's Warehousing and Sales CC v Bowsink Investments CC* 2000 (3) SA 833 (ECD) at para 14.
10*LanificioVaram SA v MasurelFils (Pty) Ltd* 1952 (4) SA 655 (A) at 661B.
11*See Harms, Civil Court Practice (vol. 1) para 23.3 page B1-166 citing: Callender-Easby v Grahamstown Municipality 1981(2) SA 810 (E); Manyetshe v SA Post Office Ltd [2008] 4 All SA 458 (T); Manyetshe v SA Post Office Ltd [2008] 4 All SA 458 (T)*

the allegation in sub-paragraph 7.3 of the particulars of claim following upon sub-paragraph 7.2 that the plaintiff "is *deemed* to be the owner of the property …" In my view, any meaning short of this would render the provisions of Clause 7.1 nugatory. In order to determine whether the word "*deemed*" provides a reasonable meaning to the use of the word "*ownership*", it may be necessary to resort to evidence of the background facts and surrounding circumstances in order to ascertain the intention of the parties at the time of the conclusion of the agreement.

[22] Bearing in mind that courts are reluctant to decide upon exceptions based on the interpretation of contracts, the defendant bore the duty of persuading the court that upon every interpretation which the particulars of claim could not reasonably bear, no cause of action was disclosed. In my view, the defendant has failed to discharge this *onus.*

AWARD OF COMPENSATION INSTEAD OF DEMOLITION

[23] The defendant's contention that the plaintiff is not entitled to relief in the absence of a claim by the defendant for the demolition of the structure, loses sight of the following averments contained in paragraph 14 of the particulars of claim:

> "The First Defendant has demanded that the Plaintiff remove the constructed premises alternatively has demanded an increased purchase price of R8 130 000 (eight million one hundred and thirty thousand rand) more than the original purchase price set forth in Annexure "A" and being the agreement dated 30 November 2009."

[24] It is well established that at an exception stage, the allegations contained in the particulars of claim must be accepted as being true. This being the case it seems to me that in light of the allegations contained in paragraph 14 of the particulars of claim, the defendant has already sought to enforce his right by demanding the removal of the encroaching portion of the structure. The argument put forward by Mr*Mathis* on behalf of the defendant that the plaintiff will have to wait for a formal claim either in convention or reconvention before it has any remedy is, in my view, untenable. The demand by the defendant for the '*removal'* of the building can only mean a demand for a demolition. It is not clear how a removal of a building can be

achieved without demolishing it. The plaintiff would thus be entitled to lead evidence, on the facts pleaded, that such a demand for a demolition was made. The submission on behalf of the defendant that the plaintiff has not specifically pleaded that the defendant has sought a "*demolition order*" loses sight of the allegations contained in paragraph 14 of the particulars of claim and the evidence that may be necessary to establish these allegations.

[25] In any event, in matters of this nature, the court has a wide and equitable discretion, based on considerations of fairness and reasonableness, to award damages in a given situation, rather than to order demolition of encroaching structures,. The existence of this wide and equitable discretion is consistent with the general approach of South African law to similar situations found in claims for enrichment, specific performance or interdicts[12]. The rigid enforcement of the primary remedy in the circumstances viz demolition of the encroachment, could sometimes have unjust results. The purpose of the court's discretion was to prevent such unjust results. On the evidence in *Brian Lackey*, it was held that the only realistic alternative to an award for damages would be the complete demolition of the plaintiff's dwelling. It was accordingly held that, weighing up the option of complete demolition against the option of payment of compensation (including a *solatium*), and having regard to considerations of the disproportionality of the prejudice and the principles of neighbor law, it was clear that ordering the complete demolition of the plaintiff's dwelling would indeed produce an unjust result. The court accordingly declined to make a demolition order.

[26] It seems to me that if the allegations contained in paragraph 14 of the particulars of claim are established, they may convince a court hearing the matter that the defendant was prepared to accept monetary compensation for his Erf and that he attempted to use his superior bargaining position in an endeavor to extract from the plaintiff a much higher amount than he was entitled to. Being armed with a demolition order would place him in an even stronger position to continue doing so. This is the position which was found to exist in *Brian Lackey, supra*. Griesel J said the following in this regard:

12*See Trustees, Brian Lackey Trust v Annandale 2004(3) SA 281 (CPD)*

"This was the precise concern expressed by the South African as well as the English Courts and on the basis of which those Courts considered themselves empowered to exercise the discretion not to order removal of an encroachment. In *De Villiers v Kalson*Graham JP put it as follows:

> 'It is quite true that for the reasons stated in so many of the English cases, the wrongdoer who encroaches on another's rights cannot be heard to say, unless there are some very special circumstances, that a monetary compensation is sufficient, for that would be tantamount to compelling the plaintiff to consent to expropriation. *But on theother hand it would be equally inequitable to place the plaintiff in a position to extort wholly excessive compensation from the defendant by granting an order for the removal of the buildings in cases in which the facts disclose that a remedy in damages would fully meet the justice of the case.'*

(my emphasis)."

[27] In the final analysis, I am of the view that for a court to exercise its discretion properly in this matter, it will need to hear all the evidence. I am accordingly of the view that the exception taken by the defendant is ill-founded.

ORDER

[28] For all the reasons set out herein, I make the following order:

a) The exceptions taken by the first defendant against the alternative claims of the plaintiff are dismissed with costs.

b) The first defendant is directed to file his plea within twenty (20) days of this order.

Date of Hearing	:	21/06/2011
Date of Judgment	:	21/09/2011
Counsel for Plaintiff	:	Adv. Tobias
Instructed by	:	De Villiers Evans & Petit
Counsel for 1st Defendant	:	Adv. Mathis
Instructed by	:	AJ.H. Nicolson Stiller &Geshen