

2/12/09
NOT REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

CASE NO. 43602/08

(1) REPORTABLE: YES/NO. ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES

In the matter between: (3) REVISED. ☒

1/12/09

DATE

lf Fabricius

SIGNATURE

BONDEV DEVELOPMENTS (PTY) LTD

APPLICANT

and

PLENTY PROPERTIES 60 (PTY) LTD

1st RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

2nd RESPONDENT

ABSA BANK LTD

3rd RESPONDENT

JUDGMENT

FABRICIUS AJ

1. In this application the applicant seeks an order that first respondent be ordered to re-transfer a certain property to it at first respondent's cost, against payment by applicant to first respondent in the amount of R290 000,00, which amount was the

purchase price of the property sold by applicant to the first purchaser, one Viljoen. First respondent thereafter purchased the property from Viljoen and registration of transfer took place on 14 November 2008.

2. It is clear that applicant is a developer of various townships, including the township known as the Midstream Estate.
3. In terms of paragraph B of the conditions on which the property was transferred from the initial purchaser (Viljoen) to the first respondent, the following condition was imposed in respect of the property and it was agreed to be enforceable by the applicant:

"Onderhewig aan die volgende voorwaarde opgelê en afdwingbaar deur BONDEV Ontwikkelings (Edms) Bpk naamlik: die transportnemer, sy opvolgers in titel of regsverkrygendes, is verplig om 'n woonhuis op die eiendom op te rig binne twaalf (12) maande vanaf 14 November 2005, by gebreke waarvan die transportgewer geregtig sal wees maar nie verplig nie, om te eis dat die eiendom aan die transportgewer op koste van die transportnemer getranspoteer word teen betaling van die oorspronklike koopprijs, rentevry. Die transportnemer sal nie die eiendom binne gemelde tydperk mag verkoop of oordra sonder skriftelike toestemming van die transportgewer nie."

4. Prior to the transfer of the property from the initial purchaser to the first respondent:
 - 4.1 applicant consented to such transfer;
 - 4.2 the relevant condition referred to was "carried forward" from the title deed of the initial purchaser to the title deed of the first respondent. It is common cause that first respondent failed to erect a dwelling on the property.
5. On behalf of applicant it was argued that the wording of the relevant condition made it clear that the applicant could enforce the condition as against first respondent. No notice to perform in this regard needed to be given according to applicant, and having regard to the decision of Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007(6) SA 87 at 90 G - H.
6. In the context of an alleged waiver of applicant's right in this particular context, it was argued on behalf of first respondent that when it took transfer of the property on 14 November 2006, the relevant one year time period had already expired, and applicant subsequently chose not to enforce the condition in the title deed against the initial purchaser, nor the first respondent. It was also argued that applicant only called upon first respondent to procure the erection of the dwelling house on 27 August 2007. In any event it was argued that first respondent sold the property to a *bona fide* third party, one Brits, who did not take transfer of the property. In the

replying affidavit applicant annexed a number of new annexures relying amongst others on the provisions of section 65 of the Deeds Registries Act, and an annexure "RBR6" which is a consent (*"toestemming"*) given by applicant when agreeing that Viljoen could sell to first respondent that *"Voorwaarde B en titel is nog nie aan voldoen nie en moet staan as 'n voorwaarde."* This consent is signed 27 September 2006. It is clear that no date for the expected performance in terms of this condition is fixed, and such performance could obviously not occur within one year after 14 November 2005.

7. During argument it was contended on behalf of first respondent that as a result such clause could not be complied with as no date for performance had been fixed, and that the strict compliance with that condition had therefore become impossible on its own wording. On behalf of the applicant it was contended that Viljoen would have been obliged to commence building on the day he took transfer, but applicant's counsel was unable to tell me when such dwelling had to be completed by, and when applicant would then have been entitled to rely on the relevant clause. The argument in this context becomes even more exotic and speculative if one has regard to the position of subsequent purchasers.
8. The relevant *"condition"* is more in the nature of a so-called term of the contract which in its proper context imposes a contractual obligation on a part to act in a particular manner. See: Design & Planning Service v Kruger 1974(1) SA 689 (T)

at 695 and *The Law of Contract in South Africa*, RH Christie, 5th Ed at 134. It is interesting that the applicant by way of an annexure dated 18 October 2007 said the following in regard to the time period which is in itself contained in the relevant clause:

"We have an obligation to other erf-owners to see to it that we keep on track with the development projects in toto. If you do not submit the said plans by the 20th of November 2007 and/or start to build very soon, we will proceed with legal action to re-transfer erf 1423, as stipulated in clause 11 of the original offer to purchase transaction between yourself and Bondev."

In applicant's annexure dated 25 February 2008 first applicant was reminded that in terms of condition C of the relevant title deed, the transferee was liable to erect a dwelling on the property within 18 months from 14 November 2005. It was pointed out (note on 25 February 2008) that *"in terms of title condition C you had to commence with building and erection of a dwelling on the property within 18 months from the 14th of November 2005"*. The absurdity of this contention ought to be obvious, and need it be asked how first respondent was obliged to comply with this specific term?

9. In the premises I am of the view that respondents' contention in this particular context is sound : the term was not and could not be complied with by either the first

purchaser or the first respondent. On its literal interpretation it cannot be enforced and was not sought to be enforced. It could of course have been enforced without demand within the relevant one year period, but it was not. In my view applicant cannot now rely on either the one year or the 18 months period as contended for, where it itself was unable to put a sound proposition to me relating to within which period a dwelling now had to be erected within the parameters of the said clause.

In the premises applicant's application is dismissed with costs.

SIGNED AT PRETORIA ON THIS THE 1st DAY OF DECEMBER 2009.

A handwritten signature in black ink, appearing to read 'AJ Fabricius', written over a horizontal line.

FABRICIUS AJ