

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: 1962/2007

In the matter between:

**ANDRIES LODEWYK LOOTS
ANTOINETTE LOOTS**

**First Applicant
Second Applicant**

and

ROJEN CC

Respondent

JUDGMENT DELIVERED : 31 AUGUST 2007

MOOSA, J:

1. This is the return date of a Rule *nisi* granted for specific performance arising from and in terms of a Deed of Sale entered into between the parties, dated 7 February 2005 ("Deed of Sale") and for ancillary relief. The final order is opposed by the respondent who is the seller in terms of the Deed of Sale. The respondent opposed the application on the basis that the Deed of Sale has lapsed by virtue of the fact that the suspensive condition contained in clause 12.1 thereof has not been fulfilled or is incapable of fulfilment. The applicants, on the other hand, deny the allegations of respondent and contend that the suspensive condition has been complied with, in that the necessary approvals

for subdivision have been obtained.

2. Clause 12.1 of the Deed of Sale referring to the suspensive condition, reads as follows:

“This offer to purchase is subject to the successful sub-division of Erf 1999 Swellendam by the relevant authorities provided that it will not be subject to any access servitude or right of way in favour of Portion A as indicated on the attached diagram.”

The effect of the suspensive condition is that the property had to be subdivided in such a manner as to avoid the remainder of the property being subject to an access servitude or right of way in favour of Portion “A”.

3. The facts that are relevant to the resolution of this matter are either common cause or undisputed and are as follows:

3.1 Pieter Theodorus Houterman (“Houterman”) of Bekker & Houteman, a firm of land surveyors, was appointed by respondent to attend to the proposed subdivision. When the Deed of Sale was concluded the subdivision process was already well advanced;

3.2 The consent of the South African National Roads Agency Limited (“SANRAL”) and the Municipality of Swellendam was required for the subdivision of the property. On 27 February 2005, Houterman submitted the subdivision application to SANRAL for approval. On 26 May 2005 SANRAL indicated in writing to Houterman that it had no objection, in principle, to the subdivision, but had reservations with regard to access and requested a plan for consolidating of the access points;

3.3 In order to discuss SANRAL’s reservation and request for an access plan, a site meeting was held between Houterman and two representatives of SANRAL. It was agreed between the parties that the existing gate of Bontebok National Park (“Park”) would be moved to the boundary between respondent’s property and the Park’s property, thus giving access to both portion “A” of respondent’s property and the Park’s property. The remainder of the property would have its own existing access;

3.4 On 29 September 2005 SANRAL, in writing to Houterman, approved the subdivision. In granting such approval, it mistakenly referred to

“Access to the remainder of Erf 1999 and Portion A”. This error was rectified by SANRAL by substituting the earlier written approval by a subsequent approval dated 29 November 2005;

3.5 On 27 October 2005, respondent informed Houterman in writing: *“Due to recent developments we hereby request you to stop all proceedings relating to Erf 1999 Swellendam with immediate effect. You will be notified at later stage of our intentions”*;

3.6 On 26 January 2006 the Swellendam Municipality (“Municipality”) approved the subdivision of Erf 1999 in terms of Section 25 of the Land Use Planning Ordinance, 15 of 1985 (“Lupo”);

3.7 On 2 March 2006, the applicants rejected the alleged repudiation of the sale by respondent, tendered due performance in terms of the Deed of Sale and called for specific performance, failing which action is to be instituted. Respondent responded by telefax the next day to the following effect: *“Please be advised that we shall not be signing any transfer papers and should you wish to take the matter further, please feel free to do so”*.

4. Adv **Van Zyl**, on behalf of the respondent, submitted that there are various factual disputes between the parties which cannot be resolved on the papers. The applicants, so it was argued, should have pursued their claim for specific performance by way of action and not by way of motion proceedings. She relied on the case of **Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd** 1949 (3) SA 115 (D) at 116 for her argument. In that case the court sets out the course of action open to it when disputes of facts arise in motion proceedings that are not capable of resolution on the papers.

5. I am not persuaded that there are genuine disputes of fact that entitle this court to exercise its discretion, in terms of Rule 6(5)(g) of the Uniform Rules of Court, either to dismiss the application, or to refer the matter for oral evidence or for trial. I am of the view that the matter is capable of resolution on the facts which are common cause and undisputed. To me it is quite clear that the respondent raised spurious disputes and defences to get out of the Deed of Sale. The respondent has not denied applicants' allegation that respondent can now obtain a much higher price for the property sold to the applicants and that respondent therefore no longer wishes to proceed with the sale.
6. Respondent alleges further that it is not *"refusing to co-operate in order to finalise the sub-division – the fact is that the property cannot be sub-divided as contemplated in the agreement, that is, without providing a servitude right of access over the remainder in favour of portion A. The respondent is, therefore, unable to pass transfer of the remainder to the applicant"*. This allegation is not only without merit, but is palpably false. It is quite clear from the conduct of the respondent that it tried to raise all sorts of technical issues and excuses to forestall the approval of the subdivision of the property. Houterman, in his supporting affidavit dated 8 June 2007, in the last paragraph of clause 22 says the following:

"Ek wil graag onderstreep dat ek deur respondent aangestel en dat ek geen belang het by die uitkoms van hierdie aansoek nie. Ek staan objektief in hierdie aansoek, maar kan dit werklik onder die hof se aandag bring dat die respondent nie net weier om samewerking te verleen nie, maar blatant aggressief is en reeds

gedreig het om my te skiet as ek die persele betree.”

7. These allegations have not been countenanced by respondent either in the form of an affidavit or through the Bar by its counsel. The veracity thereof is therefore accepted by the court. There is no reason, in my view, for Houterman to perjure himself in respect thereof. The court takes a very dim view of the threats. We are living in a civilised country with one of the best Constitutions in the world. Moreover, Jacobus van der Walt (“Van der Walt”) the regional manager of SANRAL, denied respondent’s allegation that the subdivision was based on incorrect information furnished by Houterman. He confirmed that the approval to the subdivision was granted following a site inspection and after the requirement for the line of vision was relaxed. I quote from para 2 and 3 of his Supplementary Affidavit, dated 17 August 2007:

“Ek het die ondersteunende eedsverklaring van mnr Petrus Theodorus Houterman gelees en bevestig die inhoud daarvan soos dit op my betrekking het. Ek wil spesifiek bevestig dat die goedkeuring geskied het nadat h terrein inspeksie deur myself en mnr Brink van ons kantore, vergesel van mnr Houterman, plaasgevind het. Hierdie goedkeuring het geskied afgaande (sic) op waarneming wat tydens die veldvergadering gedoen is en het ons die siglyn verslap na in ag neming van die relevante faktore. Daar is besluit om die ou parkeraad hek te skuif na die grens van gedeelte A en was SANRAL se besluit om die onderverdeling goed te keur beslis nie baseer op verkeerde informasie en inligting ontvang van mnr Houterman nie.”

8. On a very close scrutiny of the facts in issue, I conclude that there are no real genuine or *bona fide* disputes of fact that prevents this court from resolving the issues without the aid of oral evidence. (**Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E-I to 635A-C.) I am satisfied of the inherent veracity of the applicant's factual averments. In my view the probabilities are overwhelming in favour of the factual finding that the suspensive conditions as contained in clause 12.1 of the Deed of Sale has been complied with. In view of my findings, it is unnecessary to deal with the two further issues raised by applicants, namely, the question of warranty and the question of fictional fulfilment.
9. I now turn to the question of costs. In the papers, applicants asked for costs on the ordinary scale. During the course of argument, counsel for applicants asked that costs be awarded on an attorney-client scale. In support thereof, applicants submit that respondent opposed the relief sought in bad faith and it was warned, in a letter dated 1 August 2006, that if they are compelled to bring this action, they will seek a costs order on an attorney-client scale. The fact is that applicants did bring the application, but did not seek an order for costs on an attorney-client scale on the papers. Adv **Kilian**, on behalf of applicants, submitted that this court should exercise its discretion to order respondent to pay punitive costs on an attorney-client scale. Adv **Van Zyl** submitted that costs should follow the result and that there is no reason to award punitive costs.

10. Recently our courts have been flooded with litigation where sellers tried to renege on their agreement of sale because they could obtain a higher price for their property by virtue of the recent boom in the property market. Our courts will not tolerate such state of affairs and will not hesitate to award punitive costs where the circumstances justify such an award. I am tempted to grant a punitive costs order in view of the conduct of the respondent in this matter. However, I have decided against it because applicants have not asked for such relief in the papers. In my view, it would be unfair to saddle the respondent with such award if they were not granted an opportunity to respond thereto in the papers.

11. Applicants have prayed for the Rule *nisi* to be amended in order to clarify the relief. In my view such amendment does not prejudice the respondent and it is granted. The final order in terms of the amended Rule *nisi* is granted as follows:

(a) That respondent be and is hereby directed to take all necessary steps and to sign all necessary documents to finalise the subdivision application, as approved and to pass transfer of the remainder of Erf 1999, Swellendam, Western Cape (as indicated on the diagram attached to the Notice of Motion marked “Y”) (“the property”) into applicants’ names, subject to payment by applicants of the full balance of the purchase price.

(b) That, in the event that respondent refuses and/or fails to take the aforesaid steps and/or to sign the aforesaid documents within seven (7) days of the granting of this order, the Sheriff of this Honourable Court be

and is authorised and directed to take such steps and/or sign such documents on its behalf.

- (c) That respondent be and is interdicted and restrained to sell the property to any other purchaser and/or to pass transfer of the property to any other purchaser.
- (d) That the Registrar of Deeds, Cape Town, be and is authorised to register a *caveat* against the title deed of the property in accordance with the terms hereof.
- (e) That respondent is directed and ordered to pay the costs of this application.

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