

178/91

Case no. 140/90

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THAN (TAN) WAN FORD

Appellant

and

EVATON MATHLO PROJECTS (PTY) LIMITED.

Respondent

Coram: JOUBERT, HEFER, F H GROSSKOPF JJA, NICHOLAS et

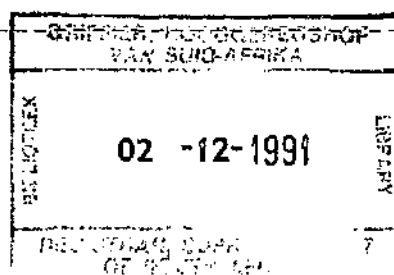
VAN COLLER AJJA

Heard:

19 September 1991

Delivered:

28/11/91.



J U D G M E N T

F H GROSSKOPF JA:

Evaton Development Company (Pty) Limited ("Evaton Development") entered into a written deed of sale dated 2 October 1987 ("the deed of sale") in terms whereof it sold a portion of the farm Rietfontein measuring 428,2660 hectares ("the property") to one Barnard in his capacity as agent for a company or close corporation to be formed. The appellant was the beneficial holder of all the shares in Evaton Development. The respondent was subsequently incorporated and it duly adopted the deed of sale.

The deed of sale contained certain stipulations for the benefit of the appellant, who was not a party to the deed of sale. It is common cause that the appellant accepted the rights and benefits stipulated in his favour. Clause 15 was one of the provisions in the deed of sale which conferred certain benefits on the appellant. It provided for a right of first refusal in his favour. Clause 15 reads as follows:

"The Purchaser hereby grant to Tan Wan Ford a right of first refusal on any number of Residential Erven, as [he] may want at market value."

The appellant, applicant in the Court a quo, sought a declaratory order that the respondent had failed to comply properly with the provisions of clause 15. The Court a quo (M J Strydom J sitting in the Witwatersrand Local Division) dismissed the application with costs, but granted the appellant leave to appeal to this Court.

This appeal concerns the proper interpretation of clause 15. A contractual provision such as clause 15 should be interpreted in its contextual setting. In Swart en h Ander v Cape Fabrix (Pty) Ltd 1979(1) SA 195(A) at 202C Rumpff CJ remarked:

"Dit is vir my vanselfsprekend dat h mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

(See also: Cinema City (Pty) Ltd v Morgenstern Family

Estates (Pty) Ltd and Others 1980(1) SA 796(A) at 804A-806A.)

The following is common cause or not in dispute. The appellant is a butcher by trade, carrying on business in Evaton. The respondent is a property development company. The property is situated near Evaton. The respondent acquired it with the intention of developing it into a black residential township comprising a large number of residential stands and some stands with business rights. In terms of clause 12 of the deed of sale the appellant also acquired a right of first refusal in respect of the erven with business rights. I shall later return to the provisions of clause 12.

Mr Heher, for the appellant, submitted that clause 15 gave the appellant a right of first refusal in respect of all the residential erven in each phase of the development, and that the respondent was accordingly obliged to offer each and every residential erf to the appellant before disposing of it to a third party. It is common cause that the respondent did not follow such a procedure; on the

appellant's interpretation, therefore, the respondent failed to comply with the provisions of clause 15.

Mr Myburgh, for the respondent, submitted on the other hand that clause 15 provided for a two-stage procedure whereby the respondent was first obliged to give the appellant an opportunity to select a number of residential erven which he "may want". He contended that the appellant had complied with that initial obligation in letters dated respectively 20 January, 7 and 8 March and 30 May 1989. It was further submitted that the appellant's right of first refusal only came into operation once he had made a selection of erven in response to the respondent's invitation to do so. The respondent would then be obliged to offer such selected residential erven to the appellant at their market value, whereupon the appellant would enjoy his right of first refusal.

On the respondent's interpretation of clause 15 the respondent duly complied with its initial obligation to give

the appellant an opportunity to make his selection of erven. The respondent's letters of 7 and 8 March 1989, read with its prior letter of 20 January 1989, clearly called upon the appellant to make his selection of erven in the first phase of the development. In its letter of 30 May 1989 the respondent requested the appellant to select erven in the second phase of the development. It is common cause that the appellant failed to make a selection of erven in response to either of these invitations, and according to the respondent's interpretation of clause 15 the appellant's right of first refusal therefore never became effective.

Mr Heher referred us to a number of cases dealing with the nature and meaning of a right of first refusal (or right of pre-emption as it is usually termed in the context of a sale). The respondent conceded that the phrase "right of first refusal" bore its ordinary meaning, but contended that the appellant's right of first refusal never came into operation. The legal principles involved are clear and do

not present any difficulty. It was held by this Court in Soteriou v Retco Poyntons (Pty) Ltd 1985(2) SA 922(A) at 932B-D, per Nicholas JA:

"A right of first refusal is well known in our law. In the context of sale it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing, and consequently he is prevented from selling to a third person without giving the first refusal. (See Van Pletsen v Henning 1913 AD 82 at 95; Owsianick v African Consolidated Theatres (Pty) Ltd 1967(3) SA 310(A) at 321F.) So, a right of pre-emption involves a negative contract not to sell the property to a third person without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies."

(See also: Van Pletsen v Henning 1913 AD 82 at 95; Sher v Allan 1929 OPD 137 at 142-143; Owsianick v African Consolidated Theatres (Pty) Ltd 1967(3) SA 310(A) at 318H-320H; Hirschowitz v Moolman and Others 1983(4) SA 1(T) at 5F-6E; Dithaba Platinum (Pty) Ltd v Erconovaal Ltd and Another 1985(4) SA 615(T) at 622G-623B, 623D-H).

Pursuant to clause 15 the appellant acquired a right of first refusal "on any number of residential erven, as [he] may want". In my judgment the appellant's right of first refusal did not relate to all the residential erven; it was to operate in respect only of those erven which he indicated that he wanted. The appellant was the only person entitled in terms of clause 15 to select those erven. It is conceivable that the appellant may have wanted all the residential erven in a particular phase of development, but until he gave such indication, or made his selection, the right of first refusal could not operate. The appellant had to determine the merx which would be subject to his right of first refusal; until the merx had been so defined the appellant's right of first refusal could not be exercised. Since the residential erven differed in size and locality, it would not have sufficed for the appellant merely to indicate a number of residential erven ; he was obliged to identify the particular erven which he wanted. Only then would the

respondent have been in a position to give the appellant the pre-emptive right of purchasing the particular erven "at market value".

Clause 12 of the deed of sale provides further support for the conclusion that clause 15 did not simply give the appellant a right of first refusal on all residential erven. Clause 12 granted the appellant a right of first refusal to buy erven zoned for business use. It provided:

"Should the Purchaser obtain any Business Rights on some of the Erven, the Purchaser hereby grant to Tan Wan Ford a right of first refusal to buy such Erf or Erven."

Clause 12 is clear; the appellant acquired a right of first refusal to buy all erven with business rights. If the language in clause 12 is contrasted with the language in clause 15, it is equally clear that clause 15 did not grant the appellant a right of first refusal on all residential erven. In clause 12 the merx was defined, while in clause 15 the merx still had to be determined. Until such time as the

appellant had selected the residential erven which he wanted, as provided for in clause 15, the respondent was not in a position to offer him any residential erven. The appellant ignored the respondent's letters and so failed to identify the erven he wanted. In my judgment the respondent duly complied with its initial obligations under clause 15, and the appellant's inaction meant that the respondent was unable to give him the first refusal in terms of clause 15.

The appeal is accordingly dismissed with costs.

F H GROSSKOPF JA

JOUBERT	JA	
HEFER	JA	Concur
NICHOLAS	AJA	
VAN COLLER	AJA	