

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ✓

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

(3) REVISED.

DATE 09/09/08

SIGNATURE [Signature]

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSCAAL PROVINCIAL DIVISION)

Case no 10452/2006

3/9/2008

BROUGHTON ADELE

NOT REPORTABLE

PLAINTIFF

v

SINETHEMBA HOPE HOUSE

RESPONDENT

JUDGMENT

The plaintiff is Adele Broughton of Boksburg.

The defendant is cited as Sinethemba-Hope House registered as a registered non profit organisation having its chosen address at 161 Hodgson Street Benoni North. It is not clear from this description that the Defendant is a legal persona with locus standi in judicio. The case proceeded however on the basis that it was such, and that it could own property and litigate in respect thereof.

On 26th April 2005 and at Benoni the plaintiff and the defendant executed a written document, apparently an agreement of sale in terms of which, according to the particulars of claim, the defendant sold to the

plaintiff a portion of immovable property known as Plot 161, Hodgson street Benoni North A/H Benoni Gauteng.

The defendant originally maintained that by reason of non fulfilment of one or more conditions upon which it was dependant the agreement had lapsed and was no longer binding. Such was its plea to plaintiff's particulars of claim. The Defendant refused and continues so to do, to transfer the property against payment of the tendered purchase. Hence we have the present proceedings.

During the hearing I raised the question of the validity of the agreement. It seemed to me that the description of the property may not comply with the requirements of Section 2(1) of the Alienation of Land Act, Act 68 of 1981. This occasioned a postponement to enable the defendant to raise this question in an amendment to its plea.

On resumption of the case the Plaintiff's evidence was completed. Defendant adduced no evidence.

Dealing now with the defences raised in turn.

Invalidity of the agreement because of insufficient description of the property?

One has to refer to the agreement itself to determine whether the property which is the subject matter of the sale is there sufficiently described. to comply with the provisions of the Alienation of Land Act.

Plaintiff has annexed to the particulars of claim, what is said to be, a true copy the original document. It is on this copy that the plaintiff relies. There is however no area demarcated in red as stated in the text of the

agreement to be the property purchased.. There is no evidence as to whether or not any area was marked in red on the original agreement.

Paragraph 2.1 of the agreement reads as follows in describing the property:-

2.1 The Property

It is recorded that:-

- The seller is the registered owner of *Plot 161 Hodson street Benoni North Agri. Holdings*
- The seller intends/is in the process of subdividing the said property basically in according with the attached sketch; *Annexure "A"(1 of 161)*
- That portion of the property marked in red on the said sketch forms the subject matter of the agreement of sale and is hereafter referred to as "The property"

The words in italic are those which have been inserted by hand in the printed pro forma document apparently prepared by, and bearing the logo of, the agent and which the agent uses in circumstances such as the present, where land is to be subdivided and a portion thereof is sold.

The sketch attached indicates the proposed division of Plot 161 into two subdivisions. The first is called RE/161 and its extent is about 7919m². It is situated abutting Hodgson Road. The second is labelled 1/161 and its extent is about 82712 and is distal to Hodgson Road.

Although the copy of the sketch shows no red markings as mentioned in the definition of the property in the agreement it is clear that by referring

to "1 of 161" the parties were indicating the portion, so labelled distal to Hodgson Road and accessed by the "pan handle" to be the property purchased. This being so there would seem to be no necessity for the marking in red to identify the property sold. This is a case where handwritten words take precedence over the printed reference to an area marked in red.

It is possible by reference to the sketch to identify the area and perimeters of the land sold although some of the figures are not distinct. This does not necessarily invalidate the agreement..

The parties in the agreement made it clear that at the time of the execution of the agreement that the boundaries of the land bought by the Plaintiff as they would be on sub division were not yet predictably fixed and certain.

The agreement was however subject to a condition reading

"6.2.1 The agreement is subject to the approval by the Surveyor General of the sub divisional diagram substantially in accordance with the attached sketch by *1 Nov 2005*"

(The Italic indicates words inserted in handwriting).

There is also an addendum to the agreement which relative to the present consideration provides

"1. The buyer is granted an extension of six months for registration of transfer of the above sub- division."

The meaning of this is not apparent, but what ever its meaning it cannot override the explicit provisions of 6.2.1 of the agreement These clauses of the agreement are clear indication that the parties agreed that what was

bought by the plaintiff was the portion of plot 161 labelled 1/161 which is that portion of the whole plot less that portion labelled Re/161. and that its boundaries and extent would be such as revealed in the subdivision diagram. Insignificant deviation from the sketch was not considered material. It was left to the surveyor to effect the subdivision and any uncertainty was eliminated once the diagram was registered.

The law accepts that the parties may leave it to a third party to determine a price. So too it may be left to a third party to determine the exact boundaries of land within the parameters agreed by the parties. Once as in this case the determination is made, by the land surveyor the property sold is identifiable without any doubt.

The evidence of the land surveyor Mr Barend Botha who drew the diagram of the subdivision removes any doubt that the "Remainder of Portion 385 of the Farm Vlakfontein No 30 IR", transfer of which is claimed by the Plaintiff is the land indicated as plot 1/161 on the sketch attached to the agreement. Although the figures of the mensuration on the copy of the sketch attached to the pleadings may be indistinct, the information is sufficient to effect a subdivision within the parameters agreed upon by the parties. The diagram describes the portion excised from plot 161 an identifiable land entity registrable in the deeds registry. The remaining extent of 161 is now Remainder of Portion 385 of the Farm Vlakfontein No 30 IR

The agreement does accordingly comply with the provisions of the Act and is not invalid on account of a deficient description of the property sold.

Non Fulfilment of Conditions Precedent

Before the resumption of the hearing the Defendant filed an amended plea. The defence raised therein, (as raised in the original plea before amendment), now examined under this rubric, read

4 AD PARAGRAPH 5.2

Save to aver that the Plaintiff

- 4.1 would be liable to pay all the costs pertaining to the sub division and;
- 4.2 that upon a proper construction of the agreement, the agreement was subject to the Surveyor General approving the sub- divisional diagram substantially in accordance with the sketch annexed to the agreement, on or before the 26th of October 2005 and
- 4.3 the plaintiff was required to take transfer of the property by no later than the 26th of October 2005, the further allegations are admitted."

and

AD PARAGRAPH 5.4.3

Th Defendant avers that upon a proper construction of the agreement the approval of the sub-divisional diagram had to be approved by the Surveyor General on or before the 26th of October 2005 to enable Plaintiff to take transfer before such date.

The plea as amended continues

AD PARAGRAPH 7.1

The defendant denies that it is obliged to sign any documents pursuant to the agreement and avers that the agreement has lapsed due to one or more of the Suspensive conditions not being fulfilled that it is obliged to sign any documents pursuant.

Because the plea was amended only after the adjournment of proceedings, no exception was taken to this vague and embarrassing way of pleading. The allegation in paragraph 9 is difficult to understand for how could transfer take place *before* the sub division was approved?

The allegation also is in conflict with the wording of the contract which is common cause, to the effect that the agreement is subject to the approval by the Surveyor General of the sub divisional diagram substantially in accordance with the attached sketch by "1 Nov 2005"

The uncontested evidence is that this condition was in fact fulfilled. The plea in so far as it refers to the non- fulfilment of the condition provided for in paragraph 6.2.1 of the agreement is not substantiated and must fail.

The provisions of paragraph 6.1.1 read:

This agreement is conditional upon the purchaser obtaining approval of a mortgage loan of R320 000 (*Three Hundred and Twenty Thousand Rand*) from a registered bank other financial institution approved by the seller or

the conveyancer by not later than *30 Days* (which period may be extended by the seller/agent for a further 30 days) upon such terms and conditions as may be stipulated by the bank or other financial institution.

(The italic indicates hand written script inserted in the pro forma printed form used).

The agreement it will be seen does not stipulate when the period of thirty days is to begin. The provision does not even stipulate that the bond has to be one securing the monies to be advanced by hypothecation of the property purchased.

Could it be thirty days from signature as contended by the defendant? The plaintiff argues not, for, so the argument runs it would not be possible to obtain a mortgage bond on the subdivided property until subdivision had taken place and the diagram prepared. The argument is flawed in that the condition pertaining to the loan secured by the mortgage requires approval not registration of the bond. It is notionally possible for a financial institution to indicate approval and readiness to finance a transaction which is subject to conditions precedent, once the conditions have been fulfilled.

The Plaintiff contends that the thirty day period only begins on the 1st November 2005 this being the date in the agreement by which the condition precedent relating to the subdivision of the property had to be fulfilled. In support of this submission the plaintiff argued that until the condition was fulfilled the plaintiff could not have obtained approval of a bond. Against this is that even if the this were so the correct date for the

commencement of the period of 30 days would be the date on which the condition was fulfilled which in fact the date on which the Surveyor General approved the sub divisional diagram which it is agreed was 27th October 2005

Neither party has asked for rectification. This is not surprising, for even if rectification were possible, as neither can allege what the parties actually agreed and what was intended. The written words "thirty days" may have been inserted by the agent without reference to the parties and without reading the paragraph to confirm its meaning and intent.. The blank space calls for a date to be inserted. The words filled in are nor apposite and clearly have been inserted with no thought of the meaning to be conveyed thereby. Clearly a date should have been specified as called for by the words before and after the blank space, to give meaning to the paragraph.

None of the suggestions made in argument as to the date of commencement is convincing or can be adopted to give meaning or effect to the Paragraph 6.1.1 of the agreement. An irremediable uncertainty has been introduced to the provision for the condition which makes it impossible to give effect thereto.


It is not possible to sever paragraph 6.1.1 from the agreement which is accordingly unenforceable as a whole, and the sale does not accordingly, in this respect, comply with the provisions of section 2(1) of the Alienation of Land Act..

The plaintiff is not entitled to transfer of the property claimed by her but in terms of the prayer for alternative relief she is entitled to such monies

as are to be repaid to her in terms of Section 28 of the Act. Such amounts totalling R43 592, comprising deposits paid and disbursements made to defendants advantage in furtherance of the transaction. Defendant made a tender in its amended plea in the event of a finding that the contract was invalid on account of a deficient description of the property. I have found that the contract fails, for another reason, not contemplated at the time of the tender.

Neither party has been substantially successful in their contentions. Both are the victims of the defects in the agreement drawn up for their signature by Defendant's agent, but for which this litigation may not have taken place. I will make no order in this regard thereto leaving both parties to bear their own costs.

I accordingly order that the defendant shall pay to the Plaintiff R43 592 with interest thereon calculated at the prescribed rate from today's date to date of payment.


S W Sapire AJ