IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION

DURBAN

Case number: 8632/2011

JOY HODGSON N.O.	**Applicant**

and

WILLIAM DOUGLAS HOWIE N.O.	**First Respondent**
NICO VAN ZYL INC.	**Second Respondent**
REGISTRAR OF DEEDS	**Third Respondent**
GREGORY FRANCIS MASSEY	**Fourth Respondent**
AMANDA LOUISE MASSEY	**Fifth Respondent**
SUSAN CATHERINE HOWIE N.O.	**Sixth Respondent**
JOHAN PEROLD	**Seventh Respondent**
NEIL THOMAS REID N.O.	**Eight Respondent**

JUDGMENT

VAN ZŸL, J.:

1. This is an application in which a purchaser seeks to obtain specific performance pursuant to a deed of sale by compelling the seller to effect

transfer of a portion of subdivided land. The seller raised prescription as an initial defence, but failing that claims rectification of the deed of sale as a precondition for performing in terms thereof.

2. The applicant is the executrix in the deceased estate of her late husband, who was the purchaser in terms of a deed of sale concluded on or about 7 September 2005 with the Chaka's View Trust (the trust), presently represented by the first, sixth, seventh and eighth respondents (although the seventh respondent is not an active participant) as its trustees. For ease of reference I will refer to these respondents simply as "the trust". The third respondent is the Registrar of Deeds, KZN. The fourth and fifth respondents are a married couple, who were cited as respondents on the basis that they have a substantial interest in the outcome of these proceedings, having subsequently purchased from the applicant the property commonly referred to as lot 347. However, the only active parties in the dispute when it came before me as an opposed motion for argument upon the affidavits were the applicant on the one hand and the trust, as represented by the first, sixth and eighth respondents, on the other hand.

3. Whilst the deed of sale does not say so, it is common cause that the subject matter of the sale, therein described as "Portion 4 of Erf 1094, Southport", did not exist at the time of the conclusion of the sale agreement and still had to be created, once the necessary approvals

were obtained, by way of a subdivision of Erf 1094, before transfer could be effected pursuant to any sale.

4. The issues need to be considered against the background and history of developments ultimately giving rise to the present dispute. The disputed portions formed part of a much larger tract of land referred to as Bendigo Farm and originally purchased, according to the answering affidavit of the first respondent Mr Howie, by him in his personal capacity some thirty five years earlier. Mr Howie said that shortly after such acquisition he transferred the land into the name of the trust.

5. Many years later, one gathers, the area had been the subject of some development and had been subdivided for residential occupation. According to the layout plan (annexure B to the applicant's founding affidavit) and relevant to the present dispute, the adjoining lots 343, 344, 345 and 347 were all bordered on their eastern side by an elongated subdivision styled Erf 1094, owned by the trust and which formed a strip of land separating the four lots aforementioned from the railway reserve.

6. At one time Erf 1094 had formed part of a roadway then known as Ocean Drive South, but this had fallen into disuse. According to Mr Howie the trust initially had in mind developing Erf 1094 for residential purposes, but this met with opposition from the owners of the adjoining

lots who feared interference with the sea views from their respective properties.

7. During the course of discussions the idea was mooted, subject to the necessary permissions being obtained, of subdividing Erf 1094 into four portions which would then be acquired by, added to and consolidated with each of the four corresponding adjoining lots. Of relevance to the issues at present is that lot 345, which would acquire portion 3 to be created, belonged to a Mrs Kriel and lot 347, which would acquire portion 4 to be created, belonged to the late Mr Hodgson (the deceased).

8. According to the trust Mrs Kriel, whilst receptive to the proposed subdivision and acquisition of the relevant portion of Erf 1094, requested a right of way, which would traverse portion 4 to be created and was intended for acquisition by the adjoining lot 347 owned by the late Mr Hodgson. Mrs Kriel apparently envisaged the future construction of garaging on the lower (eastern) part of lot 345, once consolidated with portion 3, with vehicular access thereto by means of the proposed servitude. In this regard the trust placed reliance upon her letter of the 1st February 2005 to Mr Naude, a land surveyor attached to the firm Hudson-Naude-Kirby which appears also to have prepared the proposed layout plan (exhibit B to the applicant's founding affidavit) which shows a two meter wide right of way servitude traversing the proposed portion 4.

9. The trust contends that agreement regarding the creation of such a right of way, by means of a servitude over what was to become portion 4, was reached between the trust represented by Mr Howie, Mrs Kriel and the late Mr Hodgson. In this regard it draws attention to the course of negotiations giving rise to the claimed right of way agreement.

10. According to the answering affidavit of the first respondent Mr Howie, the four proposed portions to be created from subdividing Erf 1094 were to be offered to each of the owners of the corresponding adjoining lots at a standard price of R5 000-00 each. As a result initially the proposed portion 3 was to be acquired by Mrs Kriel as owner of lot 345 at this price and the proposed portion 4 was to be acquired by the late Mr Hodgson as owner of lot 347 at the same price. The latter proposition was confirmed in a letter dated 18 July 2005 from the late Mr Hodgson to Mr Howie (being annexure F to the latter's answering affidavit).

11. Flowing from these proposals and on 7 September 2005 the proposed portions 1 and 2 were sold as envisaged to Messrs L D Barritt and B W Taylor, respectively the owners of lots 343 and 344, for R5 000-00 each. This was evidenced by copies of their agreements of sale annexed to Mr Howie's answering affidavit as annexures B and C. On the same date portion 4 was sold to the late Mr Hodgson, but at a reduced price of R3 750-00, as is apparent from the agreement of sale, a copy of which is annexure B(2) to the applicant's founding affidavit.

12. By way of contrast the proposed portion 3 of Erf 1094 had earlier been sold to Mrs Kriel for the increased price of R6 250-00 by virtue of an agreement of sale signed on 26 July 2005 and a copy of which is annexure D to the answering affidavit of Mr Howie. Significantly this agreement also includes under clause 15 a special condition, reading as follows:-

> "*See attached diagram showing servitude over sub 4 in favour of sub 3.*"

13. Reference to the diagram, annexed and marked E, reveals that it is similar to and indeed a clearer copy of annexure B to the applicant's founding affidavit which had been prepared by Messrs Hudson-Naude-Kirby, professional land surveyors of Port Shepstone, during July 2004.

14. On behalf of the trust it was submitted that the omission of a special condition of a similar nature from the agreement of sale concluded between the trust and the late Mr Hodgson could only be explained as an error at the time, probably because it was concluded simultaneously with the sales of portions 1 and 2, which were not involved in the right of way issue. It was further submitted by Mr Ungerer, who appeared for the trust, that the prices at which the four portions were ultimately sold were entirely consistent with and supported the explanation of Mr Howie that the price for portion 3 had increased by R1 250-00 and the

price for portion 4 had correspondingly been reduced by the same amount, in order to compensate for the right of way agreement affecting only these two portions.

15. An agreement, invalid for want of compliance with formalities prescribed by statute, cannot be validated by rectification. This principle was reaffirmed by Nienaber JA in Milner Street Properties (Pty) Limited vs Eckstein Properties (Pty) Limited 2001 (4) SA 1315 (SCA) in para 24 at page 1324I-J. The parties were, in my view correctly, *ad idem* that an agreement which has the effect of creating a servitude needs to be in writing in order to be capable of registration in the Deeds Office. This is because a right of way, as in this instance, over land constitutes an 'interest in land'. It falls within the definition of 'land' in section 1 of the Alienation of Land Act 68 of 1981(the Act) and section 2(1) thereof requires an agreement alienating land to be in writing. As a result an oral agreement alienating such a right in land would be of no force or effect. (Felix en ’n Ander vs Nortier NO en Andere [1996] 3 All SA 143 (SE); Janse van Rensburg and Another v Koekemoer and Others 2011 (1) SA 118 (GSJ)

16. However, the parties differed in their application of the principles set out above to the facts of the present matter. In terms of the approach taken by the trust the omission of reference to the right of way could be rectified because the un-rectified agreement of sale complies with the requirements of section 2(1) of the Act. In its approach what needs to

be rectified is the inadvertent omission of a suspensive condition in terms of which the sale and transfer of portion 4 depends upon the simultaneous registration of a servitude creating the right of way in favour of portion 3 (which of course would become consolidated with lot 345, as would portion 4 with lot 347).

17. On behalf of the applicant however counsel submitted that the oral agreement envisaging the creation of a right of way over portion 4 was an entirely distinct and separate agreement which, because such an agreement was required to be concluded in writing, failed to comply with the requirements of section 2(1) of the Act and could not therefore be rendered enforceable by way of rectification of the sale agreement.

18. In the view I take, assuming firstly that the sale agreement pertaining to portion 4 otherwise complies with the requirements of section 2(1) of the Act and secondly that the oral agreement with regard to the servitude is duly established, the clause pertaining to the creation of the servitude is, as submitted by Mr Ungerer, merely a suspensive condition to which the agreement of sale would become subject, if rectification were effected. Should the parties find themselves unable thereafter to satisfy the suspensive condition, the agreement of sale would fail. On the other hand, if the condition were satisfied by way of concluding a further agreement which complied with the requirements of section 2(1) of the Act, as well as the requirements of the third respondent (the Registrar of Deeds) for the creation and registration of

the right of way, then notionally effect could be given to the sale agreement, as rectified.

19. There is, however another issue to be considered before turning to the vexed question of whether the matter is capable of decision upon the affidavits before me. The trust raised, in limine, the issue of prescription. It is common cause the sale agreement between the late Mr Hodgson and the trust was concluded on 7 September 2005, that payment of the purchase price of R3 750-00 was made on the date of signature (annexure G of the answering affidavit of Mr Howie) and that the present application proceedings were initiated with the issue of the notice of motion on 3 August 2011.

20. The trust has adopted the attitude that the obligation upon it to effect transfer of portion 4 to the purchaser (then the late Mr Hodgson) arose upon payment of the purchase price, following the conclusion of the sale. On this approach the prescriptive period of three years in terms of section 10(1) read with section 11(d) of the Prescription Act 68 of 1969 (the Prescription Act) commenced running upon such payment and not at a much later stage when the sub-divisional requirements for the creation of portion 4, together with those for the other portions, were satisfied.

21. In developing his argument counsel for the trust submitted that, upon the conclusion of the sale of an immovable property, there arose a

general obligation upon a seller to effect delivery thereof, by way of registration of transfer, to the purchaser. In this regard counsel referred the remarks of Levinsohn DJP in Hoofar Investments (Pty) Limited vs Moodley 2009 (6) SA 556 (KZP) at para 12. Counsel further submitted that the obligation to procure transfer of a property was a "debt" as contemplated in terms of the Prescription Act. In this regard reference was made to Desai NO vs Desai & Ors 1996 (1) SA 141 (AD) at page 146G – 147B. However, as was recognised by the court of appeal at page 147 D – E, such a debt is not necessarily immediately due and may be delayed until the fulfilment of a suspensive condition.

22. In the present matter it is common cause that despite the wording of the agreement of sale, which purported to sell "Portion 4 of Erf 1094", that and the other portions sold were not yet legally in existence at the time of its conclusion. It is also clear that the payments made by the purchasers for the intended portions of Erf 1094 were to be held in trust pending the subdivisions and consolidation transfers. This strengthens the impression that these sales were subject to suspensive conditions.

23. It seems to me that at best one can assume that portion 4 (as well as the other portions) only became transferable upon the issue of the letter of 21 January 2009 by the Department of Local Government and Traditional Affairs (KZN). This letter (annexure C to the applicant's founding affidavit) informed the land surveyors that the application had

been granted in terms of section 18 of Town Planning Ordinance 27 of 1949, but subject to a number of requirements set out in the letter. However, in the absence of an up to date report by the third respondent (the Registrar of Deeds) it remains unclear, even at this late stage, whether there may remain any outstanding requirements which would prevent or impede the registration of transfer of the various portions (including portion 4), as well as their simultaneous consolidation with the respective lots to which they would attach.

24. It is not disputed that, following the conclusion of the different agreements of sale of the intended subdivisions of Erf 1094, the trust pursued efforts to obtain the necessary permissions and to meet the requirements necessary to create and give transfer of the subdivisions and facilitate the respective consolidations in terms of the various agreements of sale. In my view, in so doing, the trust tacitly acknowledged its liability within the meaning of section 14 of the Prescription Act and thereby interrupted any prescription which may otherwise have commenced running. Also, in paragraph 35 of the trust's answering affidavit Mr Howie states categorically that the trust "… has elected to enforce the sale agreement …", subject to its claim for rectification. Such election is in my view inconsistent with a claim that the agreement had lapsed due to prescription.

25. In my judgment it has therefore not been shown that prescription had commenced running from during or about September 2005, if at all and

that the trust's obligations otherwise arising out of the agreement of sale pertaining to portion 4 had become prescribed.

26. On the topic of prescription and with reference to the trust's claim for rectification, counsel for the applicant in reply submitted that such claim itself has prescribed and for that reason alone the claim for rectification should not be entertained. There is no merit in this submission because a claim for rectification is not a "debt" within the contemplation of the Prescription Act and prescription cannot run against such a claim (Boundary Financing Ltd v Protea Property Holdings (Pty) Ltd 2009 (3) SA 447 (SCA)).

27. Part of the applicant's difficulties in disputing the alleged agreement relevant to the disputed special condition to create a servitude, is that the late Mr Hodgson cannot give evidence in regard to the matter and the applicant herself did not at the time have direct personal involvement in the alleged negotiations. Counsel for the trust was critical of the applicant's decision, having been forewarned that there was a factual dispute looming with regard to the alleged agreement concerning a right of way, nevertheless to initiate proceedings by way application, instead of by way of action.

28. In this regard counsel for the trust submitted that motion proceedings were not designed to determine probabilities, or to resolve factual disputes and called in aid the remarks of Harms DP in NDPP v Zuma

2009 (2) SA 277 (SCA) at para 26 where the learned Judge of Appeal stated that;

> "[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

29. The general rule when a final interdict may be granted on the papers alone and without resort to oral evidence was authoritatively set out in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E – G, where Van Wyk J formulated it as follows:

> "*... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.*"

30. The applicable principles were also discussed by Corbett JA (as he then was) in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) at page 634E - 635C. In that matter the learned Judge

of Appeal reaffirmed the general rule in Farmers' Winery vs Stellenvale Winery (supra), but went on to qualify it at 634I – 635D, as follows –

> "*The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A).*"

(See also : Kemp NO v Van Wyk 2005 (6) SA 519 (SCA) at page 525A).

31. In developing his argument counsel for the trust submitted that it could not be said that the trust's version in the present matter was bald, or contained uncreditworthy denials, or that it raised any fictitious disputes of fact, or that its version may be labelled as palpably implausible, far-fetched, or so clearly untenable as to merit rejection merely on the papers.

32. In fact counsel for the trust suggested, despite the authority to the contrary, that the trust's version in support of rectification was the more probable and consistent with the facts and drew attention to the absence of any request, even in the alternative, by the applicant for a referral of the disputed facts for resolution by way of oral evidence. Consequently, so counsel submitted, the court would be entitled to proceed on the basis of the correctness of the trust's version and to rely upon such facts in determining whether the trust is entitled to final relief by way of rectification of the sale agreement.

33. As referred to earlier, the applicant finds herself at a disadvantage in the absence of the late Mr Hodgson because she has limited personal knowledge of the relevant events which occurred at the time. Mr Phillips, who appeared for the applicant, emphasised that the applicant was entitled to specific performance in terms of the agreement of sale which, so he submitted, complied in all respects with the requirements of section 2(1) of the Alienation of Land Act.

34. However, with regard to the disputed counter application for the alleged rectification of the sale agreement by the inclusion therein of a clause recording the agreement to create a servitude for a right of way, counsel in reply recorded that the applicant in the alternative would seek a referral of the disputed issues for the hearing of oral evidence.

35. As is apparent from the foregoing, counsel for both the applicant and the trust approached the agreement for the sale of portion 4, as well as indeed the sale agreements for the other portions of Erf 1094, as compliant with the requirements of section 2(1) of the Alienation of Land Act. However, I do have some reservations in this regard. From the affidavits before me it is apparent that Mr Howie, at a very early stage, transferred Bendigo Farm into the name of the trust and that the trust remained involved, through the years that followed, in the development of parts of the original land holding, including the sale of the subdivision of Erf 1094.

36. Although he does not say so, the impression is created that Mr Howie, at all relevant times, was a trustee of the trust and indeed that he was the moving force behind its activities. On the facts as they emerge from the various affidavits it would appear that Mr Howie was intimately involved in the ultimate disposal of the subdivisions to be created from Erf 1094 and he personally signed the various sales agreements as representative of the trust as the seller. In the result, when the present application proceedings were initiated, Mr Howie was cited by the applicant as the first respondent in his capacity as the sole trustee of the trust. However, in his answering affidavit Mr Howie disclosed that he was not the sole trustee of the trust, but merely one of several trustees, the others being subsequently joined as the sixth, seventh and eighth respondents.

37. What remains unclear, however, is whether Mr Howie was the sole trustee of the trust at the time of the conclusion of the sales of the various portions of Erf 1094 and in particular, portion 4 thereof to the late Mr Hodgson. If not, then his authority to have represented the trust in concluding the various sales of immovable property is by no means clear. On the papers before me it is not stated when each of the sixth, seventh and eighth respondents became trustees and whether they were additional or replacement appointments. In absence of authority in the trust deed, a trustee is normally to be regarded as an 'agent' within the meaning of section 2(1) of Alienation of Land Act. As a general rule trustees are required to act jointly, unless one of their number were otherwise authorised by the provisions of the trust deed, or by his or her fellow trustees. Written authority would usually be required to enable such an agent lawfully to represent the trust in the sale of immovable property (Thorpe & Ors vs Trittenwein & Ano 2007 (2) SA 172 (SCA)). Whether that was the case here cannot be determined on the papers before me.

38. The final defence advanced by the trust, and which more properly should have been advanced as a point in limine, concerns the alleged non-joinder of Mrs Kriel as a party to these proceedings. Her omission, on the face of it, is strange given that the fourth and fifth respondents were joined. However, given the conclusion to which I have come in this matter it is unnecessary at this stage for me to express any firm views

upon Mrs Kriel's participation in, or absence from, these proceedings. Insofar as may be necessary, she can be joined or afforded the opportunity of declining to participate in the proceedings in good time before the hearing of oral evidence.

39. In the circumstances I have come to the conclusion that the issues cannot properly be decided on the affidavits before me. The validity of the sale of portion 4 needs to be established, as well as whether there was an agreement to which the late Mr Hodgson was party and whereby a right of way servitude in favour of portion 3 over portion 4 of Erf 1094 was to be created. If so, then whether the trust is entitled to rectification of the sale agreement, as contended for in the counter application. Since the applicant also seeks an order for the transfer to the estate of the deceased of portion 4, it needs to be established whether portion 4 is yet capable of transfer.

40. Arguably the matter should not have been initiated by way of motion proceedings, but given the time that has passed and the resources invested to date, the most practical way of proceeding at this stage is to refer the disputed issues for determination by way of oral evidence, as envisaged by the provisions of Rule 6(5)(g) of the Uniform Rules of Court. For the present it does not appear to me desirable to make any costs orders at this stage. This should rather be left for decision by the court hearing the evidence and finally determining the issues.

41. In the result I make the following order, namely:-

(a) The matter is referred for the hearing of oral evidence, on a date to be arranged by the Registrar, on the following questions, namely:

(i) Whether or not the sale of Portion 4 of Erf 1094, Southport by the Chaka's View Trust (the trust), as represented by W G Howie, to the late Mr R T Hodgson, by deed of sale dated 7 September 2005 (the sale agreement), was validly concluded.

(ii) Whether or not there was, in relation to when the sale agreement was concluded, also agreement between the parties thereto whereby a right of way over Portion 4 in favour of Portion 3 of Erf 1094 was to be created and/or secured, by way of the registration of an appropriate servitude, at the time of the registration of transfer and its consolidation with Erf 347, Southport.

(iii) If so, then whether the trust, as seller in terms of the sale agreement, is entitled to rectification of the sale agreement, as contended for in the counter application and what the terms of the rectification clause should be.

(iv) Whether transfer of ownership in portion 4, as well as the other subdivisions to be created out of Erf 1094, Southport,

are yet capable of registration in the office of the third respondent.

(b) The evidence will be that of any witnesses whom the parties or any of them may elect to call, subject, however, to what is provided in paragraph (c) hereof.

(c) Save in the case of witnesses who have already deposed to affidavits filed herein, no party shall be entitled to call any witness unless:

(i) such party has served on the other parties at least 14 days before the date appointed for the hearing (in the case of a witness to be called by any respondent) and at least 10 days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by such person is set out; or

(ii) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

(d) Any party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

(e) The fact that a party has served a witness statement in terms of paragraph (c) hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

(f) Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues referred to in paragraph (a) hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rule 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall also be operative.

(g) The incidence of the costs incurred up to now shall be determined after the hearing of oral evidence.

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VAN ZÿL, J.

JUDGMENT RESERVED: **14 MARCH 2014**

JUDGMENT HANDED DOWN: **25 MARCH 2014**

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