REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 40323/2020

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED

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SIGNATURE DATE

In the matter between:

BILAL INVESTMENTS (PTY) LTD Applicant

and

MASILO ISAAC BOROLE 1st Respondent

FIKISWA IMELDA BOROLE 2nd Respondent

ROB FOWLER & ASSOCIATES 3rd Respondent

THE DEEDS OFFICE 4th Respondent

CITY OF JOHANNESBURG 5th Respondent

REASONS FOR EX TEMPORE JUDGMENT

WINDELL, J:

[1] This is an application for leave to amend the applicant's notice of motion.

[2] The applicant instituted an application (hereinafter referred to as the main application) against the first to the fifth respondents during November 2020 in which

it sought specific performance aimed at compelling the first and second respondents ("the respondents") to take all steps necessary to give effect to an agreement of sale, consisting of a deed of alienation concluded on 21 November 2019 ("the deed of alienation") and addendum thereto, concluded in January 2020 ("the addendum"). The deed of alienation and addendum are collectively referred to as "the agreements".

[3] The first and second respondents opposed the application and filed their answering affidavit. The applicant subsequently filed its replying affidavit and heads of argument were submitted on behalf of the applicant as well as the respondents. The matter was ripe for hearing.

[4] In their heads of argument, the respondents raised certain complaints, *inter alia,* that the property was not described in the notice of motion and, more pertinently, that the property sold is an undivided and undescribed portion of the respondents' property. It was submitted that the deed of alienation was therefore void and the relief sought was vague and incompetent.

[5] As a result, and in an attempt to address the complaints, the applicant gave notice of its intention to amend its notice of motion. The amendment was opposed and the applicant launched the current application.

[6] The applicant now seeks to delete the entire relief (prayer a to d) originally claimed and substitute it with a host of other relief completely different from the relief sought in the first notice of motion to read as follows:

> "*That the first and second respondent comply with its duties and obligations set set out in the Memorandum of Agreement (MOA) signed at Pretoria during the the month of January 2020 by:*

i. *Taking all steps necessary to ensure that the sub division application is lodged with the City of Johannesburg and provide details of the town planner to be used who will prepare and submit: proposed division of re-mainder of portion 44 of the farm Blue Hills,*

ii. *Providing an invoice from said town planner; and*

iii. *Providing verified banking statements of said town planner that will allow the Applicant to make payment of the fair and reasonable fees due to such Town Planner.*

b) In the event that the first and second Respondent fail to within 14 days of this Court order take the necessary steps to appoint such a town planner, then in that event, the Applicant is authorised to appoint a town planner to prepare and submit a proposed division of remainder of portion 44 of the farm Blue Hills.

c) The Applicant remains responsible to pay the fees associated with the appointment of a town planner and as well as fees associated with services rendered by such town planner.

d) Further in the event of the first and second Respondent fail and or neglect and or refuse to take steps to give effect to the division of remainder of portion 44 of the farm Blue Hills then in that event Sheriff having jurisdiction where the property is situated is authorized to take all the steps necessary to facilitate the division of the property including signing of documents on behalf of the first and second Respondents.

e) Cost of suit against the first and second Respondents and any other opposing party

f) Further and alternative relief."

[7] In examining the relief sought in the proposed amendment, the following common cause facts are instructive. The property in question has not been subdivided, thereby rendering transfer of a portion of it impossible in terms of the Deed Registries Act[1]. In January 2021, the parties concluded the addendum which recorded that it was necessary to obtain the approval of the intended subdivision of the property and the third respondent was appointed as principal agent in effecting the subdivision approval. Clause 4 of the addendum confirmed that the applicant was to pay *"all the costs necessarily associated with achieving the final transfer of the one-hectare portion into their name together with the costs related to the upgrading and/or relocation of essential services as may be required by the Controlling Authorities in order to effect such transfer".*

[8] The proposed amendment must be refused because the amendment is not supported by the facts set out in the founding affidavit and the amendment would result in the notice of motion being vague and embarrassing. I say so for the following reasons. It is well established that a deed of alienation has to specify and identify the property sold with precision in order to meet the requisites of section 2(1) of the Alienation of Land Act[2]. There is no provision in the deed of alienation or addendum which identifies the proposed portion which is to be transferred to the applicant. On a reading of the deed of alienation, the description of the property is "*portion 44 of the Farm Blue Hills 397 IR/subdivision 07 this ERF 1 hector*", (clause 1.1.5). The undivided property owned by the first and second respondents spans six hectares and the description of the property does not explain, delineate or describe

[1] Act 47 of 1937
[2] Act 61 of 1981

what portion of the six hectare is sold, where the hectare is situated, or what its shape and dimensions are, thereby rendering the deed of alienation invalid, unenforceable and void.

[9] The effect of this is two-fold: Firstly, even if the respondents were to be compelled to submit an application to the City of Johannesburg, the respondents could subdivide the property in any manner they wish and the applicant would have to return to court to identify and somehow enforce the portion which they intend to have transferred to them. Secondly, the Sheriff cannot practically subdivide the farm as he would have no knowledge on how the farm could be subdivided and would replace the first and second respondents as the owner of the property in the decisions to be made to subdivide the property in his or her discretion. Such an order would remove the real right of ownership of the first and second respondents to deal with the farm and/or alienate it. Thirdly, clause 3 of the addendum identifies Rob Fowler and Associates as the appointed town planner. The relief proposed is for an order to set aside clause 3 to afford the respondents (proposed prayer a(i)) or the applicant (proposed prayer b) to appoint a town planner. Such relief is incompetent as a court cannot amend the terms of the addendum which is clear.

[10] That is unfortunately not the only obstacle the applicant faces. Essentially, the applicant's case is to compel specific performance which would presumably culminate in the transfer of a one-hectare portion to the applicant. Even though such relief is not possible, the proposed amendment does not: Identify the portion which is to be transferred to the applicant. How such portion would be determined, its dimensions or where it is situated in the proposed sub-division. If one assumes that an order is granted as prayed for in the proposed prayers of the amendment, all the

applicant would have achieved is to compel the respondents to subdivide the farm. No facts appear from the founding affidavit to support the proposed prayers.

[11] But even if the deed of alienation was not void, the proposed amendment seeks to compel only part performance of the agreement by submitting an application to subdivide the property, but failing to compel transfer of a portion so divided and to make provision for which portion of the subdivided property ought to be transferred to the applicant. It is therefore impossible to determine how the property should be subdivided, who should determine what portion belongs to the applicant and is silent on what should happen after the subdivision takes place. There are no facts or evidence contained in the founding affidavit to support the relief proposed in the notice to amend.

[12] The proposed amendment will clearly prejudice the first and second respondents as the owners of the farm. It will achieve no practical end to the dispute between the parties and would only ensure that the parties return to court to determine which portion of the subdivided portion would be transferred and how this subdivided portion would be determined. The vague nature of the proposed prayers does not take accord with any provisions of the agreement and addendum. It is trite that a vague and an open-ended order, incapable of enforcement is incompetent.

[13] In the result, the following order is made:

13.1 The draft order marked “X” is made an order of court.

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L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 March 2022.

APPEARANCES

Counsel for the applicant:	Ms K. Mthetwa
Instructed by:	Pillay Thesigan Incorporated
Counsel for the first and second respondent:	Adv. C. van der Merwe
Instructed by:	Kaveer Guiness Inc
Date of hearing:	16 March 2022
Date of judgment:	18 March 2022
Date of written reasons:	10 May 2022