14-12-70

G.P.-S.33967—1968-69—1,000.

J. 219.

154/70

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

ALFRED JAMES CLEMENTS *Appellant,*

versus

ELLEN LUCRETIA SIMPSON *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Horwitz, Arvan & Lewis

Respondent's Attorney / *Prokureur vir Respondent* Ider & Sam.

Appellant's Advocate / *Advokaat vir Appellant* P.M. WILKINSON

Respondent's Advocate / *Advokaat vir Respondent* D.C. VERMOOTEN S.C.

Set down for hearing on / *Op die rol geplaas vir verhoor op* 26-3-1971

3.4.6.7.9

CORAM: HOLMES, JANSEN, A.R.B., DIEMONT, MILLER, et KOTZÉ, WNDA.

APPELLANT 9.45 AM - 11.00 AM
11.15 PM - 12.30 PM

(T.P.D.) RESPONDENT 12.30 PM - 2.00 PM
2.15 PM - 3.00 PM

APPELLANT 3.00 PM - 3.30 PM (In reply)

C.A.V.

Holmes J.A.:- The appeal is allowed, with costs in all three Courts, including the costs relating to the application for leave to appeal to this Court.

A further order relating to transfer is set out in the judgment filed of record.

REGISTRAR.
30.3.1971

Writ issued
Lodged

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ALFRED JAMES CLEMENTS ..... Appellant

AND

ELEN LUCRETIA SIMPSON ..... Respondent

Coram: Holmes, Jansen, JJ.A., et Diemont, Miller, Kotzé, A.JJ.A.

Heard: 26 March 1971. Delivered: 30 March 1971.

J U D G M E N T

HOLMES, J.A.:

The parties are litigating about some land. The issue is whether the contract of sale complies with the requirements of section 1 (1) of Act 68 of 1957. It reads -

> "No contract of sale or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this

2/... section

section unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority."

That provision, although repealed and replaced by Act 71 of 1969, governs the contract in the present case, which was signed on 6 July 1966.

The seller (the present respondent) contended that the contract is of no force or effect for want of compliance with the said section averring that the land sold is inadequately described. The buyer (the present appellant) applied unsuccessfully to the Witwatersrand Local Division for an order declaring the contract to be valid and for an order of specific performance, i.e. for transfer of the property bought. An appeal to the Transvaal Provincial Division failed. The buyer appeals to this Court with the leave of the Court a quo.

The contract was prepared by an estate agent employed by the seller. It runs to several pages. It consists for the most part of printed matter. It takes the

3/... form

form of an offer to purchase addressed to the seller and signed by the buyer. On the last page there is an acceptance, signed by the seller.

The relevant provisions are that the buyer offers to purchase "the following property, namely:-

> "Certain Leasehold/Freehold Property together with all buildings and erections and fixed improvements thereon, being: PORTION OF PORTION 1 OF PORTION A OF STAND 159, BEDFORDVIEW, AS DESCRIBED IN THE HEREWITH DESCRIBED SUBDIVISION; BEING: 40000 SQUARE FEET IN EXTENT, AND ADJOINING VAN BUUREN ROAD, BEDFORDVIEW, SITUATE IN THE NORTH-WESTERN EXTREMITY OF THE PROPERTY PRESENTLY DESCRIBED as PORTION 1 OF PORTION A OF STAND 159, BEDFORDVIEW, HAVING A STREET FRONTAGE OF 175 FEET AT A MINIMUM."

For convenience I shall refer to the foregoing as the property clause.

The only relevant conditions of sale are clause 1, which relates to payment of the price; and clause 4, which obliges the seller to effect transfer within a reasonable

4/... time;

time; and clause 17 which reads -

> "It is also agreed to between Seller and Purchaser that subdivision of the Property shall be undertaken at the instance of the Seller who undertakes to make every effort to expedite same should the subdivision as a result of factors beyond the control of the parties hereto not be possible, the sale shall be void."

As this stage I set out the approach to be followed and the principles to be applied in considering whether a contract complies with section 1 (1) of Act 68 of 1957 -

1. The section is directed against uncertainty, disputes and possible malpractices.

> "Dit kan aangeneem word, meen ek, dat die oogmerk van hierdie artikel is om, sover doenlik altans, onsekerheid en geskille omtrent die inhoud van sulke kontrakte te voorkom en moontlike wanpraktyke teen te werk. ... Die Wetgewer kon nouliks gemeen het dat dit alle onsekerheid, alle geskille en alle wanpraktyke sou besweer, en dit kan wees dat die mate waarin die oogmerk bereik is en bereik word, heelwat te wense oorlaat,

5/... maar

maar dit neem nie weg nie dat bo-genoemde wel die oogmerk is."

- Per Steyn, C.J., in Neethling v. Klopper en Andere, 1967 (4) S.A. 459 at 464 E.

2. Meticulous accuracy in the description of the res vendita is not required. Certum est quod certum reddi potest. In construing an earlier corresponding enactment, Watermeyer, C.J., said -

"Clearly, if sec. 30 be construed so as to require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms, then such a construction would merely be an encouragement to a dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases where there was no dispute at all between the parties. Such construction would be an encouragement to dishonesty and cause loss of revenue to the State, and it should be avoided if possible." See Van Wyk v. Rottcher's Saw Mills (Pty) Ltd., 1948 (1) S.A. 983 at 989.

3. The foregoing does not mean that the Court is to make a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty. It means that

"inelegance, clumsy draftsmanship or loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one CAN find therein, with reasonable certainty, the terms necessary to constitute a valid contract." Per Colman, J., in Burroughs Machines Ltd., v. Chenile Corp. S.A. Ltd., 1964 (1) S.A. 669 (W) at 670 G - H.

4. The test for compliance with the statute, in regard to the res vendita, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus.

5. In the foregoing regard there are, BROADLY, two categories of contract. The first is where the document itself sufficiently describes the property to enable identification on the ground. There is no fixed rule about this. For example, a house may be identifiable if the contract gives its address, such as its number, street and city; or a farm may be identifiable if the document mentions its name. The second category is where it appears from the contract that the parties in-

7/... tended

tended that someone, whether buyer, seller or third party, should select the res vendita from a genus or class. For example, if a dog breeder says to a prospective purchaser, "I offer you the pick of THIS litter for R100", and the buyer accepts, no further consensus is required. There is a valid sale; and the buyer may choose his pup. Or, in regard to land, a prospective buyer might offer in writing to buy, at a specified price, one out of several sites in a township, the buyer to select the particular site. The seller accepts in writing. That is a valid sale as far as the res vendita is concerned, for the res is ascertainable or identifiable on the unilateral selection of the buyer. As indicated by Van den Heever, J., in Odendaalsrust Municipality v. New Nigel Estate Gold Mining Co. Ltd., 1948 (2) S.A. 656 (O) at 665, such a contract places the res vendita and the fact of consensus out of range of the clash of will of the parties. See also Van der Merwe v. Cloete and Another, 1950 (3) S.A. 228.

6. Whether the parties intend their sale to fall within the first category or the second category, depends upon their language in the contract. If it appears therefrom that they intend the

8/... first

> first category, and their description of the property is deficient in that it does not enable identification on the ground, the sale is invalid for want of compliance with the statute; see Botha v. Niddrie AND ANOTHER, 1958 (4) S.A. 446 (A.D.).

With that prelude I turn to the task of construing the contract in the present case. It will be noticed, in what I have called the property clause, that the draftsmanship is inelegant and clumsy. Counsel for the seller made the most of these deficiencies in urging that the description was not such as to comply with the relevant statute. In my view the salient features of the clause are as FOLLOWS. The property sold is stated to be "Portion of Portion 1 ....." That indicates that the land sold HAD yet to be sub-divided from Portion 1. The person to cause that to be done is obviously the seller: it does not need reference to clauses 4 and 17 to decide that. The property clause goes on to state the exact area (40,000 square feet); the location (adjoining Van Buuren Road, Bedfordview, situate in the northwestern extremity of Portion 1); and the minimum frontage (175 feet, obviously to Van Buuren Road). Now

it is apparent that those provisions do not, and could not have been intended to, enable identification of the land on the ground. The reason is that the parties could not but have realised that, in giving effect to the foregoing provisions, there was a variety of possible shapes which the seller could select in bringing about the sub-division of her land. In that regard the site sold is one of a class. The area remains constant (40000 square feet); and the general location is fixed (northwestern extremity of Portion 1); but the shapes will depend upon (a) the extent to which the selected road frontage exceeds the agreed minimum of 175', and (b) the geometrical lay out - the site might be square, or rectangular, or [redacted] its angles might not be 90°. It must have been obvious to the parties that, until those matters were later unilaterally decided by the seller, the land sold could not be identified on the ground.

This is therefore not a case like Botha v. Niddrie and Another, supra, where the language of the contract indicated that the parties plainly intended their description to enable

10/... identification

identification on the ground, but their description fell just short of their intention; and the contract was held to be invalid for want of compliance with the statute. Of course, as counsel for the successful appellant in that case rightly pointed out at page 447 B - C, the failure of the parties to give a sufficiently accurate description of the piece of land which they had in mind cannot per se justify an interpretation that they intended to leave the selection to the seller. But the instant case is different because here the intention of the parties, as gathered from the language of their contract, was not to enable identification of the land sold by reference to description; it was to be identifiable only after the seller had decided upon the lay-out and shape and sub-division of a site conforming to certain specified requirements. It is in my view a clear example of the second category mentioned earlier. The consensus of the parties was complete. All that was needed for performance was the intended unilateral act of the seller in the matter

11/... of

of shape and sub-division. The fact that survey was required for that purpose cannot affect the question; see Van der Merwe's case, supra, at 232 F. I therefore hold that the contract does comply with the provisions of section 1 (1) of Act 68 of 1957.

The sale was entered into in 1966. Three years later the seller, in her opposing affidavit in these proceedings, said that there was a piece of paper, which the parties signed, attached to the contract when it was entered into. She was unable to state its contents but said that it related to the matter of sub-division. She does not say that the piece of paper, or a copy, is still in existence. The suggestion is that it might have had something to do with a right of way; and might even have consisted of a plan which appears at page 79 of the record. This is speculation. The buyer denies that there was a piece of paper attached to the contract; and he says that he did not sign any paper or document other than the contract. This disputed aspect of the case was not dealt with in either of the Courts below, probably

because of the view which those Courts took of the contract. In this Court both counsel, on being asked whether they wished the matter to be referred to trial for some finding in the matter of this alleged piece of paper, requested that this Court give its decision on the validity of the contract as it appears in the record. That being common cause, the alleged piece of paper calls for no further comment.

It was averred by the buyer that the land sold was in fact thereafter surveyed and the sub-division approved by the Administrator. The seller raised a query whether this was done in pursuance of the sale, and in any event whether her instructions to the surveyor had been correctly carried out. That being so, counsel for the buyer said in this Court that he would not press for specific performance on the basis of the sub-division already made, but would be satisfied with the alternative prayer (appearing at page 109 of the record) that the seller transfer a site to be sub-divided. Counsel for the seller accepted that this was appropriate in the event of this Court holding that the contract of sale was valid.

Of course, if the seller so wishes she may transfer the sub-division as it exists, for that was the buyer's main prayer

for specific performance, at page 109 of the record.

In the result -

1. The appeal is allowed, with costs in all three Courts, including the costs relating to the application for leave to appeal to this Court.

2. The order of the Court of first instance is set aside in favour of one reading as follows -

   (a) The contract entered into by the parties on 6 July 1966, (annexure "A" in the proceedings) is declared to be a valid contract of sale.

   (b) The respondent is ordered to transfer, to the applicant, property referred to in the said contract of sale, as already sub-divided or to be sub-divided by the respondent from her entire property mentioned in the contract: against payment by the applicant of R8000 being the balance of the price.

G.N. HOLMES

JUDGE OF APPEAL.

JANSEN, J.A.)
DIEMONT, A.J.A.)
MILLER, A.J.A.) Concur
KOTZÉ, A.J.A.)