THE SUPREME COURT OF SOUTH AFRICA

Case No 469/95

In the matter between:

HEADERMANS (VRYBURG) (PTY) LIMITED Appellant

and

PING BAI Respondent

CORAM: E M GROSSKOPF, F H GROSSKOPF, MARAIS, SCHUTZ, JJA

et STREICHER, AJA

HEARD: 14 March 1997

DELIVERED: 27 March 1997

J U D G M E N T

T E M GROSSKOPF, JA

The issue in this appeal is whether a contract of sale

of land between the parties is valid, and, if so, whether the respondent has lawfully cancelled it. The court a quo (the Witwatersrand Local Division) held that it was not valid in that it did not comply with sec 2(1) of the Alienation of Land Act, 68 of 1981. With the leave of that court the matter comes on appeal before us.

The appellant is the owner of land previously described as Holding 27, Strathavon Agricultural Holdings, Registration Division I. R., Transvaal. The property is situated at 27 Linden Road, Strathavon.

The appellant applied for the establishment of a residential township on the property in terms of the Transvaal Town Planning and Township Ordinance, 25 of 1965. On 8 November 1984 conditions of establishment in respect of the proposed township were issued by the administrator. The name of the township would be Sandown Ext. 51.

Thereafter the appellant caused the general plan in respect of the proposed township to be prepared and to be submitted to the surveyor-general for approval. Approval was granted on 24 November 1989. The approved general plan has however not been lodged with the registrar of deeds and the township has not yet been finally proclaimed. According to the appellant it is common practice for owners of property not to go ahead with the final proclamation of their townships until they are in a position to develop those townships immediately. The reason for this is that as soon as a township is proclaimed the owner of the township will pay significantly increased rates to the local authority. What still has to be done before proclamation of the township in the present case is to plan the services to be installed and to make the necessary arrangements in regard to these services with the local authority.

Pursuant to the conditions of establishment of the

proposed township the property was excised from the Strathavon Agricultural Holdings and renamed Portion 667 (Portion of Portion 2) of the farm Zandfontein No 42, Registration Division I.R., Transvaal.

During 1994 the appellant decided to sell the entire property situated at 27 Linden Road, Strathavon, on which the township was proposed to be laid out. It appointed a firm of estate agents, Vered Estates, as its agent to sell the property. Another firm of estate agents, Gloria Real Estates, introduced the respondent to Vered Estates. Charne du Toit, of Vered Estates, and Gloria du Toit, of Gloria Real Estates, agreed to split the commission if the respondent were to buy the property, and jointly negotiated the sale.

The estate agents accompanied the respondent to the property, which is situated between Linden Road and Helen Road, Strathavon. It is common cause that the negotiations related to the whole property. After having been shown the

property the respondent was interested in buying it. However, he had certain business commitments overseas and had to leave forthwith. Arrangements were accordingly made for the estate agents to draw the necessary documents in regard to the sale. They were uncertain as to the correct description of the property. After enquiries at the Sandton Town Council they decided upon a description which they considered correct. This description was incorporated in a written offer in the respondent's name to purchase the land. This offer was signed by the respondent as purchaser. It was presented to the appellant and accepted on behalf of the appellant as seller on 20 October 1994. The relevant portion of the document reads as follows:

> "TO THE REGISTERED OWNER HEADERMANS (Vryburg) (Pty) Ltd
> (hereinafter referred to as 'the seller'), of MANNEQUIN
> HOUSE, 97 PROTEA ROAD, COR Rivonia and Protea Roads,
> Chislehurston, Sandton.
> I/We, the undersigned PING BAI
> (hereinafter referred to as 'the Purchaser'), of No. 8
> Sanctuary, Linden Road, Strathavon, Sandton
> hereby offer to purchase, through the agency of VERED

ESTATES (hereinafter referred to as ' the Agent'), the following property, namely: ERF NO. PTN 567 & 568 TOWNSHIP Sandown Ext. 51 SITUATED AT of ERF 27, 27 LINDEN ROAD, Sandown Ext 51 together with all improvements thereon, (hereinafter referred to as 'the Property')."

In terms of the agreement the purchase price was R4 500 000. An amount of R450 000 was payable within three days of advice of acceptance of the offer to attorneys Mayat Nurick & Associates, who were to arrange the passing of transfer. This deposit was forfeitable as rouwkoop in the event of lawful cancellation by the appellant. Payment was duly made. A guarantee was to be given on or before 20 December 1994 for the balance.

On 21 December 1994 the appellant's attorneys wrote to the respondent's attorneys demanding the delivery of the guarantee. In their reply, dated 23 December 1994, the respondent's attorneys admitted that the guarantee had not been furnished. They sought to justify this by contending

that some trees on the property had been cut down or poisoned, and that a boundary wall had been damaged. Consequently, they said, it was not possible for the appellant to transfer the property in substantially the same state as it was at the conclusion of the agreement of sale and the respondent was therefore entitled to cancel the agreement.

The letter continued:

> "In any event, we are of the opinion that all the material terms of the Agreement of Sale are not in compliance with the Alienation of Land Act 68 of 1981, as amended, and the Agreement of Sale on which your client relies can accordingly be construed to be void."

The letter concluded by making an offer of settlement.

It seems that subsequently there were some discussions between the parties. These came to nought. On 31 March 1995 the appellant's attorneys wrote to the respondent purporting to cancel the contract of sale on the grounds of the respondent's refusal to furnish the guarantee. To this the

respondent's attorneys replied on 3 April 1995, repeating and

amplifying the contentions set out in their previous letter to the effect that the contract was void or unenforceable. These contentions were duly disputed in a further letter from the appellant's attorneys.

On 4 May 1995 the respondent issued a notice of motion in which he claimed an order declaring that the agreement of sale was "void and of no force or effect, alternatively, cancelled" and an order authorising and directing Mayat Nurick & Associates to pay to the respondent the sum of R450 000 held by them in trust, with an order for costs. These orders were granted in the court a quo and their correctness falls to be considered in the present appeal.

The first ground of alleged invalidity relied upon by the respondent was a non-compliance with the provisions of sec 2(1) of the Alienation of Land Act. This sub-section reads

> "No alienation of land ... shall ... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

This provision and its predecessors, which are for present purposes indistinguishable from it, have often been considered by our courts. It is not necessary to re-examine the sub-section in all its implications in this judgment since the present case is concerned solely with the adequacy of the description of the res vendita. The test for compliance with the statute in this regard 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 (Clements v Simpson 1971 (3) SA 1 (A) at 7F-G).

The section does not, however, "require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in

meticulously accurate terms" (Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 989. The true approach is the following (ibid):

> "There must, of course, be set out in the written contract the essential elements of the contract. One of such essential elements is a description of the property sold and, provided it is described in such a way that it can be identified by applying the ordinary rules for the construction of contracts and admitting such evidence to interpret the contract as is admissible under the parol evidence rule . . . the provisions of the law are satisfied. This statement must be taken subject to one caution or qualification which I wish to emphasise.
>
> In a simple written contract which need not by law be in writing it is possible to describe a piece of land by reference, e.g. the land agreed upon between the parties, and in that case testimony as to the making of the oral agreement may be admissible to identify the land, but when a contract of sale of land is by law invalid unless it is in writing, then it is not permissible to describe the land sold as the land agreed upon between the parties. Consequently testimony to prove an oral consensus between the parties which is not embodied in the writing is not admissible for any purpose, not even to identify the land sold." (emphasis added.)

I turn now to the relevant background facts in the instant case. The offer by the prospective purchaser is made to "the registered owner" of the land in question. As a fact the appellant is the owner of a site at 27 Linden Road, Strathavon. The reference to "erf 27, 27 Linden Road, Sandown Ext. 51" is therefore not completely wide of the mark.What is more important, however, is that the appellant has applied for the establishment of a township on his land situated at 27 Linden Road, Strathavon. Conditions of establishment were issued by the administrator, and the township was to be called Sandown Ext. 51. A general plan was prepared and approved. The general plan discloses that the area was to be sub-divided into three lots, numbered 567, 568 and 569. Under the township conditions erf 569 was to be transferred to the local authority for use as a park. These background circumstances are of an objective nature. They do not reflect any negotiations or consensus between the parties. They are

relevant to identify the property sold, and for that purpose

evidence of their existence is clearly admissible (see Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 454F).

It remains to read the contract against the background

of these circumstances. It may be correct, as argued on behalf of the respondent, that a reference to Sandown Ext. 51 . would normally suggest that there exists such a township in the deeds registry. In the present case there is no such township, but there is a proposed township bearing this name, which is to be laid out on the appellant's property at 27 Linden Road, Strathavon, and in which there are two erven numbered 567 and 568. Sufficient particulars are given on the approved general plan to enable a land surveyor to determine the location of erven 567 and 568 in situ. In these circumstances there can in my view be little doubt that the contract is to be read as referring to these two erven as shown on the general plan of the proposed township.

This conclusion disposes of the respondent's contention

that the res vendita was not adequately described for the purposes of the Alienation of Land Act. There is, however, one problem which still remains. It is that sec 57A of the Transvaal Town-Planning and Townships Ordinance 25 of 1965, as well as sec 67 of its successor, the Town-Planning and Townships Ordinance 15 of 1986, prohibit, on pain of nullity, the sale of erven in townships which have not been declared approved townships. For convenience I shall refer to these two ordinances simply as "the Ordinances". The appellant meets this objection by contending that the contract is to be rectified to reflect the parties' true intention, viz, that the sale related to the whole property, and not only to erven 567 and 568. If the contract were thus reformed it would not offend against the Ordinances.

It was common cause that in principle a sale of land, which complies with the requirements of the Alienation of

Land Act, may be rectified by substituting for the description of the land another description which gives effect to the parties' true common intention. See Magwaza v Heenan 1979 (2) SA 1019 (A). It was also not contended that rectification was necessarily excluded where the contract was on the face of it invalid on grounds other than the absence of required formalities. In such a case the contract is formally in order, but in substance (in the present case because it relates to a sale of erven in an unproclaimed township) it is invalid. The difference, for purposes of rectification, between a contract which is void for want of compliance with essential formalities, and one which is invalid for some other reason, was stated as follows by Didcott J in Spiller and Others v Lawrence 1976 (1) SA 307 (N) at 312 B-D:

> "The two situations are fundamentally different. In the one ..., when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely

> to what was agreed. In the other . . . the cause of nullity is indeed to be found in the transaction's form. When it is said to consist of a failure to observe the law's requirement that the agreement be reflected by a document with particular characteristics, the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from the document."

See also Litecor Voltex (Natal) (Pty) Ltd v Jason 1988 (2) SA 78 (D) at 82A-83F and Republican Press (Pty) Ltd v Martin Murray Associates cc and Others 1996 (2) SA 246 (N). In the latter case the minority judgment accepted the correctness of the above passage from the Spiller case (at 258G-I) but the majority judgment did not need to deal with it.

The argument before us consequently proceeded on the correct basis that in principle the contract could be rectified by substituting a description reflecting a sale of the entire property at 27 Linden Road, Strathavon. The respondent contended that sufficient facts were not established to justify rectification. Now, it was common cause that both parties intended that the whole property

should be sold. It is true that there was a dispute as to whether it was to be sold as proclaimed township land (as alleged by the respondent) or only as land with a proposed township. For present purposes this dispute is irrelevant. In either case the contract may be rectified, and, if rectified would not offend against the Ordinances. The sole point made by the respondent was that the appellant did not properly explain how the wrong description came to be incorporated into the contract. What was stated on affidavit by Mr E Cambouris, a director of the appellant who testified on its behalf, was:

> "By virtue of an error committed by the estate agents who attended to the transaction (of which said error neither the [respondent] nor the [appellant] had any knowledge) the description of the property was incorrectly reflected in the sale agreement concluded between the parties."

This is admittedly rather terse, but the respondent did not dispute in his replying affidavit that the appellant in fact had no knowledge of the error. And the probabilities

overwhelmingly support this assertion. If the misdescription was not inserted in error, the only alternative would be that it was deliberately done. This seems inconceivable. The " appellant at all times intended to sell the whole property, and has never averred otherwise. By inserting the wrong description the appellant would not only have described an incorrect property but would have converted the contract into one that was void in terms of the Ordinances. Why would the appellant have wished to do this? If it had wanted to get out of its promise to sell the land it could have done so easily and effectively simply by refusing to sign the written offer.

I consider therefore that the evidence discloses a common intention on behalf of the parties which was, as a result of an error on the part of both of them, not correctly incorporated in the agreement. It follows that the contract may be rectified to reflect the parties' true intention. See Meyer v Merchants' Trust Ltd 1942 AD 244 at 253-4. It also

follows that the contract, as properly rectified, would not

offend against the prohibition stated in the Ordinances.

As an alternative, the respondent claims to have cancelled the contract on the grounds of material misrepresentations. The misrepresentations relied upon are that the property which formed the subject matter of the sale was part of an approved township, known as "Sandown Ext 51", and that the property which the respondent was offering to purchase was nroperly described as "portion 567 and 568" of "erf 27" which extended from Helen Road to Linden Road, i e, which encompassed the whole property at 27 Linden Road. Now, as repeatedly stated, the parties are agreed that it was the whole area that was to be sold. The nub of the respondent's complaint is therefore that he was told that the property was part of an approved township and that the two mentioned erven encompass the whole area. This Mr Cambouris denies in his affidavit. Moreover, the two estate agents say that they

specifically told the respondent that, although application had been made to establish the township of Sandown Extension 51, that proclamation had not been finalised. And one of the two agents, Gloria du Toit, testifies that she told him that finalisation would take a number of months. These statements are in turn denied by the respondent. Since the respondent brought this matter on notice of motion and asked for an order purely on the papers without oral evidence, the version of the appellant (respondent in the motion proceedings) must prevail. See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635C. It follows that the respondent has not established the misrepresentations on which he relies.

The further matters raised in the correspondence and the papers, such as the damage to the trees and the boundary wall, were not pursued before us.

To conclude: for the reasons stated above I consider

that the contract of sale complies with the requirements of

the Alienation of Land Act, that it falls to be rectified to incorporate a description of the whole area at 27 Linden Road, Strathavon (whether as proclaimed township land or as a proposed township) that, as rectified, it would not contravene the Ordinances, and that the respondent has not established that the contract was induced by misrepresentation. In the result the appeal must succeed.

The appeal is allowed with costs. The order of the court a quo is set aside and the following substituted: The application is dismissed with costs.

E M GROSSKOPF, JA

F H GROSSKOPF, JA
MARAIS, JA SCHUTZ,
JA STRETCHER, AJA
Concur