THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO 103/06

Not reportable

In the matter between:

PROPFOKUS 49 (PTY) LIMITED	First Appellant
THOMAS NICHOLAS JOHN STEYNBERG	Second Appellant
DAVID JOHANNES STEYNBERG	Third Appellant

and

WENHANDEL 4 (PTY) LIMITED	Respondent

Coram**:** Nugent, Van Heerden et Combrinck JJA

Heard: 27 February 2007

Delivered: 20 March 2007

Summary: *Written agreement – rectification – requirements for*

Neutral citation: This judgment may be referred to as *Propfokus (Pty) Ltd v Wenhandel (Pty) Ltd* [2007] SCA 15 (RSA)

JUDGMENT

VAN HEERDEN JA:

[1] This is an appeal against a judgment of the Cape High Court granting, on application, an order for rectification of a written agreement for the sale of land. The agreement was entered into between the first appellant (Propfokus 49 (Pty) (Ltd)) and the respondent (Wenhandel 4 (Pty) (Ltd)) on 5 July 2004. The second and third appellants are the only two shareholders in Propfokus. For the sake of convenience the appellants will hereafter be referred to collectively as 'Propfokus' and the respondent as 'Wenhandel'.

[2] In terms of the agreement, Propfokus sold certain immovable property known as Erf 1410 Kuils River, Western Cape (the property) to Wenhandel, a property development company. The purchase price was formulated as follows in clause 2 of the original agreement:

'Die Koopprys is die bedrag van R1 000 000-00 (EEN MILJOEN Rand) betaalbaar op datum van Registrasie van Oordrag in die koper se naam plus 2 standaard eie titel wooneenhede alternatiewelik 3 deeltiteleenhede met 'n gesamentlike waarde van R800 000 (Agthonderd Duisend Rand) op die verkoper of sy genomineerde se naam oorgedra te word so spoedig as moontlik. Die verkoper moet die eenhede op plan nomineer binne 7 dae nadat die koper of sy agent daartoe versoek.'

[3] At a later stage, the parties agreed to amend clause 2 of the written agreement to provide for the delivery of two standard separate title units to the exclusion of any sectional title units. The words 'alternatiewelik 3 deeltitel-

eenhede' were deleted and the words '[s]ien aanhangsel A en B hierby aangeheg vir besonderhede oor die 2 eenhede' were inserted at the end of clause 2. There is an irreconcilable dispute on the papers concerning the date upon which and the reasons why this amendment was effected.

[4] In a subsequent development Wenhandel brought an urgent application consisting of two parts before the court *a quo*. The first part sought a rule *nisi* prohibiting Propfokus from selling, burdening or alienating, or attempting to sell, burden or alienate the property, or to alter or attempt to alter the status of the property in any way pending the final determination of the second part of the application, to which I will refer as 'the main application'. In the main application, Wenhandel sought, *inter alia*, an order rectifying clause 2 of the agreement by amending the first sentence of the clause to read as follows:

'Die Koopprys is die bedrag van R1 800 000.00 betaalbaar op die datum van registrasie van oordrag in die koper se naam, alternatiewelik die bedrag van R1 000 000-00 (EEN MILJOEN Rand) betaalbaar op datum van registrasie van oordrag in die koper se naam plus 2 wooneenhede in die beoogde ontwikkeling met 'n gesamentlike waarde van R800 000-00 (Agthonderd Duisend Rand) op die verkoper of sy genomineerde se naam oorgedra te word so spoedig as moontlik.'

It is worth noting that clause 2, as sought to be rectified, makes no mention of the type of dwelling unit to be transferred.

[5] The rule *nisi* was granted on 27 May 2005 by agreement between the parties. On 8 December 2005, Allie J granted an order for rectification of the agreement in the terms set out above, together with a further order declaring the agreement as rectified to be valid and enforceable. Propfokus was also ordered to do everything necessary to transfer the property to Wenhandel within seven days of the date of the order 'teen betaling van die volle koopprys', failing which the Registrar of the High Court was ordered to take the necessary steps to effect the transfer on behalf of Propfokus. With the leave of the High Court, Propfokus now appeals against this order.

[6] Wenhandel purchased the property for the purpose of erecting dwelling units thereon. Prior to the amendment of the agreement and for some time thereafter, the parties laboured under the impression that the relevant local authority would permit separate title units to be built upon the property. That impression was gained from information which Wenhandel had received from the local authority. Pursuant to the agreement as amended, Propfokus chose two separate title dwelling units off plan and, in October 2004, concluded purchase and building agreements with Wenhandel in respect of each of these units.

[7] The local authority thereafter decided to zone the property exclusively for sectional title development. Propfokus apparently became aware of this decision only on 20 April 2005, when Wenhandel's attorney wrote to Propfokus'

attorney in respect of the delays relating to registration of transfer of the property and stated that:

'Ons wil vir die rekord daarop wys dat dit nie langer eie titel eenhede is nie, maar deeltitel eenhede ooreenkomstig die magtiging deur die plaaslike owerheid'

[8] In subsequent correspondence between the respective attorneys, Propfokus referred to the amendment to the agreement and insisted that it had never intended to accept two sectional title units as part payment for the property, but only two separate title units. In these circumstances, so Propfokus contended, the nature of the property rights attached to the dwelling units had changed materially from that stipulated in the amended agreement. Propfokus accordingly purported to cancel the agreement. Wenhandel subsequently tendered to pay R1 800 000.00 against registration of transfer of the property, but this was refused by Propfokus. Wenhandel regarded the cancellation as unlawful, while Propfokus adopted the stance that, even if it were to be found that the agreement was not validly cancelled, it was on Wenhandel's own version not possible for it to perform in terms thereof.

[9] After settlement negotiations between the parties had failed, Wenhandel launched the application culminating in the order which is the subject of this appeal.

[10] At the hearing before us, counsel for Wenhandel argued that, even in the absence of rectification, a proper interpretation of the agreement between the parties entitled Wenhandel to an order that Propfokus transfer the property to the former against payment of 'the full purchase price' of R1 800 000. Relying on a number of cases dealing with the legal nature of so-called 'trade-in agreements' in the context of the sale of motor vehicles,[1] counsel submitted that that the agreement, properly construed, provided for a purchase price of R1 800 000, part of which was to be paid, at the option of the purchaser, in the form of two units. Thus, so it was contended, Wenhandel as purchaser was entitled to tender R1 800 000 in payment of the purchase price if (for example) transfer of the two units became impossible. According to counsel, clause 2 had to be interpreted to mean that Wenhandel always had the option of paying the 'full purchase price' of R1 800 000 in cash against registration of transfer of the property.

[11] I do not think that this is the correct construction of the agreement. The cases relied upon by counsel deal with a materially different factual matrix and are not in point.[2] Moreover, the construction sought to be placed on clause 2 of the agreement as amended goes contrary to the well-established rules for the

[1] Viz where the parties to a contract of sale of a motor vehicle agree that the purchase price is to be paid partly in cash and partly by the trade-in by the purchaser of another motor vehicle: see *Antonie v The Price Controller & Another* 1946 TPD 190; *Massyn's Motors v Van Rooyen* 1965 (3) SA 717 (O); *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C); *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D). See also *G J Dawson (Clapham) Ltd v H & G Dutfield* [1936] 2 All ER 232 (KB).

[2] Quite apart from any other differences, a trade-in motor vehicle is generally an asset which will not appreciate in value over time, while in this case, it is common cause that the units in the proposed development could very well increase in value after the conclusion of the agreement.

interpretation of contracts. As was stated by Joubert JA in *Coopers & Lybrand & others v Bryant*[3] with regard to the 'golden rule' of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.

[12] In this case, giving the wording of clause 2 (as amended), its grammatical and ordinary meaning does not result in any ambiguity, absurdity or inconsistency with the rest of the agreement. The wording of clause 2 is clear: the purchase price of the property is R1 000 000 plus two separate title dwelling units in the proposed development (as nominated by the seller off plan and with a combined value of R800 000)[4]. The construction contended for by counsel would have made no commercial sense for Propfokus. Not only would Wenhandel have had the benefit of not being obliged to pay the full price in cash 'up front' upon registration of transfer but, should the value of the dwelling units increase after the date of conclusion of the agreement, Propfokus would be unable to insist on reaping the benefit of this increase in value. To my mind, such an interpretation would in fact conflict with the 'nature and purpose' of clause 2 as amended.

[3] 1995 (3) SA 761 (A) at 767E–768A.
[4] It is common cause on the papers that the reference in clause 2 to 'a combined value of R800 000' meant a *minimum* combined value.

[13] I turn now to the aspect of rectification. In order to succeed with its claim for rectification, Wenhandel had to allege and prove the following:

(a) that an agreement had been concluded between the parties and reduced to writing;

(b) that the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;

(c) an intention by both parties to reduce the agreement to writing – in the present case, the agreement was for the sale of land and, therefore, had to be in writing in order to be valid and binding;

(d) a mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a *bona fide* common error; and

(e) the actual wording of the true agreement.[5]

[14] It is to requirement (b) that I immediately turn for it seems to me that it is at that level that the case for rectification fails.

[5] LTC Harms *Amler's Precedents of Pleadings* 6ed (2003) p 298-299 and the cases there cited.

[15] Propfokus' case throughout the proceedings was that the true agreement between the parties is correctly reflected in the written agreement, as amended. Wenhandel never disputed this stance during the course of the correspondence exchanged between the parties' respective attorneys. So, for example, when Propfokus' attorney, in a letter dated 8 April 2005, purported to put Wenhandel to terms as a result of 'die onnodige vertraging in hierdie oordrag' and (incorrectly) claimed payment of R1 800 000 within 14 days 'in terme van klousule 12 van die koopkontrak', the response of Wenhandel's attorney was to suggest that the sum of R1 000 000 immediately be placed in trust for Propfokus' benefit pending registration of transfer of the property, and further to refer to 'die eenhede wat u kliënt toekom'. Moreover, after Propfokus' attorney had purported to cancel the agreement on its behalf, Wenhandel's attorney threatened Propfokus, on 5 May 2005, with ''n aansoek vir 'n verklarende bevel dat gemelde koopkontrak geldig en afdwingbaar is en vir 'n bevel wat oordrag gelas'. There is nothing in the correspondence preceding the launch of the proceedings by Wenhandel to indicate that it was of the view that the written agreement as amended did not reflect the common intention of the parties and, accordingly, fell to be rectified.

[16] As was contended by counsel for Propfokus, notwithstanding the fact that Propfokus' attitude towards clause 2 of the written agreement as amended was conveyed several times to Wenhandel, the latter did not challenge this

attitude at any time prior to the launch of the application. On the contrary, the issue of rectification was raised by Wenhandel for the very first time in the notice of motion. That being so, Wenhandel could hardly have established that *its* intention, independently of Propfokus, was different to that reflected in the written agreement as amended. Much less could Wenhandel have established that *both* parties had an intention which differed to that appearing from the (amended) written agreement.

[17] Moreover, clause 2 of the agreement, as rectified by the High Court, gives Wenhandel the choice of either paying R1 800 000 against transfer, alternatively R1 000 000 plus two units in the envisaged development. As indicated above, the units would of course be sectional title units. The papers do not, however, establish that, at any stage after the amendment of clause 2 by the deletion of the reference to three sectional title units, Propfokus was prepared to accept two sectional title units. On the contrary, in its answering affidavit, Propfokus dealt in detail with its reasons for not being prepared to accept sectional title units and claimed that, since August 2004, it was not interested in sectional title units at all and that the agreement was accordingly expressly amended, as set out above.

[18] Insofar as there may be any factual dispute in this regard, the matter must be decided on the version advanced by Propfokus.[6] As pointed out by

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634C-635C.

counsel for Propfokus, the deponent to the answering affidavit filed on its behalf stated the following in opposition to Wenhandel's claim for rectification:

'Dit word ontken dat daar enige grondslag bestaan waarop hierdie agbare Hof genader kan word vir die rektifikasie van klousule 2 van die koopkontrak. Daar word nie namens die Appellant verwys na enige feite wat daarop dui dat die koopkontrak, aanhangsel CM1, soos uitdruklik gewysig deur die verdere kontrak, aanhangsel CM3, nie die gemeenskaplike bedoeling van die partye weerspieël nie. Daar word ook nie beweer of bewys dat die bewoording van aanhangsel CM3 verkeerd of foutief is as gevolg van 'n gemeenskaplike dwaling veroorsaak deur die Respondente nie.'

[19] It cannot be said that Propfokus' allegations or denials of the facts relevant to the aspect of rectification are so far-fetched or clearly untenable that the court would be justified in rejecting them merely on the papers.[7] Applying the *Plascon-Evans* rule, it is thus clear that the papers before the court do not establish the essentials of rectification and that Wenhandel's claim should not have succeeded.

[20] It follows that the appeal must be upheld. As far as costs are concerned, although Propfokus was represented before us – and, it would appear, in the High Court – by two counsel, I do not consider that the nature and complexity of the matter warranted the employment of more than one counsel.

Order

[7] See *Plascon-Evans Paints* above at 635C.

[21] In the circumstances, the following order is made:

1. The appeal is upheld with costs.

2. The order made by the Cape High Court on 8 December 2005 is set aside and substituted with the following:

'The application is dismissed with costs.'

_____

B J VAN HEERDEN
JUDGE OF APPEAL

CONCUR:

NUGENT JA

COMBRINCK JA