THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case number : 271/2006

In the matter between :

FRANCIS LESLIE BOWRING NO	***APPELLANT***
and	
VREDEDORP PROPERTIES CC	***FIRST RESPONDENT***
THE REGISTRAR OF DEEDS	***SECOND RESPONDENT***

CORAM : **STREICHER, BRAND, HEHER, VAN HEERDEN *et***

MAYA JJA

HEARD : **21 MAY 2007**
DELIVERED : **31 MAY 2007**

Summary: Doctrine of notice – application in areas of both unregistered servitudes and of successive sales – in latter instance no reason in principle why first purchaser cannot claim transfer of thing sold directly from subsequent purchaser – question whether subsequent purchasers should be joined as parties – dependent on whether they can be said to have a direct and substantial interest in the outcome of the litigation.

Neutral citation: This judgment may be referred to as *Bowring NO v Vrededorp Properties CC* [2007] SCA 80 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The appellant is the sole trustee of the F L B Trust ('the Trust'). The Trust is the registered owner of an immovable property in Loveday Street South, Selby, Johannesburg. The property was formerly used as a railway siding and it still bears that name. Proceedings commenced when the first respondent ('Vrededorp'), as the plaintiff, instituted an action against the Trust, as the first defendant, in the Johannesburg High Court. Broadly stated, Vrededorp claimed an order in two parts, namely, that the Trust be directed, first, to subdivide the railway siding and to transfer a defined subdivided portion to Vrededorp; and, secondly, to register a servitude of way – giving access to Loveday Street – in favour of Vrededorp over the remainder of the property. The Registrar of Deeds, who was cited as the second defendant in the court *a quo* and as the second respondent in this court, did not participate in any of the proceedings.

[2] In a diagram attached to Vrededorp's particulars of claim, the undivided portion of the railway siding which was the subject of its claim for transfer was depicted in blue, while the remainder of the property over which it claimed the servitude was coloured green. For ease of reference I propose to distinguish between the two portions involved with reference to these colours. The Trust resisted Vrededorp's claim and filed a counterclaim for an order that would constitute the converse of the order contemplated in the main claim, namely, that Vrededorp be ejected from the blue portion and refused access over the green portion of the railway siding. In the event, the court *a quo* (Blieden J) granted the main claim and refused the counterclaim, in both instances with costs. The appeal against that order is with the leave of the court *a quo.*

[3] At the commencement of the trial in the court below, the parties agreed that the matter should be decided on the basis that the allegations in Vrededorp's

particulars of claim were factually correct. Because of this agreement, no evidence was led. The background facts, which thus became common cause, appear from what follows. On 13 October 1994 Vrededorp purchased two immovable properties from a company called Stand 160 Selby (Pty) Ltd ('Stand 160') for a purchase price of R1,27m. The properties which formed the subject matter of the sale were collectively described as 'Erf 358 Selby, plus the subdivided portion of the railway siding on the east side of [erf 358]', ie the blue portion. Further terms of the agreement of sale that are of relevance appear from clause 17. They read as follows:

'17. Subdivision and Servitude costs

17.1 The seller [Stand 160] shall prior to the registration of transfer . . . subdivide at its own costs the portion of the railway siding that lies to the east of Stand 358 Selby [ie the blue portion] . . .

17.2 The seller records that the purchaser [Vrededorp] shall have the right, at his own cost, to establish a servitude over the remaining [ie the green] portion of the railway siding. The servitude is to ensure shared use of the land, giving the purchaser's vehicles access to the east side of the property [ie erf 358 Selby].'

[4] On 11 May 1995 Stand 160 and Vrededorp agreed to amend their agreement of 13 October 1994 in terms of what was called an 'addendum' to that agreement. The pertinent provisions of the addendum appear from clauses 2 and 4. They read as follows:

'2. The parties agree that Erf 358 Selby shall be transferred into the name of the Purchaser immediately, against payment of R1 220 000 of the purchase price.

The parties further agree that [the blue portion of] the Siding shall be transferred into the name of the Purchaser as soon as possible thereafter, against payment of R50 000 being the balance of the purchase price.

3. . . .

4. The Purchaser acknowledges that the fact that the Seller is not able to give transfer of [the blue portion of] the Siding at this stage, shall not constitute a basis to cancel the Agreement of Sale, and the Purchaser shall proceed with the Agreement of Sale in accordance [t]herewith as read with the Addendum . . . '

[5] Pursuant to the addendum, Erf 358 Selby was transferred to Vrededorp during July 1995. Subdivision and transfer of the blue portion of the railway siding were, however, overtaken by the liquidation of Stand 160. On 12 March 1997, the liquidator of Stand 160 sold the railway siding to Investec Bank Limited. Though the blue

portion had not yet been subdivided and therefore still formed part of the property, the deed of sale made it clear that that portion had to be transferred to Vrededorp 'and thus does not form part of this agreement'. In addition, clause 17 of the deed of sale provided:

'Subdivision and Servitudes

The Purchaser [Investec] acknowledges and accepts that the Seller [Stand 160 in liquidation] will subdivide at its own cost the [blue] portion of [the railway siding] that lies to the east of stand 358 Selby . . . ., further that the owners of Stand 358 Selby, ie Vrededorp Properties CC will, at their own expense establish a servitude over the remaining [green] portion . . . [of the railway siding] to ensure shared use of the land giving access to vehicles requiring such access to stand 358 Selby.'

[6] On 25 June 1998 Investec sold and subsequently transferred the whole of the railway siding, including both the blue and green portions, to the Trust. Unlike the deed of sale between the liquidator of Stand 160 and Investec, the subsequent agreement between Investec and the Trust made no reference to Vrededorp's right to procure transfer of the blue portion, nor of its right to a servitude over the green portion. Nonetheless, one of the allegations in Vrededorp's particulars of claim which was formally admitted was that at all relevant times, and particularly when Investec and thereafter the Trust purchased the railway siding, both purchasers were aware that Vrededorp had the right to take transfer of the blue portion and to register a servitude of right of way in its favour over the green portion of that property.

[7] It is this knowledge on the part of the Trust which constitutes the factual foundation of Vrededorp's case. For the legal basis of its case it relies on what has become known as the doctrine of notice. This doctrine has found application in a number of instances in the law of property. (For a succinct summary of the various applications, see eg Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's The Law of Property* 4 ed (2004) p 88.) I will first deal with its application in relation to unregistered servitudes, which has by now become settled law. In this instance the doctrine operates in the following way: if A and B enter into an agreement which entitles A to have a servitude registered over the land of B, A has a personal right to claim that B should cooperate in procuring registration of the servitude, as this is a requirement for the creation of the real right that A has bargained for. Once registration has taken place any subsequent purchaser of the land will be bound by the servitude.

[8] If, however, B should sell his land and transfer ownership to C before registration has occurred, C would normally not be bound to give effect to the servitude. But, if C had knowledge of A's unregistered servitude at the time the contract of sale was entered into between B and C, C will be bound, not only to give effect to the servitude, but also to cooperate in having the servitude registered. (See eg *Richards v Nash* (1881) 1 SC 312 at 318; *De Jager v Sisana* 1930 AD 71 at 84; *Grant v Stonestreet* 1968 (4) SA 1 (A) at 20A-B; *Wahloo Sand BK v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) paras 8-10 at 782G-783E; Badenhorst, Pienaar & Mostert *op cit* p 89; Van der Merwe *Sakereg* (1989) 2ed p 526 *et seq*. As in *Wahloo Sand* (para 9), the thus far unresolved question of whether knowledge of A's right, acquired by C after the date of purchase, but prior to the date of transfer will suffice to set the doctrine in motion, does not arise on the facts of this case.)

[9] Without more, this application of the doctrine of notice would seem to render Vrededorp's claim for registration of a servitude over the green portion, unanswerable. It had a contractual right for claiming registration of the servitude against the erstwhile owner, Stand 160, of which the Trust and its predecessor, Investec, admittedly had knowledge when they purchased the dominant property. Simply stated, the Trust's answer to this claim, was, however, that a servitude over the green portion would only give access to the blue portion and that, because Vrededorp was not entitled to claim transfer of the blue portion, the servitude claimed would only serve the Trust's own property, which was not competent in law.

[10] Factually, the answer appears to be well-founded. Vrededorp's property, erf 358 Selby, has no common boundary with the green portion. They are separated by the blue portion. Access to Vrededorp's property can therefore only be gained by a servitude over the green portion via the blue portion. As a matter of law, the argument is equally well-founded. A praedial servitude – such as the one claimed – can only exist if it provides some permanent advantage to a dominant property (see eg *Lorentz v Melle* 1978 (3) SA 1044 (T) 1049C-G; Van der Merwe *op cit* p 459). It thus became common cause during argument that Vrededorp's claim for registration of a servitude over the green portion is entirely dependent on its right to claim transfer of the blue portion.

[11] The legal basis advanced by Vrededorp for its claim to the blue portion is again derived from the doctrine of notice. This time it relies on the application of the doctrine in the sphere of successive sales. The usual operation of the doctrine in this instance, as explained in our case law, is essentially as follows: if a seller, A, sells a thing – be it movable or immovable – to B and subsequently sells the same thing to C, ownership is acquired, not by the earlier purchaser, but by the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his or her right is unassailable. If the second purchaser, C, is the first transferee, his or her right of ownership is equally unassailable if he or she had purchased without knowledge of the prior sale to B. But, if C had purchased with such prior knowledge, B is entitled to claim that the transfer to C be set aside so that ownership of the thing sold can be transferred to B. (See eg *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 at 46; *McGregor v Jordaan* 1921 CPD 301 at 308; *Tiger-Eye Investments (Pty) Ltd v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) at 358F-G; *Kazazis v Georghiades* 1979 (3) SA 887 (T) at 894B-D; *Cussons v Kroon* 2001 (4) SA 833 (SCA) at 839C-E; Badenhorst, Pienaar & Mostert *op cit* p 89; Gerhard Lubbe 'A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African Law', 1997 Acta Juridica 246 et seq. Again it is unnecessary to enter into the unresolved debate referred to earlier, ie whether knowledge acquired by C between purchase and transfer would make any difference.)

[12] It is not denied by the Trust that, in principle, the doctrine of notice affords Vrededorp the right to claim transfer of the blue portion. Nonetheless the Trust raised a twofold defence against the way in which this claim was brought. Its first contention was that the doctrine of notice, as applied in the sphere of successive sales, does not allow the first purchaser, B, to claim transfer *directly* from the second purchaser, C. Secondly, it raised a defence in the nature of non-joinder which relied on the fact that Stand 160 and Investec had not been joined by Vrededorp as parties to the proceedings.

[13] In developing its first mentioned contention, the Trust argued that the doctrine of notice only entitles the first purchaser, B, to set aside the transfer to the second purchaser, C, which then opens the way for B to claim transfer from the original seller, A. B cannot claim transfer directly from C. To allow B to do so, so the

argument went, would amount to admitting a claim for specific performance of a contract between A and B against a stranger to that contract, which would be irreconcilable with the basic principles of our law of contract.

[14] The Trust's argument seems to be supported by what happens in practice when the doctrine of notice is applied to successive sales. More pertinently, there appears to be no decided case in our law where the first purchaser's claim for transfer or delivery has been allowed directly against the second purchaser. On the other hand, some academic writers hold the view that there is no underlying reason of principle why it should not be so allowed. In fact, so they say, the possibility of a claim by B against C derives support from Roman-Dutch authorities. This appears, for example, from the following exposition by R G McKerron 'Purchaser with Notice' 1935 *SA Law Times* Vol 4 178 p180:

'It remains to consider the position where transfer has been passed to the second purchaser. If *C*, when he bought, had knowledge of the prior sale to *B*, there is no doubt as to the position. The authorities, both ancient and modern, are agreed that in such a case *C* is not entitled to retain the land as against *B*. The old authorities allow *B* to recover the *res vendita* direct from *C* by a personal action *in factum* [as opposed to the *rei vindicatio,* only available to the owner], and there is no reason why in a suitable case *B* should not be allowed to adopt this course in the modern law. But in South Africa the usual practice is for *B* to join *A* as co-defendant, and claim as against him an order cancelling the transfer, and as against *C* an order to pass transfer into his (*B*'s) name.'

(See also Voet 6.1.20; J E Scholtens 'Double Sales' 1953 *SALJ* 22 p 34; Prof Gerhard Lubbe *op cit* p 247.))

[15] The notion that B can be allowed to claim performance against C of a contractual undertaking by A is clearly an anomaly in that it flies in the face of contractual privity. But I do not think that this anomaly can, by itself, constitute a bar to affording B the right to claim transfer of the thing sold directly from C. For as Prof McKerron puts it (*op cit* p 180):

'Absence of privity is not a sufficient reason for refusing to allow a remedy founded upon a doctrine such as the doctrine of "purchaser with notice," which is a purely equitable doctrine running counter to the rule of the strict law that a real right takes preference over a merely personal right.'

[16] What is more, the same anomaly reveals itself in the sphere of unregistered servitudes when a purchaser with knowledge is compelled to cooperate in procuring

registration of a servitude previously granted by the seller of immovable property. The nature of the right granted by the seller in this instance appears from the following statement by Innes CJ in *Willoughby's Consolidated Co v Copthall Stores Ltd* 1918 AD 1 at 16:

'Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than the contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the Register and endorsed upon the title deed of the servient property.'

(See also *De Jager v Sisana* 1930 AD 71 at 84; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) at 580B-E).

[17] The essential quality of the right that the purchaser acquires from a contract of sale is therefore no different from the right of the beneficiary under a servitude agreement. Both rights are so-called *iura in personam ad rem acquirendam*, ie personal rights to acquire a real right (see eg Van der Merwe *op cit* p 86; Badenhorst, Pienaar & Mostert *op cit* p 70). In the case of a servitude, application of the doctrine of notice does not require that the transfer of the property to the purchaser be set aside so as to enable the beneficiary under the servitude agreement first to claim registration of the servitude against the seller before the property is re-transferred to the purchaser subject to a registered servitude. The beneficiary's claim is allowed directly against the purchaser (see eg *Grant v Stonestreet (supra)* at 7). That there is no privity of contract between the beneficiary and the purchaser is not seen as an insurmountable hurdle. Why then, it may in my view rightfully be asked, should the position be any different when the same doctrine is applied in the instance of double sales?

[18] My suggestion is not that in the successive purchaser situation B should always be allowed to claim transfer directly from C. The doctrine of notice is an equitable remedy and its manner of application should be determined largely by what is considered to be equitable to all concerned in the circumstances of the particular case. Where the whole property is first sold to B and then to C, the most equitable solution will probably be to restore A and C to their former position – by ordering

cancellation of the transfer and repayment of the purchase price – before A is ordered to transfer the property to B. But in this case the position is substantially different. Vrededorp claims transfer of the blue portion of the railway siding only. Cancellation of the successive transfers of the whole property to Investec and the Trust, will therefore require that the remainder of the property be re-transferred first to Investec and then to the Trust, after the blue portion had been separated and transferred to Vrededorp. No reason has been suggested, and I can think of none, why this cumbersome and wasteful process would be in anybody's interest. For these reasons I conclude that the Trust's first defence, based on the application of the doctrine of notice, cannot be sustained.

[19] This brings me to the second defence of non-joinder. Though this defence was not formally raised by the Trust in its pleadings, it nevertheless argued that the relief sought and obtained by Vrededorp should not have been granted without the original seller, Stand 160, and the intermediate second purchaser, Investec, being joined as parties to the proceedings.

[20] Central to the argument in support of this defence, was the contention that, although Vrededorp's claim for transfer was brought against the Trust only, it (a) effectively interfered with the contractual relationship between Stand 160 and Investec, on the one hand, and between Investec and the Trust, on the other; and (b) effectively amounted to an enforcement of Vrededorp's contractual claim against Stand 160. In motivating contention (b) the Trust referred, first, to Vrededorp's formal tender to pay, against transfer of the blue portion, the purchase price of R50 000 to the liquidator of Stand 160, which obligation could only arise from the agreement between Vrededorp and Stand 160. Secondly, it referred to the fact that Vrededorp sought and obtained an order from the court *a quo* that the Trust 'is to make payment of all costs and expenses pertaining to the transfer of the subdivided portion to Vrededorp'. If Vrededorp had any right to payment of these expenses, so the Trust argued, this right could only derive from its agreement with Stand 160.

[21] Though the Trust may well be right in its analysis of the effect of Vrededorp's claim, the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg *Amalgamated Engineering Union v Minister of Labour*

1949 (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder, has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Aquatur (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 62A-F; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) paras 64-66).

[22] During argument counsel for the Trust was invited to indicate, with reference to the facts available to us, how the order sought and obtained by Vrededorp could prejudicially affect the legal interests of either Investec or Stand 160. The only potential prejudice he referred to was that which could result from that part of the court *a quo*'s order which directed the Trust to pay the expenses occasioned by the subdivision of the blue portion and its subsequent transfer to Vrededorp. This part of the order, so counsel for the Trust contended, may very well lead to an action by the Trust against Investec for recoupment of these expenses, which the latter may then in turn seek to recover from Stand 160 (in liquidation).

[23] While conceding the validity of this contention, Vrededorp's counsel responded by abandoning that part of the relief granted by the court *a quo*. In the result, counsel for the Trust was not able to contemplate any other prejudicial effect which the order, thus amended, may have on the legal interests of either Investec or Stand 160. In the absence of any potential prejudice, the Trust's defence based on non-joinder must also fail.

[24] In the light of the concession by Vrededorp's counsel, the court *a quo*'s order stands to be amended by deletion of the direction that the Trust should pay the expenses occasioned by subdivision and transfer of the blue portion. Another amendment I think advisable is to incorporate Vrededorp's tender of R50 000 in favour of Stand 160, in the court's order.

[25] What remains to be considered is the costs of appeal. Despite the argument to the contrary on behalf of Vrededorp, I am of the view that the Trust has achieved substantial success on appeal. Though the exact amount of the expenses for which

the Trust will no longer be liable is unknown, I have no reason to think that it will be negligible, nor can I think of any reason why costs should not follow this event.

[26] For these reasons it is ordered that:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is amended to read as follows:

'1. The first defendant is directed to do all things necessary to transfer into the name of the plaintiff the subdivided portion of the railway siding on the east side of Erf 358 Selby depicted in blue on annexure VP-1 to the plaintiff's particulars of claim, against payment by the plaintiff of the amount of R50 000 to the liquidator of Stand 160 Selby (Pty) Ltd (in liquidation).

2. The plaintiff is to make payment of all costs and expenses pertaining to the subdivision and transfer of the blue portion referred to in paragraph 1 above.

3. The first defendant is to do all things necessary to facilitate the registration of the servitude by the plaintiff over the remaining portion of the remainder of the railway siding, depicted in green on the said annexure VP-1.

4. The first defendant's counterclaim is dismissed with costs.

5. The first defendant is to pay the plaintiff's costs of suit.'

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F D J BRAND
JUDGE OF APPEAL

Concur:

STREICHER JA
HEHER JA
VAN HEERDEN JA
MAYA JA