THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 597/07

BOUNDARY FINANCING LIMITED Appellant

and

PROTEA PROPERTY HOLDINGS (PTY) LIMITED Respondent

Neutral citation:	*Boundary Financing v Protea Property* (597/07) [2008] ZASCA 139 (27 November 2008)
Coram:	STREICHER, CAMERON, LEWIS, JAFTA and PONNAN JJA
Heard:	10 NOVEMBER 2008
Delivered:	27 NOVEMBER 2008
Summary:	Rectification and interpretation of contract – prescription does not run against a claim for rectification.

ORDER

On appeal from: High Court, Cape Town (Griesel J sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

STREICHER JA (CAMERON, LEWIS, JAFTA and PONNAN JJA concurring)

[1] Protea Property Holdings (Pty) Ltd, the respondent and the plaintiff in the court a quo, is a property holding company in the Protea group of companies ('Protea'), of which the holding company is the Protea Hospitality Corporation (Pty) Ltd, which through a management company, Protea Hotels and Inns (Pty) Ltd, markets and/or manages approximately 130 hotels in Africa and the Middle East. This appeal concerns the Edward Hotel in Durban. Boundary Financing Limited, formerly known as International Bank of Southern Africa Limited (Ibsa), the first defendant in the court a quo and the appellant in this court, got involved in financing schemes with the Karos group of companies which went into liquidation during 1999. One of the companies in that group was Karos (Pty) Ltd ('Karos'), the third defendant in the court a quo, which owned and still owns the property on which the Edward Hotel is situated. The second defendant in the court a quo was Swanvest (Pty) Ltd ('Swanvest'), which had purchased the Edward Hotel property from the liquidators of Karos. All the issued shares in Swanvest were held by the appellant and were thereafter sold to the respondent. This agreement ('the sale of shares agreement') gave rise to the action in the court a quo which resulted in the court a quo ordering:

(i) the rectification of the agreement of sale of shares so as to reflect a

warranty and undertaking by the appellant that the Edward Hotel property (and not a different hotel) would be an asset in Swanvest;

(ii) the delivery by the appellant to the respondent of all the issued shares in Swanvest against payment of R674 701; and

(iii) performance of the warranty in respect of the Edward Hotel property as per the agreement so rectified.

With the leave of the court a quo the appellant now appeals against that order.

[2] It is common cause between the parties that Protea wished to acquire the Arthur's Seat Hotel (owned by Karos Cape Shareblock (Pty) Ltd) as well as the Edward Hotel. To this end various contracts were concluded between the appellant and companies within Protea in respect of the Arthur's Seat Hotel and subsequently, on 1 March 2001, in respect of the Edward Hotel. The latter set of contracts consisted of the following:

2.1 The agreement of sale of shares in terms of which the appellant, the respondent and Swanvest agreed that notwithstanding the date of signature of the agreement and with effect from 2 February 2001 the appellant was deemed to have sold to the respondent 60 ordinary shares of R1 each in Swanvest comprising 60% of the total issued share capital of Swanvest as registered in the name of the appellant for a purchase price of R1. In an annexure incorporated into the agreement it is stated:

'1 The Seller hereby warrants and undertakes in favour of the Purchaser both as at the effective date and as at the delivery date (unless the context otherwise indicates) that:

. . .

1.24 the sole assets of the Company shall be the immovable property known as Remainder of Erf 948 Sea Point West, in extent 4048 square metres, held by Deed of Transfer No. T25566/1997, commonly described as The Arthur Seat Hotel; . . .'

In terms of the agreement the effective date was 2 February 2001 and payment of the purchase price had to be effected within 30 days of that date. Delivery of the shares had to take place within seven days of payment of the purchase price. It is common cause that the agreement formed part of the set of agreements relating to the Edward Hotel and that it had nothing to do with the Arthur's Seat Hotel. The appellant nevertheless contended that the respondent was not entitled to the rectification of clause 1.24 by the substitution of the property description therein with the property description of the Edward Hotel property.

2.2 A shareholders' agreement concluded by the same parties in terms of which it was recorded that the respondent had acquired from the appellant 60% of the equity of Swanvest and that Swanvest would be 'the registered owner of the bare dominium of the property known as 'Remainder of Sub 1 of Lot 11258 Durban, situate in the city of Durban, Administrative District of Natal, Province of Kwazulu-Natal' ('the Edward Hotel property').

2.3 An agreement of sale in terms of which Swanvest sold to the Protea Hotel Group (Pty) Ltd ('PHG') the furniture, fixtures and equipment ('FF&E') then in use on the premises of the 'the Hotel known as The Edward Hotel Beach Front Durban' for a purchase price of R2 000 000.

2.4 A cession and pledge agreement in terms of which the respondent ceded and pledged to the appellant 60% of the equity in the second defendant *in securitatem debiti* for the due payment of every sum of money which was then or could thereafter become owing by the respondent to the appellant.

2.5 An agreement of lease in terms of which the appellant let to PHG the Edward Hotel as from 1 February 2001 for a period of 10 years. Although structured as a lease the trial judge rightly found that the rent payable in fact constituted consideration for the acquisition by Protea of the Edward Hotel property.

2.6 A 'Side Letter' recording an agreement between PHG, the respondent and the appellant as follows:

'We hereby record that you have given us the irrevocable right to

restructure the series of transactions or any or more of them as contained in the abovementioned documents after we have completed a due diligence investigation of both Swanvest 258 (Pty) Limited as also Karos (Pty) Limited (in liquidation) as to the acquisition of the shares in Karos (Pty) Limited and as to the tax implications of the transactions involving Swanvest 258 (Pty) Limited. In terms of any such reconstruction, we will be entitled to cancel any of the above agreements to enable us as an alternative to purchase the entire share equity of Karos (Pty) Limited subsequent to a section 311 application to the High Court in terms of the Companies Act provided that IBSA is not unreasonably prejudiced thereby, either financially or in terms of its security. An objection by IBSA shall be *prima facie* proof that it is unreasonably prejudiced by the restructure.'

[3] Karos, the owner and operator of the Edward Hotel, had a substantial assessed loss which Protea hoped to utilise by acquiring the shares in Karos and operating the Edward Hotel through Karos instead of Swanvest, in the event of the liquidation of Karos being terminated pursuant to an application in terms of s 311 of the Companies Act 61 of 1973. It is this possibility that gave rise to the 'side letter'. It is also as a result of this possibility that effect was not given to the sale of shares agreement. Both the appellant and the respondent accepted that a restructuring was going to take place and that it could serve no purpose to give immediate effect to the provisions of the agreement. The FF & E and lease agreements were nevertheless implemented.

[4] Negotiations concerning a restructuring of the agreements ensued

and continued until 2004, some considerable time after a scheme of arrangement between Karos (Pty) Ltd (in liquidation) and its creditors had been sanctioned in terms of s 311 at the end of 2002. During the course of these negotiations, on 13 March 2002, the appellant agreed to sell 'the remaining 40% shareholding in the Arthur's Seat and the Edward Hotel' to the respondent for a purchase consideration of R2 349 400 which was subsequently, on 23 May 2002, reduced by R1m to R1 349 400 or R674 000 each. At that stage the parties were still negotiating as to the company in which the Edward Hotel property was to be housed in the event of the agreements being restructured.

[5] The negotiations came to an end on 25 November 2004 when the appellant's attorneys wrote to the respondent that, for a period in excess of three years, the parties had not regarded themselves bound by the suite of agreements concluded on 1 March 2001 and that the obligations arising from the agreement of sale of shares had become prescribed. The respondent thereupon issued summons against the appellant claiming the relief eventually granted by the court a quo. Swanvest and Karos were joined as second and third defendants respectively but no relief was claimed against them.

[6] In the court a quo and also before us the appellant contended that the respondent was not entitled to rectification of the agreement of sale of shares and in the alternative that the claim for such rectification had prescribed. In respect of the claim for the making good of the warranty and undertaking that the Edward Hotel property would be an asset in Swanvest as on 2 February 2001 the appellant contended that such an order could not be made as it was impossible to make Swanvest the

owner of the property on that date, and also because an order of specific performance was in the circumstances legally inappropriate. In the alternative the appellant contended that the claim for transfer of the shares in Swanvest and the claim that the warranty and undertaking be made good had become prescribed. I shall deal with each of these contentions in turn.

Rectification

[7] A party is entitled to rectification of a written agreement which, through common mistake incorrectly records the agreement which they intended to express in the written agreement. In the present case it is quite obvious and, as stated above, indeed common cause, that the parties never intended to warrant and undertake that the Arthur's Seat Hotel property would be an asset in Swanvest as stated in clause 1.24 of the annexure to the agreement of sale of shares. It seems to me to be equally obvious that the parties intended the reference to be to the Edward Hotel property. That is so because Protea wished to acquire the Edward Hotel and the agreements concluded on 1 March 2001 were entered into with that object in mind. Any doubt that there could possibly be in this regard is dispelled by the statement in the shareholders' agreement that the respondent had acquired from the appellant 60% of the equity of Swanvest and that Swanvest would be the owner of the bare dominium of the Edward Hotel property. One can add to this the fact that on 14 August 2000 the liquidators of Karos had sold the Edward Hotel property to Swanvest and also the fact that the reason for the error seems to be clear. As Mr Arnold Cloete, the financial manager of Protea (the sole witness at the trial), explained, similar agreements in respect of the Arthur's Seat Hotel had already been concluded and were probably used as a precedent

or template.

[8] Despite all these indications, counsel for the appellant submitted that it could not have been their intention that the appellant should warrant and undertake that the property would as at 2 February 2001 be an asset in Swanvest because they knew, when the agreement of sale of shares was concluded, that that was not the case. The fact that the parties knew that the property was not an asset of Swanvest on 2 February 2001, taken in isolation, may be considered to be an indication that the parties did not have the intention in question but it may also be an indication that, by so warranting and undertaking, the appellant was simply undertaking to procure transfer of the property to Swanvest. That the latter was the case is in my view put beyond question by the fact that the parties concluded the agreement of sale and the shareholders' agreement, as also by the terms of the shareholders' agreement. No other reason has been advanced as to why the parties would have concluded the agreement of sale of the shares of Swanvest and the shareholders' agreement if not to house the property in Swanvest except in the event of the parties subsequently agreeing to house the property in another company.

[9] The appellant submitted furthermore that, as it was envisaged that the liquidation of Karos and the agreement of sale between the liquidators of Karos and Swanvest could be terminated in terms of a scheme of arrangement in terms of s 311, the appellant would not have warranted that the Edward Hotel property would be an asset in Swanvest. However, the appellant could well have had reason to believe that it would in any event be able to procure transfer of the property to Swanvest.

[10] Yet a further submission advanced by the appellant as to why the parties would not have entered into a binding agreement to transfer the Edward Hotel property into Swanvest was that the respondent was desirous of making use of the taxed loss in Karos by leaving the property in Karos after its liquidation had been terminated and by acquiring the shares in Karos instead. It is true that, at the time when the agreements were concluded, it was envisaged that it could eventually be agreed to house the Edward Hotel property in a company other than Swanvest but it does not follow from that that the parties had no intention of entering into a binding agreement that it be housed in Swanvest should they fail to agree on another structure. As stated above it is common cause that Protea was desirous of acquiring the Edward Hotel and that it was with that object in mind that the agreements were concluded. Unless the agreement of sale of shares is rectified as claimed by the respondent the parties would not have achieved that object.

[11] For these reasons I am satisfied that the parties intended clause 1.24 to refer to the Edward Hotel property.

Prescription of the rectification claim

[12] The appellant, referring to *Primavera Construction SA v Government, North-West Province, and another* 2003 (3) SA 579 (B) at 599H-I as authority, submitted that the respondent's claim for rectification has in any event prescribed. In terms of s 10 of the Prescription Act 68 of 1969 read with s 11(d) of that Act, a debt other than the debts mentioned in ss 11(a) to (c) is extinguished by prescription after the lapse of a period of three years, save where an Act of Parliament provides otherwise.

[13] 'A debt' is not defined in the Prescription Act. Dealing with the meaning of the Afrikaans '`n skuld' Van Heerden AJA said in *Oertel en andere NNO v Direkteur van Plaaslike Bestuur en andere* 1983 (1) SA 354 (A) at 370B:

'Volgens die aanvaarde betekenis van die begrip slaan "`n skuld" op `n verpligting om iets te doen (hetsy by wyse van betaling of

lewering van `n saak of dienste), of nie te doen nie. Dit is die een pool van `n verbintenis wat in die reël `n vermoënsbestanddeel en –verpligting omvat . . ..'
A claim for rectification does not have as a correlative a debt within the ordinary meaning of the word. Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement. It is a declaration of what the parties to the agreement to be rectified agreed. For this reason a defendant who contends that an agreement sued upon does not correctly reflect the agreement between the parties may raise that contention as a defence without the need to counterclaim for rectification of the agreement (see *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824A-C). Should a claim for rectification of a contract become prescribed after three years parties may become entitled to rights and subject to obligations wrongly recorded and never intended eg in the case of a debt secured by a mortgage bond which only prescribes after the lapse of a period of 30 years.[1] That, in my view, is a result never intended by the Prescription Act. It follows that in so far as it may have been held in *Primavera* that prescription runs against a claim for rectification of a contract that decision is wrong.

[14] For these reasons the appeal against the order rectifying the agreement of sale should be dismissed.

[1] Section 11(a) of the Prescription Act 68 of 1969.

Making good the warranty

[15] As rectified, the appellant in terms of the annexure to the agreement of sale of shares warranted and undertook in favour of the respondent that the sole asset in Swanvest, as at the effective date and as at the delivery date, would be the Edward Hotel property.

[16] The appellant submitted that the warranty as formulated is an affirmative warranty of fact in so far as it related to the effective date whereas the Edward Hotel property was, as a fact, not the sole asset of Swanvest at that date. It was therefore factually and legally impossible for the warranty to be rendered true. As a result the respondent's only remedy was to claim damages, so the appellant submitted. As authority for the submission the appellant referred to De Wet and Van Wyk *Kontraktereg & Handelsreg* 5 ed p 88-89 where the authors, with reference to the example of a person selling a horse with a warranty that the horse was still alive only to discover subsequently that the horse was already dead, said: 'Waar ek die onmoontlike as moontlik waarborg, kan ek dit wel nie moontlik maak nie, maar moet ek by wyse van skadevergoeding my waarborg goed maak.' In these circumstances the warranty that the horse is still alive is in reality an undertaking to pay damages should it transpire that the horse is already dead.[2] Similarly, so the appellant submitted, the sale of shares agreement goes no further than a promise by the appellant to pay damages if the facts are not as warranted.

[17] There is no reason to interpret the warranty and undertaking at issue here in a like manner. Unlike the case of the horse, there is no reason to believe that the parties intended that, in the event of the

[2] S Williston *A Treatise on the Law of Contracts* (1938) vol 6 p 5417.

property not being an asset in Swanvest as at the effective date, there would be an obligation on the part of the appellant to pay damages but not an obligation to cure its breach of a term of the contract by procuring transfer of the property to Swanvest. Furthermore, unlike the example, the appellant not only warranted but also undertook that the property would be an asset in Swanvest. An undertaking to procure a certain state of affairs on a particular date does not, in the absence of any reason to so interpret the undertaking, change into an undertaking to pay damages should the undertaking not be honoured. Any doubt that there may be in this regard is dispelled by reference to the background circumstances.[3] At the time when the agreement of sale of shares was concluded the parties to the agreement were aware that the property had not been registered in the name of Swanvest. They could not, therefore, have intended the 'warranty and undertaking' to be anything other than an undertaking to procure transfer of the property to Swanvest.

[18] In the alternative the appellant submitted that the court a quo had a discretion to order specific performance and that the present case was not an appropriate case for such an order. It is settled law that a court has a discretion to grant or refuse a decree of specific performance of a contractual obligation. That discretion has to be judicially exercised upon a consideration of all relevant facts and will only be interfered with on appeal when it can be said that 'the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons'.[4]

[3] See *Coopers & Lybrand and others v Bryant* 1995 (3) SA 761 (A) at 767E-768E.
[4] *Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335; and *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 776 at 781A-783C.

[19] The appellant submitted that the court a quo should not have granted specific performance because it was not an appropriate remedy as the order could be given effect to only by way of an agreement of sale complying with the formalities prescribed by s 2(1) of the Alienation of Land Act 68 of 1981, between Karos and Swanvest. Not only did such an agreement not exist, the terms of the agreement of sale could not be determined and although the appellant was the sole shareholder of both Karos and Swanvest the directors of these companies might not consider it advisable either to sell or buy the property. For these reasons the order of specific performance by the court a quo amounted to a *brutum fulmen*.

[20] There is no merit in these submissions. An agreement of sale between Karos and Swanvest is not a requirement for the transfer of the property by Karos to Swanvest.[5] The appellant undertook to procure such transfer and must have been confident that it would be able to give effect to that undertaking. The appellant did not plead that it would not be able to give effect to an order of specific performance and tendered no evidence to that effect. Moreover, both Swanvest and Karos were parties to the action in the court a quo and neither of them sought to contend that the appellant would not be able to perform the obligation undertaken by it. In these circumstances the court a quo had no reason to doubt that the appellant would be able to do so. No other basis for interfering with the exercise by the court a quo of its discretion to order specific performance was advanced by the appellant.

[5] *Cape Explosive Works Ltd and another v Denel (Pty) Ltd and others* 2001 (3) SA 569 (SCA) at 577D-H par [10].

Prescription of the obligations under the agreement of sale of shares

[21] The appellant pleaded that its obligations to deliver 60% of the shareholding in Swanvest and to comply with the warranty and undertaking in respect of the Edward Hotel property fell due for performance by not later than 11 March 2001 and that they were extinguished by prescription by not later than 11 March 2004 ie before service of the summons which took place no earlier than 2 February 2005. The respondent in its plea and before us denied that the appellant's obligations had prescribed and contended that the running of prescription was interrupted in terms of s 14 of the Prescription Act in that after 11 March 2001, the appellant either expressly or tacitly acknowledged its liability to give effect to the agreement of sale of shares. It did so by, amongst others, concluding, on or about 6 February 2002 and 25 May 2002, the price-reduction agreement in respect of 'the remaining' 40% of the shares in the company that was going to hold the Edward Hotel property and also by engaging in negotiations with the respondent in order to effect a restructuring of the agreements relating to the Edward Hotel.

[22] In terms of s 14 the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor and commences to run afresh from the day on which the interruption takes place.

[23] At the time when the sale of shares agreement was entered into the parties knew that the liquidation of Karos could possibly be terminated in terms of s 311 and that this might enable the respondent to acquire the Edward Hotel property by acquiring the shares in Karos instead of

Swanvest. For that reason they agreed that the respondent would be entitled to restructure the agreements relating to the Edward Hotel even to the extent of cancelling the agreement of sale of shares. Pursuant to that agreement, and shortly after the conclusion thereof, the appellant and the respondent started negotiating a restructuring of the agreements. As a result of these restructuring negotiations the agreement of sale of shares was not implemented. It does not however follow that the parties had no intention of implementing the agreement of sale of shares. On the contrary, the agreement of sale of shares was clearly entered into to bind the parties to a fall back position should the restructuring negotiations fail. By negotiating a restructuring of, amongst others, the agreement of sale of shares, and not a fresh agreement, the parties tacitly acknowledged the binding nature of that agreement. Confirmation that that was the case is afforded by an internal memorandum of the appellant dated 12 February 2002 in which it is stated, with reference to the set of agreements relating to the Edward Hotel, that due to the s 311 compromise no change would be allowed to the agreements until they (the appellant) understood the implications on the agreements. By selling the remaining 40% of the shareholding in the company that was eventually to hold the Edward Hotel property, the appellant similarly tacitly acknowledged the binding nature of the sale of the other 60% of the shares.

[24] The restructuring negotiations were terminated only during 2004 while the sale of the remaining 40% of the shares in the property holding company was concluded on 6 February 2002 and amended on 25 May 2002. It follows that the running of prescription was interrupted by an acknowledgement of liability less than three years before 2 February

2005 when the summons was served and that the respondent's claims had not become prescribed as contended by the appellant.

[25] For these reasons the appeal against the court a quo's order that the shares in Swanvest be delivered to the respondent against payment of the purchase price in respect thereof and that the warranty be made good should be dismissed.

Order

[26] The appeal is dismissed with costs including the costs of two counsel.

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P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

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