THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 617/07

J R 209 INVESTMENTS (PTY) LTD First Appellant
M & T DEVELOPMENT (PTY) LTD Second Appellant

and

PINE VILLA COUNTRY ESTATE (PTY) LTD Respondent

Case no: 2/08

PINE VILLA COUNTRY ESTATE (PTY) LTD Appellant

and

J R 209 INVESTMENTS (PTY) LTD Respondent

Neutral citation: *J R 209 Investments v Pine Villa Estates* (617/07); *Pine Villa Estates v J R 209 Investments* (2/08) [2009] ZASCA 3 (26 February 2009)

CORAM: Harms ADP, Ponnan, Cachalia JJA, Leach and Mhlantla AJJA

HEARD: 18 November 2008

ORDER: 28 November 2008

REASONS: 26 February 2009

CORRECTED:

SUMMARY: Validity of a deed of sale of land – whether the description of property alienated was sufficiently clear in terms of s 2(1) of the Alienation of Land Act 68 of 1981 – interdict preventing the establishment of a township development set aside – application for leave to amend pleadings dismissed**.**

ORDERS

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1 In *J R 209 Investments (Pty) Ltd and M & T Development (Pty) Ltd v Pine Villa Estates (Pty) Ltd* (case 617/07):

(i) the appeal is upheld with costs, including the costs of two counsel;

(ii) the order of the court below is set aside and replaced with an order in the following terms:-

'The application is dismissed with costs, inclusive of the costs of two counsel.'

2 In *Pine Villa Estates (Pty) Ltd v J R 209 Investments (Pty) Ltd* (case 2/08):

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

REASONS FOR JUDGMENT

HARMS ADP et MHLANTLA AJA (PONNAN, CACHALIA JJA and **LEACH AJA** concurring):

Introduction

[1] These reasons for judgment deal with two related appeals: the first was an appeal against the judgment of Rabie J in *J R 209 Investments (Pty) Ltd and M & T Development (Pty) Ltd v Pine Villa Estates (Pty) Ltd* (case no 617/07) (the first case); and the second was against a judgment of Botha J in *Pine Villa Estates (Pty) Ltd v J R 209 Investments (Pty) Ltd* (case no 2/08) (the second case). As the citations suggest, the parties in the second appeal were also adversaries in the first.

[2] Both appeals arose from an agreement to sell land and the seller's allegation that the agreement was either void or had been cancelled. They were heard together. Due to the urgency of the matter the orders issued on 28 November 2008, it having been intimated then that reasons were to follow. The first case concerned the grant of an interdict by Rabie J, effectively preventing the purchaser from dealing with the property sold pending the conclusion of action proceedings. In that matter the order of this Court was to uphold the appeal with costs, including the costs of two counsel; to set aside the order of the court below and replace it with an order in the following terms:

'The application is dismissed with costs, inclusive of the costs of two counsel.'

The second case concerned the refusal by Botha J to permit the seller of the property to amend its particulars of claim to reflect certain additional causes of action on which the interdict was based. The order on appeal was as follows:

'In case 2/08, the appeal is dismissed with costs, including the costs of two counsel.'

It will be immediately apparent that the two learned judges had diametrically opposed views about the matter.

[3] Although the appeals depend on essentially the same legal questions, different considerations may arise in deciding the two cases because amendments and interdicts are not decided on the same principles.

The contract

[4] Pine Villa Estates (Pty) Ltd was the seller of a property which for the sake of convenience will be referred to as Portion 7. Its sole shareholder and director was Mr Patrick Ian Oberem. He was not a party to the litigation although he was the main deponent to the affidavits in the interdict proceedings. The purchaser was JR 209 Investments (Pty) Ltd while M&T Development (Pty) Ltd was the developer of the property, which had been bought for the purpose of township development. The proposed township in the course of events came to be known as Monavoni Extension 18, which consisted of a number of properties including Portion 7. The parties will be referred to by their aforesaid contractual capacities.

[5] On 12 May 2004, the seller (represented by Mr Oberem) and the purchaser entered into an agreement of sale in terms of which the seller sold to the purchaser the immovable property described as 'portion 7 of the farm Swartkop 383, JR, Gauteng – in extent 8,5653 hectares'. The purchase price of R3,5m was payable in two tranches: a non-refundable deposit of R500 000 was payable upon acceptance of the offer to the seller and the balance on registration (guarantees had to be issued within 90 days of the date of signing).

[6] A few further terms have to be noted. In terms of clause 5.1 the property was to be transferred to the purchaser as soon as the purchaser had complied with 'all obligations in terms of this agreement'. Possession of the property was to pass on registration subject to the right of 'the seller' to occupy the portion of the property mentioned in clause 11.2 (to which we shall revert soon). The agreement also recorded that the purchaser would, already upon acceptance of the offer, immediately initiate the process of township development.

[7] Much of the case turns on clause 11.2 which was in these terms:

'Both parties take note that a portion of this property between 5000 m^2 and 5653 m^2 in extent and including the residential house on this property is to be transferred into the name of Ian Patrick Oberem I.D. 6504135149081 as soon as sub-divisional diagrams are available to effect this transfer. The Purchaser shall be liable for all costs relating to this subdivision and hereby guarantees that these diagrams will be available not later than 7 (seven) months after date of this agreement. The Seller shall be liable for all costs regarding the transfer of this property into the name of I.P. Oberem.'

[8] On 1 October 2004, Portion 7 was transferred to the purchaser. The purchaser was, however, unable to make the diagrams referred to in

clause 11.2 ‘available’ within the agreed period or for that matter when the action was instituted during February 2007 or even later when the interdict proceedings were launched during May 2007. The effect thereof is that the property described in clause 11.2 (the clause 11.2 property) was not transferred into the name of Mr Oberem. The reasons for the purchaser’s failure to perform in terms of this ‘guarantee’ or to transfer the portion are of no consequence and need not be related.

The seller’s claim

[9] The seller then issued summons against the purchaser claiming retransfer of Portion 7 and, in the alternative, payment of damages being the difference between the present market value of the property and the purchase price. The cause of action was an alleged breach of the sale agreement, arising, so it was contended, from the purchaser’s failure to obtain the sub-divisional diagrams within the stated period. The particulars further alleged that due notice had been given in terms of the cancellation clause; that the purchaser had failed to rectify the breach within the stated period; and that the contract had been cancelled.

[10] When the seller decided to launch the interdict proceedings it received advice to amend its cause of action and to base the interdict proceedings on the new causes. The application to amend the particulars of claim (which was opposed) and the interdict proceedings followed different routes and the interdict proceedings terminated before the amendment proceedings. In order to assess the validity of the seller’s causes of action, both for purposes of the amendment and the interdict, it is convenient to begin with a consideration of the amendment application.

[11] It is not neccessary to quote the terms of the proposed amendment but it boils down to this. First, the seller alleged that the agreement of sale was invalid because it did not comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981, which reads as follows:

'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, 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.'

Its case was that although Portion 7 had been adequately identified, the area to be excluded and re-transferred to Mr Oberem in terms of clause 11.2 was not; the contract was accordingly invalid and unenforceable *ab initio* for non-compliance with s 2 of the Act inasmuch as that piece of land could not be identified with reference to the provisions of the contract alone.

[12] The alternative cause of action was based on a failure to comply with the 'guarantee' contained in clause 11.2 within the time limit. The seller sought to make it clear that it was relying on the fact that a guarantee imposes an absolute obligation to comply and that it is not necessary to first place a party who has failed to honour the guarantee *in mora* in order to cancel.

[13] Before dealing with these two causes of action it is necessary to deal with another amendment which has no bearing on the relief sought but which was ostensibly introduced to forestall a defence. The seller wished to allege that the property sold was not Portion 7 as set out above but Portion 7 minus the clause 11.2 portion and that Mr Oberem was the person authorized to receive transfer of the latter portion as the *solutionis*

causa adjectus of the seller. The seller presumably anticipated that the purchaser would allege that clause 11.2 was intended to create a contract for the benefit of a third person and that Mr Oberem was accordingly the person to enforce its provisions after having accepted the benefit. (It transpired during the interdict proceedings and from the notice of objection to the amendment that this was indeed the purchaser's case.) The other unexpressed reason for these allegations may well have been to anticipate reliance on the *Wilken v Kohler*[1] principle, which was incorporated into the Act - namely that an alienation which does not comply with the provisions of s 2(1) 'shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.'[2]

[14] Although the seller initially sought to rely on either the express alternatively tacit terms of the contract, it soon became clear that sole reliance was placed on tacit terms. These tacit terms are, however, in conflict with the express terms of the contract. The *merx* was clearly identified as Portion 7. Although ultimately Portion 7 less the clause 11.2 portion would have come to be in the hands of the purchaser, the parties decided to structure their agreement differently. The clause 11.2 portion was not to be retransferred to the seller, but rather to its sole shareholder and director, Mr Oberem. It is consequently artificial to redefine the *merx* as suggested in the amendment. In our view the facts of the present case are similar to those in *Olifants Trust Co v Pattison*[3] and the ratio of that judgment at 891C-G is applicable. The contract further stated that transfer was to be effected after the purchaser had complied with 'all'

[1] *Wilken v Kohler* 1913 AD 135.
[2] Section 28(2).
[3] 1971 (3) SA 888 (W) at 891.

obligations in terms of the agreement. That provision clearly did not relate to clause 11.2. And, it will be recalled that transfer did take place after payment of the purchase price. Nor it is it alleged to have taken place in error (except in relation to the validity of the contract). Transfer duty had to be paid by the purchaser on the full price and the seller undertook to pay the transfer costs (which would include transfer duty) on the clause 11.2 portion - facts that are destructive of the seller's argument.[4] Mr Oberem could also not have been an *adjectus* simply because the clause 11.2 portion had to be registered in his name and not in the name of the seller. One person cannot without more receive transfer of an immovable property on behalf of another. The expressed intention was that Mr Oberem would become owner of that portion on registration. It is conceivable that the agreement was thus structured for tax or transfer duty reasons or to make the seller company a shell company. There is no reason why the parties should not be held to their chosen structure irrespective of their motives.

[15] We are satisfied that the clear intention of the parties was to create a contract for the benefit of a third party. Since Mr Oberem negotiated and signed the agreement one would have assumed that he had then already accepted the benefit of clause 11.2. If he did, it follows that he was the only person who was entitled to enforce its provisions. Cancellation of the main agreement was not an option available to him. All he could claim was specific performance under clause 11.2 or damages for non-compliance with its provisions. If he failed to accept the benefit, there was nothing the seller could claim vis-à-vis the purchaser. This conclusion disposes at the same time of the alternative based on the guarantee argument.

[4] *Olifants Trust Co v Pattison* at 890F-H.

[16] It follows from this that Botha J correctly dismissed these particular aspects of the application to amend and that Rabie J had erred in holding that the seller had locus standi to reclaim Portion 7.

Validity of the Deed of Sale

[17] We now turn to deal with the validity of the deed of sale. Rabie J held that the description of the portion of land mentioned in clause 11.2 was not sufficiently clear to comply with the requirements of s 2 and would result in an insufficient description of the *res vendita* if it could not be severed from the remaining part of the contract. He held that Mr Oberem at all relevant times intended to remain in his house and the adjacent area and that he would become the registered owner thereof. The learned judge accordingly held that the deed of sale was *prima facie* void for want of compliance with s 2(1). Botha J, on the other hand, held that the deed of sale was valid because the property was adequately described and the fact that the shape and exact configuration of the clause 11.2 portion were left entirely to the purchaser's discretion depending on the layout of the township did not invalidate the agreement.

[18] It does not matter for purposes of this part of the judgment whether the property sold was Portion 7 or, as alleged by the seller, Portion 7 minus the clause 11.2 portion. Bearing in mind that the Act applies to the alienation of land which by definition 'includes' a sale, exchange or donation, the clause 11.2 portion was 'alienated' by the purchaser to Mr Oberem.

[19] The test for compliance with the provisions of s 2(1) is whether the land alienated 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] The section does not however, 'require a written contract of sale [now: alienation] to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms'.[6]

[20] For the proposition that this agreement was void for failing to describe the *merx*, counsel for the seller relied on *Parsons v M C P Bekker Trust (Edms) Bpk*.[7] The property sold in *Parsons* was described as a portion of a certain farm measuring 92,5764 hectares excluding the dwelling house and vacant ground around it of approximately 3965m². The Court held that the property described was inadequately described because, as it said, not a word was contained in the contract as to how the configuration of the homestead area was to be determined (at 104C-D) and that to render the agreement effective the parties should have included some indication of how or by what means the shape of the land embracing the homestead portion was to be determined (at 104E-F).

[21] In *Clements v Simpson*[8] the part sold had to be subdivided from the property as a whole. The seller contended that the part sold was inadequately described and that the contract was thus of no force or effect for want of compliance with s 1 of the then applicable General Law Amendment Act 68 of 1957 (which was almost identical to the provisions of s 2(1)). The part sold was identified by stating the exact area; the location (adjoining a named street, situate in the north-western extremity of the main property); and the minimum frontage on that street. The judgment then stated (at 8E-H) :

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[5] *Clements v Simpson* 1971 (3) SA 1 (A) at 7F-G.
[6] *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989.
[7] 1978 (3) SA 101 (T).
[8] Supra.

'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 (40,000 square feet); and the general location is fixed (North-western 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 feet, and (b) the geometrical layout - the site might be square, or rectangular, or its angles might not be 90°.'

The court nevertheless held that the contract was valid because there were indications in the contract that the seller would determine the shape. Distinguishing the case from *Botha v Niddrie*,[9] Holmes JA said (at 9A-B):

'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 of shape and sub-division. The fact that survey was required for that purpose cannot affect the question; ... I therefore hold that the contract does comply with the provisions of sec. 1 (1) of Act 68 of 1957.'

[22] In the present case the situation is similar. The contract envisaged that the purchaser would establish a township on Portion 7 and that the homestead portion was to form a separate erf as part of the development. The purchaser by necessary implication had the right to determine the

[9] 1958 (4) SA 446 (A).

shape and size of the erf subject to two express limitations, namely that the residence had to be included and that the erf had to be between 5 000 and 5653 m^2.[10] There was an additional implied limitation namely that the purchaser's determination should have been bona fide.[11]

[23] In the result we are of the view that the description of the property alienated in terms of clause 11.2 sufficed for purposes of s 2(1) and that this ground of attack has no merit. This means that the amendment was rightly refused by Botha J and that Rabie J had erred in finding that the seller had any right that could be protected by an interdict.

Appealability of the Interim Interdict

[24] The final issue to be decided is whether the interdict granted by Rabie J was appealable. He granted an order in the following terms:

'An interim interdict is granted pending the final adjudication of [the action] . . . in terms of which the [purchaser and the developer] are restrained from:

'(a) Lodging the plans, diagrams or title deeds in respect of the township Monavoni Ext 18 for endorsement or registration . . . or

(b) . . . procuring the registration of the general plan of the township Monavoni Ext 18 . . .,

(c) Taking any further steps . . . declaring the township an approved township . . ..'

[25] In *Cronshaw & Another v Coin Security Group (Pty) Ltd*[12] this Court held that an interim interdict was appealable if it were final in effect and not susceptible to alteration by the court of first instance. *Metlika Trading Ltd and Others v Commissioner, South African Revenue*

[10] Cf *Mayfair South Townships (Pty) Ltd v Jhina* 1980 (1) SA 869 (T) at 872D-873E.
[11] *SA Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323, [2004] 4 All SA 168 (SCA). Cf *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928, [1999] 4 All SA 183 (SCA).
[12] 1996 (3) SA 686 (A).

Service[13] held that in determining whether an order is final, it was important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect.'

[26] The order which was sought and granted had as its substrate that the purchaser and the developer were prohibited from proceeding with the establishment of the township as a whole and not only in respect of the development of Portion 7. The order affected the entire development, yet the dispute between the parties related to portion 7 only. The order was overbroad. The right to develop the township as a whole is not an issue that would be decided by the trial court and it was consequently final in effect even if only for a limited period.[14] In our view the *merx* could have been preserved without the necessity for an order in those terms. It follows therefore that the order of Rabie J was appealable.

Conclusion

[27] The findings made earlier that the seller had no right, prima facie or otherwise, that could have been protected by an interdict mean that the order granted by Rabie J had to be set aside.

[28] The other side of the coin is that in view of our interpretation of the contract the proposed amendments were ill-conceived. In the result

Botha J was correct in dismissing the seller's application to amend. This appeal was consequently dismissed.

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[13] 2005 (3) SA 1 (SCA) at para 23.
[14] *Maccsand CC v Macassar Land Claims Committee* [2005] 2 All SA 469 (SCA).

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ACTING DEPUTY PRESIDENT

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N. Z. MHLANTLA
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