THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1017/17

In the matter between:

LEOLA SHARON MEYER N O	**FIRST APPELLANT**
GLENN TYRES N O	**SECOND APPELLANT**
HELEEN JEANNE MEYER N O	**THIRD APPELLANT**
J G MEYER BOERDERY (PTY) LTD	**FOURTH APPELLANT**
and	
BIG FIVE DEVELOPMENTS (PTY) LTD	**FIRST RESPONDENT**
FORE STREET HOLDINGS (PTY) LTD	**SECOND RESPONDENT**

Neutral Citation: *Meyer & others v Big Five Developments (Pty) Ltd* (1017/17) [2018] ZASCA 136 (28 September 2018)

Coram: Shongwe ADP and Dambuza, Mathopo, Mocumie and Molemela JJA

Heard: 23 August 2018

Delivered: 28 September 2018

Summary: Contract – Interpretation of the agreement – whether joint venture agreement includes sale of land or not – whether Alienation of Land Act applicable – authority of trustees – rectification whether claims properly abandoned or not.

ORDER

On appeal from: The Gauteng Division, Johannesburg (Nicholls J, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include costs occasioned by the employment of two counsel.

JUDGMENT

Mathopo JA (Shongwe ADP and Dambuza, Mocumie and Molemela concurring):

[1] This appeal concerns the interpretation of an agreement concluded between Big Five Developments (Pty) Ltd, a development company, Fore Street Holdings (Pty) Ltd, (hereinafter collectively referred to as Big Five) and Klipriviersberg Trust, JGM Trust and JG Meyer Boerdery Trust, a private company which conducts farming operations on the land owned by the Trust (the Trusts or the appellants). It arises from an action instituted by the respondent (Big Five) in the Gauteng Division, Johannesburg. Big Five sought the following relief; (a) rectifying various clauses of the joint venture agreement, (JVA) (b) declaring that the agreement concluded is valid and of full force and effect, (c) interdicting the trustees from negotiating the sale of the property to Home Talk Developments and any other third party.

[2] The appellants raised various defences to the relief sought. Primarily they questioned the validity and enforceability of the JVA. First, they contended that the agreement is a sale of land and thus invalid for lack of compliance with the requirements of the Alienation of Land Act 68 of 1981 (the Act). Second, they averred that Ms Leola Meyer, one of the trustees, did not have the authority to bind the trusts. Third, they averred that no proper case for rectification was made by the respondent. Each of these contentions

will be considered later. The high court dismissed the appellants' defences. With leave of the high court the appellants now appeal against that decision.

[3] The brief background facts are as follows. During 2010 Leola Meyer, a trustee of Klipriviersberg Trust and JGM Trust approached Glenn David Crick, a director of Big Five and proposed that he develop a piece of land belonging to the Trust. I should add that Leola and Crick had previously dealt with each other when developing another piece of land in Bassonia belonging to the Trust. The negotiations led to the conclusion of three agreements styled joint venture agreements.

[4] During the negotiations relating to the first agreement, the envisaged development was originally a low to medium density residential estate with an equestrian theme, incorporating some commercial offices at a fairly low density residential scheme. The first agreement was concluded on 22 October 2010 between Crick on behalf of Big Five and Leola as a representative of Klipriviersberg Trust, JGM Trust, Pather Trust and the Boerdery Trust. The second agreement, which was similar to the first, was signed on 20 July 2011 by Crick on behalf of Big Five and Leola on behalf of the Klipriviersberg Trust, JGM Trust and the Boerdery. The Pather Trust was excluded from the agreement. By the time the third agreement was finalised the vision had changed. It was envisaged that a high density mixed use residential scheme incorporating residential, commercial, hospitality, medical facilities, offices and large retail component would be developed. In order to achieve this vision a team of experts was engaged to assist with the development of the area and the rezoning of the property from agricultural to a property with rights to develop a mixed used scheme.

[5] The main purpose of the JVA according to the respondents was to increase the value of the land by obtaining the appropriate rezoning, then on sell it to a third party or a realisation company. It was not contemplated that Big Five would purchase the property from the Trust. The appellants as intimated earlier adopted the stance that the JVA was intertwined with the

sale agreements. Absent compliance with the provisions of the Act, the agreement was invalid and unenforceable.

[6] Premised on the factual allegations that the respondents mischaracterised the JVA as only an agreement to develop the property and not of sale, the appellants raised special pleas which principally attacked the validity of the agreement. The appellants' principal stance was that the agreement is a sale of land which, absent compliance with the Act, is invalid or unenforceable. This argument was based on the suggestion that because it was not determinable from the agreement which Trusts own the land purportedly sold, and again since the purchase price and value thereof was uncertain, the agreement is void for vagueness. It was further submitted that because the purchase price was not clearly stated in the agreement or rather left to the determination of Big Five. The unilateral determination of the purchase price by Big Five renders the contract of sale uncertain, void and thus unenforceable. The submission made was that this clause took away the parties' opportunity to decide for themselves before they become bound in law whether they wished to enter into a contract or not. It was argued that giving Big Five an unfettered discretion to decide on the contract price is unconscionable.

[7] A second string to the appellant's bow related to the validity of the November 2011 agreement. It was submitted that following upon the evidence of Mr Ewan Simmonds (Simmonds), an attorney who acted for Big Five at the conclusion of the agreement, the trustees' resolution related to the July agreement only. We were urged to accept that absent any proper formal quorate resolution of the trustees of a particular trust regarding a particular parcel of land, the agreement was invalid and unenforceable. Foundational to that contention is the suggestion that there was no proper resolution authorising the conclusion of the November agreement. Thirdly, it was submitted that no proper case had been made for rectification of the agreement. This argument was developed further as a result of the purported abandonment of certain orders during the application for leave to appeal by counsel for the respondents. In essence it was submitted that by abandoning

the orders in relation to clauses 8.1 and 8.2 of the JVA, the respondents lost their locus standi to sue. Each of these contentions will be considered later.

[8] The respondents adopted an approach that on a proper reading of the JVA agreement there was no sale of land between Big Five and the Trusts. The high-water mark of the respondent's case was that all the clauses of the agreement referred to the transfer of land only to the realisation company and development company. These sales, so the argument continued, would only take place in the future with other parties. Accordingly the respondents submitted that the Act was inapplicable. Addressing the appellant's contention that the agreement was void for vagueness as a result of the undetermined purchase price and value of the property, the respondents submitted that the appellants misconstrued the agreement and to a large extent ignored the unchallenged evidence of Crick and Simmonds that Leola or the Trusts did not envisage any sale.

Was the JVA intertwined with elements of property development as well as the sale of land by the Trust to the realisation company?

[9] To answer this question it is necessary to interpret the agreement. The starting point is the words of the agreement. It has to be borne in mind as emphasised by this court in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para 27, 'that this court has consistently held ... that the interpretative process is one of ascertaining the intention of the parties'. To this end the court has to examine all the circumstances surrounding the conclusion of the agreement i.e. the factual matrix or context including any relevant subsequent conduct of the parties.

[10] To fully appreciate the parties' contention, one should start with a consideration of the relevant provisions of the written agreement. The heading of the agreement is styled 'Joint Venture Agreement'. In the interpretation section the Trusts are defined as Klipriviersberg Trust duly registered with registration number 1333/1994 and JGM Trust duly registered with

registration number 4907/1995. The property means the immovable properties known as:

‘1.2.2.4.1 The remaining extent of Portion 136 (a portion of Portion 2) of the Farm Klipriviersberg 106, measuring approximately 730794 hectares and held under Title Deed T84172/1994;

1.2.2.4.2 Portion 240 of the Farm Klipriviersberg 106, measuring approximately 205132 hectares and held under Title Deed T54572/2001;

1.2.2.4.3 Remaining extent of Portion 2 of the Farm Klipriviersberg 106, measuring approximately 905481 hectares, held under Title Deed T22463/2002.

Jointly measuring approximately 380 hectares and set out in the diagram attached hereto marked “A”.’

[11] Clause 2.2 sets out the purpose of the agreement as follows:

‘2.2 The Trust and Big Five hereby enter into a joint venture in terms whereof Big Five will rezone the property for purposes of increasing the value of same for on sale to the development company.’

[12] Clause 3.3 states the value of the property as follows:

‘3.3 The parties hereby agree that the value of the property is an amount of R200 000 000.00 (Two Hundred Million Rand) subject to the proposed rights, as envisaged by Big Five, being approved.’

[13] Clause 3.8 provides:

‘3.8 On signature hereof, Big Five undertakes to pay to the Trust the amount of R1 000 000.00 (One Million Rand), as part payment of the purchase price, which is paid for and on behalf of the realization company.’

[14] Clause 3.4 sets out the role of the realisation company. It reads as follows:

‘3.4 It is anticipated that prior to any portion of the property being proclaimed, that a company/ies, being a special purpose vehicle/s. will be established for the purpose of taking transfer of the relevant portions of the property ((“the realization company”), and on selling same to the development company.

[15] Clause 5 sets out the obligations of Big Five:

'5. Big Five's obligations

5.1 Big Five shall be responsible for the day-to-day affairs of the project.

5.2 The Trust hereby authorises Big Five to apply to the relevant Authorities in regards to obtaining the relevant permission to continue with the development and undertakes to sign any and all documentation necessary to give effect thereto.

5.3 Big Five shall be entitled to appoint agents and sub-contractors to assist it in performing its obligations in terms thereof.

5.4 Big Five shall be responsible for the costs associated with and related to the development.'

[16] In terms of the JVA, the Trusts would contribute the land to the joint venture and Big Five would undertake the task of developing and rezoning it. It would pay all the fees associated with that function. Big Five maintained the properties and employed labourers to tend the properties. During October 2005 Big Five obtained approval for the construction of an off-ramp for the purposes of facilitating access to the property. This, according to Crick, increased the expenditure to R5 million. It was further anticipated that after the rezoning process the land would have to be transferred into a company to be formed and only at that point would money flow to the Trusts. It was further contemplated that the land would be subdivided so that the Trusts would get paid once those subdivided portions of the land were transferred.

[17] It is quite clear that the purpose of the agreement was to increase the value of the land by means of residential and commercial rezoning. In the interpretation clause only the word 'development' is defined. No sale is mentioned or contemplated. This, in my view, indicates that any possible sale could only take place in the future to the realisation company and thereafter the development company. There was no agreement of sale between Big Five and the Trusts. In the bigger scheme of things Big Five would not be a party to the eventual alienation of land agreement. Its limited role in terms of clause 3.7 of the agreement was to negotiate the purchase price for the property

which would accrue to the realisation company and be shared equally between the parties in terms of clause 3.5 of the agreement, which provides:
'The shares in the realization company/ies will be held equally by the Trusts and/or its nominees and by Big Five and/or its nominees.'

[18] The contention by the appellants that the agreements did not expressly state the values of the property misconstrues the purpose of the JVA. In terms of the agreement once the properties are developed and rezoned, the values would be assessed at the applicable market values at that time. What the appellants lost sight of is that all the clauses of the agreement which refer to the sale of land relate to the realisation company and development company. The alienations are to take place in the future and do not concern Big Five. The evidence of Crick that there was never a sale intended between the parties was unchallenged. Equally undisputed was his evidence that the parties intended future sale agreements with other parties.

[19] It cannot be successfully contended that during the negotiations between Leola and Crick any sale was discussed. The evidence points to the contrary. What was foremost in the minds of both was to develop the property. To achieve this the JVA was concluded. On a proper reading of the agreement and further considering the evidence of Crick and Simmonds, no evidence of the intended sale by means of a JVA could be established. This evidence was corroborated by Simmonds who testified that:
'When Leola came to see us she instructed us that she had provided a third party with a right of first refusal to purchase the property because of that she could not enter into a purchase agreement.'
This crucial piece of evidence was unchallenged and there is no reason why it should not be accepted.

[20] There is no doubt in my mind that there could not have been a development agreement without the subsequent sales by the realisation company. The appellants' contention would lead to an unbusinesslike conclusion where Big Five would develop the property belonging to the Trusts without any quid pro quo. In my view what elevates this agreement to a legally

enforceable one and distinguishes it from being intertwined to the sale agreement is the fact that Leola categorically agreed that the Trusts were entering into a JVA to develop the land and granted the right of first refusal to a third party, Home Talk Development. On the facts of this case enforcing the JVA as being only a property development agreement would not be interfering with the good faith which the parties promised themselves.

Was Leola Meyer authorised to represent the trustees and if so was there a proper resolution of the trustees to sign the November agreement?

[21] The lack of authority argument was premised on the contention that Leola, one of the trustees, did not have the authority to sign the agreement on behalf of the other Trusts. The argument advanced on behalf of the appellants was that in order to bind the Trusts all trustees were required in law to sign. In support of his argument counsel relied on the judgment of this court in *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA), where it was held that: 'when fewer trustees than the number specified in the trust deed were in office, the trust suffered from an incapacity that precluded action on its behalf'. The facts in *Parker* are clearly distinguishable from the present case and accordingly reliance on it is misplaced.

[22] There are also many insuperable obstacles standing in the way of the appellants. There were three trustees of the Trusts namely Leola, Heleen and Tyers. The deeds provided for decisions of the trustees to be taken by a majority vote and no unanimity was required. As to the resolutions, two were signed by all three, the third was signed by Leola and Heleen, while the fourth was signed by Leola and Tyers. On the uncontradicted evidence of Simmonds and Crick, there is nothing to suggest that Leola did not have the authority of the other trustees. On the contrary the evidence demonstrates that the other trustees were involved in the process. Heleen was present when the meetings with Crick took place. Tyers at some stage demanded a meeting with Crick to discuss the financial implications of the agreement. Evidently all of the trustees were aware and in fact actively involved in the discussion to sign the

JVA. In a letter dated 11 September 2013 signed by all of them addressed to Home Talk Developments the following is stated:

'We confirm that the Trust is of the view that it was entitled to conclude a joint venture agreement with a third party to develop its own immovable property, which it has duly done.'

The extract of this letter is ample evidence that all trustees formally resolved to conclude the JVA and authorised Leola to sign on behalf of the Trusts. The evidence of Simmonds that the relevant resolutions were passed authorising the November agreements cannot be faulted. The submission that the high court relied on informal processes is accordingly misplaced.

[23] Confronted with the aforegoing evidence the appellants declined to join issue with the respondents. In *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC) at para 61 it was stated that 'if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the *House of Lords in Browne v Dunn* and has been adopted and consistently followed by our courts.' In my view the fundamental flaw in the appellants' case is that the witnesses which the appellants failed to call were the defendants themselves in the high court and on whose behalf the plea was filed. In the absence of their evidence it is difficult to imagine how the appellants expected to discharge the evidentiary burden on the defence of lack of authority. I am satisfied that the high court correctly accepted the evidence of Crick and Simmonds on the purpose of the agreement and Leola's authority to bind the Trusts.

Rectification and abandonment

[24] I now turn to another related matter of considerable importance which was debated at length by the parties during the application for leave to appeal and argument in this court. For a proper appreciation of this issue a brief history is necessary. In the particulars of claim the respondents (plaintiffs) sought rectification in 14 instances. At the trial 11 claims for rectification were abandoned and only three were persisted with. The rectification was

grounded on the allegation that there was a common error between the parties which led to the parties signing the agreement in the mistaken belief that the agreement recorded their true intention in the JVA. Before us the appellants did not challenge the orders granted by the high court which related to the rectification of the description of the property. The rectification sought by the respondents before the high court related to clauses 8.1 and 8.2 of the agreement which read as follows:

'8.1 In view of the fact that Big Five is a holding company and acts as an agent of its subsidiary companies, Big Five is concluding this agreement on behalf of one of its subsidiary companies.

8.2 Big Five shall be entitled to cede, assign and make over its rights in terms of this agreement to the relevant nominee subsidiary company.'

[25] The rectification in respect of clause 8.1 of the agreement as explained by Crick in evidence was intended to delete this clause in its entirety and align it with the evidence that Big Five acted as the principal and not agent. In other words it had locus standi to sue. In support of this argument reliance was placed on the evidence that Leola always dealt with Crick as principal on behalf of Big Five. Rectification was all aimed at rectifying the erroneous description of the properties and drafting mistakes. It did not affect the rights and duties resting on the parties in terms of the agreement. It also did not affect the substance of the agreement.

[26] During the hearing of the application for leave to appeal before the high court counsel for the respondents inadvertently abandoned the orders relating to clauses 8.1 and 8.2 of the agreement. These orders were at the core of the respondents' case. It bears mentioning that there were other orders in the judgment of the high court which were not sought or asked for. What is evident from the high court's judgment is that it conflated the evidence relating to the misdescription of the property with the rectification in clauses 8.1 and 8.2 which had nothing to do with the property description but locus standi. In the process of trying to clarify the issues and more importantly to appraise the high court that such orders which were not sought would be abandoned, counsel for the respondents inadvertently abandoned the order which related

to the locus standi of Big Five. The locus standi of Big Five was at the heart of the respondents' case and it was admitted on the pleadings by the appellants. It seems clear from the provisions of the JVA read as a whole that Big Five acted as principal and not agent for its subsidiaries. There is no doubt in my mind that the abandonment arose as a result of a bona fide error on the part of counsel for the respondents. To hold the respondents bound by that erroneous submission which in any event was corrected during argument before the high court is opportunistic and devoid of merit. For the abovementioned reasons the appeal must fail.

[27] The following order is made:

The appeal is dismissed with costs, such costs to include costs occasioned by the employment of two counsel.

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R S Mathopo
Judge of Appeal

APPEARANCES:

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