



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

CASE NO: 8294/22P

In the matter between:-

ZENITH ESTATES CC

APPLICANT

and

BLUE GUM ESTATE (PTY) LTD

FIRST RESPONDENT

REGISTRAR OF DEEDS

SECOND RESPONDENT

JUDGMENT

ANNANDALE, AJ

[1] The issue in this application is whether the applicant validly exercised an option to acquire a portion of land referred to as 'the House Sub-division' and is consequently entitled to an order compelling transfer.

[2] The first respondent resists the application, contending that the option was incapable of being exercised as four separate subdivisions were created instead of the House Sub-division, alternatively that the option was not validly exercised. The second respondent, the Registrar of Deeds has played no part in the proceedings.

[3] The matter has a long history but, for reasons unknown, various aspects of that history which one would expect to be canvassed in the affidavits are not mentioned by any of the parties.

The facts

[4] On 11 August 2006 the applicant and the first respondent concluded an agreement of sale of a commercial timber farming enterprise, comprising the land and timber farming business on the farm Zenith Estates Umhlali (the sale agreement). I refer to the farm Zenith Estates as defined in the sale agreement as 'the whole property' to distinguish it from the subdivisions at issue in these proceedings and because that is how it is referred to in various agreements to which reference will be made in this judgment.

[5] In terms of clause 6.1 of the sale agreement, the first respondent granted the applicant 'the sole and exclusive right and option at (its) written election' to purchase the House Sub-division for the sum of R900 000.00 together with VAT if applicable (the option). The House Sub-division was defined as a proposed new subdivision of the whole property containing the existing homestead as depicted on a layout plan which was referenced in and annexed to the sale agreement.

[6] The sale agreement required the option to be exercised by the earlier of either 31 July 2015 or 90 days after the first respondent furnished the applicant with the approved sub-divisional diagram of the House Sub-division together with any other documents, approvals and items required in law to enable the applicant to take transfer of the House Sub-division. The date of 31 July 2015 was subsequently extended to 31 July 2020 by an addendum which otherwise left the sale agreement unchanged.

[7] At the vanguard of the first respondent's opposition to the application in its answering affidavit were arguments that the applicant's claim had prescribed or lapsed prior to 31 July 2015. At the start of the hearing however, counsel for the first respondent, abandoned reliance on these arguments

[8] Clause 6.3 of the sale agreement provided that pending the exercise of the option, the first respondent was obliged immediately to proceed with and do all things reasonably necessary to procure that the whole property was sub-divided and developed, either in the whole as a complete residential township with numerous subdivisional lots, one of which would comprise the House Sub-division, or that the whole property was subdivided and developed in part into at least two subdivisions, one of which would be the House Sub-division.

[9] It is apparent from this clause that at the time the agreement of sale was concluded, the parties envisaged the creation of a single subdivision which would constitute the House Sub-division as defined.

[10] The first respondent did procure that the whole property was sub-divided and developed as a residential estate with numerous sub-divisional lots over a period spanning some seven years. For reasons which are not explained in any of the affidavits however, the first respondent did not create the House Sub-division as a single subdivision. Instead, the first respondent created four separate sub-divisions out of the area of land constituting the House Sub-division.

[11] Although this happened pursuant to planning and development applications submitted by the first respondent, it is the first respondent's case that the creation of the four subdivisions rendered the option incapable of acceptance as the *merx* to which it related no longer existed.

[12] The applicant claims to have exercised the option on 31 July 2015. It relies on a letter of that date sent by its attorneys to the first respondent and its attorney, Ms Halstead which stated:-

‘We advise that our client, who is described as the “Seller” in the said “First Agreement of Sale”, hereby exercises its right and option to purchase the House-Subdivision from Blue Gum Estate Proprietary Limited.’

[13] The letter of 31 July 2015 went on to state: ‘(i)n acceptance of this right, please also find the following documents’ which comprised an agreement signed by the applicant in respect of ‘the purchase of House Sub-Division’ and the annexures

to that agreement. Of importance for the first respondent's case is annexure E, a resolution passed at a meeting of the applicant on 30 July 2015 and signed by all its members.

[14] The applicant asserts that the terms of the annexed agreement had been previously agreed between the parties, but this is disputed by the first respondent. It is however common cause that the first respondent did not sign the agreement and so I shall refer to it as 'the proposed agreement'.

[15] The proposed agreement referred to the fact that the first respondent had caused the whole property to be renumbered and was in the process of sub-dividing it into 32 erven as set out on a General Plan which had been provisionally approved by the Surveyor General and was annexed as 'A' to that agreement. The proposed agreement records that erven 503 to 506 depicted on the General Plan constitute the House Sub-division and the agreement is for the acquisition of those four subdivisions.

[16] The proposed agreement records that the purchase price for the four sale erven was the option price of R900 000 together with what is described as 'a separate amount being the additional Sub-division Development costs for the Substituted Sale Erven' of R372 000.00 for the additional costs of '3 extra Erven @ R124 000.00'.

[17] The applicant's unanimous resolution, annexure 'E' (the resolution) was:-

'That the CC acquires the Sale Erven 503, 504, 505 and 506 (inclusive), being components of Erf 489 Sheffield Manor, to Zenith Estates CC pursuant to a valid exercise of its Option to Purchase all as provided in the draft Agreement prepared by Tomlinson Mnguni James Attorneys which was tabled and approved at the meeting.'

[18] Despite the unequivocal recordal in the letter of 31 July 2015 that that the attorney's client, the applicant, 'hereby exercises its right and option to purchase the House-Subdivision', the first respondent contends that the letter of 31 July 2015 was not a valid exercise of the option for four reasons. First, the property described as

the House Sub-division did not exist and was in any event different property to the four separate subdivisions which were created and which were referenced in the proposed agreement and the resolution. Consequently, the proposed agreement related to different pieces of land being acquired than were specified in the option. Second, the resolution did not authorise the applicant's attorneys to exercise the option on the applicant's behalf. Third, the proposed agreement was not to acquire at the price of R 900 000 stipulated by the option, but in the different and increased amount of sum R1.272 million. Fourth, payment of the price was not tendered.

[19] I will deal with the merits of these contentions in due course. It is however notable that they were raised for the first time in the answering affidavit. Until then, and over a period spanning several years, both the applicant and the first respondent had accepted that the option had been validly exercised and conducted themselves accordingly. The only area of contestation was payment for servicing the four subdivisions. This is relevant and admissible contextual evidence of the manner in which the parties implemented their agreement.¹ Four examples suffice for purposes of illustration.

[20] On 11 August 2015 there was an email exchange between the parties' attorneys. It was initiated by the applicant's attorney with reference to their letter of 31 July 2015 some ten days before and a telephone conversation held between the attorneys the same day. The applicant's attorney wrote 'as discussed, Zenith Estates cc has exercised its option to purchase which was created in the "First Agreement of Sale". Kindly advise if you have presented the agreement in respect of the purchase of the House-Subdivision to your clients and advise if they were happy with the agreement.'

[21] The first respondent's attorney replied as follows: '(a)s discussed telephonically last week, although your client has exercised the option there are a number of issues that need to be discussed prior to any agreement being concluded. It is important that all parties fully understand the criteria set out in the Tribunal Judgment when the development was approved and precisely what is required to take place to enable our client to pass transfer of the 4 sub-divisions to your client'.

¹ Comwezi Security Services v Cape Empowerment Trust Ltd 2012 ZASCA 127 (21 September 2012) para 15.

This exchange conveys that whilst the first respondent and its attorneys accepted that the option had been exercised, there would need to be further engagement on the details of any agreement giving effect to the valid exercise of the option in the form of a sale agreement which would be required to pass transfer.

[22] In 2019, the shareholding in the first respondent changed. The sale of shares agreement contains the following clause:

10. **Retained Erven**

The purchaser acknowledges that:

- 10.1 in terms of the agreement of sale concluded between the Company and Zenith, Zenith was granted an option to purchase the subdivisions reflected in red on the Layout Plan annexed hereto marked "A" ("the Retained Erven") for the sum of **R900 000 (Nine Hundred Thousand Rand)** plus contributions and Zenith has exercised its option in the regard thereto;
- 10.2 the Company is obliged to transfer the Retained Erven to Zenith as soon as it is in a position to do so;
- 10.3 Zenith is aware of the fact that the Company will only be in a position to transfer the Retained Erven to it once the relevant services have been installed and the required certificates in terms of the applicable legislation have been issued by the Municipality and/or other relevant authorities.'

[23] In 2021, the parties' representatives were corresponding regarding the bulk costs for the servicing of all four sites to ready them for registration and transfer. Those exchanges suggest that at that time the cost was in the region of R527 000.00 excluding costs for sewer, water and electrical connection fees.

[24] In April 2022, Mr Ingo Roolf, a representative of one of the new shareholders in the first respondent who had not been involved in the sale agreement in 2006, stated the first respondent's position plainly when corresponding – with a degree of irritation – with the applicant's attorneys in the following terms:

‘..your clients have the time until the 31st March 2022 to choose one of our options otherwise they will get what was agreed in the contract between our company and Zenith cc. I also wrote that the 1st of April we will start to consolidate the 4 erven to one if I don’t get an answer from you...

By the way, your clients have rights against us because of an agreement between us and them. The RoD has nothing to do with the rights of your clients. The RoD describes rights and duties of Blue Gum Estates (Pty) Ltd. At the moment the land your clients want to purchase is still in our ownership. Your clients didn’t pay anything to us and the land is not transferred. I don’t understand why you write pages about this RoD. Even if this RoD would make it impossible to transfer the land to your clients, this would be our problem and not your problem as we have to deliver what is written in the agreement of our company and Zenith cc’.

[25] The ‘options’ which the applicant had to exercise by 31 March 2023 to which Mr Roofl refers were three potential solutions to the dispute in which the parties had found themselves which had been proffered by the first respondent in an email of 11 February 2022. They ranged from excising what is described as ‘the 1 existing erf’ from the residential estate the first respondent had developed, to the applicant acquiring four erven ‘after the subdivision of the 1 existing erf’ in exchange for a contribution to costs of a little over R 3 million.

[26] The reference to ‘the RoD’ in Mr Roofl’s email is to the Record of Decision in respect of the development of the whole property by KwaDukuza Municipality (ROD). An amended ROD issued in February 2022 set numerous conditions with which the first respondent was required to comply before the municipality would issue the certificate required by section 53 of the Spatial Planning and Land Use Management Act 6 of 2013, which is a prerequisite for the registration or transfer of any property

resulting from a land development application. Those conditions included the provision of services to the boundary of each erf in the development.

[27] The dealings outlined above demonstrate that the applicant and first respondent understood and accepted that the option had been exercised but were at times at odds about payment for the additional costs occasioned by the potential creation of four subdivisions instead of one.

[28] It is apparent from the alternatives proffered by the first respondent in February 2022, that at the time of the correspondence the four subdivisions had not yet been registered. This only occurred on 13 May 2022 when certificates of registered title were issued, recording the correct descriptions of the four subdivisions as follows:-

- [a] Erf 1450 Sheffield Beach, in extent 2498 square metres, as will more fully appear from General Plan S.G. Number 907/2021, held by Certificate of Registered Title number T14766/22;
- [b] Erf 1451 Sheffield Beach, in extent 2500 square metres, as will more fully appear from General Plan S.G. Number 907/2021 held by Certificate of Registered Title number T14767/22;
- [c] Erf 1452 Sheffield Beach, in extent 2498 square metres, as will more fully appear from General Plan S.G. Number 907/2021 held by Certificate of Registered Title number T14768/22;
- [d] Erf 1453 Sheffield Beach, in extent 7437 square metres, as will more fully appear from General Plan S.G. Number 907/2021 held by Certificate of Registered Title number T14769/22.

[29] It is against this factual matrix that the first respondent's legal contentions fall to be determined.

The House Sub-division and the four separate subdivisions created instead

[30] The first respondent contends that as at 31 July 2015 the House Sub-division did not exist as a separate subdivision. What existed instead were four different

registerable subdivisions. As stated in heads of argument filed on the first respondent's behalf: 'the fact that these four subdivisions make up the land that comprised the erstwhile proposed House Sub-division is irrelevant. What is relevant is that they are four distinct and separately registerable subdivisions.' In argument, counsel for the first respondent submitted that the creation of the four subdivisions destroyed the option. I disagree.

[31] The submission that the four separate subdivisions were registrable at the time the applicant purported to exercise the option is based on evidence contained in supplementary affidavits deposed to by the first respondent's attorneys which sought, in large part, to deal with the history of the whole property and the various planning and subdivisional approvals. The first respondent had sought to introduce this affidavit less than 10 calendar days before the matter was due to be heard as an opposed motion, several months after the opposed hearing date had been allocated. The applicant objected to the late introduction of the affidavits and at the commencement of the hearing counsel for the first respondent abandoned reliance on them.

[32] As matters stand then, there is no evidence before me which establishes whether the four subdivisions were separately registerable on 31 July 2015. Such evidence as there is, including the language employed in the proposed agreement, suggests that the subdivisions were still in the process of being created at that date, not portions of land which were already separately registerable.

[33] Be that as it may, even if the four subdivisions were separately registerable in July 2015, the option related to an area of land which was identifiable from the description in the sale agreement as required for a valid option in respect of immovable property.² The agreement of sale defined the House Sub-division and depicted it on a layout plan which also formed part of the sale agreement. A valid option thus existed in relation to that physical land. Whether that same area on the ground became differently described due to planning applications made by the first respondent, or ultimately became four separate subdivisions instead of one does not change the identity of the *merx*, much less mean that it ceased to exist on the

² Du Plessis NO and another v Goldco Motor & Cycle Supplies (Pty) Ltd 2009 (6) SA 617 (SCA) para 19.

creation of the four subdivisions. In addition, and in any event, as Mr Roolf of the first respondent understood, the four subdivisions could always be consolidated to create a single erf.

[34] I therefore find that the fact that the House Sub-division was not created did not mean the option was incapable of being exercised. By parity of reasoning, the fact that the proposed agreement and the resolution referred to the acquisition of the four subdivisions created or to be created on that same area of land did not mean that they related to anything other than the *merx* that was the subject matter of the option. There was a clear intention to exercise the option to secure that parcel of land, even if it was now differently described.

The letter of 31 July 2015 and its annexures

[35] The first respondent advances additional reasons as to why it now views the applicant's exercise of the option as invalid. These reasons are based in part on its principal contention that the House Sub-division and the four separate subdivisions over the same area are two different things, and in part on its interpretation of the letter of 31 July 2015 read together with its annexures even if the House Sub-division and the four separate erven are the same *merx*. As I have already found against the first respondent on its principal contention it remains necessary only to consider the extent to which its interpretation is sustainable when one accepts that references to the four separate subdivisions as opposed to the House Sub-division matter not.

[36] The first respondent stresses that the letter cannot be read in isolation and so argues that the applicant's attorney's unequivocal statement that her 'client, who is described as the "Seller" in the said "First Agreement of Sale", hereby exercises its right and option to purchase the House-Sub division from Blue Gum Estate Proprietary Limited' cannot be viewed as a valid exercise of the option because it must be construed together the proposed agreement and the resolution.

[37] Whilst it is so that the letter must be construed as a whole, it must also be construed in context and purposively with due regard to its language in a business-

like manner which does not render an absurd result³ but a commercially sensible meaning.⁴

[38] I engage in that exercise below as I am required to do,⁵ but it is worth pausing for a moment to consider the implications and results of the first respondent's interpretation which are as follows. The applicant plainly wanted to exercise the option and thought it had done so by the letter. That view was shared by the first respondent and its attorneys for seven years. By happenstance however, because the applicant's attorney had authored the letter and not the applicant, and the applicant had offered to pay an amount in addition to the option price, the applicant had not actually exercised the option and its right to do so has lapsed.

[39] The first respondent's construction pays insufficient heed to the purposes of the letter and purpose of the proposed agreement and fails to differentiate between them.

[40] The option contained no formalities for its exercise save that it be in writing before a specified date. If no proposed agreement had been annexed to the letter of 31 July 2015 that would not have invalidated the exercise of the option. The option contained only a description of the *merx* and the acquisition price. This, together with the requirements of the Alienation of Land Act 68 of 1981, meant that a further written agreement would be required for transfer to be registered once the option had been exercised.

[41] Within this context, the letter was intended to serve two purposes. The first was to convey the applicant's exercise of its option in writing. The second was to set out the terms upon which the applicant proposed the necessary further agreement should be concluded.

[42] As to the first purpose the letter was intended to serve, this is revealed by the recordal of the applicant's exercise of the option using the language of the sale agreement and referencing it specifically. The submission by counsel for the first respondent that the attorney who authored the letter was not authorised by the

³ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 18 -23.

⁴ Novartis SA (Pty) Ltd v Maphil Trading Ltd 2016 (1) SA 518 (SCA) paras 24– 25.

⁵ Auction Alliance v Wade Park 2018 (4) SA 358 (SCA) para 19.

resolution to exercise the option, loses sight of the fact that the attorney was simply conveying her client's exercise of its rights, not purporting to exercise them herself. Even if one could style the letter as a purported exercise of the option by the applicant's attorney, it would be an exercise as agent on behalf of her client as disclosed principal, not *qua* principal.

[43] The resolution must also be construed in this context and together with the proposed agreement. It is a resolution to acquire the four subdivisions pursuant to a valid exercise of what is referred to in the resolution as 'its Option to Purchase'. The same term, with identical capitalisation, is defined in the proposed agreement to which the resolution refers. It is clear that the term utilised in the resolution was intended to bear the same meaning as in the draft agreement where it is defined as the 'Option to Purchase the House Sub-Division as set out in the First Sale Agreement'. The latter is in turn defined as the agreement of sale concluded in August 2006. The resolution endorses acquisition of the land constituting the House Sub-division on the terms in the proposed agreement, which it seeks to conclude pursuant to the valid exercise of that option.

[44] As to the second purpose of the letter, the terms upon which the applicant proposed that the option it had exercised should be implemented were contained in the proposed agreement. The applicant understood those terms to have been agreed, but as this is disputed by the first respondent, the proposed agreement was no more than an offer as to the additional terms not already determined by the option.

[45] The first respondent styles that offer as destructive of an acceptance of the option because it was not at the price of R 900 000 stipulated in the option but R 1,272 million. That contention cannot be sustained.

[46] The option stipulated a price and the letter did not purport to change that price, nor did the proposed agreement, which refers to R 900 000 as the sum to be paid for the option to purchase, and to the amount of R 372 000 as 'a separate amount' in respect of the additional sub-divisional development costs arising from the creation of four erven. The fact that the proposed agreement contained an offer to pay amounts in addition to the option price, specifically described as being

separate, does not mean that the applicant had failed to exercise the option at the stipulated price.

[47] The first respondent also contends that the option was not validly exercised as the purchase price was not tendered. There is in my view no merit to this contention. Clause 6.3 of the sale agreement only required payment against transfer. In an email dated 16 March 2022 Mr Roof recorded that the first respondent had not yet serviced the four subdivisions and could not therefore secure the section 53 certificates required to pass transfer. Payment of the purchase price was however tendered and secured in the applicant's attorneys' trust account April 2022 which is shortly after the certificates of registered title were issued and the first respondent was in a position to pass transfer.

[48] I consequently find that the exercise of the option was conveyed in writing as required by the letter of 31 July 2015.

[49] Ordinarily that would mean that the first respondent should be directed to do all such things as might be necessary to transfer the land comprising the House Sub-division as defined in the sale agreement without more. However, first respondent contends that the agreement of sale only obliged it to provide the House Sub-division with access to supply routes for the provision of services, not the services themselves. That being so, the argument ran, it could only be compelled to give transfer of those erven to the applicant against payment of the costs of providing the services to them, alternatively payment of the sum representing the difference between the cost of providing services to the four subdivisions and to a single subdivision if one had been created. It is therefore necessary to consider whether a rider to this effect should be included in the order compelling transfer.

The cost of servicing the four subdivisions

[50] The first respondent has not stated that it has in fact supplied services to the four subdivisions. This had apparently not yet occurred by the time the replying affidavits were filed. It is however apparent from the amended ROD that the first respondent will need to provide services to the boundaries of all four subdivisions in order to pass transfer to the applicant. I therefore deal with this argument on the

basis that the first respondent either already has or will have to incur the costs of servicing the four subdivisions.

[51] The first respondent submitted that as clause 6.5 only requires it to provide supply routes for amenities, the applicant ought to pay for the costs of the services installed to each of the four sub-divisions as this is a benefit to which the applicant is not contractually entitled. The clause reads as follows:

6.5 Simultaneously with the transfer of the House Sub-division into the name of the Seller the Purchaser shall cause to be registered over the whole of the remainder of the property sold by the Seller to the Purchaser, a six (6) metre general right of way servitude in favour of the Seller as owner of the House Sub-division granting it full access to the House Sub-division from the Public Road together with *electricity, water and amenities supply routes therein*. The exact final location and route of such servitude shall be decided by agreement by the Parties after a sub-divisional development plan has been formulated by the Purchaser and shall be recorded in a servitude diagram to be approved by the Surveyor General at the cost of the Purchaser under this Sale Agreement.' (emphasis added)

[52] Clause 6.5 of the sale agreement cannot be read in isolation. It must be read with clause 6.4 which provides:

'6.4 The Purchaser under the current Sale Agreement as the new registered owner of the whole property shall pay for and be *liable for all of the costs of creation of the new House Sub-division including survey and compliance with all conditions of approval and other regulatory approvals required in law so as to give effect to the registrability of the House Sub-division*. The transfer documents and registration into the Purchaser's name shall be prepared

and registered by the Conveyancers at the cost of Zenith Estates CC.' (emphasis added)

[53] Clause 6.4 obliges the first respondent to pay all the costs of creating the new House Sub-division as well as the costs of complying with conditions of approval. One of the conditions imposed by the amended ROD was the provision of services - not just supply routes - to the boundary of each of the subdivisions that the first respondent had chosen to create. The provision of such services is therefore required in order for the first respondent to comply with the conditions of approval, and consequently it is the first respondent which is liable for the costs thereof. The first respondent would therefore also have been obliged to bear the costs of providing services to the boundary of the House Sub-division if it had chosen to create only a single subdivision.

[54] It is so that the sale agreement envisaged the creation of a single subdivision and not four. That, coupled with the circumstances under which the first respondent chose to create four subdivisions, and the conduct of the parties described above which suggests that the applicant had agreed to pay whatever additional costs were occasioned by servicing four erven rather than one, may mean that the first respondent has a claim for the additional servicing costs either in contract or enrichment.

[55] It is however not only unnecessary for me to make any finding in this regard, it would be improper for me to do so as the first respondent did not institute a conditional counter claim for payment of these amounts against transfer. As the sale agreement obliges the first respondent to bear the costs of approval before the transfer can be effected there is no room for the application of the *exceptio non adimpleti contractus*. Confined as I am to the evidence the parties have chosen to present, there is no basis upon which such payment could be ordered in these proceedings. This does not leave the first respondent without recourse. If it has a claim, it is still free to pursue it.

Order

[56] I consequently grant the following order:

1. It is declared that the applicant has validly exercised the option contained in clause 6 of the Agreement of Sale of Commercial Timber Farming Enterprise concluded between the applicant and the first respondent on 11 August 2006.
2. The first respondent is directed to do all such things as are necessary to transfer to the applicant the following immovable properties against payment of the purchase price of R 900 000:
 - [a] Erf 1450 Sheffield Beach, in extent 2498 square metres, as will more fully appear from General Plan S.G. Number 907/2021, held by Certificate of Registered Title number T14766/22;
 - [b] Erf 1451 Sheffield Beach, in extent 2500 square metres, as will more fully appear from General Plan S.G. Number 907/2021 held by Certificate of Registered Title number T14767/22;
 - [c] Erf 1452 Sheffield Beach, in extent 2498 square metres, as will more fully appear from General Plan S.G. Number 907/2021 held by Certificate of Registered Title number T14768/22;
 - [d] Erf 1453 Sheffield Beach, in extent 7437 square metres, as will more fully appear from General Plan S.G. Number 907/2021 held by Certificate of Registered Title number T14769/22.
3. The first respondent is directed to sign all such documents and to do all such things as are required in order to give effect to the order in paragraph 2 above, within five calendar days of being called upon in writing to do so by the conveyancers attending to the transfer.
4. The first respondent is directed to pay the costs of the application, including all costs previously reserved.

ANNANDALE, AJ

JUDGMENT RESERVED: 28 JULY 2023

JUDGMENT HANDED DOWN: 27 November 2023

Appearances

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For second respondent: No appearance