IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 21/11/2007

CASE NO: 15340/07
UNREPORTABLE

In the matter between:

IBEST (PTY) LTD 1st
Applicant

HANS GEORGE WILHELM DU PLESSIS 2nd
Applicant

and

WAPADRAND EXTENSION 34 CC 1st
Respondent

WAPADRAND ESTATE HOMEOWNERS ASSOCIATION 2nd
Respondent

JUDGMENT

MURPHY J

1. The applicants seek an order for a specific performance compelling the first respondent to comply with the provisions of clause 17 of the deed of

sale entered into between the first applicant and the first respondent dated 12 October 2001, requiring the first respondent to remove all man made structures, including but not limited to roads, situated within a distance of 50 metres parallel to and along the full length of the western boundary of Wapadrand Ext. Township. The applicants also seek alternative relief to which I will refer presently.

2. The first applicant is a company incorporated in terms of the Companies Act 61 of 1973. The second applicant is the sole director of the first applicant. He and his family occupy the dwelling situated on the first applicant's property, being erf 572, Wapadrand Ext. 34 Township in terms of a lease agreement between them.

3. The first respondent is a close corporation and the successor in title of Wapadrand Ext. 34 (Pty) Ltd, the entity with whom the first applicant contracted in respect of the property forming the basis of the dispute in this matter.

4. No relief is sought against the second respondent, the Wapadrand Estate Homeowners Association, which appears to have been cited on the grounds that it may have an interest. The second respondent has not opposed the proceedings and presumably abides by the order of the

court.

5. On 22 June 2000 the first respondent bought the property known as the remaining extent of portion 72 of the farm The Willows No. 340, registration division JR province of Gauteng, which was registered into the first respondent's name on 26 January 2001. On 2 October 2001 the first respondent caused the Registrar of Deeds of the Pretoria deeds registry to issue a certificate of registered title in respect of a portion of the first respondent's property, which portion after the issuing thereof became known as portion 448 (a portion of portion 72) of the farm The Willows No. 340, registration division JR province of Gauteng. The first respondent also applied to the relevant authority for the establishment of a township on the said portion 448, which township became known as Wapadrand Ext. 34 Township ("the Township") in respect of which a general plan was approved by the Surveyor General. The township is informally known as the "Wapadrand Estate" ("the Estate") and was marketed as such by the first respondent and its duly authorised agents.

6. The estate consists of forty three full title erven, varying in size between 600m² and 1230m². The estate forms the northern foothills of the Bronberg mountain range and is situated on the eastern outskirts of Pretoria.

7. The second applicant was so impressed by the bushveld ambiance and vistas offered by erf 572 in the township that on 12 October 2001, on behalf of the first applicant, he entered into a written deed of sale for the purchase of the property. Clause 17 of the deed, the contentious provision in this dispute, makes reference to a second phase of a proposed development on the first respondent's farm. The unamended clause as contained in the deed of sale reads as follows:

> "17.TWEEDE FASE ONTWIKKELING
>
> Die Koper aanvaar hiermee dat hy bewus is van die intensie van die Verkoper om aansoek te doen vir 'n verdure eko-sensitiewe dorpstigting op die oorblywende gedeelte van die eiendom direk aangrensend tot die suidelike gedeelte van die dorpsgebied bekend as Wapad Rand Uitbreiding 34, wat as 'n verdure dorpsgebied sal bestaan uit 40 tot 60 erwe. Die Koper stem hiermee onherroeplik toe tot so 'n verdere aansoek onderneem deur die Verkoper en onderneem om so 'n aansoek nie teen te staan nie op enige manier of om enige ander persoon of instansie te beïnvloed om so 'n aansoek teen te staan nie. Die Verkoper sal geen aksie neem wat nadelig teen die goedkeuring van hierdie aansoek sal wees nie."

8. The first applicant and the first respondent agreed to a handwritten insertion of an addition to clause 17 in the following terms:

"Met dien verstande dat 50 meter aangrensend aan Wapadrand X 34 nie ontwikkel sal word nie."

9. According to the applicants, on 24 October 2001 a further addendum to the deed of sale was concluded. That addendum has been annexed as annexure F7 to the founding affidavits. It reads as follows:

"BESKRYWING VAN DIE VOORWAARDES VAN TOEPASSING OP ERF 572, WAPADRAND EXTENSION 34 AANGEHEG TOT DIE KOOPOOREENKOMS TUSSEN WAPADRAND EXTENSION 34 (PTY) LTD EN IBEST BK

1.

Die gedeelte soos aangedui op die diagram hierby aangeheg, naamlik 'n 80m strook aan die suidelike grens van erf 572 het betrekking.

2.

Die partye kom ooreen dat die ontwikkelaar, Cosmopolitan Eiendomsontwikkeling (Edms) Bpk Asook die Wapadrand Landgoed Huiseienaarsvereninging geen parkering, geboue en of paaie vir voertuie op hierdie gedeelte sal oprig nie. Geen natuurversteuring, uitgesluit die omheining met hekke sal tydelik of permanent op hierdie gedeelte geskied nie anders as maatreëls ter bekamping van erosie.

3.

Binne redelike riglyne sal die privaatheid en waarde van erf 572 in ag geneem word tydens enige toekomstige uitbreidings."

10. It will be noticed immediately that the addendum of 24 October 2001 goes somewhat further than the handwritten insertion included in the deed of sale. Annexure F7 is signed on behalf of the applicants by the second applicant. However, notably, it is not signed on behalf of the first respondent. The first respondent denies that the addendum to the deed of the sale was concluded as part of or as an addition to the deed of sale. Mr JC Reyneke, the deponent to the answering affidavit who deposed on behalf of the first respondent, averred that Mr JP Reyneke who was involved in the negotiations with the applicants undertook to convey annexure F7 to the seller for its consideration. The contents of annexure F7 were not acceptable to the seller and according to the first respondent it was accordingly never signed and therefore did not form part of the deed of sale. The applicants contend that Mr JP Reyneke indeed signed the addendum in the presence of the first applicant on 24 October 2001, but has adduced no evidence in support of that. There is accordingly a dispute of fact regarding whether or not the addendum was in fact signed. For reasons which will appear presently I do not consider it necessary to resolve the dispute of fact and in the absence of a signed addendum I incline to accept the respondent's version that it was not signed. Accordingly, any relief to which the applicants may be entitled should be granted in accordance only with the terms of the handwritten insertion in

clause 17.

11. On 13 November 2001 the first applicant took transfer of the property. Thereafter during 2003 the applicants commenced with the construction of a dwelling which was completed during 2004 and the first applicant and his family took occupation at that time.

12. During 2005 the first applicant became aware that the first respondent's employees and contractors were busy working on a road in close proximity to the first applicant's property. It is common cause that the road in question is situated within 50 metres parallel to and along the length of the western boundary of the township, being the boundary of the first applicant's property, erf 572. A dispute then arose between the parties regarding the road.

13. On 12 July 2005 the first applicant's attorneys addressed a letter to the first respondent requesting it to cease constructing the road. The attorneys received a reply from the first respondent's attorneys on 14 July 2005 which contained the following undertaking:

> "Desnieteenstaande en, slegs in 'n poging om onnodig litigasie en verspilling van regskostes te voorkom, en sonder dat daar enige verpligting vir ons kliënt

tot dien effekte bestaan, is ons kliënt bereid om die volgende uitdruklike onderneming aan u kliënt te verskaf:

(a) Dat ons kliënt geen verdure 'ontwikkeling sal onderneem' binne die tersaaklike gebied van 80 meter suid van u kliënt se eiendom nie sonder dat daar redelike vooraf kennisgewing aan u kliënt gegee word;

(b) Dat die beweerde 'padkonstruksie' gestaak sal word en dat dit slegs voortgesit sal word met redelike vooraf kennisgewing aan u kliënt."

14. The applicants accepted this undertaking subject to the reservation of their rights to institute legal action should that be necessary.

15. Later, on 14 December 2005, the applicants sought a further indication from the respondents that they still abided by the undertaking. The first respondent's attorney replied to the request on 23 January 2006 in which it was indicated that the first respondent was to stand by the undertaking given in the letter of 14 July 2005.

16. It seems though that the undertaking did not have the desired effect from the point of view of the applicant in that the construction work on the road continued and for that reason the applicant launched these proceedings.

17. The essence of the applicant's case is that clause 17, particularly the handwritten portion thereof, constitutes a contractual obligation on the part of the first respondent not to construct a road within 50 metres of the boundary of the western side of the township. The first respondent denies that such a restriction applies in the present context. Firstly, it submits that from the text and context of clause 17 it is evident that the clause deals with a "tweede fase ontwikkeling" pertaining to a "dorpstigting" on the property. It maintains that the clause applies only when the township development occurs, and the second phase to which the clause refers materialises. It is common cause that such township development is still in the planning stage, hence it contends the clause is not of application.

18. In the alternative the respondent argues that should it be held that clause 17 does indeed apply, then the facts pertaining to the particular roadway do not constitute an "ontwikkeling" within the meaning and context of clause 17.

19. The respondent maintains that the road in question existed prior to the parties entering into agreement, which was used to service an existing Eskom servitude running more or less from east to west and to the immediate west of erf 572. This servitude has been kept clear over the years and has been used by Eskom for their own purposes. The

respondent maintains further that the road was then used for the purposes of accessing the ridge by Eskom in the exercise of its right of way and that it had been utilised for many years. It is currently utilised by the respondent to obtain access to a show house they have built on top of the hillside as part of their plans to develop the area. The first respondent,however, admits that it did in fact improve the condition of the servitude road by strengthening the surface thereof by way of concrete and strengthening the shoulders of the road with rocks in order to limit erosion. They claim therefore that the facts pertaining to the road amount to nothing more than an improvement of an existing road which was there when the first applicant purchased the property and as such do not constitute a development within the meaning of clause 17.

20. After receiving the answering affidavit, the applicants undertook an investigation with the aim of establishing whether or not the servitude road existed at the time the applicants purchased the property. Their investigations reveal that the first respondent may have confused an Eskom servitude with a servitude road. The servitudes that exist, as reflected on the relevant maps, are servitudes for power lines. They maintain that there is no truth in the averment that a road existed along or underneath the Eskom servitude, or that a road was being used at the time when the township was established or when the first applicant bought

its property. The applicants have attached confirmatory affidavits in support of these allegations by the former caretaker and the present chairman of the second respondent, both of whom have lived in the area for some time and are acquainted with the developments that have taken place. They both state that during 2001 when they purchased their properties there existed no overhead power lines on the servitude area and also no servitude road running either parallel to or within the servitude area at all. Nor was there any gravel road or a “twee spoor bospaadjie” from which one could gain access to the ridge, as is alleged by the first respondent.

21. Besides this evidence, the applicants conducted investigations at the offices of the Surveyor General in Pretoria and later at the office of the Surveyor General in Cape Town where they were able to obtain a copy of an orthophoto map.

22. After perusing and studying the orthophoto map annexed to the replying affidavit as annexure F22, I am satisfied that no road did in fact exist on the date the applicants purchased the property.

23. I am mindful of the fact that these averments and the annexing of annexure F22 were made and done in the replying affidavit and

accordingly that the first respondent had no entitlement to respond to them, and in the normal course the additional evidence could not be denied or explained by the respondents. Nevertheless, if the allegations and the orthophoto map were untrue, or of questionable reliability, then leave of the court could and should have been sought to make that case or to answer the averments - see *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (TkSc) at 550F. Despite the fact that the replying affidavit was filed considerably out of time, leaving the respondents with short notice in which to deal with it, the respondents did not request the opportunity to do so. Considering the nature of the evidence, and the fact that one can reasonably rely upon the documentation of the Surveyor General, and absent any countervailing evidence, I am prepared to accept that there was indeed no road at the date of the sale.

24. The question then is whether the respondent's road works, whether they be the building of a new road from scratch or the upgrading of an existing tract through the bush, amount to an "ontwikkeling" or development, which is prohibited by the handwritten addition to clause 17.

25. The first respondent maintains that the words "nie ontwikkel sal word nie" contained in the handwritten addition to clause 17 do not contemplate

road building activities or road maintenance activities. The matter is essentially one of interpretation. The ordinary principles of contractual interpretation must then be applied to ascertain the common intention of the parties at the time of concluding the deed of sale. According to the golden rule of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the contract.

26. The English meaning of the Afrikaans word “ontwikkel” is “develop”. The ordinary grammatical meaning of the word “develop” is extremely wide. The Shorter Oxford English Dictionary defines it in a functional manner as follows:

> “Unfold more fully; bring out all that is potentially contained in; bring out from an innate to an active or a visible state; make fuller, more elaborate or systematic or bigger; cause to grow or mature, evolve, cause to come into existence or operation; display an operation; begin to exhibit or suffer from.”

27. Reliance then on the literal meaning of the word “develop” is clearly insufficient. Therefore it is permissible to have regard to the context in which the word or phrase is used with its interrelation to the contract as a

whole, including the nature and purpose of the contract, as well as to the background circumstances which explain the genesis and purpose of the contract, that is to matters probably present to the minds of the parties when they contracted - see *Coopers + Lybrand and Others v Bryant* 1995(3) SA 761(A) at 768A-C.

28. The context in which the word has been used in the contract is one concerning a change of the use of land for purposes different to its then present use.

29. I agree with Mr Liversage, counsel for the applicants, that there is no merit in the first respondent's submission that the construction of a road falls outside the ambit of the concept of development in a town planning sense. If the first respondent's submission were true then all internal roads situated within sectional title schemes would then be regarded as not forming part of such developments.

30. Given the ambiguity it is permissible to have regard to the meaning assigned to the word "development" as it appears in the Development Facilitation Act 67 of 1995, the statute governing almost all forms of land development irrespective of location throughout the country. "Land development" is defined in section 1 of the Act as meaning:

> "any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small scale farming, community or similar purposes."

31. Relying on that definition, one may safely conclude that the construction of a road would fall in the concept of a development and thus was within the contemplation of the parties when they used the word "ontwikkel".

32. The argument that the clause only finds applicability once the second phase development commences is equally without merit. While it is correct that the handwritten insertion forms part of a clause aimed at obtaining an undertaking from the purchaser not to object to future developments, the purpose of the handwritten insertion could only be to restrict the extent of the seller's rights when embarking on the second phase development. The purpose of the clause clearly was a reservation by the purchaser of its rights to continue to enjoy the bushveld ambiance and eco-system immediately adjacent to the property. To maintain that the clause only operated if and when the second phase development moved into the operation phase would mean that the applicants' attempt to secure the bushveld ambiance immediately adjacent to their property would be wholly unprotected against any other form of development. That

clearly was not what was in the contemplation of the parties. The clause aims at preserving the ambiance and eco-system within 50 metres of the boundary. Logic and common sense tell us that the parties intended that no other developments including a road should be constructed within the area described in clause 17 of the deed of sale. The applicants agreed not to object to the second phase development provided they were given a guarantee that there would be no developments of any kind altering the eco-system immediately adjacent to their property.

33. In the premises, I am satisfied that the applicants are entitled to the relief they seek. They have a clear contractual right which the first respondent has breached.

34. The applicants also seek a costs order on the scale as between attorney and client. There are two bases for such an order. The first is that the first respondent appears to have continued in the construction of the road contrary to an undertaking given by its attorneys not to do so. The first respondent however has contended that the attorney's letter did not contain any admissions that the allegations made on behalf of the applicants were true or correct. It claims that the undertakings given on behalf of the first respondent could readily be made because neither developments nor road works were taking place at the time. In my opinion

such an argument is disingenuous. The second basis for an attorney and client costs order is the dubious nature of the first respondent's claim regarding the servitude road. It appears quite clearly from the evidence that there were no operative power lines and therefore no road or any need to upgrade the road. I agree with the applicants that the more probable truth is that the road was constructed by the first respondent when it wanted to erect show houses. The evidence suggests that the road was indeed constructed in 2003 or 2004 and that the purpose in doing so was to gain access to the show house with the view to proceeding with further development. I accept then the submission that the first respondent was less than truthful with the court.

35. In the result, the following orders are issued:

1. The first respondent is ordered to comply with provisions of clause 17 of the deed of sale entered into between itself and the first applicant, dated 12 October 2001, by removing all man made structures, including but not limited to roads situated within the area depicted by the figure FDCEF on annexure F8 to the applicant's founding affidavit within six weeks of this order.

2. The first respondent is ordered to pay the applicants' cost on a

scale as between attorney and client.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:19 September 2007
For the Applicants:Adv A Liversage
Instructed By:Prinsloo & Bekker Attorneys, Pretoria
For the 1st Respondent: Adv TJ Kruger SC, Pretoria
Instructed By:Ivan Pauw & Associates, Pretoria