

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2014/37846

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| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

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DATE

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SIGNATURE

In the matter between:

ILAN BERNSTEIN N.O.

First Applicant

YARON BERNSTEIN N.O.

Second Applicant

And

GOLDEX 16 (PTY) LTD

First Respondent

THE REGISTRAR OF DEEDS: BLOEMFONTEIN

Second Respondent

J U D G M E N T

KEIGHTLEY, AJ:

- [1] This is an application for specific performance arising out of a sale agreement associated with a residential sectional title development scheme, known as Waterford, ("Waterford") on the Vaal River.
- [2] The applicants are the trustees of the Bernfin Trust ("the Trust"). The first respondent is Goldex 16 (Pty) Ltd ("Goldex"). The second respondent is the Registrar of Deeds, Bloemfontein. The Registrar was joined solely to give effect to the relief original sought by the Trust. He has played no part in the proceedings.
- [3] On 23 August 2012 the parties entered into the written sale agreement. The ultimate purpose of the agreement was to secure for the Trust a Certificate of Registered Sectional Title in respect of a particular unit in the Waterford development scheme.
- [4] To this end, the agreement included the following salient provisions:
- [4.1] The Trust purchased from Goldex, which was the developer of Waterford, a real right of extension in respect of a particular portion of the development for the amount of R1,8 million.
- [4.2] The real right of extension was defined as meaning: *"that portion described as site RR78 (site1) in extent 1191 square metres of the right to be reserved by the seller upon the opening of the sectional title register to erect and complete a further building or buildings*

on the common property in terms of section 25(1) of the (Sectional Titles Act, 95 of 1986) Act and as shown on the plans”.

[4.3] The land was defined as meaning subdivision 9 (of 4) of the Farm Luciana 214, District Parys, Free State Province (“the Waterford land”).

[4.4] Pursuant to the real right of extension, the Trust was obliged to construct a dwelling house on the relevant portion of land within two years.

[4.5] The Trust would be entitled to cause a Certificate of Registered Sectional Title to be registered in respect of its portion once the construction of the house was complete.

[5] At the insistence of the Trust, an additional manuscript clause (“the manuscript clause”) was included in the sale agreement as clause 17.5. It provided that:

“It is recorded that the Purchaser is attempting to arrive at an all inclusive price of construction, including land and buildings of the house as per Annexure ‘A’ attached on specification similar to the existing house, 14 Waterford and a large boathouse and fees at an all inclusive price of R4, 000, 000. 00 (VAT inclusive).”

[6] In its founding affidavit the Trust explains the context in which the manuscript clause was included in the sale agreement. During discussions between the parties leading up to the conclusion of the agreement, Mr Bernstein (acting

as a trustee on behalf of the Trust) advised one Mr Sneece (Goldex's representative) that if the Trust were to invest in Waterford, its purchase would have to include a boathouse. Mr Sneece showed Mr Bernstein a particular existing boathouse ("the boathouse"). He told Mr Bernstein that the boathouse would form part of the proposed sale agreement. The manuscript clause was inserted to give effect to this.

- [7] Mr Sneece confirms in a supporting affidavit that: *"the boathouse formed part of the agreement of 23 August 2012. The intention at the time of the signature of the ... agreement was to give the Purchasers free and unencumbered ownership, and occupation of the boathouse from the date of registration"*.
- [8] The Trust duly constructed a house on its section of the property. It also took over the use of the boathouse.
- [9] On 16 May 2013 a Certificate of Registered Sectional Title was registered in the name of the trustees of the Trust in respect of a unit described as Section No. 101 of the Waterford Sectional Plan in terms of section 25(11)(c) of the Sectional Titles Act. It specifically records that it relates to the land and building or buildings situated on Portions 9 (4) of the Farm Luciana 214.
- [10] In 2014 a dispute arose between the parties regarding the issue of whether or not the boathouse formed part of the sale agreement. The Trust asserted that it did, and demanded immediate transfer of the boathouse at no cost to the Trust. Goldex disputed that the boathouse had formed part of the sale agreement. It took the position that if the Trust wanted to take over the

boathouse, it would have to pay an additional amount to Goldex. It issued an invoice to the Trust in the amount of R150 000. 00 for the “sale of boathouse for #1 Waterford.”

[11] This stalemate led to the Trust instituting the present proceedings against Goldex. In its original notice of motion, the Trust sought an order directing Goldex to take all steps necessary to transfer ownership of “the large boathouse situated at or near Stand No. 1, Waterford Estate, forming part of subdivision 9 (of 4) of the Farm Luciana 214 ” into the name of the Trust.

[12] However, subsequent developments introduced a spanner in the works for the Trust.

[13] When Goldex filed its answering affidavit, it transpired for the first time that the boathouse is not situated on the Waterford land at all. It is actually situated on a separate piece of land, described in the relevant titled deed as “the remaining extent of portion 4 of the farm Luciana no. 214” (emphasis added). For simplicity’s sake, I refer to this as “the boathouse land”. The boathouse land is held by Goldex under separate title from that in respect of the Waterford land. The sectional title plan for the Waterford development does not cover the boathouse land.

[14] On this basis, Goldex opposed the relief sought by the Trust. It averred in its answering affidavit that the boathouse could not be transferred without a transfer of the land to which it has acceded. The relief sought by the Trust would require a transfer to the Trust of the boathouse land. Goldex averred

that it was never the intention of the parties when they entered into the sale agreement that the Trust would purchase the boathouse land.

[15] Goldex raised a second complication in its answering affidavit. It pointed out that the boathouse land is zoned agricultural. The Subdivision of Agricultural Land Act 70 of 1970 requires consent by the relevant authority for any subdivision of the boathouse land. No consent has been granted. Goldex relied on the absence of the requisite consent as an additional basis for opposing the relief sought.

[16] It is clear that until the answering affidavit was filed the Trust had no idea that the boathouse was not situated on the Waterford land. The deponent to the Trust's replying affidavit, Mr Bernstein, states that the Trust was "blissfully unaware" of the situation until then. Furthermore, he says, Goldex itself had not raised this issue before.

[17] Despite the changed factual scenario, the Trust persists in its efforts to obtain an order of specific performance against Goldex. It still seeks an order directing Goldex to take the necessary steps to transfer ownership of the boathouse to the Trust. The only change in this regard is that it now describes the boathouse as being situated on or near the boathouse land.

[18] The attitude of the Trust is that the changed facts do not change the legal situation. It says that what the Trust is entitled to is an order compelling Goldex to take whatever steps are necessary to ensure that the boathouse is transferred to it. If that means that a portion of the boathouse land must also be transferred to the Trust then, in Mr Bernstein's words, "so be it".

[19] The thrust of the Trust's case in this regard is that even though the parties were unaware that the boathouse was not situated on the Waterford land, they intended that it would form part of the sale agreement. The Trust argues that this intention can be gleaned from the terms of the agreement, and the context within which it came about. It submits that, properly interpreted, the agreement placed an obligation on Goldex to ensure that the Trust acquired ownership of the boathouse as part and parcel of what it was purchasing, and regardless of whether it was situated on the Waterford land or not. It seeks to enforce Goldex's obligation in this regard, even if this means that Goldex will have to transfer a portion of the boathouse land to the Trust.

[20] The common intention of the parties lies at the heart of every contract. To succeed the Trust must establish that the common intention of the parties was that the Trust would acquire the boathouse regardless of whether it was on the Waterford land or not. The Trust must show that this intention existed at the time that the agreement was entered into.

[21] I accept, as counsel for the Trust submitted, that Mr Sneece confirms Mr Bernstein's version that both parties intended that the boathouse would form part of the sale agreement. Mr Sneece also confirms that the manuscript clause was inserted to give effect to this intention. Goldex does not refute this evidence in its answering affidavit.

- [22] If the boathouse was situated on the Waterford land, this evidence of a common intention may well have been sufficient for the Trust to establish its case.
- [23] It may even have been sufficient if the evidence showed that the parties were aware at the time that there was some uncertainty as to whether the boathouse was situated on the Waterford land or not. In those circumstances, the Trust conceivably could have argued that the manuscript clause was intended to place an obligation on Goldex to transfer the boathouse to the Trust even if it was subsequently found not to be on the Waterford land.
- [24] However, that is not what we are dealing with in this case. On the contrary, the evidence before me demonstrates that when the sale agreement was entered into neither of the parties had any idea that the boathouse was not situated on the Waterford land. At the time that Mr Bernstein deposed to the founding affidavit he was blissfully unaware, as he put it subsequently, of the true facts. The same is true of Mr Sneece. His affidavit makes no mention of the land on which the boathouse is situated.
- [25] Mr Bernstein stated in his replying affidavit that he only became aware that the boathouse was not situated on the Waterford land when Goldex filed its answering affidavit. However, Mr Bernstein did not go further to say that the parties had considered this possibility and its consequences at the time they entered into the sale agreement.

- [26] The only reasonable inference to draw from the evidence is that both Mr Bernstein and Mr Sneece assumed at the time they negotiated the sale agreement that the boathouse was on the Waterford land. This assumption was subsequently shown to have been incorrect.
- [27] That the parties both mistakenly assumed that the boathouse was on the Waterford land is supported by the terms of the sale agreement. As I have already indicated, the only land referred to and dealt with in the sale agreement is the Waterford land. The Trust's real right of extension is linked specifically to a particular portion of the Waterford land, viz. site 1. The Certificate of Sectional Title subsequently registered is in respect only of this portion of the Waterford land.
- [28] In the circumstances, there is nothing in the agreement to indicate that the parties foresaw the possibility that the boathouse was on land other than the Waterford land. There is certainly nothing in the agreement to indicate that they considered what the respective rights and obligations of the parties would be if the boathouse turned out not to be situated on the Waterford land at all. All indications from the agreement are that the rights and obligations of the parties would be restricted to the Waterford land.
- [29] From the context within which the sale agreement came about, as well as from the terms of the agreement itself, I can only conclude that whatever agreement the parties thought they had reached in respect of the boathouse this was flawed by a common mistake. A common mistake exists in circumstances where the parties reach agreement on an issue but they are

both under the same fundamental misapprehension about an underlying fact.¹

[30] In this case, the parties both mistakenly thought that the boathouse was situated on the Waterford land. The evidence of the Trust indicates that the parties intended that the boathouse would form part of the agreement. However, that intention was formed on the mistaken assumption that the boathouse fell within Waterford. As a result of this assumption, the parties did not consider what the position would be if, as it subsequently transpired was the case, the boathouse was actually situated on a different property altogether, falling outside Waterford. There is no evidence from Mr Bernstein or Mr Sneece that they ever did. The terms of the sale agreement also indicate that they did not consider this possibility. Had the parties done so, I would have expected the sale agreement to contain specific provisions to deal with the situation. There are none, either in the manuscript clause or elsewhere.

[31] Common mistake vitiates the relevant agreement, and it may be treated as invalid.² The present case indicates why this is so. The inevitable consequence of the parties' mistaken belief is that there is an absence of consensus on the critical issue for this case, viz. the parties' respective rights and obligations in respect of the boathouse when in reality it is not situated on the Waterford land.

¹ A J Kerr *The Principles of the Law of Contract* (6th ed) p255

² *Dickenson Motors (Pty) Ltd v Oberholzer* 1952 (1) SA 443 (A)

[32] For these reasons I cannot accept the Trust's submissions that the parties intended that the Trust would acquire the boathouse regardless of where it was situated. I find that there was no obligation on Goldex to transfer ownership of the boathouse in circumstances where this would also necessarily entail a transfer of the boathouse land, or a portion of it, to the Trust. In the absence of this obligation, the Trust's claim for specific performance must fail.

[33] In light of this finding, it is unnecessary for me to give detailed consideration to Goldex's alternative defence based on the Subdivision of Agricultural Land Act. It seems to me that this Act is a further obstacle to accepting the interpretation of the sale agreement relied on by the Trust. Transfer of the boathouse to the Trust would inevitably require a subdivision of the boathouse land. This is prohibited under the Act without prior ministerial consent.³ It is common cause that this consent has not been obtained in respect of the boathouse land. In the circumstances, the parties could not validly have agreed that Goldex would be under an obligation subsequently to obtain the necessary consent in order to effect a transfer of the boathouse to the Trust. An agreement of this nature is unenforceable, and for this reason too, the Trust's claim for specific performance is ill-founded.

[34] As far as costs are concerned, counsel for the Trust submitted that if I dismiss the application, I should nonetheless not hold the Trust liable for the

³ Section 1(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970 provides, in relevant part that:

"no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold ... unless the Minister has consented in writing."

costs of the application, at least up until the answering affidavit was filed. He submitted that the Trust should not be mulcted in costs for an application based on facts that were not brought to the attention of the Trust until the answering affidavit was filed.

[35] I see no reason in this case why the usual order of costs should not be made. The Trust persisted in its relief, subject to a relatively minor amendment, after the answering affidavit was filed. In my view, it is appropriate that the costs of its application should follow the outcome of that application.

[36] I make the following order:

(a) The application is dismissed with costs.

**R M KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard: 1 June 2015

Date of Judgment: 4 June 2015

Counsel for the Applicants: K. Ioulianos

Instructed by: Rene Kyriakou Attorneys, Rosebank

Counsel for Respondent: SF Mouton

Instructed by: Max Lourens Attorneys, Stellenbosch