REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 07/28371

In the matter between:

BRAY, MICHAEL GEOFFREY	**Plaintiff**
and	
GRAND AVIATION (PTY) LTD	**Defendant**
and	
DE WET REITZ ATTORNEYS	**Third Party**

SUMMARY OF THE JUDGMENT

BARNES A.J.

The Plaintiff launched an application in November 2007 against the defendant in which he compelled him to comply with the sale agreement conclude by both parties.

The sale of agreement has two components; the sale of an erf in a residential estate being developed by the defendant and the construction of a dwelling on the erf. The purchase price was paid by the by plaintiff. This occurred despite that the defendant never signed the sale of agreement with the plaintiff. The sale of the land is contained in the Deed of Sale and the construction is contained in Annexure “A”

The plaintiff sought an order for the specific performance in which he compels the defendant to build the dwelling on the erf as per terms in the sale of agreement. On the other hand, the defendant opposed the application on the ground that it never signed the sale of agreement and it does not in comply with Section 2(1) of the Alienation of Land Act 68 of 1981, and contended that it has validly cancelled the sale of agreement.

The matter was heard on trial for the period in which the appellant argued that he signed the sale of agreement on the 28 September 2003, and the defendant never signed same. The defendant could not explain why it was not signed .The defendant thought at all material times that the agreement was signed and its valid and binding.

I was only after the proceedings has been launched for specific performance that he realised that the sale of agreement was never signed, and it was invalid and not complying with the Alienation of Land Act 68 of 1981.The agreement of sale describes a “Unit E” dwelling. The defendant provided the plaintiff with its building plan for the type of unit that formed part of the plaintiff application for his bond and building loan. The plaintiff obtained the mortgage bond over the erf and a building loan for the construction of the building.

In the months ensued, discussion were held between the plaintiff and the defendant in respect of the alterations that the plaintiff wanted to make to his Unit E. A revised quote was sent to defendant incorporated the alterations sought by the plaintiff. There were two items which were not quoted, and the plaintiff was asked to sign the quote and fax them back to the defendant. And this was not done by the plaintiff as per request from the defendant. After receiving the email from the defendant, he signed the quote, initialled the altered floor plan. The plaintiff averred that he could not produce the transmission of the document sent to the defendant, but maintained it has been done.

The defendant wrote a letter to the bank, Nedbank requesting it to extend the mortgage bond. The plaintiff attached the letter from the defendant who confirms the delay of the development, and the bond was also extended again with the defendant confirming same.

The plaintiff received an email from the defendant, where he attached detailed plans of the unit, incorporating the alterations sought. The plaintiff responded to the defendant on the same day and responded positively. The plaintiff received the revised quote for the alterations, and it was incorporated into the Addendum. It was quite identical to the initial quote in respect of items quoted, their description and cost.

The only difference between the initial quote and the revised quote was that the latter included a new item 24 a ‘modification fee’. The modification fee is the subject of dispute between the parties. The plaintiff was told that the fees were for the delays in the development. This was denied by the defendant, and alleges it was for the “basket of finishes” to be applied to the plaintiff’s unit and it was communicated to the plaintiff. It was found that the modification fee was indeed to cover the increased building costs.

The modification fee was regarded as unacceptable by the plaintiff and was not prepared to pay it, and it was communicated to the defendant. But he could not recall to whom it was communicated, and it must have been an oral agreement, and the defendant disputed this fact. The defendant relied on the notes which were written on the file. The indication was that, the plaintiff was prepared to pay the modification fee as it was send earlier. The plaintiff did not admit on affidavit that he had prepared to pay the modification fee. It was not disputed that the plaintiff never signed the addendum to the agreement.

There was no communication for the period of eight months between the defendant and the plaintiff was surprised by the letter. The plaintiff promised to respond to the letter within seven days, but failed to do so. The defendant wrote the letter to the plaintiff in terms of which he cancelled the sale of agreement in March 2007.

The plaintiff pointed out that he attempted meeting failed to resolve the issue between the parties. In dispute is whether ownership of the land has been validly transferred to the plaintiff, particularly, Erf 444 Greenstone Hill, Extension 7. It was found to be transferred, and the counterclaim of the defendant cannot succeed.

Whether the plaintiff has performed in full in terms of the sale agreement. It was argued that the full performance of the land registration has been complied within terms of Section 28 (2) of the Alienation of Land Act 69 of 1981. The proper understanding of the sale agreement is that there is no contract for the sale of a dwelling. The defendant agreed to construct a dwelling on an erf, in which the construction commences, would have been transferred to the plaintiff. Therefore, the defendant has never owned and would never have owned the dwelling, and could not have agreed to alienate the unbuilt dwelling.

The sale of agreement has two components; which is separate, one relates to the sale of land and the other for the construction of dwelling on the land. It is only in the contract in sale of land that the signature is needed. It was found that Section 28 (2) the Alienation of the Land Act 68 of 1981 has been complied with. It renders valid ab initio the act of alienation, the transfer of the land, and not the contract of sale, as stipulated in Section 2 (1) of the Act. The effect of Section 28 (2) is not to render the contract of sale valid abnitio, but only the transfer itself. There is no valid contract of sale of the land between the parties.

The plaintiff signed the sale agreement. Therefore, there is clear indication that he intended signing on the terms set out in the agreement. While he did not signed the contract, its conduct showed that it contracted to construct a standard Type E unit on the plaintiff's erf on the terms set out in the agreement.

The defendant was prepared to entertain the alterations to the standard unit and stipulated that if certain stipulations were not met, it reserved the right to build the standard unit in terms of the sale agreement. The parties did sign the alterations to the standard unit, and the plaintiff did confirm that he signed in terms of the initial quote signed by the plaintiff on 30 June 2005.

The defendant argued that he cancelled the agreement that and it was entitled before the commencement of the construction to demand the guarantee for the full amount for the building costs, and the plaintiff failed to provide same, despite demand being made. It is entitled to a bank guarantee for the cost of the erf and the

building costs. It needed a demand guarantee in order to waive its builder's lieu in favour of the registered bondholder since the financial institutions required it before they would make progress payments.

The plaintiff submitted that the agreement could not be interpreted in the manner contended by the defendant. The plaintiff was entitled to finance the construction of the dwelling by means of a mortgage bond and the building loan and there was no need for the defendant to demand guarantee for the building costs when the plaintiff, bound himself.

The interpretation contended by the defendant was untenable and cannot be accepted. Clause 3.3 was intended to deal with the method of payment for the purchase of the erf only.

It does not require a demand guarantee in all circumstances but only possibly where the building costs are to be self-financed by the purchaser. In this regard the plaintiff has provided acceptable security for the building costs in terms of the agreement and the defendant had no entitlement to insist on demand guarantee from the plaintiff. The purported cancellation of the agreement was accordingly invalid. The only plan which was in existence at the time of the agreement was the defendant's building plan for the type of E unit. The defendant provided the plaintiff with this plan and it formed part of the plaintiff's application for his bond and building loan.

The parties were ad idem on the obligation to build and if the parties failed to reach agreement on the alterations, the defendant was obliged to build a standard unit in terms of the agreement. The parties were also ad idem on what is to be built a standard type E. The issue of the costs would be costs in the cause. The following order is granted:

1. the defendant counter-claim is the dismissed
2. the plaintiff claim is dismissed
3. the defendant is ordered to do all things necessary in preparation for and to effect the construction of a standard type E unit on Erf 444 Greenside Hill ,

Extension 7 at a cost of R410. 540, 00 in terms of the agreement of sale conclude between the parties in September 2003

4. the defendant is ordered to pay the costs of the action and the application that preceded it.