REPUBLIC OF SOUTH AFRICA

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

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

....
DATE SIGNATURE

CASE NO: 22605/2018

In the matter between:

HELM CONSTRUCTION (PTY) LTD Appellant

and

NOORTMAN, GOTTLIEB ANTONIE 1st Respondent

ANNA ALFREDA NOORTMAN 2ND Respondent

JUDGMENT

MIA, J

[1] The applicant is Helm Construction (Pty) Ltd, a private company duly incorporated in terms of the company laws of South Africa. Its principal place of business is situated at R114 and Koala Roads, in Muldersdrift, Mogale City. The first respondent is Mr. Gottlieb Antonie Noortman, an adult male residing at […], P. Road, Wilgeheuwel. The second

respondent is Ms Anna Alfreda Noortman, the wife of the first respondent, cited herein as the parties are married in community of property. The respondents are the owners of a property which forms the subject of the dispute. The applicant sought an order that the provisional sale agreement entered into between the applicant and the first respondent on 25 January 2011 be declared void in terms of the Alienation of Land Act 68 of 1981(the Alienation of Land Act). Furthermore, that the respondent be directed to refund the R1 016 000 which the applicant paid as the part of purchase. The respondents opposed the application.

[2] It is necessary to consider the background facts which gave rise to the dispute before considering the relief requested. The applicant and first respondent entered into a provisional sale agreement (the agreement) which provided that the applicant would purchase the property situated at Plot 12 Paul Kruger Road, Wilgeheuwel (the property) from the respondent. The parties entered into a written provisional sale agreement that the applicant would purchase the property, and they would conclude a deed of sale agreement in the future. The applicant paid a deposit of R 200 000.00 to ensure the seller did not offer the property to any other buyers. The agreement made provision for further payments to be made when necessary. No other conditions were agreed upon regarding the price of the property or when a deed of sale would be concluded regarding the property.

[3] According to Municipal Notice 253 of 2009, the respondents applied for, and approval was granted to the respondents to establish a township on the remaining extent of Portion 192(a portion of portion 61) which was to be Wilgeheuwel Extension 36 in terms of section 103 of the Town Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986). Before the rezoning application, the property was zoned as agricultural land. Once the property was rezoned, there was a specification with regard to planned development. The Municipal Synchronicity Development Planning Unit advised that " *Based on the*

available information. It is advisable to realise the potential of the land for the purpose of medium to high-density residential development. The location of the land in relation to Paul Kruger Avenue implies that the upper end of the density scale could be achieved in this area (namely 60 du per hectare). Alternative uses which may be accommodated in terms of policy guidelines might prove to be less profitable" These conditions did not meet the requirements of the applicant who had in the interim erected 300 square metres of office space and 1200 metres of storage and related buildings on the property. The zoning of the property did not allow for such usage. Neither the applicant as lessee nor the respondents as owners applied for the rezoning when the buildings were erected. Once the approval for a township was approved, the respondents were informed that the property was zoned for residential usage and not commercial usage. A notice of infringement of use was sent to the applicant who was the occupier renting from the respondent at the time.

[4] The applicant paid a nominal rental as it had rented the property as vacant land from the respondent and paid various sums over a period of time. The rental commenced at R7500, it increased to R9000 and then R15 000. In terms of the agreement, the applicant paid rental and the extra amounts to secure the purchase of the property. The money paid amounted to a total of R2 016 000.00 paid toward the purchase price. The applicant held the view that the agreement was void *ab initio*. This was because the agreement did not comply with the requirements of the Alienation of Land Act; specifically, section 2(1)[1]. Having paid the respondent R2 016 000.00 towards the purchase price of the property in terms of the agreement, the applicant sought the return of the amount. The respondent returned the amount of R1 000 000.00 to the applicant and retained the amount of R 1 016 000.00, which it contended was for market-related rental. The

[1] s2(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

respondent now claimed the rental it charged was not market-related since the applicant was going to purchase the property. Since the sale was no longer proceeding, it sought to retain the R 1 016 000.00 for rental as it sought a market-related rental retrospectively for the property. This amount was in addition to the rental that had been paid as indicated above.

[5] In addition to the payment of the amount of R2 016 000.00, for the property, the applicant affected improvements estimated at approximately R3 275 000.00. In addition to the payment above and improvements, the applicant paid the respondent a monthly rental,which increased over time. The applicant only moved out of the premises when it received a notice from the municipality indicating the property was not zoned for the purpose for which it was being utilised. The notice stated that the occupier or owner was required to furnish plans for the improvements failing which legal steps would ensue. The applicant had laboured under the impression that the land was zoned for agricultural use. The applicant vacated the premises as it alleged the first respondent represented that the property had been rezoned for residential use with commercial rights use. The respondent had not informed the applicant that it had been rezoned for residential use without commercial rights.

[6] The issues for determination:

a. Was the agreement concluded between the parties a valid and enforceable sale of land?
b. If the agreement is not enforceable, are there any obligations or payments applicable or due by either party?
c. The third issue is whether the court should order the respondent to pay the applicant the amount of R1 016 000.?

[7] The Act provides in section 28(1) as follows:

"(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2 (1), or a contract which has been declared void in terms of the provisions of section 24 (1) (*c*), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and—

(*a*) the alienee may in addition recover from the alienator—

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for—

(*aa*) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(*bb*) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(*b*) the alienator may in addition recover from the alienee—

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable."

[8] In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* [2003] 3 All SA 1 (SCA) at paragraph [15] the Court stated:

*"*The same principle applies if the contract is void due to a statutory prohibition (*Wilken v Kohler* 1913 AD 135 at 149–50), in which case the *condictio indebiti* applies. There is no reason why contractual and enrichment remedies should be conflated. Caterna's case was one of

> a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: see De Wet and Van Wyk, *Kontraktereg en Handels-reg* 5ed vol 1 172 and the authorities there cited. The law provides a remedy for that case in the form of the *condictio ob causam finitam*, an offshoot of the *condictio sine causa specialis*. According to Lotz, 9 *LAWSA* (1st reissue) paragraph 88, the purpose of this remedy is the recovery of property transferred under a valid *causa* which subsequently fell away. See De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3ed 65–6, cf *Holtshausen v Minnaar* (1905) 10 HCG 50; *Hughes v Levy* 1907 TS 276 at 279; *Snyman v Pretoria Hypotheek Maatschappij* 1916 OPD 263 at 270–1; *Pucjlowski v Johnston's Executors,* op cit. It is sometimes suggested that the *condictio causa data causa non secuta* is the appropriate remedy. See paragraph 85 of *LAWSA* (*supra*). Indeed in *Cantiare San Rocco v Clyde Shipbuilding and Engineering Co* 1923 SC 105 (HL), a case of a contract frustrated by the outbreak of war which made performance legally impossible, the Judicial Committee after an exhaustive consideration found that that was the remedy."

[9] In the same matter *Kudu* at paragraph [21] the Court found:

> "A presumption of enrichment arises when money is paid or goods are delivered. A defendant then bears the onus to prove that he has not been enriched: De Vos (*supra*) 2ed 183 quoted with approval in *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 713G–H."

[10] In *Laco Parts (Pty) Ltd t/a ACA Clutch v Turners Shipping (Pty) Ltd* [2007] JOL 20715 (W), the Court per Borochowitz J considered what

remedy was available where a contract was void *ab initio* and was referred to certain authorities as follows:

> "Reliance for this submission was placed on the following statement by AJ Kerr in *The Principles of the Law of Contract*:8
>
> "What remedy is available if the contract based on a fundamental common mistake has been partly executed? In *Dickinson Motors (Pty) Limited v Oberholzer* 1952 (1) SA 443 (A) it was argued that the claim was a *condictio indebiti* but Schreiner JA, with whom Fagan JA concurred, took care not to restrict a present day court to the requirements of this remedy in Roman law. The court allowed repayment without any enquiry into the enrichment or otherwise of the defendant at the time of action. This accords with the express statement in *Lediker and Sache v Jordaan* (1898) 5 OR 107 at 111 that the proper remedy is restitution, which in turn accords with the award of restitution and restitutionary damages in *Van Der Westhuizen v James* (1898) 5 OR 90."

[11] Mr Jacobs, for the respondents, raised two points *in limine*. The first point *in limine* related to non- joinder of the respondents' spouse to whom he was married in community of property. However, the second respondent was subsequently joined in the proceedings. Thus the respondent no longer persisted with this point. On, the second point *in limine*, he argued was not really a point *in limine* as it should really form part of the main issue for determination. This point, he continued, related to the admission of the confirmatory affidavit filed in the replying affidavit. He raised points regarding its admissibility *in limine* nonetheless.

[12] Mr. Jacobs argued that the deponent to the affidavit as mentioned earlier, did not have personal knowledge of the matter and a certain, Mr. De Groot was part of the negotiations. Mr. De Groot deposed to the confirmatory affidavit. This confirmatory affidavit was attached to the replying affidavit and not the founding affidavit. It was trite, he argued,

that the applicant could not make out its case in the replying affidavit. As it applied to the present matter, the confirmatory affidavit should not be allowed as it was attached to the replying affidavit. A confirmatory affidavit, he argued, when the affidavit was available at the time of the deposition of the founding affidavit should not be permitted to be attached to the replying affidavit.

[13] He continued further on the point *in limine* that Mr. De Groot's affidavit at p 105 at paragraph 2, confirms what was related to him as true and correct and not the full contents of the affidavit. Further, the deponent who took the oath pronounced the oath and stated that the deponent was a female as the word "she" is reflected in the affidavit, and Mr. De Groot is a male. In addition to the above, the Commissioner of Oaths did not certify on which day he took the oath and attested the affidavit. Therefore the affidavit was defective.

[14] Mr. Gibson, appearing for the applicant, submitted in response that Mr. De Groot confirmed the affidavit in so far as it pertained to him. Mr. De Groot, and confirmed the affidavit of Mr. Gustav Nel. He argued further that the applicant had to make out a case for the cause of action in the founding affidavit, which the deponent Mr. Nel did. Mr. De Groot was merely filing a confirmatory affidavit. In any event, all Mr. De Groot confirmed were the facts relating to the provisional sale agreement. The parties concluded an agreement of sale which Mr. Jacobs argued was a *pactum* which is an agreement to agree to purchase the property at a later date. The agreement, however, did not provide for the purchase price. All of the negotiations led to the provisional sale agreement and not beyond. However, the page with which Mr. Jacobs took issue with had the police stamp with a date which was sufficient to indicate the date on which the affidavit was signed and commissioned. The policeman stamped the documents with a date stamp instead of writing in the date by hand. In the circumstances, he argued that the affidavit ought to be condoned. If the court did not find a reason to condone the non-compliance, the confirmatory affidavit was irrelevant.

He continued that the confirmatory affidavit was not essential for the applicant's case.

[15] In my view, the issue of the gender appeared to be typographical, and the date stamp indicated the date on which the affidavit was signed and commissioned. This explanation satisfied me concerning the points raised regarding the defects in the affidavit. The affidavit was thus condoned on this aspect. The remaining issue regarding the affidavit being attached to the reply is an issue for the merits to be dealt with later. The applicant does not appear to place much reliance on this affidavit attached to its reply in any event.

[16] As pointed out already, Mr. Gibson argued that the agreement providing for the sale of the property was void *ab initio.* The applicant paid for the property over a period of time and also paid a monthly rental. He submitted further that the rental valuation submitted by the respondent of R60 (sixty rands) per square meter of storage space and R95 (ninety five rands) per square metre of office space was based on a property with improvements. He pointed out that the court should not lose sight of the fact that these improvements had been effected by the applicant and maintained by the applicant. The applicant had received and rented a vacant piece of land on which it affected improvements given the agreement to purchase the property. The rental value of the property without the improvements effected by the applicant was estimated at approximately R2500 per hectare at present-day value. He continued furthermore that the rental applicable over the period that the applicant paid rental would have been much less. It would be opportunistic for the respondent to intend to gain from the applicant's improvements to the property by seeking retrospectively a market-related rental based on the applicant's improvements to the vacant land which the respondent rented to the applicant on a rental they had agreed upon. The rental valuation of the land should be considered without the improvements effected by the applicant.

[17] Mr. Gibson argued furthermore that the respondent had earned interest on the money paid toward the purchase price of the property. Interest had thus accrued on the amount of R 2 016 000.00 whilst it was in the respondent's account. In addition to benefitting from the interest accrued, the respondent also benefited from the improvement to the property valued at R3 275 00.00. He argued that the applicant was entitled to recover this interest from the respondent in terms of s 28(1)(a)(i) and (ii) of the Alienation of Land Act as well as the improvement to the property. The applicant, however, did not seek interest on the R 2 016 000.00 paid or reimbursement or compensation for the improvements valued at R 3 275 000.00. The applicant only sought the balance of the payment of R 1 016 000.00 paid for the property. In respect of the improvements, the applicant tendered to demolish such improvements despite the Alienation of Land Act not requiring it to do so. He submitted that as neither party had performed fully in terms of the agreement, the applicant was still entitled to recover the capital amounts paid in terms of a void agreement.[2] The respondent was not entitled to retain any amounts as he had not launched a counterclaim and had not set out any amounts which could be due for rental. It was not possible to ascertain what such charges could be or on what basis.

[18] Mr. Jacobs submitted that the respondents denied that they had misrepresented to the applicant that the zoning of the property was as it was alleged by the municipality or that they had benefitted by earning interest on the amount of R 2 016 000.00 paid. He continued furthermore that the respondent also denied that they were enriched by the improvements to the property or by the interest accrued on the R2 016 000.00 received to date. He submitted that on the respondent's version, the R2 016 000.00 received was received as a payment to ensure the property was not offered to any other purchaser but was not the full purchase price. He explained further that the respondent

[2] *Legator McKenna Inc and Another v Shea and Other* [2009] 2 All SA 45 (SCA)

contended that the applicant paid a nominal rent for the premises. He explained further that the difference between the market-related rental for the property and the nominal rental paid by the applicant should be set off against any amount found to be payable to the applicant by the respondents.

[19] Mr. Jacobs submitted furthermore that the applicant's contention that the agreement was void as it did not comply with section 2 of the Alienation of Land Act was incorrect. This was so; he submitted because the agreement which the parties entered into was not a deed of sale. Instead, he continued it was an agreement to conclude a sale agreement for the property in the future, namely a *pactum de contrahendo*. Such an agreement he argued, was simply an agreement that the respondents would sell the property to the applicant in the future upon payment of a sum of money. This, he argued, was a right of pre-emption which need not have been in written form to be valid. In this regard, he relied on *Kretzmann v Kretzmann* [2019] JOL 45702 (ECP) at paragraph [12]

> "[12] On this basis the majority in the Constitutional Court concluded that *Hirschowitz* was wrongly decided in this respect and that a right of pre-emption relating to land need not be in writing for it to be binding."
>
> [13] An option to purchase, however, is a different phenomenon. An option to purchase is comprised of two distinct parts: an offer to purchase; and an agreement to keep that offer open, usually for a fixed period (*Boyd v Nel* 1922 AD 414 at 421; *Hersch v Nel* 1948 (3) SA 686 (A) at 695 [also reported at [1948] 3 All SA 427 (A) – Ed]; *Brandt v Spies* 1960 (4) SA 14 (E) at 16F–17C [also reported at [1960] 4 All SA 50 (E) – Ed]; *Venter v Birchholtz* 1972 (1) SA 276 (A) at 283G–284B [also reported at [1972] 1 All SA 361 (A) – Ed]; *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633D [also reported at [1987] 3 All SA 171 (SWA) – Ed]; GB Bradfield at 66; and Glover at 125). The undertaking to keep the offer open (the option agreement) is of course a *pactum de contrahendo*. It is not an alienation as envisaged in the Act and is not required to be in writing

> (Glover at 66 and Van der Merwe *et al* at 70). The offer, however, which the *pactum* has undertaken to keep open, must be a firm offer which will result in a binding contract when it is accepted (*Efroiken v Simon* 1921 CPD 367 at 370; *Finestone v Hamburg* 1907 TS 629 at 632; *Venter v Birchholtz*; *Aris Enterprises* (*Finance*) (*Pty*) *Ltd v Waterberg Koelkamers* (*Pty*) *Ltd* 1977 (2) SA 425 (A)). By virtue of the provisions of section 2(1) of the Act an offer resulting in the sale of land can only bring about a binding agreement upon acceptance if it is in writing.

[20] Mr. Jacob's moreover disagreed with the applicant's reliance placed on section 6 of the Alienation of Land Act which applied to a contract wherein the land is sold in the deed of alienation against payment of an amount of money paid in more than two instalments over a period exceeding one year. He argued that the agreement was not provisional and was not invalid, void and unenforceable. He contended that the first respondent offered to sell the property to the applicant and submitted an offer to purchase the property to the applicant for consideration and acceptance. This offer to purchase was attached to the founding affidavit. The applicant refused to accept the offer to purchase.

[21] Furthermore, Mr. Jacobs argued that the applicant might have been correct that to the extent the parties purported the agreement to be a deed of sale or an agreement in terms of the Alienation of Land Act for the sale of the property it was void and of no force and effect. He continued furthermore, however, that on the applicant's version, the agreement was not an agreement in terms of the Alienation of Land Act. The parties, therefore, need not have complied with the Alienation of Land Act. He, accordingly, submitted that the agreement was, in fact, an agreement where the parties agreed that the property would be sold to the applicant in the future. The provisional agreement was therefore not void, invalid or unenforceable.

[22] In considering whether the agreement concluded between the parties was a valid and enforceable sale, there was only a provisional agreement to purchase the property. No price was determined, and no date was set to conclude the deed of sale. In *Mokone v Tassos Properties Ltd and Another* [2017] 1 BCLR 1216 (CC) 1 the Court stated at paragraph [50] –[51]

> "[50] This is how the Court got there:
>
> > "[A] right of pre-emption gives the pre-emptor no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is completed then, and not before, will he have a right to claim transfer of land, so that it is the agreement which must be in writing."44
>
> So, according to *Rogers* there is no need for compliance with the formalities at the time a right of pre-emption is granted.
>
> [51] Not according to Corbett JA. His view to the contrary is expressed in *Moolman*.45 According to him section 1(1) of the Formalities Act and section 2(1) of the Alienation of Land Act require signature by all parties to a right of pre-emption.46 He makes this point:
>
> > "In general a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves. . ."47

[23] Even if the agreement which the parties entered into were a *pactum de contrahendo* to agree on a sale at a later date, I have considered that that agreement was enforceable at the applicant's instance as suggested in *Mokone* above in paragraph [54] where the Court stated:

> "Now, let us have a close look at that reasoning. The fundament of the reasoning is that inexorably the holder of the right of pre-emption can become a purchaser in terms of the right only through means that fall foul of the formalities. It is this that gives rise to the anomaly to which the Court is referring. I do not see why - upon the

> occurrence of the contingencies that trigger an entitlement to exercise the right - the holder cannot exercise it in a manner that complies with the requisite formalities. The holder may simply make a signed written offer to purchase. If the grantor accepts the offer in writing under signature, a sale that meets the formalities will come into being. If she or he does not, the holder of the right may seek a declarator by a court that she or he is entitled to the exercise of the right and a mandamus requiring the grantor to accept the offer in writing. If the relief is warranted, it must be granted. That is nothing more than holding the grantor to the parties' agreement."

[24] The *pactum* which the respondent relies on is not an agreement concluded in terms of the Alienation of Land Act. The offer made by the respondent was not accepted. No agreement exists which meets the requirements of the Alienation of Land Act. In the present instance, the agreement even if it is valid, it is an agreement which is enforceable at the instance of the right holder. The terms of the agreement do not, however, meet the requirements for transferring the property in terms of the Alienation of Land Act. The applicant did not accept the offer to purchase which the respondents presented, and there is no enforceable agreement in terms of the Alienation of Land Act.

[25] Given the first question being decided above, any payments made by the applicant toward the purchase price may be recovered. The applicant paid monies toward the purchase price of a property. In terms of section 28 of the Alienation of Land Act and subject to subsection 2 the applicant may recover interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery. In this instance, I regard the extra amounts paid other than rentals as monies paid in terms of the agreement. The applicant is also entitled to a reasonable compensation for necessary expenditure he had incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon. Further, he is

entitled to compensation for any improvement, which enhanced the market value of the land and was effected by him on the land with the express or implied consent of the said owner or applicant. The applicant made improvements valued at R3275 000.00. He was thus entitled to compensation for such improvements. The applicant asserted that he does not wish to pursue such compensation for improvements. He only sought the balance of the money paid, namely R1016 000.00 and interest thereon. He is entitled to the same in terms of the Alienation of Land Act. Mr. Jacobs requested that the rentals due by the applicant be set off against any monies owing by the respondent. The respondent did not file any counterclaim, and there are no amounts to be set off against the amount of R 1 016 000.00. The respondent's claim that amounts be setoff can not be entertained as it had not lodged a counterclaim, and there was no way of knowing what amounts were to be setoff and on what basis.

COSTS

[26] I proceed to the costs issue. Both parties argued that costs should follow the cause. There are no unusual circumstances to divert from such the usual order.

[27] For the reasons given above, I make the following order :

ORDER

1. The Provisional Sale Agreement entered into between the applicant and the respondent on 25 January 2011 is void in terms of the Alienation of Land Act 68 of 1981.
2. The respondent is ordered to pay the applicant the sum of R 1016 000.00.
3. The respondent shall pay Interest on the amount mentioned in paragraph 2 above at the rate of 9% per annum a tempora more until the date of final payment.
4. The respondent shall pay the costs of the application.

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S C MIA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv C Gibson
Instructed by	:	Andrew Miller & Associates
On behalf of the respondent	:	Adv TL Jacobs
Instructed by	:	Craig Harvey Attorneys.
Date of hearing	:	10 May 2020
Date of judgment	:	21 September 2020