IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

1/4/2014 — DATE — SIGNATURE

CASE NO: 44493/13

In the matter between

2/4/2014

FOUR ARROWS INVESTMENT 68 (PTY) LTD — Applicant

and

ABIGAIL CONSTRUCTION CC — First Respondent

THE REGISTRAR OF DEEDS PRETORIA — Second Respondent

JUDGMENT

BAM J

1. The main dispute in this matter turns upon an agreement (*"the agreement"*) between the applicant and the first respondent in regards to immovable property, Portion 175 of the farm Tweefontein, extent 21.8 ha, situated in the Limpopo province, registered in the name of the first respondent.

2. The applicant, basing its application on the terms of the said agreement, applied for an order entitling applicant to take transfer of the property against payment in the amount of R3 585 972.43 to the first respondent. The first respondent opposed the application and in its counterclaim applied for an order declaring the said agreement null and void, and that the mortgage bond registered over the property be cancelled against payment in the the amount R4 047 000.00.

3. The salient facts are as follows. The first respondent purchased the property, Portion 175, in extent 21ha, for a purchase price of R8 094M. On 1 March 2011 the parties entered into the agreement, the terms, amongst others, provided that the applicant would assist the first respondent in financing the purchase price and that the Property would be registered in the name of the first respondent. The terms further provided that the parties intended to have 10.9ha of Portion 175, subdivided which subdivided portion the first respondent then sold to the applicant.

4. It is common cause that leave to subdivide the property was subsequently granted by the Minister of Land Use and Soil Management. It is further common cause that the applicant did assist the first respondent in financing the purchase price.

5. The applicant's case is founded on the provisions of clause 2.5 of the agreement which provides as follows;
   *"Should the sale agreement between the Seller (*First Respondent) *and the liquidator in respect of Portion 175 stand to be terminated or not to proceed for any reason pertaining to the inability on the part of the Seller to comply with the Seller's payment obligations towards the liquidator, then the Purchaser* (Applicant) *shall have the right to either:*
   2.5.1 . . .
   2.5.2 advance to the Seller all amounts payable by the Seller to the Liquidator in order that registration of transfer of Portion 175 may be passed into the name of the Seller and to simultaneously register transfer of Portion 175 from the name of the Seller into the name of the purchaser; in which event this Agreement mutatis mutandis shall constitute the required deed of alienation between the Seller of the purchaser for this purpose".

6. In this regard it is the applicant's contention that it had to advance an amount of R495 369 69 to the first respondent in order to enable the first respondent to pay the liquidators the required deposit. This fact, as submitted made by Mr Erasmus SC, appearing for the applicant with Mr Prinsloo, entitled the applicant to rely on the provisions of clause 2.5.2 to claim that the property be transferred into its name.

7. Mr da Silva SC, appearing with Mr Klopper for the respondent, argued that the applicant was not entitled to rely on that clause in view of the fact that the sale in fact proceeded.

8. I agree with the Mr da Silva's argument. The problem with the applicant's contention in the above regard starts with the factual situation that, although the first respondent may have experienced problems with the full payment to the liquidators, and for that reason needed the financial assistance of the applicant in terms of the agreement, the sale was indeed proceeded with and eventually concluded. The property was then registered in the name of the first respondent on 30 June 2011. The applicant was clearly satisfied with the developments. Only after expiration of a further approximately 2 years, the applicant decided to rely upon the provisions of clause 5.2. Accordingly I am of the opinion that the applicant's belated reliance on clause 5.2 is without merit.

9. However the main dispute between the parties turns upon the validity of the agreement. The first respondent's contention is that the agreement was null and void *ab initio*, based on the prohibition of contracts in respect of the subdivision of agricultural land in terms of the provisions of section 3(e)(i) of the Subdivision of Agricultural Land Act, No. 70 of 1970, that provides:
"no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale . . . unless the Minister has consented in writing."

10. The applicant contended that the agreement was subject to a suspensive condition and therefore not prohibited, alternatively, that the clauses not dealing with the subdivision of land should be separated from the offending clauses and held to be valid, binding on the parties and enforceable.

11. The issue regarding the validity of agreements pertaining to the sale of land subject to a suspensive condition that the consent of the Minister for the subdivision of land be obtained in cases where subdivision of land is prohibited by the Act as referred to above, was discussed and ruled upon in *Geue and Another v Van der Lith and Another* 2004(3) SA 335. In this case it was pointed out that the definition of "sale" in the Subdivision of Land Amendment Act, No. 18 of 1981, includes a sale subject to a suspensive condition. After considering the relevant principles in regards to the issue at hand, the Court arrived at the conclusion that an agreement for the sale of land subject to a suspensive condition as in this case, is null and void. The said case is the *locus classicus* on the issue.

12. In my view the clauses of the agreement cannot be separated as suggested by Mr Erasmus, in that the whole of the agreement was void *ab initio*. It therefore follows that the applicant cannot rely on any clause of the agreement.

13. Regarding the averment in the first respondent's answering affidavit, I am not convinced that Ms Maphanzela, representing the first respondent, was not *au fait* with the contents of the agreement, although at the time she signed the agreement, she may not have been aware of the fact that the agreement was in fact null and void. In paragraph 51 of the affidavit Ms Maphanzela stated that in August 2011 she, albeit on advice of the applicant's attorneys, approached the land surveyors to enquire about consent by the Minister for the sub division of the land. In paragraph 52 Ms Maphanzela stated that upon realizing that the agreement was null and void she was prepared to enter into a new contract with the applicant. She did however not state when this happened.

14. At first blush it appeared that the parties were in dispute in respect of the total amount paid by the applicant. However in paragraph 24.2.3 of the first respondent's opposing affidavit it is admitted that the applicant in fact contributed a total amount of R4 757 000 00 and the first respondent R3 592 093 00. In respect of the latter sum, the applicant's calculation, at p16, amounts to R3 585 972 45. In the circumstances the difference between the two figures is insignificant. The first respondent's calculation of

the tendered R4 047 000 00 plus R510 00 00 (R710 00 00 – R200 000 00) therefore seems substantiated.

15. Accordingly it is clear that the applicant's application cannot succeed. The respondent's counterclaim, on the other hand, should be granted.

ORDER

1. The applicant's application is dismissed with costs.

2. The first respondent's counterclaim succeeds as follows:

   (i) The agreement signed on behalf of the Applicant and First Respondent, dated 1 March 2011 is declared null and void and unenforceable;

   (ii) The Applicant is ordered, not later than 20 days from the date of this order, to take all reasonable steps required for the Second Respondent to cancel Mortgage Bond B27312/2011 registered against the property known as Portion 175 of the farm Tweefontein 915, Registration Division L.S. Limpopo Province, in the extent of 21.8000 hectares, held by the First Respondent in terms of Deed of Transfer T42174/2011, against payment to the Applicant of the amount of R4 047 000-00;

   (iii) That in the event of the Applicant failing or refusing to take all reasonable steps required for the Second Respondent to cancel Mortgage Bond B27312/2011 registered against the property mentioned in (ii) above, held by the First Respondent in terms of Deed of Transfer T42174/2011, against payment to the Applicant of the amount of R4 047 000-00, within the 20 days stated in (ii) above, the Sheriff of the Court for the Limpopo Province is empowered to sign all documents required for the Second Respondent to cancel the mortgage bond mentioned in (ii) above;

   (iv) The applicant is ordered to pay to the respondent an additional amount of R510 000.00, plus interest a tempore morae, at the present mora interest rate;

(v) The applicant is directed to pay the costs of the counter application, including the costs of two counsel; as well as the costs occasioned by paragraphs (ii) or (iii), whichever is applicable.

A J BAM

JUDGE OF THE HIGH COURT 31 March 2014