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.

DATE **SIGNATURE**

CASE NO: 16760/2013
DATE:3/4/2014

IN THE MATTER BETWEEN:

NICOLAAS ALBERTS BONTHUYS	**FIRST APPLICANT**
MARYNA JOHANNA BONTHUYS	**SECOND APPLICANT**
AND	
DANNY POTGIETER	**FIRST RESPONDENT**
EMILE COLLINS	**SECOND RESPONDENT**
HESTER M. HALL	**THIRD RESPONDENT**
VARSITY RENTAL BK	**FOURTH RESPONDENT**
FREDERIK CHRISTOFFEL GROENEWALD DREYER	**FIFTH RESPONDENT**
DIE REGISTRATEUR VAN AKTES	**SIXTH RESPONDENT**
TLOKWE MUNISIPALITEIT	**SEVENTH RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. In this application the following relief is sought by the applicants:
   a) A declaratory order that the third respondent has no right in law to lease the property known as Unit 1 in the Sectional Title Scheme Abacus 628/2007 situated at […….] and held under Title Deed ST [……] (hereinafter referred to as 'the unit') to the first and second respondents or at all;
   b) An order evicting the first and second respondents from the unit;
   c) Costs of the application to be borne by any of the respondents opposing the application.

2. The third respondent opposes the application and the relief sought.

3. **THE BACKGROUND AND THE RELEVANT FACTS**

3.1 The applicants and the fifth respondent concluded a written agreement of sale on the 26th of October 2012 in terms of which the applicants purchased the property described as Unit 1 in the Sectional Title Scheme Abacus ('the unit') to which reference has already been made. Transfer of the unit was effected in the name of the applicants on the 29th of November 2012 by the sixth respondent.

3.2 After the registration of transfer the applicants discovered that the unit was being occupied by the first and second respondents in accordance with a lease agreement that the latter concluded with the third respondent.

3.3 The stance of the applicants is that the occupation of the unit by the first and second respondents is unlawful and they accordingly seek the relief as set out hereinabove as against those respondents as well as the declaratory relief in respect of the third respondent.

3.4 It warrants mention that the intention of the applicants when purchasing the unit was to provide accommodation for their daughter, a university student. When they were unable to obtain occupation of the unit, they

were offered occupation of Unit 6, Abacus, which they accepted as an interim measure pending the finalisation of this application.

4. The factual matrix however becomes more complex and intricate when one has regard to the stance of the third respondent in her opposition to the application which essentially is that:

4.1 During 2006 she entered into a written agreement to purchase a unit known as unit 5 in the Abacus Sectional Title Scheme. The deed of sale described the unit as Unit 5 and in addition its location was identified on the developer's plan as Unit 5. There was consensus between the developer and herself both with regard to the description of the unit, as well as its physical location.

4.2 Transfer of unit 5 was effected to her on the 27th of June 2006 in terms of Title Deed ST […….]. It appears however that when the Surveyor General prepared the Sectional Title Plan, the numbering of the various units was unilaterally and erroneously changed with the result that the physical location of the various units as depicted on the Surveyor General's plan differed from those on the developer's plan. It is not in dispute that the developer's plan served as the basis for the identification of the unit sold to the third respondent and to the majority of the purchasers of units who purchased at the time.

4.3 If one has regard to the Surveyor General's plan then it is clear that what transpired is that while the location of Unit 5 on the developer's plan was at the far end of the building marked as '5', unit 5 was now in terms of the Surveyor General's plan, at the front end of the building. This is evident from the copies of the developer's plan and the Surveyor General's plan annexed hereto.

4.4 It is not clear how this error occurred but it is hardly in dispute that there was a changing of the unit numbers on the Surveyor General's plan which was not in accordance with the actual location of the units the third respondent as well as other purchasers bought.

4.5 The effect of this is that while the third respondent bought and obtained transfer of unit 5, in truth and reality she was in occupation of unit 1 and exercised the rights of ownership in respect of unit 1, if regard is had to the plan of the Surveyor General.

4.6 It appears that neither the third respondent nor any of the other original purchasers were aware of this inconsistency between what they believed they had purchased and what was depicted on the Surveyor General's plan. From the year 2006 or thereabouts all of them continued to occupy and / or exercise their rights of ownership of the units as located on the developer's plan.

4.7 It also appears that all of the owners used the numbering of the units as per the developer's plan in physically identifying their units in that door numbers on the units corresponded with those on the developer's plan. In this regard the third respondent alleges that her unit was known as unit 5 and the other units were numbered on the same basis. She has attached a photograph of the front door of her unit which reflects the number '5' on it.

4.8 In the context of this application she contends accordingly that unit 1 as per the developer's plan appears as unit 6 on the Surveyor General's plan.

4.9 It appears that matters proceeded without incident with all and sundry being blissfully unaware of the conundrum created by the Surveyor General's plan, until the owner of the unit described as unit 1 (reflected as unit 6 on the developers 's plan) was sequestrated .

4.10 The fifth respondent purchased the unit and transfer was accordingly passed to him of Unit 1 which he in turn sold to the applicants.

4.11 At that stage, when the problem was discovered, the applicant states that the developer and attorney involved undertook to remedy the situation by way of a correcting deed. In addition, all of the owners, with the exception

of the fifth respondent, agreed to continue to remain in occupation of the units they occupied. What emerges from the papers is that none of the original owners regarded the problem as significant but rather as an error that could be remedied so as to ensure that the Surveyor General's plan was consistent with the location of the properties they bought and in respect of which they exercised ownership rights.

4.12 The process of correcting the title deeds and diagrams has not been completed and it appears that it will only be possible if all the owners agree thereto. In addition it may not be the appropriate route to follow if regard is had to the provisions of the Sectional Titles Act which suggests that in instances such as these, an order of Court may be required to cancel the Sectional Title Plan.

4.13 Accordingly and on the basis of the above the stance of the third respondent is that while she concedes that the applicants are the registered owners of the unit described as unit 1 Abacus, that unit in her view, is not the unit she owns and occupies even though the plan of the Surveyor General depicts it as such. Her stance is that her rights of ownership in the unit she purchased by way of description and location cannot change, be diluted or rendered irrelevant simply on account of an error made on the Sectional Title Plan by the Surveyor General.

4.14 The applicants on the other hand contend that the history of what transpired at Abacus is not relevant to these proceedings and that they are the registered owners of Unit 1 which in their view can only be unit 1 as depicted on the Surveyor General's plan and accordingly they are entitled to the relief they seek.

POINTS *IN LIMINE*

5. The third respondent has in addition to its opposition on the merits also raised various points *in limine* and they include:

a) That there is a dispute of fact regarding ownership which dispute the applicants should have foreseen; and

b) That there has been non-joinder of the other owners of units in Abacus as the relief the applicants seek would have a direct and substantial impact on the interests and the rights of other owners in general and in particular on the owner of Unit 6 as per the Surveyor General's plan (Unit 1 on the developer's plan).

- **<u>THE ISSUE OF NON-JOINDER</u>**

6. The unique and somewhat unusual circumstances that form the factual basis of the dispute between the parties is not confined to the parties themselves, even though in a narrow sense the relief sought is essentially relief against the third respondent and not any other owners of units in Abacus.

7. It is trite that a third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such order cannot be carried out without prejudicing that party, is a necessary party and should be joined in the proceedings.

   (See Herbstein and Van Winsen, The Civil Practise of the High Courts of South Africa (5th Edition) at page 215).

8. In ***AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR*** **1949 (3) ALL SA 436 (A)**, the Court employed two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the third party would have *locus standi* to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.

(See also ***TRANSVAAL AGRICULTURAL UNION v MINISTER OF AGRICULTURE AND LAND AFFAIRS AND OTHERS*** **[2005] JOL 14177 (SCA)**).

9. The first test has been described as joinder on the basis of necessity as the Court, once a direct and substantial interest has been demonstrated, has no discretion and must order joinder. In the second instance the test has been described as joinder on the basis of convenience in which the Court has a discretion to order joinder.

(See ***HAROUN v GARLICK*** **2007 (2) All SA 627 (C)** at para 14).

10. The reference to a direct and substantial interest relates both to the subject matter of the litigation as well as interest in the outcome thereof. Applying this test to the facts on hand it is clear that while the relief sought is as against the first to the third respondents only, the issue in dispute is the error in the location of the unit, regard being had to the difference in location on the developer's plan as compared to the plan of the Surveyor General. This is the crux of the dispute between the parties and has relevance for all of the owners of units in Abacus in that their rights as owners will be directly impacted upon by any order this Court is called upon to make.

11. Simply by way of illustration, if the Court was inclined to grant the applicants the relief they seek, the third respondent would have to vacate unit 1 and would in turn have to lay claim to unit 5 as per the Surveyor General's plan which is currently being occupied by one Ingrid Henning, who in turn would have to lay claim to unit 9 and so the chain and cascading effect will continue and ultimately impact on all of the owners. This would have a domino effect and thus the order this Court is called upon to make will in my view have a direct and substantial interest for the other owners of units in Abacus. In this regard, any order which the court may make will of necessity be founded on the acceptance or otherwise of the Surveyor General's plan. The Surveyor General's plan as compared to the developers plan is the common thread that runs through the claims ownership of all the owners and on that basis the subject matter of the litigation as well as the

outcome thereof will constitute the basis for all the other owners having a direct and substantial interest.

12. In addition and even if I am wrong on whether the requirements of a direct and substantial interest have been satisfied, my view for largely the same reasons outlined above, is that it would be convenient to join the other owners and I would have exercised my discretion to this effect. In this regard it is not inconceivable that, in the absence of joinder and in the event that this court grants the relief the applicants seek, the third respondent brings proceedings for the eviction of Ms Henning, who occupies unit 5. In such an action the court may well refuse such relief and take a view contrary to the view that the Surveyor General's plan is determinative of the matter. Such an order would in substance be irreconcilable with the order this court may make to the extent that it may lead to differing interpretations of the same legal dispute with widely differing and irreconcilable outcomes. In the example postulated above, the third respondent would essentially be left without any relief under the same circumstances as the applicants were found to be entitled to relief.

13. In this regard even though the applicants contend that they were unaware of the situation at Abacus at the time of the sale and transfer, they certainly became aware of it before the launch of these proceedings. Their stance, that it was of no relevance to them, is, with respect, incorrect. Once they became aware of what had transpired as intimated to them by Mr Hein du Plessis after the latter was confronted, they would have been alive to the cascading effect of the action they instituted and were under an obligation to join the other owners of units in Abacus. The failure to join has in my view rendered the point *in limine* sustainable and the relief sought impermissible.

THE MERITS

14. Assuming that I may have erred in coming to the conclusion that I have on the point *in limine*, I have also considered the merits of the dispute.

15. From the summary of the facts underpinning the dispute it would appear that the central and overriding consideration relates to ownership and in particular the content of that ownership, which is disputed, not in its technical sense, but in its substantial sense.

16. The right to property, given the power dimensions in society as well as the history of both its acquisition and its disposal, has constantly been the terrain of almost universal contestation. In ***EX PARTE CHAIRPERSON OF THE CONSTITUTIONAL ASSEMBLY: IN RE CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996,*** **1996 (4) SA 744 (CC)** at paragraph 72, the Constitutional Court concluded that 'no universally recognised formulation of the right to property exists' and the author Van Der Walt in Constitutional Property Law (3rd edition) concludes that the negative formulation in section 25 of the Constitution was widely accepted as an appropriate formulation that provides implicit protection for the holding of property.

    Section 25 of the Constitution provides that:

    > 'No one may be deprived of property except in terms of law of general application…'

17. Accordingly and at the very least, the protection of property rights has been accorded constitutional recognition, even in its negative formulation.

18. In the context of this application it becomes necessary and inevitable to consider what has emerged as the competing rights of the applicants and the third respondent to the property known as unit 1 in the title deed of the applicants, but erroneously located on the Sectional Title Plan which forms part of the Title Deed.

THE HISTORY AND THE MANNER OF ACQUISITION OF THE PROPERTY / PROPERTIES IN QUESTION

19. The applicants allege that they bought unit 1 after it was pointed out to them by an agent for the fifth respondent, one Hein du Plessis. It is not in dispute that they

never inspected the inside of the property in question but inspected other units which would have been similar in size and layout to the unit they intended to purchase.

20. It is not clear from the papers precisely which unit was pointed out to them. The stance of the third respondent is that all the units in Abacus are numbered in accordance with the numbers that originally appeared on the developer's plan and indeed that the unit she occupies is numbered as Unit 5. She attaches a photograph of the front door of the unit she occupies which clearly depicts the number 5 on the door. She also states that the unit in the Abacus complex which is numbered '1' on its door is in fact the unit depicted as unit 6 on the Surveyor General's plan and on the basis of the above contends that if the applicants were pointed out the location of unit 1 it could not have been the unit she occupies but in fact unit 6, which was and still is marked as unit 1.

21. While the applicants dispute this, it is not clear on what basis they do so as the number '5' is clearly visible from the photograph the third respondent relies on and neither the testimony of the applicants nor that of Mr du Plessis provides any insight into the actual location of the unit that was pointed out.

22. On the other hand the deed of sale which the applicants signed has as an attachment, the Sectional Title plan which depicts unit 1 as the property at the far end of the property – the same property that the third respondent has leased to the first and second respondents.

23. The applicants also point out that there has been a change of ownership in respect of unit 1 which has been transferred on three occasions without the sectional title plan being rectified. In this regard it is of course significant to note that if indeed the unit was transferred on three occasions and the rights of ownership and occupation which the third respondent claims in respect of the unit were never interfered with on those occasions, this lends itself strongly to the conclusion that while unit 1 changed hands, there were no physical consequences for the third respondent's occupation.

24. This must in my view strongly suggest that even though the unit described as unit 1 was being transferred on those various occasions, the physical location of that unit was not unit 1 as depicted on the Surveyor General's plan but some other unit. It simply could not have been unit 1 as located on the Surveyor General's plan because if it was, then it is highly improbable that any of those purchasers would not have sought at least some form of physical control over the unit which would then have brought them into conflict with the third respondent who was exercising rights of ownership during this period. The fact that no such conflict or contestation arose must strongly suggest that while unit 1 may have changed hands as unit 1 described in the Title Deed and the Surveyor General's plans, in reality what physically changed hands must have been another unit, and more likely unit 6 (which was unit 1 on the developer's plan).

25. Arising out of this of course is what are the consequences of the applicants being the registered owners of unit 1 with its location as depicted on the Sectional Title Plan? Have they as a result acquired rights in and to the unit which trump the rights of the third respondent? It is accordingly necessary to examine the third respondent's acquisition of the unit that she claims ownership of.

26. The third respondent and the developer, Mr Dawid Maree, both confirm that what was sold by the developer and purchased by the third respondent was unit 5 in Abacus which was described by both description and location in the deed of sale. Clearly, Unit 5 located on the developer's plan at the far end of the property was what the seller intended to sell and what the purchaser intended to purchase. The author Christie in the Law of Contract in South Africa (6th edition), makes the observation that if at the time of sale the block (sectional title units) have not been built, the unit may be identified by reference to a plan. This is precisely what occurred here. There was consensus on this aspect and all things being equal the process of registration in the Deeds Office was meant to give effect to the agreement between the parties.

27. In this regard it warrants mention that the deed of transfer and accompanying documents merely give effect to the deed of sale which continues to constitute

the primary and only source with regard to the terms and conditions of the agreement.

28. After transfer was effected the third respondent acted consistently with what she believed were the rights of ownership she acquired following the deed of sale and subsequent transfer. She exercised all the rights of owner in relation to the unit and she did this without her right to do so being contested. In her view, and it is a perfectly reasonable view in my consideration, she received what she purchased and even when she subsequently discovered the error on the Surveyor General's plan, it did not change her stance with regard to her claim to ownership.

29. The applicants, relying on the deed of sale entered into between the third respondent and the developer, have argued that the third respondent must have contemplated that the boundaries of the property she bought would be those shown on the final approved plan and in addition accepted that the property description on the sectional plan may differ from the description in the agreement. The relevant provision in the deed of sale provide as follows:

> *'9.1 The purchaser acknowledges that the sectional plan has not yet been approved and hereby agrees that the exact boundaries forming part of the property shall be those shown on the final approved sectional plan. The seller warrants that subject to 9.3 below the boundaries will be substantially in accordance with those set out in the annexures hereto, and that the undivided share of the common property allocated to the section shall be in accordance with the participation quota which is ultimately determined in terms of the Act upon approval and registration of the sectional plan.*
>
> *9.3 If the boundaries or the area of the section or any other section or building differs in major respects from the boundaries or…as shown on the layout plan annexed hereto, or if the number of the section being altered or the undivided share in the common property attaching to the property is altered; or if the exclusive use area (if applicable) adjoining the section is altered, the purchaser undertakes to accept transfer of*

the property as defined and renumbered in the sectional plan approved by the municipality and the Conveyer-General

9.4 *The Purchaser acknowledges that the property description on the sectional plan may differ from the description in the agreement.'*

30. When one has regard to those provisions they provide in the main for a changed description and possibly changed boundaries but even then the seller warrants that the boundaries 'will be substantially in accordance with those set out in the annexures hereto'. It is common cause that included amongst those annexures are the developer's plan which depicts the location of Unit 5 and to which reference has already been made.

31. None of these provisions lay the basis for the submission that the third respondent was obliged to accept transfer of a property different in substance from the one she purchased. It is simply untenable to suggest that those provisions can justify the situation where a party who purchases and agrees on both description and location of the property purchased, must be content with another property different in location because of an error on the part of a third party – in this case the Surveyor General.

32. This would in my view run counter to the principle of *pacta sunt servanta* and the doctrine of contractual freedom which is firmly embedded in our law. Rather than promoting certainty and predictability it would result in uncertainty and would in any event give one contracting party the right to unilaterally change the material terms of a contract, namely the subject matter of the agreement. The interpretation that the applicants seek to place on Clause 9 of the Deed of Sale is simply unsustainable in my view.

33. It is trite that the principle of *'pacta sunt servanda'* constitutes an important feature of the law of contract. It provides for certainty and predictability in a rapidly changing world and our Courts have consistently recognised its pivotal role in contract law.

(See ***BARKHUIZEN v NAPIER*** **2007 (5) SA 323 (CC)**)

34. Accordingly and in the absence of public policy considerations, what the parties have agreed on must be given effect to and the role of regulatory and other structures such as the sixth respondent is precisely that. Of course it may prescribe procedures and form to be followed but it cannot, either by design or by error or omission, remake the parties' contract or give effect to something other than what the parties have agreed upon.

35. It was argued that to the extent that the transfer of unit 1 (both as described and located) to the applicants has not been challenged, it continues to remain valid. In ***KNYSNA HOTEL CC v COETZEE*** **N. O. 1998 (2) SA 743 (SCA)**, the Supreme Court of Appeal characterised our system of registration as a negative one where it could not simply be said that the person in whose name the property was registered was necessarily the owner of the property. The Court took the view that somebody else for example could have become the owner of the property without this being reflected in the Deeds Office. The Court however also pointed out that although the transfer could be challenged it remained valid until set aside by an order of Court.

36. In expressing the same sentiments, the learned author Delport in South African Property Practise and the Law takes the view that in the normal course of events the owner of immovable property is the person in whose name the property is registered. He points out that the definition of owner in the Deeds Registries Act 47 of 1937 is relevant for the purposes of the Deeds Registries Act only and does not change the common law meaning of owner of immovable property.

37. From this must follow the conclusion that notwithstanding the error in the Surveyor General's Sectional Title Plan, the third respondent was and continues to be the registered owner of unit 5 Abacus, albeit that such unit was depicted as unit 1 on the Surveyor General's plan. To suggest, in the light of what is set out above and in particular the history of this development and what was purchased, acquired and regarded as their property by the respective owners, that the third respondent was the owner of unit 5 as it is located on the Surveyor General's

plan, would undermine the rights and interests of all those owners who bought units in the period 2006/7 as well as run contrary to the principles of contract and the sanctity of contracts that have been alluded to.

38. The issue of what has been described as the non-challenge to the applicants' title has been raised. If one has regard to the chronology of the matter then it appears that after the error / discrepancy arose, a meeting of the owners of Abacus was convened on the 6th of September 2012. At this meeting it was recorded that most of the owners were in occupation of units they had chosen and purchased but that the description of the units they were occupying differed from that which appeared in their title deeds. There was a suggestion that the Sectional Title Plan be re-registered to deal with the error that occurred but that the consent of 100% of the owners was required. At this meeting Mr Du Plessis, representing the fifth respondent, intimated that the fifth respondent was against re-registration but that he was willing to re-consider his stance upon proof that the units that were originally purchased were incorrectly registered. It is not clear what came out of this.

39. Reverting to the question of the challenge to the applicants' title deed, it appears that what had become apparent to at least the majority of the owners by September 2012 was the need to rectify matters as opposed to challenging the respective title each held, and the absence of a formal challenge to the title deed of the applicants must be viewed and considered in context and my view in this regard is that the steps proposed by the owners appeared reasonable and the stance of the fifth respondent in requiring some proof of the error appeared reasonable as well. It is not clear what happened beyond this meeting in providing such proof to the fifth respondent, which proof was clearly available if one has regard to the papers in these proceedings. Under such circumstances a formal challenge to the fifth respondent's title would have been premature.

40. On the same basis I am not of the view that the remedy of the third respondent and other owners lies in challenging the title they each hold as well as the title of the applicants. Given the circumstances under which the error in the Surveyor General's plan occurred, it can hardly be said to be impractical or unreasonable

for them to have attempted to resolve the matter in a non-adversarial manner. I still hold the view that that is possible.

41. I am also concerned that when Mr du Plessis concluded the sale of unit 1 with the applicants, he was well aware of the problems at Abacus and the attempts to resolve them. He was, after all, present at the meeting of the 6th of September 2012 when the matter was discussed and where he represented the fifth respondent. It is inexplicable that he failed to inform the applicants of the true state of affairs at Abacus.

42. In the circumstances, acceding to granting the relief sought by the applicants would constitute taking a very narrow, formal and technical approach to a matter of some complexity. It would ignore and undermine the principles of ownership which have, over time, developed in our law.

43. Accordingly and on what is before me, it may be said that the applicants are the registered owners of unit 1 Abacus located as such on the Sectional Title Plan. I am less certain as to whether it could be equally said that they are the true owners of the unit as described and located on the Surveyor General's plan given the history of the third respondent's acquisition and exercise of the rights of ownership in respect of the same unit as located on the developer's plan.

44. On the contrary it must be eminently arguable that notwithstanding the error in location on the Surveyor General's plan, the uncontroverted evidence in these proceedings compellingly demonstrates that the third respondent is the owner of Unit 5 Abacus which unit is located in the area erroneously depicted as unit 1 (as opposed to unit 5) on the Sectional Title Plan.

45. For these reasons I would also have dismissed the application on its merits.

ORDER

43. In the circumstances I make the following order:

The application is dismissed with costs.

N KOLLAPEN
JUDGE OF THE HIGH COURT (GAUTENG DIVISION, PRETORIA)

16760/2013

HEARD ON: 18 MARCH 2014

FOR THE APPLICANTS: ADV G. F. HEYNS

INSTRUCTED BY: SEYMOUR DU TOIT BASSON INGELYF (ref: M Day/MD3477/ek)

FOR THE THIRD RESPONDENT: ADVOCATE Z. F. KRIEL

INSTRUCTED BY: LE ROUX & DU PLESSIS INC (ref: P9558/du Plessis/PEL)