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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

21/11/16.
Case Number: 47615/2014

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
<u>2.11.2016</u>	
DATE	SIGNATURE

In the matter between:

BONDEV MIDRAND (PTY)LTD

Applicant

and

MULAMBILU PHALANNDWA

First Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Second Respondent

NQABA GUARANTEES SPV

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant, in essence, prays for an order directing the first respondent to take all necessary steps to re-transfer Erf [....] M. E. E. [....], Township, Registration Division J. R., Gauteng ("the property") to the applicant.

FACTS

- [2] The applicant conducts business as a property developer and developed the Estate in which the property is situated. On 27 June 2011 the applicant, in terms of a written agreement, sold the property to the first respondent.

- [3] Clause 10 of the agreement reads as follows:

"10. BUILDING PERIOD:

10.1 The PURCHASER undertakes to erect buildings on the PROPERTY to the reasonable satisfaction of the SELLER within EIGHTEEN (18) months of date of proclamation, failing which the SELLER shall be entitled (but not obliged) to claim that the PROPERTY be retransferred to the SELLER at the cost of PURCHASER against repayment of the original purchase price to the PURCHASER, interest free.

10.2 The PURCHASER shall not within the said period sell or transfer the property without the SELLER'S written consent."

- [4] The aforesaid condition is contained in the Title Deed of the property, to wit:

"B. SUBJECT to the following condition imposed and enforceable by BONDEV MIDRAND PROPRIETY LIMITED (Registration Number: 2000102760007), namely:

The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (EIGHTEEN) months from 13 May 2008, failing which the Transferor will be entitled, but not obliged to claim that the property is transferred to the Transferor at the cost of the

Transferee against payment by the Transferor of the original purchase price, interest free. The Transferee shall not within the said period sell or transfer the property without the Transferor's written consent. This period can be extended at the discretion of the Developer."

[5] In its founding affidavit, the applicant refers to a so-called extension agreement that was entered into subsequent to the sale agreement. The paragraph reads as follows:

"16. In addition to the aforementioned agreements (sic) the First Respondent entered into a further agreement with the Applicant to extend the building period for the erection of a property for 12 (twelve) months from the 16th of September 2011 ("the extension agreement")."

[6] The agreement is attached to the papers and was, *ex facie* the document, signed by the parties at Pretoria on 16 September 2011.

[7] The transfer of the property was registered by the second respondent on 12 March 2015. In compliance with condition B of the Title Deed referred to *supra*, the applicant lodged the following document with the second respondent:

"

CONSENT

I, the undersigned

PHILLIPUS JACOBUS LODEWIKUS STRYDOM

Duly authorised thereto by a resolution by

BONDEV MIDRAND PROPRIETARY LIMITED

Registration number: 20001027600107

Hereby confirms that an extension of building period has been granted for an unlimited period in the company's discretion and hereby consents to the transfer of

Erf [...], M. E. E. [...] Township, Registration Division J.R, Province Gauteng

MEASURING: 1005 (ONE THOUSAND AND FIVE) square meters.

FROM: BONDEV MIDRANO PROPRIETARY LIMITED
Registration Number: 20001027600107

TO: MULAMBILU PHALANDWA
Identity Number: [8....]
Unmarried

Clause B in the title deed has not been complied with and stands as a condition."

[8] The applicant only refers in passing to the document in its founding affidavit, to wit:

"15 The Applicant consented to the transfer of the property on the 27th of October 2010 (sic) on condition that the above title condition must be complied with. The consent is attached to the title deed. "

[9] The applicant, relying on the extension agreement, contends that it is entitled to the relief claimed. It is clear from the extension agreement that the period of 12 months expired on 17 September 2012.

[10] The first respondent does not agree. The first respondent contends that the period contained in the consent document is applicable and consequently, the building period has not expired. The first respondent dealt as follows with the events that led to the contents of the consent document:

- "12 In September 2011, before my bond finance application was approved, I signed an extension of building period document. A copy of the extension is attached to the founding affidavit as annexure 85.
13. The extension document is, on the face of it, also contradictory and vague. The obvious contradiction is, inter alia, that it records that I acknowledge that the original building period will expire on 31 March 2010. However at the time of signing the document, in September 2011, the building period end date of 31 March 2010 had already expired.
14. The third respondent was not satisfied with the extension document and its apparent vagueness and contradictions with building periods and indicated that it would not grant the necessary bond approval if there were uncertainties on the building periods.
15. The parties then agreed that the building period would be extended for an unlimited period and that the applicant would sign a consent document to this effect.
16. On 27 October 2011, the applicant's conveyancer signed a consent document. The consent document has been included and attached to the Deed of Transfer."

[11] In its replying affidavit, the applicant vehemently denies these averments. The relevant portion of the replying affidavit reads as follows:

"AD PARAGRAPH 15

9.1.....

9.2 The Applicant is not in possession of such a document and the First Respondent has not produced such a document. There are more than 4, 000 houses in the Midstream development and the Applicant granted no open extension to any owner.

9.3.....

9.4....."

[12] This answer obviously flies in the face of the clear wording of the consent document.

[13] Having realised this apparent difficulty, the applicant then alleges that it only accepted the first respondent's "offer" contained in the extension agreement subsequent to the transfer being registered in March 2012.

[14] Needless to say this averment, which appears for the first time in the replying affidavit, does not correspond with the contents of the extension agreement.

DISCUSSION

[15] In view of the aforesaid facts, it is necessary to determine whether the applicant made out a case for the relief claimed.

[16] Mr Stone, counsel for the applicant, urged me at the commencement of the hearing to refer certain issues raised by the first respondent in his answering affidavit to oral evidence. According to him issues raised in the answering affidavit coupled with the applicant's response thereto in the replying affidavit created factual disputes that is not capable of being resolved on the affidavits as they stand.

[17] I do not agree and consequently refused the application to refer the matter to oral evidence.

[18] The first respondent's version of events is supported by the annexures attached to the founding affidavit. Mr Stone, understandably, had difficulty in explaining the rationale behind the consent document and more specifically the exact wording thereof.

[19] He submitted that, should I find that the consent document is valid and binding on the applicant, the applicant through its letter of demand dated 24 October 2013 exercised its discretion in terms of clause B of the Title Deed and changed the unlimited period of extension to immediate performance.

[20] The letter reads as follows:

"DEVELOPMENT OF ERF [....]: MIDLANDS ESTATE

Despite several requests to resolve this matter we have no cooperation from you.

In terms of inter alia the Title Deed of the property and the Home Owner's Association Rules this stand for should have been developed long ago.

Bondev did reserve their right to retransfer this erf until now. We do have a commitment to our residents to see to it that Midlands Estate being developed as soon as possible. Your delay in the development is not conducive to our commitment.

Unless you submit building plans and/or start with the building process immediately, Bondev will exercise their right to retransfer this property back into their name. Messrs Tim Du Tait Attorneys will then liaise with you in the preparation of the transfer documents."

[21] Mr Manchu, counsel for the first respondent, submitted that the letter of demand does not refer to the exercise of a discretion by the applicant as envisaged in clause 8 of the Title Deed.

[22] I agree. It is furthermore trite that an applicant must make out its case in the founding papers. [See *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 W at para [36]]

[23] The principle underlying this rule is one of the cornerstones of litigation. A respondent must be able to ascertain the exact case he/she has to meet from the allegations contained in the founding affidavit. Mr Stone's submission is not borne out by the allegations in the founding affidavit.

[24] It would be hugely unfair to call upon a respondent to meet a specific case and to thereafter, during argument, change tact.

[25] As alluded to earlier, the applicant's own documents support the first respondent's version and consequently the applicant failed to make out a case in its founding affidavit in support of the relief claimed.

ORDER

In the premises, I make the following order:

The application is dismissed with costs.


J. VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
JUTENG DIVISION, PRETORIA
GA

ATTORNEYS FOR THE APPLICANT:

TIM DU TOIT & CO

COUNSEL ON BEHALF OF THE APPLICANT:

Advocate STONE

ATTORNEYS FOR THE FIRST RESPONDENTS:

LEDWABA MAZ.\NAI

COUNSEL ON BEHALF OF THE FIRST RESPONDENT

Advocate T MANCHU

Date of hearing: 18 October 2016

Date of judgment: 2 November 2016