



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

Case Number: **A285/2020**

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **YES/NO**
 (2) OF INTEREST TO OTHER JUDGES: **YES/NO**
 (3) REVISED: **YES/NO**
 DATE: 14 July 2022
 SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

SAVANNAH COUNTRY ESTATE HOMEOWNERS

ASSOCIATION

Appellant

and

ZERO PLUS TRADING 194 (PTY) LTD

First Respondent

MARION BRONN PRETORIUS

Second Respondent

UNIVERSITY OF PRETORIA

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] This appeal pertains to an agreement of sale, in terms of which the appellant sold an immovable property known as Erf 445 Savanna Country Estate Extension 5 Township ("the property") to the first respondent.
- [2] The appellant (plaintiff in the court *a quo* and hereafter referred to as plaintiff), alleged that the sale was in conflict with the provisions of section 228 of the Companies Act and the plaintiff's memorandum of association. In the result and according to the plaintiff, the agreement is unlawful and null and void.
- [3] In view of the aforesaid contentions, the plaintiff prayed for the following relief:
- "1. *Declaring the sale agreement dated 27 April 2007 between the Plaintiff and the First Defendant unlawful, null and void ab initio.*
 2. *Setting aside the registration of Erf 445 Savannah Country Estate Extension 5 Township.*
 3. *Ordering the First Defendant to sign all documents necessary to set in motion the process of transfer of Erf 445 Savannah Country Estate, Extension 5 to the Plaintiff."*
- [4] The first and second respondents (first and second defendants in the court *a quo* and hereafter referred to as the first and second defendants) raised three special pleas to the relief claimed by the plaintiff. The third respondent (the third defendant in the court *a quo* and herein after referred to as the third defendant) filed a plea to the particulars of claim.

- [5] At the commencement of the trial the parties agreed to separate the issue pleaded in paragraphs 3.1. to 3.3 of the first and second defendant's third special plea read with paragraph 6.3 of the third defendant's plea. The issue pleaded in the aforesaid paragraphs pertains to impossibility of performance, in that, even if the plaintiff would succeed with its claim, it is not possible for the first defendant to comply with the relief sought by the plaintiff.
- [6] The court *a quo* found in favour of the defendants on the separated issue, which finding is the subject matter of this appeal.

Evidence

- [7] The parties agreed not to lead *viva voce* evidence and the separated point was adjudicated on the common cause facts that appeared from the pleadings.
- [8] The first and third defendants' third special plea read as follows:

" 3.

3.1 *Erf 445 is zoned and has been developed with 100 sectional title units, most of which have been sold by the First Defendant.*

3.2 *The common property forming part of the sectional title development on Erf 445 has been transferred to the body corporate of the sectional title development.*

3.3 *The First Defendant is no longer the owner of any of the common property or of most of the sectional title units which form part of Erf 445*

and accordingly it is impossible for the First Defendant to comply with the relief sought in the particulars of claim.”

- [9] Paragraph 6.3 of the third defendant’s plea raises the same issue and reads as follows:

“6.3 The Third Defendant pleads that it is in any event impossible for the First Defendant to restore the 32 sectional title units in Annexure “A” hereto to the Plaintiff, as the Third Defendant is the registered owner of the said units.”

- [10] The factual background giving rise to the plea of impossibility appears more fully from the allegations in the first and second defendants’ plea. The first defendant, Zero Plus Trading 194 (Pty) Ltd (“Zero Plus”) became the owner of Portion 23 of the Farm Zwartkoppies 364 J.R. (Portion 23) on 15 April 2003. Zero Plus utilised portion 23 for the development of a residential estate known as Savannah Country Estate, which development was approved by the local authority on 10 March 2004.

- [11] In terms of the approval, Portion 23 was developed in five phases and the property forming the subject matter of the dispute between the parties was developed as part of the fifth phase.

- [12] On 18 April 2005 Erf 445 was zoned as *“Special for the purposes of Sporting Facilities, Hotel and Convenience Shop”*. Prior to the proclamation of the township, the first defendant decided to change the zoning of Erf 445 to *“Residential 3, ERF 166 (3 storeys as per SDP, 145)”*. To this end the First

Defendant formally lodged an application on 22 June 2006 in terms of Section 100 ("the Section 100 application") of the Town-Planning and Townships Ordinance 15 of 1986 (the Ordinance") to amend the zoning.

- [13] Although Erf 445 should have been excluded from the category of common property, such exclusion was, due to an error, never prepared and lodged with the local authority.
- [14] On 30 March 2007 the local authority approved the Section 100 application. The error, referred to *supra* was discovered subsequent to the approval of the Section 100 application and the Plaintiff, Savannah Country Estate Homeowner Association's ("the Estate") only two directors at the time, being the Second Defendant, Mario Brown Pretorius ("Pretorius) and Ian Miller decided to rectify the error by transferring the property back to Zero Plus.
- [15] In order to give effect to the decision and on 24 April 2007, the Estate and Zero Plus entered into a sale agreement in order to facilitate the transfer of the property.
- [16] The transfer occurred on 9 July 2007 and 100 sectional title units were developed on the property, most of which has been sold to date. The Third Defendant, the University of Pretoria, purchased 32 units in the Estate.
- [17] A Conveyancer's certificate confirming the aforesaid facts was submitted into evidence by Zero Plus and Pretorius.

Legal position

- [18] In view of the aforesaid factual position, the first and second defendants maintained that it is impossible to transfer the property to the plaintiff in circumstances where a Sectional Title Scheme has been established and registered on the property in terms of the provisions of the Sectional Titles Act, 95 of 1986. This much is confirmed by Section 13 of the Act. Once the Scheme is registered the buildings and land on the property is deemed to be divided into sections, which sections become individual units.
- [19] Upon establishing the township on which the Sectional Title Scheme was developed, the property was removed from the farm register in the Deeds Office and entered into the township register, resulting in the farm ceasing to exist.
- [20] The first defendant is, furthermore, no longer the owner of the property and as a result it is impossible for the first defendant to comply with the relief sought by the plaintiff.
- [21] The third defendant, being the owner of 32 units, submitted that the sale agreement in respect of the units resulted in the transfer of ownership of the units into the name of the third defendant upon registration in the Deeds Office. In the result it is no longer possible to declare the sale agreement *null and void*.
- [22] The court *a quo*'s judgment correctly reflects the aforesaid legal position.

Grounds of appeal

- [23] The plaintiff maintains that the court *a quo* erred in the following respects:

- 23.1 by finding that the plaintiff did not produce evidence in support of its claim that the sale of the property and the subsequent transfer was unlawful;
- 23.2 by dealing with the merits of the claim, whereas the trial only proceeded on the separated issue;
- 23.3 by holding that there were common cause facts that the parties had agreed upon;
- 23.4 by placing reliance on the provisions of the Sectional Titles Act;
- 23.5 by finding that was incumbent upon the plaintiff to present evidence that the plaintiff had no intention to conclude the sale;
- 23.6 by failing to consider that the plaintiff was incorporated in accordance with section 21 of the Companies Act and that it had established a Homeowners Association in terms of a Memorandum of Association which contained very specific objectives;
- 23.7 by failing to take into account that at the time of the sale, the plaintiff had approximately 280 members and that none of them were consulted regarding the decision of the second defendant to sell the property to his own company, being the first defendant;
- 23.8 by failing to have regard to the legality underlying the transfer of the property as well as other legislative frameworks dealing with such transactions.

Discussion

- [24] The grounds of appeal are misguided, to say the least.
- [25] Firstly, the separated issue only dealt with the impossibility of performance defence. The merits of the plaintiff's claim did not form part of the issue that had to be determined during trial and as a result any evidence pertaining to the plaintiff's claim is irrelevant.
- [26] Secondly, the common cause facts emanate from the transactions registered in the Deeds Office records and is public record. The court *a quo* was correct in relying on the documents in adjudicating the separated issue.
- [27] Thirdly, the court *a quo*'s finding in paragraph 16 of the judgment, is irrelevant for purposes of the defence of impossibility of performance and any reliance by the plaintiff on the finding does not alter the ultimate order granted by the court *a quo*.
- [28] In the result and having regard to the common cause facts and the legal principles flowing from the facts, the order of the court *a quo* is correct, and the appeal stands to be dismissed.

ORDER

In the premises, I propose the following order:

The appeal is dismissed with costs.



N. JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree.,



A C BASSON
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.



D MOLEFE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

18 May 2022 (Virtual hearing)

DATE DELIVERED PER COVID19 DIRECTIVES:

14 JULY 2022

APPEARANCES

For the Appellant: Advocate K Wilson

Instructed by: Matojane Malungana Inc

Counsel for the First and Second Respondents: Advocate LGF Putter SC

Instructed by: Klagsburn Edelstein Bosman De Vries Attorneys

Counsel for the Third Respondent: JP Vorster SC

Instructed by: Tim du Toit Attorneys