REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.AR.587/10

In the matter between

REDMOND DALES Appellant

and

LEON STEFANUS RHEEDER First Respondent

LYNN RHEEDER Second Respondent

THE REGISTRAR OF DEEDS,
PIETERMARITZBURG Third Respondent

J U D G M E N T

Del. 1 April 2011

WALLIS J .

[1] This is yet another in the long line of cases that commences with *Wilken v Kohler*,[1] passes through the seminal decisions in *Van Wyk v Rottcher's Sawmills (Pty) Limited*[2] and *Clements v Simpson*[3] and arrives most recently at *Exdev (Pty) Limited and Another v Pekudei Investments (Pty) Limited*,[4] in which our courts have had to consider whether agreements for the purchase and sale of immovable property comply with statutory requirements that such agreements be reduced to writing and signed by or on behalf of the parties.[5] Such cases arise either because the

1 1913 AD 135
2 1948 (A) SA 983 at 989
3 1971 (3) SA 1 at 7 F-8A
4 2011 (2) SA 282 (SCA)
5 The current statutory provision is s 2(1) of the Alienation of Land Act 68 of 1981.

purchaser[6] or the seller[7] no longer wishes to proceed with the transaction. In the present case it is the seller, Mr Rheeder, who no longer wishes to sell the property concerned to the purchaser, Mr Dales.

[2] This appeal arises from a successful exception taken to the particulars of claim delivered on behalf of Mr Dales in an action to compel specific performance of the agreement. The exception was taken on the basis that the particulars of claim failed to disclose a cause of action and, in the alternative, on the basis that they are vague and embarrassing. It is not entirely clear from the judgment on which of these inconsistent grounds the learned acting judge upheld the exception. This is important because in the former case the judgment would be appealable and in the latter not.[8] The acting judge dealt first with the exception that the particulars of claim failed to disclose a cause of action. Whilst not expressly saying so it appears that he held that this complaint was well-founded as he concluded that the agreement on which Mr Dales relied did not contain 'any clear agreement on the piece of land to be sold' and 'there was no agreed price'. He also said that it was neither here nor there whether Mrs Rheeder had knowledge of the agreement between her husband and Mr Dales. This conveys that he concluded that the claim against Mrs Rheeder was unfounded in law. All in all it appears that the exception based on the absence of a cause of action was upheld. But then, after reaching these conclusions, the judgment continues to deal 'briefly' with the complaint that the particulars of claim are vague and embarrassing and concludes that the defendants would not know what case they have to meet if the pleading is allowed to stand.

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6 *Johnston v Leal* 1980 (3) SA 927 (A).
7 *Rockbreakers and Parts (Pty) Limited v Rolag Property Trading (Pty) Limited* 2010 (2) SA 400 (SCA).
8 *Trope and others v South African Reserve Bank* 1993 (3) SA 264 (A) 270F-H.

[3] This overlooks the difference between the two types of exception, which is that the former attacks the legal validity of the claim and the latter its formulation. That difference was expressed by FH Grosskopf JA in the passage already mentioned[9] from his judgment in *Trope and others v South African Reserve Bank* :

'Where an exception is granted on the ground that a plaintiff's particulars of claim fail to disclose a cause of action, the order is fatal to the claim as pleaded and therefore final in its effect. (*Liquidators, Myburgh, Krone & Co Ltd v Standard Bank of South Africa Ltd and Another* 1924 AD 226 at 229, 230.) Leave to amend will be of no avail to a plaintiff in such a case unless he is able to amend his particulars of claim in such a way as to disclose a cause of action. On the other hand, where an exception is properly taken on the ground that the particulars of claim are vague and embarrassing, by its very nature the order would not be final in its effect. All that a plaintiff would be required to do in such a case would be to set out his cause of action more clearly in order to remove the source of embarrassment.'

[4] In this case the court *a quo* dealt first with the complaint that the pleaded claim did not disclose a cause of action. As I have indicated it appears that it upheld this contention. That served to dispose of the case and the brief consideration of the question of the vagueness of the pleadings added nothing to that conclusion. In my view the judgment must be read as one upholding the exception on the basis that the particulars of claim disclose no cause of action. That was the approach of counsel in argument. In my view they were correct to adopt that stance. I turn then to consider whether the particulars of claim disclosed a cause of action.

[5] The agreement on which Mr Dales relies is contained in a letter dated 6 May 2002 addressed by him to Mr Rheeder. The opening paragraphs

9 In footnote 8.

deal with a loan by Mr Dales to Mr Rheeder. The material paragraphs then read as follows:

'(4) This loan, as discussed with you, is primarily to confirm that, in the event of you or a company in which you have shares, purchasing the property belonging to Pierre de Villiers and/or his Trust, between our two homes, you will sell to me, immediately you have acquired such property, a strip of approximately 20 m running parallel to my property. The purchase price will be approximately one-quarter of the price paid by you for the full piece of land that will exclude the pan-handle which Pierre de Villiers wishes to keep. The price for the portion I wish to acquire will be approximately R150 000 (One Hundred and Fifty Thousand Rand).

(5) I also confirm that I have intimated to you that, should you be successful in concluding a deal with Pierre de Villiers, I will assist with arranging the necessary finance, up to a maximum of approximately R600 000 (six hundred thousand Rand), again this being primarily bridging money until such time as you are able to secure finances on your home.'

Mr Rheeder signed this letter beneath a statement that he accepted the conditions contained therein.

[6] According to the particulars of claim the property owned by Pierre de Villiers was transferred jointly to Mr and Mrs Rheeder in October 2008 pursuant to the purchase thereof for the sum of R1 800 000. Mr Dales now seeks to enforce the agreement embodied in the letter of 6 May 2002 and instituted this action with a view to obtaining specific performance. Mr and Mrs Rheeder are defending the action and the exceptions that are the subject of this appeal were taken on their behalf. Their main argument is that the letter on which Mr Dales relies does not adequately define either the property that is the subject of the sale or the purchase price payable by Mr Dales. They submit that neither the locality nor the extent of the strip of land to be acquired can be determined by reference to the agreement and any admissible extrinsic evidence. They contend further that the task of identifying the strip of land is complicated by the

reference to the panhandle. Lastly they say that as the price is only approximate it is neither fixed nor determinable. There is a further issue relating to the joinder of Mrs Rheeder to the proceedings that will be addressed separately.

[7] Before turning to Mr and Mrs Rheeder's primary contentions it is appropriate to mention that Mr Dales wrote a further letter to Mr Rheeder on 27 February 2004, which Mr Rheeder signed below the words:

'I acknowledge and confirm the contents of this letter.'

The relevant portion of the letter reads:

'It is a specific condition of the loan that, when you purchased the "de Villiers" property you would sell to me 20 metres of that portion running adjacent to our property and at a subsequent meeting it was decided that this property would have a pan-handle access to Pearson Road, when the de Villiers sold their residence.'

[8] The basis of the pleaded claim on behalf of Mr Dales is that the subject matter of the sale is a strip of land 20 metres wide running adjacent to the border of his property and parallel to the boundary between his property and the de Villiers property. He alleges that in addition to the transfer to him of this property the existing panhandle access to the de Villiers property from Pearson Road is to be maintained and he (Dales) will secure the right to use the panhandle access by way of the registration of a servitude over the balance of the de Villiers property. Insofar as the purchase price is concerned Mr Dales contends that the price payable by him is to be calculated as an amount that bears to the purchase price paid by the Rheeders the same proportion as the area of the strip of land to be acquired by him bears to the overall area of the de Villiers property.

[9] The legal principles to be applied in this case are clear. In order to be enforceable the whole contract of sale, or at any rate all the material terms thereof, must be reduced to writing. At the very least this means that the identity of the parties, the amount of the purchase price and the identity of the subject matter of the contract, as well as any other material terms, must be ascertainable without recourse to evidence of an oral consensus between the parties.[10] With regard to the description of the property the question is whether the land alienated can be identified from the contract itself, without resorting to evidence from the parties regarding their negotiations and their consensus. However this does not require a faultless description of the property sold, couched in meticulously accurate terms. The cases fall into two broad categories. First there are those where the document itself sufficiently describes the property to enable identification on the ground. Second there are those where it appears from the contract that the parties intended that either the buyer or the seller (or possibly some third party) should identify the property sold from a broader property.[11] The price must be fixed, or ascertainable by means of the application of a formula or the determination of some third party. An agreement providing that one of the parties should determine the price payable, in the absence of parameters within which such determination must be made, may be vulnerable to attack as being void for vagueness.[12] However that issue does not arise here.

[10] These principles fall to be applied in the present case in the context of an exception. That means that we are not required finally to determine the proper construction to be given to the agreement between Mr Dales and Mr Rheeder. It will suffice to defeat the exception if the construction

10 *Johnston v Leal* 1980 (3) SA 927 (A) 938B-C.
11 *Exdev, supra,* paras [15] and [16]
12 *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) para 24.

contended for by Mr Dales is a possible construction of the language of the agreement bearing in mind the possibility of there being admissible evidence that will aid in the process of construction. Courts are slow to resolve issues of interpretation in exception proceedings. Other than the negotiations between the parties, all evidence that is relevant to establish the context or factual matrix against which the contract is to be construed is admissible. The former distinction between background circumstances and surrounding circumstances no longer applies.[13] The meaning of contracts is not determined in isolation but in the light of the whole context surrounding their conclusion and in such a way as to give them a commercially sensible meaning.[14]

[11] Whilst at the stage of an exception the court is not aware of all the evidence that may be available and admissible in regard to a question of construction the nature of some of the evidential material in this case is relatively clear. The layout of the two properties will be relevant as will their topography. The history, location and nature of the existing panhandle access to the de Villiers property will be a feature. An examination of the terrain may reveal why the parties fixed the dimensions of the strip as being approximately 20 metres. Evidence may be admissible to show why Mr Dales wished to acquire this additional strip of land. Bearing in mind that the agreement is embodied in a letter addressed in 2002 it may be relevant to the determination of the price to have regard to the likelihood of the de Villiers property being available for purchase at that time and what price would have been a reasonable market price for it in 2002. The circumstances in which Mr Rheeder might have required bridging finance from Mr Dales in order to effect the

13 *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA) [39].
14 *Ekurhuleni Metropolitan Municipality v Germistion Municipal Retirement Fund* 2010 (2) 498 (SCA) para [13].

acquisition of the property may also be relevant. This is not to say that any of these matters will necessarily be admissible or decisive of the proper interpretation of the agreement. However, when one is dealing with an exception to a pleading in circumstances where it is plain that there may well be extrinsic evidence that is admissible and relevant to the proper construction of the contract the court must be wary of deciding, in the absence of that evidence, that a particular construction of the contract is impermissible.

[12] Starting with the description of the property purchased it was said in the letter of 6 May 2002 to be a strip of approximately 20 metres running parallel to Mr Dales' property. It was rather faintly suggested in argument that this did not mean that the property to be acquired was necessarily adjacent to Mr Dales' property. However that seems to be a farfetched contention. No reason is suggested why Mr Dales should want an additional piece of land not bordering on his own property. In any event the letter of 27 February 2004 makes it clear that this additional strip would be adjacent to the Dales' property. Once that is accepted the concept of a strip of land running parallel to Mr Dales' property may reasonably convey that what was intended was a piece of land of consistent width adjacent to the existing boundary and running the length of the relevant portion of Mr Dales' property. There is annexed to the particulars of claim a survey diagram of the de Villiers property showing that the relevant boundary is a straight line some 211 metres long. With that piece of information it is relatively easy to conceive of a strip of land adjacent to that boundary of uniform width and running the length of the boundary.

[13] The next issue is the description of this strip as being 'approximately

20 m'. It was not suggested that this refers to anything other than the width of the strip and that is a proper inference to be drawn from the terms of the letter. There are two possible answers to the submission that this renders the description of the property sold insufficiently determinate. The first is that the letter of 27 February 2004 says that what is to be sold is a strip 20 metres wide. The two letters read together are therefore capable of the construction that what started as an approximate description became definite when the second letter was written. The second answer is that this vested a discretion in Mr Rheeder to determine precisely how wide the strip should be, having regard to the topography of the land adjacent to the boundary between the two properties. That it is permissible to vest the seller with a discretion to identify the exact layout of the property to be sold and its dimensions has been recognised in several cases.[15] This is not to say that in every case where parties to a sale of land describe the property sold in approximate terms their contract will necessarily be construed as giving one or other of the parties a discretion to determine precisely what was sold.[16] What is required is a careful consideration of the agreement in the light of all the evidence.[17] In this case it is at least reasonable to suppose that a consideration of the topography of the two properties and Mr Dales' reasons for wishing to acquire the additional strip may indicate that he was not concerned with the precise width of the strip and was happy for that to be determined in good faith by Mr Rheeder in the light of the factors I have mentioned. As that is a possible construction of the agreement it cannot be said at the stage of an exception that the description of the property does not comply with the requirements of the statute.

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15 *Clements v Simpson, supra,* 9A-B; *JR 209 Investments (Pty) Limited and Another v Pine Villa Country Estate (Pty) Limited: Pine Villa Country Estate (Pty) Limited v JR 209 Investments (Pty) Limited* 2009 (4) SA 302 (SCA).
16 *Botha v Niddrie and Another* 1958 (4) SA 446 (A).
17 As occurred in *Party Investments (Pty) Limited v Padayachey* 1975 (3) SA 891 (N) at 893 C-894C.

[14] I turn then to consider the price. The letter says that the price would be approximately a quarter of the price to be paid by Mr Rheeder for the full piece of land excluding the panhandle. A consideration of the survey diagram shows that a 20 metre strip along the boundary between the two properties is approximately 4200 square metres of land. As the de Villiers property in its entirety is 1.7 hectares such a strip would be slightly less than a quarter of the whole property. The statement that the agreed price is approximately one quarter of what Mr Rheeder pays for the property is capable of conveying that the parties intended the price to bear the same relationship to the total price as the area of the strip bears to the area of the whole property. Certainly that is a possible construction. That is fortified by paragraph 5 of the letter dealing with the bridging finance that the parties anticipated Mr Rheeder would need in order to acquire the de Villiers property. This indicates that they thought the property could be acquired for approximately R600 000 in 2002. That may explain the statement in paragraph 4 that the purchase price of the strip to be acquired by Mr Dales would be approximately R150 000 as that is one quarter of R600 000. Giving due regard to these factors it cannot be held at the stage of an exception that Mr Dales' contention that the price payable for the strip to be acquired by him was to bear the same relationship to the overall price payable by Mr Rheeder as the area of the strip bore to the whole of the de Villiers property, is untenable and not a construction that could reasonably be given to the agreement.

[15] It follows that the contention that the agreement between the parties does not comply with the requirements of the Alienation of Land Act cannot be sustained in proceedings by way of exception. That is not to say that Mr Dales' contentions in regard to the proper construction of the

agreement are necessarily correct. This judgment goes no further than holding that they are a possible construction to be given to the agreement in the light of all admissible extrinsic evidence. That conclusion suffices to hold that the exception based on non-compliance with the statute should have failed.

[16] The exception was also advanced on certain alternative grounds. It was said that the documents relied on constitute agreements to agree and that they do not contain all the *essentialia* of a sale. However, once it is held that the agreement is capable of bearing the meaning contended for by Mr Dales those contentions must necessarily fail. That leaves only one other point arising from the fact that Mrs Rheeder took transfer of the de Villiers property jointly with her husband and, although she was not a party to either of the letters, she is cited as a defendant against whom relief is sought jointly together with Mr Rheeder.

[17] It is unclear whether this exception serves any point. As the joint registered owner of the de Villiers property Mrs Rheeder was in any event a necessary party to this litigation and would have had to be joined to defend her interest in the property, if she chose to do so. Insofar as relief is sought against her it does not appear to add any significant issue to those that will in any event arise at the trial. Either she had knowledge of the agreement or she did not and it is unlikely that this will be a major factual issue between the parties. As the purpose of an exception is to dispose of a particular cause of action and avoid the leading of unnecessary evidence at the trial[18] that purpose would not be served by upholding an exception by Mrs Rheeder. It would do nothing more than eliminate paragraph 17 of the particulars of claim and Mrs Rheeder's

18 *Dharumpal Transport (Pty) Limited v Dharumpal* 1956 (1) SA 700 (A) at 706; *Barclays National Bank Limited v Thompson* 1989 (1) SA 547 (A) at 553 G-I.

name from prayers 1 and 2. That would not materially affect the issues at the trial.

[18] Mr Dales contends that Mrs Rheeder is liable to give effect to the agreement that he concluded with her husband because she was at all times aware of his rights in terms of the two letters and cannot, by taking transfer of the property into her name jointly with her husband, defeat Mr Dales' rights. In this regard counsel relied upon the doctrine of notice. We were referred to a number of cases involving double sales where that doctrine has been applied. This is not such a situation. In the case of double sales the effect of the doctrine of notice is to prevent the second purchaser from defeating the prior personal rights of the first purchaser. In this case the acquisition of any right by Mr Dales to demand transfer of the strip of land was dependent on Mr Rheeder or a company in which he held shares purchasing the de Villiers property. The right would only ripen into an enforceable right after that acquisition and is, in that sense, subsequent to, as well as being dependent upon, the acquisition of the real right. With double sales the rights of the first and second purchasers are mutually exclusive. Here the rights of Mr Dales are wholly dependent upon Mr Rheeder first acquiring ownership of the de Villiers property. The cases involving double sales are accordingly distinguishable.

[19] However, that is not an end to the matter. The doctrine of notice has recently been the subject of reconsideration and restatement by the Supreme Court of Appeal in *Meridian Bay Restaurant (Pty) Limited and Others v Mitchell NO.*[19] That case dealt with a sectional title development. The original plans when units were initially offered for sale showed that there would be 86 sections with a total area of 5886 square metres, with

19 [2011] ZASCA 30.

the balance of the property being common property. After a number of purchasers had bought sections in the development the person who controlled the developer of the scheme caused a sectional title plan to be registered in the Deeds Registry providing for 120 sections with a total area of 14 420 square metres. He did this not by enlarging the building but by appropriating a large portion of the common property. A number of the extra sections were registered in the name of the developer or an associate company. When those companies were placed in liquidation and the true situation was discovered the purchaser of a section successfully applied for the appointment of a *curator ad litem* to the body corporate for the purpose of investigating the situation and taking steps to recover the misappropriated common property. The liquidators sold and transferred certain of the disputed sections to purchasers who had knowledge of the pending proceedings for the appointment of a *curator ad litem*. Once the *curator ad litem* had been appointed he commenced the action that gave rise to the appeal to recover the units transferred by the liquidators to the third parties. The claim succeeded.

[20] In giving the judgment of the court Ponnan JA pointed out that the doctrine of notice is an equitable doctrine that runs counter to the rule that a real right takes preference over a merely personal right. He said:

'[14] Under the doctrine of notice, someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held bound to give effect thereto. Thus a purchaser who knows that the merx has been sold to another, may, in spite of having obtained transfer or delivery, be forced to hand it over to the prior purchaser.'

The doctrine affords an equitable remedy in circumstances to which it applies and is not dependent upon fraud or *mala fides*.[20]

20 *Meridian* para [17]

[21] Although the classic statement of the doctrine of notice and its principal form of application arises in the context of double sales it is not confined to that situation. Thus in *Associated South African Bakeries (Pty) Limited v Oryx & Vereinigte Bäckereien (Pty) Limited en Andere*[21] the doctrine was applied to give relief to the holder of a right of pre-emption, where the property had been sold to a third party in breach of that right. In *Cussons en Andere v Kroon*[22] it was applied to give relief to a partner in relation to a partnership asset registered in the name of one partner but held as a partnership asset on behalf of both. The party in whose name the property was registered had sold and transferred it to a third party without informing his partner or obtaining his consent to the sale. The purchaser contended that the sale and transfer could not be attacked on the grounds of the doctrine of notice on the basis that the doctrine is only available where the personal right relied on by the claimant is a right to acquire property (a *ius ad rem acquirendam*). It was argued that the only exceptions to that are in the case of a right of pre-emption or an option. These contentions were rejected by the court in the following passage from the judgment:

'[13] Indien aan die persoonlike reg van die reghebbende van 'n voorkoopsreg saaklike werking verleen word teenoor diegene wat daadwerklik daarvan kennis dra bestaan daar, na my mening, geen rede waarom aan die respondent se persoonlike reg in die onderhawige geval nie ook sodanige werking gegee behoort te word nie. Die twee gevalle is analoog aan mekaar. In die een geval kan die verkoper nie verkoop sonder dat hy die reghebbende geraadpleeg het en sy toestemming tot die verkoping verkry het nie. In die ander geval moet hy ook die reghebbende se toestemming tot verkoping verkry in die sin dat die reghebbende moet aandui dat hy nie self die eiendom wil koop nie. 'n Verkoping in stryd met 'n verpligting om nie sonder die toestemming van 'n derde te verkoop nie is ewe onbehoorlik as 'n verkoping in stryd met die regte van die reghebbende van 'n voorkoopsreg. Beide die reghebbende van 'n

21 1982 (3) SA 893 (A) at 908 E-H.
22 2001 (4) SA 833 (SCA).

voorkoopsreg en die persoon wat 'n reg het dat 'n eiendom nie sonder sy toestemming verkoop word nie het slegs 'n persoonlike reg en nie 'n reg *ad rem acquirendam* nie. As die reg eersgenoemde beskerm is daar geen rede waarom dit nie ook laasgenoemde behoort te beskerm nie. Ons reg is immers 'n lewende sisteem wat steeds ooreenkomstig die basiese beginsels daarvan aangepas kan word om effektief te handel met nuwe situasies wat opduik (vgl *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) op 220D - E). Insoverre die kennisleer nog nie toegepas is op 'n geval soos die onderhawige nie behoort dit, in die lig van die voorgaande, uitgebrei te word om ook die onderhawige geval te dek.'[23]

[22] In *Meridian Bay* itself the curator was not enforcing a right to acquire the additional sections. His contention was that they should never have been created and could not properly be deducted from the common property of the development. Their acquisition by *Meridian Bay* with knowledge of that contention meant that *Meridian Bay* could not assert its real right of ownership against the claim of the curator. The court cited with approval[24] the following statement:

'Infringement of a personal right by an acquirer of the real right is perceived as unlawful conduct.'

It continued and said in regard to *Meridian Bay*[25] that it:

'… knew, when it acquired the disputed sections, not just that complaints were being levelled by the prior purchasers but also of the exact nature of those complaints. It nonetheless chose to acquire the disputed sections with full knowledge that such

23 'If effect is given to the personal right of a holder of a right of pre-emption against those with actual knowledge of that right, there exists, in my opinion, no reason why in the present case similar effect should not be given to the respondent's similar right. The two situations are analogous to one another. In the one case the seller cannot sell without consulting the holder of the right and obtaining his consent to the sale. In the other case he must also obtain the consent of the holder of the right in the sense that he must indicate that he does not himself wish to buy the property. A sale in conflict with an obligation not to sell without the consent of a third party is as improper as a sale in conflict with the rights of the holder of a right of pre-emption. Both the holder of the right of pre-emption and the person who has a right that the property not be sold without his consent only have a personal right and not a right *ad rem acquirendam*. Our law is a living system that can be developed in accordance with basic principles in order to deal with new situations that emerge. Insofar as the doctrine of notice has not yet been applied to a situation such as the present it ought, in the light of the aforegoing, to be extended to cover the present situation. (My translation)

24 In an extract from an article by Brand JA quoted in para [19].

25 Para [28].

acquisition was in conflict with the prior personal rights of the purchasers. It follows that in conducting itself thus Meridian Bay's conduct was wrongful.'

Accordingly, the action by the curator succeeded.

[23] The net effect of this is that the doctrine of notice provides a flexible instrument through which prior personal rights can be protected against the holders of real rights acquired with knowledge of those prior rights. Reasoning by analogy the rights that Mr Dales seeks to protect in this action were acquired prior to the acquisition by Mrs Rheeder of a real right of ownership in the de Villiers property. Whilst Mr Dales' right could only be enforced once that property had been acquired by Mr Rheeder its origin is prior to the acquisition of ownership of the de Villiers property by Mr and Mrs Rheeder. If, as Mr Dales contends, Mrs Rheeder had full knowledge of Mr Dales' agreement with her husband and the rights he had secured thereby her position seems to me sufficiently analogous to the position of the purchasers in *Cussons* and *Meridian Bay* to have the same consequences. Accordingly, if the contract is enforceable against Mr Rheeder and Mrs Rheeder had notice thereof it will in my view be enforceable against her as well.

[24] That conclusion makes it unnecessary to consider the effect of an obligation on Mr Rheeder to procure compliance with his agreement with Mr Dales in accordance with the rule enunciated by *Pothier* that:

'The seller is bound to deliver the thing to the buyer if it is not already in his possession; and as a necessary consequence of this obligation, to do at his own expense, whatever may be necessary to enable him to perform it.'[26]

On that basis also the joinder of Mrs Rheeder in these proceedings, even if no relief can be obtained against her, was necessary and the fact that relief is sought against her does not justify an exception.

26 *Rockbreakers and Parts (Pty) Limited v Rolag Property Trading (Pty) Limited, supra,* para [16].

[25] In the circumstances the appeal is upheld with costs and the order of the court *a quo* is set aside and replaced with the following order:

'1. The exceptions are dismissed.

2. The first and second respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of the exceptions.'

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SEEGOBIN J.

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BOOYENS AJ

DATE OF HEARING	25 MARCH 2011
DATE OF JUDGMENT	1 APRIL 2011
APPELLANT'S COUNSEL	MR G D HARPUR SC
APPELLANT'S ATTORNEYS	De Villiers, Evans and Petit
RESPONDENTS' COUNSEL	MR R J SEGGIE SC
RESPONDENTS' ATTORNEYS	Sinclair and Company