



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 795/10

In the matter between:

LAEVELD TRUST 2001 (PTY) LTD	First Appellant
SAAMSTAAN BELEGGERS (PTY) LTD	Second Appellant
INDUSIT BELEGGINGS (PTY) LTD	Third Appellant
LEGOGOTE EIENDOMME (PTY) LTD	Fourth Appellant
FRANNEMANS BELEGGINGS (PTY) LTD	Fifth Appellant
TWIN CITY MALELANE 2001 (PTY) LTD	Sixth Appellant
ERF 4 MALELANE (PTY) LTD	Seventh Appellant
and	
BLUE FIRE PROPERTIES 115 (PTY) LTD	Respondent

Neutral citation: *Laeveld Trust 2001 v Blue Fire Properties 115 (795/10)*
[2011] ZASCA 174 (29 September 2011)

Coram: CLOETE, MALAN AND THERON JJA

Heard: 2 September 2011

Delivered: 29 September 2011

Summary: Contract – Interpretation – period within which the purchaser is entitled to request documents relevant for due diligence investigation – purchaser thereafter entitled to decide which properties are not viable and exclude from the sale– completion of due diligence period postponed because of the seller’s breach - purchaser not limited to documents in existence at time of agreement.

ORDER

On appeal from: North Gauteng High Court, Pretoria, (Rabie J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

THERON JA (CLOETE AND MALAN JJA concurring)

[1] On 24 June 2005 the parties concluded a written agreement of sale in respect of which the appellants sold certain commercial properties (the properties) in Mpumalanga to the respondent for the sum of R128, 6 million. Clause 8 of the agreement provided as follows:

'8.1 The Purchaser shall, for a period of 7 [SEVEN] WORKING DAYS after the date of signature of this agreement by the Seller, be entitled to conduct a due diligence investigation in relation to all matters pertaining to the property which the Purchaser, in its discretion, regards as being material to its purchase thereof. For the purpose of such due diligence investigation, the Seller undertakes forthwith to make available to the Purchaser upon request, all documentation and information (which the Purchaser shall keep strictly confidential) relating to the property which may be material to a purchase of the property and the Seller [shall] allow the Purchaser and its representative:

8.2.1 to inspect and make copies of all lease agreements relating to all the occupants of the property, the title deeds of the property ... and all agreements relating to the property (including but not limited to, agreements relating to the provision of services to the property);

8.2.2 to inspect and make copies of all financial and other records relating to the property, including, but not limited to, all records relating to the income and expenditure of the property.

8.2.3 The Purchaser shall advise the Seller in writing within 2 [TWO] DAYS after completion of the investigation that it has completed the due diligence investigation to its satisfaction and of fulfilment of the suspensive condition;

8.2.4 If in the course of the Purchaser's inspections it is deemed by the Purchaser that certain properties are not viable, then these properties will not form part of this agreement and the parties thereby agree that the purchase price will be pro-rata amended to reflect same.

8.3 The Purchaser obtaining a first Mortgage Bond from a registered lending institution for an amount of not less than R104 000 000. 00 [ONE HUNDRED AND FOUR MILLION RAND] ...

within 21 days from due diligence by the Seller.

8.4 In the event of the conditions not being met or fulfilled within the times provided for ... this agreement shall be null and void and of no further force or effect, unless the conditions are so waived in writing by the relevant beneficiary.'

[2] The respondent was therefore entitled, in terms of clause 8, to conduct a due diligence investigation in respect of the properties over a seven-day working period. This seven-day period would in the ordinary course have expired on 5 July 2005. During the due diligence period the respondent could request access to documentation and information that it, in its discretion, regarded as material to the purchase of the properties. In terms of clause 8.1 the appellants were obliged to make available 'forthwith' documents properly requested by the respondent.

[3] On 1 July 2005, the respondent requested certain specified documents from the appellants. The appellants failed to make all the documents requested, in particular, the annual audited financial statements, available to the respondent. The appellants subsequently denied that the respondent was entitled to them. The dispute between the parties was referred for arbitration. On 12 January 2010 the arbitrator's award was made which declared that the respondent was entitled to the documents requested. The appellants were ordered to allow the respondent to inspect and make copies of the audited annual financial statements which existed in respect of each of the appellants as at 30 June 2005. The arbitrator also declared that from the date when the said documents were made available, the respondent would have two working days to complete the due diligence investigation, whereafter it would have a further two days within which to inform the appellants which properties it intended purchasing.

[4] In terms of a letter dated 13 January 2010, the respondent was advised that the requested documents would be available that afternoon. It follows, in terms of the arbitrator's award, that the respondent was required to complete its due diligence investigation on or before 15 January 2010. On 13 January, the

respondent requested further documents in order to update the information relating to the properties to 2010. The documents specified in the arbitration proceedings related to the period prior to July 2005. The appellants refused to make available any documents not in existence as at July 2005. The respondent then approached the North Gauteng High Court, Pretoria, for an order compelling the appellants to make available the more recent documents requested, extending the period for the due diligence investigation and interdicting the appellants from disposing of the properties. Rabie J granted the order applied for. The appellants appeal to this court, with the leave of the high court.

[5] The appellants concede that they were obliged, in terms of the agreement, to provide information to the respondent in order to enable the latter to conduct a due diligence investigation in relation to the properties. It was, however, argued that they were not obliged to provide documents that had not been in existence at the time of the conclusion of the agreement. It was submitted that having regard to the limited time frame within which the due diligence investigation had to be concluded, and the other terms of the agreement, the parties could not have envisaged that the respondent would be entitled to documents not in existence during the period of seven days within which the due diligence investigation had to be completed. It was argued that it was contemplated by the parties that the respondent would have made its decision about the viability of the properties within nine days of the conclusion of the agreement.

[6] The appellants' argument loses sight of the fact that the delay was due to their breach of contract. The consequence of the breach was that the due diligence period was extended. During that period the respondent was entitled to call for documents to enable it to exercise its right to exclude properties from the sale because it deemed them not to be viable. The documents could only be those relevant to the exercise of this right at the time the respondent was entitled to exercise it. That must have been the intention of the parties as any other conclusion would be at odds with commercial reality. It was not submitted that the documents which the respondent called for during the extended due diligence

period, were irrelevant. The conclusion is inescapable that in refusing to provide the documents requested, the appellants again breached their obligation and that the due diligence period has in consequence again been extended. The respondent would accordingly, even now, have the right to call for documents relevant to the decision it is still entitled to make.

[7] At the hearing of the appeal, the further argument was raised that the respondent was precluded from claiming documents that were more recent than June 2005 as the award by the arbitrator rendered the respondent's entitlement to documents *res judicata*. The requirements for *res judicata* are that the proceedings must be between the same parties, the grounds for relief (*causa petendi*) must be the same in both cases and the same relief must be sought in both cases.¹ The defence of *res judicata* cannot successfully be raised in this matter. The relief sought by the respondent in the arbitration proceedings related to documents in existence at June 2005 while the relief sought in the high court, although similar in that it was also a request for documents, related to different documents – it was for the production of documents that only came into existence after June 2005. Thus the relief sought in the arbitration proceedings and in the high court was not the same.

[8] The appeal is dismissed with costs.

L V THERON
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS: J P VORSTER SC with H J STEYN

¹See *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H.

Instructed by Du Toit - Smuts & Mathews Phosa Inc,
Nelspruit
Symington & De Kok, Bloemfontein

RESPONDENT:

C PUCKRIN SC

Instructed by Gildenhuys Lessing Malatji Inc,
Pretoria
Vermaak & Dennis Inc, Bloemfontein