THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 327/2013

In the matter between:

MICHAEL ROBARTS **APPELLANT**

and

STEFAN OKREGLICKI ANTONI NO **FIRST RESPONDENT**
CARLA ANTONI NO **SECOND RESPONDENT**
ANTON JAMES SLABBERT NO **THIRD RESPONDENT**

Neutral citation: *Robarts v Antoni NO* (327/2013) [2014] ZASCA 64 (19 May 2014)

Coram: Maya, Leach and Theron JJA, Van Zyl and Mocumie AJJA

Heard: **17 March 2014**

Delivered: **19 May 2014**

Summary: Contract – alleged oral agreement granting respondents height servitudes over appellant's property in exchange for zoning scheme departures and title deed amendment concessions not proved – servitudes included in the definition of 'any interest in land' and capable of alienation by exchange as envisaged in s 2(1) of the Alienation of Land Act 68 of 1981 – servitudes a subtraction of the dominium of the servient land and s 2(1) requires agreement granting them to be in writing and signed by the parties – written agreement not proved.

ORDER

On appeal from: Western Cape High Court, Cape Town (Louw J sitting as a court of first instance):

1 The appeal is upheld with costs including the costs of two counsel where employed.
2 The order of the court below is set aside and replaced with the following:
'(a) The application is dismissed.
(b) The applicants shall pay the respondents' costs of suit including the costs of two counsel and the wasted costs occasioned by the hearing on 28 February 2013.'

JUDGMENT

MAYA JA: (LEACH AND THERON JJA, VAN ZYL AND MOCUMIE AJJA concurring)

[1] This is an appeal against a judgment of the Western Cape High Court (Louw J). The court below granted the respondents an order of specific performance of a contract and directed the appellant (Robarts) to do all things necessary to permit the registration of certain height servitudes over an immovable property belonging to his late father's estate (the Robarts property). The appeal is with the leave of the court below.

[2] The respondents are trustees of the Stefan Antoni Family Trust. In that capacity, they are the registered owners of another piece of immovable property (the trust property), which adjoins the Robarts property, in respect of which the height servitudes were sought and on which the first respondent (Antoni) and his wife, the second respondent, resided. Robarts is the son of the late Mr Frank Robarts and the testamentary heir to the deceased estate which owns the Robarts property. Robarts was sued in the court below together with the joint executors of the deceased estate who administered the Robarts property. He lives on the property and would become its registered owner in terms of a redistribution agreement he concluded with the executors.

[3] The dispute concerns the two residential properties which are situated on the Atlantic Seaboard in Bantry Bay, Cape Town. Both enjoy spectacular views of the Atlantic Ocean which contribute significantly to their huge value. As the Robarts property is situated directly in front of the trust property, it may affect the sea views enjoyed from the trust property if developed vertically.

[4] In the latter part of 2011, Robarts started developing the Robarts property, which was damaged by a fire in which his father died, with the intention of moving in. He was assisted by a town planner, Mr Brümmer. To protect their interests, the respondents also engaged a town planner, Mr Burhmann. The latter took the view that the development, which inappropriately preceded municipal approval of its plans, breached various restrictive conditions registered against the property's title deed. For example, the title deed prescribed that only one dwelling could be built on the erf, to the extent of only a third of the erf's area, and prohibited the use of galvanised iron roofing. The development, however,

comprised two dwellings, covered 56 per cent of the erf and included a roof, found unsightly by the Antonis, made of sheet metal. In addition, according to Antoni, the planned building was placed inconsiderately on the site in relation to neighbours as its windows and balconies overlooked neighbouring properties. It was further complained that an inappropriate location (the roof) was proposed for the DSTV dish, air-conditioners and solar panels.

[5] Pursuant to threatened litigation and several e-mail communications, in which some of the issues were resolved (Robarts agreed to relocate the DSTV dish, solar panels and air-conditioners from the roof) the parties, represented by their town planners, met on 25 July 2012. The purpose of the meeting was to settle the remaining differences and future rights in respect of both properties. At that meeting the respondents agreed not to object to Robarts' applications for departure from various zoning scheme requirements and amendments to the title deed conditions.

[6] According to the respondents, Robarts would, in exchange for these concessions, register various height servitudes over the Robarts property in favour of the trust property. Robarts is further alleged to have agreed to change the roof material to non-trafficable steel 'clip lock' upon which stone chips would be set in epoxy. Robarts however disputed any such agreement. He stated that he reserved his position in respect of the stone chips on the roof until he had satisfied himself that they would not pose a problem and did not agree to any specific departure or details of any servitudes.

[7] It was common cause though that Robarts and Antoni shook hands at the conclusion of the meeting and agreed that Brümmer would record the proceedings in writing. According to Robarts, if the parties found the Brümmer draft agreement (the Brümmer draft) suitable, they would sign it and there would be a final agreement only when both parties agreed to and signed a written document recording an agreement. Thereafter, on 30 July 2012, Brümmer sent Robarts a draft agreement by e-mail and asked for his comments. He also e-mailed a copy to Antoni with a note that he was giving him a 'sneak preview' although he did not yet have Robarts' permission to do so. The Brümmer draft mis-stated two of the dimensions of the servitudes and omitted the items agreed upon before the meeting. Robarts was not satisfied with the draft's recordal regarding the roof material. On 1 August 2012 Brümmer, on behalf of Robarts, informed Antoni that Robarts had been advised by 'clip lock' roof suppliers that putting stone chips on the roof would void its guarantee. He asked Antoni to consider alternative roofing material. Antoni responded on the same day and undertook to do so in exchange for permission to build a timber deck off the fourth bedroom of the trust property. He enclosed a copy of the Brümmer draft which was amended by the correction of the misreported figures and the addition of the items agreed upon before the meeting. He also attached a diagram reflecting the agreed height servitudes for addition to the 'agreement package' (the Antoni draft).

[8] On 2 August 2012 Robarts extensively modified the Brümmer draft and sent a signed copy of the revised document (the Robarts draft) to Antoni the same day. The changes included Robarts' description of himself as a representative of the Robarts property and not its owner as previously recorded. No reference was made to a stone chip roof cover. Instead, a cost sharing arrangement in the event that other roofing

material was used, and non-variation, non-waiver and non-novation clauses were included. A clause providing for the registration of the servitudes immediately after registration of transfer of the Robarts property to Robarts was also inserted.[1] The respondents replied eight days later through their attorneys, Slabbert Venter Yanoutsos Inc. They advised Robarts that his draft did not accurately record the terms of the agreement reached by the parties at the meeting. The response included an amended copy of the Antoni draft (the Slabbert draft) which incorporated a clause stating that the agreement was between the executors of the deceased estate, Robarts and the respondents.

[9] Robarts wrote back on 14 August 2012. He noted that the agreement was nullified by a difference of opinion on a critical term of the parties' agreement in the drafts and suggested a meeting to resolve the disagreement. After some to and fro-ing in further e-mail correspondence on 15 and 21 August, all went quiet without resolution of the dispute. In the meantime, the development of the Robarts property had continued to completion without objection to any of the Robarts' planning applications for departure and title deed amendments from the respondents. On 16 November 2012 the respondents sold the trust property subject to a condition that they register the servitudes agreed to by Robarts by 1 March 2013. Their attorneys simultaneously sent Robarts another copy of the Slabbert draft which they insisted represented the parties' agreement of 25 July 2012. In his reply of 29 November 2012, Robarts denied that any final agreement had been reached at the meeting and averred that the subsequent offer he had made to Antoni had been rejected.

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[1] The latter amendment, which the respondents claimed to have noticed only after the opposing affidavits were delivered in the application proceedings, prompted them to amend the relief they sought by seeking to compel Robarts directly, and not the executors of the Robarts estate, to register the servitudes once he took transfer of the Robarts property.

[10] Pressured by the sale condition to register the height servitudes, so he said, Antoni signed the Robarts draft on 29 January 2013. It was e-mailed to Robarts on the following day with a request for him to co-operate in the registration of the height servitudes. Robarts' refusal to do so prompted the respondents to launch these proceedings in a bid to enforce the signed Robarts draft.[2]

[11] In the court below Robarts denied that the signed Robarts draft constituted a binding written agreement. He argued that it was merely an offer made to the respondents to contract on its terms, which was rejected on 2 August 2012 and was followed by a counter-offer on 10 August 2012 which Robarts did not accept. Alternatively, Robarts continued, if the offer did not lapse, he revoked it before Antoni signed it on 29 January 2013. And it would have been open only for a reasonable period and was no longer available for acceptance when Antoni signed it, six months after it was made.

[12] The court below was not persuaded by these submissions. It found that the parties had concluded an oral agreement on 25 July 2012 and that all that remained was to reduce their consensus into a formal, written agreement which the parties mandated Brümmer to do. In the court's view, the various drafts were an attempt to present the respective drafters' version of the agreement. The court accepted that Antoni was compelled to sign the Robarts draft because of the delay and the urgency brought about by the sale of the trust property. The effect of that, the court found, was merely that the trust waived its right to a written record of the oral

[2] The draft agreement made provision for registration of the height servitudes in clauses 2.1 and 2.2 which the respondents' notice of motion specifically cited.

agreement regarding the roof material. The court below concluded that the Robarts draft signed by Antoni became the written, agreed version of the terms of the parties' oral agreement and thereby constituted a valid written agreement between the trust and Robarts in his personal capacity. For that reason, Robarts had to facilitate the registration of the servitudes.

[13] On appeal before us, the issues distilled to whether (a) the parties concluded a binding oral agreement on 25 July 2012; (b) s 2(1) of the Alienation of Land Act 68 of 1981 (the Act) applies to the matter and requires the agreement, which the trust seeks to enforce, to be in writing, and (c) the legal significance of the various draft agreements and the Robarts draft relied upon by the respondents.

[14] As indicated above, the respondents' case in the court below rested on an alleged written agreement, in the form of the signed Robarts draft, concluded on 29 January 2013. However, they changed tack on appeal in an argument which proved somewhat difficult to follow. It was contended on their behalf that Robarts and the trust concluded a binding oral agreement on 25 July 2012 which precluded Robarts from making any offer to contract thereafter. By signing the Robarts draft, now termed a 'written instrument', Antoni meant merely to facilitate proof of the terms of that oral contract and did not bring about a new contract. The trust chose to sue not on the oral agreement but on the written instrument as it was constrained to do by the operation of the parol evidence rule once Antoni signed it.[3] And even though the written instrument was a 'misrecordal' of the oral agreement as its terms were inconsistent with

[3] According to this rule of evidence, a written agreement is generally regarded as the exclusive memorial of the parties' transaction and, in litigation between them, no evidence concerning the terms of such transaction may be adduced save the document itself or secondary evidence of its contents which may not be contradicted or amended in any manner by parol evidence. See *Union Government v Vianini Ferro-Concrete Pipes (Ltd)* 1941 AD 43.

what was agreed upon at the meeting, there was 'substantially one agreement'; the oral agreement which remained extant. Thus the Act – in terms of which no alienation of land shall be of any force or effect unless it is contained in a deed of alienation duly signed by the parties or their agents acting on written authority[4]– did not apply as it does not require the agreement relied upon to be in writing because there was no alienation of land involved. Alternatively, the relief sought was nevertheless competent because the written instrument, by which the parties intended to be bound despite its inconsistency with the oral agreement, met the requirements of the Act. The nub of the respondents' argument on appeal therefore, as I understand it, is that they seek specific performance of provisions of a binding oral agreement which are inaccurately recorded in a written instrument signed by both parties.

[15] The respondents' submissions are beset by a host of difficulties as their counsel was constrained to concede in argument before us. The foremost hurdle is that their application did not set out to enforce the provisions of an oral agreement. They relied wholly on an alleged written agreement which, by their own admission, was a 'misrecordal' of the terms of the alleged oral agreement, nonetheless signed by Antoni to bring about a written agreement for expedience, which entitled the respondents to an order of specific performance of its provisions. Antoni stated unequivocally in the respondents' affidavits that the respondents resolved to accept the misrecordal and waive any right to insist on an accurate recordal because of the impending transfer of the trust property and that he, accordingly, signed the Robarts draft on the trust's behalf to 'bring about a contract which ... [he] was prepared to go along with'. It was then made plain in those affidavits and in the correspondence of their

[4] Section 2(1) of the Act.

attorneys following the signing of the Robarts draft that it was its provisions and not the oral agreement that they sought to enforce. Their reference to the parol evidence rule conclusively supports this view because if it indeed applies they are then confined to rely on a valid written agreement between the parties.

[16] The case argued by the respondents on appeal is entirely different to that advanced in their papers and the order sought in the court below. Quite obviously, Robarts would be considerably prejudiced if the respondents were allowed to change their approach at this stage.[5] As was argued on his behalf, he might have conducted his case very differently if the respondents had indicated that they relied on an oral agreement instead of a written one. He might have taken steps to disprove it by adducing facts he thought were irrelevant to the allegations that had been made or seek a referral of the matter to oral evidence, in light of the material disputes of fact regarding what was agreed at the meeting of 25 July 2012. I see no reason to reject Robarts' version on the papers as there is nothing inherently far-fetched or clearly untenable in it.[6] This is especially so in the light of, inter alia, (a) Brümmer's odd reference to 'a sneak preview' when he sent Antoni a copy of his draft recordal, which still awaited Robarts' comment and approval, if a firm agreement had been reached on the issues at the meeting, (b) the several reformulations of the Brümmer draft which all embodied new proposals on substantive issues not even raised at the meeting, and (c) the very fact that the respondents opted to rely on a document that they themselves

[5] *Swissborough Diamond Mines (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 323F-324C; *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) paras 27 – 31.

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *National Scrap Metal (Cape Town) (Pty) Ltd & another v Murray & Roberts Ltd & others* 2012 (5) SA 300 (SCA).

acknowledged did not embody the terms of the alleged oral agreement. The facts show nothing but that no firm agreement was reached on 25 July 2012 and that the respondents failed to prove the binding oral agreement on a balance of probabilities as their counsel prudently conceded.

[17] All indications on the facts are rather that the parties intended to be bound only by a written and signed agreement as contended by Robarts. This has to be so in any event because, as indicated above, s 2(1) of the Act requires alienation of land to be contained in a deed of alienation duly signed by the parties or their agents acting on written authority to be valid. In terms of s 1(b) of the Act 'land' includes 'any interest in land' and 'alienate' which corresponds with 'alienation', in relation to land, means 'sell, exchange or donate'. It is established that a praedial servitude (such as the height servitudes involved here)[7] constitutes an 'interest in land' as envisaged in the Act.[8] The height servitudes are real rights which diminish the dominium of the owner's rights in the Robarts property as they entitle the respondents and their successors in title to restrict the owner of the Robarts property from exercising normal rights to ownership and developing the property to its full potential.[9]

[18] As was argued for Robarts, the parties' affidavits and indeed the written instrument relied upon by the respondents, make clear that the

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[7] Praedial servitudes, as opposed to personal servitudes, are created in favour of the successive owners of the dominant land; perpetual; attached to an immovable property; indivisible; and alienated together with the alienation of the dominant land.

[8] *Brink v Stadler* 1963 (2) SA 427 (C) at 428H-429F; *Felix en 'n Ander v Nortier NO en Andere* [1996] 3 All SA 143 (SE) at 153b-154c; *Janse van Rensburg v Koekemoer* 2011 (1) SA 118 (GSJ) paras 8, 16 – 18.

[9] *Denel (Pty) Ltd v Cape Explosive Works Ltd & another Cape Explosive Works Ltd & Another v Denel (Pty) Ltd & Others* 1999 (2) SA 419 (T); *Erlax Properties (Pty) Ltd v Registrar of Deeds & others* 1992 (1) SA 879 (A) at 885B.

servitudes were agreed upon 'in exchange' for the zoning scheme departures and title deed amendments, which would impinge on the trust property, sought on behalf of the Robarts property. The trust would waive its rights to enforce the zoning scheme and title deed restrictions and support Robarts' applications in that regard. In exchange, Robarts would abandon the right to build higher than he was otherwise entitled and secure the servitudes for the trust property. Each party therefore agreed to waive certain rights and simultaneously undertake certain obligations in exchange for the same concession from the other. In sum, the parties exchanged corporeal rights in land. So, whilst there may not have been an alienation of an interest in land in the form of a sale or donation, there certainly was an exchange thereof in the manner envisaged in s 2(1) of the Act. The decision of this court in *Hoeksma & another v Hoeksma* [10] upon which the respondents sought to rely cannot assist because it is distinguishable. There, the agreement in issue was intended to be a compromise and not an exchange and there was in any event no discernible object exchanged. The Act must therefore apply to the written instrument relied upon by the respondents as they also acknowledged.

[19] The respondents consequently have to prove the existence of the written agreement on which they rely.[11] To that end, they must show that a binding agreement was concluded between the parties when Antoni signed and sent the Robarts draft, which manifestly constituted a fresh offer, to Robarts on 30 January 2013. Interestingly, they conceded, albeit in another context, that even if there was an oral agreement, it would be legally irrelevant or moot if nothing more had happened after the meeting of 25 July 2012 or if one or both of the parties did not sign the written

[10] *Hoeksma & another v Hoeksma* 1990 (2) SA 893 (A).
[11] *Kriegler v Minitzer & another* 1949 (4) SA 821 (A) at 826 – 828; *Da Silva v Janowski* 1982 (3) SA 205 (A) at 219B-C and 220A-B.

instrument of 29 January 2013. And Robarts would thus have been entitled to make a written offer in whatever terms he wished. This concession must obviously redound to Robarts' favour in this instance too as the result is the same: there was no oral agreement. In that case Robarts and the respondents themselves were at liberty to renegotiate the terms of the mooted arrangement. This is precisely what Robarts did in his draft as the respondents accepted.

[20] Upon receiving the Robarts draft on 2 August 2012, Antoni telephoned Brümmer and told him that he would institute legal action as the draft differed from what was agreed at the meeting of 25 July 2012. A week later, on 10 August, the trust's attorneys sent Robarts the Slabbert draft which required him to sign a materially different, tripartite agreement.

[21] An offer lapses if it is rejected by the offeree and a counter-offer by the offeree amounts to a rejection of the offer.[12] Brand JA described a counter-offer as follows in *Legator McKenna Inc v Shea*:[13]

'[A] binding contract can only be brought about by an acceptance which corresponds with the offer in all material aspects. "Yes, but" does not signify agreement. At best it is a counter-offer.'

Once rejected, the offer is dead and cannot thereafter be accepted, unless it is revived.[14] And the offer may be revoked by the offeror at any stage before it has been accepted. Antoni's telephone call to Brümmer clearly constituted an outright rejection of the Robarts offer. And on the above principles the Slabbert draft, which sought to substantially vary the Robarts offer was tantamount to a counter-offer. Both occurrences

[12] *Watermeyer v Murray* 1911 AD 61.
[13] *Legator McKenna v Shea* 2010 (1) SA 35 (SCA) para 17.
[14] *Legator McKenna Inc v Shea* 2010 (1) SA 35 (SCA) para 17; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 420.

constituted a rejection of the Robarts offer. Robarts did not revive the offer and simply completed his development as he saw fit, without paying any attention to the items in issue between the parties. That conduct clearly evinced an attitude that the offer was no longer open.[15] In the circumstances, Antoni's signing of the Robarts draft did not bring about a written agreement between the parties. And that is the end of the respondents' case.

[22] It must be said for the sake of completeness that even if it were accepted that the written instrument constituted a binding agreement, the respondents would face yet another practical problem. On their version, they concluded the oral agreement with the executors of the Robarts estate but struck the written agreement with Robarts who was seemingly acting in his sole interest. In that case, the executors were not party to the written instrument and it could not be enforced against the estate which may still own the Robarts property.

[23] In the result, the appeal succeeds and the following order is made:

1 The appeal is upheld with costs including the costs of two counsel where employed.

2 The order of the court below is set aside and replaced with the following:

'(a) The application is dismissed.

(b) The applicants shall pay the respondents' costs of suit, including the costs of two counsel and the wasted costs occasioned by the hearing on 28 February 2013.'

[15] *Wissekerke en 'n ander v Wissekerke* 1970 (2) SA 550 (A) at 557F-H.

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JUDGE OF APPEAL

APPEARANCES:

For Appellant:	J Muller SC (HL du Toit) Instructed by: Kritzinger & Co, Cape Town Matsepes Inc, Bloemfontein
For Respondents:	M Fitzgerald SC (D Baguley) Instructed by: Slabbert Venter Yanoutsos Inc, Cape Town Janice Hayden, Bloemfontein