Court File

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

Case No: 10169/04

In the matter between

PENTABOD (PTY) LTD	**APPLICANT**
and	
GEORGE THOMAS HAZELDEN	**1ST RESPONDENT**
DERRICK DELSON	**2ND RESPONDENT**
EDWARD STUART DELSON	**3RD RESPONDENT**
FRANK THEODORE VLOK	**4TH RESPONDENT**
JULIAN WEIL	**5TH RESPONDENT**

Being the Trustees for the time being of the Somerset Park Business Trust

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JUDGMENT (delivered on 23 July 2008)

DESAI J:

This matter relates to the sale of certain immovable property in Somerset West. On 17 July 2000 the parties to this dispute concluded a deed of sale in terms of which the applicant company, **Pentabod (Pty) Ltd**, purchased from the **Somerset Park Business Trust** ("the Trust") a portion of land, being erf 12597 Somerset West, at an agreed price. The land sold is part of a larger development being undertaken by the Trust. The respondents herein are cited in their capacities as trustees of the said trust.

Clause 20 of the said agreement leads to the present dispute. It relates to a portion of the land which had not been rezoned and subdivided at the time the agreement was concluded. The relevant clause is handwritten and reads as follows:

> ***"The purchaser of this property has the first option to purchase the section of land marked as Anexure*** *(sic)* ***A approximately 1.09ha @ R50m² plus VAT."***

The applicant contends that the said clause constitutes an option in its favour, which option the applicant has validly exercised. The Trust, on the other hand, is of the view that the term "option" in the clause quoted above was not intended to create a true option and ought to be interpreted as a

right of pre-emption. A resolution of this dispute is a key issue which arises for determination in this matter.

The events leading up to the insertion of the said clause in the agreement, and the authorship of the clause, are disputed by the parties.

Mr **David Charles Tolson, ("Tolson")** the managing director of applicant, contends that the inclusion of clause 20 was "critical to the deal as a whole". He says he agreed to the purchase of erf 12697 subject to the said clause as it secured for the applicant a one hectare site at a minimal holding cost of approximately R300 000 which was the approximate purchase price of erf 12697.

According to **Tolson** he represented the applicant and the fifth respondent, Mr **Julian Weil, ("Weil")** was the Trust's representative. It was agreed that Weil, an attorney, would draw up the agreement. **Tolson** was comfortable with this as Weil was also his attorney and had assisted him in various property transactions. It was agreed between them that once the portion of the development was ready for development, the applicant would

be entitled to exercise the option.

Weil proceeded to prepare the deed of sale and **Tolson** attended on his offices to sign the document. When he received the document **Tolson** realised that the option had been left out. He raised this with **Weil** who apologised for the oversight and wrote the clause in by hand. **Tolson** accepted that **Weil's** formulation of the option was in accordance with the intention of the parties.

Weil denies that he was present when the deed of sale was signed by **Tolson**. He also denies that it was signed at his offices. He alleges that the handwritten clause was written by the first respondent, Mr **George Hazelden ("Hazelden"). Hazelden** confirms this in his agreement.

In his replying affidavit **Tolson** quite properly contends that this dispute is not of great moment. On respondents' own version the clause was included by a duly authorised representative of the trust.

One of the points raised *in limine* by the Trust is the proper identification of

the property referred to in the handwritten clause 20. It was contended on behalf of the Trust that the alleged option to buy the land in question is invalid as the said land is not identifiable from the provisions of the said clause. There is no section of land marked "A" in either the agreement or on the diagram which is attached to it. It appears that when the agreement was concluded the parties accepted that the "section of land" referred to in clause 20, was the shaded area depicted on the diagram which is attached to the agreement and marked "Anexure (*sic*) A".

Mr **A J Smit** SC, who appeared on behalf of the respondents, argued that it is impossible to identify the property with reference solely to the description contained in clause 20. For it to constitute a valid option with the purchase of land, the terms of the option must be in writing in accordance with the provisions of s2(1) of Act 68 of 1981 ("the Act"). The description of the property sold must comply with the provisions of the Act. What is required is that the land sold must be identifiable "*on the ground by reference to the provisions of the contract without recourse to evidence from the parties as to their negotiations and consensus".* (See ***Clements v Simpson*** **1971 (3) SA 1 (AD) at 7F-G**). Mr **Smit** submitted that the said option, if such,

was invalid for want of compliance with the statute as the description of the property is not sufficient to enable identification on the ground.

Compliance, however, does not mean "a faultless description of the property sold couched in meticulously accurate terms". (See ***Van Wyk vs Rottchers Saw Mills (Pty) Ltd*** **1948 (1) SA 983 A at 989**). The property was clearly demarcated on Annexure A – the un-subdivided land was shaded in by the parties and can be clearly seen from the document itself. It is approximately 1ha in extent and is bounded by erven numbers 14794, 12697, a private open space, a proposed access road and so on. In any event, the Trust has not advanced any reasons why the land is not identifiable *ex facie* the agreement.

Furthermore, the applicant's interest in the land was historically recognised by the Trust. When a draft deed of sale was forwarded by the Trust attorneys to the applicant the annexure to the agreement was omitted. On 11 November 2002 the applicant's attorneys advised the Trust's attorneys of the omission. A day later the Annexure was forwarded to the applicant's attorneys and the diagram clearly shows the portion to be acquired being

one hectare in extent and bounded by the erven and open spaces as indicated above. **Weil** in fact admits that the diagram shows the shaded area which is approximately 1ha in extent.

The portion of land to which clause 20 refers is quite clearly identifiable *ex facie* the document. If so, then the agreement is valid.

Respondents counsel also referred to other problems with regard to transferring the property described in clause 20 to the applicant. It appears that the property has been subdivided already. The new Portion A differs to some extent from the shaded portion of the diagram attached to the deed of sale. As it is not applicant's case that it bought Portion A, the property would have to be "re-subdivided" to demarcate a portion with a similar configuration as the shaded portion. Mr **Smit** contends that this further complicates the relief sought by the applicant, namely, transfer upon subdivision of the property described in clause 20.

As Mr **A D Brown**, who appeared on behalf of the applicant, has pointed out, the fact that the land ultimately sought to be transferred may differ

slightly from the identified land due to subsequent events cannot, and does not, affect the validity of the agreement. Although it may result in a claim for damages, a discrepancy between the stated size of the piece of land and the actual size of the land does not affect the validity of the sale of agreement. (See ***Conroy vs Coetzee*** **1944 OPD 207**).

On the issue as to whether clause 20 constitutes an option, **Hazelden** states that it was his intention to grant "a prior right to purchase the land". He says that it was described as a first option as a right of pre-emption was intended and that is how the clause should be interpreted.

In this instance the meaning of the clause is clear from the words used and no intrinsic evidence is required to ascertain the intention of the parties. It unequivocally indicates an option. An option gives to a party the right to purchase the subject-matter for a specified price. A right of pre-emption is quite different. It places an obligation on the owner of the subject-matter to offer it to the right-holder before selling it to a third party. In the latter instance the right to acquire the subject-matter only arises when a decision is made to sell it. (See ***Hirschowitz vs Moolman*** **1985 (3) SA 739A at**

plus VAT" indicates the granting of an option. It would be most unusual where a right of pre-emption is granted. (See ***Stewart vs Breytenbach*, *supra*, at 52I**). The right of pre-emption or first refusal is the right to meet what a third party may offer.

As Mr **Brown** has correctly pointed out, **Hazelden** was unable to explain the fact that the Trust did not intend to be bound to a price yet an amount was in fact stipulated in the agreement.

The fact that no time period is specified for the duration of the option does not invalidate the option (see ***Christie: The Law of Contract in South Africa Third Ed at 58)*** and insofar as the Trust suggests that clause 20 does not correctly reflect the intention of the parties, no case is made out for rectification. A party relying on rectification must claim it specifically and it must set out the terms of the rectification sought. (See ***Lazarus vs Gorfinkel* 1998 (4) SA 123C at 131B-H**). The Trust does not allege a mistake in the drafting of the clause nor does it seek to make out a case for rectification.

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In the result, an order is granted in the following terms:

1. That clause 20 of the Deed of Sale concluded on 17 July 2000 between the applicant and **Somerset Park Business Trust ("the Trust")** constitutes an option granted in favour of the applicant to purchase the property described therein at a price of R50 per square metre plus Value Added Tax;

2. That the applicant has validly exercised its rights in terms of the option and that it is entitled to transfer of the property, upon its subdivision, against payment of the purchase price therefor; and

3. That the **Somerset Park Business Trust ("the Trust")** is to pay applicant's costs.

DESAI J