[*REPORTABLE*]

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

CASE NO: 13703/07

In the matter between:

DOUBLE OPTION TRADING 197 (PTY) LTD Applicant

and

BRENT DE VERE GRIMBEEK First Respondent

CAMILLA FIONA GRIMBEEK Second Respondent

JUDGMENT DELIVERED ON THE 13TH DAY OF AUGUST 2009

NDITA, J:

[1] The applicant seeks an order declaring the agreement between it and the respondents for the development of land in respect of which the applicant paid a deposit in the amount of R2 000 000, 00 (two

million rand), as null and void *ab initio,* and that the respondents be ordered to repay to the applicant the said amount with interest at the rate of 15,5% per annum.

[2] The applicant is a company duly registered and incorporated in accordance with the Laws of the Republic of South Africa and the developer of the land, which is the subject matter of the present dispute. The respondents are the owners of the land and married to each other. Mr J P Coetzee represented the applicant in court in these proceedings. Mr M Bridgman appeared for the respondents.

THE CONTRACT

[3] On 10 March 2006, the applicant concluded a written agreement in terms of which the respondents were to make available to it farm land defined in clause 1.2.8 of the contract as:

> *"Remaining extent of the farm Retreat and The Willows nr 168 Stellenbosch RD in extent 5,9045 hectares and Portion 9 of Farm nr 119 Stellenbosch RD in extent 9,9034 hectares, both held in terms of T.37142/2001 known as BERGPLAAS.*"

[4] The overall extent of the land in terms of the agreement was therefore 15,8079 hectares for which the applicant was to pay an amount of R2 000 000,00 as a non-refundable deposit. In terms of clause 1.2.3 of the agreement, the applicant was obliged to develop a minimum of 300 stands with an average of 350 square metres on the land. The applicant paid the requisite sum of R2 000 000,00 on 16 March 2006. However, during February 2007, the applicant avers that it came into possession of the title deed of the land and discovered that, according to condition E of the Title Deed, two portions of the land described in the agreement as portion 9 of the farm 119 Stellenbosch RD, have been expropriated by the Divisional Council of Stellenbosch on 17 December 1982. The portions expropriated are in the extent of approximately 1,469 hectares and 710 square metres, as a result of which the aggregate of the expropriated land was 1,54 hectares. The extent of the land for development was thus 14, 2679 hectares and not 15,8079 hectares as reflected in the agreement between the parties. The Deed of Transfer T837142-2001 that reflects the extent of the property as 9,9034 hectares and 5,9045 metres is attached to the agreement.

[5] Some terms of the agreement have to be noted. In terms of Clause 2.2.1 the deposit of the sum of R2 000 000,00 is non-refundable and would, upon payment, become the sole and absolute property of the respondents. A further clause which turns on the issue for adjudication is Clause 2 of part B providing that the owner makes the land available to the developer voetstoots. I shall revert to these two issues later in this judgment.

[6] The applicant avers in an affidavit deposed to by Mr Johannes Petrus Nel, who is its director, that the parties never reached a consensus to contract with each other for a lesser area for development, and for this reason the contract was void *ab initio* because of a mutual or common mistake, misrepresentation and or repudiation in that the respondents refuse to provide the 15,8079 hectares. Effectively the land available for development is 14,2679 hectares and not 15,8079 hectares as agreed. According to the applicant, such mistake has rendered it impossible for it to perform its obligations in terms of the agreement. Furthermore, the extent of the land was a material term of the agreement as the applicant could only

determine the size of the erven to be developed based on the size of land available. In view of the voidness of the agreement, the applicant states that it is entitled to the refund of the amount paid together with interest at 15.5% from 16 March 2006 to date of payment by the respondents.

[7] The respondents filed a counter application in which they sought an order declaring that the agreement of 10 March 2006 was a valid agreement and further seek an order rectifying clause 1.2.8 referred to above describing the land by adding the following words:

> *"which title deed records that two portions of the property, measuring a total of plus minus 1,54 Ha have been expropriated by the Divisional Council of Stellenbosch, leaving a total of plus minus 14, 2679 Ha available for development."*

The reference to the title deed in the agreement incorporates the terms and conditions appearing in the title deed by reference.

[8] The respondents further seek an order declaring that they had lawfully cancelled the agreement between the parties on 16 March 2007, and in consequence a further order declaring that they are entitled to retain the non-refundable deposit of R2 000 000,00 paid by the applicant on 16 March 2006.

[9] In the affidavit in support of the counter application deposed to by the first respondent, it is averred that the reference to the Deed of Transfer, which clearly reflects that a portion of the land had been expropriated and was therefore less than the extent referred in the agreement, shows that the parties intended to incorporate such deed in the contract. According to the respondents, it is clear from the contract that they intended to supply the land for development as referred to in the deed. Nothing more, nothing less. However, this attitude, in my view, does not take into account that the contract specifically provides the full size and the extent of the land for development. The respondents further aver that the deed is a public document accessible to interested parties and the applicant could have easily verified the correct size of the land before signing the contract if the extent was material to the intended development. As

developers of the land, so avers the respondents, it was up to the applicant to survey the land or verify its true extent in order to complete the responsibility it assumed under the contract.

[10] The first respondent admits that at no stage prior to the conclusion of the contract, did the parties discuss the extent of the land. Notwithstanding this averment, he, in his affidavit in support of the counter-claim, insists that the applicant had, prior to signing the contract, knowledge that less than 15,0879 hectares were available for development. He sketches a brief history of how the present transaction arose. According to the first respondent, he was approached by Mr Andries Breedt from Rawson Properties who then informed him that there was a developer interested in the land. The representative of the respective parties met on 8 February 2006 at the offices of Musto Brindley Inc, the respondents' attorneys of record. Pursuant to the meeting, the respondents confirmed in a letter dated 10 February 2006 that they were in favour of the deal and suggested incorporation of milestones in order to regulate the project. In response to this proposal, the applicant did not raise the issue of

the size of the land for development and the agreement was signed on 10 March 2006.

[11] After the contract was signed and during April or May 2006, the first respondent met with the applicant's representatives, Mr Nortjie and Mr Nel, who informed him that the size of the property was not as big as earlier envisaged and that that would create potential problems for development. According to the first respondent, Mr Nortjie seemed associated with the applicant. Nothing much turned on the size of the property but for the fact that Mr Nel and Mr Nortjie discussed changing the style of the development and making it more up market. The respondents requested a layout plan for the development. During June 2006, the respondents met with one Susanna Nel (Mr Nel's sister) who requested him to sign a Notification of Intent to Develop in terms of Section 38 of the National Heritage Resources Act No.25 of 1999. In the notice the size of the land is reflected as 14, 3389 hectares contrary to the extent referred to in the contract.

[12] In a meeting held on 6 June 2006 at the respondents' attorney's offices in Tokai, at the instance of Mr Nel who was represented by Mr Wallace and Mr Nortjie, the issue of the size of the property was raised as a concern. At this meeting, according to the first respondent, the applicant confirmed that they had had the property surveyed. Again the extent of the land did not appear to have any impact on the agreement because Mr Nel undertook to present a layout plan of the proposed development. On 13 December 2006, the first respondent received a request to sign a special power of attorney from a company known as Under the Boardwalk 19 (Pty) Ltd, which claimed to be the applicant's development planner. The power of attorney was sent to the first respondent's attorneys, Musto Brindley Inc. Attached to the power of attorney was an email in which the new company confirmed that the process of Rezoning and Subdivision application was finalized on 12 December 2006 and all that remained was for the respondents to sign the power of attorney.

[13] The first respondent avers that he did not sign the document as he had not yet discussed the layout plan with the applicant's representatives. On 30 January 2007 a further meeting was held at the respondents' attorney's office. Mr Nel and Mr Wallace were again present. Mr Nel gave a progress report on the development. However, on 2 February 2007, the first respondent was notified by the Stellenbosch Municipality that the application for the subdivision and rezoning was lodged in December 2006, but the application process had not commenced as the lodgment fee had only been paid on 27 January 2007. The first respondent alleges that he brought that information to Mr Nel's attention through a texted cellphone short message system, ie, sms. Eventually, on 6 February 2007, the first respondent received the application for rezoning and subdivision. The rezoning layout reflected that, contrary to 300 houses agreed upon by the parties, only 248 residential erven and 2 apartments could be developed.

[14] All of this background information, coupled with the applicant's conduct of performing in terms of the contract despite realizing that the extent of land was less than the size reflected on the agreement, according to the first respondent, leads to one inescapable conclusion that the contract between the parties had been rectified.

[15] The first respondent denies that the agreement between the parties is void and contends that it is the applicant who is in breach of the terms of such agreement. In terms of clauses 2.9.1 and 2.9.2 the parties agreed that:

> *"2.9.1 The DEVELOPER shall obtain rezoning and subdivisional approval for the land development from the local authority by 31 October 2006;*
>
> *2.9.2 The DEVELOPER shall obtain the record of Decision from the Department of Environmental Affairs approving development in terms of the*

Environmental Conservation Act 73 of 1989, as amended, by 31 October 2006."

It is not in dispute that the above terms of the contract were not complied with. It was only subsequent to the above meeting that the respondents discovered that the Application for Rezoning and Sub-division had only been lodged during January 2007, and the Application to the Department of Environmental Affairs had not yet been lodged.

[16] The respondent alleges that because of such breach, he cancelled the contract in a letter dated 12 February 2007 to the applicant, which reads as follows:

" Dear Sirs,

RE: BERGPLAAS

The above matter and in particular the meeting at our offices on 30 January refers.

After careful consideration, our clients have decided that they cannot overlook your failure to meet the deadlines set out in clauses 2.9.1 and 2.9.2 of the Agreement namely:

(i) the obtaining of rezoning and sub-divisional approval,

(ii) Department of Environmental Affairs approval,

by 31st October 2006.

It was only subsequent to the above meeting that our clients discovered that the Application for rezoning and Sub-division had only been lodged during January 2007 and the Application to the Department of Environmental Affairs had not yet been lodged.

Effectively this puts to the time frame envisaged in the Agreement for the development of the property.

Accordingly, our clients hereby notify you of their decision to exercise their right to terminate this agreement in terms of clause 2.9.

You, of course are entitled to exercise your right in terms of clause 7.1 to purchase the land for R50 000 000,00 (Fifty Million Rand).”

[17] The applicant responded to this letter by stating that it had obtained a copy of the title deed which clearly reflected that 1,469 hectares and approximately 710 square metres have been previously expropriated by the Divisional Council of Stellenbosch. In the replying affidavit, the applicant emphatically denies that he was aware of the true extent of the land available at the time the contract was entered into. According to the applicant, he received a copy of the title deed only in February 2007. Furthermore, the respondents’ claim to rectification cannot be sustained because Clauses 9.2 and 9.3 of the agreement provide as follows:

“*9.2 No addition or variation, consensual cancellation or novation of this Agreement shall be of any force or effect unless reduced to writing and signed by all the parties or their duly authorized representative.*

9.3 This Agreement constitutes the whole agreement between the Parties as to the subject matter hereof and no agreements, representations or warranties between the Parties regarding the subject matter hereof other than those set out herein are binding on the Parties."

[18] In the replying affidavit, the applicant admits that, after learning that there was a discrepancy in the land available, he attempted to give effect to the agreement but it was impossible because of the rezoning plan. According to the applicant, only 248 erven for single residential stands, two apartments and a private road could be developed from the available land. In response to the respondents' assertion that they cancelled the contract because the applicant failed to perform, the applicant states that the respondents are not entitled to rely on the failure to *"timeously or fully perform"* any obligation, because the contract is void. In a nutshell, the applicant opposes the counter application for rectification on the basis that:

1. The respondents did not disclose their confusion as to the extent of the land when the contract was concluded; and

2. Impossibility of performance of developmental obligations in that a minimum of 300 stands (as envisaged in the contract) cannot be developed on the available land; and

3. Misrepresentation; and

4. Repudiation in that the respondents refuse to provide 15, 8079 hectares for development; and

5. The Conventional Penalties Act.

DISPUTE OF FACTS

[19] Ordinarily, material disputes of fact cannot be resolved in motion proceedings unless the parties are given leave to lead oral evidence. However, the approach to such disputes in applications for final relief, as is the case in the instant matter, has been correctly set out in the applicant's Heads of Argument as restated in **Wrightman**

t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at 375 D-I:

> *"[12] … the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by the opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or* bona fide *dispute of facts or are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers…*
>
> *[13] A real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if that fact averred is purely within the knowledge of the averring party and no basis*

is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they not be true or accurate but, instead of doing so rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which need to be borne in mind when arriving at a decision." (See also **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) SA 623).

[20] In the present matter, there is no genuine or material dispute of facts. Both parties admit all the terms of the contract. The weighty consideration is whether the applicant was, at the time of the inception of the contract aware of the actual size of available land. I am not persuaded that the respondents, who raised the dispute, have in the affidavits filed, seriously and unambiguously addressed the issue of how the applicant obtained prior knowledge of the extent of the land available for development at the time the contract was

entered into in the light of the fact that there were no discussions between the parties pertaining to the expropriated land. The only reference to the applicant's prior knowledge appears in the affidavit of Mr Breedt (the estate agent) in which he states that he informed Mr Nel, who represented the applicant, that there might be a discrepancy of 1,5 hectares in the size of the property before the recordal of the contract. I am in this regard persuaded to accept the applicant's version for the following reasons:

"1. Mr Breedt states that:

14 "While we were standing on land, I told Mr Nel about the expropriation for the road and there might be a 1,5 hectare discrepancy. I told him to work on the available +-14,3 hectares. I said that if the Deeds Office was correct and there needed to be no deduction then they would have an extra 1,5 hectares to work with.

15 When I told Mr Nel to work on 14,3 hectares, he told me not to tell him how to do his job. He said he knew his job. We returned to Stellenbosch and we discussed further details."

[21] If Mr Breedt knew of the discrepancy before the contract was signed there is no tangible reason why the true extent of available land was not recorded in the contract. It is noteworthy that Mr Breedt is the estate agent who solicited developers on behalf of the respondents and was in fact the respondents' agent. Furthermore, the contract was carefully drafted by the respondents' attorney who presumably must have had sight of the title deed. It is difficult to comprehend why he did not bring that information to the attention of the respondents ,seeing that he was the one sourcing a buyer for the land. The agreement specifically provides that the developer was obliged to pay the estate agent, Mr Breedt, R6 000,00 in respect of each erf sold after completion of the development and he had sole mandate to market the stands to prospective purchasers. Surely if he had information that the extent of the land was less than originally agreed, that would have been a very important factor impacting on his earnings, a fact that should have been disclosed to the contracting parties.

[22] Mr Breedt is not a party to the agreement but merely an estate agent. It was incumbent upon the owners of the land to correctly define the land in the light of the knowledge their estate agent possessed.

[23] The developer, by necessary implication, had the right to determine the shape and size of the land. It appears that the applicants also did not verify the extent of the land and simply relied on what was reflected in the contract. Mr Nel, as the director of the applicant, would obviously wish to negotiate a deal favourable to the applicant. The question is then why he would deliberately enter into this agreement if he was told by Mr Breedt that the land could be insufficient for the intended development. Clearly that would be to the disadvantage of the applicant as a developer.

[24] The first respondent concedes throughout his affidavit that the actual extent of the land was never an issue when the contract was signed. It is easy to understand why the actual extent was not an issue if the extent of the land was more than the hectares the respondents had undertaken to make available for development.

However, it becomes material should it be lesser than envisaged. He states that:

> *"In about April May 2006 I met with Mr Jan Nel and Mr Ferdi Nortjie at the property. Mr Nel asked me if I was aware that the property was not as big as they had originally envisaged. I replied that I was not aware of the size of the property and I said that I had never discussed the size with them. I said to them that they were property developers and that it was up to them to survey the land or check the size of the land."*

[25] It is clear from the aforegoing that both parties signed the contract believing that the actual size reflected in the agreement was available. There is therefore a disagreement over an important quality or attribute of the agreed subject matter of the contract. I am of the view that this was a mutual mistake.

MUTUAL MISTAKE AND IMPOSSIBILITY OF PERFORMANCE

[26] One of the arguments raised by the applicant, as pointed out earlier in this judgment, is that the contract is void by reason of a mutual mistake between the parties, rendering it impossible for the

applicant to comply with its developmental obligations. On the facts of this case, the blame is squarely on both parties for the obvious mistake. Although the parties are *ad idem* on all terms of the contract, including the *merx*, the question that remains is whether the parties would have entered into the agreement had they known that their expectations would not be realised. The legal position in contracts of this nature is succinctly summed up in Christie's **The Law of Contract in South Africa** 4th ed at 377 as follows:

> *"It being clear from all the cases that mutual mistake, once it comes to light, is treated as non-correspondence of offer and acceptance, two results must follow. The first is that there can be no question of the contract being merely voidable at the option of either party. If offer and acceptance agree, there is a binding contract; if not there is no contract at all, not a voidable one. It may happen, of course that the parties decide to ignore the mistake and carry on with one version or the other of the contract, but they can do this with a fresh agreement, since without a fresh agreement (express or tacit) there is no contract with which they can carry on, and a party who carries on with the other's version because he thinks he is legally obliged to do*

so is not tacitly making a fresh agreement because he does not have the animus contrahendi*."*

[27] Whilst it must be acknowledged that public interest and the Constitution require in general that parties must comply with contractual obligations, external manifestation of the agreement is an equally important factor. In **Diamond v Kernick** 1947 (3) SA 69 (A) at 83 Tindall JA considered circumstances where a mutual mistake occurs and stated as follows:

"… each party was mistaken as to the other's intention, though neither realised that his promise was misunderstood by the other. See ***Cheschire and Fifoot on Contract*** *(p.141). This is not a case where the Court can apply in favour of the plaintiff the well-known principle stated by Lord Blackburn in* ***Smith v Hughes*** *(L.R,. v1 Q.B.597, at p. 607), that if a man, whatever his real intention maybe, so conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and the latter upon that belief enters into a contract with him, the former would be bound as if he had intended to agree to the other party's terms.*

In the circumstances, the plaintiff failed to prove that the minds of the parties ever met, or, to use another phrase, failed to prove a true consensus *ad idem."*

[28] The applicant's intentions when he entered into the agreement are explicitly set out in paragraph B of the preamble as follows:

"The Developer envisages subdividing the land into 316 and 330 residential stands."

[29] The development of the stands is inextricably linked to the size of the land. The contract required that the respondents make 15, 8079 hectares available to develop the required number of erven. On the respondents' own version, the actual extent of the land was not mentioned when the contract was signed. There is no indication in these papers that the parties achieved any consensus for the 14, 2679 hectares. Mr Nel's averments that the applicant found it impossible to develop 300 erven of an average size of 350 square metres each on 14,2679 hectares is unchallenged. The developmental obligation in the contract itself is defined as *"the*

developer's obligation to develop a minimum of 300 stands with an average size of 350 square metres on the land". It must follow that the contract should be *"treated as non-correspondence of offer and acceptance".*

[30] In the counter application the respondents claim that the contract had been rectified. Furthermore, so allege the respondents, the title deed referring to the expropriated land should be incorporated to the contract by reference. I now proceed to deal with such rectification and incorporation of the title deed by reference.

RECTIFICATION AND INCORPORATION BY REFERENCE

[31] It is trite law that where a contract records a version that is not in accordance with what was actually agreed upon, the appropriate remedy is an order for rectification. (See Christie supra at 383). De Wet CJ in **Meyers v Merchants' Trust Ltd** 1942 AD 244 at 253 held that:

> *"… it is competent to order rectification of a written contract in those cases where, in which it is proved that both parties had a*

common intention which they intended to express in the written contract but through a mistake failed to express."

[32] Brand JA in **Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd** 2004 (6) SA 29 (SCA) at 38J-39 held that:

"It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' *(per Bristow J in **Bushy v Guardian Assurance Co** 1915 WLD 65 at 71; see also **Bardopoulos and Macrides v Miltiados** 1947 (4) SA 860 (W) at 863 and **Levin v Zoutendijk** 1979 (3) SA 1145 (W) at 1147H -1148 A). In essence, a claimant for rectification must prove that the written agreements does not correctly express what the parties had intended to set out therein."*

[33] In the present matter, in line with the respondents' version, the parties did not discuss the extent of the land before the conclusion of the contract. The respondents seek to rectify the description of the land to 14,2679 hectares in stead of the agreed 15,8079 hectares.

Flowing from the above dicta, it is clear that the respondents must prove a common intention that reference to the expropriation should have been included in the description of the land and that the specific extent of the land which was available for development, viz. 14, 2679 hectares, should have been recorded. The applicant's version is that its intention was set out in the contract itself. The respondents, on the other hand, rely on the alleged negotiation regarding the expropriation between Mr Nel and Mr Breedt in which the latter informed Mr Nel *"to work on an available +-14.3 hectares"*. Even if one assumes in favour of the respondents that this was the case, it still does not accord with the rectification sought because it does not demonstrate a common intention between the parties. Furthermore, if on the respondents' version, the parties had never discussed the impact of the disparity on the size of the land, they could not have had any common intention with regard to the actual size and its impact on the written contract. After all, the respondents themselves aver that they did not concern themselves with the actual size of the land. Even the attorney who drafted the contract on behalf of the respondents, presumably in possession of the title deed, did not deem it necessary to ensure that the correct size of the available land

was brought to the attention of the contracting parties. In my view, the respondents have not made out a case for rectification.

[34] With regard to incorporation by reference into a contract, Scott JA in **Industrial Development Corporation of SA (Pty) Limited v Silver** 2003 (1) SA 365 (SCA) at para [2] of the judgment (p368), discussed and held:

> *"[2] The appellant sued the respondent in the Court below for payment of the sum of money said to be due and payable to it by the respondent as surety and co-principal debtor in terms of a deed of suretyship dated 10 December 1999. The document specified the amount of the principal debtor's indebtedness, that such indebtedness was in respect of money to be lent and advanced by the appellant to the principal debtor in terms of an agreement (defined as* 'the loan agreement'*) and the loan agreement was to be entered into simultaneously with the signing of the deed of suretyship. But it did not reflect the name of the principal debtor; a space left for the insertion of the latter's name was left blank.*

[3] The appellant annexed to its summons a copy of a loan agreement entered into between it as lender and a company, Auto Spares and Accessories (Pty) Ltd trading as Engineplan ('Engineplan'*) as borrower and alleged in its declaration that this was the loan agreement referred to in the deed of suretyship. It followed, so it was alleged, that the principal debtor was Engineplan. From the loan agreement it appears that the loan was for R6 million, being the same amount referred to in the deed of suretyship, and that it was signed by the respondent both on its own behalf and on behalf of Engineplan on the same day as the deed of suretyship was signed, viz. 10 December 1999. The loan agreement provided further that any advance in pursuance of its terms was conditional upon the Respondent first guaranteeing the obligations of Engineplan under the loan agreement in the form and subject to such terms as the appellant reasonably required.*

[5] … What the section requires is that the 'terms' *of the contract of suretyship are to be embodied in a written document. Those terms are not limited to the essential terms*

but would include at least the material terms of the contract. … Although it may at first blush appear not to be the case, the identity of the principal debtor is undoubtedly a material term of a contract of suretyship. … Unless, therefore, the identity of the principal debtor is embodied in the written document, the contract of suretyship will be invalid. In the present case the appellant relies on the reference in the deed of suretyship to the loan agreement which in turn discloses the identity of the principal debtor. It is contended that the loan agreement was incorporated by such reference into the deed of suretyship and that there was accordingly compliance with the section despite the blank space where the name of the principal debtor ought to have been inserted.

[6] Incorporation by reference, as the name implies, occurs when one document supplements its terms by embodying the terms of another. Leaving aside for the moment the admissibility of extrinsic evidence that may be necessary to complete the identification of a document whose terms are sought to be incorporated, the first enquiry is whether the deed

of suretyship may be supplemented in this way." (my underlining)

[35] In the present case, the extrinsic evidence, as embodied in the contract, clearly identifies the land for development as 15,8079 hectares. The title deed refers to 9,9034 **metres** and the remainder as 5,9045 hectares. This is a considerable anomaly. Clearly, the incorporation is at odds with the respondents' own version. The title deed itself inadequately describes the land in question. In my view, the respondents were negligent in raising this issue on the counter application without due regard to the precise contents of the title deed.

[36] I have indicated earlier on in this judgment that, in terms of Clause 2 of part B, the owner makes the land available to the developer voetstoots. Generally a voetstoots clause relates to latent defects of physical nature. Goldblat J in **Van Nieuwkerk v McCrae** 2007 (5) SA 21 went on to say that a seller cannot in these terms rely on a voetstoots clause since it excludes liability only for latent defects of a physical nature but does not apply *"to lack of certain*

qualities or characteristics which the parties agreed the merx should have".

[37] Accordingly, the respondents' reliance on the voetstoots clause is misplaced because the clause cannot exempt the respondents from the obligation to deliver to the applicant the land as specifically agreed in the contract. Thus the voetstoots clause cannot in the circumstances of this case be read as referring to the extent of the land as the contract specifically provides for same, but rather to the condition of the land.

CONCLUSION

[38] In this judgment I have held that the contract between the parties must be *"treated as non-correspondence of offer and acceptance*". It follows from this reasoning that the contract is void for lack of consensus. I have also indicated that the respondents' counter-application for rectification is not good in law, and neither can the defective title deed be incorporated by reference to the agreement. Similarly, the respondents' reliance on the voetstoots

clause is misplaced. The unavoidable consequence is therefore that there is no contract between the parties. It therefore becomes unnecessary to consider whether the applicant had failed to perform obligations arising therefrom. Further, the respondents cannot claim to have cancelled or repudiated a non-existent agreement. It stands to reason that the applicant should be refunded the R2 000 000,00 it paid to the respondents as a non-refundable deposit.

[39] In the result, I make the following order:

1. The contract between the applicant and the respondents, dated 10 March 2006, is declared void *ab initio;*

2. The Respondents are ordered to pay the applicant an amount of R 2 000 000,00;

3. The respondents are ordered to pay interest to the applicant at the rate of 15,5% per annum with effect from 16 March 2006;

4. The Respondents are further ordered to pay the Applicant's costs of suit;

5. The respondents' counter-application is dismissed with costs.

NDITA, J