

**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 6140/21

BAJ MANUFACTURING (PTY) LTD t/a PLASTI PART Applicant

v

JAN PAUL YNTEMA N.O. 1st Respondent

KINNY WILLEMINA YNTEMA N.O 2nd Respondent

ANRICH ALBERT MARAIS OBO 3rd Respondent

FINLEYS TRUST SERVICES N.O. 4th Respondent

JUDGMENT DELIVERED ON THIS 10th DAY OF MAY 2022

FORTUIN, J:

A. INTRODUCTION

[1] This is an application for an order, directing the respondents to sign all documents necessary to cause transfer of the property described as Section 29, plus an undivided share of the common property in the sectional title scheme known as SS

Firgrove Industrial Park, situated on Farm No. 1528, Stellenbosch Road, Firgrove, (Unit C5) against payment of the purchase price of R2 441 500.00 (excluding VAT) within 30 days of the order being granted, or, failing compliance by the respondents with the above, authorizing and directing the Sheriff to sign all documentation on behalf of the respondents and effect transfer of Unit C5 to the applicant.

[2] The respondents opposed the application.

[3] The applicant is BAJ Manufacturing (Pty) Ltd t/a PLASTI PART with Registration no 200[...]. Olga Estelle Hobley is a director of the applicant. The first, second and third respondents (the respondents) are the trustees of the JPY Family Trust (“the trust”).

B. COMMON CAUSE BACKGROUND FACTS

[4] During 2018, the trust was the owner of the sectional title property known as SS Firgrove Industrial Park. At this time, the applicant was interested in purchasing two units in this building, which was being developed. The applicant and the respondents then entered into an Option and Right of First Refusal Agreement (“option agreement”) on 18 October 2018. The parties agreed that the applicant would purchase two units being an existing building B, which required renovation and modification, and a further adjacent property, C6. At the time of the negotiations, the areas described as C4, C5 and C6 were vacant land. The parties agreed that the applicant could purchase the property consisting of the “Existing Building B”, as well as the adjacent property described as C6. As stated before, this building still had to be developed and built.

[5] The parties also agreed that, should the applicant need additional space in future, the respondents will grant the applicant the option to buy the developed units described as C4 and C5. The option period started from date of completion of unit C6 and would last for a period of two years. Unit C6 was completed on 20 March 2020. This start of the option period was initially from the date of signature of the agreement,

but was subsequently changed on a suggestion by the applicant to being the date of completion of Unit C6.

[6] The applicant exercised its option in respect of Unit C5 by giving the respondent written notice on 28 January 2021.

[7] Clause 1.4.1 of the Option states that:

“1.4.1 If the option is exercised before the expiry of year one of the Option Period, the purchase price shall be the Yr1 price as contained in Table 1.2.”

[8] It was visualised that the construction of all the units would be completed by October 2019, including the units in respect of which the applicant wanted an option.

[9] The right of first refusal prepared by the trust included a schedule known as table 1.2 in which the purchase price to be paid for the two units was set out and linked to certain time periods.

[10] This option and right of first refusal agreement in respect of units C4 and C5 had a hand written amendment relating to the commencement of the option period. Table 1.2 of the agreement, which recorded the purchase price of the combined units, however, remained unchanged as part of the option agreement. The parties signed the two sale agreements and the option and right of first refusal agreement on 8 October 2018.

[11] A number of points in *limine* were raised by the respondents. Firstly, that the applicant did not exercise the option agreement. Secondly, that the applicant should have claimed for rectification.

[12] It is undisputed that the price for Unit C5 is R2441 500.

[13] It is common cause that Olga Hobley and Benjamin Hobley are both the only directors of the applicant, as well as a company registered as Plastipart Holdings (Pty) Ltd.

[14] Construction work in respect of units in building C was not achieved by October 2019. As a result, completion of unit C6 as well as units C4 and C5, were only achieved on 20 March 2020. Consequently, the option period of two years started then.

[15] It is common cause that Unit C6 was completed on 20 March 2020 with the result that the option period started to run from this date. This revised start of the option period was confirmed by the respondents, resulting in the period expiring on 19 March 2022.

[16] In terms of table 1.2 of the agreement, the combined purchase price for both unit C4 and C5 would be R4 873 500.00, should the applicant choose to exercise the option in the first year. In the second year the joint price for these two units would be R5 263 380.00.

[17] The year one purchase price of Unit C4 would amount to R2431000.00, while that of Unit C5 was R2 441 500.00.

C. APPLICANT'S VERSION

[18] It is the applicant's version that it exercised its option in January 2021, and that the only dispute at the time was the price of the unit. Moreover, that it was the respondents who offered to draft the Offer to Purchase. According to the applicant, the defences raised by the respondents are not *bona fide*, and the dispute is not about the content of the option, but only a matter of interpretation of the offer.

D. RESPONDENTS' VERSION

[19] The respondents refused to accept the Offer to Purchase. Moreover, it is the respondents' case that the Option Agreement does not reflect the true intention of the parties, and that clause 1.4 thereof should be rectified.

[20] It is further the respondents' version that the applicant, i.e. BAJ Manufacturing (Pty) Ltd t/a Plastipart, did not exercise the option, but that it was Plastipart Holdings (Pty) Ltd who did, as the notice to exercise the option was on a letterhead of the latter.

[21] The respondents further claim that the applicant should have claimed for rectification, as the agreement did not reflect the common intention of the parties. The respondents submitted that clause 1.4 should be rectified to read as follows:

"1.4 Upon exercising the option, the Grantee shall purchase the Units at the price stipulated in Table 1.2 of the year cycle in which the option is exercised."

E. DISCUSSION AND APPLICATION OF RELEVANT LEGAL PRINCIPLES

Rectification of the option agreement

[22] The law in respect of rectification is trite. A party claiming rectification, or raising it as a defence, must allege and prove the following:

22.1 An agreement between the parties that was reduced to writing;

22.2 An intention of both parties to reduce the agreement to writing;

22.3 That the written document did not reflect the common intention of the parties correctly;

22.4 A mistake in drafting the document; and

22.5 The wording of the agreement as rectified.

[23] In *casu* there was in fact an agreement between the parties that was reduced to writing. The intention of the parties to reduce the agreement to writing is also common cause. The question is whether the written document reflects the common intention of the parties. It is further common cause that both parties were involved in the drafting of the agreement to such an extent that the applicant suggested changes to the original agreement drafted by the respondents.

Interpretation of documents

[24] The interpretation of documents have been discussed in the Supreme Court of Appeal matter **Unica Iron and Steel (Pty) Ltd and another v Mirchandani**¹ where the following requirements were listed:

24.1 the court must ascertain what the parties intended the contract to mean;

24.2 in order to ascertain what the parties intended the contract to mean, the court must consider;

24.2.1 the words used by the parties in the relevant clause;

24.2 .2 the contract as a whole; and

24.2 .3 the factual matrix of (or context in which) the contact was concluded, whether or not there is ambiguity in the meaning of the words used.

24.3 the way in which the parties to a contract carried out the agreement may furthermore be considered part of the contextual setting to ascertain the meaning of the disputed term in the contact.

¹ 2016 (2) SA 307 (SCA) at paras 21 and 22.

Requirements for a final interdict

[25] The requirements for a final interdict has been laid down in **Van der Merwe and others v Drenched Boxing Pty Ltd and others**² as follows:

“The applicants must establish: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy.”

Exercising of an option

[26] The law, in respect of an option, was laid down in the matter of **Hirschowitz v Moolman and Others**³:

“Now, the grant by an owner of property of an option to purchase the property amounts in law to an offer to the grantee of the option to sell the property to him and an agreement to keep that offer open for a certain period. The grantee acquires the right to accept the offer at any time during the stipulated period and, if he does so, a contract of purchase and sale immediately comes about.”⁴

Lack of consensus/ void for vagueness

[27] It is trite that consensus is the cornerstone of the agreement between parties. It therefore follows that where there is no consensus, there is no agreement.

Plascon-Evans

[28] The law in respect of motion proceedings is trite, i.e. the applicant’s case is to be made out in its founding papers. Moreover, is it well established in terms of the

² [2021] 93 at par [18].

³ 1985 (3) SA 739 (A)

⁴ Supra at 763 A-B

Plascon- Evans rule that, where disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. Such an order will not be granted where the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, or is so farfetched or is so clearly untenable that the court is justified in rejecting them merely on the papers. In this regard see **National Director of Public Prosecutions v Zuma**.⁵

F. CONCLUSION

[29] Considering the above legal principles, I am persuaded that the agreement reflects the true intention of the parties and rectification of clause 1.4 is therefore not necessary. As to the interpretation of the Option Agreement, I am satisfied that the manner in which clause 1.4 was originally drafted did reflect the true intention of the parties. Rectification was therefore not required.

[30] I am further persuaded that there was no real *bona fide* defence raised by the respondents, and accordingly the matter is capable of being decided on the papers.

[31] Whether the applicant, in fact, exercised its option is a matter to be determined on the papers. In assessing the two versions placed before me, I am satisfied that the respondents knew at all times who they were contracting with, and the evidence placed before this court by the applicant, and confirmed by the respondents in its Answering Affidavit, makes it clear that the agreement was between the respondents and the applicant.

[32] In applying the principles in respect of the interpretation of documents, I am satisfied that the purchase price in terms of the option agreement is Yr1 contained in Table 1.2. I am further satisfied that it was the intention of the respondents to complete

⁵ 2009 (2) SA 277 SCA.

unit C6 by 5 October 2019. Moreover, I am persuaded that any delay was caused by the respondents.

[33] I am further satisfied that the respondents' refusal to do the necessary transfer of unit C5 is an attempted repudiation of the agreement.

[34] In my view, the applicant complied with the requirements for a final interdict in that it has a clear right and has suffered an actual injury when the respondents did not want to transfer the unit as agreed. Moreover, it is clear from the papers that the unit will be sold for a higher price to a different buyer, had the applicant not approached this court for relief.

[35] I am further satisfied that there was consensus between the parties at the time when the agreement came into effect.

F. ORDER

[36] Consequently, I make the following order:

- 1. The respondents are hereby interdicted and restrained from further dealing with the property more fully described as Section 29, plus an undivided share of the common property in the sectional title scheme known as SS Firgrove Industrial Park, Situated on Farm No. 1528, Stellenbosch Road, Firgrove, (Unit C5).**
- 2. The respondents are directed to sign all documents necessary to cause transfer of the property described in 1. to the applicant against payment of the purchase price of R2 441 500.00 (excluding VAT) within 30 (thirty) days of this order.**

3. Failing compliance by the respondents with the order set out in paragraph 2. above within 5 (five) days of the date of service of this order on the respondents, the Sheriff of this Court is hereby authorised to sign all documents necessary and required on behalf of the respondents to effect said transfer to the applicant.

4. The respondents are ordered to pay the cost of this application.

FORTUIN, J

Date of hearing: 4 November 2021

Date of judgment: 10 May 2022

Counsel for applicant: Adv V Manser

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Mr J Potgieter

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