IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 21942/07

DATE: 18/6/2007

NOT REPORTABLE

IN THE MATTER BETWEEN

CHARLES JOHN STAMP BRANSCOMBE	1ST APPLICANT
VILVARANJEE BRANSCOMBE	2ND APPLICANT
AND	
O AND T DEVELOPMENT (PTY) LTD	1ST RESPONDENT
BEFORE THE WIND INVESTMENTS 231 (PTY) LTD	2ND RESPONDENT
THE REGISTRAR OF DEEDS – PRETORIA	3RD RESPONDENT

JUDGMENT

SERITI, J

This matter came in the urgent court by way of a motion.

In the notice of motion the applicant seeks an order in the following terms:

(1) that the applicant's non-compliance with the normal rules of this court relating to service, filing and time limits is condoned and the matter is dealt with as one of urgency in terms of rule 6(12);

(2) that the registration of the transfer of the immovable agricultural land more fully described as Portions 175, 176 and 179, Knopjeslaagte 385 JR ("the property") be stayed;

(3) that the order referred to in paragraph 2 above to be of immediate effect pending the outcome of an action to be instituted by the applicants within twenty one days from date hereof for final relief;

(4) costs be reserved.

The facts of this case are briefly as follows.

0n 22 July 2005 the first applicant and the first respondent entered into an agreement of sale of land in terms of which the first respondent purchased the immovable property known as Portions 175, 176 and 179 of the farm described in the notice of motion. The second respondent is not a party to the said agreement.

According to the papers before court the first respondent's intention was to develop the property and for that purpose it proposed cutting it up into separate lots.

Clause 19 of the sale agreement reads as follows:

"The purchaser hereby confirms that the purchaser has agreed that the seller's wife, Ms Vilvaranjee Branscombe will be given free of charge one of the proposed one hectare or one morgan subdivisions on the above properties. It is further agreed that Ms Vilvaranjee Branscombe will be given first choice of which subdivision she requires."

In a letter addressed to the second applicant the first respondent confirmed that the second applicant has chosen plot 38 and that same will be given to her as per the sales agreement. The proposed plot number 38 formed part of portion 179.

The first respondent paid the agreed purchase price and the land was transferred into its name on 28 0ctober 2005.

The first respondent is a property development company and as such it will from time to time purchase land in order to develop same, primarily for residential home purposes.

At all relevant times the first and second applicants were aware that it was the intention of the purchaser to subdivide the various portions of land into seventy two stands measuring one hectare in extent. Both parties thought that the first respondent would be successful in applying for the subdivision of the property into one hectare stands.

A town planner on behalf of the first respondent approached the Tshwane Metropolitan Municipality in order to obtain their support for the subdivision application. After having drafted the layout plan and furnishing same to the municipality, the latter stated that it would not consent to or support the subdivision of the various portions of land, but would in future consider and in all likelihood support and approve the establishment of a township on the respective portions.

The position adopted by the municipality meant that the erven within the township as suggested by the municipality would have been substantially smaller in size than the subdivisions initially envisaged by the first respondent. Without the support of the municipality the first respondent's subdivision stood no chance of being granted by the minister.

First respondent did not regard the establishment of a township as a viable proposition and accordingly took a decision to sell the respective portions of land and received an offer to purchase said land from the second respondent, which offer was accepted by the first respondent.

As a result of the fact that the municipality refused to support the initially proposed subdivision and the fact that the respective portions of land were now sold by first respondent to second respondent the immovable property that first applicant and first respondent agreed that it will be transferred to the second applicant no longer exists.

0n enquiry of the first applicant the attorney acting for the first respondent on 26 May 2007 wrote a letter to first applicant which reads as follows:

"RE: TRANSFER: PORTIONS 175, 176 AND 179 KNOPPJESLAAGTE 385 JR

We refer to the abovementioned and act on instruction of our client O & T

Development (Pty) Ltd.

With reference to your email addressed to the director of our client it is our instruction that although our client is in the process of reselling the aforementioned properties it is still our client's intention to honour the initial agreement.

0ur client is therefore willing to pay the amount of R1 000 000,00 to yourself as soon as proclamation of a future development takes place on the land and although our client will not have control over the marketing and sales of the individual stands they are still willing to purchase a stand of your wife's choice in the future development and see to the registration of it into her name, subject to the availability of that specific stand."

0n the same day first applicant responded to the above letter and stated that the undertaking contained in the letter under reply was not acceptable as his wife had already

chosen her designated piece of land being plot no 38, which choice was confirmed by the first respondent. After said confirmation by the first respondent the only outstanding issue was for plot 38 to be clearly designated on a future layout and then be registered in her name.

The initial plan, which was prepared in May 2005 by town planners, plot 38 was clearly defined.

In his heads of argument the first respondent's counsel submitted that clause 19 of the sales agreement mentioned above read with other relevant documents in this case does not comply with the principles laid down in the Alienation of Land Act 68 of 1981 and consequently same is of no force and effect.

He further submitted that the failure to create an erf as envisaged in clause 19 mentioned above lays at the door of the local authority who is the regulatory authority to approve a township and who is not prepared to allow a township with a layout of one hectare erven in the said area. He further submitted that the first respondent is therefore not the party who obstructs the contractual term and can therefore not be in breach of the contractual term.

He also submitted that the factors of this case are such that the performance under the agreement is divisible, thereby negating the applicant's contention that failure to comply with clause 19 mentioned above by the first respondent renders the entire agreement null and void.

0n the other hand the applicant's counsel submitted that the applicants have accepted that the first respondent's obligation to perform in terms of clause 19 of the agreement mentioned above has become impossible which impossibility of performance renders the agreement null and void. Applicant's counsel submitted that the agreement is an indivisible whole and non-performance of any portion thereof renders the whole agreement null and void.

In *Bob's Shoe Centre v Henaways Freight Service (Pty) Ltd* 1995 2 SA 421 (A) at 430G-I GROSSKOPF JA said the following:

> "A useful test which can be applied in deciding whether a particular provision of a contract is subsidiary to the main purpose, and therefore severable from the rest, is to determine whether the parties would have entered into the contract without that provision. [Compare *Kriel v Hochstetter House (Edms) Bpk* 1988 1 SA 220 (T) at 227H228A; *Sasfin*'s case *supra* at 17D-H, 28B-D; *Christie* at 464.]

> Although we are here not dealing with the severability of an offending provision, the present matter is likewise concerned with the severance of a part of the contract – not because it was an illegal or void provision, but as a result of the supervening impossibility of performance. I would therefore apply the same test in this case to determine whether the term which became impossible of performance was subsidiary to the main purpose and therefore severable from the rest."

Prima facie it appears to me that when determining and accepting the purchase price mentioned in the agreement of sale, the first applicant took into account that a certain piece of land to be chosen by his wife would be transferred into his wife's name free of charge. The probabilities are that the first applicant would not have entered into the sale agreement with the first respondent on the terms appearing in the said agreement if he had known that clause 19 of the agreement mentioned above would not be implemented.

Applying the principles enunciated in the *Bob's Shoe Centre* case *supra* to this case, my *prima facie* opinion is that the entire agreement is an indivisible one and failure by the first respondent to comply with clause 19 thereof renders the whole agreement null and void.

The applicants in my view have made out a case and they are entitled to the prayers as contained in the notice of motion.

The court therefore grants an order in terms of prayers 1, 2, 3 and 4 of the notice of motion.

W L SERITI
JUDGE OF THE HIGH COURT

21942-2007

HEARD ON:
FOR THE APPLICANTS:
INSTRUCTED BY:
FOR THE RESPONDENTS:
INSTRUCTED BY: