IN THE HIGH COURT OF SOUTH AFRICA

(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

NOT REPORTABLE Date: 2009-04-01

Case Number: A168/2006

In the matter between:

DANIEL JOHANNES BLOMERUS First Applicant

JOHANNA CATHARINA FREDERIKA BLOMERUS Second Applicant

and

LORINDA THEODORA THERON Respondent

JUDGMENT

SOUTHWOOD J

[1] This appeal is concerned with the validity of a written agreement ('the agreement') entitled 'Offer to Purchase' signed by the parties on 11 September 2003 which reflects that the appellants sold to the respondent an immovable property ('Westelike Helfte van Plot 53, Marjoranstraat, (1)ha') for R324 000. According to the terms of the agreement, when accepted, the offer to purchase would constitute a deed of sale and the offer would become a final and binding sale upon acceptance of the offer by the seller (i.e. the appellants) on or before 1

October 2000. The document records that the purchaser (i.e. the respondent) had paid a deposit of R100 000 but it is silent about when the balance of the purchase price was to be paid.

[2] On 15 December 2004, after a dispute arose about the validity of the agreement, the respondent launched an application seeking an order –

(1) Declaring that the written agreement of purchase and sale concluded between the appellants (the respondents in the application) and the respondent (the applicant in the application) and in terms of which the appellants sold to the respondent the property correctly known as Annlin Ext 88 formerly known as 'Ptn 261, Wonderboom 302, JR' prior thereto known as 'Holding 53, Wonderboom Agricultural Holdings', physically situated at 53 Marjoran Avenue, Sinoville, Pretoria is valid and enforceable;

(2) Directing that the appellants sign all documents and take all steps necessary in order to transfer the property purchased by the respondent (being the portion of Annlin Ext 88 in respect of which an application has been brought for the approval of a township to be known as Annlin Ext 103, which is the property purchased by the respondent);

(3) That the interdict granted by Motata J on 18 November 2004 be lifted and curtailed so as to provide only that the

appellants are empowered and authorised to transfer Annlin Ext 103 to the respondent but that the interdict in respect of any other person other than the appellants stands.

[3] On 25 May 2005 De Vos J granted prayers 1, 2, 3 and 4 of the notice of motion (i.e. the relief referred to above and costs). With the leave of the court *a quo,* granted on 2 August 2005, the appellants appeal against the judgment and order.

[4] It is convenient at this stage to consider the appellants' application for condonation and for reinstatement of the appeal and the appellants' application to set aside the order made on 18 June 2007. The relevant facts are not in dispute and may be summarised as follows:

(1) After the court *a quo* granted leave to appeal on 2 August 2005, the appellants delivered their notice of appeal on 18 August 2005;

(2) Thereafter, to prosecute the appeal, the appellants were required in terms of Rule 49(6)(a) to apply to the registrar for a date for the hearing of the appeal within 60 days after delivery of the notice of appeal and were required in terms of Rule 49(7)(a), to file with the registrar, at the same time, three copies of the appeal record and to furnish the respondent with two copies thereof;

(3) The appellants' erstwhile attorney, Mr Grobler of Ebersohn & Grobler, failed to apply to the registrar for a date for the hearing within 60 days after delivery of the notice of appeal, which period elapsed on 10 November 2005. He became involved in other litigation between the appellants and the respondent and he only discovered his error on 9 February 2006 when the respondent's attorney, Mr Weber, informed him, at court, that the appeal had lapsed because of the failure to apply for a date for the hearing. Mr Weber also said that he expected an application for condonation which is a clear indication that Mr Weber knew that the failure to apply for a date for the hearing was due to an oversight;

(4) On receiving this information Mr Grobler immediately consulted counsel and gave them instructions to prepare an application for condonation for the appellants' failure to comply with the rule and for reinstatement of the appeal. Mr Grobler deposed to a comprehensive affidavit in support of this application. The appellants served this application on 15 February 2006;

(5) In his supporting affidavit Mr Grobler, commendably, gives a full, frank and brutally honest account of his failure to apply timeously for a date for the hearing. According to Mr Grobler he was newly qualified and practised primarily as a conveyancer.

He was not versed in the niceties of litigation and he did not consult the rules to find out what was required to prosecute the appeal. He did so only after he was informed that the appeal had lapsed;

(6) The respondent did not give notice to oppose this application for condonation and reinstatement or deliver an answering affidavit. Despite deposing to a lengthy answering affidavit on 15 June 2007 Mr Weber did not deliver this affidavit until 18 September 2008. There is no explanation for this failure to deliver the answering affidavit before the hearing on 18 July 2007 or the delay until 18 September 2008;

(7) On 31 March 2006 Mr Grobler applied to the registrar for a date for the hearing and purported to deliver the appeal record. It is now clear that this was not the complete appeal record required by the rules;

(8) In November 2006 the appellants terminated Mr Grobler's mandate. On 16 November 2006 Mr Hepple of Bezuidenhouts Hepple Inc, the appellants' present attorney of record, gave notice that he was acting on behalf of the appellants and on 24 November 2006 Mr Grobler gave notice to the registrar and Bezuidenhouts Hepple that he was withdrawing as the

appellants' attorney of record. Mr Hepple's notice that he was acting on behalf the appellants was filed with the registrar;

(9) On 20 March 2007 the registrar sent to Ebersohn & Grobler and the respondent's attorney, Deon C. Weber, a notice entitled 'Magistrates' Court Appeals/Rule 50(5)' advising that the appeal was enrolled for hearing on 18 June 2007. This notice was wrong in two important respects. Firstly, it was the appropriate notice for enrolment of a civil appeal from the magistrates' court and not appropriate for an appeal from the High Court. Secondly, it was sent to the wrong attorney: i.e. Ebersohn & Grobler instead of Bezuidenhouts Hepple;

(10) On 4 June 2007 and 15 June 2007 the respondent's counsel filed their initial and supplementary heads of argument. The appellants did not file heads of argument because their attorney did not know that the appeal was on the roll. Despite repeated enquiries by members of the firm the registrar's staff persisted in advising them that the appeal was not on the roll;

(11) The registrar wrongly enrolled the appeal for hearing by a full bench (two judges) instead of a full court (three judges). On 18 June 2007 the members of the court had before them an incomplete record, the respondent's heads of argument and counsel for the respondent. No heads of argument were filed by

the appellants and they were not represented. Both sets of heads of argument filed by the respondent contained a section entitled 'Ad Condonation Application (If Any)' and indicated that as at 4 June 2007 the appellants had not delivered a condonation application. They then proceed to make submissions in the event of the appellants bringing such an application on the date of the appeal. To the knowledge of the respondent's attorney, Mr Weber, the statement that as at 4 June 2007 the appellants had not delivered a condonation application, was untrue. On 15 June 2007, the same day on which the respondent's supplementary heads of argument were signed by senior counsel, J.J. Reyneke SC, Mr Weber deposed to an answering affidavit dealing with the application for condonation and reinstatement of the appeal. Mr Weber has not explained why he permitted this to be said in both heads of argument and why he allowed the impression to be created that the appellants were not applying for condonation and reinstatement of the appeal;

(12) Since the appeal was wrongly enrolled before a full bench and not a full court the court had no jurisdiction to hear the appeal. It should have simply removed the matter from the roll and reserved the costs. Instead, it made an order striking the matter from the roll and ordered the appellants to pay the costs;

(13) On 1 August 2007 the appellants launched an application seeking an order in terms of Rule 42, alternatively, the common law that the order made on 18 June 2007 be set aside and that the respondents be ordered to pay the costs of the application on the scale as between attorney and client, if they opposed, and if they did not, as the court orders. The respondent did not give notice of intention to oppose this application or deliver an answering affidavit;

(14) On 11 August 2007 Bezuidenhouts Hepple applied to the registrar for a date for the hearing and the registrar again wrongly enrolled the matter for hearing before the full bench as if it was an appeal from the magistrates' court. The date for the hearing was 29 October 2007 but fortunately the parties discovered that the matter was wrongly enrolled and by agreement removed the matter from the roll;

(15) The appeal was then enrolled for hearing before the full court on 20 August 2008. On that day the appeal record was incomplete and the respondent's counsel was not prepared to argue the appeal. The court postponed the appeal and the preliminary applications for condonation and rescission *sine die* and reserved the costs. In argument before this court the parties agreed that the costs of 20 August 2008 should be costs in the appeal;

(16) The appeal was finally enrolled for hearing before this court.

[5] With regard to the application for condonation and reinstatement of the appeal the respondent's counsel relied primarily on the following statement in ***Saloojee and Another NNO v Minister of Community Development*** **1965 (2) SA 135 (A)** at 141C –

> 'There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. The attorney, after all, is the representative whom the litigant has chosen for himself'

However the same judgment states clearly that it has never been held that condonation will be withheld simply because of an attorney's negligence (141B-C) and that even where there is a high degree of negligence on the part of the attorney (as there clearly was in the present case) condonation may still be granted if there are strong prospects of success (141H). It is well-settled that condonation will depend on a number of interrelated factors. In ***United Plant Hire (Pty) Ltd v Hills*** **1976 (1) SA 717 (A)** at 720E-G the court described the approach as follows:

> 'It is well-settled that, in considering applications for condonation, the Court has a discretion, to be exercised

> judicially upon a consideration of all of the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
>
> These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. See ***Liquidators, Myburgh Krone and Co Ltd v Standard Bank of SA Ltd and Another*****, 1924 AD 226** ("the merits of the appeal may in some cases be very important" – *per* Innes CJ at p231); ***Melani v Santam Insurance Co Ltd,*** **1962 (4) SA 531 (A)** at p532; ***Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie,*** **1969 (3) SA 360 (AD);'**

[6] In my view, although it is clear that the appellants' attorney negligently allowed the appeal to lapse and the reasons for doing so are not acceptable, the appellants did not simply leave the case to him and do nothing. They frequently enquired about the progress of the appeal and clearly intended to prosecute it. In addition the appellants' prospects of success are strong and the matter is of great importance to the appellants. Accordingly condonation will be granted and the appeal reinstated.

[7] With regard to the application for setting aside the order made on 18 June 2007, the appellants ask only that the costs order be set aside. The respondent's counsel did not contend that the order was not wrongly sought or wrongly granted and that the court was not misled and conceded that the costs order should be set aside.

[8] I turn now to the merits of the appeal.

[9] There are a number of factual disputes in the affidavits. For present purposes the respondent's version will be accepted and the issues decided on the following facts:

(1) The appellants are married in community of property and reside on their property, 53 Marjoran Avenue, Sinoville, Pretoria which is portion 261 of the farm Wonderboom, 302, Registration Division JR, 2.0214 hectares in extent (portion 261).

(2) In September 2000 the respondent and the appellants entered into an oral agreement in terms of which, with effect from 1 October 2000, the appellants sold to the respondent a portion consisting of 1,001 hectares of portion 261, now known as Annlin Extension 88, for R300 000, payable by means of a deposit of R100 000 to be paid within 12 months of the effective date; the respondent was entitled to immediate possession and occupation of the property purchased; the appellants would pay

the rates and taxes in respect of Portion 261 until the date of transfer; the respondent would take all steps necessary to have Portion 261 subdivided and would bear the costs thereof; the subdivision of the property would be effected in accordance with a sketch plan to be prepared after the oral agreement was concluded to depict the portion of Portion 261 purchased by the respondent and a portion of Portion 261 to be retained by the appellants.

(3) During the period 1 October 2000 to 16 June 2001 the respondent paid various amounts totalling R100 000 to the appellants.

(4) To effect the subdivision of the property the respondent appointed a specialist town planner, Cadre Plan CC ('Cadre'). Cadre surveyed portion 261 and prepared a sketch plan to depict the subdivision of Portion 261, i.e. showing the portion of portion 261 purchased by the respondent and the portion of portion 261 to be retained by the appellants. The parties regarded this as the manner in which the property would be subdivided. The sketch plan shows that portion 261 is rectangular with northern and southern boundaries (running east west) of 108,81 metres and eastern and western boundaries (i.e. running north south) of 185,76 metres. The proposed boundary dividing the property is shown from a point 58,67

metres from the south western corner of the property to a point 50,14 metres from the north western corner of the property; i.e. it is not parallel with the eastern and western boundaries. From the northern boundary this subdivision line runs parallel with the eastern and western boundaries for 76,06 metres and from the southern boundary the subdivision line runs parallel with the eastern and western boundaries for 51,36 metres. The southern and northern ends of these two lines are connected by a line running at an angle to the eastern and western boundaries, 58.97 metres long. The angle is very small and the subdivision boundary is 186,39 metres long: i.e. ,63 metres longer than the eastern and western boundaries. To all intents and purposes the two portions of portion 261 would be rectangular. Cadre prepared this sketch plan within a few days of the first agreement and it forms the basis for all further agreements reached by the parties in respect of portion 261 and the portion which the respondent wished to purchase.

(5) On 29 September 2000 Cadre furnished the respondent with a description of the work necessary for the subdivision and a quotation for the fees and expenses. On 4 October 2000 the appellants, as registered owners of portion 261, signed a power of attorney authorising Cadre to apply for the subdivision of portion 261. The power of attorney records that the appellants

would not be liable for the fees and expenses associated with the application for subdivision.

(6) On 3 November 2000 Cadre submitted to the Tshwane City Council an application for the subdivision of portion 261 which was then zoned ‘Agricultural’.

(7) Because the respondent had possession and occupation of the portion of portion 261 she wished to purchase the parties agreed that the respondent would pay the appellants’ bond instalments as from 1 December 2001 which the respondent proceeded to do.

(8) As from October 2001 and pursuant to a further agreement between the parties the respondent effected a number of improvements to the portion of portion 261 she wished to purchase at a total cost of almost R700 000. These included –

(i) A fence around the property which in 2001 was replaced by a wall 2,3 metres high which physically divided portion 261 as depicted in the sketch plan;

(ii) A tennis court – in 2001-2002;

(iii) A borehole – in 2002;

(iv) An access road from the subdivided portion to the main road;

(v) A sprinkler irrigation system;

(vi) Landscaping of the property and the planting of 115 indigenous trees.

(9) The parties agreed that the respondent would carry out the improvements at her own expense and at her own risk.

(10) Cadre proceeded with the application for subdivision of portion 261 until Cadre was placed in liquidation in the middle of 2001. In May 2001 the respondent appointed Stefan Frylinck & Associates Property Consultants ('Stefan Frylinck') to complete the application for subdivision and on 31 May 2001 the appellants signed a power of attorney authorising Stefan Frylinck to apply to the City of Tshwane Metropolitan Municipality for the subdivision of portion 261.

(11) On 25 September 2001 Tshwane Municipality informed Stefan Frylinck that the subdivision would not be approved unless certain matters were rectified. The relevant communication reads as follows:

‘1. A building plan is required for the proposed Remainder which indicates the position of existing buildings and sewers in relation to the new erf boundaries. This plan must be submitted to the Executive Director: City Planning and Development (City Development Control Division) for approval. It seems that additions have been made without the required building plan approval of the Tshwane Metropolitan Municipality. Alternatively proof must be submitted that building plans were approved at some stage. The building plans must be approved before the property will be allowed to be transferred or registered in the Deeds Office.

2. Only one dwelling per holding is allowed. Therefore the subdivision can only be approved subject to the illegal dwellings being demolished or altered into outbuildings. Alternatively if the owner does not want to demolish or alter the illegal dwellings on the property, a township has been established. If the owner wishes to alter the dwellings into outbuildings the work must be executed before the property will be allowed to be transferred or registered in the Deeds Office. The owner should take notice that before any building may be demolished, a demolishing permit must first be obtained from the Executive Director: City Planning and Development (City Development Control Division).

3. An existing French drain may not be nearer than 3,0 metres from any new boundary. If this condition results from the sub-division, a new French drain shall be constructed in which case, a proposed building drainage plan must be submitted, and the work must be executed before the property will be allowed to be transferred or registered in the Deeds Office.'

(12) As a result of these problems the respondent and the appellants agreed that the appellants would apply for a township to be proclaimed in respect of portion 261; that the appellants would appoint the professionals and other persons necessary to bring such an application and that the appellants would bear the cost of applying for the proclamation of the township. Pursuant to that agreement the appellants appointed Stefan Frylinck to attend to the application for a township.

(13) While the application for the township was pending the parties decided to formalise the purchase of the portion of portion 261. On about 11 September 2003 the respondent's husband informed the first appellant that the respondent, with the assistance of her mother, would purchase the property. The respondent's husband then handed to the first appellant the document he had prepared. As already mentioned, the parties signed the agreement on 11 September 2003. The price was increased to R324 000 because the respondent had not paid occupational rental for a period.

(14) When the parties signed the agreement on 11 September 2003 the application for the proclamation of the township was pending. On 23 April 2004 Tshwane Municipality informed Stefan Frylinck that the application for the establishment of the township on portion 261 (proposed township Annlin Ext 88) had been approved in terms of section 98(1) of the Town Planning and Townships Ordinance, 15 of 1986 (the Ordinance'), subject to the conditions set out in an annexure to the communication. The sketch plan annexed to the letter of approval reflects that portion 261 would be divided into four erven, numbers 1 to 4, that parts of portion 261 would be utilised for an access road and that there would be servitudes for municipal services and storm water.

(15) The respondent then applied for the division of Annlin Ext 88 into two townships to be known as Annlin Ext 102 and Annlin Ext 103 and effected payment of the fees and expenses associated therewith to Stefan Frylinck. On 4 November 2004 the appellants signed a power of attorney authorising Stefan Frylinck to apply to the Tshwane Municipality for the division of Annlin Ext 88 into two separate townships, Annlin Ext 102 and Annlin Ext 103.

(16) During August 2004 the first appellant informed the respondent's husband that the whole property, i.e. Annlin Ext 88, could be sold, that the appellants would pay the respondent R1 150 000 and accordingly that it would not be necessary to incur any further expenses. The first appellant did this because the value of the property had increased dramatically.

(17) The offer was conveyed to the respondent by her husband. After it was refused her husband conveyed the refusal to the first appellant.

(18) After that the parties obtained legal advice and a dispute arose as to the validity of the agreement.

(19) On 18 November 2004 the respondent brought an urgent application to interdict the appellants from alienating the property. The appellants did not oppose the application and consented to an order the terms of which were agreed.

[10] The issue before the court *a quo* was whether the agreement was valid and enforceable. The issues relating to the validity of the agreement were that the agreement was invalid because –

(1) It did not comply with section 2 of the Alienation of Land Act, 68 of 1981 in that –

(a) The *res vendita* was not properly described;

(b) The purchase price was not certain;

(c) The document contained an inchoate agreement; and

(2) It was entered into in contravention of section 67 of the Ordinance.

[11] Before this court the appellants persisted in only two of these contentions i.e. –

(1) That the *res vendita* was not properly described; and

(2) That the agreement was prohibited by section 67 of the Ordinance and is therefore of no force and effect.

[12] With regard to the description of the *res vendita* it has long been accepted that the principles stated in ***Clements v Simpson* 1971 (3) SA 1 (A)** must be applied. These are set out at 7C-G where the court said –

> '2 Meticulous accuracy in the description of the *res vendita* is not required. *Certum est quod certum reddi potesti.* In construing an earlier corresponding enactment, Watermeyer, CJ, said –

> "Clearly, if sec 30 be construed so as to require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms, then such a construction would merely be an encouragement to a dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases where there was no dispute at all between the parties. Such construction would be an encouragement to dishonesty and cause loss of revenue to the State, and it should be avoided if possible." See ***Van Wyk v Rottcher's Saw Mills (Pty) Ltd*** **1948 (1) SA 983 (AD)** at p989.

3 The foregoing does not mean that the Court is to make a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty. It means that

> "inelegance, clumsy draftsmanship or loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract". Per Colman, J, in ***Burroughs Machines Ltd v Chenile Corporation of SA (Pty) Ltd*** **1964 (1) SA 669 (W)** at p670G-H.

4. The test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified 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 ***Headermans (Vryburg) (Pty) Ltd v Ping Bai*** **1997 (3) SA 1004 (SCA)** at 1008G-1009B: ***Vermeulen v Goose Valley Investments (Pty) Ltd*** **2001 (3) SA 986 (SCA)** para 6.

[13] When the parties signed the agreement on 11 September 2003 the respondent had already erected a 2,3 metre high wall around the portion of portion 261 she wished to purchase. The wall enclosed, in effect, the western half of portion 261. In my view the western half of portion 261 was clearly identifiable on the ground by means of this wall. I am further of the view that even without the wall the *res vendita* could be identified on the ground. With reference to the fact that portion 261 is rectangular and the further facts that there are access roads running east west along both the northern and southern boundaries the boundary line dividing the property would have been drawn parallel with the boundaries on the north south axis. This line would have been situated so that portion 261 was divided into equal halves. See ***Party Investments (Pty) Ltd v Padayachey*** **1975 (3) SA 891 (N).** Accordingly, this argument cannot be upheld.

[14] Section 67 of the Ordinance reads as follows:

> 'Prohibition of certain contracts and options. -
>
> (1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 –
>
> (a) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;

(b) grant an option to purchase or otherwise acquire an erf in the township,

until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.

(2) Any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.

(3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.

(4) For the purposes of subsection (1) –

(a) "steps" includes steps preceding an application in terms of section 69(1) or 96(1);

(b) "any contract" includes a contract which is subject to any condition, including a suspensive condition.'

The section clearly prohibits, in the circumstances stipulated, the sale of an erf in a township. It must be read together with the definitions of 'erf' and 'township' to determine what is prohibited.

[15] Section 1 of the Ordinance provides that unless the context otherwise indicates –

> ‘erf’ means ‘land in an approved township registered in a deeds registry as an erf, lot, plot or stand or as a portion or the remainder of any erf, lot, plot or stand or land indicated as such on the general plan of an approved township, and includes any particular portion of land laid out as a township which is not intended for a public place, whether or not such township has been recognised, approved or established as such in terms of this Ordinance or any repealed law.’
>
> and
>
> ‘township’ means ‘any land laid out or divided into or developed as sites for residential, business or industrial purposes or similar purposes where such sites are arranged in such a manner as to be intercepted or connected by or to abut on street, and a site or street shall for the purposes of this definition include a right of way or any site or street which has not been surveyed or which is only notional in character.’

[16] ‘Erf’ therefore includes –

(a) land in an approved township registered in a deeds registry as an erf, lot, plot or stand;

(b) land in an approved township registered in a deeds registry as a portion of an erf, lot, plot or stand;

(c) land in an approved township registered in a deeds registry as the remainder of any erf, lot, plot or stand; and

(d) land indicated as such (i.e. as an erf, lot, plot or stand or portion or remainder thereof) on the general plan of an approved township, and includes any particular portion of land laid out as a township which is not intended for a public place, whether or not such township has been recognised, approved or established as such in terms of this Ordinance or any repealed law.

It is clear that (a) to (c) relate to land already registered in the deeds office and (d) refers to land indicated on the general plan of an approved township. The land referred to in (a), (b) and (c) is actual and the land referred to in (d) is notional: i.e. it is an abstraction indicated or depicted on a general plan. This is consistent with the last part of the definition of 'township' which expressly provides that 'a site or street shall for the purposes of this definition include a right of way or any site or street which has not been surveyed or which is only notional in character'. It can only be notional in character if it is the abstraction is indicated or depicted on a general plan.

This is entirely consistent with the judgment in ***Soja (Pty) Ltd v Tuckers Land & Development Corp (Pty) Ltd*** **1981 (3) SA 314 (A)** which dealt with the sale of erven in a township 'which had been laid out as a township on a plan which accompanied an application to the Administrator for his approval of it as a township.' (319H)

[17] The question arises whether the *res vendita* sold in terms of the agreement is an erf for the purposes of section 67 of the Ordinance. Obviously it has not been registered at the deeds office and it is an abstraction depicted on the sketch plan prepared for purposes of the application for subdivision of portion 261. As appears from the general plan depicting the township the *res vendita* incorporates erven 1 and 2 of the approved township. In my view this was a sale of the two erven and it is irrelevant that the description of the *res vendita* does not pertinently refer to these erven. The question then arises whether the agreement was entered into after the owner had taken steps to establish a township on portion 261. The court *a quo* found that the agreement was concluded with effect from 1 October 2000 and was therefore not hit by the provisions of section 67 because this was before steps were taken to establish a township on portion 261. Whatever was intended by the reference to 1 October 2000 in clause 1 of the agreement (this is by no means clear as it purports to set a date for the acceptance of the offer) it did not have the effect of changing the date on which the agreement was concluded. That date remained

11 September 2003: i.e. after the appellants had taken steps to establish a township on portion 261.

[18] The agreement was therefore hit by the provisions of section 67 of the Ordinance and it is of no force and effect - see ***Headermans (Vryburg) (Pty) Ltd v Ping Bai*** **1997 (3) SA 1004 (SCA)** at 1010B-D. Accordingly the appeal must be upheld.

Order

[19] I The appellants' failure to apply timeously for a date for the hearing of the appeal is condoned and the appeal is reinstated;

II The costs order made by the court on 18 June 2007 is set aside;

III The appeal is upheld and the declaratory and ancillary orders made by the court *a quo* on 25 May 2005 are set aside and substituted with the following order:

'The application is dismissed with costs'.

IV The reserved costs of 20 August 2008 are to be costs in the appeal;

V The respondent is ordered to pay the costs of –

(1) The appellants' application for condonation and reinstatement of the appeal which they launched on 15 February 2006;

(2) The appellants' application to set aside the order made on18 June 2007, which they launched on 1 August 2007;

(3) The appeal.

_____
B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

_____
J.R. MURPHY
JUDGE OF THE HIGH COURT

I agree

_____
G.L. GROBLER
ACTING JUDGE OF THE HIGH COURT

CASE NO: A168/06

HEARD ON: 25 February 2009

FOR THE APPELLANT: ADV. N. DAVIS SC

INSTRUCTED BY: Mr W. Hepple of Bezuidenhouts Hepple Inc.

FOR THE RESPONDENT: ADV. P.J. VERMEULEN

INSTRUCTED BY: Mr D.C. Weber of Weber Attorneys

DATE OF JUDGMENT: 1 April 2009