IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

DATE **SIGNATURE**

CASE NO: 38331/2015

DATE: 11/11/2016

IN THE MATTER BETWEEN

BONDEV MIDRAND (PTY) LIMITED (Registration Number: 2000/027600/07)	APPLICANT
AND	
SIKHUMBUZO NDLANGAMANDLA N.O. (TRUSTEE OF B & L RESIDENCE TRUST)	1ST RESPONDENT
iPROTECT TRUSTEES (PTY) LTD N.O. (TRUSTEE OF B & L RESIDENCE TRUST)	2ND RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	3RD RESPONDENT

JUDGMENT

PRINSLOO, J

[1] The applicant claims re-transfer of a property situated in a large property development, Midstream Estate, registered in the name of the Trust, B & L Residence Trust ("the Trust"), of which the first and second respondents are the trustees, and they are cited in this matter in their representative capacity as such.

[2] The Trust, as owner of the property, and as represented by the first and second respondents as the trustees, opposes the application.

[3] The Registrar of Deeds, the third respondent, did not play any part in the proceedings before me.

[4] Mr Horn appeared for the applicant and Mr Fouche appeared for the first and second respondents.

Synopsis

[5] The applicant is a developer of various townships, including Midstream Estate.

[6] The applicant has developed in excess of 4 500 residential stands in Midstream Estate, as well as shopping centres, private schools, a retirement complex and other amenities in that development.

[7] Over a period of some ten years, the applicant has been selling off the originally demarcated erven to interested buyers.

[8] The property forming the subject of this dispute is Erf […], Midstream Estate Extension 35 ("the property").

The first purchasers of the property out of the development, were R Moatshe and B K Maditse ("Moatshe and Maditse") who bought the property from the applicant/developer for a sum of R560 000,00. They took transfer of the property in January 2009, obviously subject to the title conditions stipulated in the title deed. In the papers, Moatshe and Maditse are also referred to as "the first purchasers".

[9] The sale was subject to title condition B which is directly relevant for present purposes. The title condition reads as follows:

> "B. Subject to the following condition imposed and enforceable by Bondev Midrand (Pty) Ltd registration number 2000/027600/07 (an obvious reference to the present applicant), namely:
>
> The Transferee or his Successors in Title will be liable to erect a dwelling on the property within 18 (eighteen) months from 25 April 2008, failing which the Transferor will be entitled, but not obliged to claim that the property is transferred to the Transferor at the cost of the Transferee against payment by the Transferor of the original purchase price, interest free. The Transferee shall not within the said period sell or transfer the property without the Transferor's written consent. This period can be extended at the discretion of the Developer (also a reference to the applicant)."

[10] Moatshe and Maditse failed to erect a dwelling on the property within the time provided for in the title deed, or at all.

[11] During 2012, Moatshe and Maditse sold the property to M M and S C Mphahlele ("Mphahlele").

[12] In terms of title condition B the applicant's consent was required, and provided, for transfer of the property to take place in the name of Mphahlele. Such consent was given on the strength of an agreement between Mphahlele and the applicant, in the spirit of title condition B, for an extension of the building period. The extension was signed (on behalf of both parties) on 27 February 2012, recognising that the original building period stipulated in the title condition expired on 30 June 2010, and providing for the dwelling to be erected by Mphahlele within twelve months, ie by 27 February 2013. This did not happen.

[13] In June 2013 Mphahlele sold the property to the Trust represented, as I mentioned, by the first and second respondents as trustees and the property was transferred in the name of the Trust in November 2013.

[14] Prior to transfer taking place in favour of the Trust, the Trust, represented by the first respondent, entered into a written agreement with the applicant under the title "Extension of Building Period – Midlands Estate". This is annexure B5 to the founding affidavit. For the sake of brevity I will refer to it as B5.

[15] I consider it convenient, and appropriate, to quote the contents of B5:

"[The first respondent on behalf of the Trust] hereby acknowledge, agree and undertake:

1. The original building period, as stipulated in the Title Deed, has expired on 30 June 2010.
2. I am bound by the building period stipulated in the conditions in the Title Deed whether as first owner and/or subsequent owner and/or new transferee and I am again bound as a separate legal enforceable document in terms hereof.
3. Bondev is entitled to purchase the stand back, at the original selling price which Bondev sold the stand for as the original transferor from the developer to the first owner amounting to R560 000,00.
4. Midlands Home Owners Association is a separate legal entity with its own rules who manages and enforces their own rules and regulations including rules in respect of the standard of buildings, aesthetical rules and building regulations.
5. By my/our signature hereto as owner and/or transferee I agree and undertake to be fully bound by the terms of the building period and any extensions granted in writing by Bondev on the conditions imposed by Bondev for such extension in terms of the Title Deed or in terms of this agreement which constitutes a separate binding agreement.
6. I undertake and agree with Bondev to erect and complete a fully completed dwelling house on the stand within 9 months of signature hereof.

7. I undertake not to sell the property unless these conditions have been fully complied with and that the building has been erected on the property.
8. I bind myself hereby irrevocably to this undertaking to erect a dwelling on the property and complete such a dwelling and will not sell the property until such dwelling has been fully built and completed, save with the written consent of Bondev.
9. I hereby fully agree that if the dwelling is not built and/or completed fully within the agreed time period herein, Bondev shall be entitled on demand to take re-transfer of the property alternatively I hereby grant Bondev an option to buy the property for a purchase price of R560 000,00 to be executed by Bondev in writing if I fail to comply with my obligation to erect a dwelling on the property.

I undertake to:

1. immediately proceed with the preparation of building plans and lodge building plans within thirty days hereof at the Aesthetical Committee of the Home Owners Association;
2. appoint a building contractor within sixty days hereof;
3. supply Bondev with proof of finance and a monthly building program within sixty days hereof;
4. start construction within ninety days after acceptance hereof by Bondev;
5. complete construction within nine months hereof.

If I fail to comply with any of above undertakings, Bondev shall immediately be entitled to take re-transfer of the property and/or execute the option stipulated hereinbefore for the purchase of the property from me at the agreed price.

I understand that this agreement does not negate or affect:

1. Bondev's rights in terms of the original Offer to Purchase and the Title Deed;
2. that this agreement constitutes a new binding agreement in addition to all existing rights between the owner and Bondev enforceable by Bondev, and in the event of non-compliance with this agreement, Bondev shall be entitled to re-transfer the property at the initial purchase price;
3. the rules of the Home Owners Association.

Bondev hereby extends the building period, on condition that this undertaking is strictly complied with."

[16] B5 was signed on 16 September 2013 by the first respondent on behalf of the Trust and by a representative of the applicant.

[17] I simply record, although perhaps unnecessarily so, that title condition B also appears in the 2013 Deed of Transfer reflecting the sale between Mphahlele and the Trust.

[18] I add that B5 was ostensibly signed on behalf of "Bondev Developments (Pty) Ltd" and not on behalf of Bondev Midrand (Pty) Ltd. This issue, if it is one, was not mentioned anywhere in the papers or during the hearing before me. I assume that it is of no consequence, and it may even be an erroneous reference.

In this regard, it may also be noted that the required consent (in the spirit of title condition B) for the transfer from Mphahlele to the Trust to take place, was signed on 27 September 2013 by Conveyancer P J L Strydom ("Conveyancer Strydom") recording that it was done in terms of a resolution of the applicant, Bondev Midrand (Pty) Ltd. In the consent it is also recorded that title condition B had not yet been complied with and that the consent is subject to such compliance.

[19] It is common cause that, by the time of the launching of this application, the Trust had not yet erected a dwelling on the property, neither has it done so in the mean time. The time frames for the systematic implementation of the construction of the dwelling, as stipulated in B5, were also not complied with.

[20] On 14 October 2014, more than a year after B5 was entered into, and about four months after the nine month period stipulated in B5 had expired, the applicant's attorneys wrote a letter of demand to the Trust, c/o the first respondent, to set the re-transfer process in motion, against payment of the original purchase price.

[21] When the demand was not adhered to, this application was launched towards the end of May 2015, and served on the Trust on 1 June of that year.

[22] Importantly, I have to record that, at the commencement of the proceedings before me, and although the application was launched on the basis of calling for a re-transfer against payment of the original purchase price of R560 000,00, counsel for the applicant informed me that the latter tenders payment of the purchase price paid by the Trust, namely R840 000,00, as opposed to the entitlement figure of R560 000,00 against re-transfer, in the event of the application being upheld.

Remarks about defences raised in the opposing papers, responses thereto in reply and submissions offered by counsel in argument before me

[23] The bulk of the opposing affidavit consists of no fewer than five points *in limine*. At the commencement of the proceedings, I was informed that the respondents were not proceeding with the third point *in limine* which, in any event, has no merit, in my view.

[24] I turn to the remaining four points *in limine*.

First point *in limine*

[25] Essentially, it was argued that Conveyancer Strydom, who signed the consent to the transfer of the property from Mphahlele to the Trust, appears to have an interest in the transaction, with the result that his actions fly in the face of the provisions of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963, and the regulations promulgated in terms thereof.

[26] Regulation 7 stipulates:

"(1) A Commissioner of Oaths shall not administer an oath or affirmation relating to matter in which he has interest.

(2) Subregulation (1) shall not apply to an affidavit or a declaration mentioned in the schedule."

(The affidavits mentioned in the schedule do not apply for present purposes.)

[27] In the replying affidavit, it is stated that Conveyancer Strydom is a conveyancer acting on behalf of the applicant. He is not involved in the litigation and has no knowledge, interest or applicability whatsoever in respect of the litigation. Conveyancer Strydom signed a confirmatory affidavit confirming that he does not have any interest whatsoever in respect of the applicant or the respondents, does not have such a file in his office, does not have knowledge of the background of the dispute and he is completely impartial in the matter. It also appears that he is a director of Wikus Strydom Attorneys (probably named after him, judging by his full names, Phillipus Jacobus Lodewikus) which is not the attorney of record. One is left with the impression that he simply performs standard conveyancing duties to comply with all the formalities flowing from the host of property transactions and other business conducted in this vast property development scheme. It appears that he clearly does not have "an interest" in the matter as foreshadowed by regulation 7(1).

[28] The respondents, in support of their argument, rely on the judgment in *Radue Weir Holdings Ltd t/a Weirs Cash and Carry v Galleus Investments CC t/a Bargain Wholesalers* 1998 3 SA 677 (EC). In that case, in an application for summary judgment, the defendant's opposing affidavit had been attested to by an attorney practising in association with the defendant's attorneys. The *rationale* behind the rule

is illustrated at 680E-H where, with reference to *R v Brummer* 1952 4 SA 437 (T) the learned Judge in *Radue* quotes the following passage from the said judgment:

> "The reason for the rule appears to me to be that a person attesting an affidavit is required to be unbiased and impartial in relation to the subject-matter of the affidavit. If his position is such that this qualification is *prima facie* absent there is a danger that he may have influenced the deponent in regard to the subject-matter of the affidavit."

[29] The learned Judge also quotes from another judgment, at 680E-F, in which it was stated:

> "The object of the rule in practice is, I think, to prevent an attorney from drawing up a petition and putting, as it were, the words of the petition in the mouth of a client, and then himself taking the oath of the petitioner to that petition."

[30] It seems to me, from the uncontested evidence of the deponent on behalf of the applicant, confirmed by Conveyancer Strydom, that the present situation falls well outside the ambit of the rule.

[31] Counsel for the applicant referred me to *Louw v Riekert* 1957 3 SA 106 (TPD) where the word "interest" in the context of the "interest" which a Commissioner should not have in a matter when administering the oath, was considered and discussed at 110A-H. The following is stated:

> "In determining the sense in which it is used in the regulation, one should have regard to the object of the regulation. ... It must at least mean some pecuniary

interest or some interest by which the legal rights or liabilities of the Commissioner of Oaths are affected."

In my view, the involvement of Conveyancer Strydom, such as it may have been, falls well short of these requirements.

In any event, the main objection to Conveyancer Strydom's involvement was the fact that he signed the consent for the transfer of the property to take place in the name of the Trust. On a general reading of the papers, he did not even officiate as a Commissioner of Oaths. This much appears *ex facie* the document which is part of the record. As I understand the papers, this was simply a formality to be complied with, with the document being filed with the Registrar of Deeds to meet the requirement in title condition B that the property is not to be transferred (if no house had been built) without the consent of the applicant/developer. In this sense, the statutory provisions relied upon by the respondent do not come into play.

[32] In all the circumstances, I am of the view that there is no merit in this argument *in limine* and it falls to be dismissed.

The second point *in limine*

[33] In summary, the argument amounts to the following: title condition B provides that the first owner is obliged to erect a dwelling on the property within 18 (eighteen) months from 25 April 2008.

The Trust, as the third owner, only bought the property in June 2013, and took transfer in November 2013, well after the initial period expired in about October 2009.

[34] Consequently, as the Trust could not comply with the requirements of title condition B, the applicant had to rely on B5, the agreement quoted, which, *inter alia*, provides for an extension of the period within which the dwelling had to be erected. The extension was until about 16 June 2014.

[35] However, B5 was only signed by the first respondent and not by the remaining trustee, the second respondent. The trust deed does not make provision for a single trustee to enter into an agreement such as B5, so that B5 is a nullity and unenforceable.

In this regard, it is convenient to quote the extracts from the Trust Deed which are relevant to this argument:

> "14.3 notwithstanding any power herein granted to the Trustees;
>
> 14.3.1 no Trustee shall have the power, on their own, to appropriate or dispose of any part of the Trust Fund, as they see fit, <u>for their own benefit or for the benefit of their estate</u>, whether directly or indirectly, including the use of any person, to achieve same,
>
> 14.3.2 no Trustee shall have or be competent to obtain such power directly or indirectly by the exercise, whether with or without notice, of any power exercisable by them or with their consent." (Emphasis added.)

And also:

"17. **Authority to negotiate and execute documents**

17.1 The Trustees are authorised to enter into, negotiate, execute and sign any document, contract, agreement, instrument, negotiable instrument, bill of exchange, deed, memoranda, articles of association and any prescribed form in any statute to achieve the purpose and objectives of the Trust in terms of the provisions of the Trust Deed.

17.2 All and any document, contract, agreement, instrument, negotiable instrument, bill of exchange, deed, memoranda, articles of association or any prescribed form in any statute which are required to be signed on behalf of the Trust shall be signed in such manner as the Trustees shall from time to time determine: Provided that all such negotiable instruments, contracts, deeds and other documents shall be signed by Sikhumbuzo Ndlangamandla (my note: an obvious reference to the first respondent who, in any event, signed B5) or his/her alternate, should he/she be a Trustee at the time.

17.3 The Trustees are empowered to appoint or nominate any person in their place and stead to act on their behalf to so sign or execute any document, contract, agreement, instrument, negotiable instrument, bill of exchange, deed, memoranda, articles of association or any prescribed form in any statute."

From the aforegoing extracts, it is clear that the submission on behalf of the respondents that "the Trust Deed does not make provision for a single Trustee to enter

into an agreement such as the purported agreement ... B5" is not correct: it is quite clear, from a reading of clause 17 of the Trust Deed, that the first respondent is authorised to sign the necessary documents, alternatively his "alternate" and, as per 17.3, the Trustees are empowered to appoint or nominate any person to sign documents on their behalf. This is exactly what happened, as appears from what is stated hereunder.

[36] The argument offered by the applicant in reply, is that all three the owners, including the Trust, failed to erect a dwelling since 2009. It consequently became imperative for the applicant to enforce title condition B. The argument is developed along the following lines:

- Had B5 not been signed and delivered together with documents proving the ability of the Trust to proceed with the erection of the house, the applicant would never have consented to the transfer of the property and would never have consented to the extension of the building period.

- B5 is therefore the *causa* for the consent for transfer and the consent for the extension of the building period.

- The applicant attached a resolution to the replying affidavit, as "RA4", which is clearly to the effect that a representative of the second respondent, iProtect Trustees (Pty) Ltd, authorised the first respondent, in his capacity as a trustee, to "sign the relevant documents which may be necessary for the registration of transfer thereof into the name of the B & L Residence Trust Registration Number IT2612/2013". In the body of the resolution, the property transfer

referred to, is the one from Mphahlele to the Trust of the property Erf […] Midstream Estate Extension against payment of the sum of R840 000,00.

- The resolution clearly authorises the first respondent to enter into B5 on behalf of the Trust, alternatively, by virtue of the resolution and the facts, the first respondent acted on ostensible authority of the second respondent.

- If it was found that there was no proper authority, the respondents intentionally and/or negligently made a misrepresentation to the applicant to procure the latter's consent under false, misrepresented and misstated facts to obtain the benefit of the granting of the building extension and the consent to transfer. Both the extension of the building period and the consent to the transfer were granted by the applicant at its prejudice and detriment which caused harm to the applicant under the circumstances and the respondents are *estopped* from denying the authorisation of the authority of the first respondent.

- In any event, if it were to be found that the first respondent had no authority and that the respondents are not *estopped* as argued, the respondents were in any case in *mora* with the obligation to erect a dwelling on the property as soon as they took transfer of the property. The result is that the applicant simply became entitled to enforce title condition B, a restrictive condition, on that basis alone.

As authority for this proposition, counsel for the applicant relied on the judgment of Du Plessis J, in this court, in a virtually identical matter, *Bondev*

Developments (Pty) Ltd v Mosikare and three Others, under case number 50391/2008. On pages 7-8 of the judgment, the learned Judge remarks:

> "Counsel pointed out that the fact that the second purchaser (respondents in this case) took transfer after the building time-limit had expired, does not mean that the obligation to build within the stipulated time had 'disappeared'. It only means, the argument went, that when the respondents took transfer the first purchaser was in *mora* with the obligation to build. It further means that, the moment they took transfer, the respondents were also in *mora*.
>
> I agree with counsel's submission. Obligations are extinguished when they are performed. Apart from that, obligations can be extinguished by, for instance, waiver or prescription. If, however, an obligation is not extinguished, it remains despite the fact that the time for its performance has come and gone. The person who has to perform the obligation is not excused when he falls into *mora*. Mr Celliers correctly pointed out that the applicant could not have enforced the obligation before expiry of the time limit. To hold that it cannot thereafter enforce it would render the whole obligation meaningless."

In that matter an order was made for the property to be re-transferred, along the lines of the relief presently sought.

[37] I find myself in respectful agreement with the arguments advanced on behalf of the applicant in response to this point *in limine*.

[38] In the result, I am of the view that point *in limine* two falls to be dismissed.

The third point *in limine*

[39] I have pointed out that this argument was abandoned.

[40] In any event, it overlaps with the second point *in limine,* relying on the fact that the initial time period for erecting the dwelling had lapsed before the Trust entered into B5.

[41] For the reasons mentioned, there is no merit in this argument *in limine*.

The fourth point *in limine*

[42] This argument *in limine*, essentially, amounts to the following:

Title condition B stipulates that, in the event of the transferee not erecting a dwelling within the specified time, the applicant can claim re-transfer against payment of the original purchase price, interest free.

In this case, the original purchase price was R560 000,00.

The Trust, as the third owner, paid R840 000,00 for the property.

In terms of B5, it is acknowledged by the first respondent (on the authority of the second respondent, as I have mentioned) that the Trust is bound by the title conditions

and that the applicant is entitled to re-transfer at the original amount of R560 000,00, in the event of the extended building period not being met.

In the circumstances, the agreement (B5) is in contravention of the provisions of the Consumer Protection Act 68 of 2008 ("the Act") in that:

- it is unfair, unreasonable and/or unjust as the agreement is excessively one-sided in favour of the applicant;
- it requires the Trust to forfeit money to the applicant to which the applicant is not entitled in terms of the Act or any other law;
- it expresses, on behalf of the applicant, a consent to a predetermined value of costs relating to enforcement of the agreement;
- the agreement is therefore unconscionable, unjust, unreasonable and unfair;
- the respondents therefore seek an order declaring the agreement B5 to be unenforceable.

[43] In the replying affidavit, and in heads of argument, the following submissions are made on behalf of the applicant:

- The respondents (essentially the Trust) bought the property from an individual (Mphahlele) and not from the applicant. It bought the property from an individual subject to the existing conditions of title and is bound by those conditions.

- In the result, the provisions of the Act are not applicable. If the Trust has any recourse, it should be exercised against the previous owner from whom the property was bought.

- The rights and obligations flowing from B5 cannot be said to be goods or services as defined in the Act. The Extension Agreement imposes an obligation to build within a particular period, failing which the applicant is entitled to re-transfer of the property.

- Should the respondents contend that the applicant's right to re-transfer is a legal interest in land as defined in paragraph (d) under the definition of "goods" in the Act (my note: this is the only aspect that may resort under the definition of "goods" and it reads:

  > "A legal interest in land or any other immovable property, other than an interest that falls within the definition of 'service' in this section."),

  the Act still does not apply as it is the applicant who acquires the interest and not the respondents. The Trust is then the "supplier" of the "goods" who "supplies" the legal interest in land to the applicant.

- As for the respondents' acquisition of the property, the respondents did not buy the property from the applicant. Consequently, there is no "transaction" between the parties as far as the sale of the property is concerned. (I add that, on my reading of the definition of "transaction" in the Act, this specific stipulation in B5, dealing with the re-transfer, falls outside the ambit of the "transaction" definition.)

[44] I also make the following observations:

- The complaint about having to return the property for payment of less than what the Trust paid when taking transfer thereof, is, in any event, overtaken by the rather gracious gesture by the applicant to refund the full R840 000,00 as opposed to the R560 000,00 as it is entitled to do in terms of title condition B and the provisions of B5.

In this regard it is convenient to revisit clause 9 of B5 which stipulates:

> "I hereby fully agree that if the dwelling is not built and/or completed fully within the agreed time period herein, Bondev shall be entitled on demand to take re-transfer of the property alternatively I hereby grant Bondev an option to buy the property for a purchase price of R560 000,00 to be executed by Bondev in writing if I fail to comply with my obligation to erect a dwelling on the property."

It is well settled that contracts are there to be enforced by the courts. The learned author, Christie, *The Law of Contract in South Africa*, 6th edition puts it as follows at page 12:

> "The principle that the courts will enforce contracts, expressed in Latin as *pacta sunt servanda*, is obviously necessary as a general principle and it is consistent with the constitutional values of dignity and autonomy."

For the sake of brevity I refrain from referring to all the authorities relied upon by the learned author for this proposition.

I add, in fairness, that the learned author does mention that it is "by no means obvious that the courts should enforce unfair contracts". The learned author deals with investigations into this subject by the South African Law Commission.

Nevertheless, objectively speaking, I am of the view that there is no indication that this contract, B5, was unfair: there is no suggestion that the first respondent was coerced into signing the agreement or that he did not understand what he was committing the Trust to do. There is no suggestion that the Trust, objectively speaking, was not in a position to erect the dwelling within nine months. In B5, as I have quoted from its terms, a clear time frame is provided for the respondents to systematically manage the process from the preparation of building plans, the appointment of a building contractor, the start of the construction and up to the completion thereof. After the previous owners had also failed to erect the dwellings, it was understandable and, indeed, imperative, as stated by the applicant, that the extension period had to be enforced. There is no suggestion that a nine month period is unfair. There is no suggestion that the Extension Agreement, B5, was not freely and voluntarily concluded. There is no suggestion that the first respondent, at any stage before the filing of the opposing papers, considered the agreement to be unfair. There is also no evidence of a change in circumstances to render the title condition invalid.

It seems to me that, in the particular circumstances, it was practical and realistic for the "return purchase price" in the event of a re-transfer, to be fixed

in title condition B. Failure to do so, may cause insurmountable difficulties years down the line, if, like here, the latest in a line of defaulting purchasers, fails to erect a dwelling, through no fault of the applicant, and be put in a position to insist on a higher "repurchase" amount commensurate with the purchase price paid by this particular purchaser.

- In these circumstances, I am not in sympathy with the argument offered on behalf of the respondents that B5 was "unfair, unreasonable and/or unjust".

The only one of these terms defined in the Act is "unconscionable" which definition stipulates that, when used with reference to any conduct, it means:

> "(a) Having a character contemplated in section 40; or otherwise unethical or improper to a degree that would shock the conscience of a reasonable person."

Section 40 deals with "unconscionable conduct" and provides:

> "(1) A supplier or an agent of the supplier must not use physical force against the consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, in connection with any-
>
> (a) marketing of any goods or services;
>
> (b) supply of goods or services to a consumer;
>
> (c) negotiation, conclusion, execution or enforcement of an agreement to supply any goods or services to a consumer;

(d) demand for, or collection of, payment for goods or services by a consumer; or

(e) recovery of goods from a consumer.

(2) In addition to any conduct contemplated in subsection (1), it is unconscionable for a supplier knowingly to take advantage of the fact that the consumer was substantially unable to protect the consumer's own interest because of physical or mental disability, illiteracy, ignorance, inability to understand the language of an agreement, or any other similar factor.

(3) Section 51 applies to any court proceedings concerning this section."

(Section 51, dealing with prohibited transactions, does not apply for present purposes.)

In the light of these provisions, it seems to me to be clear, objectively speaking, that B5 does not disclose or exhibit any form of "unconscionable conduct", as defined in the Act.

[45] Against this background, I am of the view that there is no merit in the fourth argument *in limine* and it also falls to be dismissed.

The fifth point *in limine*

[46] The submission by the respondents is that B5 is *contra bonos mores*.

[47] I have, at least to a considerable extent, dealt with this subject when considering the fourth point *in limine*.

[48] Counsel also referred me to the case of *Napier v Barkhuizen* 2007 5 SA 323 (CC) where the following is said at paragraph [57]:

> "The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that had been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress."

And, at paragraph [58]:

> "The second question involves an enquiry into the circumstances that prevented compliance with the clause. It was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time-limitation clause. Naturally, the *onus* is upon the party seeking to avoid the enforcement of the time-limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy

and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply."

[49] For all these reasons, I am of the view that the respondents failed to discharge the *onus* to show that this contract, B5, was *contra bonos mores*. Consequently, the fifth point *in limine* also falls to be dismissed.

Other "defences" raised

[50] As I indicated at the outset, the points *in limine* make up the bulk of the opposing affidavit.

[51] In dealing *seriatim* with the paragraphs in the founding affidavit, the respondents, again, raised the point, already dealt with, that the time period for the erection of the dwelling on the property had lapsed (as per the original title condition B) by the time the Trust took transfer.

In this regard, when dealing with this argument, I mentioned that this court, per Du Plessis J, in case no 50391/2008, already endorsed a claim for similar relief based on title condition B, or a similar title condition, applicable to transactions in Midstream Estate. I need not dwell on this subject any further.

[52] The respondents, in the opposing affidavit, also deny that the Trust failed to take any steps to erect the dwelling on the property. An account is given about various steps allegedly taken by the respondents to get the construction of the dwelling off the

ground. Reference is made to a number of contractors engaged for the purpose who did not comply with their mandates.

An allegation is made that in June 2015 (well after the extension period lapsed in June 2014, and even after this application was launched), a certain contractor was again instructed to draw the plans for the proposed dwelling and these were allegedly submitted to the Aesthetics Committee of the Home Owners Association. Of course, this is irrelevant, given the fact that by then the contract, B5, had been breached, and the extension period had expired at least a year earlier. It is alleged that on 9 June 2015 (after the papers were served on the respondents) an attempt was made to file the final plans with the Aesthetics Committee whereupon a member of that committee informed the first respondent that the applicant had instructed that committee not to accept the plans as the matter is now the subject of litigation.

Apart from the fact that all this is irrelevant, for the reasons mentioned, the following is said in reply by the applicant:

> "The entire history stipulated and set out by the respondents is apparently an issue between the Home Owners Association and the respondents as owners of the property and as members of the Home Owners Association. As indicated hereinbefore, the applicant has no *locus standi* in respect of the Home Owners Association, has no *locus standi* in respect of the Ethical Committee of the Home Owners Association and has no influence thereon.
>
> The Home Owners Association is a separate legal entity running under its own management and auspices."

And further:

> "It is an issue between the Home Owners Association and the owner's financiers. The applicant's only interest after transfer is to take action once it has noted that the building period has not been complied with.
>
> Save therefore, the applicant has no authority to intervene or impose itself in any way whatsoever."

[53] Against this background, I am of the view that the "defences" raised, such as they are, have no merit.

[54] Finally, I add that, after the replying affidavit was delivered, the respondents saw fit to file another affidavit "in response to" the replying affidavit. The following issues are raised:

- The Home Owners Association has a direct and substantial interest in the matter and the applicant's failure to cite this association as a party to the proceedings constitutes a non-joinder.

  In view of the circumstances, and the relationship between the applicant and the Home Owners Association, and, in particular, because the latter association was approached more than a year after the extension period had lapsed, I see no merit in this argument.

It was also submitted, in this regard, on behalf of the applicant, that the test for joinder is whether or not a party has a direct and substantial legal interest in the subject-matter of the litigation. A mere financial or commercial interest (which in my view is not present either) is insufficient – see *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2010 5 SA 479 (WCC) at 482F-483A.

- The case should have been referred to oral evidence or trial, with particular reference to the second point *in limine*, dealing with the question of estoppel and, as explained, the fact that there was a resolution signed on behalf of the second respondent authorising the first respondent to enter into the transaction.

There was no application by either party, during the proceedings before me, for the matter to be referred to evidence.

It is generally undesirable for the court itself to refer the matter for oral evidence *mero motu* – see Harms *Civil Procedure in the Superior Courts* at B-64 and the authorities there quoted.

In any event, I see no need for the matter to have been referred to evidence on this particular subject. As I have pointed out, even if there was no authority, the respondents were, in any event, in *mora* from the outset, as held by Du Plessis J in the case mentioned with which finding I am in respectful agreement.

Conclusion

[55] For all the reasons mentioned, I have come to the conclusion, and I find, that there is no merit in any of the points *in limine* raised, neither in the other "defences" such as they may be.

[56] In the result, the relief ought to be granted, and the amount tendered by the applicant ought to be increased, as per the request of the applicant, from R560 000,00 to R840 000,00.

The costs

[57] Some argument was presented on behalf of the respondents that the tender to increase the "refund amount" came at a late stage and the matter was initially prepared on the basis of the lower amount of R560 000,00. Consequently, there is some justification in considering a costs order whereby the respondents are ordered to pay only a percentage of the applicant's costs, in the event of the application being upheld.

[58] After due consideration, I have come to the conclusion that there is some merit in this argument and it seems to me that a proper contribution to the applicant's costs, in these circumstances, ought to be 75%.

The order

[59] I make the following order:

1. The first and second respondents, jointly and severally, are ordered to take the necessary steps to re-transfer the property described as Erf […], Mainstream Estate Extension 35 Township, Registration Division J.R.; held by Deed of Transfer T90725/13 to the applicant.
2. The first and second respondents, jointly and severally and in their representative capacities, are to bear the costs associated with 1 above.
3. The applicant is to pay to the first and second respondents, in their representative capacities, the amount of R840 000,00 (eight hundred and forty thousand rand) against transfer of the property mentioned in 1 above.
4. The first and second respondents are directed to sign all documents and take all steps reasonably required to give effect to the order in 1 above, within a period of seven days from date of such request by the applicant and/or someone on its behalf.
5. Should the first and second respondents refuse and/or fail to sign the relevant documentation to give effect to the orders in 1 and 4 above, then the Deputy Sheriff of this Court is authorised and directed to sign all necessary documents on their behalf to effect re-transfer of the aforementioned property from the B & L Residence Trust to the applicant against payment of the amount of R840 000,00 (eight hundred and forty thousand rand) less the costs payable to the Sheriff, transfer fees, clearance fees at the local authority and Home Owners Association in respect of the transfer.
6. It is declared that the applicant is entitled to register this order with the third respondent, the Registrar of Deeds.

7. The first and second respondents, jointly and severally, in their representative capacities, are ordered to pay 75% of the applicant's taxed or agreed costs flowing from this application.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

38331/2015

HEARD ON: 4 MAY 2016
FOR THE APPLICANT: N J HORN
INSTRUCTED BY: TIM DU TOIT & COMPANY INCORPORATED
FOR THE 1ST AND 2ND RESPONDENTS: VAN RHYN FOUCHE
INSTRUCTED BY: VAN STADE VAN DER ENDE INCORPORATED