THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 235/2020

In the matter between:

TRAMORE PROPERTY GROUP (PTY) LTD **APPELLANT**

and

VOSLOORUS SQUARE CC **RESPONDENT**

Neutral citation: *Tramore Property Group (Pty) Ltd v Vosloorus Square CC* (Case no 235/2020) [2021] ZASCA 41 (13 April 2021)

Coram: MBHA, NICHOLLS and MBATHA JJA and GORVEN and GOOSEN AJJA

Heard: 11 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLI. The date and time for hand-down is deemed to be 10h00 on 13 April 2021.

Summary: Contract – Property Law – enforceability of contract of sale of property of another – no basis for cancellation – locus standi – seller disposed of rights to require owner to transfer under sale agreement – owner withdrew opposition to transfer – claim for transfer enforceable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Neukircher J, Tuchten and Teffo JJ concurring, sitting as Full Court):

The appeal is dismissed with costs.

JUDGMENT

Gorven AJA (Mbha, Nicholls and Mbatha JJA and Goosen AJA concurring):

[1] On 17 September 1991, the City Council of Vosloorus (the council) and Permprop (Pty) Ltd (Permprop) concluded a written agreement. It was termed an 'Agreement of Exchange of Land by Leasehold' (the exchange agreement). At the time, Permprop owned certain land, which the council required. As a result, specified properties owned by Permprop (the Tramore properties) were to be disposed of to the council. In turn, specified properties owned by the council (the council properties) were to be disposed of to Permprop. The agreement was that the transfers should be simultaneous. No money was to change hands. The council took occupation of the Tramore properties pursuant to the exchange agreement. It erected a large school on these properties. No transfers of any of the properties concerned have taken place.

[2] The Ekhuruleni Metropolitan Municipality (the municipality) is the successor in title to the council. Permprop changed its name to that of the appellant (Tramore).

[3] On 7 April 2000, Tramore and the respondent (Vosloorus Square) concluded two written agreements. Both were styled 'Agreement of Sale of Land'. In one, Tramore agreed to sell to Vosloorus Square the council properties (the sale agreement). All of the council properties are undeveloped. In the other, Tramore agreed to sell to Vosloorus Square certain other properties. The second sale agreement is not relevant to the present matter.

[4] On 19 September 2012, the Gauteng Department of Housing proclaimed a township (the township), which included the council properties. Certain properties were made subject to special conditions in the proclamation. These included the requirement that:

'The internal roads on the erf shall be constructed and maintained by the registered owner to the satisfaction of the local authority . . . .'

It is common cause that the rights in the council properties have been converted from leasehold to outright ownership.

[5] Vosloorus Square requested that Tramore transfer the council properties to it. Tramore refused to do so. This prompted an application to the Gauteng Division of the High Court, Pretoria, in which Vosloorus Square sought the following relief:[1]

'1. The Registrar of Deeds, Johannesburg, shall simultaneously record and give effect to the following transfers of property:

[1] This is the relief applied for by the time the hearing took place.

a. Erven 21686 to 21708 Vosloorus Extension 29 be transferred from [the municipality] to [Vosloorus Square]; being first transferred (insofar as is necessary) from [the municipality] to [Tramore];

b. Erven 14258, 14259, 14260 and 14261, Vosloorus Extension 30, be transferred from [Tramore] to [the municipality];

c. In the event of any of the aforenamed Respondents do not sign whatever documents and deeds might normally be required to effect the aforesaid transfers and registrations, the Sheriff having jurisdiction . . . shall execute and sign such documents in their stead.

2. Costs of the application are to be paid by [Tramore].'

Both Tramore and the municipality were cited as respondents in the application. Both opposed it and delivered answering affidavits, after which the municipality withdrew its opposition, leaving Tramore as the only party opposing.

[6] The court of first instance, per Mavundla J, dismissed the application with costs on the basis that Vosloorus Square lacked the requisite *locus standi* to obtain the relief sought. He granted leave to appeal to the Full Court of the Gauteng Division, Pretoria. That court, per Neukircher J, with Tuchten and Teffo JJ concurring, upheld the appeal and substituted the following order for that of the court of first instance:

'2.1 [T]hat the [municipality] and [Tramore] are ordered to take all steps necessary to transfer to each other the land envisaged in the Exchange Agreement dated 1991 and that *pari passu* therewith [Tramore] shall pass transfer of the properties received from [the municipality] to [Vosloorus Square];

2.2 the Services Agreement signed by [the municipality] and [Tramore] respectively on 29 May 2013 and 14 February 2014 remains *in esse* and is ceded and assigned from [Tramore] to [Vosloorus Square];

2.3 [Tramore] is ordered to pay [Vosloorus Square's] costs.'

It is this order which is appealed against by Tramore with the special leave of this court. The municipality takes no part in the appeal.

[7] As will have become apparent, much time has elapsed since the exchange agreement was concluded in 1991. This, also, since the sale agreement was concluded in 2000 and the proclamation of the township took place in 2012. After the conclusion of the sale agreement, negotiations took place between Vosloorus Square and the municipality. In these, the municipality was clearly aware of the sale agreement and that it was Vosloorus Square, and not Tramore, that would develop the council properties. As will be seen, the municipality has never objected to Vosloorus Square being the developer of the council properties.

[8] The main substantive ground on which Tramore opposed the application was that the sale agreement was cancelled on 8 July 2014. It claimed that Vosloorus Square had breached its obligations under the sale agreement. The purported breach was of clause 10.3 of the sale agreement. This provides:

'The purchaser undertakes to provide guarantees for internal services and bulk contributions as may be required by the local authority pursuant to proclamation of the township or subdivision and transfer of the property within 14 days of being called upon to do so by the seller.'

Tramore claimed that Vosloorus Square failed to provide the requisite guarantees when called upon by Tramore to do so. In support of this claim, Tramore called in aid a series of email communications.

[9] Before dealing with the communications on which Tramore relies, it will assist to provide some context. Vosloorus Square applied to the municipality for the rezoning of the council properties to residential within a township. On 6 October 2011, Ms Dowd, the Manager: Corporate and Legal Services for the municipality, wrote to the representative of Vosloorus Square saying that she would recommend Vosloorus' rezoning application to the Department City Planning, subject to the submission of certain documents. Vosloorus Square provided the required documents. The township was accordingly proclaimed on 19 September 2012. On 10 October 2012, Ms Dowd requested the Director: Planning Water Services to furnish her with conditions he wished to be included in the services agreement. In this communication she indicated that Tramore had sold the council properties to Vosloorus Square but that, because the exchange agreement had not been amended to substitute the latter for Tramore, the services agreement would have to be concluded between the municipality and Tramore.

[10] The municipality then set out certain requirements for the services to be provided by Vosloorus Square when it developed the council properties. As a result, Vosloorus Square furnished the municipality with the following reports:

(a) A storm water report;

(b) A water and sewer report;

(c) An electricity reticulation report; and

(d) A dolomite stability investigation report.

These were considered and approved by the municipality prior to preparation of the services agreement referred to below. The cost to Vosloorus Square of obtaining the various reports exceeded R1 127 813.48.

[11] On 29 May 2013, after receiving and approving the said reports, the municipality signed what is referred to as a Services Agreement (the services agreement) which, as foreshadowed in Ms Dowds's letter of 10 October 2012, reflected Tramore as the other party. In the services agreement, the municipality fixed a guarantee for 'all defects occurring in the roads and storm-water' at R485 000. Although the services agreement requires many other services from the developer, no further guarantees are fixed in it concerning those other services. At this stage only the municipality had signed the services agreement.

[12] The sequence of the communications and events relied on by Tramore to support its assertion of a breach of clause 10.3 of the sale agreement follows.

(a) On 29 May 2013, the municipality signed the services agreement, fixing the above guarantee at R485 000.

(b) On 29 July 2013, a representative of Vosloorus Square sent an email to Tramore, copied to the municipality. In it, Vosloorus Square indicated that it was prepared to issue an irrevocable guarantee.

(c) On 31 July 2013, Tramore sent an email to Vosloorus Square and copied the municipality. In the section headed 'Council Guarantees', it said that the consulting engineers of Vosloorus Square should 'now establish the cost of the internal services and council should agree to the services and the cost thereof and the amount of the guarantee they require'. It went on to say that it required a letter from the municipality confirming this.

(d) On 12 August 2013, Vosloorus sent an email to Tramore confirming that the consulting engineers were engaged in the suggested process.

(e) On 16 October 2013, Vosloorus Square sent an email to the municipality and copied Tramore. The email referred to that of Tramore of 31 July 2013 and said:

'[W]e confirm that we have established the cost of the internal services and further confirm we are prepared to issue the required irrevocable bank guarantees to council as stipulated on the service agreement.

Can you kindly confirm this as stated by Mr Roye in his mail below, dated 31st July 2013 and request his availability any time next week for the signing of the service agreement at your office.'

It also confirmed that it was prepared to enter into a cession of the services agreement.

(f) The response from the municipality, sent by Ms Dowd on 18 October 2013, is to the effect that, since the municipality had signed the services agreement, Tramore should do so. The municipality did not respond to the question raised by Vosloorus Square concerning what had been said of guarantees in the email of Tramore dated 31 July 2013.

(g) This reply caused Tramore and Vosloorus Square to draft an addendum to the services agreement. This sought to substitute Vosloorus Square as the developer and provided that the municipality agreed to this substitution and to Vosloorus Square taking over all of the obligations of the developer under the services agreement. A copy of the draft addendum was sent to the municipality for approval on 31 October 2013.

(h) No response from the municipality was put up in the papers.

(i) Tramore signed both the services agreement and the addendum on 14 February 2014. Vosloorus Square had signed the addendum a few days before. The addendum has not been signed by the municipality but there is no indication that it objects to it. All indications are to the contrary, and

Vosloorus Square stated in the application, without challenge, that the municipality had no objection to it.

(j) On 19 June 2014, attorneys for Tramore addressed a letter (the breach letter) to Vosloorus Square. It recorded that the latter had breached clause 10.3 of the sale agreement by failing 'to furnish guarantees for the internal services and bulk contributions within 14 days of being called upon by the seller to do so'. It contended that the 'most recent occasion' on which Vosloorus Square had been called upon by Tramore to provide guarantees was 'at a meeting . . . on or about July 2013'. It also indicated that the terms of the guarantees must be acceptable to Tramore and the municipality and called upon Vosloorus Square to remedy the breach and furnish the required guarantees within 7 days.

(k) On 8 July 2014 the said attorneys delivered a letter to Vosloorus Square purporting to cancel the sale agreement on the basis that Vosloorus Square had 'failed to furnish the guarantees for the internal services and bulk contributions within the specified 7 days as demanded.'

[13] The contentions of Tramore concerning cancellation must be considered against this background. Tramore claims that clause 10.3 entitled it to call upon Vosloorus Square to provide guarantees. What is required of Vosloorus Square by clause 10.3 is that it 'provide guarantees . . . as may be required by the local authority'. This, of course, means that, until the municipality requires guarantees, Vosloorus Square is not obliged to provide them. The necessary corollary to this is that Tramore is not entitled to call upon Vosloorus Square to do so.

[14] Tramore submitted that the services agreement showed that the municipality had fixed the amount of the guarantee for 'defects occurring in the roads and storm-water' at R485 000. This, it said, showed that the municipality had 'required' the guarantees. But this clearly did not call for them to be furnished at this stage. During argument, Tramore was constrained to concede that there is no evidence that the municipality had called for any guarantees. As such, it cannot be said that it had 'required' the guarantees at the time Tramore purported to call for the guarantees and, based on the failure of Vosloorus Square to provide them, to cancel the sale agreement.

[15] Tramore then submitted that the amount of the guarantee had been fixed. But Tramore did not itself treat the services agreement as determinative of the amount or amounts. Subsequent to signature by the municipality of the services agreement, on 31 July 2013, it sent an email to Vosloorus Square and the municipality. It stated that, after the consulting engineers of Vosloorus Square had established the cost of the internal services, 'council should agree to the services and the cost thereof and the amount of the guarantee they require'. This was sent on the last day of the month during which Tramore claimed that it had demanded that Vosloorus Square furnish the guarantees. There could clearly have been no breach based on the amount of the guarantees having been clarified.

[16] Further, Vosloorus Square had tendered the requisite guarantees in the email to the municipality of 16 October 2013. This referred to the email of Tramore of 31 July 2013, which stated that the municipality should agree the amount. The municipality did not respond to this tender by Vosloorus Square

and specify the amount it would require. Nor did it indicate that it required that the guarantees be furnished at that stage.

[17] Finally, in the breach letter the attorneys for Tramore indicated that the terms of any guarantee must be acceptable. There is no assertion, let alone evidence, that any terms were ever agreed. All that was put up in the papers was a *pro forma* document headed 'Guarantee', which is in the form of a deed of suretyship, for damages sustained by the municipality by non-performance of obligations under an unspecified memorandum of agreement concluded between the municipality and the 'Township Owner' for an unspecified amount. It also includes a suretyship for the obligation to construct a 'consumer communal substation', referencing clause 1.1.4 of the 'Contract'. No such clause appears in the services agreement and no such provision is required of the developer. It is clear, accordingly, that no agreement had been reached on the terms of any guarantees to be furnished by Vosloorus Square.

[18] This means that Tramore did not show that the municipality had requested that the guarantees be furnished. It did not show that the amount had been finally specified and it did not show that any terms had been suggested by the municipality or agreed between it and either Tramore or Vosloorus Square. It was therefore not competent for Tramore to have demanded guarantees under clause 10.3 because there is no indication that the guarantees were 'required by the local authority'. There is thus no basis on which Tramore was entitled to cancel the sale agreement. Vosloorus Square correctly regarded the purported cancellation as a repudiation of the sale agreement and elected to enforce it.

[19] Two further substantive defences to the claim in the application to specific performance of the sale agreement were raised. First, Tramore claimed that Vosloorus Square had not performed its reciprocal obligations. As such, it could not require Tramore to perform its obligations. The reciprocal obligation relied upon by Tramore was that of Vosloorus Square to provide guarantees under clause 10.3. In essence, this raises the same issue of non-compliance on which the defence of cancellation was founded. It must accordingly meet the same fate as that defence. Secondly, Tramore contended that there was a statutory bar to the relief sought but abandoned this defence at the outset of the hearing before us. In my view, this abandonment was correct. Nothing more need accordingly be said about it. The substantive defences raised by Tramore were thus correctly dismissed by the full court.

[20] The issue on which the court of first instance found against Vosloorus Square was that there was no contractual privity between it and the municipality. For this reason, it lacked the requisite *locus standi* to enforce transfer from the municipality to Tramore, which is a necessary precursor to enforcing the sale agreement. This point was taken in the papers only by the municipality and not by Tramore. As indicated, the municipality withdrew its opposition to the application and has elected not to join in this appeal. This despite the order requiring it to transfer the council properties to Tramore against transfer of the Tramore properties to it. Tramore, however, relied on it as a point of law as it is entitled to do. In essence, the argument is that the exchange agreement was concluded between Tramore and the municipality. Because Vosloorus Square was not a party to it, only Tramore could enforce performance by the municipality. This defence must now be considered.

[21] Tramore requested transfer of the council properties sometime prior to 20 January 2014. The response of the municipality on that date said that 'the properties . . . will not be transferred to yourself in order for you to transfer the properties which you sold to Vusi Khumalo, until such time as the properties in Vosloorus X30 are transferred to the council.' In other words, the municipality simply required the simultaneous transfer of Tramore's properties if Tramore wished to obtain transfer of the council properties. This was required under the exchange agreement. No other bar to the request for transfer was raised or has since been raised. It should be mentioned that Vusi Khumalo, mentioned in this communication, has at all times represented Vosloorus Square.

[22] In considering this defence, an evaluation of the obligations of Tramore under the sale agreement is required, along with the context in which it was concluded. While a person may sell property belonging to another, the usual position is that the only obligation resting on the seller is to give possession to the purchaser and to indemnify the purchaser against eviction by the owner. The seller is generally not obliged to transfer ownership to the purchaser. This position was established as far back as 1897 in the matter of *Theron and Du Plessis v Schoombie*,[2] where De Villiers CJ, beginning with a quotation from *Benjamin on Sales*,[3] said:

"On the completion of the contract of sale," he says, "the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred was something more than the mere manual delivery, and the Romans had a special term for it; it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered. And if the vendor knew that he was not the

[2] *Theron and Du Plessis v Schoombie* (1897) 14 SC 193.
[3] *Benjamin on Sales* 4 ed at 377.

owner and made a sale to a buyer ignorant of that fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was authorised to bring an equitable suit, *ex empto,* without waiting for an eviction." These principles have not been materially modified by the Dutch law. Under that law the sale of a thing belonging to another was not illegal if made *bona fide,* but was subject to the buyer's right to be indemnified against eviction.'[4]

In the sale agreement, however, Tramore went further than undertaking to give possession of the council properties to Vosloorus Square. This had already taken place. Tramore did not only sell the council properties but undertook that Vosloorus Square would obtain transfer.

[23] In the founding affidavit, Vosloorus Square asserted that the sale agreement 'constitutes a complete sale and alienation to the Applicant of all rights, title and interest that Tramore has or had (in terms of the Exchange Agreement) in the Council Land'. This assertion was not challenged by Tramore but must, of course, be consistent with the sale agreement.

[24] The sale agreement is not particularly elegantly drafted but certain factors bearing on its interpretation make the assertion more probable than not. The property sold is described as 'proposed erven' in the still undeclared township. It requires Vosloorus Square to finalise the township at its own cost. It requires Vosloorus to provide the guarantees required by the municipality of Tramore in the exchange agreement 'pursuant to proclamation of the township'. It also requires that Vosloorus Square conclude a services agreement with the municipality. All of these are consistent with a disposal of the rights of Tramore under the exchange agreement. It can hardly be

[4] *Theron and Du Plessis v Schoombie* fn 2 above at 198-199.

considered that the sale agreement would allow Vosloorus Square to deal directly with the municipality concerning land to which Tramore was entitled under the exchange agreement, unless Tramore had disposed of its rights under that agreement to Vosloorus Square. This is further buttressed by the addendum to the services agreement in which Tramore cedes and assigns its rights under the services agreement to Vosloorus Square.

[25] And this was recognised by the municipality; it undertook negotiations with Vosloorus Square concerning property which it had agreed to transfer to Tramore. The negotiations related specifically to the application of Vosloorus Square, and not Tramore, to have the township proclaimed. Ms Dowd called on Vosloorus Square, not Tramore, to submit documents before she would recommend the proclamation of the township. Having received the requisite documents from Vosloorus Square, she recommended proclamation, which took place shortly thereafter. Straight after it was proclaimed, she wrote to the Director: Planning Water Services enquiring what he required in a services agreement. The municipality then requested reports from Vosloorus Square and approved them before drafting the services agreement, which dealt with the services covered by the reports.

[26] The fact that the services agreement reflected that Tramore had the obligation to provide the services is consistent with the legal position. Ms Dowd, in her letter to the Director: Planning Water Services, stated that Tramore had sold the council properties to Vosloorus Square and that, in terms of the sale agreement, the latter ‘shall be obliged to conclude a services agreement with the Council’. She went on to say that the exchange agreement ‘has not been amended to make provision for the agreement that exists

between Messrs Tramore and Mr Khumalo and therefore the Council is obliged to enter into a services agreement with Messrs Tramore . . .'.

[27] Although this was not addressed in the judgment of either of the courts below, or the heads of argument, or in argument before us, the position of Ms Dowd is correct. For the municipality to be bound by any delegation of the obligations of Tramore under the exchange agreement to Vosloorus Square, it would have to have accepted the delegation. This is because instead of looking to Tramore to perform its obligations, it would have to look to Vosloorus Square to perform the obligations of Tramore under the exchange agreement. And because the municipality had not accepted the delegation, the obligations remain those of Tramore. It is presumably on that basis that she required that the services agreement should be concluded between the municipality and Tramore, as Tramore was obliged to do under the exchange agreement. This is also why the addendum to the services agreement drawn up by Tramore made provision for acceptance of the delegation of obligations contained in it by the municipality. Because the municipality did not sign the addendum, the municipality remains entitled to look to Tramore to perform the obligations resting on it under the services agreement.

[28] The position is, accordingly, that Tramore was entitled to dispose of its rights under both the exchange agreement and the services agreement without acceptance by the municipality. Vosloorus Square is entitled to enforce the rights of Tramore under the exchange agreement, including that the municipality transfer the council properties to Tramore. But, until the municipality accepts that Tramore can delegate its obligations under those agreements to Vosloorus Square, Tramore remains obligated. Vosloorus

Square is entitled to enforce the rights of Tramore under the exchange agreement to transfer of the council properties and, by virtue of the sale agreement, to require Tramore to perform its reciprocal obligation to transfer Tramore's properties to the municipality. Specific performance of Tramore under the sale agreement to perform its obligation to transfer the Tramore properties to the municipality requires Tramore to give effect to its obligation to transfer the Tramore properties to the municipality. All of this is what Vosloorus Square sought to achieve in the application and has been given effect in the order of the full court.

[29] The municipality has nowhere indicated that it would not be prepared to give effect to the exchange agreement, as long as it obtains transfer of Tramore's properties. The only other obligation of Tramore to the municipality under the exchange agreement is to sign a services agreement. This had already been done. Vosloorus Square has undertaken to Tramore to perform its obligations under the services agreement by way of the addendum. The proposed delegation of Tramore's obligations is still capable of being accepted by the municipality by its signing the addendum.

[30] In the result, it is my view that the full court was correct, albeit for different reasons, to hold that Vosloorus Square obtained the rights of Tramore to enforce the exchange agreement. This is presumably why the municipality, having initially taken the point that there was no contractual privity between it and Vosloorus Square and that the latter could not enforce the exchange agreement, withdrew its opposition and elected not to take up the cudgels in the appeal against the order of the full court

[31] In the result, the appeal is dismissed with costs.

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GORVEN AJA

ACTING JUDGE OF APPEAL

APPEARANCES

For appellant:	H P West
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	Lovius Block Incorporated, Bloemfontein
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