THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 16 May 2023

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Cooper N O and Another v Curro Heights Properties (Pty) Ltd (1300/2022) [2023] ZASCA 66 (16 May 2023)

Today, the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

The issue before the SCA was whether a written sale of land agreement was null and void *ab initio* due to non-compliance with s 2(1) of the Alienation of Land Act 68 of 1981 (the Act) and for want of consensus between the parties in respect of the *merx* (the subject-matter of the sale).

The first and second appellants, Mr Chavonnes Badenhorst St Clair Cooper and Ms Sumiya Abdool Gafaaf Khammisa N N O, were the joint liquidators (the liquidators) of Nomic 151 (Pty) Ltd (in liquidation) (Nomic). The respondent was Curro Heights Properties (Pty) Ltd (Curro), its sole director being Mr Rhett Molyneux (Mr Molyneux).

On 8 April 2016, a written sale of land agreement was concluded between the liquidators and Curro, represented by Mr Molyneux, in terms whereof the liquidators sold land to Curro at a purchase price of R5.5 million plus value added tax (VAT). The *merx* was recorded to be 'Road Portion of Erf 19555 Mossel Bay with extent of approximately 4 816 m²' (the ring road), 'Erf 1948 Mossel Bay being 3 600m²', 'Erf 19563 being 1.99 Ha' and 'Erf 19564 Mossel Bay being 7378 m²'. After the written sale of land agreement was concluded, it was realised that the measurement of the ring road was incorrectly recorded. The parties accordingly concluded a written addendum to the written sale of land agreement wherein the measurement of the ring road was rectified. However, the parties did not realise that the written sale of land agreement also erroneously recorded the ring road's erf number as '19555' instead of '19565'.

On 14 November 2016, the liquidators and Curro, represented by Mr Molyneux, concluded yet another written sale of land agreement in terms whereof the same land was sold to Curro for a purchase price of R4.5 million plus VAT (the agreement). The same erroneous recordal of the ring road's erf number crept into the agreement, although this time its measurement was correctly recorded. The parties were *ad idem* that their common intention was to refer to erf '19565' and not to '19555'.

On 5 June 2017, Mr Molyneux, by email, stated that due to investigations that he conducted, he realised that erf 19565 extended into the adjacent Nurture Park development and that that

part of the erf would also vest in Curro if effect was given to the sale. He accordingly suggested that that part of the ring road be excluded from the sale and that erf 19565 be subdivided.

No subdivision materialised during the next few years. On 1 November 2019, almost three years after the agreement had been concluded, the liquidators, through their attorneys, in writing made it clear to Curro that they would no longer entertain any further indulgences in respect of the subdivision of the ring road and they demanded signature of the necessary documents to allow ownership of the land to pass to Curro. Curro did not accede to the liquidators' demand. By letter dated 10 March 2020, the liquidators called upon Curro to remedy its breach within 21 days. This was not done and by email dated 31 August 2020, they advised Curro that they had cancelled the agreement. On 10 September 2020, the liquidators sought certain declaratory relief from the high court, *inter alia* a declarator that the agreement was invalid for non-compliance with s 2(1) of the Act and for want of consensus in respect of the *merx*.

In respect of the issue of consensus, the SCA found that at the time of the conclusion of the agreement the liquidators intended to sell the whole of erf 19565, which is the property that fell into the estate of Nomic, and on Curro's own version it never intended to purchase that part of erf 19565 that extends into Nurture Park. The SCA therefore concluded that the agreement was null and void *ab initio* for want of consensus at the time of its conclusion.

In respect of s 2 of the Act, the SCA held that the section requires the whole contract of sale – its material terms – to be reduced to writing signed by or on behalf of the parties. The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, namely the parties to the contract, the *merx* and the *pretium*. Generally speaking, these terms, and especially the *essentialia*, must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, and also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral *consensus* between the parties. Whether a term constitutes a material term is determined with reference to its effect on the rights and obligations of the parties. The SCA held that subdivision materially affects the rights and obligations of the parties to the agreement in this case. There was no express reference to a subdivision in the agreement or the addendum, as the possibility of a subdivision of the ring road was only raised for the first time by Mr Molyneux on 5 June 2017, some six months after the agreement had been signed. The SCA therefore concluded that the agreement and the addendum concluded between the parties were null and void *ab initio* due to non-compliance with s 2(1) of the Act.

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