THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No.785/2015

In the matter between:

TAMRYN MANOR (PTY) LTD **APPELLANT**

and

STAND 1192 JOHANNESBURG (PTY) LTD **RESPONDENT**

Neutral citation: *Tamryn Manor v Stand 1192 Johannesburg* (785/15) [2016] ZASCA 147 (30 September 2016)

Coram: Maya DP, Bosielo, Saldulker and Van der Merwe JJA and Fourie AJA

Heard: 01 September 2016

Delivered: 30 September 2016

Summary: A written agreement for the sale of an immovable property in respect of which the party who signed the agreement as the purchaser is not the true purchaser as a result of a *bona fide* error common to the parties: the agreement is capable of rectification to reflect the true purchaser where *ex facie* the document all the essential elements for a valid contract for the sale of land have been met.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Cilliers AJ sitting as a court of first instance).

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with an order dismissing the exception with costs.

JUDGMENT

Bosielo JA (Maya DP, Saldulker and Van der Merwe JJA and Fourie AJA concurring):

[1] This appeal, brought with the leave of this court, raises a crisp legal issue: whether an agreement for the sale of land in circumstances where the person who signed as the purchaser is not the true purchaser, is capable of being rectified to substitute the true purchaser.

[2] The salient facts of this case relevant to the resolution of this appeal can be set out succinctly as follows: on 16 August 2007, Tamryn Manor (Pty) Ltd (the appellant) concluded a written agreement for the sale of an immovable property, being Erf 1192, Marshalltown, Johannesburg with Stand 1192 Johannesburg (Pty) Ltd (the respondent) for an agreed purchase consideration of R3,2m. This agreement was reduced to writing. An agent acting on behalf of the respondent signed whilst Ryan Edward Otto (Otto) signed ostensibly as the purchaser. Otto did not indicate on the deed of sale that he was signing as an agent or representative of the appellant. Furthermore, on the same day, 16

August 2007, Otto signed a Suretyship Agreement in terms whereof he bound himself jointly and severally as surety and co-principal debtor in solidum with the purchaser for the due and punctual performance by the purchaser of all its obligations in terms of the agreement of sale of the immovable property.

[3] In terms of clause 2.1 of the agreement, the appellant was required to pay a deposit of ten per cent of the purchase price to the seller's attorneys upon signature of the agreement. The appellant and not Otto, paid R320 000, being the agreed ten per cent deposit of the purchase price to the respondent's attorneys in terms of clause 2.1 of the agreement. Furthermore, the appellant paid R278 002 representing the transfer duty and all other costs of transfer of the immovable property as required by clause 7.1 of the agreement. On or about 16 October 2008, the appellant furnished the respondent with guarantees in the amounts of R1 184 480,23 and R1 695 519,71 in respect of the balance of the purchase price. It is not in dispute that the respondent had demanded and duly accepted these guarantees. The balance of the purchase price was to be covered by a written bank or other guarantee acceptable against registration of the transfer of the property into the appellant's name to be furnished by the appellant.

[4] Notwithstanding the fact that the appellant had complied with its obligations in terms of the agreement, and the lapse of a reasonable time, the respondent failed or refused to do all that was necessary and sign the necessary documents to effect registration and the transfer of the property into the appellant's name as envisaged by clause 7 of the agreement. As a result, the appellant instituted an action against the respondent seeking an order directing it to cause the transfer and registration of the immovable property, into the

appellant's name, as well as rectification of the agreement to reflect it as the true purchaser and not Otto.

[5] In seeking rectification, the appellant averred that due to a *bona fide* mutual error of the parties, the agreement did not reflect the common intention of the parties correctly as it erroneously reflected Otto as the purchaser and not the appellant. The appellant averred that, contrary to what appears *ex facie* the agreement, it was the common continuing intention of the parties that the appellant was the true purchaser.

[6] The respondent filed two exceptions to the appellant's declaration. The respondent's main defence is a complete denial of the existence of any error regarding who the real purchaser was. It asserted that the written agreement correctly reflected what the parties intended namely, that it contracted with Otto and not the appellant. Based on this, it asserted that there was no basis for the rectification of the agreement.

[7] The respondent further pleaded specially that if it is true, as the appellant asserted, that the written agreement does not reflect the correct purchaser, then this rendered the agreement invalid as it did not comply with the strict requirements of s 2(1) of the Alienation of Land Act 68 of 1981 (the Alienation of Land Act). As a result, rectification of the agreement is not permissible.

[8] As s 2(1) is central to this dispute I find it necessary to quote the relevant section. It reads as follows:

'No alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[9] In its replication to respondent's special plea, the appellant pleaded that the formal validity of the written agreement had to be determined ex facie the agreement. It pleaded further that if proper regard had to the agreement and its terms, it is clear that it complied with the provisions of s 2(1) of the Alienation of Land Act in that the agreement was reduced to writing and signed by both parties or their agents acting on their written authority. It asserted that in the circumstances, it had satisfied the requirements for rectification and therefore rectification was permissible. It persisted with its claim as set out in its declaration.

[10] The court below agreed with the respondent that the agreement as it stood, did not reflect and identify the appellant as the purchaser. It held that Otto was identified in unqualified terms as the purchaser in the agreement. Crucially, it held that to correct the alleged mistake, extraneous evidence of the negotiations preceding this agreement was necessary. This was not permissible, so it was held. The court then concluded that in the circumstances the agreement was not capable of being rectified.

[11] As recently as 2005, this court reaffirmed the correct approach to the question whether to grant rectification or not as follows in *Inventive Labour Structuring*:[1]

'… As a general rule the determination whether rectification of a suretyship should be ordered or not involves a two-stage enquiry. The first is to determine whether the formal requirements contained in s 6 of the General Law Amendment Act 50 of 1956 are met. The focal point at this stage is whether the written document on its own, constitutes a valid contract of suretyship or not. If it does not, the enquiry ends there. If it does, then the enquiry moves to the second leg which focuses on whether a proper case for rectification has been

[1] *Inventive Labour Structuring (Pty) Ltd v Corfe* [2005] ZASCA 139; 2006 (3) SA 107 (SCA) para 6.

made out. If the answer to the latter question is in the affirmative, an order for rectification must be granted.' See also *Intercontinental Exports*.[2]

[12] I interpose to state that this case took an unorthodox route. The respondent preferred to raise two special pleas to the appellant's declaration. The appellant filed a replication to the respondent's amended plea. In turn, the respondent filed an exception to the appellant's replication. It is trite that when a court is dealing with an exception, it is bound to accept the pleadings as they are. As a result, I have no choice but to determine this appeal on the pleadings as they stand.

[13] As set out in *Weinerlein v Goch Buildings*[3] the starting point is whether this agreement meets the statutory requirements set out in s 2(1) of the Alienation of Land Act. For an agreement for the sale of land to be valid, it has to be reduced to writing and signed by the parties thereto or by their agents, duly authorised in writing. *Wilken v Kohler*.[4] This principle was endorsed further in *Dowdle's Estate v Dowdle and others*[5]where the court held:

'Before there can be rectification of a contract of sale of a fixed property, there must be a written contract, which on the face of it complies with the requirements of s 30 of Proc 8 of 1902. It seems to be that this is implicit in the reasoning of *Weinerlein v Goch Buildings Ltd* 1925 282, the locus classicus on the law to the rectification of contracts for the sale of fixed property. . . . I agree with Mr Claasen's contention that you cannot, by rectification, invest a document which, on the face of it is null and void, with legal force.'

Evidently, this requires us to scrutinise the written agreement to see, if *ex facie* the document, the formal requirements are met.

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[2] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 13.
[3] 1925 AD 282.
[4] 1913 AD 135.
[5] 1947 (3) SA 340 (T) at 354.

[14] On the face of it, there is no dispute that the written agreement clearly identifies who the seller and the purchaser are, as well as what the merx and the agreed price are. These are the essential elements for a valid contract of sale. It is not in dispute that the agreement for the sale of the immovable property was reduced to writing, and duly signed by the parties. *Ex facie* the written agreement, all the statutory requirements set out in s 2(1) of the Alienation of Land Act have been met. As a result I find that the agreement is formally valid. It follows ineluctably that, having passed this hurdle, this agreement is capable of rectification. *Magwaza v Heenan* 1979 (2) SA 1019 (A); *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at para 10; *Swanepoel v Nameng* 2010 (3) SA 124 (SCA) at para [15].

[15] Based on the above exposition, I am driven to conclude that the court a quo erred in granting the respondent's exception. As this court is not in a position to enter into the second stage of the enquiry whether to grant rectification, the matter must be referred back to the trial court to decide if indeed rectification should be granted.

[19] In the result, the following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and replaced with an order dismissing the exception with costs.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	S Pincus SC Instructed by: Mathopo Attorneys, Johannesburg Bahlekazi Attorneys, Bloemfontein
For Respondent:	SJ Reinders Instructed by: Lingerfelder & Baloyi Attorneys, Pretoria Van Wyk & Preller Attorneys, Bloemfontein