THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No 574/02

In the matter between

PRETORIA EAST BUILDERS CC	**First Appellant**
INFOGOLD INVESTMENTS CC	**Second Appellant**

and

EDRIAAN STÉPHAN BASSON	**Respondent**

Coram	Brand JA, Jones AJA and Southwood AJA
Heard	15 February 2004
Delivered	29 March 2004

Summary: Sale of *res aliena* — written agreement for the sale of land belonging to another — no proof that owner authorized seller to sell on its behalf — owner not bound — no enforceable contract because counter-offer not accepted in writing — order for specific performance against seller inappropriate where he cannot perform.

JUDGMENT

Jones AJA

JONES AJA:

[1] This appeal concerns a contract for the sale of immovable property. On 10 May 2002, in an urgent application, the court a quo granted a final interdict prohibiting the appellants from alienating the immovable property to anybody other than the respondent, and ordering them to give effect to a written agreement between the parties (1) by permitting the respondent to occupy the property forthwith, and (2) by registering the property in the respondent's name. The appellants were also ordered to pay costs. They now appeal against this relief with leave from this court.

[2] The background facts are for the most part common cause. The second appellant, Infogold Investments 56 CC ('Infogold') is the registered owner of erf No 6733, Woodland Estate, Moreleta Park, Pretoria. The first appellant, Pretoria East Builders CC ('Pretoria East Builders') was the developer of the property, charged with building a house on it. Mr F van Schalkwyk is and was the sole member of Infogold and Pretoria East Builders. Acting in his capacity as member of Pretoria East Builders he appointed his sister, Ms G Badenhorst, as the project manager to oversee the development. It was part of her mandate to make arrangements for marketing the property. Her husband was the builder. During

November 2001, at a stage when the building work was under way but not yet completed, an estate agent introduced the respondent to her. In due course the respondent submitted a written offer to purchase the property for R890 000-00. The offer was made to Pretoria East Builders. It was signed and accepted on its behalf by Ms Badenhorst. It contemplated giving occupation to the purchaser on 1 May 2002, by which time the building would be completed. It was conditional upon the conclusion of the sale of the respondent's home by 30 April 2002 and upon a loan secured by a bond for R890 000-00 being applied for on behalf of the seller and being granted. The offer was in printed form with blank spaces to be filled in. It contained paragraph No 18, which was headed 'other conditions' which had been left blank. Ms Badenhorst caused the following to be inserted in the blank space: 'This offer is subject to the presentation of a specification list and the signing of a building contract with Pretoria East Builders/Bouers CC'. After making this addition she placed her signature at the end of the document and she initialled the insertion of paragraph 18. When the document was returned to the respondent about a month later he noted the addition of clause 18, but he did not initial or sign it.

[3] The building work proceeded without incident or delay. The respondent requested certain alterations and extra work, which were agreed to by Ms Badenhorst and carried out by Pretoria East Builders, some of it at the respondent's expense. In time Ms Badenhorst furnished him with a document headed 'Specification list of house on stand: 6733, Woodlands Security Estates, Moreleta Park', but the parties at no stage entered into the written building agreement contemplated by paragraph 18. The respondent's home was sold before 30 April 2002 and produced a cash amount of R160 000-00 which the respondent decided to devote to the purchase price of erf No 6733. He says that he therefore did not need a loan for the full amount of the purchase price and that he applied for a loan of R812 000-00 instead of the R890 000-00 referred to in the agreement of sale. The application for a loan and mortgage was presented to a particular official of ABSA Bank at the insistence of Ms Badenhorst, and was not made on behalf of the respondent but in the name of Infogold. This was at Ms Badenhorst's suggestion, to leave open the possibility of the respondent in due course taking over the close corporation owning the property instead of taking transfer of the property. No agreement to that effect was however reached, and the loan application, though made in Infogold's name,

was considered and granted on the strength of the respondent's personal creditworthiness.

[4] In early April 2002 the house was all but completely built. The respondent was obliged to vacate his home to give occupation to the new owners by the end of April 2002, and he made arrangements accordingly. He was ready to take occupation of erf No 6733 on 1 May 2002. In mid April 2002 Ms Badenhorst called upon him to agree to change the firm of attorneys who had been instructed to do the conveyancing work. After taking advice from his attorneys and from the official at ABSA Bank, and because he wished to avoid any delay in the transfer process, he notified Pretoria East Builders and its attorneys that he was not prepared to agree to change the conveyancer. Shortly thereafter, he became aware, from communications made to him by the estate agent and Ms Badenhorst's attorneys, that Pretoria East Builders intended to cancel the agreement, and, later, that it had indeed cancelled it. In consequence, his attorneys wrote to Pretoria East Builders, calling for its assurance that it would honour the agreement, and advising that failing such assurance the respondent intended to bring an urgent application. On 22 April 2002, Infogold's attorneys replied to

his attorneys in the following terms:

'1 Mnr JFV Van Schalkwyk, synde die enigste lid van the voormeld BK, het geen kontrak met Mnr Basson geteken nie en gevolglik nie gebonde gehou word aan enige koopooreenkoms.

2 Ons kliënt het geen magtiging verleen vir die sluit van 'n koopooreenkoms nie.

3 U kliënt het derhalwe geen reg tot afdwinging en sal enige so poging teengestaan word.'

This letter came as a complete surprise. It is common cause that Ms Badenhorst had at no stage disclosed to the respondent that Pretoria East Builders was not the registered owner of erf No 6733. The letter led his attorneys to make enquiries, and they established the true position. Their enquiries also confirmed that Ms Badenhorst was in the process of trying to sell erf No 6733 to other would-be buyers. The upshot was the present application.

[5] I shall first deal with the liability of the second appellant, Infogold. Infogold's case is simply stated: it was the owner of the property; it was not a party to the sale; it is not bound it by the sale; and it did not authorize Ms Badenhorst to act for it as its agent, whether in the sale or for any other purpose. Mr *Du Toit*'s counter-argument is that Infogold is bound to the sale as the undisclosed

principal of its agent, Pretoria East Builders. The counter-argument is in my view unsound.

[6] During the course of presenting his argument Mr *Du Toit* for the respondent addressed the question whether the provisions of s 2 of the Alienation of Land Act No 68 of 1981 preclude the application of the doctrine of the undisclosed principal in a sale of land because it requires disclosure of the identity of the principal in the written deed of alienation.[1] It is, however, not necessary to consider the point because the undisputed facts do not show that when the contract of sale was concluded either Ms Badenhorst or Pretoria East Builders was acting as the agent of Infogold. The respondent did not allege in the founding affidavit that Ms Badenhorst was authorized to act as the agent of both Infogold and Pretoria East Builders. Only in his replying affidavit, in dealing with Ms Badenhorst's denial that she was not acting on behalf of Infogold and was not authorized by Infogold to sell the property, is this suggested, and then by inference and not as a statement of fact. The argument is that Van Schalkwyk, as sole member of Pretoria East Builders, authorized Ms Badenhorst to act as project

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[1] He referred to the issues raised in *Grossman* v *Baruch and another* 1978 (4) SA 340 (W); *Muller en 'n ander v Pienaar* 1968 (3) SA 195 (A) 204E-H; *Durity Alpha (Pty) Ltd* v *Vagg* 1989 (4) SA 1066 (N); and *Durity Alpha (Pty) Ltd* v *Vagg* 1991 (2) SA 840 (A) 842H.

manager to build the house on erf 6733 and to enter into the agreement of sale in terms of which Pretoria East Builders sold erf 6733 to the respondent. He therefore knew, in his capacity as sole member of Pretoria East Builders, that Ms Badenhorst had sold Infogold's property to the respondent. This knowledge must be imputed to Van Schalkwyk in his capacity as sole member of Infogold. Infogold must be taken to have been aware all along that Pretoria East Builders had sold its property to the respondent despite Van Schalkwyk's denial of this in his affidavit on behalf of Infogold. This knowledge, and its failure to object to Pretoria East Builders actions in selling its property, it is argued, gives rise to an inference that it went along with the arrangement and must have authorized Pretoria East Builders to act as its agent.

[7] Mr *Du Toit*'s submissions are founded on innuendo and on inferences which, he suggests, should be drawn from the facts alleged. However, these are motion proceedings and the general rule formulated in *Plascon-Evans Paints Limited* v *Van Riebeeck Paints (Proprietary) Limited*[2] must be applied. In the circumstances of this case it is not permissible on the papers to go behind the evidence of Van Schalkwyk and Ms Badenhorst that at no stage

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[2] 1984 (3) SA 623 (AD), at 634E-635C.

was Ms Badenhorst authorized to act on behalf of Infogold. There is thus a dispute about the fundamental facts. Even if it is possible to reject Van Schalkwyk's denial that he was aware that the respondent had purchased Infogold's property on the ground that it is 'so far-fetched or clearly untenable that the Court is justified in rejecting [it] merely on the papers'[3], there is no such justification for rejecting the evidence on behalf of the appellants that at no stage was Ms Badenhorst authorized to contract on behalf of Infogold, whether in her capacity as agent for Pretoria East Builders or at all.

[8] In my view Infogold's knowledge, if it had such knowledge, that somebody else had sold its property would not be sufficient in the circumstances of this case for an inference that Infogold must have authorized the sale. The result is that whether or not it is permissible to hold an undisclosed principal to an agreement for the sale of land there is no evidence to show that the seller acted or was authorized to act on behalf of the alleged undisclosed principal. This being so, there is no basis on which to hold that Infogold is liable to the respondent in terms of the agreement of sale.

[9] A number of submissions were made regarding the liability of the first appellant, Pretoria East Builders. I think that it is necessary

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3 *Plascon-Evans Paints Limited* v *Van Riebeeck Paints (Proprietary) Limited at* 635C.

to deal with only two of them. The first is that on the facts there was no enforceable contract between the respondent and Pretoria East Builders. The insertion of paragraph 18 in the offer made by the respondent and submitted to Ms Badenhorst on behalf of Pretoria East Builders amounted to a counter-offer which was not accepted by him in writing. This means that the provisions of s 2(1) of the Act were not complied with, and no enforceable contract came into being. There can be no doubt, to my way of thinking, that the insertion of paragraph 18 alters the whole content of the contract. It couples the original offer to buy the land with the building of a house on the land, and makes these two things dependent on each other. It therefore amounts to a rejection of the original offer and the submission of a different offer with a different content and different obligations. This distinguishes this case from *Menelaou* v *Gerber and others*[4] upon which Mr *Du Toit* relied. See also *Admin Estate Agents t/a Larry Lambrou* v *Brennan.*[5] Mr *Du Toit*'s further argument that *ex facie* the document the respondent's signature at the end should be taken as an acceptance of everything contained in the document that preceded it is entirely artificial in the light of the known and accepted fact that paragraph 18 was inserted after he had signed it.

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4 1988 (3) SA 342 (T).
5 1997 (2) SA 922 (E).

[10] Secondly, Mr *Wagener* argued on behalf of the appellants that the court should not have issued an order for specific performance because, in the circumstances of this case, it cannot be carried out. The rule is set out in *Shakinovsky* v *Lawson and Smulowitz*[6] as follows:

'Now a plaintiff has always the right to claim specific performance of a contract which the defendant has refused to carry out, but it is in the discretion of the Court either to grant such an order or not. It will certainly not decree specific performance where the subject-matter has been disposed of to a *bona fide* purchaser, or where it is impossible for specific performance to be effected; in such cases it will allow an alternative of damages.'

The owner of the property, Infogold, has made its attitude perfectly clear that it has no intention of performing Pretoria East Builders' contract with the respondent, and that it has no intention of itself selling to the respondent. It advised the respondent of its attitude before the commencement of proceedings, which should have alerted the respondent of the possibility of confining himself to an action for damages, and it repeated its attitude under oath in the opposing papers (through the evidence of Van Schalkwyk). In these

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[6] 1904 TS 326, 330 per Innes CJ, Solomon & Wessels JJ concurring. See also *Rissik* v *Pretoria Municipal Council* 1907 TS 1024, 1037 per Wessels J (with specific reference to the sale of property belonging to another), *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 441D--443F per Miller JA, and *Benson* v *SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783E-G per Hefer JA.

circumstances, an order for specific performance against Pretoria East Builders is futile. It should not have been granted.

[11] In the result, the appeal of both appellants is allowed with costs. The order of the court a quo is set aside and will be replaced with an order that the application is dismissed with costs.

RJW JONES
Acting Judge of Appeal

CONCURRED: BRAND JA
SOUTHWOOD AJA