THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 51/2010

In the matter between:

OUTWARD INVESTMENTS (PTY) LIMITED First Appellant
ELLERINE BROTHERS (PTY) LIMITED Second Appellant

and

PARK ROAD TRADING 7 (PTY) LIMITED Respondent

Neutral citation: *Outward Investments v Park Road Trading 7* (51/10) [2011] ZASCA 61 (31 March 2011)

Coram: HARMS DP, NAVSA, SNYDERS, MALAN AND SERITI JJA

Heard: **11 MARCH 2010**

Delivered: **31 MARCH 2010**

Summary: Contract of sale of land – (a) Interpretation of warranty. (b) Applicability s 67 of Town-planning and Townships Ord 15 of 1986 (Gauteng) – application for extension of boundaries not equivalent to one for establishment of a township.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Lamont J sitting as court of first instance):
The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Seriti JA (Harms DP, Navsa, Snyders, Malan JJA concurring)

[1] This appeal emanates from the South Gauteng High Court. In the court a quo, Park Road Trading 7 (Pty) Ltd (Park Road) launched an application for an order declaring that the cancellation of various agreements of sale of land by the purchasers, Outward Investments (Pty) Ltd (Outward) and Ellerine Brothers (Pty) Ltd (Ellerines), was invalid and that the agreements are of full force and effect.

[2] Outward opposed the application and in a counter-application applied for an order declaring that the agreements of sale had been validly cancelled because of breaches of contract by Park Road. Although sequentially illogical, an alternative order was sought declaring the agreements to be of no force and effect because they contravened s 67(2) read with s 67(1) of the Town-Planning and Townships Ordinance 15 of 1986 (the Ordinance).

[3] The matter was heard by Lamont J who upheld Park Road's application and dismissed the counter-application. Outward and Ellerines now appeal the decision with the leave of the court a quo. I shall for convenience refer to the appellants as Outward.

[4] There are two issues to be decided in the appeal. The first is whether Park Road breached a clause of the sale agreements as alleged by Outward.

The second is whether the sale agreements contravened s 67(2) of the Ordinance.

Background facts

[5] Wilgespruit Blomkwekery (Pty) Ltd (Blomkwekery) was the owner of two adjacent farms, namely (a) the Remaining Extent of Portion 61 (Portion 61) and (b) Portion 322, both of the farm Wilgespruit No 190, Registration Division IQ, Gauteng Province. Blomkwekery conducted flower farming activities on the two farms that were managed as one.

[6] On 12 March 2004, Blomkwekery applied to the authorities for permission to establish a township on Portion 61. Wesplan and Associates (Wesplan), Town and Regional Planning Consultants, made the application on behalf of Blomkwekery. The application was approved on 6 July 2004 and a township called Wilgeheuwel Extension 16 was proclaimed on Portion 61 on 21 November 2005 in terms of section 103 of the Ordinance.

[7] Becolger Development Company (Pty) Ltd (Becolger) became interested in developing a township on the properties. To accomplish this it sought to purchase Portion 61 outright and to take options (valid until 31 December 2008) on parts of the undivided Portion 322. For the purposes of the options this property was notionally divided into five portions. On one of these there was a retail nursery which the seller insisted on retaining. The intention was that Becolger would take options on four notional portions and that the portion with the nursery would be retained by the seller.

[8] On 7 September 2004 a comprehensive set of agreements was concluded between Park Road, Becolger and Wilgespruit Blomkwekery. Blomkwekery, pursuant to tax advice, sold the properties to Park Road, which in turn sold Portion 61 to Becolger. Park Road also gave a number of options to Becolger to purchase the four notional portions of Portion 322. Attached to each option was a document containing the terms of sale that would regulate the sale transactions, should the options be exercised.

[9] The sale agreement stipulated that Becolger would take all necessary steps to establish a township on Portion 61. Clause 7 of the sale agreement provided that the seller (Park Road) reserved the right to incorporate Portion 322 into Wilgeheuwel Extension 16.

[10] The options did not have a similar requirement but were based on the assumption that the seller would exercise its option to incorporate Portion 322 into the township on Portion 61. This would have enabled Becolger to exercise one or more of its options, to subdivide the property into five erven and to retransfer the portion with the nursery to Park Road.

[11] In order to subdivide Portion 322, clause 4 of the Conditions of Sale obliged Becolger to appoint Wesplan to procure the subdivision as well as the necessary zoning of the property. The zoning referred to was 'Business 1'.

[12] On 14 March 2006, application was made for the extension of Wilgeheuwel's boundaries to include Portion 322 as an erf. However, prior to the completion of this process, and on 21 July 2006, Becolger, with the consent of Park Road, assigned its rights and obligations in respect of the sale and option agreements in a cession and sale agreement to Outward. The extension of the boundaries of Wilgeheuwel Extension 16 was authorised on 19 October 2006. On 14 December 2006 Ellerines entered into an agreement with Outward with the consent of Park Road in terms of which Ellerines became a co-option holder.

[13] On 29 June 2007, the options in respect of three of the notional erven were exercised resulting in agreements of sale between Outward and Park Road, but some terms were amended. Outward was allowed to take early occupation of the properties against payment of occupational interest, and it did forego its option rights in respect of the fourth portion.

[14] The boundaries of Wilgeheuwel Extension 16 were extended by proclamation to include Portion 322 on 13 February 2008. Portion 322 became Erf 1553 in Wilgeheuwel Extension 16.

[15] Erf 1553 had now to be subdivided so that Outward could take transfer of its portions. Outward alleged that it was unable to subdivide Erf 1553 as the City of Johannesburg Metropolitan Municipality had refused to approve the subdivision because (a) Becolger had failed to pay certain bulk services contributions to the City as it should have done consequent to the proclamation of Wilgeheuwel Extension 16 as a township on 21 November 2005; and (b) there were various irregularities that might have been committed in the process that led to the extension of the boundaries of Wilgeheuwel Extension 16.

[16] In a letter dated 20 February 2009 addressed by Outward's attorneys to Park Road's attorneys it was alleged that Park Road had breached a warranty contained in clause 5.1 read together with 5.1.8 of the sale conditions in two respects. Park Road had namely warranted that it had disclosed to the purchaser ‘all other information relating to the Sale property which is, or reasonably likely to be material to a purchaser of the Sale Property.’ First, it said that Park Road had failed to inform Outward about the non-payment of the bulk services contributions, alleging that if Outward had been informed of such failure it would not have incorporated Portion 322 into Wilgeheuwel 16, but would instead have established Portion 322 as a separate township. Secondly, the letter also referred to the fact that Park Road had failed to disclose to Outward the irregularities attaching to the approval of the incorporation of Erf 1553 and alleged that this was material information to it as purchaser of the property at the time that the options were exercised. The letter was, in conclusion, said to serve as demand requiring Park Road to remedy the breaches within ten days, failing which Outward would cancel the agreements.

[17] Since Park Road rejected the demand Outward's attorneys in a letter dated 3 March 2009 cancelled the agreements with immediate effect.

The warranty

[18] I now turn to consider the first issue mentioned, namely, whether Park Road breached the clause in question.

[19] At this stage it is necessary to have regard to Clause 5.1.8, which cannot be read in isolation but must be construed in the context of the whole of clause 5:

'5 Voetstoots

5.1 The Seller hereby warrants that, as at the date of last signature hereof and as at the date of transfer –

5.1.1 the Sale Property is to be rezoned as per the zonings set out in annexure "B" hereto;

5.1.2 the improvements on the Sale Property do not encroach on any other land and there are no encroachments on the Sale Property;

5.1.3 there is no impending expropriation of the Sale Property or any part thereof and the Seller is not aware of any facts or circumstances which may give rise thereto;

5.1.4 the Seller has not granted any right or option to any person to acquire the Sale Property or any part thereof and is entitled to give unencumbered title in and to the Sale Property to the Purchaser;

5.1.5 the Seller is the registered owner of the Sale Property and is able to pass transfer of the Sale Property to the Purchaser. In this regard it is recorded that the Property is currently owned by Wilgespruit Blomkwekery (Pty) Limited and the Seller warrants that it shall procure that it acquires the Property from the said title holder and is in a position to sell it to the Purchaser as required in terms of this agreement;

5.1.6 save as is contained in the title deeds in respect of the Sale Property and as set out herein, the Sale Property is not subject to any servitude or other encumbrance and no agreements or arrangements exist in terms of which any person has any claim to any servitude or other encumbrance over the Sale Property or any part thereof;

5.1.7 the Purchaser shall be entitled to vacant occupation of the Sale Property on the Date of Transfer;

5.1.8 the Seller has disclosed to the Purchaser all other information relating to the Sale Property which is, or reasonably likely to be material to a purchaser of the Sale Property;

5.1.9 the Seller has not been informed of the registration of any claims for restitution of land rights in respect of the Sale Property;

5.2 It is recorded that each of the warranties set out in this agreement –

5.2.1 shall be deemed to be a representation and undertaking by the Seller in favour of the Purchaser;

5.2.2 shall conclusively be deemed to be a representation of the facts inducing the Purchaser to enter into this agreement unless the contrary is proved;

5.2.3 shall be material unless the contrary is proved;

5.2.4 shall, insofar as any of the warranties are promissory or relate to a future event, be deemed to be given as at the due date for the fulfillment of the promise or the happening of the event, as the case may be; and

5.2.5 shall be a separate warranty and in no way limited or restricted by reference to or inference from the terms of any other warranty.

5.3 Save as set out above, the Sale Property is sold and purchased voetstoots, absolutely as it stands, with all its defects, whether patent or latent, and is sold subject to all conditions of title and as described in the title deed and the Seller shall not be liable for any deficiency in the extent thereof nor shall it benefit by any surplus.'

[20] The argument on behalf of the appellants turned on the meaning of clause 5.1.8 which they submitted was a material term of the agreement of sale the breach of which entitled the appellants to cancel the agreements. Clause 5, it was submitted, dealt with the allocation of risk (relying on *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) at para 25) relating to the Sale Property between the parties, and the 'warranties' in clause 5.1 were representations by Park Road that the Sale Property had certain characteristics, or that a certain state of affairs existed and would have continued to exist until the date of transfer. Clause 5.1.8 allocated the risk in respect of 'all information relating to the sale property which is, or reasonably likely to be material to a purchaser' to Park Road. The contention on behalf of Outward was that where information exists which is material and which has not been disclosed to Outward, the responsibility, and therefore the risk, for that unknown information had to be borne by Park Road. Park Road's actual knowledge of the information was therefore irrelevant because the clause does not state that it relates only to information of which the seller is aware.

[21] It was also submitted that the finding of the court below, that the warranty in clause 5.1.8 'is as to the existence of known facts not as to the existence of a state of affairs', was wrong. Moreover, so the argument went, clause 5.1 required the seller to warrant a state of affairs both at the time of signature *and* at the time of transfer. In context this meant a continuous

warranty enduring from the time of signature until transfer. Such a construction of the agreement, it was suggested, made sense and was businesslike, because it would enable Outward to stop the sale from proceeding at any time before registration of transfer thereby avoiding the unwinding of transfer and recovery of transfer fees and the like. This construction according to the agreement was preferable to that given by the court below, that is, that the use of the conjunction 'and' in the introductory words of clause 5.1.8 was not 'to join two different time periods and provide for a continuing obligation over the period produced by combining the two'. It was contended that, although the date of transfer had not yet arisen the obligation to disclose at that date already existed. This meant that Park Road by indicating that it would not remedy the breach that would be committed at the date of transfer would have repudiated the Sale Agreements.

[22] I am unable to accept these submissions and agree with Lamont J for the reasons that follow. Clause 5 is entitled 'Voetstoots' and commences with the words 'The Seller hereby warrants'. The word 'warranty' it is not a word that is always used with precision and can either mean a term in a contract or it can mean a material term the breach of which entitles the aggrieved party to cancel the agreement (*Masterspice (Pty) Limited v Broszeit Investments CC* 2006 (6) SA 1 (SCA) para 35). Clause 5.2 of the Conditions of Sale expressly provides that the 'warranties' set out in clause 5 'shall be material unless the contrary is proved'.

[23] Clause 5.1 contains nine 'warranties'. Counsel for Park Road aptly described the clause as a 'rag-bag' of different provisions including conditions, warranties and ordinary terms of contract. The warranties in clauses 5.1.2, 5.1.6 and 5.1.8 all relate to a characteristic of the property sold. Those in clauses 5.1.1, 5.1.5 and 5.1.7 all contain undertakings by the Seller: that the property shall be zoned as agreed; that it would become owner capable to pass transfer and that vacant possession would be given. Clause 5.2 provides that each of the warranties shall be deemed to be a representation and undertaking in favour of the purchaser. It continues in clause 5.2.2 that each warranty shall 'be deemed to be a representation of the facts inducing the

Purchaser to enter into this agreement …'. The facts relied on by Outward all occurred after entering into the option contracts but before the options were exercised.

[24] The words 'as at the date of last signature hereof and as at the Date of Transfer' appear in the introductory part of the clause. It was submitted on behalf of Outward that the 'date of last signature' in clause 5.1 was a reference to the date the options were exercised because the sale agreements were concluded only then. The Conditions of Sale were not signed but clause 7.1 of the option agreements provides that on their exercise the resultant sale shall be governed by them. The Conditions of Sale is further 'an integral part of and shall be read with' the option agreements (clause 7.2). Clause 16 of the Conditions of Sale contain a similar reference to the option agreements stating that it is 'an integral part of and shall be read together with this agreement'. Clause 5 of the option agreements records that the validity of the options shall continue until 31 December 2008 commencing 'on the date of last signature hereof'. Since the option agreements and the Conditions of Sale must be read together and because the latter have not been signed the inference is that the 'date of last signature' is the date of last signature of the option agreements.

[25] Some of the warranties in question relate to the past, some to the present some to the future and some to the past, the present and the future. Despite use of the word 'and' some of the warranties cannot be applied to both the date of signature and the date of transfer. Clause 5.1.1, in so many words, relates to the future and, read with clause 14, embodies a condition suspending the validity of the sale, that is that the Sale Property is to be zoned as agreed.

[26] Clause 5.1.2 relates to the present, employing words such as 'do' and 'are'. Even if that clause may be construed to relate to the date of transfer the same cannot be said of clause 5.1.3. The latter contains a warranty that there is no impending expropriation of the property but the second part is based on the knowledge of the seller of facts at the time of signature which could in the

future give rise to expropriation. It provides specifically that the ‘Seller is not aware of any facts or circumstances which may give rise thereto …’).

[27] Clause 5.1.4 states that the seller ‘has not granted any right or option’, which can only be a reference to the state of affairs as at the time of signature. The second part of clause 5.1.4, read with clause 5.1.5, may well be a warranty as at the date of transfer. Clause 5.1.5 records that the seller is not owner of the property at the time of signing but that it would acquire the property and be able to sell it. Clause 5.1.6 deals with the position as at the time of signature: ‘save as is contained in the title deeds’, the ‘Sale Property is not subject to any servitude or other encumbrance’ and no agreement or arrangement exists entitling any other person to a servitude or other encumbrance. The reference to the title deeds can only be a reference to the title deeds as at the time of signature. Clause 5.1.7 expressly refers to the date of transfer. Clause 5.1.9 records the knowledge of the seller as at the date of signature (‘has not been informed of the registration of any claims for restitution of land rights …’).

[28] It follows that not all the provisions of clause 5.1 can be made applicable to both the date of signature and the date of transfer. In order to give proper meaning to clause 5.1 the conjunctive ‘and’ should be read disjunctively as ‘or’. This does not mean, as was suggested by counsel for Outward, that the warranties on such an interpretation in any event relate to both dates, that is that they are operative at either the date of signature or the date of transfer. What it means is that the different warranties apply either at the date of last signature or at the date of transfer or at both times, whichever is or are the applicable date or dates relating to the specific warranty.

[29] Clause 5.1.8 uses the words ‘the Seller has disclosed’. This clearly relates to facts that existed in the past. It cannot sensibly be interpreted to require the seller to disclose facts of which he is ignorant or which will only become known in future. Nor can it mean that there is a continuing duty on the Seller to disclose: the seller warrants that he has disclosed not that he will disclose in future. Any other interpretation would lead to absurdities. The

construction contended for by Outward would leave the status of the sale agreements uncertain until the time of transfer. Moreover, this construction would make the determination of the date of breach difficult, if not impossible, to ascertain. Counsel representing Outward sought to overcome these difficulties by suggesting that clause 5.1.8 sometimes operated as a warranty and sometimes as an ordinary term of the contract. If the latter the notice in terms of clause 15 to remedy the breach would be pointless.

[30] My view is that the applicant has not demonstrated that the respondent has, in any way, breached clause 5.1.8. The question of the alleged failure to pay for bulk services and irregularities allegedly committed during the process of incorporating Portion 322 into Wilgeheuwel Extension 16 arose long after the option agreements were entered into. The respondent cannot be expected to have disclosed these facts at the time the option agreements were signed.

The Ordinance

[31] The second issue, as mentioned is whether the sale agreements contravene s 67(2) read with s 67(1) of the Ordinance and that they are accordingly of no force and effect.

[32] The part of s 67 relied upon reads as follows:

'(1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 –

(a) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;

(b) grant an option to purchase or otherwise acquire an erf in the township, until such time as the township is declared an approved township...'.

Section 67(2) provides that a contract entered into in conflict with the provisions of s 67(1) shall be of no force and effect.

[33] The argument of Outward is that the prohibition in s 67(1) is triggered 'after an owner of land has taken steps to establish a township'. The submission was made that the 'taking of steps to establish a township' includes the lodging of an application to extend the boundaries of an existing

township in terms of s 88 of the Ordinance. Section 69 of the Ordinance provides for the procedure to establish a township. Section 88 deals with the extension of the boundaries of an existing township and s 88(2) provides that the provisions of s 69, excluding s 69(1) and s 71(1), shall apply *mutatis mutandis* to an application to extend the boundaries of a township.

[34] Park Road granted the options in respect of Portion 322 on 4 January 2005. At the time no steps had been taken. However, at the time of exercise of the options steps had been taken to incorporate Portion 322 into Wilgeheuwel Ext 16.

[35] The submission was made that the lodging of the application for extension of the boundaries of Wilgeheuwel Ext 16 and the consequent incorporation of Portion 322 into it amounted to the 'taking of steps to establish a township' on Portion 322 within the meaning of s 67(1). The consequence of this argument is that the sale agreements fell foul of the prohibition in s 67(1) since they were agreements for the sale of erven in a township entered into after steps to establish a township on portion 322 have been taken.

[36] The court below rejected the argument and found that s 67(1) did not apply: 'The process of extension of boundaries resulted in a change of the character of Portion 322 into township land, or land situated within a township, but did not result in the creation of a township on the land.' I agree with this conclusion.

[37] Section 67(2) clarifies the word 'steps' used in s 67(1). It includes 'steps preceding an application in terms of section 69(1) or 96'. Sections 69 and 96 deal with the procedure for the establishment of a township. Section 67(2) makes no mention of s 88 or the extension of the boundaries of an existing township. The procedures are different. This is recognized by the Regulations under Ordinance 15 of 1986 (Administrator's Notice 858 of 1987 of 10 June 1987) reg 23 of which provides for the documents to accompany an application for the extension of the boundaries of an existing township.

Schedule 13(2)(b) to which reg 23 refers requires the applicant to furnish a report with a comprehensive motivation relating to 'the reasons why the procedure prescribed for the establishment of a township should not be followed'. An application for an extension of the boundaries of an existing township is made under s 88 to the Administrator through the local authority (s 88(1)). The provisions of s 69 (excluding s 69(1)) and s 71(1) then apply (s 88(2)). The Administrator takes the decision to approve the extension (s 88(2)) and he may add conditions to his approval including conditions relating to the payment by the applicant of a sum of money for the provision of engineering services as contemplated in Chapter V of the Ordinance (s 88(3)(b)(i)) as may be imposed in the case of an established township (ss 98 and 117). The extension of the boundaries of the existing township may then be proclaimed and the conditions imposed set out in a schedule to the proclamation (s 88(4)). The procedures for the establishment of a township are regulated by ss 69 ff and 96 ff. Although there are similarities in the procedures the Ordinance treats the two applications separately. It follows that s 67(1) does not apply to applications for the extension of the boundaries of an existing township. Nor is there the same need for protection of the public as exists in the case of an application for the establishment of a township.

[38] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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W SERITI
JUDGE OF APPEAL

APPEARANCES:

For appellant:	M vd Nest SC A P H Cockrell SC Instructed by: Bowman Gilfillan Inc Sandton, Johannesburg McIntyre & Van Der Post Bloemfontein
For respondent:	P F Louw SC C F vd Merwe Instructed by: Mark-Anthony Beyl Attorneys Johannesburg Honey Attorneys Bloemfontein