THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 430/02

REPORTABLE

In the matter between

ROBYN LYNNE HEATHFIELD **Appellant**

and

LIJANE MAQELEPO **Respondent**

Before: Scott, Mthiyane JJA, Southwood AJA

Heard: 14 November 2003

Delivered: 27 November 2003

Summary: Proper construction of written agreement to purchase immovable property – purchaser or surety

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JUDGMENT

SOUTHWOOD AJA

[1] On 5 August 2001 the respondent signed a written offer to purchase from the appellant stand no 716, Bedfordview Extension 115, for a purchase price of R1 300 000. In terms of the offer the purchase price was payable by way of one instalment of R120 000 to be paid in cash within 30 days of acceptance of the offer and the balance of R1 180 000 was to be paid against registration of the property in the name of the purchaser. The balance was to be secured by a Bank or other approved guarantee delivered within 120 days of acceptance of the offer. The offer was subject to a bond or bonds of R1 180 000 being obtained by the purchaser within 30 days of acceptance of the offer. The appellant accepted the offer on 6 August 2001.

[2] The agreement consists of an estate agent's printed form (the 'Offer to Purchase') containing standard terms and conditions into which the purchaser's and seller's names and addresses, the purchase price, amounts to be paid, dates of payment and bond details must be inserted. It incorporates an additional page on which the relevant information pertaining to the purchaser and seller is to be inserted for the purpose of transfer and/or a bank loan application. The purchaser is described in the form as 'Lijane Maqelepo [the respondent] for and on behalf of the above co'. The 'above co' is obviously a reference to New Heights (Pty) Ltd as the name, New Heights Pty Ltd, has been inserted above that of the respondent.

[3] Clause 21 of the offer to purchase has been inserted in manuscript and reads as follows:

'Should the PTY LTD NEW HEIGHTS not be able to take transfer and or ratify this agreement I LIJANE MAQELEPO HEREBY holds (sic) myself surety and co-principal debtor for all the obligations of this offer towards the seller and irrevocably hereby undertake to take transfer in my own name.'

The respondent signed the offer to purchase as purchaser without qualifying his signature.

[4] The respondent is reflected in the additional page referred to as the purchaser and all his relevant details have been inserted. There is no reference to the company, New Heights (Pty) Ltd.

[5] It is clear that the document was completed in two stages. Initially the purchaser was to be LIJANE MAQELEPO as his name was entered as purchaser in the appropriate place in the document and only his particulars were inserted in the additional page as purchaser. Thereafter the parties attempted to make NEW HEIGHTS (PTY) LTD the purchaser by inserting the words 'on behalf of the above co' after the respondent's name as purchaser, the name NEW HEIGHTS PTY LTD above the respondent's name and by inserting clause 21.

[6] The respondent paid the cash instalment of R120 000 and obtained a mortgage loan of R1 180 000 from ABSA Bank as stipulated by the agreement. After the respondent obtained the mortgage loan, Biccari Bollo Mariano, the attorney appointed to attend to the transfer, communicated with him and he signed all the documents which were necessary to take transfer. On 10 January 2002 the respondent paid the transfer duty and registration

costs amounting to R118 927,60 to Biccari Bollo Mariano.

[7] In February 2002, when the respondent called upon the appellant to pass transfer, the appellant repudiated the agreement. The respondent did not accept the repudiation and launched an application in the Witwatersrand Local Division for an order that the appellant transfer the property to him.

[8] The appellant opposed the application. In her answering affidavit the appellant did not dispute any of the respondent's factual allegations. She contended that as New Heights (Pty) Ltd ('New Heights') did not exist the agreement was null and void; and that the respondent was no more than a surety and therefore had no right to enforce the agreement.

[9] It is common cause that a company called New Heights (Pty) Ltd has never been registered and accordingly has never existed.

[10] The matter came before Goldstein J in the Witwatersrand Local Division who identified the essential issue to be whether the respondent signed the agreement as principal or as surety. After analysing the provisions of the Offer to Purchase (i e the agreement) the learned Judge concluded that the clear intention of the parties was that the respondent would be the purchaser if the company was not such. He accordingly granted the relief sought.

[11] With the leave of the Court *a quo* the appellant now appeals. The appellant contends that the agreement is void because the principal on behalf of whom the respondent signed the Offer to Purchase did not exist; that the Court *a quo* erred in finding that the respondent signed the Offer to Purchase

as principal and not as surety and that as surety the respondent is not entitled to claim performance by the appellant in terms of the agreement.

[12] As correctly pointed out by the Court *a quo* the essential question is whether the parties intended that the respondent be a purchaser in his own right or a surety for New Heights. This depends upon the proper construction of the agreement and in particular whether the alteration to the description of the purchaser and the insertion of clause 21 changed the intention that the respondent be the purchaser.

[13] The appellant's counsel has seized on the words 'surety and co-principal debtor' in clause 21 of the agreement and argued that the parties intended that the respondent would be a surety for New Heights and nothing else. In effect, his argument is that the respondent signed the agreement as agent on behalf of New Heights, as purchaser, and in his personal capacity, as surety, for New Heights. He contended that an agreement signed on behalf of a non-existent principal is invalid. If these are the facts that contention is clearly correct. See *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120: *McCullogh v Fernwood Estate, Ltd* 1920 AD 204 at 207: *Sentrale Kunsmis Korporasie (Edms) Bpk v N K P Kunsmisverspreiders (Edms) Bpk* 1970 (3) SA 367 (A) at 396D-E.

[14] In my view the appellant's counsel's argument ignores the context in which these words have been used in clause 21 and the agreement as a whole. The context in which words are used in an agreement is vital. See

Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 (A) at 767E-768E: *List v Jungers* 1979 (3) SA 106 (A) at 118D-119B: *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) par [1].

Furthermore, as pointed out by Colman J in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) a court should not lightly hold that an agreement is invalid. At 670G-H the learned Judge said:

'In so doing I must, I think, have regard to the fact that exh. "A" is a commercial document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftmanship or the loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract.'

See also *Hillas & Co Ltd v Arcos Ltd* 1932 All ER 494 (HL) at 499H-I and *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) 922 (A) at 931G-I.

In construing the agreement it is also proper to take into account and make allowance for the fact that 'the language used was manifestly not that of a lawyer or linguistic precisian' – *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd* 1982 (1) SA 7 (A) at 15C-D: *African Organic Fertilizers and Associated Industries Ltd v Premier Fertilizers Ltd* 1948 (3) SA 233 (N) at 235-6.

[15] Clause 21 is inelegantly worded. It is obviously not the work of 'a lawyer

or linguistic precisian'. When read together with the description of the purchaser it shows that the respondent was purporting to act on behalf of New Heights when he did not have authority to do so and that the parties knew that the company would have to ratify the agreement to become bound. The parties clearly contemplated that the company might fail to do so in which event there would be no binding agreement between the appellant and the company. They sought to regulate what would happen in such an eventuality. They accordingly agreed that in the event of the company not being bound the respondent would perform all the obligations of the purchaser in terms of the agreement and that he would take transfer of the property in his own name. They provided that in so doing the respondent would act as 'surety and co-principal debtor'.

[16] The agreement that the respondent would perform all the obligations of the purchaser in terms of the agreement in the event of the company not being bound is not consistent with the obligations of a surety in two crucial respects. First, a surety cannot be liable unless there is a principal debtor who is or becomes liable. The liability of a surety is entirely dependent upon the liability of the principal debtor: i e it is accessory to that of the principal debtor. And second, a surety is liable for the debt or obligations of another. See *Trust Bank of Africa Ltd v Frysch* 1977 (3) SA 562 (A) at 584F- H: *Sapirstein and Others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 11G-H: *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 473G-474B.

The agreement that the respondent would take transfer of the property into his own name is also inconsistent with the position of a surety. If a surety is called upon to perform the purchaser's obligations and does so, the agreement between the purchaser and the seller remains in force and the seller will be obliged to transfer the property into the name of the purchaser, not that of the surety. Performance of the purchaser's obligations and taking transfer of the property are consistent with the respondent being the purchaser.

[17] It is therefore clear from clause 21 that the parties intended that if the company did not ratify the agreement and become bound as purchaser the respondent would step into the shoes of the purchaser and perform the purchaser's obligations and take transfer of the property. This construction is supported by the respondent's unqualified signature as purchaser and the respondent's name and other details in the annexure to the agreement as those of the purchaser. I therefore agree with the Court below that the word 'surety' was used inappropriately and that it was inconsistent with the parties' true intention.

[18] In so far as clause 21 may be ambiguous, there is also the evidence of the respondent, which is not disputed, that he performed the obligations of the purchaser and that when he met the Appellant on 7 January 2002, he and she discussed the agreement and the implementation thereof on the basis that the respondent was the purchaser. It is clear from this evidence that both

the appellant and the respondent regarded the respondent, and not the company, as the purchaser of the property. See *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-H: *Shacklock v Shacklock* 1949 (1) SA 91 (A) at 101.

[19] The conclusion that the respondent was intended to be the purchaser renders it unnecessary to consider the other arguments raised with regard to the position of a surety.

[20] The appeal is dismissed with costs.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

CONCUR:

SCOTT JA
MTHIYANE JA