REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 121/99

In the matter between

OCKERT CORNELIS VERMEULEN **Appellant**

and

GOOSE VALLEY INVESTMENTS (PTY) LTD **Respondent**

CORAM: VIVIER, MARAIS, OLIVIER, ZULMAN JJA *et* CHETTY AJA

DATE HEARD: 15 February 2001

DATE DELIVERED:

S 2(1) Alienation of Land Act 68 of 1981 - adequacy of description of property sold - whether exception proceedings appropriate - exception misdirected.

JUDGMENT

MARAIS JA

MARAIS JA: [1] With the leave of this Court appellant appeals against the upholding by Van Deventer J in the Eastern Circuit Local Division of the first of two exceptions to his particulars of claim in so far as they related to the claim against Goose Valley Investments (Pty) Ltd (first defendant/respondent). The issue raised by the first exception is a narrow one. Appellant's claim is dependent upon the existence of a valid and legally binding written agreement of sale of certain immovable property at Plettenberg Bay. The attack upon the cause of action pleaded was directed at the formal validity of that agreement. The respondent's contention (upheld by the court *a quo*) was that the description of the property sold was insufficient to enable it to be identified without recourse to the negotiations which preceded the signing of the agreement and that the agreement therefore failed to comply with the requirements of s 2 (1) of the Alienation of Land Act 68 of 1981 and was consequently invalid.

Alternatively, it was submitted to be void for vagueness at common law.

[2] It is necessary to quote fairly extensively from the particulars of claim and the agreement to appreciate the problem.

"**Particulars of Claim**

1. -----
2. -----
3. -----
4. (a) On 24 December 1994 at Plettenberg Bay and in writing, Plaintiff sold to First Defendant, who purchased from him for a consideration of R800 000,00 the immovable property described as Portion 48 of Ganse Vallei No 444, Division of Knysna.

   (b) Plaintiff acted personally when entering into the said agreement and Second Defendant represented First Defendant, the latter having furnished one Marc Player with a Power of Attorney to sign same.

   (c) A copy of the said agreement is annexed hereto marked "A".

5. In terms of the said agreement and more particularly clauses 2, 3, 4, 5, 6, 7 and 10 thereof

   (a) First Defendant was *inter alia* obliged to

      (i) make application to procure the prerequisite consent of the

applicable authorities for the rezoning and subdivision of the said property for use as a golf course and residential development scheme and in particular

(aa) at its own cost and expense, to transfer to Plaintiff a maximum of ten subdivided erven each approximately 1500m ^{2} in extent as depicted on the layout plan annexed to the said agreement, such erven to be fully serviced as to electricity, water and sewerage with all survey beacons clearly marked;

(bb) procure the approval for the rezoning of the homestead portion of the said property to Resort Zone 2 for the possible future development as flats, sectional title, timeshare or group housing;

(cc) at its entire cost and expense to provide to the boundary of the said homestead portion of the said property all essential services including water, electricity and sewerage, such services to be sufficient for fifteen separate erven or units;

(ii) procure the prerequisite approval for such rezoning and subdivision by 30 September 1995 or within a reasonable time thereafter, should the said approval have been imminent by the aforesaid date;

(iii) -----

(iv) -----

(v) pay the said purchase price to Plaintiff upon approval of the rezoning application by 30 September 1995;

(b) Plaintiff was *inter alia* obliged to transfer the said property to First Defendant upon payment of the purchase price and other costs for which First Defendant was responsible and as soon as possible after First Defendant had obtained the prerequisite consent for the rezoning and subdivision aforesaid against First Defendant giving Plaintiff satisfactory security for its compliance with its obligations reflected in paragraphs 5 (a) (i) (aa), (bb) and (cc) *supra*;

(c) the agreement itself would lapse should First Defendant not be able to procure the prerequisite consent for the said rezoning and subdivision.

(d) -----

(e) -----

(f) -----

6. (a) In breach of the agreement aforesaid

(i) First Defendant failed to

(aa) procure the prerequisite consent for the rezoning and subdivision of the said property save to the extent of ten subdivided erven plus one further subdivided erf;

(bb) provide services as undertaken.

(b) In compliance with the said agreement First Defendant has paid to Plaintiff the said purchase price.

7. (a) As a result of First Defendant's breach aforesaid, the parties in writing entered into an addendum to the said agreement at Plettenberg Bay on 24 October 1995.

(b) -----

(c) A copy of the addendum is annexed hereto marked "B".

8. In terms of the said addendum and more particularly clauses 1, 3, 4 and 5 thereof

(a) the purchase price of R800 000,00 was reduced to R750 000,00

(b) the rezoning envisaged in the said addendum, Annexure "B", had to be approved by competent authorities by 31 December 1995, failing which the agreement would at the election of Plaintiff, lapse;

(c) First Defendant was permitted to allow the application for rezoning prepared by Nel and De Kock to be processed by competent authorities in its existing form on the following terms and conditions:

(i) that First Defendant had to submit a revised application to competent authorities for the consent within 30 days of the date of the approval of the said application for rezoning for

(aa) the subdivision of a further eight erven, bringing the

total to eighteen erven as set out on the diagram annexed to the addendum, annexure "B";

(bb) the rezoning of the homestead portion as detailed in clause 5 (a) of the agreement annexure "A";

(ii) (aa) should First Defendant fail to obtain any consent referred to in subparagraph (i) *supra* then it would be obliged to pay the Plaintiff the sum of R1 000 000,00 by 30 June 1997 together with interest thereon at the prime interest rate of Standard Bank of South Africa as from 1 January 1997 to date of payment thereof;

(bb) -----

(iii) (aa) should First Defendant fail to obtain the consent referred to in subparagraph (i) (bb) *supra*, then First Defendant would be obliged to pay to Plaintiff the said sum of R500 000,00 by 30 June 1997 together with interest thereon at the prime lending rate of Standard Bank of South Africa from 1 January 1997 to date of payment;

(bb) -----

(iv) (aa) should First Defendant obtain the consent referred to in subparagraph (i) (bb) *supra* but fail to obtain the consent for all or any of the erven referred to in subparagraph (i) (aa) *supra* then First Defendant

would be obliged to pay to Plaintiff the sum of R62 500,00 for each erf not approved by 30 June 1997 together with interest thereon at the prime lending rate of Standard Bank of South Africa as from 1 January 1997 to date of payment thereof;

(bb) -----

(v) it was an implied term of the said addendum, annexure "B", that the said further subdivision and rezoning of the homestead portion be obtained within a reasonable time after the submission thereof to competent authorities within the time period stipulated in clause 4 (a) of the said addendum.

(d) save as amended in the said addendum, annexure "B", the further terms and conditions of the agreement, annexure "A" would remain of full force and effect.

9. (a) In breach of the addendum aforesaid First Defendant failed to procure the prerequisite consent by 31 December 1996 and within a reasonable time of the time period stipulated in clause 4 (a) of the said addendum, annexure "B".

(b) Plaintiff gave fourteen (14) days written notice to First Defendant as envisaged in the said agreement, annexure "A".

(c) Plaintiff has elected to enforce the terms of the agreement and addendum, annexures "A" and "B" respectively.

10. (a) In the premises Plaintiff is entitled to orders compelling First and Second Defendants jointly and severally to

(i) provide the ten subdivided erven with services in terms of Clause 4 (a) of the agreement, annexure "A";

(ii) transfer such erven to Plaintiff or his nominee *pari passu* with the transfer of the said property to First Defendant by Plaintiff;

(iii) to provide at their entire cost and expense to the boundary of the homestead portion of the said property all essential services, for fifteen separate erven in terms of Clause 4 (b) of the agreement, Annexure "A";

(iv) provide Plaintiff with an acceptable bank or building society guarantee in respect of the payment of the sum of R1 000 000,00 by 30 June 1997 together with interest thereon at the prime lending rate of Standard Bank of South Africa from 1 January 1997.

(b) Plaintiff tenders transfer of the said property to First Defendant on compliance with the orders aforesaid subject to First Defendant providing Plaintiff with satisfactory security for the compliance by First Defendant of the provisions of clauses 4 and 5 of the agreement, annexure "A", as provided for in clause 10 of the said agreement.

11. Alternatively and in the event of First Defendant failing to comply with the

above orders within 30 days alternatively a reasonable time, then

(a) Plaintiff cancels the said agreement with its addendum, annexures "A" and "B" respectively, and

(b) in such event Plaintiff alleges that he has suffered damages in the sum of R4 050 000,00 (being the difference between the values of the properties which Plaintiff would have received had First Defendant fulfilled its obligations in terms of the said agreement and its addendum, and the value of his property unenhanced plus the paid portion of the purchase price);

(c) for the payment of which First and Second Defendants are in the premises jointly and severally liable, which sum is made up as follows:

(d) value of

(i)	ten subdivided and serviced erven @ R300 000,00 each	R3 000 000,00
(ii)	eight subdivided erven @ R250 000,00 each	R2 000 000,00
(iii)	rezoned homestead erf with services provided at the boundary	R1 500 000,00
(iv)	TOTAL	R6 500 000,00

(e) less the value of

(i) the paid portion of the purchase

		price	R 750 000,00
	(ii)	Plaintiff's said property without subdivision or rezoning	R1 700 000,00
	(iii)	TOTAL	R2 450 000,00
(f)		TOTAL DAMAGES	R4 050 000,00

WHEREFORE Plaintiff prays for

1. Orders compelling First and Second Defendants jointly and severally to

    (a) provide the ten subdivided erven with services in terms of Clause 4 (a) of the agreement, annexure "A";

    (b) transfer such erven to Plaintiff or his nominee *pari passu* with the transfer of the said property to First Defendant by Plaintiff;

    (c) to provide at their entire cost and expense to the boundary of the homestead portion of the said property all essential services, for fifteen separate erven in terms of Clause 4 (b) of the agreement, annexure "A";

    (d) provide Plaintiff with an acceptable bank or building society guarantee in respect of the payment of the sum of R1 000 000,00 by 30 June 1997 together with interest hereon at the prime lending rate of Standard Bank of South Africa from 1 January 1997;

    as against Plaintiff's tender in paragraph 10 (b) *supra*;

2. *alternatively*

(a) cancellation of the said agreement, annexure "A", and the addendum hereto, annexure "B";

(b) judgment against First and Second Defendants jointly and severally in the sum of R4 050 000,00, as and for damages aforesaid;

3. An order compelling First and Second Defendants to pay the costs of this action jointly and severally together with interest thereon at the prevailing legal rate from a date fourteen (14) days after the *allocatur* to date of payment;

4. Further and/or alternative relief."

[3] The initial agreement of sale ("A") was concluded on 24 December 1994 and contained the following provisions relevant to the issue.

"AGREEMENT OF SALE

between

OCKERT CORNELIS VERMEULEN
Identity Number 2412235013003

(Seller)

and

GOOSE VALLEY INVESTMENTS (PROPRIETARY) LIMITED

herein represented by GARY JIM PLAYER, duly authorised hereto, or his nominee (Purchaser)

WHEREAS the Seller is the registered owner of Portion 48 of Ganse Valley Number 444 Division of Knysna,

AND WHEREAS the Purchaser is desirous of purchasing a portion of the said Portion 48/444 for the purposes of constructing thereon a golf course and a sectional title development.

AND WHEREAS the Seller will retain a portion of Portion 48/444 on which is situate the main dwelling and outbuildings of the property and will also be allocated certain additional ground and will receive certain other benefits on the following terms and conditions:

1. THE PROPERTY

The Purchaser purchases the entire Portion 48/444 excluding the portion of land depicted in the diagram annexed hereto marked "X" which portion shall be referred to as the Homestead Portion and excluding also the portion of land referred to in Paragraph 4 (a) hereafter. The property purchased shall hereinafter be referred to as the Property.

2. PURCHASE PRICE

(a) The purchase price in respect of the Property shall be the sum of R800 000,00 (EIGHT HUNDRED THOUSAND RAND) which amount shall be paid to the Seller upon approval of the re-zoning application in terms of Paragraph 3 herein, which shall be approved by 30th of September 1995. Should the said re-zoning application not have been approved by the competent authorities by the 30th September 1995 then this agreement shall, at the discretion of the Seller, lapse and be of no further force and effect. It is however, a condition that, should the Purchaser be able to prove that as at the 30th September 1995, the said re-zoning is imminent and will be approved within a reasonable time thereafter, then the said date of 30th September 1995 shall be extended and the agreement shall remain in force, and the Purchaser shall pay to the Seller interest on the purchase price of R800 000,00 at the rate of 10% per annum payable monthly in arrear until the said purchase price is paid.

(b) -----
(c) -----

3. RE-ZONING

The Purchaser undertakes, immediately upon the date of this sale, to use its best endeavours and to make application to procure the consent of whatsoever competent authorities for the re-zoning and sub-division of the Property. The Seller agrees to assist the Purchaser wherever possible to this end, and agrees further to grant to the Seller or the Seller's nominee a Power of Attorney in order to give proper effect to this condition. It is a condition hereof that the Property will be developed as part of a golf course scheme, together with neighbouring properties, and for the opening of a Sectional Title Register. To give effect to this condition the Purchaser acknowledges that the Property will have to be consolidated with other properties to be included in the development scheme and agrees thereto.

4. TRANSFER OF PROPERTY BACK TO THE SELLER

(a) It is a further condition that the Purchaser shall transfer, at the Purchaser's total cost and expense, to the Seller or his nominees, a maximum of 10 sub-divided erven, each approximately 1500m² in extent, to be established around the Homestead Portion, as depicted on the annexed layout plan or such future revised layout plan to be approved by the Seller. These erven shall be fully serviced as to electricity, water and sewerage and all survey beacons shall be

clearly marked. Where possible the appropriate erven shall include the Seller's existing outbuildings which are associated to the main homestead.

(b) The Purchaser further undertakes at its entire cost and expense to provide to the boundary of the Homestead Portion, all essential services, i.e. water, electricity and sewerage, such services to be sufficient for 15 (FIFTEEN) separate erven or units.

5.

(a) ZONING OF HOMESTEAD PORTION TO GENERAL RESIDENTIAL

Simultaneously with the re-zoning and sub-division application as envisaged in Paragraphs 3 and 4 hereof the Purchaser undertakes to procure the approval for re-zoning of the Homestead Portion to Resort Zone 2, i.e. for the possible future development as Flats, Sectional Title, Timeshare or Group Housing. The purchaser agrees and undertakes to use its best endeavours and to perform all acts and deeds of whatsoever nature necessary to give effect hereto. Should the Purchaser not succeed with this application, to the entire reasonable satisfaction of the Seller, by the date when the golf course and associated sub-division has been completed, then this obligation on the Purchaser shall be ongoing and indefinite and shall not lapse unless cancelled or varied with the written consent of the Seller.

(b) FIRST REFUSAL IN FAVOUR OF PURCHASER

The Seller hereby grants to the Purchaser or its nominee a right of first refusal to purchase the Homestead Portion subject to the following terms:

(i) The Seller shall provide the Purchaser with a copy of any acceptable written offer received (the Outside Offer).

(ii) The Purchaser shall be afforded a period of 30 (THIRTY) days within which to equal the Outside Offer and submit its own offer in writing to the Seller on terms no less onerous than the Outside Offer.

(iii) Should the Purchaser fail to equal the Outside Offer to the satisfaction of the Seller, within the said period of 30 (THIRTY)

days, then the Seller shall be entitled to sell the Homestead Portion to the Outside Offeror.

(iv) This right of first refusal shall terminate simultaneously with abandonment in terms of Clause 2(c) above. In the event of the Purchaser taking transfer as envisaged herein, then this right of first refusal shall lapse after 5 years reckoned from the date of such registration of transfer.

6 (a) CLUB MEMBERSHIP

The Purchaser hereby warrants that all of the houses or units to be developed at any future time by the Seller or his nominees, either on the land as described in Paragraph 4(a) above or on the Homestead Portion shall be eligible for Golf Club Membership in the eventual development scheme. The Purchaser further warrants that Golf Club Memberships will also be made available to all owners of Share Blocks within The Tides Share Block Development, on the terms and conditions prevailing from time to time in respect of such memberships."

(b) -----

7. -----
8. -----
9. -----
10. TRANSFER

Transfer of the property shall be given to the Purchaser upon payment of the purchase price and other costs for which the Purchaser is responsible as soon as possible after compliance with Paragraph 3 hereof. The Purchaser shall be entitled to take transfer at any time after the said re-zoning but subject to the Seller being given satisfactory security for the compliance by the Purchaser of *(sic)* the provisions of Paragraphs 4 and 5 hereof.

11. -----
12. -----
13. -----
14. -----
15. -----
16. -----
17. -----

18. -----
19. -----
20. -----
21. -----
22. -----
23. -----
24. -----

[4] Annexure “X” to the agreement is appended to this judgment. It is common cause that the words appearing next to point E and point C are respectively “shed” and “gate”.

[5] The addendum (“B”) was in the following terms:

"ADDENDUM

TO THE AGREEMENT OF SALE

between

OCKERT CORNELIS VERMEULEN
Identity No. 2412235013003

and

GOOSE VALLEY INVESTMENTS (PROPRIETARY) LIMITED
herein represented by , duly authorised hereto

(dated 24th December 1994)

(THE FIRST CONTRACT)

AGREED AS FOLLOWS:

1. The sum of R800 000.00 (Eight Hundred Thousand Rand) is reduced to R750 000.00 (Seven Hundred and Fifty Thousand Rand).

2. Interest at the rate of 15% per annum on R750 000.00 (Seven hundred and Fifty Thousand Rand) shall be payable monthly in arrear from 1st October 1995 until date of payment of the capital of R750 000.00 (Seven Hundred and Fifty Thousand Rand). The first interest payment shall be made by not later than 31st October 1995.

3. The sum of R750 000.00 shall be payable upon rezoning as envisaged in the First Contract. Should the rezoning not have been approved by the competent authorities by 31st December 1995, then this agreement shall, at the entire unilateral discretion of the Seller, lapse and be of no further force or effect.

4. Notwithstanding the fact that the application for rezoning as submitted by Nel & de Kock in September 1995 was not submitted in terms of the First Contract, the parties agree that same shall be allowed to be processed by the competent authorities in its current form, subject to the following

further conditions:

a) Within 30 days from the date of approval of rezoning referred to in paragraphs 3 and 4 above, the Purchaser shall procure that a revised application be submitted to the relevant authorities requesting:

   (i) Sub-division of a further 8 stands, bringing the total to 18 stands as per the diagram annexed hereto marked A, or such revised layout as shall be agreed to in writing by the Seller.

   (ii) The rezoning of the Homestead portion as detailed in paragraph 5(a) of the First Contract, i.e. to resort Zone 2 (for the possible future development as flats, sectional title, timeshare or group housing).

b) It is a specific condition that the Purchaser, when submitting the application in terms of 4(a)(i) above, shall specify to the relevant authorities that it shall relinquish so much of the bulk or density pertaining to the proposed sectional title development on the adjoining property (Goose Valley Phase 2) as may be necessary for the granting of the approval for the total of 18 stands.

c) The terms and conditions of paragraph 4(a) and (b) of the First Contract save where these now vary in terms of the number of erven and the size of erven, shall specifically apply hereto.

d) Complete details of the applications envisaged above, together with all annexures and motivations, shall be given to the Seller or his nominee for his approval prior to the submission of these to the competent authorities. These documents shall be delivered to the Seller or his nominee by not later than 21 days from the date of approval of rezoning as envisaged in the First Contract.

e) The Purchaser agrees and undertakes to use his best endeavours and do all things necessary to ensure the implementation and execution of the aforementioned conditions.

f) Should both of the applications as per paragraphs 4(a)(i) and (ii)

above be unsuccessful, then the Purchaser shall pay to the Seller the sum of R1 000 000.00 (One Million Rand) by not later than the 30th June 1997, together with interest at prime commercial bank rate, as charged by the Standard Bank of S A, as this fluctuates, reckoned from 1st January 1997 to date of payment. Bank or building society guarantees in respect of the said amount, acceptable to the Seller, shall be provided to the Seller by not later than the 31st December 1996.

g) Should the application in terms of 4(a)(i) be successful but not that in terms of 4(a)(ii), then the Purchaser shall pay to the Seller the sum of R500 000.00 (Five Hundred Thousand Rand), together with interest at prime commercial bank rate as charged by the Standard Bank of S A, as this fluctuates, reckoned from 1st January 1997 to date of payment, the said sum to be guaranteed and paid as per 4(f) above.

h) Should the application in terms of 4(a)(ii) be successful, but not that in terms of 4(a)(i), i.e. that approval not be granted for all or any of the additional 8 sub-divided erven, then the Purchaser shall pay to the Seller the sum of R62 500.00 (Sixty Two Thousand Five Hundred Rand) for each plot not approved and the total sum so calculated, together with interest at prime commercial bank rate as charged by the Standard Bank of S A, as this fluctuates, reckoned from 1st January 1997 to date of payment, and the said sum shall be guaranteed and paid as per 4(f) above.

5. Save as amended in terms of the Addendum, the further terms and conditions of the First Contract shall remain in full force and effect.

6. Upon signature hereof by the Purchaser, the Seller's objection lodged with the Plettenberg Bay Municipality in respect of the zoning application shall immediately be withdrawn and proof thereof submitted to the Purchaser.

7. THUS DONE and SIGNED at *Sandton*

on this *24* day of *October* 1995."

Annexure "A" to the addendum is also appended to this judgment.

[6] The principles to be applied in considering the first question raised by the exception are well settled. "The test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus". So said Holmes JA in 1971 in *Clements v Simpson* 1971 (3) SA 1 (A) at 7F-G and there has been no departure from that approach. On the contrary, it has been reaffirmed on a number of occasions by this Court, most recently, in *Kriel and another v Le Roux* [2000] 2 All SA 65 (A) at 67 i.

[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may

be based, the claim *is* (not may be) bad in law. In the circumstances of this particular case (putting aside for the moment the complication to which I shall return in par 8) that means that the excipient (respondent) had to show that *ex facie* the written documents relied upon by appellant it will not be possible to identify the *res vendita* on the ground and that there is no reason to suppose that any admissible evidence could conceivably exist which would enable that to be done. In my view, the respondent failed to establish that such was the case for reasons to which I shall return and the exception should have been dismissed on that ground alone.

[8] The exception grounded on alleged non-compliance with s 2 (1) was directed only at the initial agreement "A" and the accompanying layout plan "X". It was not directed at the addendum "B" and the accompanying diagram "A" or at all the documents viewed as a composite whole. In my view, it was

misdirected. Whatever the status in law of the initial agreement may have been is irrelevant. It is quite plain that the parties commenced to implement it, that it was thereafter subsumed in the addendum, and that the breach of it alleged in par 6 of the particulars of claim is merely the explanation for the coming into existence of the addendum. No relief is claimed in respect of that breach. The appellant's claims are based upon the initial agreement and the addendum viewed as a composite whole. If any deficiencies in description of the *res vendita* existed in the initial agreement and layout plan they would be of academic interest only if, when both the agreement and the layout plan and the addendum and the diagram are read together, the description is adequate. As it happens, it seems obvious when the layout plan "X" is compared with the diagram "A", that the boundaries of the area referred to in clause 4 (a) of the first agreement and upon which the 10 subdivided erven were to be established, had been altered and that

the agreement had been varied. But the fact remains that both the layout plan and the diagram contain useful descriptive data, common to both, which has to be taken into account in deciding upon the adequacy of the description of the area to be excluded from the property sold to the respondent. It was the alleged inadequacy of the description of that excluded area which it was argued rendered the transaction invalid in law. For that reason too, namely, the erroneous targeting of the initial agreement and the layout plan "X", the first exception should have been dismissed.

[9] However that may be, I shall assume in respondent's favour that it was open to it to argue the exception as if it had been directed at the composite agreement. What appears to have been insufficiently appreciated by the court *a quo* in considering the question is that by the time the addendum was entered into on 24 October 1995, ten months had elapsed since the first agreement had

been concluded on 24 December 1994. By that time, so it is alleged in the particulars of claim and so it appears from the addendum itself, steps had been taken in implementation of the first agreement. Plaintiff had been paid the purchase price of R800 000,00. Defendant had submitted an application for the rezoning to the authorities in September 1995. Precisely what it comprehended is not apparent from the papers but the allegation is made in par 6 (a) (1) (aa) read with par (a) of the particulars of claim that consent for the rezoning and subdivision of "ten subdivided erven plus one further subdivided erf" was obtained and that the addendum was entered into thereafter. Clause 4 (a) of the addendum provided for a revised application to be submitted after the original application had been approved. In the revised application permission was to be sought for

> "(i) Sub-division of a further 8 stands, bringing the total to 18 stands as per the diagram annexed hereto marked A, or such revised layout as shall be agreed to it in writing by the Seller.

(ii) The rezoning of the Homestead portion as detailed in paragraph 5 (a) of the First Contract, ie to resort Zone 2 (further possible future development as flats, sectional title, timeshare or group housing)."

[10] The significance of all this is that the diagram "A" appears to reflect 11 erven for the subdivision of which the consent of the authorities had already been obtained. Those are *prima facie* the erven numbered 1 to 10 and the eleventh erf is *prima facie* the Homestead Portion (unnumbered). The erven numbered 11 to 18 are *prima facie* the "further 8 stands" which would bring "the total to 18 stands". The Homestead Portion was obviously not regarded as one of the 18 stands although four of them (erven 15 to 18) were now situated on part of it. If these *prima facie* impressions are correct (and whether or not they are would be objectively ascertainable without reference to evidence of the negotiations between the parties or their consensus, by examining what was submitted to the authorities when it authorised the subdivision of the first 11 erven) it appears likely that data would be available which, when taken together

with the data appearing on the diagram "A" would enable the boundaries of the excluded area (and hence of the area sold) to be ascertained on the ground. The application which had been made to the authorities and to which reference was made in the addendum was an objectively existing document when the addendum was entered into and reference to it would not be objectionable in law.

[11] But even if one was to confine one's attention to the layout plan "X" and the diagram "A" there appears to be a good deal of data which collectively suggests very strongly that the boundaries of the area to be excluded can be identified on the ground by a surveyor without reference to the parties. The diagram "A" reflects existing erven which are named ("Neap Tide", "Summer Breeze", etc) some of which share a common border with the Homestead Portion. The point "K" is plainly determinable. True north is indicated and the diagram appears to have been drawn to scale. Whether that is so will be

ascertainable by comparing the measurements given in the deeds registry of the named erven with their depictions in the diagram. If that is indeed the case, the angles at which boundary lines meet are measurable and the length of the boundary lines is also measurable.

[12] I stress that these are not firm findings. It may be that some of the data which I have postulated probably exists, and would be admissible in evidence if it did exist, does not in fact exist. But that will only be known once the appellant has been given an opportunity to adduce evidence. By allowing the exception, the court *a quo* deprived the appellant the opportunity of showing that the land excluded from the sale can be identified on the ground by reference to the description of it in the layout plan"X", the diagram "A", and other data admissible in evidence. In short, it was not an issue which lent itself to fair resolution by way of exception.

[13] The same considerations apply to the contention that the transaction was void for vagueness at common law.

[14] What requires to be emphasised yet again is that evidence going to facilitation of the task of relating the description of the *res vendita* given by the parties in their written agreement to an area on the ground is not objectionable provided that it does not relate to the negotiations between the parties or an *ex post facto* attempt to discover their consensus, and provided further that no breach of the parol evidence rule is involved. As long ago as 1948 this Court in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 984 recognised that a statutory provision that a contract of sale of land must be in writing "cannot mean that the only evidence by which the property can be identified must be contained in the writing because that ----- is impossible." (Watermeyer CJ at 990.) In elaborating that statement the learned Chief Justice said:

> "It has been suggested that a written contract does not satisfy the provisions of the statute unless the mere reading of the document is sufficient to identify the land sold without invoking the aid of any evidence *dehors* the document, but a moment's reflection and an appreciation of the fact that a written contract is merely an abstraction until it is related, by evidence, to the concrete things in the material world will show at once that suggestion makes sec 30 demand performance of an impossibility."

Since then, numerous instances will be found in the law reports of courts having regard to objectively existing facts *dehors* such an agreement in order to decide whether the description of the *res vendita* contained in the written agreement does indeed enable it to be ascertained "on the ground". *Kriel's* case, *supra*, and *Headermans Vryburg (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA) are recent illustrations. The exception grounded upon the alleged inadequacy of the description of the *res vendita* should not have been upheld by the court *a quo* on exception.

[15] A second exception was taken in the court *a quo* but not decided because of the upholding of the first exception. It was directed at prayer 1 (d),

of the particulars of claim. The point taken was that the relief sought in that prayer was conditional upon the applications for the subdivision of a further 8 stands and the rezoning of the Homestead Portion being unsuccessful, and that no allegation that they were unsuccessful had been made in the particulars of claim. In this Court counsel for appellant formally abandoned the claims made in prayer 1 (d), and all that remains to be considered is what impact, if any, that should have upon the costs orders to be made.

[16] Appellant has plainly achieved success in this Court in having a decision that the contract upon which it sues is invalid in law set aside. Respondent appeared here to resist that but has failed to resist it. It did not appear here to defend the upholding of an exception to prayer 1 (d). As I have said, the court *a quo* made no finding on that exception and no argument was addressed to it thereanent. The parties acquiesced in the court *a quo's* suggestion that only the first exception be argued and that the second be argued

only if the first failed. In the result, the second exception was never decided. It is questionable whether, despite that, respondent could have required this Court to decide that exception if the claim had not been abandoned. This Court would, in effect, have been entertaining an appeal against a non-existent upholding of an exception to a distinct and separate claim. In all the circumstances, I see no good reason to deprive appellant of his costs in either this Court or in the court below, save that appellant should bear the costs incurred by respondent in the noting of the exception to prayer 1 (b).

[17] The costs orders in the court *a quo* require revision. In so far as they relate to second defendant they must remain undisturbed as leave to appeal against the striking out of plaintiff's (appellant's) particulars of claim in so far as they related to the claim against second defendant was refused both by the court *a quo* and by this Court. In so far as plaintiff (appellant) was ordered to pay the costs of first defendant (respondent) that order cannot stand in the light of

appellant's success in this appeal. Similar considerations apply to the costs of the application for leave to appeal to the court *a quo* and to this Court. The orders as to costs that should have been made in the court *a quo* at the hearing of the exceptions are set out below. So too are the orders as to costs that should now be made in connection with the hearing of the application of leave to appeal in the court *a quo* and the applications for leave to appeal in this Court.

[18] The following orders are made -

1. The appeal is upheld with costs, including the costs of two counsel;
2. The orders of the court *a quo* made at the hearing of the exceptions are set aside and substituted by the following orders:

    2.1 The particulars of claim are set aside in so far as they relate to second defendant.

    2.2 The exception to the particulars of claim in so far as it relates to the claim against first defendant and is grounded upon the alleged invalidity in law of the agreements upon which plaintiff sues, is dismissed.

    2.3 Plaintiff shall pay second defendant's costs, including the costs of two counsel.

    2.4 First defendant shall pay plaintiff's costs, including the costs of two counsel, save that plaintiff is to pay first defendant's costs of noting the exception to prayer 1 (d) of the particulars of claim, but

only to the extent that the taxing master considers them to be severable and quantifiable from the costs of noting the exceptions to the particulars of claim as a whole;

3. The order of the court *a quo* made at the hearing of the application for leave to appeal, in so far as it related to the issue of costs as between plaintiff and first defendant, having been set aside by this Court when granting leave to appeal, and those costs and the costs of the application to this Court for leave to appeal having been reserved for decision by this Court, it is now ordered

3.1 that first defendant shall pay plaintiff's costs, including the costs of two counsel, in the application for leave to appeal in the court *a quo* and,

3.2 in respect of the application to this Court for leave to appeal,

3.2.1 that plaintiff shall pay the costs of second defendant, and

3.2.2 that first defendant shall pay plaintiff's costs.

R M MARAIS
JUDGE OF APPEAL

VIVIER JA)
OLIVIER JA)
ZULMAN JA)
CHETTY AJA) CONCUR