THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1074/2016

In the matter between:

RECLAMATION PROPERTY HOLDINGS (PTY) LTD	**APPELLANT**

and

ARCELORMITTAL SOUTH AFRICA LIMITED	**FIRST RESPONDENT**
THE RECLAMATION GROUP (PTY) LTD	**SECOND RESPONDENT**
THE NEW RECLAMATION GROUP (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Reclamation Property Holdings (Pty) Ltd v Arcelormittal South Africa Ltd* (986/2016) ZASCA 112 (21 September 2017)

Coram: Ponnan and Mathopo JJA and Plasket, Ploos van Amstel and Rogers AJJA

Heard: 5 September 2017

Delivered: 21 September 2017

Summary: Section 67 of the Town-Planning and Townships Ordinance 15 of 1986: prohibition of sale of erf until township is declared an approved township: definition of 'erf'.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Wepener J sitting as court of first instance).

1 Subject to para 2 below, the appeal is dismissed with costs, including those consequent on the employment of two counsel.

2 The first respondent is ordered to pay the costs of the opposed application for the introduction of the general plan by way of further evidence.

JUDGMENT

Ploos van Amstel AJA (Ponnan and Mathopo JJA and Plasket and Rogers AJJA concurring):

[1] This appeal concerns the validity of an agreement of sale of land in a proposed township in Benoni, to be known as Benoni Extension 74. The court a quo (Wepener J) held that the agreement contravened the provisions of s 67 of the Town-Planning and Townships Ordinance 15 of 1986 (the Ordinance) and was consequently of no force or effect. Section 67, generally speaking, prohibits the sale of an erf in a proposed township until such time as the township is declared an approved township.

[2] The background is briefly as follows. The Reclamation Group (which is the name by which I shall refer collectively to the appellant and the second and third respondents)

is one of the largest recyclers of ferrous and non-ferrous metals in South Africa. In 1999 it purchased the business of National Metal (Pty) Ltd, which was then a wholly owned subsidiary of Iscor Ltd (Iscor). Iscor later became ArcelorMittal South Africa Ltd, the first respondent in this appeal. The business had been conducted by National Metal on land owned by Iscor. The Reclamation Group continued the business on the same land, which it leased from Iscor.

[3] In 2000 Iscor appointed professional town planners to investigate the feasibility of establishing a township in Benoni with a view to disposing of redundant properties and facilities. Several immovable properties fell into this category, including the land occupied by the Reclamation Group. The recommendation by the town planners resulted in an application being made, in terms of the provisions of the Ordinance, for the establishment of a township to be known as Benoni Extension 74 Township.

[4] The Reclamation Group indicated its desire to purchase the land which it was leasing from Iscor. This resulted in a written agreement of sale which was concluded in March 2003. In terms thereof Iscor sold the land to the appellant. The land comprised three properties, referred to as (i) Remaining Extent of Erf 2665, Benoni Township, Registration Division IR, Gauteng; (ii) Erf 5198 Benoni Township, Registration Division IR, Gauteng; and (iii) Portion 32 of the farm Kleinfontein 67, Registration Division IR, Gauteng. (I refer to this last property as ‘Portion 32’). The agreement was subject to suspensive conditions regarding the establishment and approval of the township in terms of the Ordinance. Two further properties featured in the agreement. The seller

undertook to use its best endeavours to acquire them, in which event the agreement would be amended so as to include them in the merx, without the purchaser having to pay any additional consideration for them. One of these properties was described as portion of the Remaining Extent of Portion 14 of the farm Kleinfontein 67, Registration Division IR, Gauteng, measuring approximately 0,55 hectares. I shall refer to this property as 'Portion 14'.

[5] The establishment of the township was complex and required various subdivisions and consolidations. Although it has been approved by the local authority it has not yet been declared an approved township in terms of the Ordinance.

[6] It was undisputed in the court a quo that Iscor worked towards the fulfilment of the suspensive conditions. In January 2010, however, a dispute arose in this regard. Iscor contended that the agreement had lapsed due to the non-fulfilment of the suspensive conditions, while the appellant contended that the time for their fulfilment had been extended and that the agreement remained valid. What led to the current litigation, however, was an assertion by Iscor that the agreement was of no force or effect as it was prohibited by s 67 of the Ordinance.

[7] In October 2012 the Reclamation Group instituted an action in the Gauteng Local Division, Johannesburg, for an order declaring the agreement to be valid and binding, and in the alternative claims based on unjustified enrichment. The enrichment claims related to improvements, totalling some R73 million. The appellant, as the purchaser,

was the claimant in respect of the primary relief. The second and third respondents were the claimants in respect of the alternative enrichment claims. Since the second and third respondents played no part in the present appeal, I refer to ArcelorMittal South Africa Ltd simply as 'the respondent'.

[8] When the trial commenced before Wepener J he made an order, by agreement, for the separation of the issues in terms of Uniform rule 33(4). Four separate issues were identified for determination. Three of these fell away during the trial, so that the only remaining issue which the learned judge was asked to decide was whether the agreement was valid and enforceable. He held that the agreement was void as it was in conflict with s 67, and dismissed the claim for declaratory relief, with costs. The appeal before us is with his leave.

[9] Section 67 of the Ordinance provides as follows:

'Prohibition of certain contracts and options,

(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: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the

township as an approved township, one or more of the erven therein will be transferred to the seller.

(2) Any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.

(3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.

(4) For the purposes of subsection (1)-

(a) “steps” includes steps preceding an application in terms of section 69(1) or 96(1).

(b) “any contract” includes a contract which is subject to any condition, including a suspensive condition’.

[10] It was common cause that neither s 70 nor the proviso in s 67 finds any application in this matter. The first two properties referred to in the agreement formed part of another approved township at the time of the sale and do not feature in the dispute, save to the extent that it was common cause that the transaction was indivisible. The real dispute between the parties in the court a quo, and in this appeal, was whether Portion 32 fell within the definition of ‘erf’ in the Ordinance.

[11] ‘Erf’ is defined in section 1 of the Ordinance as

‘land in an approved township registered in a deeds registry as an erf, lot, plot or stand or as a portion or the remainder of any erf, lot, plot, or stand or land indicated as such on the general plan of an approved township, and includes any particular portion of land laid out as a township which is not intended for a public place, whether or not such township has been recognised, approved or established as such in terms of this Ordinance or any repealed law’.

[12] It will be noted that the definition consists of two distinct parts. The first refers to land in an approved township. The second refers to land laid out as a township, whether or not such township has been recognised, approved or established as such in terms of the Ordinance or any repealed law. The first part of the definition is not relevant to s 67(1) as the prohibition for which it provides only applies for as long as the township has not been declared an approved township. The issue therefore was whether Portion 32 fell within the second part of the definition.

[13] It was common cause on the pleadings, and before us, that Portion 32 formed part of land which had been laid out for a proposed township, to be known as Benoni Extension 74. It was also common cause that before the agreement of sale was concluded the owner of the land had taken steps to establish a township on its land, as contemplated in s 67(1).

[14] Mr Dacomb, a professional town planner, testified on behalf of the respondent. He had been involved, in his professional capacity, with the application for the establishment of the township since about 2002. He testified that the land that formed the basis of the application for the township included Portions 32 and 14, which were intended collectively to become erf 8740 in the new township. This was indicated on the general layout plan of the township. The township was approved by the local authority in 2009. Portions 32 and 14 form part of it and collectively constitute erf 8740.

[15] It was submitted on behalf of the respondent that in those circumstances Portion 32 fell within the definition of ‘erf’ as it was a particular portion of land laid out as a township which has not been recognized, approved or established as such in terms of the Ordinance or any repealed law, and was not intended for a public space.

[16] Counsel for the appellant submitted that Portion 32 did not fall within the definition of ‘erf’ as it was not a particular portion of land in the proposed township. In other words, although it was a particular portion of the land which was laid out as a township, it would lose its identity once the township was established because it would become part of a larger plot (Erf 8740), without being demarcated as a particular portion of it.

[17] Counsel however accepted that if the merx had been described in the agreement as erf 8740 in the proposed township, then the agreement would have fallen foul of the prohibition in s 67(1). On the interpretation contended for by the appellant a portion of land laid out as a proposed township, which is intended to form part of a larger plot in the township, thereby losing its identity, can be sold validly as it does not fall within the definition of ‘erf’. The same land would however be an ‘erf’ as defined if it was intended to retain its identity in the township. This interpretation is not supported by the wording of the definition.

[18] The context here is the prohibition in s 67(1). ‘Township’ is defined in the Ordinance as any land laid out or divided into or developed as sites for the purpose and

in the manner set out in the definition. The prohibition in s 67(1) applies until the township is declared an approved township. The purpose of the prohibition is to protect buyers of properties in a proposed township. They may find later that the developer is unable to provide the engineering services which are essential for the establishment of the township, or the township may for some other reason never be approved in terms of the Ordinance. See in this regard *Soja (Pty) Ltd v Tuckers Land & Development Corporation (Pty)* Ltd 1981 (3) SA 314 (A), where the court dealt with a similar prohibition in s 57A of the Transvaal Town-Planning and Townships Ordinance 25 of 1965, which was the predecessor of the Ordinance we are dealing with. Trollip JA referred to the risk of services not being provided and Kotzé JA referred to the risk of financial loss by the buyers. In *Tuckers Land and Development Corporation (Pty) Ltd v Strydom* 1981 (3) SA 231 (O), Flemming J referred (at 236F) to the potential prejudice of purchasers of unproclaimed erven, e.g. where a purchaser pays the purchase price, only to find much later that the establishment of a township will not be permitted.

[19] I do not see the logic, when interpreting the definition of ‘erf’, in distinguishing between a portion of land laid out as a township which will retain its identity in the approved township, and one which will be subsumed in a larger plot, thereby losing its former identity. In both cases the purpose of the prohibition in s 67 is apparent. It seems to me that once an owner of land has laid it out as a township, and has taken steps to establish the township, then the prohibition in s 67 applies to any particular portion of that land. It makes no difference whether the particular portion is intended to retain or lose its identity in the township when it is approved.

[20] It is true, as counsel pointed out, that an owner of land may in terms of s 97 of the Ordinance apply to the local authority for its consent to enter into a contract contemplated in s 67(1). The local authority may give its consent subject to any condition it may deem expedient, and the applicant is obliged, before the contract is entered into, to furnish to the local authority a guarantee that he will fulfil his duties in respect of the engineering services contemplated in the Ordinance. It seems plain that the risks to which I have referred will be substantially reduced in those circumstances.

[21] As a further string to his bow, counsel for the appellant submitted that the second part of the definition of 'erf' refers to a particular portion of land, the whole of which portion has been laid out as a township. He said that as Portion 32 was but one of several portions making up the land laid out as a township, it did not fall within the definition. However, counsel's interpretation makes the words 'particular portion of' in the definition superfluous. It also makes the words 'which is not intended for a public place' inapposite, as the whole of a proposed township will never be intended for a public place. The definition of 'township' in the Ordinance refers to sites for residential, business or industrial purposes or similar purposes. In any event, it was held in *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA) that where the entire property which has been laid out as a township is sold, the contract is not prohibited by s 67(1) as the land cannot be said to be an 'erf' as defined in the Ordinance.

[22] Counsel's final point was that Portion 32 did not fall within the scope of s 67 as the mischief sought to be avoided by it did not exist with respect to Portion 32. He said the Reclamation Group has been conducting its business on the properties concerned for many years, did not need any further services, and there was no financial risk against which it needed to be protected. There is nothing in the wording of s 67 or the rest of the Ordinance to support this approach. On the contrary, s 67(3) provides that any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence. It is therefore not permissible to carve out exceptions as far as the prohibition in the section is concerned.

[23] It follows in my view that part of the merx in terms of the sale agreement was an erf as contemplated in s 67, with the result that the agreement was of no force and effect.

[24] The approach in the court a quo was somewhat different, although the result was the same. It seems that neither of the parties approached the matter there on the basis that the first part of the definition of 'erf' was irrelevant and that it was the second part that mattered. This led to some confusion about the relevance of the general plan. Counsel for the appellant submitted in the court a quo, and in his heads of argument in this court, that the respondent failed to prove that Portion 32 was an erf as defined, as it did not enter the general plan in the evidence. As a consequence there was an application before this court to introduce the general plan as further evidence, which was opposed by the appellant.

[25] The general plan seems to me to be a red herring. It did not exist when the agreement was concluded and was only approved in August 2011. In argument before us counsel for the appellant accepted that the first part of the definition of 'erf' was not relevant to the present dispute. As a result of this concession counsel for the respondent did not pursue the application to introduce the general plan as further evidence before us. That application was unnecessary and the respondent will have to bear the costs of it.

[26] The order of this court is as follows:

1 Subject to para 2 below, the appeal is dismissed with costs, including those consequent on the employment of two counsel.

2 The first respondent is ordered to pay the costs of the opposed application for the introduction of the general plan by way of further evidence.

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JA Ploos van Amstel

Acting Judge of Appeal

APPEARANCES:

For the Appellants:	CM Eloff SC (with him SW Burger)
Instructed by:	Bowmans, Johannesburg
	Matsepes Inc, Bloemfontein
For Respondents:	R Du Plesis SC (with him JA Venter)
Instructed by:	Deon Rens Attorneys, Parktown
	Jordaan Attorneys, Bloemfontein