THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 543/2018

In the matter between:

GOLDEX 16 (PTY) LTD	**APPELLANT**
and	
DENE CAPPER NO	**FIRST RESPONDENT**
DENE CAPPER	**SECOND RESPONDENT**
IPROTECT TRUSTEES (PTY) LTD	**THIRD RESPONDENT**

Neutral citation: *Goldex 16 (Pty) Ltd v Capper NO & others* (543/2018) [2019] ZASCA 105 (4 September 2019)

Coram: Leach, Saldulker JJA and Tsoka AJA

Heard: 29 August 2019

Delivered: 4 September 2019

Summary: Invalid written agreement of sale of immovable property – respondent signing agreement on behalf of a trust without necessary authority – seller abandoning claim for specific performance against the trust but seeking to hold respondent liable for payment of the purchase price, tendering to transfer the immovable property to him – claim dismissed.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Van der Nest AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Saldulker JA and Tsoka AJA concurring)

[1] On 24 January 2013, the appellant and an entity described as the Des Property Trust, represented at the time by the Mr Dene Capper, cited as the second respondent in this appeal, signed a written agreement of sale in which the trust purported to purchase a real right of extension reserved in terms of s 25(1) of the Sectional Titles Act 95 of 1986 (the Act) in respect of a sectional title scheme, against payment of a purchase price of R1.45 million. It is common cause that the agreement was obliged to comply with the provisions of the Alienation of Land Act 68 of 1981, that it did not do so, and that it was therefore void *ab initio*.

[2] The appellant subsequently instituted action against the trust represented by both its trustees, Mr Capper and his co-trustee, iProtect Trustees (Pty) Ltd, seeking, inter alia, payment of the purchase price. It also sued Mr Capper in his personal capacity. At the commencement of the proceedings in the court a quo, the appellant abandoned its claim against the trustees, conceding that the alleged

sale had not complied with the Act and was therefore unenforceable. However the proceedings continued against Mr Dene Capper in his personal capacity. At the conclusion of the hearing the claims against both the trust and Mr Capper were dismissed but, with leave of the court a quo, the appellant appeals to this court.

[3] The appellant never sought to appeal against the dismissal of its claim against the trust and restricted itself to appealing against the dismissal of its claim against Mr Capper in his personal capacity. Thus despite the papers indicating that the parties to the appeal are those a quo, in truth the trust plays no part in these proceedings. Accordingly I shall from now on refer to Mr Capper simply as 'the respondent'.

[4] As mentioned at the outset, the written agreement upon which the appellant founded its claim was purportedly concluded on 24 January 2013, the respondent having signed the agreement on behalf of the trust. Of material relevance are the provisions of clause 12.1 of the agreement which read as follows:

'12. CAPACITY OF PURCHASER

12.1 Should the purchaser be a company, a close corporation, or an existing trust, the signatory hereto warrants and binds himself in his personal capacity by virtue of his signature hereto –

12.1.1 that he is duly authorised to enter into this agreement on behalf of the company, close corporation or trust;

12.1.2 that the company, close corporation or trust is lawfully entitled to acquire and take transfer of the property;

12.1.3 that all conditions have been complied with in order to make this agreement binding on the company, close corporation or trust; and

12.1.4 that the company, close corporation or trust will duly and punctually comply with all its obligations in terms of this agreement.'

[5] The fact of the matter is that the respondent was not duly authorised to enter into the agreement on behalf of the trust as set out in 12.1.1. Nor for that matter had all conditions been complied with in order to make the agreement binding upon the trust as set out in 12.1.3, nor did the trust duly and punctually comply with its obligations in terms of clause 12.1.4. This was because there was another trustee who had not authorised the sale and refused to do so. For this reason the agreement was void.

[6] Despite the invalidity of the sale, the appellant contended that the respondent, as the person who signed the agreement on behalf of the trust, should be compelled to pay the purchase price, and tendered to transfer the property to him if he did so. This, counsel for the appellant argued, was due to the respondent having breached the warranty he had given, that such warranty was severable from the sale itself, and that as it had been breached, the appellant should be put into the same position it would have been in had the warranty not been breached. To do this, so it was contended, required the respondent as guilty party to pay the R1.45 million the trust would have paid against transfer of the property. The argument is, then, that the claim is not one for specific performance of the invalid sale, but flows from the breach of the warranty when that sale could not be enforced.

[7] The ingenuity of this argument is surpassed only by its lack of substance. Despite appellant's counsel's contrary protestations, what the appellant is essentially seeking is specific performance of a void and invalid contract against the person who signed that contract but was not a party to it – this on the basis that if he'd had the authority to sign, which he had not, the property would have been sold to another. This merely had to be stated to be rejected.

[8] In an attempt to overcome this problem, the appellant argued that it was a tacit or implied condition of the warranties I have set out above that 'if the purchaser was not bound by the agreement as a consequence of the non-fulfilment of one or more of such warranties, then the [respondent] would be liable to fulfil or to ensure the fulfilment of all and any obligations that would have rested on the purchaser had it been bound by the agreement'.[1]

[9] Appellant's counsel was unable to point to any authority from which such a term was to be implied as a matter of law. He fell back on an argument that the officious bystander, if asked, would have immediately replied that such a clause must have been within the contemplation of the parties when they contracted. No circumstances from which this so-called tacit condition could be implied appear from the evidence. I understood counsel to base his argument in this regard solely upon the terms of clause 12.3 of the sale agreement.

[10] That clause provided that in the event of clause 12.2 not being fulfilled, the signatory 'shall be deemed to have acted in his personal capacity and shall be deemed to be the purchaser in terms of this agreement'. Clause 12.2, however, provided that in the event of the signatory acting as trustee for a company or close corporation to be formed (not a trust such as is here the case) he or she undertook to procure that the company or close corporation would be duly incorporated within three months and would adopt and ratify the agreement, and would be bound as surety and co-principal debtor with such company or close corporation for the due and punctual performance of all its obligations under the agreement.

[11] Those provisions related solely to the event of the signatory, at the time the agreement, purporting to act on behalf of a company or close corporation still to

[1] I quote the clause alleged in the appellant's amended particulars of claim.

be formed. That is not the case here. As the court a quo correctly observed in this regard, the argument:

'. . . confuses and conflates the rights against a signatory of the sale agreement under 12.1 with the rights against such signatory under clauses 12.2 and 12.3. Had the [respondent] signed as trustee for a company or close corporation to be formed then, in accordance with 12.3, [he] could have been "deemed to be the purchaser in terms of this agreement". No equivalent right exists where the signatory represents an existing trust and there is no basis upon which the [respondent] can be deemed to be the purchaser or . . . regarded "as if [he] was the purchaser of the real right".'

[12] There is therefore no room to import the tacit term contended for by the appellant. At one stage during his address, counsel for the appellant conceded that should we find against the appellant on this issue, the claim had to fail and abandoned any reliance upon a claim for damages. In reply, however, he changed his stance, resurrected an argument that the claim as pleaded was susceptible to be understood as a claim for damages, and argued that the measure of those damages would be the amount of the purchase price; but that, to avoid injustice, his client would then tender transfer of the immovable property. This, once more, would have been no more than an order for specific performance of the invalid sale under the ruse of such an order being one for damages.

[13] I am satisfied that theoretically the respondent could be held liable to the appellant for damages flowing from his breach of warranty – see *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 408E-409F and the authority there cited. However, no claim for damages is formulated in the appellant's claim and, most importantly, no evidence relevant to the quantum of damages was led. In the light of the offer to transfer, one must presume that the property is still in the possession of the appellant; but one has no idea as to whether its value is more or less than the agreed purchase price.

[14] As this court observed in *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) where a contract of purchase and sale of a marketable commodity is breached by non-performance, the extent of the innocent party's loss is generally established by measuring the difference between the price sold and the market value – and that if a claimant seeks to avail itself of a different measure it is necessary to satisfy the court that the measure it contends for is appropriate in all the circumstances. None of this was done in the present case. Consequently, even if one was to be extremely charitable by regarding the pleadings as containing a claim for damages, such damages have not been proved.

[15] For all these reasons the court a quo correctly dismissed the appellant's claim. The only mistake it made was to conclude that there was a reasonable prospect of success when it granted leave to appeal. This appeal was inevitably doomed to failure.

[16] The appeal is dismissed with costs.

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L E Leach

Judge of Appeal

Appearances

For the Appellant:	G F Porteous
Instructed by:	Jordaan & Wolberg Attorneys, Johannesburg
	A P Pretorius & Vennote, Bloemfontein
For the Respondent:	N P G Redman SC
Instructed by:	Le Roux Vivier Attorneys, Johannesburg
	Lovius Block, Bloemfontein