THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 372/08

JAN ABRAHAM DU PLESSIS N O First Appellant

NICOLAAS JOHANNES SMITH N O Second Appellant

and

GOLDCO MOTOR & CYCLE SUPPLIES (PTY) LTD Respondent

Neutral citation: Du Plessis & Smith NNO v Goldco Motor & Cycle Supplies (372/2008) [2009] ZASCA 62 (29 May 2009)

Coram: NAVSA, LEWIS and SNYDERS JJA and KROON and GRIESEL AJJA

Heard: 18 May 2009
Delivered: 29 May 2009

Summary: Option to purchase immovable property deemed to have been exercised by purchaser where seller has deliberately frustrated exercise in prescribed mode.

ORDER

On appeal from: Free State High Court (Kruger J sitting as court of first instance).

The appeal is dismissed with costs, save that the order of the high court is altered to read:

‘(a) The option for the purchase by the applicant of Shop 1, Prosperitas Gebou, 133D Jan Hofmeyr Road, Welkom, from the first and second respondents, in their capacities as trustees of the Prosperitas Trust, for the price of R4 840 000 plus 14 per cent VAT, in terms of clause 5 of the agreement of lease between the parties, dated 10 March 2005, is deemed to have been exercised.

(b) The first and second respondents are ordered to take all necessary steps to transfer the property described in (a) to the applicant against payment of R4 840 000 plus VAT.

(c) The first and second respondents are ordered, jointly and severally, to pay the costs of the application.’

JUDGMENTS

LEWIS JA (NAVSA and SNYDERS JJA and KROON AJA concurring)

[1] At issue in this appeal is the validity and enforceability of an option to purchase immovable property. The appellants are trustees of a trust (Prosperitas) which owns immovable property in Welkom. The respondent, Goldco Motor & Cycle Supplies (Pty) Ltd (Goldco), is a company that hired premises in a building constructed on property owned by the trust. The premises were constructed in accordance with the specifications of Goldco’s chairperson, Mr Boyd Cooper.

[2] The background to the matter is briefly this. Towards the end of 2004 the first appellant, Mr Jan du Plessis, approached Cooper and suggested that Goldco take premises in a building that the trust proposed to construct in Welkom. Goldco's premises in Welkom had recently burned down. A week later Cooper visited the site and considered it to be suitable. Du Plessis offered to build premises that would be suitable for the business, and to sell the building to Goldco. Subsequently it was agreed that Goldco would hire only a section of the building and that a sectional title register would be opened in respect of the building: Goldco would then purchase a unit rather than the entire building. It was also agreed that Goldco would occupy the premises as lessee before the sectional title register was opened.

[3] Accordingly, a lease was prepared by the trust's attorney, Mr F Rossouw of Rossouw & Vennote Ing (Rossouws) and was signed by Cooper on 14 March 2005. The lease was for a period of five years since the parties were not sure how long it would take for the sectional title register to be opened such that the premises could be sold and transferred to Goldco. The premises to be let were described as follows:

''n Perseel in die gebou, wat deur die verhuurder opgerig word te Erf 10671/A, Jan Hofmeyrweg 133D, Welkom, soos uitgewys deur die verhuurder aan die huurder, groot ongeveer 1331 . . . vierkante meter'.

The lease elaborated on the description by stating that the premises would be known as 'winkel nommer 1, Prosperitas gebou, Jan Hofmeyerweg 133D, Welkom'. I shall revert to the description of the premises in considering the enforceability of the option to purchase.

[4] Clause 5 of the lease reads:

'<u>Opsie om perseel te koop:</u>

Die verhuurder verleen hiermee 'n opsie aan die huurder om die perseel te koop teen 'n koopsom van R4,000,000.00 (vier miljoen rand) plus BTW, welke koopprys sal styg teen 10% (tien persent) per jaar vanaf 1 April 2005.

Hierdie opsie is onderworpe daaraan:

(a) dat die deeltitelregister ten opsigte van die grond en gebou waarin die perseel geleë is, geopen word binne 24 (vier en twintig) maande na datum van ondertekening van hierdie huurkontrak deur die verhuurder;
(b) dat die huurder hierdie opsie uitoefen deur 'n skriftelike koopkontrak, opgestel te word deur Mnre Rossouw & Vennote Ing van Stateway 352, Welkom, 9459, by hulle kantore te onderteken binne 24 (vier en twintig) maande na datum van ondertekening van hierdie huurkontrak deur die verhuurder;
(c) dat die gemelde koopkontrak opgestel sal word nadat die goedgekeurde deelplan deur die Landmeters aan Rossouw & Vennote Ing gelewer is en die koopsaak sal omskryf word as 'n deeltiteleenheid waarvan die deel ooreenkom met die perseel wat verhuur word.'

I shall refer to this provision of the lease as 'the option clause' even though it is contended by the trust that it did not confer an option at all – a question to which I shall revert.

[5] The dispute between the parties arises from the failure by Rossouws to draw up the contract for the sale of the premises envisaged in the option clause within the stipulated period (that is, before March 2007), despite Cooper's timeous intimation that Goldco wished to exercise the option and despite the receipt by Rossouws of an approved sectional plan. Moreover, the trust subsequently refused to sell the premises to Goldco at the price that had been agreed in the option clause. Goldco applied to the Free State High Court for an order compelling the trust and Rossouw to draw up a written contract pursuant to the option, tendering payment of the purchase price which had escalated, in terms of an escalation clause, to R4 840 000. Rossouws was cited as the third respondent in the court below. No order was made against it and it is not a party to this appeal. The high court found for Goldco, ordering that the written contract envisaged in the option clause be drafted and that steps be taken by the trust to transfer the premises against payment of the agreed price. The trust appeals with the leave of the high court.

[6] The high court accepted Goldco's version that Cooper had advised Rossouw several times before March 2007 that it wished to exercise the option, but that Rossouw ignored the requests. It also accepted the argument

that the trust, through its attorney and agent, had thus deliberately frustrated performance under the contract, and should be compelled to perform.

[7] The factual background that emerges from the founding affidavit of Cooper, and which is uncontested, is that after the lease containing the option clause was concluded, Cooper applied to the Standard Bank, Welkom for finance for the purchase of the premises. The application was granted, subject to the conditions (inter alia) that the written contract prescribed in the option clause be drawn up and that a sectional title register be opened for the property. (The document approving the loan anticipated that the premises would be bought in the name of another company – a shelf company of which Cooper was a director, but nothing turns on this since it is Goldco that seeks relief and an order that the premises be sold and transferred to it.) Goldco in fact took occupation of part of the premises before the lease commencement date (1 May 2005).

[8] When approval of financing was given by the bank, Cooper took the documentation to Rossouws. He pointed out to Rossouw that the financing was dependent on the fulfilment of certain conditions such as the opening of the sectional title register. Rossouw explained that he could not yet draft the contract because the land surveyors had not provided a sectional plan, required for the opening of a sectional title register.

[9] Cooper then visited the land surveyors in question, and the plan was completed by 28 July 2005 and approved by the Surveyor General on 24 August 2005. The plan was sent by the land surveyors to Rossouw shortly afterwards. Rossouw's brother, Roelie Rossouw (R Rossouw), also an attorney but with a practice in Bloemfontein, was mandated to see to the opening of the sectional title register. Cooper visited him too to ensure the opening of the register. R Rossouw explained that he could not proceed without an instruction from the trust. Cooper was assured by Du Plessis and both Rossouw brothers that the process of opening the register would be expedited. Cooper considered that there was nothing further that he needed

to do. The trust denies that R Rossouw was instructed to attend to the opening of the sectional title register.

[10] It was only in July 2006, at a function arranged by Standard Bank, that officials of the bank asked why the transaction was taking so long to complete. Rossouw was present, as was Cooper. The bank officials asked about the apparent delay in the opening of the sectional title register. Rossouw remained silent. And Cooper began to worry. The price was escalating. He went to visit Rossouw to ask about the delay, but was advised to speak to his own attorney.

[11] Rossouw did not depose to an affidavit and so we have no knowledge of his version of events. Du Plessis responded that he had asked Rossouw about the request made by Cooper: the visit had taken place, he was told, after the option period had expired. That remains the trust's position: the option was not exercised timeously. In fact, even Cooper does not contend that it was exercised *in the prescribed mode* timeously.

[12] Although Goldco claimed in the court below that the option had been exercised timeously, it is clear that no written contract, as contemplated in the option clause, had been drawn up by Rossouws and signed by the parties. Goldco thus did not exercise the option in the manner prescribed in the option clause. But Goldco contends, and the high court found, that Rossouw deliberately failed to draw up the written contract timeously, and that 'performance' can be deemed to have occurred by virtue of the doctrine of fictional fulfilment. It is not entirely clear to me what the high court meant when it concluded that performance was deemed to have been made, but I shall revert to this issue later in the judgment when dealing with fictional fulfilment.

[13] The trust contends that the option was not exercised and that the decision of the court below is incorrect. It raises several arguments in this regard: that the option clause did not in fact constitute an option – a right to purchase the premises simply by indicating acceptance in writing – but was

merely an agreement to agree; that even if it was an option it would not have resulted in a binding contract because the description of the premises was inadequate (an argument not made to the court below and raised at the last minute before the hearing of the appeal by counsel for the trust); that Rossouw was Goldco's agent for the purpose of drafting the contract for the sale of the land; and that there was no deliberate failure to perform. I shall deal with each contention separately.

An option or an agreement to agree?

[14] The trust contends that because the option clause required that a written contract for the purchase of the premises be drawn by Rossouws and signed by the parties within 24 months of the date of the lease in order to exercise the option, no right was actually conferred on Goldco. Goldco could not, it was argued, bind the trust simply by advising it that the option was being exercised. The contention that there was no option at all lacks merit.

[15] The essence of an option is that it is binding on the option grantor. It is an offer, in this case to sell property, which cannot be revoked. It is the option holder that has the choice whether to exercise its right.[1] The principle is put thus by R H Christie:[2]

'To understand the true nature of an option it is best to analyse it into two parts – an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) binding the offeror to keep that offer open for a certain period. On this analysis it is easy to see that the offeror is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it or by expressly or impliedly repudiating it he will be liable for damages for breach of contract.'

[16] Could the trust with impunity have advised Goldco, within the 24-month period, that it was not going to sell the premises to Goldco on the terms set out in the option clause? The answer must be no: that if it did refuse to comply

[1] *Cairns (Pty) Ltd v Playdon* 1947 EDL 145.
[2] *The Law of Contract in South Africa* 5 ed p 54.

with its undertaking it would be guilty of breach of contract and liable to an order for specific performance or damages.

[17] The fact that Goldco's right could not be exercised simply by notifying the trust (in writing) does not mean that there was no right conferred on Goldco. The written contract envisaged in the option clause was, in my view, no more than a prescribed mode of acceptance: the conclusion of a written contract, drafted by Rossouws, and signed by the parties.[3] That of course raises the question what the content of the written contract envisaged by the parties would be. Usually an option will reflect all the material terms of the contract. Indeed, the option clause did reflect the essential terms of a contract of sale of immovable property: the merx (whether the description is adequate is a matter to which I shall return) and the price. What other terms would the additional contract contain?

[18] In my view it is not necessary to answer the question, since I do not believe that it is necessary for the parties now to enter into the agreement originally envisaged. But this does not mean that the trust is not bound by its undertaking to sell the premises at the price agreed. If the trust (through its agent) deliberately frustrated the exercise of the option in the prescribed mode, the position is not that the option falls away, but that the prescribed mode of acceptance ceases to be such. And since the option clause embodies all the essential terms of a contract of sale it must be enforced on those terms.

Is the description of the premises sufficient?

[19] Shortly before the hearing the trust filed supplementary heads of argument in which counsel argued that the premises could not be identified without reference to the negotiations between the parties, and their conduct, before the lease was concluded. The argument stems from the description of the property (set out above) as premises in the building to be erected by the

[3] See *Driftwood Properties v McLean* 1971 (3) SA 591 (A), and, most recently, *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties Ltd* [2008] ZASCA 131 (21 November 2008); 2009 (2) SA 504 (SCA) and *Pillay v Shaik* [2008] ZASCA159 (27 November 2008); [2009] 2 All SA 65 (SCA).

trust *as pointed out* by the trust to Goldco. Of course, in order for a contract for the sale of land to comply with s 2(1) of the Alienation of Land Act 68 of 1981, the property sold must be identifiable from the description in the contract itself. But it has long been settled law that objective evidence may be adduced to identify the property. These principles relate also to options: *Hirschowitz v Moolman*.[4] This court has often reiterated the principle that regard may be had to objective evidence to correlate the description in the document with the actual property sold. In *Vermeulen v Goose Valley Investments (Pty) Ltd* [5] Marais JA said*:*

'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*[6]. . . 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 . . .' . [7]

[20] There is no need, in ascertaining precisely what and where the premises are, to resort to the negotiations between the parties. There is clear objective evidence. Goldco had in fact occupied the premises pursuant to the lease. Moreover, the premises are described also as Shop 1, Prosperitas Building, and the street address is also set out. As Goldco submits, the merx is determinable simply by having regard to the building plan. There can be no uncertainty as to what the merx was. This contention must thus fail.

Was Rossouw the trust's agent?

[21] This question is germane to the application of 'fictional fulfilment'. The high court found that Rossouw was the trust's agent, and that his failure to

[4] 1985 (3) SA 739 (A) at 765F-H and 767E-G.
[5] 2001 (3) SA 986 (SCA) para 14.
[6] 1948 (1) SA 983 (A) at 990.
[7] See also, for example, *Headermans (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA) and *J R 209 Investments v Pine Villa Estates; Pine Villa Estates v J R 209 Investments* [2009] ZASCA 3 (26 February 2009); [2009] 3 All SA 32 (SCA) para 19.

draw up the written contract was attributable to the trust. The trust denied that Rossouw was required to act as its attorney and agent. On the contrary, it asserted, he was Goldco's agent since only Goldco could give him the instruction to draft the contract. The facts do not support the argument. It is clear that Rossouw acted on behalf of the trust, and on its instructions, in drafting the lease agreement. It was the contract prepared by him that provided that the mode of exercising the option was through the signature of a written contract signed by the parties. And, importantly and understandably, subclause (c) of the option clause provided that the contract would be prepared after the sectional title plan had been delivered to Rossouws by the land surveyors. Throughout, it was clearly envisaged that Rossouws were the agent of the trust, and in correspondence Rossouw referred to the trust as his client. Indeed, Goldco could not exercise the option without the cooperation of Rossouws. The court below thus correctly found that Rossouws was the agent, as the attorney, of the trust.

Fictional fulfilment: frustration of the exercise of a right

[22] That brings me to the question whether the court was correct in finding that the doctrine of fictional fulfilment was applicable. The high court found that where a contract is subject to a condition that both parties sign it, one party cannot escape the contract by making it impossible for the other to sign.[8] In such a case, it held, it would be assumed that the party refusing to comply had in fact performed.

[23] It is important to understand, however, that the drafting of a written contract to be signed by the trust and Goldco was not a condition in the true sense. A condition is an uncertain future event. On fulfilment, a contract may come into operation (in which case the condition is termed suspensive) or it may be terminated (a resolutive condition). In this case the exercise of the option was subject to one condition – the opening of the sectional title register. It was also dependent on the performance by the trust of an

[8]Relying on *First National Bank Ltd v Avtjoglou* 2000 (1) SA 989 (C), confirmed in this respect on appeal to the full court in *Avtjoglou v First National Bank of Southern Africa Ltd* [2002] 2 All SA 1 (C). This court found that that decision, which granted provisional sentence, was not appealable: 2004 (2) SA 453 (SCA).

obligation: procuring a written contract, on the terms set out in the option itself, drawn by Rossouws, to be signed by the parties. But that is not a true condition. Thus once Goldco intimated to the trust or its attorney that it wished to exercise the option, and once the approved sectional plan was provided by the land surveyors to Rossouws, there was an obligation imposed on the trust to ensure that the written contract was prepared and signed by it. If anything was then frustrated it was Goldco's right to exercise the option, which was rendered impossible by the failure of the trust to ensure that the prescribed mode of exercise was available to Goldco in the agreed period.

[24] There is ample authority for the extension of the doctrine of fictional fulfilment of conditions to the situation where there is deliberate frustration of contractual performance. In *Koenig v Johnson*[9] the payment of the balance of the price of shares in a company by the purchaser was to be made on the delivery to it of two patents. Delivery could not be made without signatures to certain documents. The company that could procure signature refused to do so because it believed that the patents were invalid. Wessels CJ held that although the company genuinely believed this to be the case, the 'condition' of signature should be deemed to have occurred. Although the court used the word 'condition' it is clear that what was referred to was an obligation to ensure signature.[10]

[25] Similarly, in *East Asiatic Co Ltd v Hansen*[11] the court found that where a buyer prevented a seller from performing a term of their contract of sale, on which payment of the price was dependent, the seller was deemed to have performed.[12] Hathorn J said that both the doctrine of fictional fulfilment and that of deemed performance spring from what Kotze JA described in *MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd* [13] as 'a branch of

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[9] 1935 AD 262.
[10] See in this regard *Van Heerden v Hermann* 1953 (3) SA 180 (T) at 187, where Ramsbottom J said that the delivery of the patent in *Koenig* was not a 'condition properly so called'.
[11] 1933 NPD 297.
[12] At 302.
[13] 1924 AD 573 at 611.

the broad equitable rule of our law that no one can take advantage of his own wrong, for it is unjust and contrary to good faith that he should do so'.

[26] Thus although there is a distinction between a refusal to perform an obligation upon which another party's performance is dependent, and which amounts to a breach of contract such that performance can be compelled (or damages awarded), on the one hand, and the fulfilment of a condition, on the other, in some cases, because of the deliberate frustration by a party of the other's right, performance will be deemed to have occurred or performance will be ordered by a court.[14] Christie[15] suggests that the doctrine of fictional fulfilment applicable to conditions has breached the division between fulfilment of a condition and performance of a term because 'the facts sometimes call for the doctrine to be applied when what has not been fulfilled, due to the deliberate action or inaction of one party, is really a term of the contract'.

[27] Christie concludes that the doctrine of fictional fulfilment

' . . . applies equally to true conditions precedent and to terms of the contract that operate as conditions precedent; that in either case it will apply when there has been bad faith; it will also apply when there has been deliberate intention no matter the motive, unless the terms of the contract and the surrounding circumstances indicate to the contrary; . . . and at all levels no distinction is drawn between acts and omissions'.

[28] Had Goldco sued the trust to compel performance before the expiry of the option period there is no doubt that the court would have compelled the trust to ensure compliance with the option clause. But it did not do so, and its efforts to ensure compliance were thwarted by Rossouw, the trusts's agent. In my view, it would be inequitable to allow the trust to escape its obligation through deliberately frustrating Goldco's right to exercise the option. The trust was in a position to ensure that the written contract, a 'condition' precedent to the exercise of the option, was prepared by Rossouws and signed by it. The

[14] See *Scott v Poupard* 1971(2) SA 373 (A) at 378H.
[15] Op cit p 150.

deliberate frustration of the exercise by Goldco of its right in the prescribed mode requires that Goldco be deemed to have done so. The effect of the application of fictional fulfilment is thus to bind the trust after the expiry of the option period because of its frustration of the right to exercise the option timeously.

[29] I accordingly conclude that the court below was correct in finding that this was a case where the doctrine of fictional fulfilment is applicable. On the undisputed facts Goldco timeously attempted to exercise its option. It is only because Rossouw, acting as the trust's agent and attorney, deliberately frustrated Goldco's attempt to exercise its right that there was not compliance with the option clause before its expiry. The trust cannot rely on the deliberate failure of its agent to draw up a written contract for the sale of the premises in order to escape its obligation to sell the premises to Goldco.[16]

[30] But nor, in my view, can the court order (as the high court did) that the parties enter into the written agreement envisaged in the option clause, because it cannot compel agreement on terms to be negotiated subsequently. As I see the position, as indicated earlier, the prescribed mode of exercise of the option – the signing by both parties of a written contract drafted by Rossouws – is effectively dispensed with (or, to put the same notion differently, deemed to have been complied with) as a result of the trust's frustration of the exercise of the option in that mode within the agreed time.

[31] The result is that the terms of the sale of the premises are to be found in the option clause itself, as well, of course, as in the common law rules governing sales. It follows that the appeal must be dismissed, but the order of the high court changed to reflect the findings of this court.

[32] The appeal is dismissed with costs, save that the order of the high court is altered to read:

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[16] *Scott v Poupard* at 378G-H.

‘(a) The option for the purchase by the applicant of Shop 1, Prosperitas Gebou, 133D Jan Hofmeyr Road, Welkom, from the first and second respondents, in their capacities as trustees of the Prosperitas Trust, for the price of R4 840 000 plus 14 per cent VAT, in terms of clause 5 of the agreement of lease between the parties, dated 10 March 2005, is deemed to have been exercised.

(b) The first and second respondents are ordered to take all necessary steps to transfer the property described in (a) to the applicant against payment of R4 840 000 plus VAT.

(c) The first and second respondents are ordered, jointly and severally, to pay the costs of the application.’

C H Lewis

Judge of Appeal

GRIESEL AJA (dissenting)

[33] I have had the advantage of reading the judgment of my colleague Lewis JA but respectfully disagree with her conclusion that the appeal should fail.

[34] Where I differ from my colleague is with regard to the validity of the option clause in question.[17] In order to be enforceable, an option must be such that the substantive contract – whether sale, lease, or some other form of contract – comes into existence without more by mere acceptance of the offer; that is, by exercise of the option by the grantee.[18] As stated in *Brandt v Spies*:[19]

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[17] Quoted in para 4 above.

[18] *Hirschowitz v Moolman & others* 1985 (3) SA 739 (A) at 767F. See also Van der Merwe *et al Contract: General Principles* 3ed (2007) p 80.

[19] 1960 (4) SA 14 (E) at 16F–G, quoted with approval in *Venter v Birchholtz* 1972 (1) SA 276 (A) at 284A.

'Through the option the grantee acquires the right to accept the offer to sell at any time during the stipulated period; and if this right is exercised a contract of purchase and sale is immediately brought into being. It follows that the offer must be one which is capable of resulting in a valid contract of sale from the fact of acceptance by the person to whom the offer is made.'

[35] It is not open to dispute that the option clause in this case contains all the *essentialia* of a contract of sale. My colleague appears to regard this as sufficient whereas I respectfully hold a different view. It is settled law that, in order to comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981, 'the whole contract of sale, or at any rate all the material terms thereof' must be in writing.[20] As explained by Corbett JA in *Johnston v Leal*:[21]

'The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, viz the parties to the contact, the *merx* and the *pretium*, but include, in addition, all other material terms…. It is not easy to define what constitutes a material term.'

What emerges clearly from the cases, though, is that 'a material term is not necessarily one of the essentials – parties, property and price – of a contract of sale'.[22]

[36] It follows that, in order to serve as the basis for a valid contract of sale, an option to buy land must not only contain all the *essentialia* of a deed of sale; it must also contain all the other material terms thereof. I accordingly agree with my colleague that '[u]sually an option will reflect all the material terms of the contract'[23] – as indeed it should. It is with the next part of her reasoning that I have a difficulty. After pointing out that 'the option clause did reflect the essential terms of a contract of sale of immovable property', my colleague asks rhetorically: 'What other terms would the additional contract contain?' In my view, it is not necessary for us to speculate as to what those other terms might be. It was for Goldco, as applicant in the court below, to

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[20] *Johnston v Leal* 1980 (3) SA 927 (A) at 937G and the cases referred to therein.
[21] At 937H.
[22] *Meyer v Kirner* 1974 (4) SA 90 (N) at 98D, cited with approval in *Johnston v Leal* at 937G–H.
[23] Para 17 above.

prove the contract which it seeks to enforce.[24] This means that it had to satisfy the court that the parties had intended that the further written contract would in fact *not* contain anything more than what is already contained in the lease, ie the bare *essentialia*.

[37] In my view, Goldco has failed to discharge that onus. First, the interpretation that no further material terms were necessary would make a further written agreement completely superfluous. Second, such an interpretation is contradicted by the background circumstances. It appears from a letter dated 1 December 2004 attached to the founding affidavit that the trust at that stage offered to sell a portion of the property – identified with reference to erf number, surface area, dimensions and street frontage – to Goldco at a stipulated price of R2,45 million excluding VAT and on certain further conditions outlined in the letter. The trust described this offer as 'ons skriftelike aanbod *in konsep* vir verkoop' of the property (emphasis added). Significantly, the penultimate paragraph of the letter reads as follows:

'Indien hierdie hoofbeginsels aanvaarbaar is, sal die partye toetree tot ['n] *kontrak met volle detail* soos opgestel deur die oordragprokureurs Rossouw & Vennote Welkom.' (Emphasis added).

[38] Those 'hoofbeginsels' were indeed acceptable to Goldco. However, instead of the detailed contract of sale envisaged in the letter, the parties some 3½ months later entered into the lease, containing the option clause in question. Having regard to these background circumstances, there can be little doubt that the 'skriftelike kontrak' contemplated by the option clause is the same as the 'kontrak met volle detail' referred to in the letter of 1 December 2004. The inference is irresistible that further material terms and conditions, in addition to the *essentialia* already agreed upon, had indeed been contemplated by the parties when the lease was signed. In these circumstances, it is insufficient to hold, as my colleague does: 'And since the option clause embodies all the essential terms of a contract of sale it must be

[24] This is a question which, according to Christie *op cit* p 154, 'must now be regarded as settled'.

enforced on those terms'.[25] The question to be answered is a different one, namely whether the option clause in fact embodies all the *material* terms of the contemplated contract of sale; not just the *essentialia*. To my mind, the answer to this question is no.

[39] For these reasons I am, with respect, unable to agree with my colleague's further statement that 'the written contract envisaged in the option clause was . . . no more than a prescribed mode of acceptance'.[26] It is true that clause 5(b) tends to create that impression, but then it should immediately be pointed out that the clause is notable for its ineptitude rather than its precision. Before acceptance can take place in the manner prescribed by the option clause, a further written contract between the parties was required, with neither guidelines as to the content of such contract nor any deadlock-breaking mechanism in the event of deadlock between the parties. In these circumstances, the option granted in terms of clause 5(b) is, in my view, nothing more than an agreement to agree, which is insufficient to serve as the basis for a binding agreement of sale. Put differently, the option is not of such a nature that it is capable of resulting in a valid contract of sale from the mere fact of acceptance thereof. All of these features, in my view, are entirely destructive of a valid and binding option.[27]

[40] Had it not been for the provisions of clause 5(b), I would have had little hesitation in holding that a valid option had been granted in favour of Goldco. Clause 5(b), however, makes it clear that the offer to sell, as it stands, does not purport to contain the entire offer by the offeror. Without a complete offer, it is impossible to have a valid contract of sale complying with the provisions of Act 68 of 1981. For these reasons I conclude that the option in question is unenforceable.

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[25] Para 18 above.
[26] Para 17 above.
[27] Compare *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) at 773I–774A; *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 567A–C; *Premier, Free State and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) paras 35–36.

[41] Having said that, I now wish to deal briefly with the relief claimed in prayer 1 of the notice of motion, as ordered by the court a quo. It reads as follows:

'[D]at die respondente gelas word om binne tien (10) dae na datum van die verlening van hierdie bevel 'n skriftelike koopkontrak ter uitvoering van die opsie soos beliggaam in klousule 5 van die huurkontrak tussen die partye . . . aan [die respondent] voor te lê vir ondertekening teen 'n koopprys van R4 840 000 plus 14% BTW'.

[42] My colleague, with respect rightly, recoils from the prospect of compelling agreement 'on terms to be negotiated subsequently'.[28] Her suggested solution, as contained in para (a) of the proposed order, is, however, equally unpalatable. Leaving aside the question whether this Court should, in the exercise of its powers on appeal,[29] *mero motu* amend in any material way the relief claimed and granted in the court below, the proposed order seeks to dispense with the peremptory requirement of a written acceptance of the option.[30] Moreover, the proposed order seeks to impose upon the parties a written contract containing only the *essentialia* of a contract of sale whereas the evidence reveals, on a balance of probability, that further material terms were contemplated.

[43] In these circumstances, I would respectfully echo the words of Botha JA in his minority judgment in *Soteriou v Retco Poyntons (Pty) Ltd*:[31]

'No doubt the parties intended the clause to have business efficacy. But then, they no doubt did not realise that an agreement to agree was devoid of legal effect. The Court is powerless to correct their error for them. While the Court will strive not to be a destroyer of bargains, it can never be the creator of them.'

[44] For these reasons, I would uphold the appeal, set aside the order of the court below and substitute it with the following:

'The application is dismissed with costs.'

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[28] Para 30 above.
[29] Section 22 of the Supreme Court Act 59 of 1959.
[30] *Hirschowitz v Moolman*, n 2 above, at 766D; Van der Merwe *et al op cit* p 83–84.
[31] 1985 (2) SA 922 (A) at 936I–J.

B M Griesel

Acting Judge of Appeal

NAVSA JA (LEWIS and SNYDERS JJA and KROON AJA concurring)

[45] I have had the benefit of reading the judgments of my colleagues Lewis JA and Griesel AJA. I agree with the reasoning and conclusions reached by the former and I am in respectful disagreement with the latter. I am constrained to add the comments that follow.

[46] First, it is important to note that up until the present appeal Prosperitas had not contended that there were any terms, over and above those contained in the option, which still had to be agreed upon. It is clear, both from the founding and answering affidavits, that it was envisaged that it would take up to 18 months for the sectional title register to be opened to enable a deed of sale to be completed and that the parties provided a 24-month period to that end. Factually, the only defence presented in the answering affidavit is that the option had not been properly exercised by Goldco and that it was solely to blame.

[47] Second, and perhaps more importantly, the agreement which this court in *Driftwood*, referred to in para 17 by Lewis JA, held to be enforceable was in similar terms to the option in the present case.[32] The differences relate to commission, a suspensive condition relating to the establishment of a township and, that the purchase price was payable upon registration. The first two aspects are inapplicable and the latter is in any event the position at common law.

[48] Third, other than the question of the description of land which is dealt with by Lewis JA, it was never suggested that the contents of the option would

[32] At 595F-H.

otherwise not be in compliance with the provisions of the Alienation of Land Act 68 of 1981.

[49] Fourth, Griesel AJA, in para 37 above, in interpreting the option had regard to 'background circumstances'. In particular, he had regard to correspondence preceding the conclusion of the lease. It is clear that the lease signed on 14 March 2005 superseded all prior negotiations and agreements. It is the option contained in the lease that has to be interpreted and applied. The option is, in my view, clear and unambiguous. It is to be given its grammatical and ordinary meaning unless this would result in absurdity, repugnancy or inconsistency with the rest of the document. The circumstances in the present case are not such as to exclude the rule against extrinsic evidence in aid of interpretation.[33] The question we were called upon to decide is whether the option was an agreement to conclude an agreement. Lewis JA had regard to the terms of the option and in my view correctly concluded that it did not.

[50] For all these reasons I concur in the judgment of Lewis JA.

M S Navsa

Judge of Appeal

[33] See R H Christie (op cit) p 204 and the discussion of *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at p 205.

Appearances:

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