THE SUPREME COURT OF APPEAL
**REPUBLIC OF SOUTH AFRICA**

# JUDGMENT

**Case No: 43/2009**

**JACOBUS CORNELIUS SWANEPOEL** **Appellant**

**and**

**SUNNYBOY SOLOMON NAMENG** **Respondent**

**Neutral citation:** *Swanepoel v Nameng* (43/2009) [2009] ZASCA 101 (18 September 2009)

**Coram:** Mthiyane, Nugent, Ponnan, Snyders JJA and Griesel AJA

**Heard:** 1 September 2009
**Delivered:** 18 September 2009

**Summary:** **Agreement of sale of immovable property – property incorrectly described but subsequently amended by the parties – whether formalities prescribed by s 2(1) of the Alienation of Land Act 68 of 1981 complied with – agreement subject to suspensive condition requiring bond approval by certain date – whether suspensive condition fulfilled.**

## ORDER

**On appeal from:** Johannesburg High Court (Motloung AJ sitting as court of first instance).

1 Save to the extent set out in paragraph 2 hereof, the appeal is dismissed with costs.

2 The order in paragraph 5 that 'costs of the application are to be paid by the respondent on the scale as between attorney and client' is set aside and replaced with the following:

'5 Costs of the application are to be paid by the respondent.'

## JUDGMENT

MTHIYANE JA (NUGENT, PONNAN, SNYDERS JJA and GRIESEL AJA concurring):

[1] The issue in this appeal is whether an agreement of sale of immovable property entered into between the parties is valid and if so, whether the agreement lapsed for alleged failure to comply with the suspensive condition contained in the agreement. The Johannesburg High Court (Motloung AJ) held that the agreement complied with s 2(1) of the Alienation of Land Act 68 of 1981 ('the Act') and that the suspensive condition had been fulfilled.

[2] On 26 July 2006 the appellant sold to the respondent immovable property described as erf 1172 Greenstone Hill, for the sum of R470 000. The sale agreement was subject to a suspensive condition in terms of which the respondent had to obtain approval of a loan by not later than 16

August 2006 against registration of a first mortgage loan over the property. The agreement further provided that if the bond was not approved by that date, an automatic extension of a further six working days would be allowed to enable the estate agent to obtain the relevant bond approval. Such extension thus allowed for fulfilment of the suspensive condition by 24 August 2006.

[3] Subsequent to the approval of the loan on 18 August 2006 the estate agent who brokered the sale between the parties discovered that the property had been incorrectly described in the agreement as erf 1172 instead of 1173. The agreement was then amended by the parties on 22 August 2006 to reflect the property sold as erf 1173.

[4] Consequently it became necessary to also correct the loan documentation at the bank to reflect the mortgaged property as erf 1173. Accordingly the respondent was on application issued with a fresh approval of the loan on 24 October 2006 in respect of erf 1173.

[5] In the meantime the estate agents had on 18 October 2006 instructed the conveyancers, Biccari Bollo Mariano Inc to proceed with the transfer of the property into the respondent's name. On 30 and 31 October 2006 the appellant and the respondent respectively signed transfer documentation so as to effect transfer of the property to the respondent.

[6] It appears that there was thereafter considerable delay in effecting the transfer of the property. This prompted the appellant to write to the respondent in July 2007 threatening to cancel the agreement on the grounds of unreasonable delay. The concluding portion of the letter

contains the following ultimatum:

'I hereby give you notice in terms of clause 9 of the offer to purchase to lodge the transaction in the relevant deeds office within 10 days from the date hereof failing . . . [which] . . . I will have to cancel this agreement. A copy of the letter will also be addressed to the transferring attorneys.'

[7] The respondent wrote back to the appellant denying that he was to blame for the delay and disputing the appellant's right to cancel. On 2 August 2007 the respondent instructed the conveyancers, in view of the dispute that had arisen, not to proceed with the transfer, until they received further written instructions from him.

[8] By letter dated 18 August 2007 the respondent attempted to stave off the cancellation, by reiterating that he was not to blame for the delay and insisting that he had signed all the necessary transfer documents in October 2006. This however failed to elicit any positive reaction from the appellant. Similarly the conveyancer's attempts to explain the delay met with similar rebuff. The parties remained deadlocked.

[9] The deadlock culminated in an application to the Johannesburg High Court in which the respondent sought an order declaring that the appellant's purported cancellation of the agreement was invalid and an order to enforce specific performance. The appellant opposed the application, at that stage, on two grounds. First, he contended that there had been an unreasonable delay in effecting the transfer, which delay he attributed to the respondent and the conveyancers. Second, the appellant contended that even if a reasonable time had not elapsed for the transfer of the property, he was entitled to avoid the agreement, because it had lapsed for non-fulfilment of the suspensive condition contained in clause

13.1. The sub-clause provided that the respondent had to obtain approval of a bond by not later than 24 August 2006.

[10] As already indicated the High Court found that the suspensive condition had been fulfilled in that the home loan in respect of erf 1172 had been approved timeously. The learned judge held that the suspensive condition had been fulfilled and that the agreement between the appellant and the respondent was valid and binding and granted the relief claimed. The appellant was consequently ordered to pay costs on an attorney and client scale.

[11] With leave granted by this Court the appellant now appeals the above ruling. The appellant's challenge in the appeal stands on two legs. First, it is contended that the agreement prior to its amendment was invalid for failure to comply with the provisions of s 2(1) of the Act in that the property sold (erf 1173) cannot be identified by reference to the written agreement, as it was prior to the amendment. Second, and alternatively, even if the agreement between the parties (in its unamended form) complied with s 2(1) of the Act, it nevertheless lapsed because the suspensive condition to which it was subject, was not timeously fulfilled. This because approval of the loan in respect of the property erf 1173 (after the amendment) took place on 24 September 2006, whereas clause 13.1 of the agreement required that it occur by not later than 16 August 2006 or within the extended time provided for therein, that is 24 August 2006.

[12] Before discussing the appellant's submission on the first point relating to the alleged invalidity based on non-compliance with the provisions of s 2(1) of the Act, it is necessary to quote the relevant

subsection and to make a few general observations. The subsection reads as follows:

'No alienation of land . . . shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[13] The subsection has been the subject of comment in a number of decisions of this court and the high court. For purposes of the decision in this case it is not necessary to embark on a comprehensive analysis of the subsection because the issue raised by the respondent bears solely on the description of the *res vendita.* The test for compliance with the subsection as laid down by this court over the years is a simple one. If an immovable property can be identified by reference to the terms of the agreement, without recourse to evidence from the contracting parties as to their negotiations and consensus, the provisions of law are met. (*Clements v Simpson* 1971 (3) SA 1 (A) at 7F–G.) The subsection does not, however, 'require a written contract of sale to contain, under pain of nullity, *faultless description of the property sold couched in meticulously accurate terms'.* [Emphasis added] (*Headerman (Vryburg) (Pty) Ltd v Ping Bai* 1997 (3) SA 1004 (SCA) at 1009B.)

[14] The objective of the subsection is to achieve certainty in 'transactions involving the sales of fixed property, as to the terms agreed upon and thus avoid or minimise the possibility of . . . fraud or unnecessary litigation'. (*Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1051D) ─ hence the requirement that all agreements relating to the sale of land be reduced to writing and signed by the parties thereto or by their agents on their written authority.

[15] In the present matter all the essential elements for the conclusion of a valid agreement for the sale of land were present. The agreement was in writing and signed by the parties thereto as required by the subsection. More importantly there was reference in the parties' agreement to an identifiable property, (erf 1172) albeit in error. Thus standing alone, the agreement sufficiently described the subject-matter sold to enable identification of it on the ground. The purchase price of the property (R470 000) was set out and so were details of how payment was to be effected. Clearly, there was certainty on all the formal elements required by the subsection. On the face of it therefore, the agreement of the parties complied with the subsection.

[16] As the agreement of sale on the face of it complied with s 2(1) of the Act, it was permissible for it to have been amended or rectified, by substituting the correct description of the property sold (*Magwaza v Heenan* 1979 (2) SA 1019 (A).) *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) para 10.) It therefore follows that the determination of the question whether the formalities prescribed by the subsection have been complied with does not involve an enquiry into the intention of the parties as to the property sold. Indeed the section makes no reference to intention. By omitting any reference to intention in respect of the property sold the legislature was, I think, mindful of the fact that the parties could still amend their agreement by, for example, exercising their common law right to rectify it, if they so wish, or make whatever corrections they consider necessary. At the stage of determining whether the formalities prescribed in s 2(1) of the Act have been complied with one is therefore not concerned with the question whether the property identified in the agreement as the *res vendita*, is in fact the property that the parties intended to sell to each other ultimately. The

appellant's argument seems to be that in order to comply with s 2(1) of the Act the agreement had to reflect the property sold as erf 1173 from the outset. The argument ignores the fact that the parties are as a matter of law entitled to amend or rectify their agreement once a valid agreement was concluded and the section does not impose any bar to this. The fact that the agreement had to comply with the formalities prescribed by s 2(1) of the Act did not mean that the description of the property could not be corrected or rectified at any later stage. The remarks of Smalberger JA in *Intercontinental Exports* are apposite:

'Rectification is a well established common-law right. It provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. In thereby enables effect to be given to the parties' actual agreement. . . '.( at para 11).

[17] For the above reasons I conclude that the agreement of sale entered into between the appellant and the respondent complies with the requirments of the Alienation of Land Act and was valid even prior to the amendment of the property sold from erf 1172 to erf 1173. The appellant's contention that the agreement did not comply with the provisions of s 2(1) is without merit.

[18] I turn to the appellant's second point. The appellant argues that the suspensive condition was not fulfilled in that in terms of clause 13.1 the bond in respect of the property sold was not approved before 16 August 2006 or within the automatic extension period (24 August 2006). Because the respondents only succeeded in obtaining approval of a home loan in respect erf 1173 on 27 September 2006, the appellant submits that the agreement had by then lapsed in terms of clause 14.2.

[19] In my view when the respondent's application for a loan was approved and the bank furnished its guarantee in relation to erf 1172 the suspensive condition was fulfilled, that being the necessary step to render what was previously an inchoate agreement complete. Once that occurred the agreement was valid and enforceable. The only remaining obstacle to the enforcement of the agreement in respect of erf 1173 at that stage was the incorrect description of the property sold as erf 1172 instead of erf 1173. The parties put paid to that by amending the agreement. The suspensive condition in clause 13.1 (that had already been fulfilled) was not all of a sudden revived by the granting of a home loan in respect of erf 1173. In any event that is how the parties saw the situation. In my view the fact that on 30 and 31 October 2006 the parties signed transfer documents to give effect to the transfer of the property into the name of the respondent supports this conclusion. When transfer was not effected by July 2007 the respondent threatened to cancel the agreement on the grounds of unreasonable delay. Why, if one may ask rhetorically, would he do so if he regarded the agreement as having lapsed? The answer must surely be that both parties regarded the suspensive condition as having been fulfilled.

[20] To this may be added the fact that it probably mattered little to the bank whether the loan was in respect of erf 1172 or erf 1173. The application for a loan in respect of erf 1173 was in my view, merely a means by which the bank was putting its loan documentation in line with the corrected description of the property sold. Being a bank it could not do it in any other way. A mortgage bond had to be registered over erf 1173 to secure the loan ─ an act which could hardly be viewed as reviving a suspensive condition that had already been fulfilled.

[21] For the above reasons I conclude that the suspensive condition had been fulfilled by the time the description of the property was corrected and the argument to the contrary is without merit.

[22] I turn to the question of costs. It is not clear why the appellant was ordered to pay costs on an attorney and client scale. Counsel for the respondent was unable to support this aspect of the judgment. It appears that the judge took umbrage at the appellant for taking points which he had not raised initially when he sought to cancel the agreement. I do not think that there was any justification for penalising the appellant for acting in the manner that he did if he considered this to advance his case. His actions do not amount to abuse of the process of court. Accordingly a punitive costs order was not justified and falls to be set aside.

[23] Accordingly the following order is made:

1. Save to the extent set out in paragraph 2 hereof, the appeal is dismissed with costs.
2. The order in paragraph 5 that 'costs of the application are to be paid by the respondent on the scale as between attorney and client' is set aside and replaced with the following:

'5 Costs of the application are to be paid by the respondent.'

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**KK MTHIYANE**
**JUDGE OF APPEAL**

Appearances:

For Appellant: JM Kilian

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Symington & De Kok Bloemfontein

For Respondent: NPG Redman

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