UPHOLDING UNSIGNED SALE AND CONSTRUCTION AGREEMENT

Bray v Grand Aviation (Pty) Ltd and Another (07/28371) [2015] ZAGPJHC 139 (18 May 2015)

The purchaser bought a property in a development in an agreement that included a contract for the construction of a unit on the property. After transfer, when a dispute arose regarding finishes for the unit-to-be-erected, it was established for the first time that the developer never signed the agreement. The latter sought to use this fact to claim cancellation of the transfer and to escape liability in terms of the construction agreement. The interesting facts explain why the court found in favour of the purchaser.

The Judgment can be viewed here.

FACTS

In March 2005, Bray entered into an agreement with Grand Aviation (Pty) Ltd (the developer) in which he purchased an erf in the Emerald Estate development. He also signed a linked building contract in terms of which the developer would erect a 'standard type E' unit on the erf. Registration of transfer was effected, although it transpired later that the developer never signed the agreement. The developer could not explain why the agreement was not signed and testified that it always was under the impression that the agreement was signed and binding.

For purposes of the building contract, Bray obtained a building loan from Nedbank and the bank furnished confirmation to the developer that it held the required amounts available for guarantee/payment.

The building works in the development was substantially delayed, to the extent that on two occasions, in 2006 and in 2007, Bray had to approach the bank to extend the bond. On both occasions he obtained a letter from the developer confirming the delay in the commencement of construction.

During this time, discussions were held between Bray and the developer regarding alterations that Bray wanted to make to his unit. At a stage, a revised quote was sent to Bray incorporating the alterations he sought. Two items in the quote however did not reflect the relevant cost. Bray was asked to sign the quote and fax it back to the developer, and when he did not, the developer re-sent the quote and advised that if it was not signed and returned, it would build the unit as per the standard design without incorporating any specific modifications. Bray thereupon signed the quote and returned it

to the developer, although the two items in the quote still did not reflect a Rand value.

At a later stage, Bray received an email from the developer to which was attached detailed plans of the unit to be built, incorporating the alterations specified by Bray. A revised quote was then sent to Bray, which was substantially similar to the initial quote, except for the inclusion of R110,000.00 in respect of a so-called 'modification fee'. (The earlier two items that did not have a quote, also remained without a value.) It was this modification fee that became the subject of the dispute between the parties. The developer advised Bray (and apparently other purchasers too) that the modification fee was for increased building costs arising from the delay in finalising the development.

Bray found the modification fee unacceptable and alleged that he advised the developer accordingly. The developer however testified that Bray indicated that he accepted the revised quote including the modification fee. The revised quote was never signed by Bray.

There was no further communication between the parties for the next 8 months. Then Bray received a letter from the developer demanding him to furnish a demand guarantee for the building costs by a certain date, failing which the developer would cancel the agreement. Bray did not respond as he considered the existing bond approval sufficient to comply with his obligations. The developer subsequently cancelled the sale.

Bray immediately indicated that he did not accept the cancellation. He launched an application for an order compelling the developer to perform in terms of the building agreement. The developer opposed the application on the grounds that (i) it never signed the agreement and that it therefore did not comply with the Alienation of Land Act, or (ii) in the alternative, that it validly cancelled the agreement.

The legal issues to be determined

1) Was ownership of the land validly transferred to Bray?
2) Did the parties conclude a contract for the construction of a dwelling on the land and if so on what terms?
3) If such a contract was concluded between the parties, was it validly cancelled by the developer?
4) If the contract was not validly cancelled, was Bray entitled to specific performance?

HELD:

Was ownership of the land validly transferred to Bray?

- This question had to be addressed with reference to the abstract theory of transfer. In

accordance with the abstract theory, the requirements for the passing of ownership are twofold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or 'saaklike ooreenkoms.' The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and an intention on the part of the transferee to become the owner of the property. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement."

- In this case, delivery of the immovable property in the form of registration of transfer in the deeds office was clearly established. On the facts too, both parties intended transfer to pass when registration was effected.

- Thus despite the signature formalities not having been complied with, the real agreement was not flawed and transfer validly passed.

Did the parties conclude a contract for the construction of a dwelling on the land and if so, on what terms?

- The evidence established that the parties reached a conscious accord in September 2003 to conclude a contract that the developer would construct a unit for Bray on the terms set out in the sale agreement.

- Even if such contract was not concluded expressly, the facts supported an inference that it was concluded tacitly.

- Bray signed the sale agreement and there can be no clearer indication that he intended to contract on the terms set out in the agreement. While the developer did not sign the agreement, it clearly indicated by its conduct that it contracted to construct a unit on Bray's erf on the terms set out in the agreement and was prepared to entertain alterations to the standard unit. The developer further conceded that even if there was no agreement with Bray regarding the different finishes, it was obliged to build a standard type unit on Bray's erf.

- Whilst there was agreement on the construction of a standard type unit, there was no agreement on the alterations to be made to the standard unit. The initial quote lacked a Rand value for "kitchen customisation" and "additional paving." In the absence of these items having been quoted and the quotes having been accepted by Bray, it could not be said that there was agreement on the cost of the alterations.

- As such the parties did not reach agreement on the alterations to be made to the standard unit. There was however a valid and binding contract between the parties for the construction of a standard type unit on the erf.

Was the construction contract validly cancelled?

- For its contention that it was entitled to a demand guarantee for the full amount of the building costs, the developer relied on clause 3.3 of the deed of sale which provided that "the balance of the purchase price shall be payable against the registration of transfer into the name of the Purchaser but payment thereof is to be secured by means of a bank guarantee…" The developer submitted that since the purchase price indicated in clause 3.3. included both the price for the erf and the cost of the construction, the clause clearly entitled it to a bank guarantee for the cost of the erf and the building costs.

- Bray argued that the agreement specifically entitled him to finance the construction of the dwelling by means of a mortgage bond and a building loan as he had done, that the developer was aware of the financial arrangements made by him and that the security furnished constituted "acceptable security" within the meaning of the Deed of Sale.

- On the facts it was shown that the developer's interpretation conflicted with a number of clauses in the sale agreement which specifically entitled Bray to finance the construction of the dwelling by means of a mortgage bond and a building loan. The sale agreement and construction agreement, although linked, were two separate agreements and the distinction between construction costs which are financed through a mortgage bond and construction costs which are self-financed by a purchaser, was evident throughout both agreements.

As a result the developer was ordered to construct the standard type E unit on Bray's erf, in terms of the agreement of sale concluded between them in September 2003.

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