AGREEMENT VOID BECAUSE MATERIAL TERMS OMITTED

Cooper N O and Another v Curro Heights Properties (Pty) Ltd (1300/2022) [2023] ZASCA 66 (16 May 2023)

The parties in the sale agreement in this matter had, subsequent to signing, made plans to procure subdivision of one of the properties included in the sale. This was because the purchaser only wanted to buy part of one of the erven that was included in the sale. Subdivision was not achieved and the relationship between seller and purchaser floundered. (Also after the signing of the agreement, was the discovery that an erf number of one of the erven sold reflected the wrong erf number, although both parties were clear on the erven being sold and purchased.) The matter landed with the Supreme Court of Appeal which confirmed that, amongst other things, the subdivision constituted a material part of the arrangement between the parties and since it was not recorded in writing and made part of the agreement, there was non-compliance with the Alienation of Land Act and the agreement was void.

It is significant to note that the seller was a company in liquidation and the agreement entered into in 2017 already, meaning that the delays in relation to the subdivision and the subsequent litigation, delayed the process for almost 5 years. Remember therefore always to ensure that every material aspect of your agreement is recorded in writing.

The Judgment can be viewed here.

FACTS

In April 2016, the liquidators of Nomic 151 (Pty) Ltd (in liquidation) ("Nomic") and Curro Heights Properties (Pty) Ltd ("Curro") concluded a written sale of land agreement in terms whereof the liquidators sold certain unimproved erven in Mossel Bay to Curro as part of the winding up of Nomic's affairs. One of the erven included in the sale was Erf 19565 Mossel Bay, a private 'ring road' erf that provides access to various other neighbouring erven.

The parties did not realise that their written sale agreement erroneously recorded the ring road's erf number as '19555' instead of '19565'.

The first agreement fell away and the parties subsequently entered into a further agreement. The same land was sold to Curro, at a reduced purchase price. The same erroneous recordal of the ring road's erf number crept into the agreement. (The Nomic liquidators and Curro were in agreement at all times that their common intention was to refer to erf 19565 and not to erf 19555; the Curro liquidators in any event never intended to sell Erf 19555 as it was not part of the liquidated company's assets.)

It was only during the process of preparing the transfer documents that the error was detected. At the behest of the liquidators, an addendum was prepared to correct the erroneous recordal of the ring road's erf number. It was signed by the liquidators in May 2017 and sent to Curro for signature. Curro however reverted stating that after its investigations (this being some months after the agreement had been concluded), it realized that erf 19565 extends into an adjacent development (Nurture Park) which meant that Curro would then become owner of that portion as well, if effect were to be given to the sale. It suggested that that part of the ring road be excluded from the sale and that erf 19565 be subdivided.

The liquidators were willing to attempt to salvage the sale and negotiations ensued between the parties in respect of the subdivision of the ring road. No formal written agreement or addendum was ever concluded regarding the subdivision of the ring road erf. Subdivision did not materialise and in November 2019, the liquidators communicated that they would no longer entertain any further indulgences in respect of the subdivision. They demanded signature of the necessary documents for transfer of ownership to be procured. Curro did not accede to the liquidators' demand.

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In March 2020, the liquidators called on Curro to remedy its breach. This was also not heeded and in August 2020, the liquidators advised Curro that they had cancelled the agreement insofar as it had ever been valid. Then, in September 2020, the liquidators initiated the application under consideration. They sought certain relief from the High Court, *inter alia* a declarator that the agreement was invalid for non-compliance with section 2(1) of the Alienation of Land Act ('the ALA') and for want of consensus in respect of the *merx* (the subject-matter of the sale).

The High Court found in favour of Curro and this matter deals with the appeal by the liquidators. The issue before the SCA was whether a written sale of land agreement was null and void *ab initio d*ue to non-compliance with section 2(1) of the ALA *and* for want of consensus between the parties in respect of the *merx*.

HELD

- In respect of the issue of consensus, the SCA found that at the time of the conclusion of the agreement the liquidators intended to sell *the whole* of erf 19565, which is the property that fell into the estate of Nomic and which extended into the Nurture Park development. On Curro's own version, it never intended to purchase that part of erf 19565 that extends into Nurture Park. Therefore the agreement was null and void *ab initio* for want of consensus at the time of its conclusion.

- In respect of section 2 of the ALA, the SCA reiterated the interpretation in our law that this section requires the whole contract of sale – all its material terms – to be reduced to writing signed by or on behalf of the parties.

- The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, the latter being the parties to the contract, the *merx* and the price (*pretium*). Generally speaking, these terms, and especially the *essentialia*, must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, and also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral consensus between the parties.

- Whether a term constitutes a material term is determined with reference to its effect on the rights and obligations of the parties. In the present matter, the SCA held that the issue of the subdivision of the ring road erf materially affected the rights and obligations of the parties to the agreement.

- However, there was no express reference to a subdivision in the agreement or the addendum, as the possibility of a subdivision of the ring road was only raised for the first time by Curro in 5 June 2017, some six months after the agreement had been signed.

CONCLUSION

The agreement and the addendum concluded between the parties were null and void *ab initio* due to non-compliance with section 2(1) of the Act.

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