

SUMMARY OF THE JUDGMENT

AGREEMENT WHERE PARTIES SHARE THE SAME MISCONCEPTION?

Bernstein N.O and Another v Goldex 16 (Pty) Ltd and Another (2014/37846) [2015] ZAGPJHC 122 (4 June 2015)

Where a seller and purchaser are in agreement that a certain boathouse would form part of the property purchased in a sectional title development, and makes a note to that effect in the sale agreement, what does a court do when the seller then refuses transfer of the boathouse land as it later transpired, to both parties' surprise, that the boathouse was situated outside the land encompassing the development and was in fact held by separate title? The discussion in this judgment illustrates the inevitable outcome.

The Judgment can be viewed [here](#).

FACTS

In August 2012, the Bernfin Trust (the Trust) and Goldex 16 (Pty) Ltd (Goldex) entered into an agreement in terms of which the Trust would acquire a Certificate of Registered Sectional Title in respect of a particular unit in the Waterford sectional title development on the Vaal River. Goldex was the developer.

The following provisions, relevant to the present matter, were included in the sale agreement:

- The Trust purchased from Goldex a real right of extension in respect of a particular portion of the development for R1,8 million.
- The real right of extension was defined as meaning “that portion described as site RR78 (site1) in extent 1191 square metres of the right to be reserved by the seller upon the opening of the sectional title register to erect and complete a further building or buildings on the common property ...”.
- The land was defined as meaning “subdivision 9 (of 4) of the Farm Luciana 214, District Parys, Free State Province” (the Waterford land).

Pursuant to the agreement, the Trust was obliged to construct a dwelling house on the relevant portion of land within two years. The Trust would be entitled to cause a Certificate of Registered Sectional Title to be registered in respect of its portion once the construction of the house was complete.

During discussions between the parties leading up to the conclusion of the agreement, the Trust advised Goldex that if it were to invest in Waterford, its purchase would have to include a boathouse. The Trust was shown a particular existing boathouse (the boathouse) and Goldex advised the Trust that the boathouse would form part of the proposed sale agreement. An additional clause was inserted in the agreement to give effect thereto.

In the papers before the court, Goldex confirmed that the boathouse formed part of the agreement and that the intention was to give the Trust ownership and occupation of the boathouse from the date of registration. The Trust duly constructed a house on its section of the property and took over the use of the boathouse.

In May 2013 a Certificate of Registered Sectional Title was registered in the name of the Trust in respect of unit 101 of the Waterford Sectional Title scheme. It specifically recorded that it related to the land and building or buildings situated on "Portion 9 (4) of the Farm Luciana 214".

In 2014 a dispute arose between the parties regarding the issue of whether or not the boathouse formed part of the sale agreement. The Trust asserted that it did, and demanded immediate transfer thereof at no cost to the Trust. Goldex disputed that the boathouse had formed part of the sale agreement. It took the position that if the Trust wanted to take over the boathouse, it would have to pay an additional amount to Goldex.

The stalemate led to the Trust instituting proceedings against Goldex for an order directing the latter to take all steps necessary to transfer ownership of the boathouse "situated at or near Stand No. 1, Waterford Estate, forming part of subdivision 9 (of 4) of the Farm Luciana 214" into the name of the Trust.

Subsequent developments however introduced a spanner in the works for the Trust. When Goldex filed its answering affidavit, it transpired for the first time that the boathouse was not situated on the Waterford land at all, but on a separate piece of land and held by Goldex under separate title from that in respect of the Waterford land. The sectional title plan for the Waterford development did not cover the boathouse land.

Goldex therefore opposed the relief sought by the Trust and averred that the boathouse could not be transferred without a transfer of the land to which it has acceded. Goldex averred that it was never the intention of the parties that the Trust would purchase the boathouse land. In addition, so Goldex argued, the boathouse land was zoned agricultural and the Subdivision of Agricultural Land Act 70 of 1970 required consent by the relevant authority for any subdivision of the boathouse land. No such consent had been sought or obtained.

It was clear that until the answering affidavit was filed, the Trust had no idea that the boathouse was not situated on the Waterford land. Despite the changed factual scenario, the Trust persisted in its efforts to obtain an order of specific performance for transfer of ownership of the boathouse against Goldex. The only change in this regard was that it now described the boathouse as being “situated on or near the boathouse land”.

The thrust of the Trust’s case in this regard was that even though the parties were unaware that the boathouse was not situated on the Waterford land, they intended that it would form part of the sale agreement.

HELD:

Transfer of the boathouse land

- The common intention of the parties lies at the heart of every contract.
- To succeed with its claim, the Trust had to establish that the common intention of the parties was that the Trust would acquire the boathouse regardless of whether it was on the Waterford land or not. The Trust had to show that this intention existed at the time that the agreement was entered into.
- The facts showed that both parties intended that the boathouse would form part of the sale agreement. If the boathouse was situated on the Waterford land, this evidence of a common intention may well have been sufficient for the Trust to establish its case. However, the evidence demonstrated that when the sale agreement was entered into, neither of the parties had any idea that the boathouse was not situated on the Waterford land.
- The parties also never considered this possibility and its consequences at the time they entered into the sale agreement.
- Accordingly, the only reasonable inference to draw from the evidence was that both the Trust and Goldex assumed at the time they negotiated the sale agreement that the boathouse was on the Waterford land. This was also supported by the terms of the sale agreement. This assumption was subsequently shown to have been incorrect.
- The only land referred to and dealt with in the sale agreement was the Waterford land, and the Trust’s real right of extension was linked specifically to a particular portion of the Waterford land, viz. site 1. The Certificate of Sectional Title subsequently registered was in respect only of this portion of the Waterford land.

- In the circumstances, there was nothing in the agreement to indicate that the parties foresaw the possibility that the boathouse was on land other than the Waterford land, or that they considered what the respective rights and obligations of the parties would be if the boathouse turned out not to be situated on the Waterford land at all. All indications from the agreement were that the rights and obligations of the parties would be restricted to the Waterford land.
- Accordingly, whatever agreement the parties thought they had reached in respect of the boathouse was flawed by a common mistake. (A common mistake exists in circumstances where parties reach agreement on an issue but they are both under the same fundamental misapprehension about an underlying fact.)
- As a result of this assumption, the parties did not consider what the position would be if, as it subsequently transpired was the case, the boathouse was actually situated on a different property altogether.
- Common mistake vitiates the relevant agreement and it may be treated as invalid. The present case indicates why this is so, as the consequence of the parties' mistaken belief was that there was an absence of consensus on the critical issue for this case, being the parties' respective rights and obligations in respect of the boathouse when in reality it is not situated on the Waterford land.
- As a result, the court rejected the Trust's submissions that the parties intended that the Trust would acquire the boathouse regardless of where it was situated. There was no obligation on Goldex to transfer ownership of the boathouse in circumstances where this would also necessarily entail a transfer of the boathouse land, or a portion of it, to the Trust. In the absence of this obligation, the Trust's claim for specific performance had to fail.

Subdivision of Agricultural Land Act

- In light of the aforementioned finding, it was unnecessary to give detailed consideration to Goldex's alternative defence based on the Subdivision of Agricultural Land Act. However, clearly the Act is a further obstacle to accepting the interpretation of the sale agreement relied on by the Trust. Transfer of the boathouse to the Trust would inevitably require a subdivision of the boathouse land, which is prohibited under the Act without prior ministerial consent, which was not obtained in respect of the boathouse land.

- In the circumstances, the parties could not validly have agreed that Goldex would be under an obligation subsequently to obtain the necessary consent in order to effect a transfer of the boathouse to the Trust. An agreement of this nature was unenforceable, and for this reason too, the Trust's claim for specific performance was ill-founded.

The Trust's application was therefore dismissed with costs.

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