

SUMMARY OF THE JUDGMENT

RECTIFICATION OF SALE CONTRACT WITH NON-VARIATION CLAUSE?

Jacobs v Southey and Others (724/14) [2015] ZANHC 12 (24 April 2015)

Rectification is a remedy for a contracting party whose written agreement does not reflect the common intention of the parties at the time the agreement was concluded. Can the remedy be invoked where an agreement contained a non-variation clause and in circumstances where a purchaser alleges the agreement is void due to non-compliance with a suspensive condition which the seller seeks rectification of? This was the issue requiring adjudication in this judgment.

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

FACTS

Southey sold her property to Jacobs for R750,000. The agreement was subject to a condition that the purchaser obtains a bond in an amount of R750,000 by a certain date. The sale agreement also contained a non-variation clause.

When it transpired that Jacobs could only get a bond for R675,000, the parties orally agreed that the purchase price would be reduced to R650,000, leaving R25,000 for payment by the purchaser (Jacobs) of the transfer and bond registration costs.

Transfer was subsequently effected into Jacobs' name and a bond registered in favour of Standard Bank.

After the transaction was finalised, Jacobs sought an order re-transferring the property back to Southey against payment of the R675,000 to Standard Bank, alleging that the agreement was void for non-compliance with the suspensive condition regarding the bond.

Southey filed a counterclaim, advising the court that due to the oral agreement to reduce the purchase price to R650,000, the signed agreement did not reflect the true intention of the parties and sought an order rectifying the agreement. The oral agreement, entered into subsequent to the written agreement, was not reduced to writing as a result of a common mistake between the parties.

Jacobs raised an exception to Southey's counterclaim (for rectification) and alleged that, legally, rectification cannot be claimed after date of conclusion of an agreement containing

a non-variation clause. In essence, so it was alleged, her claim was one for amendment of an agreement which was not allowed as it would constitute non-compliance with the suspensive condition and contravened the non-variation clause. In any event, due to the non-compliance with the suspensive condition, the agreement had lapsed and was void.

HELD:

- In order to succeed with a claim for rectification, a party must prove:
 - a) an agreement had been concluded and reduced to writing;
 - b) the written document does not reflect the true intention of the parties;
 - c) an intention by both parties to reduce the agreement to writing;
 - d) a mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a *bona fide* common error; and
 - e) the wording of the actual agreement.
- Our courts have held that where both parties to a written agreement were under a misapprehension when they signed the contract, for example that a condition formed part of the written contract whilst it was not included in the written record, a non-variation clause does not exclude a defendant's right to rectify the contract in the event of a mutual error.
- The object of rectification is to have a written contract conform to the common intention of the parties. The result aimed for is to reproduce in writing the real agreement between the parties.
- In the present matter, both parties were aware that the loan approved was for a lesser amount (R675,000) and not R750,000 as initially stipulated. The reduced amount was paid by Jacobs to Southey, who in turn accepted it. Both parties ignored the non-variation clause. Jacobs signed the documentation pertaining to transfer and paid the bond costs. Consequently the property was registered in his name.
- The oral agreement referred to by Southey was consistent with the conduct of both parties and as such the error was capable of rectification.

Jacobs' exception was unsuccessful.

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