THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 223/2013
Reportable

In the matter between

KINGSWOOD GOLF ESTATE (PTY) LTD **APPELLANT**

and

JONATHAN MARK WITTS-HEWINSON **FIRST RESPONDENT**
MICHELLE SUSAN WITTS-HEWINSON **SECOND RESPONDENT**

Neutral citation: *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson & another* (223/13) [2013] ZASCA 187 (29 November 2013)

Coram: Brand, Ponnan, Cachalia, Bosielo and Shongwe JJA

Heard: **12 November 2013**

Delivered: **29 November 2013**

Summary: Contract – whether clause 1. 2. 4 of the addendum to the deed of sale concluded by the parties is so vague that it can be regarded as void for vagueness and thus unenforceable – whether the court below erred in considering the post-contractual newsletter of November 2004 to give content to clause 1. 2. 4 – whether the court below erred in ordering the appellant to construct a clubhouse substantially in compliance with the newsletter within two years of the order.

ORDER

On appeal from: Western Cape High Court, Cape Town (Meer J sitting as court of first instance):

1 The appeal is upheld.

2 The respondents are directed to pay the appellant's costs in the appeal, including the costs of two counsel, jointly and severally.

3 The order of the court *a quo* is set aside and replaced with the following:

3 1 'The application is dismissed.

3 2 The applicants are ordered, jointly and severally, to pay the respondents' costs, including the costs occasioned by the employment of two counsel.'

JUDGMENT

BOSIELO JA (Brand, Ponnan, Cachalia and Shongwe JJA concurring):

[1] This is an appeal against the judgment and order of the Western Cape High Court (Meer J) granted on 17 September 2012 in terms whereof the court granted the following order:

'IT IS ORDERED:

1. It is declared as follows:

1.1 In terms of the deed of sale concluded between the applicants and the first respondent, a copy of which is Annexure "JWH2" to the founding affidavit of the first applicant, the first respondent undertook to construct and/or be provided at the Kingswood Golf Estate a clubhouse, duly furnished in accordance with the upmarket

quality and nature of the proposed development (the clubhouse), within a reasonable period after the date of conclusion of the sale agreement, being 10 March 2004;

1.2 A reasonable period for the construction of the clubhouse has elapsed;

1.3 The first respondent has not constructed the clubhouse contemplated in the sale agreement;

1.4 The first respondent is not entitled in terms of the deed of sale to construct the clubhouse only at such time as it considers it prudent and/or viable to do so.

2. That the first respondent is ordered to cause a clubhouse to be built substantially in accordance with the design of the architect Andrew Horne, referred to in the Kingswood Golf Estate newsletter dated November 2004, incorporating the facilities and amenities identified therein and duly furnished in accordance with the upmarket quality and nature of the Kingswood Golf Estate Development, such clubhouse to be constructed and made available to the members of the Kingswood Golf Estate Homeowners' Association, including the applicants, at the first Respondent's expense, within 2 years of the date of this order.

3. The First Respondent shall pay the costs of the application.'

[2] This appeal against that order is with the leave of this Court.

[3] The background facts to this case are largely common cause. They can be succinctly set out as follows. The parties hereto entered into a written deed of sale on 10 March 2004 in terms whereof the respondents purchased from the appellant the property at Kingwood Golf Estate. Attached to the deed of sale was an addendum which contained some representations made by the appellant. Both the deed of sale and addendum were signed by the appellant on 10 March 2004 and by the respondents on 15 March 2004. The relevant part of the addendum reads as follows:

'Notwithstanding the provisions of the deed of sale to which this addendum is annexed, the parties record and agree that:

'The Seller acknowledges that the Purchaser has entered into this Deed of Sale on the strength of the representations that the seller will, at expense, cause the following to be constructed and/or furnished for the benefit of the proposed development and Homeowners Association, namely;
1.2.4 a clubhouse, duly furnished in accordance with the upmarket quality and nature of the proposed development.'

The clause which is at the heart of the dispute is clause 1. 2. 4.

[4] Significantly, the deed of sale contained so-called non-variation and non-representation clauses which read:

'17.1. The terms of this agreement form the sole contractual relationship between the parties hereto and no variation of this agreement shall affect the terms hereof unless such variation shall have been reduced to writing and signed by all the parties hereto.
20.3. Save as specifically set out in this agreement, the purchaser acknowledges that neither the seller nor any person acting or purporting to act on behalf of the seller has made any representations, and has given any warranties relating thereto this sale is accordingly "voetstoots".'

[5] Though the appellant had built a clubhouse the respondents contended (as will presently emerge) that this was not the one contemplated in clause 1. 2. 4 of the addendum. This caused the first respondent to write a letter to the appellant on 24 August 2010 wherein he recorded his complaint that a reasonable time within which the clubhouse should have been built, had already passed. That period was calculated to be seven years from the date the respondents purchased their property. A flurry of correspondence then ensued between the appellant and respondents.

[6] In a letter dated 8 October 2010, the appellant responded as follows:

'We do however wish to point out to you that the clubhouse which we intend to construct when financial and market conditions make it financially prudent and economically viable to do so, is a project which we envisage outside our contractual obligations towards purchasers liker yourselves. You appear to overlook the fact that we have already provided clubhouse facilities which are adequate for the present needs of the development.

Your repeated contentions that we are in breach of our obligations contractually undertaken is again rejected. Needless to say, your requests that we provide you with confirmations and undertakings regarding the building of a further clubhouse are also rejected.'

[7] Predictably, this letter added fuel to an already toxic and volatile situation. The respondents responded as follows to that letter in para 5 of a letter dated 13 October 2010:

'It ill behoves you to refer to the building of a "further clubhouse". The existing facility, used as a temporary clubhouse, is nothing more than that (ie, a temporary facility).You yourself have never referred to the existing facility as anything else. What I have placed the seller on terms to deliver is not a 'further clubhouse' but indeed the clubhouse contemplated in terms of and specifically referred to in the deed of sale executed by Kingswood Golf Estate (Pty) Limited on 15 March 2004.'

[8] This rather acrimonious exchange led inexorably to this case. The main allegation is that the appellant has failed to construct a clubhouse as agreed in terms of clause 1. 2. 4 of the addendum to the deed of sale.

[9] The appellant opposed this application. The gravamen of his defence is that he has constructed and made available to golfers, members of the public and, importantly, members of the Kingswood Homeowner's Association, including the respondents, clubhouse facilities at the Gatehouse Complex with effect from 15 December 2007. According to

the appellant this clubhouse has been constructed and ‘furnished in accordance with the upmarket quality and nature of the Kingswood Golf Estate development.’ To demonstrate this, he has attached to his papers a copy of the floor-plan of the clubhouse at the Gatehouse Complex and a number of photographs which show the following of features of the clubhouse: a restaurant and a bar, a lounge area, a deck area, gentlemen’s toilet and shower facilities, the ladies’ toilet and shower facilities, a pro-shop, entrance area, Gatehouse Complex Building and parking area. Based on this, he asserts that he has complied with his obligations embodied in clause 1. 2. 4 of the addendum to the deed of sale.

[10] The legal question to be answered in this appeal is very narrow, namely, whether a reasonable person, reading clause 1. 2. 4 of the addendum as it stands, and, without the aid of the post-contractual newsletter of November 2004, will be able to determine what ‘a clubhouse, duly furnished in accordance with the upmarket quality and nature of the proposed development at Kingswood Golf Estate’ is.

[11] It is common cause that clause 1. 2. 4, on its own, does not contain any indications, specifications, benchmarks, characteristics or particulars to enable one to determine what ‘a clubhouse built and furnished in accordance with the upmarket quality and nature of the proposed development’ should look like. Nor is it in dispute that the only document which contains some specifications or indications as to the kind of clubhouse which was envisaged in the addendum is the post-contractual newsletter sent out on behalf of the appellant in November 2004. The question is whether the newsletter is admissible to add content to a clause which is admittedly vague.

[12] The respondents submit that this post-contractual newsletter is relevant and permissible to lend content to or amplify clause 1. 2. 4. On the other hand, the appellant's contention is that the newsletter is inadmissible as it constitutes extrinsic material.

[13] The court below not only admitted the newsletter; it granted judgment in the respondents' favour in accordance with its terms. The appellant's main contention as to why the court erred in doing so, is that the phrase 'a clubhouse, duly furnished in accordance with upmarket quality and nature of the Kingswood Golf Club development' is so vague and uncertain that one cannot tell with any measure of certainty what was envisaged by the parties. Consequently, the appellant urged us to find that clause 1. 2. 4 of the addendum is void for vagueness and thus legally unenforceable.

[14] In the alternative, the appellant submitted that he has complied with clause 1. 2. 4 of the addendum as he has constructed clubhouse facilities at the Gatehouse Complex which are 'in accordance with the upmarket quality and nature of the Kingswood Golf Club development.'

[15] The respondents responded as follows in their replying affidavit:

'The applicant's complaint is not that the Gatehouse complex is not in keeping with the upmarket quality and nature of the development at Kingswood. As Laker is doubtless well aware, the applicant's case is something entirely different, namely, that the first respondent has not delivered on its obligation in respect of the (permanent) clubhouse facility contemplated in terms of the deed of sale.'

[16] The respondents do not dispute the fact that the appellant has built a clubhouse at the Gatehouse Complex and further that the facilities are in keeping with the upmarket quality and nature of the development at Kingswood. Their complaint is that this is not in terms of the deed of sale. Their reasons for saying so is that it is common cause that the present clubhouse was not intended to be permanent and therefore did not constitute compliance with the deed of sale. But this argument seems to rest on a *non sequitur*. The mere fact that everybody envisaged a better clubhouse to be built in future does not mean that the present one failed to satisfy the requirements of the agreement.

[17] This brings me back to the essential question – what were the terms of the agreement? What must the clubhouse look like? The court a quo found the answer in the newsletter of November 2004. But on what basis can that letter be incorporated into the deed of sale?

[18] Counsel for respondents was pressed to concede that in terms of the current law, such a step is not permissible. However, he sought to avoid the effect of the prohibition by submitting that such material and circumstances surrounding the conclusion of the contract can be used to give content to the contract but not necessarily to be incorporated as a term of the contract. He relied on *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) as support for his proposition.

[19] To my mind reliance on *Endumeni* was misplaced. *Endumeni* is no authority for the proposition that in order to interpret a clause in a written contract, reliance can be placed on post-contractual extrinsic material.

According to *Endumeni* the proper approach to the interpretation of documents is to 'consider at the outset, the context and the language together, with neither predominating over the other'.

[20] In addition, the respondents' approach militates against non-variation and non-representation provisions in clauses 17.1 and 20.3 of the addendum to the deed of sale. The two clauses expressly precludes reliance or any amendment, additions or variations to the deed of sale unless reduced to writing and signed by both parties. The post-contractual newsletter of November 2004 was never signed by any of the parties. It therefore does not form part of the deed of the sale.

[21] Finally, the respondent's approach also militates against the parol evidence rule which was thus enunciated in *Lourey v Steedman* 1914 AD 532 at 543:

'The rule is that when a contract has once been reduced to writing no evidence may be given of its terms except the document itself, nor may the contents of such document be contradicted, altered, added or varied by oral evidence'.

See also *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

[22] Over the years, this rule has received universal recognition by our courts. It was recently reaffirmed by this Court in *KPMG v Scurrefin Ltd* 2009 (4) SA 399 (SCA) at para 39 as follows:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B).'

[23] Based on the above, it follows that the court below erred in accepting the newsletter of November 2004 to add content to clause 1. 2. 4 of the addendum to the deed of sale.

[24] However, the respondents had another string to their bow. This was based on the principle *arbitrio boni mori*. Building on this, the respondents submitted in the alternative that clause 1. 2. 4 creates a fettered discretion for the appellant to decide what constitutes 'a clubhouse duly furnished in accordance with the upmarket quality and nature of the proposed Kingswood Golf Club development'. I understand the submission to mean that, notwithstanding the fact that clause 1. 2. 4 of the addendum might be vague, the appellant could still invoke his discretion and use it bona-fide to build a clubhouse which, in his discretion, would qualify as 'a clubhouse, duly furnished in accordance with the upmarket quality and nature of the proposed development at Kingswood Golf Club'.

[25] I find this submission to be startling as the respondents themselves disputed the fact that the appellant had any discretion as set out above. This is the only reason why they rejected the appellant's assertion that he had exercised his discretion when he built the clubhouse at the Gatehouse Complex, the quality whereof the respondents did not challenge. This makes their submission rather disingenuous if not fallacious. Evidently, the reliance by the respondents' counsel on the principle of *arbitrio boni viri* is misplaced. The misconception is further illustrated by the case in which counsel for the respondents sought to find authority, ie *NBS Boland Bank Ltd v One Berg River Drive CC & others* 1999 (4) SA 928

(SCA). What that case turned on was a discretion expressly bestowed upon one of the contracting parties which is absent in this case. In short, the present contract does not bestow any discretion on the appellant.

[26] Even if I were to agree with the respondents that the appellant had a fettered discretion, the respondents would still fail, in my view, as it is common cause that the appellant has, whilst exercising his discretion, built a clubhouse at the Gatehouse Complex. The respondents do not dispute that it is 'duly furnished in accordance with the upmarket quality and nature of the Kingswood Golf Course development'. However, they insist that it is not in terms of clause 1. 2. 4 of the addendum in that it is not built at the place agreed upon. Undoubtedly, this presents a serious dispute of fact on this very critical issue which cannot be resolved on the papers as they stand as I still do not know the kind of a clubhouse which was envisaged in clause 1. 2. 4 of the addendum. Applying the principle in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), one would have had either to resolve this issue on the appellant's version or, at worst, dismiss the application.

[27] In sum, I therefore find that the court below erred, first, in accepting the post-contractual newsletter of November 2004, to amplify or lend content to clause 1. 2. 4 of the addendum, second, in finding that the deed of sale clothed the appellant with some fettered discretion based on the *arbitrio boni mori* principle, and third, in granting an order for specific performance as such an order would be impractical to implement. Undoubtedly, it would be wellnigh impossible for a court to monitor the implementation of such an order. It follows that this appeal must succeed.

[28] In the result the following order is made:

1 The appeal is upheld.

2 The respondents are directed to pay the appellant's costs in the appeal, including the costs of two counsel, jointly and severally.

3 The order of the court *a quo* is set aside and replaced with the following:

3 1 'The application is dismissed.

3 2 The applicants are ordered, jointly and severally, to pay the respondents' costs, including the costs occasioned by the employment of two counsel.'

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L O BOSIELO
JUDGE OF APPEAL

Appearances:

For Appellant	:	LS Kuschke SC (with him HC Schreuder) Instructed by: C & A Friedlander Inc., Cape Town Naudes Attorneys, Bloemfontein
For Respondent	:	J Muller SC Instructed by: Cliff, Dekker, Hofmeyer Inc.; Cape Town Webbers Attorneys, Bloemfontein