

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 497/2014

In the matter between:

BASFOUR 2994 (PTY) LTD

Applicant

and

REGISTRAR OF DEEDS: BLOEMFONTEIN

Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] On 13 March 2014 I granted the following orders in the unopposed Motion Court at the request of the applicant, Basfour 2994 (Pty) Ltd:

- “1. Dit word verklaar word dat subartikel 8(7) gelees met subartikel 8(5) van die Vrystaatse Ordonnansie op Dorpe, 9 van 1969, nie kontrakte wat onderteken is voordat voldoen is aan die vereistes soos gestel in subartikel 8(5)(b)(iv) van die gemelde Ordonnansie, maar waarin voorsiening gemaak is dat die regswerking van sodanige kontrakte opgeskort is tot tyd en wyl daar wel aan sodanige voorwaardes voldoen is, verbied nie en dat sodanige kontrakte dus nie nietig is nie.

2. Die respondent word verbied om te weier om registrasies van oordragte te passeer op sterkte daarvan dat kontrakte soos hierbo vermeld en geïdentifiseer nietig is.”

As I was of the view that the application was relatively urgent and satisfied that a proper case has been made out, I granted relief whilst indicating that my reasons would be made available in due course. These are my reasons.

- [2] The papers were drawn in Afrikaans, but I decided to draft my reasons in English as I have reason to believe that some of the senior employees in the employ of the Department of Rural Development and Land Reform who might have an interest in the matter are not conversant in Afrikaans.
- [3] It is indicated in the founding affidavit deposed to by Roelof Johannes Rossouw, an attorney and conveyancer with 41 years of experience, that although he was aware that affidavits should not deal with submissions of a legal nature, the opportunity was taken to do so due to the specific nature of the application. I found this helpful in this specific instance, especially insofar as the Registrar of Deeds neither opposed the application, nor filed any report to assist me in coming to a decision. I find this somewhat deplorable in view of the detailed written submissions to the respondent by Mr Rossouw in an attempt to avoid this application. These were attached to his affidavit and showed thorough research and understanding of the law. The respondent or her advisors

did not, *ex facie* the documents before me, respond meaningfully and in writing to any of Mr Rossouw's submissions. Mr Pienaar, who appeared on behalf of applicant in the Motion Court, presented detailed heads of arguments at my request on short notice. I appreciate this greatly and I am indebted to him and Mr Rossouw.

THE DISPUTE

- [4] At the heart of the matter is a rejection note made on or about 10 January 2014 by an examiner employed at the local Deeds Registry on transfer documents lodged for registration purposes which reads as follows:

“The Township was proclaimed on 6/9/2013. The erf cannot be sold before date of proclamation. Comply with the Ordinance or lodge court order-
RCR45/2012. Redraft all docs.”

The effect of the rejection note is that the respondent refused to approve the transfer documents in order for the transfer of the particular property to be registered in the Deeds Registry. This rejection of the documents was based on the Registrar of Deeds' viewpoint that the underlying deed of sale was null and void due to the provisions of the Free State Townships Ordinance 9 of 1969.

- [5] The reference to RCR 45/2012 in the rejection note is a reference to item 45 of the Registrars' Conference of 2012,

being RCR 45/2012. I quote from Mr Rossouw's written response to the rejection note prior to lodging this application:

"RCR 45/2012 provides as follows where the purchase date of a first transfer (is) before the proclamation date of the township:

The question posed was:

'In terms of the various Provincial Ordinances land in a township cannot be sold, exchanged, leased or disposed of in any manner before the proclamation date. Can the owner based on the *Huntrex 148 (Pty) Ltd v J A van Jaarsveld*, case 217/2010 sell property before the townships is proclaimed (sic)?'

The Conference resolved:

"The Ordinances must be adhered to alternatively a court order is required."

- [6] Notwithstanding Mr Rossouw's detailed written and oral presentations to the Registrar of Deeds and other officials with reference to most of the authorities referred to herein, whilst pointing out important differences in the wording between the Free State and Transvaal (now Gauteng) Ordinances, the Registrar of Deeds, allegedly being provided with advice by a certain Mr Allan West, was not prepared to accept the legal position as advanced by Mr Rossouw. In response to Mr Rossouw's written response to the rejection note and his follow-up written submissions of 28 January 2014, both documents dealing extensively with the legal

position, he was merely informed as follows and in the process no authority for the viewpoint was quoted:

“Dear Mr Rossouw

Attached memo refers.

Section 8(5) of the Free State Townships Ordinance 9 of 1969 is clear that no sales of land in a township to be established may take place prior to township establishment unless the responsible Member approved or until the services certificate has been issued.

If the date of transaction therefore is before township establishment or the issue of the services certificate, the approval of the responsible Member must be lodged for registration purposes or in the absence thereof, a Court order.

You are welcome to request a report to Court made by a Registrar in terms of section 97 of the Deeds Registries Act when you approach the High Court.

Regards

Carlise Strydom

Registrar of Deeds

Bloemfontein”

[7] The transferor in respect of the particular transaction, Basfour 2994 (Pty) Ltd, a land developer and township establisher, decided to lodge an application to obtain a court order as advised by the Registrar of Deeds and this is the application entertained by myself.

[8] According to the undisputed evidence of Mr Rossouw it has been the practice in the Free State Province over many years until the end of December 2013 to allow township

developers to enter into contracts with proposed purchasers of erven in a township to be established, subject to a suspensive condition that they shall not come into being until such time as the MEC shall have declared the township as an approved township and satisfied himself that the services and amenities, which have to be provided in connection with the relevant land in terms of the conditions subject to which the establishment of the said township, was approved, are available and shall have issued a certificate to that effect.

- [9] Applicant, the owner of immovable property just outside Bloemfontein applied in 2011 for permission to establish a township thereon in accordance with the aforesaid Ordinance. The township established on the property of applicant is known as Bloemfontein (uitbreiding 213), or in English, Bloemfontein (extension 213). Initially and particularly in respect of this land the Registrar of Deeds was prepared to register deeds of transfer in respect of the erven sold subject to the aforesaid suspensive conditions. Approximately ten such erven have been transferred prior to the event on 10 January 2014 when one deed of transfer pertaining to an erf in the township was rejected as mentioned *supra*.

- [10] Prior to the establishment of the township, applicant entered into several contracts with interested purchasers of erven within the township to be established. In all these contracts the sales and thus the rights and obligations of the parties

thereto were made subject to certain suspensive conditions. I requested a precedent of a typical suspensive condition which reads as follows:

“13. Suspensive condition:

13.1 It is recorded that:

13.1.1 section 8(5) of the Townships Ordinance No. 9 of 1969 provides that, after an owner of land has taken steps to establish a township thereon, no person shall enter into any contract whereby any land in such township is sold until the member of the Executive Council of the Province responsible for the administration of the said ordinance (‘the MEC’) shall have declared the township an approved township and the MEC shall have satisfied itself that the services and amenities which have to be provided in connection with such land in terms of the conditions subject to which the establishment of such township was approved, are available and shall have issued a certificate to that effect;

13.1.2 the property is situated on land of which the seller has taken steps to establish a township and regarding which land the seller shall use its best endeavours to, at its cost, and within 24 (twenty-four) months after the signature date provide all the services and amenities which have to be provided in connection with the land in terms of the conditions subject to which the establishment of

the township in which the property is situated was approved;

13.1.3 the agreement is subject to the suspensive condition that it shall not come into being until such time as:

13.1.3.1 the MEC shall have declared the township in which the property is situated as an approved township and;

13.1.3.2 the MEC shall have satisfied himself that the services and amenities which have to be provided in connection with the relevant land in terms of the conditions subject to which the establishment of the said township was proved, are available and shall have issued a certificate to that effect.

13.2 ...”

[11] It is thus clear from the aforesaid suspensive condition that the sale shall not come into being until such time as (i) the MEC shall have declared the township in which the property is situated as an approved township and (ii) the MEC shall have satisfied himself that the services and amenities which have to be provided in connection with the relevant land are available and shall have issued a certificate to that effect.

**THE HISTORY OF EVENTS RELATING TO SECTIONS 8(5)
READ WITH SECTION 8(7) OF THE FREE STATE TOWNSHIPS
ORDINANCE (“THE ORDINANCE”)**

[12] The reference to “administrateur” in the Afrikaans version of the Ordinance is a reference to the administrator of the Free State Province in the pre-constitutional era. The Afrikaans version is outdated and has not been amended in line with the English version. “Responsible member” is defined in section 1 of the Ordinance as the Member of the Executive Council (“MEC”) of the province responsible for the administration of this law (the Ordinance). The amendments to delete references to “administrator” and to substitute same with “responsible member” and the insertion of the definition were done in 1994 and after the demise of the apartheid government.

[13] The English version of sections 8(5) and 8(7) read as follows:

- “8. (5) After an owner of land has taken steps to establish a township thereon, no person shall –
- (a) enter into any contract whereby any land in such township is sold, exchanged, leased or disposed of in any other manner;
 - (b) erect a building on such land,

except with the approval of the responsible member or otherwise than in accordance with the conditions imposed by the responsible member when granting such approval, until –

- (i); or
 - (ii)
 - (iii); or
 - (iv) the responsible member shall have declared the township an approved township and, in the case of such an owner who is not a local authority, the responsible member shall have satisfied himself that the services and amenities which have to be provided in connection with such land in terms of the conditions subject to which the establishment of such township was approved, are available and shall have issued a certificate to that effect.
- (6)
- (7) Any contract entered into in conflict with the provisions of subsection (5) shall be of no force or effect.”

It should immediately be apparent that section 8(5) of the Ordinance refers to a contract whereby land in a township to be established is sold, exchanged, leased or disposed of in

any other manner and that it contains no reference to contracts subject to suspensive conditions. Notwithstanding two successive governments being in power since the **Soja** judgment of the then Appeal Court referred to *infra*, delivered on 27 March 1981 and thus exactly thirty three years ago, the particular Free State Ordinance has not been amended as is the case in the old Transvaal province in particular.

[14] Section 57A(1) of Ordinance 25 of 1965 (T) (the old Transvaal Ordinance) initially read as follows:

“After an owner of land has taken any steps to establish a township thereon, no person shall, subject to the provisions of section 58, enter into any contract for the sale, exchange or disposal in any other manner of an erf in such township or grant an option to purchase or otherwise acquire such erf, until such township has been declared an approved township.”

This Ordinance was amended immediately after the decision of the then Appeal Court in **Soja (Pty) Ltd v Tuckers Land & Development Corporation (Pty) Ltd** 1981 (3) SA 314 (A). The amendment was effected by section 3 of Ordinance 19 of 1982 (T) to provide that “a contract” for purposes of section 57A(1) of Ordinance 25 of 1965 (T), includes any contract subject to any condition including a suspensive condition.

[15] It is important to emphasise that section 8(5) of the Free State Ordinance 9 of 1969 has not been amended

accordingly, notwithstanding Soja and several judgments thereafter, some of which will be referred to herein. The only reasonable conclusion to be drawn from this is that the Free State legislature is satisfied with the state of affairs mentioned *supra* by Mr Rossouw in his undisputed evidence.

THE AUTHORITIES

[16] A contract of sale subject to a condition precedent that has not yet been fulfilled is not a sale. See Christie and Bradfield, **Christie's The Law of Contract in South Africa**, 6th Edition, p 147 and the authorities quoted in footnote 72 stretching as far back as **Quirks Trustees v Assignees of Liddle & Co** (1885) 3 SC 322. The authors also cite the well-known and often quoted judgment of **Corondimas v Badat** 1946 AD 548.

[17] In **Corondimas** Watermeyer CJ expressed himself as follows at 551:

“Such an agreement is clearly subject to a true suspensive condition. It is an agreement to buy and sell if the Minister grants a permit to the parties to enter into it. According to the decision of this Court in the case of *Provident Land Trust v Union Government* (1911, AD 615), when a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled. In other words, the prohibited contract (e.g., a contract of sale), which is declared null and void by sec 5(2) of the Act unless the Minister consents to it, cannot come into existence unless and until that condition is fulfilled. Until that moment, in the case of a sale

subject to a true suspensive condition, such as this is, it is entirely uncertain whether or not a contract of sale will come into existence at some future time. Until that moment there is certainly a legal relationship, contractual may be... existing between the parties, which may ripen into a contract of sale, but, in the particular case in which the coming into existence of a contract of sale is made, by agreement between the parties, to depend upon consent to it having been given by the Minister, that relationship is not one which is forbidden by the Act or declared by it to be of no force and effect.”

Feetham AJA, concurred in by Tindall JA, Greenburgh JA and Schreiner JA, remarked as follows at 558 of **Corondimas**:

“Where an agreement of purchase and sale is entered into subject to a suspensive condition, no contract of sale is there and then established, but there is nevertheless created ‘a very real and definite contractual relationship’ which, on fulfilment of the condition, develops into the relationship of seller and purchaser.”

- [18] In **Tuckers Land and Development Corporation v Strydom** 1984 (1) SA 1 (A) the court found that the sale of erven in a township yet to be proclaimed in terms of Ordinance 25 of 1965 (T) subject to a suspensive condition that the township be duly proclaimed was not hit by the prohibition in s 57A(1) of the Ordinance. The court found that the agreement *in casu* became a valid sale on fulfilment of the suspensive condition and that the amendment of Ordinance 25 of 1965, referred to *supra*, did not apply to

contracts entered into before the amendment on 13 October 1982. The court considered contracts subject to suspensive conditions and stated as follows:

“Of ‘n verkoop onderhewig aan ‘n opskortende voorwaarde nou ook al as geen koopkontrak nie, dan wel as ‘n koopkontrak wat nog net nie *perfecta* is nie, bestempel word, is daar geen rede waarom die regsgevolge wat gemeenregtelik aan so ‘n verkoop geheg is nie nog steeds ten volle toepassing sal vind nie. En wat wetgewing betref, sal vermoedelik in die toekoms duidelik aangedui word, soos nou deur die wysiging van Artikel 57A(2) geskied het, wat met die gebruik van bogenoemde begrippe beoog word. Voorts staan dit natuurlik die wetgewer vry om, sonder inbreukmaking op bestaande regte, statutêre bepalings waarin die begrippe reeds voorkom te wysig indien die huidige stand van die regspraak en hierdie uitspraak meebring dat nie gevolg gegee word aan die wetgewer se werklike maar onvoldoende uitgedrukte bedoeling nie. Dit is dan ook insiggewend dat, na verloop van onderskeidelik vyf en vier jaar na die beslissings in die Wallis- en Nieuwoudt-sake, Artikel 3(e) van Wet 70 van 1970 ongewysig bly voortbestaan.”

[19] The Supreme Court of Appeal followed the judgment in **Corondimas**, *supra*, more recently in **Thorpe and Another NO v BOE Bank and Another** 2006 (3) SA 427 (SCA) and I quote from para [12] p 431:

“... when a contract of purchase and sale is entered into subject to a suspensive condition no contract of sale is then and there established and the binding contractual relationship which does arise is not a contravention of a statute prohibiting the

conclusion of a contract of purchase and sale and only matures into such a contract on fulfilment of the condition.”

(emphasis added)

[20] Rampai J considered several of the authorities mentioned herein in **Huntrex 145 (Pty) Ltd v Van Jaarsveld and Another**, Case No 217/2010, Free State, a judgment delivered on 1 July 2010. He, based on these authorities, rejected a submission that a contract subject to a suspensive condition as *in casu* was invalid and held it to be good in law. In that case the deed of sale was also subject to a similar suspensive condition as *in casu* which condition had eventually been fulfilled. This judgment led to the discussion and eventual decision reflected in RCR45/2012.

[21] In 1981, probably in reaction to the **Soja** judgment, the legislature amended the definition of “sale” in the Subdivision of Land Act 70 of 1970 to include a sale subject to a suspensive condition. The legislature also extended the definition of “alienate” in the Alienation of Land Act 68 of 1981 to read as follows:

“‘Alienate’ in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and...”

Prior to the amendment of Act 70 of 1970 our courts accepted the validity of sales subject to a suspensive condition that ministerial consent be given for the subdivision of the land which was the subject of the sale. See

Sentraalwes Personeel Ondernemings (Edms) Bpk v Nieuwoudt 1979 (2) SA 537 (C) at 543 - 545 and authorities quoted such as **Corondimas** and **Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd** 1978 (2) SA 872 (A).

[22] In **Geue and Another v Van der Lith and Another** 2004 (3) SA 333 (SCA) the court considered whether a contract subject to a suspensive condition was a contract for the sale of property as set out in Act 70 of 1970. With reference to relevant authority some of which I have referred to above, the court found as follows at 340H:

“In all these cases it was held that contracts subject to these suspensive conditions were not hit by the legislative enactments concerned. The reason that formed the basis of these decisions was essentially that the agreement prohibited by both enactments was a sale whereas, in accordance with the decision of this Court in **Corondimas**, an agreement of sale subject to a suspensive condition cannot, pending fulfilment of the condition, be regarded as a ‘sale’. It only becomes a sale when a condition is fulfilled, in which event there is no contravention of the statutory provisions involved.”

The SCA found that the agreement in **Geue** was the very kind that the legislature wished to include in the provision of section 3(e)(i) of Act 70 of 1970 when it specifically extended the definition of sale in 1981, that it was settled principle that a contract which contravenes a statutory provision was not *ipso iuro* void, unless of course it contained an express statement to that effect, but in line with several decisions of

the High Court it was apparent that the legislature's intention was to the effect that agreements prohibited by the section should be visited with invalidity and therefore it found that the agreement was null and void.

- [23] Through the decades and notwithstanding the amendment of the Transvaal Ordinance 25 of 1965, the Subdivision of Land Act 70 of 1970 and the introduction of the Alienation of Land Act 68 of 1981 in 1981, as well as the authorities referred to above, the Free State Provincial legislature has refrained from amending the Free State Townships Ordinance 9 of 1969 to be in line with any of the aforesaid legislation.

CONCLUSION

- [24] I endorse the judgment of Rampai J in **Huntrex 148**, *supra*. Insofar as respondent and her advisors are of the view that the judgment in **Huntrex 148** does not have to be followed, I trust that this judgment is clear. The Free State Townships Ordinance 9 of 1969 must be interpreted as the Appeal Court did in respect of the Transvaal Ordinance 25 of 1965 and the Subdivision of Land Act 70 of 1970 prior to their amendments. The resolution adopted at the Registrar's conference of 2012, RCR 45/2012, is based on an erroneous understanding of the legal position, is wrong and cannot be endorsed. It has clearly been shown that the Free State and Transvaal Ordinances differ comprehensively, that the Transvaal Ordinance was amended since the judgment of **Soja**, but that the Free State Provincial legislature failed to do likewise. Therefore the legal position pertaining to the

Free State Townships Ordinance 9 of 1969 is exactly as set out in **Soja** and **Strydom** *supra* in which judgments it was found that a contract pertaining to the sale of land in a township to be established, subject to a suspensive condition similar to the one *in casu*, is valid. Therefore the respondent may not refuse to register deeds of transfer based on underlying deeds of sale subject to suspensive conditions as *in casu*, once these conditions have been fulfilled.

[25] For these reasons I granted the relief to applicant as set out in paragraph [1] *supra*.

J. P. DAFFUE, J

On behalf of applicant: Adv T Pienaar
 Instructed by:
 Rossouws Attorneys
 BLOEMFONTEIN