SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 10 December 2020

STATUS Immediate

K2012076290 (Pty) Ltd v Oude Chardonnay Rusoord (Pty) Ltd and Another (Case no 642/2019) [2020] ZASCA 164 (10 December 2020)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (the SCA) today upheld the appeal by the appellant and set aside the order of the Western Cape Division of the High Court (the high court).

The appeal was against an order and judgment of the Western Cape Division of the High Court, Cape Town (high court) (Vos AJ), discharging a rule nisi granted by Saldanha J on 24 July 2018 and dismissed the appellant's claim with costs. The rule nisi called upon Oude Chardonnay Rusoord (Pty) Ltd (OCR), the first respondent, prior to its voluntary liquidation, to show cause why, inter alia, it should not be compelled to do all things reasonably required to cause a first continuing mortgage bond for an amount of R2.4 million to be registered over Erf 39937 Paarl, in favour of the appellant, as security for the due and proper fulfilment of its present and future obligations towards the appellant.

The high court discharged the rule nisi on the ground that the mortgage bond was incapable of registration as the property, over which the first mortgage bond was sought to be registered, was not sufficiently described in the relevant deed of sale and that the parties were not in agreement concerning the identity of the property sought to be mortgaged.

During or about 2012 the appellant, a property developer, purchased Erf 4788, Paarl (the property) from the liquidator of Aslo Holdings (Pty) Ltd (in liquidation) which, prior to its liquidation, had partially developed the property in terms of the approved plans (original plans). The original plans entailed the proposed development consisting of the restoration of the original house and construction of a further 42 flats. The appellant had, upon enquiry, been advised verbally by the local authority that a developer's contribution or Bulk Infrastructure Contribution Levies were not payable in respect of the development initially proposed. In 2016 the appellant sold the property to OCR for R6 million excluding VAT. The sale agreement was subject to suspensive conditions.

The property was registered into the name of OCR on 30 January 2018 and OCR paid the sum of R4 840 000 towards the purchase price. OCR thereafter became concerned that it would not be able to pay the balance of the purchase price amounting to R2 million by the due date of 30 April 2018. It requested that the agreement be further amended by extending, inter alia, the due date for payment of the balance, or the furnishing of a guarantee for the payment, from 30 April 2018 to 30 June 2018. This was achieved by way of second addendum which the parties signed on 28 January 2018. At this stage OCR had not paid the local authority the development contribution of R1 012 060, which was payable upon the approval of the plans to subdivide and develop the property.

Thereafter on 17 May 2018 and out of the blue, Johan Victor Attorneys on behalf of OCR, wrote to the appellant's conveyancers informing them that the appellant was in breach of the agreement and further that OCR would not cause a mortgage bond to be registered over that portion of Erf 4788 or furnish any undertaking for the due payment of the balance of the purchase price whilst the appellant was in breach of the agreement. OCR's attorneys alleged that the appellant had fraudulently represented that the development contribution was not payable to the local authority. This allegation formed the basis of OCR's defence of fraudulent representation and its claim for the reduction of a balance of a purchase price.

The issue before the SCA was whether the property over which the mortgage bond was to be registered was sufficiently described in the sale agreement and whether the court a quo was entitled to find that the appellant misrepresented to OCR that no development contribution levies were payable to the local authority or had in fact been paid.

The SCA held that the court a quo misdirected itself by deciding and dismissing the matter on the basis of points that had not been raised by any of the parties. Moreover, those points were entirely without merit. The SCA stated that the inadequacy of the description of the property in the mortgage agreement was never advanced by OCR as a basis for its refusal to have a mortgage bond passed over the property. OCR's opposition to the relief sought by the appellant was based on the assertion that the appellant had allegedly misrepresented the fact that no Bulk Infrastructure Contribution Levies were payable to the local council in respect of the proposed development of Erf 4788 Paarl.

The SCA held further that the question whether the property to be mortgaged was sufficiently described depended on the interpretation of clause 3.3.2.5 of the agreement as amended by clause 2.4 of the second addendum providing for a mortgage bond and in the light of the correspondence between the parties. That OCR knew full well what the nature and extent of the property to be developed was, was apparent from the Site Development Plan it submitted to the local authority for approval. The SCA found thereafter that the high court failed to take into account that on OCR's own version it knew before any of the two addendums were concluded that the local authority required payment of the contribution levy.

The SCA concluded that the immovable property to be mortgaged was, without more, clearly identifiable. The parties understood it to be so. The agreement between the parties clearly indicated an intention to mortgage the identified property. As between the parties the agreement was valid and enforceable.