REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: 2018/15109

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

23.06.2019
DATE

SIGNATURE

In the matter between:

CHETTY: CAMERAN Applicant

and

ERF 311, SOUTHCREST CC Respondent

JUDGMENT

KAIRINOS AJ:

1. In this matter the Applicant seeks an order interdicting the Respondent from alienating the property situate at Erf 1015, South Crest Extension 7, Labor Village, Eeufees St, South Crest ("the property"), an order compelling the Respondent to pay

all outstanding rates and taxes for the property, an order compelling the Respondent to comply with the written agreement to purchase the property entered into between the Applicant and the Respondent on 4 July 2012 ("the agreement"), an order directing the Respondent to have the property registered in the Applicant's name and costs of the application on the scale as between attorney and client. I interpose to mention that the agreement was in fact signed by the purchaser only on 11 July 2012 and was therefore only concluded on 11 July 2012.

2. At the hearing the Applicant's counsel indicated that the Applicant no longer persisted with the interdictory relief. This concession was wisely made as no case had been made out in the founding affidavit for interdictory relief.

3. The remaining relief sought is essentially specific performance of the agreement in terms of which the Respondent sold to the Applicant the property for a purchase consideration of R430 000.00 ("the purchase price"). It is common cause that purchase price was payable in instalments of R17 084 per month until the purchase price was paid in full. The said instalments were payable to a Mr James Motswa, the Respondent's attorney and the appointed conveyancer for the transaction.

4. The Applicant contends that he has paid the full purchase price and is entitled to registration of transfer into his name. It is common cause that the Applicant has paid at least R300 000 of the purchase price to Mr Motswa. The Respondent however disputes that the balance of the purchase price was paid and contends that due to non-payment of the balance of the purchase price and the outstanding rates and

taxes, it has properly cancelled the agreement and the Applicant is therefore not entitled to registration of transfer of the property into his name.

5. It appears that things went awry as far as the transaction is concerned when Mr Motwsa misappropriated the funds in his trust account and ceased practising towards the end of January 2016. However, it appears to me that insofar as it is common cause that Mr Motswa was the Respondent's agent for the purposes *inter alia* receiving payments from various purchasers, his absconding with the trust monies and the consideration paid to him by purchasers, in fact left the Respondent "high and dry" and not the purchasers. This is something that the Applicant, as a purchaser, and the Respondent, as seller, do not seem to have appreciated and new attorney for the Respondent (appointed by the Law Society to administer the practice of Mr Motswa) in fact persuaded and assisted purchasers, including the Applicant, to lodge claims with the Attorneys' Fidelity Fund for return of the payments made by them. Why the Respondent did not lodge claims in its own name for payment of the purchase considerations paid to and misappropriated by its agent, Mr Motswa, was not explained to me. This would have been the proper route to take.

6. Be that as it may, it is common cause that the Applicant, assisted by the Respondent's new attorneys (being the Respondent's current attorneys of record), lodged a claim with the Fidelity Fund during or about March 2016. It is important to note that the Applicant, for the purposes of such claim, deposed to an affidavit on 2 March 2016 in which he confirmed that he had paid R385 000 into the trust account of Mr Motswa and not the amount of R430 000, being the purchase price. This failure to claim the full purchase price of R430 000 from the Fidelity Fund was

never explained by the Applicant. The Fidelity Fund then wrote on 14 November 2017 and indicated that the supporting documents and proof of payments submitted by the Applicant only evidenced payments by the Applicant in the amount of R300 000 being paid into the trust account of Mr Motswa. It appears that the Applicant then accepted the payment of R300 000 from the Fidelity Fund and the Fund paid such amount into the Respondent's attorneys' trust account. However, what is not clear is whether the Applicant, by accepting R300 000 from the Fidelity Fund, was also accepting that he had only paid that particular amount to the Respondent's agent, being its erstwhile attorney, Mr Motswa or whether he reserved the right to contend that he had in fact paid the full purchase price to Mr Motswa.

7. The aforesaid occurred despite the fact that the Applicant attached to his founding affidavit and relied upon a statement from Mr Motswa, dated 17 September 2015, indicating that a total amount of R377 500 had been received from the Applicant by Mr Motswa and that the outstanding balance of the purchase price was only R63 069. The Applicant then relies on a proof of payment of the amount of R63 069 into the trust account of Mr Motswa on 5 October 2015 by a company known as India Steel (Pty) Ltd ("India Steel"), which payment reference referred to Erf 1015. The Applicant explained that India Steel was making payment of the balance of the purchase price of R63 069 on his behalf since it owed him monies for "services rendered". In the circumstances the Applicant contends that he did in fact make payment of the full purchase price. However, it appears that India Steel (Pty) Ltd also lodged a claim with the Fidelity Fund for repayment of the amount of R63 069. Why India Steel (Pty) Ltd would also lodge a claim for repayment of the R63 069 was also not explained, other than the Applicant in its replying affidavit disputed

that the payment was for a motor vehicle (as alleged by the Respondent) and stating that it was in fact in respect of services rendered by the Applicant to India Steel.

8. On a conspectus of all the facts relating to whether the Applicant has in fact made payment of the full purchase price, it appears, as stated by Marcellus to Horatio in Shakespeare's Hamlet: "Something is rotten in the state of Denmark". There are many questions that remain unanswered in the affidavits concerning the payment and whether the Applicant has made full payment or not. There appears to be a dispute of fact in this regard which is not resoluble on the papers. The importance of this dispute of fact will become apparent later in this judgment.

9. It was quickly apparent from the papers and the heads of argument by both parties that neither party had appreciated the fact that since this was an instalment sale agreement in respect of immovable property, the provisions of Chapter 2 of the Alienation of Land Act, 68 of 1981 ("the ALA") were applicable. Both counsel were rather nonplussed when I raised the ALA and whether its provisions had been complied with. They both readily conceded that they had not considered the ALA at all. It appears that both legal teams fixated on the issue of whether the Applicant had paid the full purchase price and whether the Respondent was entitled to have cancelled the agreement due to alleged non-payment of the balance of the purchase price and did not consider the provisions of the ALA and in particular the provisions of section 20 and 26 of the ALA.

10. The importance of the ALA became immediately apparent in relation to whether the Respondent was indeed entitled to have cancelled the agreement, as it alleged. In

terms of section 20 of the ALA, the Respondent was obliged to have recorded the contract by the registrar of deeds concerned in the prescribed manner within 90 days from the date of the contract, if the land was registrable, or from when the land became registrable. It is common cause that this was not done or at the very least there was no allegation by the Respondent that it had in fact complied with the provisions of section 20 of the ALA or, if it had, that it had notified the Applicant of such recordal of the contract. Section 26 then provides that no person shall by virtue of a deed of alienation relating to an erf, receive any consideration until such erf is registrable and in the case the deed of alienation is a contract required to be recorded in terms of section 20 (as *in casu*), until such recordal has been effected. This position was recently confirmed by the Constitutional Court in *Amardien and Others v Registrar of Deeds and Others 2019 (3) SA 341 (CC)*, where that court held as follows at paragraphs 45 and 46:

"*[45] The fifth respondent was obliged to record the instalment sale agreements with the Registrar of Deeds within 90 days of concluding the agreements with the applicants, but failed to do so timeously. The fifth respondent eventually recorded them more than 10 years after the conclusion of these agreements and the occupation of the houses by the applicants during that time. It is common cause that the instalment sale agreements were recorded on 1 April 2014. The s 129 NCA notices were issued on 25 April 2014. These notices contained the following information: that the applicants were in default and were advised of their options under the NCA. The fifth respondent also threatened cancellation. At the end of that notice, it was merely stated that these agreements had been recorded. This was the very first communication to the applicants of the recording of the instalment sale agreements by the fifth respondent.*

[46] As the fifth respondent was statutorily barred from accepting payment, the applicants could not have been in breach of the agreements at the time of receipt of the s 129 NCA notice, as they had not been aware of the recordal of the instalment sale agreements before that date. The fifth respondent should have alerted the purchasers to this fact before issuing the s 129 NCA notices and claiming cancellation of the agreements. In the proper course of action, the fifth respondent should have advised the applicants of the recordal, therefore signalling that the debt

would then be due and payable, and given them a reasonable opportunity to pay, before moving to enforce the agreement and subsequently cancel the agreement."

11. Not having recorded or notified the Applicant of any recordal of the contract in terms of section 20 of the ALA, the Respondent was not entitled to have received any consideration pursuant to the agreement and was furthermore precluded from placing the Applicant in *mora* and cancelling the agreement. In any event, it also does not appear that the Respondent made proper demand in terms of the requirements of section 19 of the ALA and was therefore in terms of section 19(1)(b) of the ALA, in any event precluded from cancelling the agreement. This problem appears to have escaped the attention of the Respondent's attorney dealing with the matter when the agreement was purportedly cancelled.

12. A further issue raised by the Respondent was that the Applicant had refused to make payment of the arrear rates and taxes levied on the property and which the Respondent contended was payable by the Applicant and failing which the Respondent would not pass registration of transfer, even if the balance of the purchase price (if any) was paid by the Applicant. This then raises the issue of whether the Applicant was liable at all for the payment of rates and taxes, particularly during the period of delay occasioned by the misappropriation of the purchase price (or portion thereof) by Mr Motswa (although as stated above this should not have caused any delay whatsoever in respect of the transaction). A perusal of the agreement reveals no basis whatsoever for the contention that the Applicant is liable for the rates and taxes on the property prior to registration of transfer into his name. In fact, an analysis of the agreement reveals quite the contrary. Clause 1.4 specifically provides that "the seller warrants that the purchase

price is sufficient to cover the outstanding bond/s, Agent's commission, *rates and taxes*, electricity and water and other imposts levied by the local authority" (my emphasis). Furthermore, clause 4 also provides that "on registration of transfer of the property, the risk of ownership thereof shall pass to the purchaser, from which date the purchaser shall receive benefits from *and be responsible for all rates and taxes and other imposts levied on the property*" (my emphasis). These clauses make it clear that the Applicant would only be liable for rates and taxes upon registration of transfer and the Respondent did not indicate in its answering affidavit nor during the counsel's address at the hearing, on what basis it contended that the Applicant was liable for rates and taxes before it was entitled to claim registration of transfer of the property into his name. It seems that the Respondent is now aggrieved that it is foisted with substantial amounts of rates and taxes (which amounts were not revealed in the papers) which it has had to pay or is liable to pay and that the delay and concomitant increase in payable rates and taxes in the interim, were not factored into the calculation of the purchase price. However as stated above, the Respondent is largely the author of its own misfortune in this regard, since it did not record the agreement and notify the Applicant of such as required by section 20 of the ALA; its own erstwhile agent misappropriated that portion of the purchase price paid and the Respondent should not have allowed the fact of such misappropriation and the claiming from the Fidelity Fund to have delayed the registration of transfer, when claimed by the Applicant.

13. It is therefore clear that the Respondent was not entitled to have cancelled the agreement (insofar as it purported to do so) and that any cancellation was invalid and ineffectual.

14. That being so, and since the Applicant has on the Respondent's own version, paid at least 50% of the purchase price, it would seem that the Applicant is entitled to claim registration of transfer in terms of the provisions of section 27(1) of the ALA which provides:

"*Rights of purchaser who has partially paid the purchase price of land*

(1) Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation."

15. Section 27(1) however provides that the purchaser may demand registration of transfer if it has paid not less than 50 per cent of the purchase price (if the land is registrable which neither party has *in casu* contended it is not) on condition that simultaneously with the registration of transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation. The Respondent however contended that the Applicant had not in its affidavit brought itself within the jurisdictional requirements of section 27 of the ALA. When it was put to counsel that the Applicant had proved (even on the Respondent's version) that it has paid at least 50% of the purchase price and that it had demanded registration of transfer, counsel for the Respondent contended that there had been no demand for registration

of transfer prior to the launching of the application and secondly, section 27 of the ALA requires that in the demand the Applicant must tender the simultaneously with the registration of transfer that there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation as provided for in section 27 of the ALA.

16. In regard to the first point, many courts have held that a notice of motion (or summons) constitutes demand and that there is no need for an extra judicial notice of demand (unless the contract or Act specifically requires such extra judicial notice). In this regard and after a useful survey of the relevant case law, it was held as follows in *Win Twice Properties (Pty) Ltd v Binos 2004 (4) SA 436 (W)* at 441C-444B:

"It is common cause too that the respondents failed to timeously make payment of rental in other amounts due in respect of May 2003. In consequence of this, the applicant instituted the present application without having given notice prior to the application of a cancellation of the lease agreement consequent upon the breach in respect of May 2003. In the founding affidavit, the applicant relies upon the various notices and contends that the lease agreement was previously cancelled, alternatively, it is recorded in para 45 that the lease is cancelled in terms of the founding affidavit. Mr Kairinos, on behalf of the respondents, forcefully argued, in a well constructed argument, that the applicant is not entitled to rely upon a cancellation first communicated in the application since, in terms of clause 17.1.5, notice of cancellation was required to be given prior to the institution of the application. Mr Kairinos relies upon the decision in Shrosbree NO v Simon 1999 (2) SA 488 (SE) in which Liebenberg J said at 492D - H:

'It was argued by Mr Schubart on behalf of applicant that the notice of cancellation may be given by service of summons or, as in this case, notice of motion. For this proposition he relied on Christie The Law of Contract 3rd ed at 597, the decisions in Middelburgse Stadsraad v Trans-Natal Steenkoolkorporasie Bpk 1987 (2) SA 244 (T) at 249A - G and Du Plessis v Government of the Republic of Namibia 1995 (1) SA 603 (Nm) at 605C - F and Kerr The Principles of the Law of Contract 4th ed at 565 - 6. It is, however, clear from these authorities that they are not concerned with the situation where the agreement provides that cancellation must be effected by giving the purchaser notice of such cancellation as in the present

agreement. The parties are entitled by their agreement to prescribe a particular procedure to be followed by a party who decides to invoke the contractual remedy of cancellation (Swart v Vosloo 1965 (1) SA 100 (A) at 112F). In my view, the parties have done that in clause 10(f)(2). Because the parties have included the requirement of notice in their agreement it must be established what the intention of the parties was when they did so. When the words "cancel this agreement by giving the purchaser notice of such cancellation" are given their ordinary meaning they do not, in my view, convey that notice may be given impliedly by conduct or service of a notice of motion. In my view, the word "notice" in its present context must be understood to mean an express, extra-judicial announcement made by the applicant to the respondent that he is cancelling the agreement. Because the contract does not require the notice to be in writing, it may also be given orally.'

The learned Judge proceeded by saying that, even if he were wrong in his conclusion, the notice could not, under the circumstances of that matter, be given by means of service of the notice of motion, then, in any event, the application in that matter did not constitute A notice since there was no indication of a cancellation in the application itself. The learned Judge in Shrosbree's case recognised the well-established principle that, at common law, notice of cancellation may be communicated in a pleading or an application. On the facts of that case, the learned Judge was of the view, however, that the agreement required there to be an extra-judicial notification preceding the application. The clause in the present case is not dissimilar from that in Shrosbree and, if I were to follow that judgment, a similar result would follow in this matter. For the reasons that follow, however, I am in respectful disagreement with the learned Judge and am unable to find that clause 17.1.5 alters the common-law position entitling the innocent party to give notice of cancellation in the application itself. In Noble v Laubscher 1905 TS 125 at 126, Innes CJ said:

'Under clause 9 it is provided that if the lessee should fail to pay the monthly rent, or should break the contract in any other way, then the lessor should immediately have the right to declare the lease cancelled, and should be entitled to remove the goods at his pleasure. I think if the lessor wished to take advantage of clause 9, it was a condition precedent to his doing so that he should intimate to the lessee his contention that the latter had broken the contract, and that he therefore demanded his goods back. . . . The issue of summons was a formal intimation to the lessee of the lessor's contention that he had broken the contract, that it was cancelled, and that the lessor insisted upon his right to reclaim the goods.'

In Alpha Properties (Pty) Ltd v Export Import Union (Pty) Ltd 1946 WLD 518, the Court was concerned with the interpretation of a provision in a lease agreement that on the expiry of the period the lease was to 'continue and remain in full force and effect as a monthly tenancy terminable by either party giving unto the other one month's notice in writing'. Rathouse AJ, as he then was, said at 519 - 20:

The first of these points is that there has been no cancellation of the lease on the part of the applicant. It is contended that there was no cancellation prior to the launching of the petition, and that the petition itself did not amount to an intimation to the respondent that the lease was cancelled. I agree with the argument that there was on the facts of this case no cancellation prior to the institution of proceedings. I think it unnecessary to refer to the facts or to give my reasons for coming to this conclusion. . . . I think however, the point fails because I am satisfied that the launching of the petition was a formal notice to the respondent that the lease was cancelled. The petition, after referring to the breaches, goes on to state that the respondent's conduct in committing the breaches entitles the applicant, in terms of clause 14 of the lease (ie the cancellation clause), and apart from the fact of the lawful notice given to the respondent, to the ejectment of the respondent. Basing myself on the above and other allegations in the petition, I can see no answer to the applicant's contention that the institution of proceedings can only mean that the applicant has cancelled the lease. But in any event there is abundant authority on the point. In the case of Noble v Laubscher (1905 TS 125), the provisions of a hire-purchase agreement entitled the lessor to cancel the lease and reclaim the goods in the event of the lessee failing to pay the monthly instalments stipulated for. It was held by the Full Court that the issue of summons was a formal intimation to the lessee of the lessor's contention that the contract had been broken, that it was cancelled and that the lessor insisted upon his right to reclaim the goods. This decision has since been frequently followed . . . . I might also refer to the case of Jowell v Behr (1940 WLD 144). In that case it was held that the issue of summons claiming damages for breach of contract was, in itself, a binding announcement of an election to repudiate the contract on the ground of a breach going to the root thereof, and that there was no need for a specific allegation in the declaration that the contract had been broken. . . .

It was further contended that there was a difference between the cases where proceedings were instituted by way of action on the one hand and by petition on the other. I fail to see why there should be any difference. But if anything it would be easier to infer notice of cancellation from a petition than from a summons simply because the former document contains much more information than the latter.'

In Thelma Court Flats (Pty) Ltd v McSwigin 1954 (3) SA 457 (C), Watermeyer AJ, as he then was, said at 462C - D:

'There is ample authority for the proposition that the issue and service of a summons in cases of this nature is a formal intimation to the lessee of the lessor's contention that the contract has been broken and of the fact that he has elected to treat the lease as cancelled. . . .'

In Swart v Vosloo 1965 (1) SA 100 (A), Holmes JA considered the following provision in a lease agreement 'the lessor shall be entitled . . . to declare this lease cancelled and terminated forthwith' (at 105H). The learned Judge of Appeal said at 105H:

'Now "declare" means to make known, which necessarily connotes a person or persons to whom something is made known. And in the context of the lease the obvious and only such person is the lessee. Now you cannot make something known to him unless it reaches his mind. Hence this provision does not vary the basic rule discussed above: it is in conformity with it. This answers the contention that the lease expressly empowers the lessor to cancel without notice to the lessee.'

See, further, Truter v Smith 1971 (1) SA 453 (E). In my view, this line of authority demonstrates that what is required in a notification of cancellation is an intimation of the aggrieved party's election to cancel. There is nothing in any of those decisions to suggest that such intimation must be an extra-judicial one; on the contrary, the various cases referred to recognise as valid an intimation of a cancellation in an application or summons. In Shrosbree's case, Liebenberg J does not appear to depart from this but finds that the parties, in agreeing to 'written notice' agreed that such notice must be an extra-judicial notice. Mr Kairinos also argues that clause 20 of the lease agreement distinguishes between Court process, notices and other communications and this supports an interpretation that 'written notice' in clause 17.1.5 of the lease agreement means something other than the actual Court process. In my view, there is no basis for this distinction and no warrant for finding that the parties to the lease agreement intended by clause 17.1.5 that there be an extra-judicial notice and that a notice of cancellation in an application/summons would not suffice. In my view, this would lead to a highly artificial result. Since there is no necessity for notice to be given to the respondents to remedy any default, there is little purpose to be served in notice of cancellation being given other than in a Court process. Obviously, in the event of the respondents not opposing an application for ejectment, it would be arguable that the applicant ought not to be granted its costs since an application would have been unnecessary. In this matter, that issue is academic since the application is indeed opposed."

17. Whilst it is so that the *Win Twice v Binos* matter and the cases referred to therein dealt with notices of cancellation, in my view the principles are equally applicable to a demand for specific performance. There appears to be no reason why a party should be able to claim cancellation without a prior notice of cancellation but not be able to claim specific performance without a prior demand where the notice of motion makes such demand. As stated by Subel AJ in the *Win Twice v Binos* matter, the failure to make demand prior to issuing summons or instituting an application may have a bearing on costs in instances where the respondent contends it would not have opposed had demand been made prior to litigation and the application was therefore unnecessary. However, similarly, that is academic in this matter since the

Respondent opposed the application hammer and tongs and did not contend that the application was unnecessary. Indeed, it has opposed the grant of an order for registration of transfer.

18. The Respondent relied for the submission that there must be an extra-judicial demand and that such demand must incorporate a tender to allow simultaneous registration of transfer, on the decision in *Botha and Another v Rich and Others NO 2014 (4) SA 124 (CC)*. This decision is undoubtedly a seminal one in the sphere of the instalment sale agreements and the application of section 27 of the ALA and will be referred to later in this judgment when dealing with the intention of the legislature in relation to instalment sale agreements for land. However, I cannot find anywhere in the decision support for the submission of the Respondent that the demand for registration of transfer must include a tender for simultaneous registration of a first mortgage bond for the outstanding balance of the purchase price. Indeed, the Constitutional Court held the opposite as appears from paragraph 34 of the judgment where the Court held as follows:

> *"A plain reading of s 27(1) reveals that it seeks to protect the rights of a purchaser who has paid not less than half of the purchase price. The section states that a purchaser 'shall . . . be entitled to demand . . . transfer' (emphasis added). Plainly, this section requires the presence of the following jurisdictional facts before the purchaser can enjoy the protection under it. First, the purchaser must have undertaken to pay the purchase price in specified instalments. Second, the purchaser must have paid to the seller in such instalments not less than 50 % of the purchase price. Third, the property in question must be registrable. Section 27(1) itself does not state any other requirement."* (my emphasis)

19. There is no mention of a tender to register the first mortgage bond being necessary to establish the jurisdictional facts for reliance on section 27(1) of the ALA. This is so since the seller has such a right in any event arising from section 27(1) and there

appears to be no logical reason that the legislature would require that such a tender be made in the purchaser's demand for registration of transfer. The provisions of section 27(1) of the ALA would apply, whether the purchaser made such tender or not. In my view section 27(1) of the ALA merely makes the registration of transfer conditional upon simultaneous registration of transfer for the balance of the purchase price, in the event that the purchaser demands registration of transfer. Nothing more and nothing less.

20. The Applicant has on the facts alleged brought itself within the four corners of the requirements of section 27(1) of the ALA to seek registration of transfer, albeit that it has done so inadvertently and without apparently even realising that it had the rights contained in section 27(1). This is no doubt because it approached the Court on the basis that it has paid the full purchase price and is therefore entitled to registration of transfer. However, even if it has not proved that it has paid the full purchase price and there is a factual dispute in this regard, the Applicant has nevertheless established that it has paid at least 50% of the purchase price and is therefore entitled to registration of transfer of the property in terms of section 27(1) of the ALA, on condition that there is simultaneous registration of a first mortgage bond in favour of the Respondent for the outstanding purchase price (if any), subject to what is set out below.

21. However, that is not the end of the matter. The question arose during the hearing whether the agreement was required to comply with the provisions of section 6 of the ALA and whether a failure to do so rendered the agreement void *ab initio* and

whether the Court was in such circumstances able to grant the relief sought by the Applicant of registration of transfer into his name.

22. Section 2 of the ALA provides as follows:

"Formalities in respect of alienation of land

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

(2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A."

23. Section 6(1) of the ALA in turn provides as follows:

"(1) A contract shall contain-

(a) the names of the purchaser and the seller and their residential or business addresses in the Republic;

(b) the description and extent of the land which is the subject of the contract;

(c) if the seller is not the owner of the land, the name and address of that owner;

(d) if the land is encumbered by a mortgage bond, the name and address of the person, or his representative or, in the case of a participation bond, the name and address of the nominee company, or its representative, in favour of whom the mortgage bond over the land is registered at the time the contract is concluded;

(e) the amount of the purchase price;

(f) the annual rate at which interest, if any, is to be paid on the balance of the purchase price;

(g) the amount of each instalment payable under the contract in reduction or settlement of the purchase price and interest (if any);

(h) the due date or the method of determining the due date of each instalment;

(i) if the land is sold by an intermediary, the name and address of every other intermediary who alienated the land prior to the date the contract is concluded;

(j) the amount or amounts of any transfer duty (if any) payable in terms of the Transfer Duty Act, 1949 (Act 40 of 1949), in respect of the land, and the name of the person or persons by whom such duty is to be paid;

(k) the dates on which and the conditions on which the purchaser shall be entitled to take possession and occupation of the land;

(l) the place where the payments shall be made;

(m) the date on which the risk, profit and loss of the land shall pass to the purchaser;

(n) a statement of the obligation (if any) of the purchaser to insure the subject matter of the contract;

(o) a statement-

(i) of any amount which in terms of any law is payable in respect of the land as endowment, betterment or enhancement levy, a development contribution or any similar imposition and an indication of the person to and the person by whom it is so payable; and

(ii) that no amount contemplated in subparagraph (i) is payable in respect of the land, if such is the case;

(p) an indication of the party who shall be liable for the payment of the costs of-

(i) the drafting of the contract;

(ii) the recording thereof in terms of section 20; and

(iii) the transfer of the land;

(q) if the land is not the subject of a separate title deed at the time the contract is concluded, the latest date at which the land shall be registrable in the name of the purchaser;

(r) if the seller is the owner of the land, an undertaking by him that the land shall not be encumbered or further encumbered by a mortgage bond on or before the date on which the contract is recorded in terms of section 20;

(s) the period within which the purchaser is obliged or may be compelled to take transfer of the land against simultaneous payment of all amounts owed by him in terms of the contract;

(t) a reference to-

(i) the right of a purchaser under section 11 to perform the obligations of the owner or an intermediary;

(ii) the right of the purchaser under section 17 to accelerate payments in terms of the contract and to claim transfer of the land against simultaneous payment of all the amounts payable by him to the seller in terms of the contract;

(iii) the right of the purchaser under section 20 to have the contract recorded;

(iv) the rights and remedies of the purchaser under sections 13 (2), 16 (3), 23 and 27;

(v) the obligation of the purchaser-

(aa) in terms of section 9 to give the information referred to in that section to any mortgagee;

(bb) in terms of section 15 (2) to accept a mortgage bond arranged in terms of that section on his behalf;

(cc) in terms of section 21 (1) to give the information referred to in that section to the owner of the land;

(vi) the limitation in terms of section 19 of the right of the seller to take action by reason of any breach of contract on the part of the purchaser."

24. A perusal and analysis of the agreement reveals that the agreement does not comply with at least the provisions of sections 6(1)(j), (k), (l), (p)(i) and (ii), (q), (r), (s) and (t) of the ALA. I then queried with the parties' counsel whether such non-compliance rendered the agreement void *ab initio* or voidable and if so, at which parties' instance. The matter stood down from 10 June 2019 to 13 June 2019 to enable the parties' respective legal representatives to consider this issue and make further submissions in this regard. If the agreement is found to be void *ab initio*, then the Applicant would not be entitled to claim specific performance and the parties would be left with restitutionary claims in terms of the provisions of section 28 of the ALA. If the agreement is found to be voidable, but only at the instance of the Applicant, then the Applicant would be entitled to claim registration of transfer on the basis as set out above.

25. Unfortunately, neither of the parties, nor indeed I, could find any reported case dealing specifically with whether the non-compliance with the requirements of section 6(1) of the ALA renders the agreement void *ab initio* or even voidable and at which party's instance. There is an abundance of case law confirming that non-compliance with the requirements of section 2(1) of the ALA renders the agreement void *ab initio*. This is so because section 2(1) of the ALA specifically provides that no alienation of land shall (subject to the provisions of section 28 i.e. where both

parties had performed in full and registration of transfer had taken place) be of any force or effect unless contained in a deed of alienation signed by the parties or by their agents acting on their written authority. This wealth of case law has interpreted section 2(1) as requiring the deed of alienation to include a description of the parties, the signature of the parties (or their duly authorised agents), a description of the land, a description of the purchase price any terms which the parties had agreed on as being material terms of their agreement. In this regard, I refer to the discussion in *Johnson v Leal 1980 (3) SA 927 (A)* at 937G-941A. Whilst *Johnson v Leal* dealt with the provisions of section 1(1) of Act 71 of 1969 (being the predecessor to the ALA), the principles enunciated nevertheless are equally applicable to the provisions and requirements of section 2(1) of the ALA. This has been confirmed in *inter alia Mulder v Van Eyk* 1984 (4) SA 204 (E) at 205H – 206B; *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) at 658D-E and *Rockbreakers and Parts (Pty) Ltd v Rolag Property Trading (Pty) Ltd 2010 (2) SA 400 (SCA)* at 403E-404F.

26. In order to determine whether an alienation of land is void *ab initio* in terms of section 2(1) of the ALA, I must determine firstly whether the terms required to be included in the written deed of alienation were intended by the legislature to be material terms of any such agreement and if so, whether the legislature intended that the non-compliance with the requirements of section 6(1) rendered the agreement void *ab initio*.

27. At first blush, it would appear that the requirements of section 6(1) of the ALA are indeed peremptory since the section states that "*A contract shall contain*". The use

of the word "shall" is often indicative of a peremptory requirement by the legislature although it is not necessarily conclusive (see the discussion in

28. In my view the Act should however be considered in its totality in order to determine what the legislature intended. I am fortified in this view by the decision in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA)* at 146 where it was held that when interpreting legislation which requires compliance with some step or formality when agreements are entered into, are:

"the language of the Act, its nature and scope, the mischief it seeks to prevent, and the consequences of visiting invalidity upon the transaction."

29. The genesis and purpose of the ALA and particularly Chapter 2 thereof and the mischief it seeks to prevent was explained as follows by the Constitutional Court in *Botha v Rich supra* at paragraphs 30 - 34, as follows:

"[30] The 1970s in South Africa were marked by the collapse of large township-development companies that resulted in devastating financial losses for many individuals. Then, as now, matters concerning alienation of land or immovable property on instalments were regulated by legislation. When the repealed Sale of Land on Instalments Act 45 (1971 Act) was enacted, land sold on instalments was not registrable in the name of the purchaser at the date of sale. This resulted in purchasers not obtaining a right to enforce transfer of the land into their names in circumstances where an unreasonably long time may have passed after the signing of the contract of sale. The 1971 Act was enacted to protect the interests, not only of the purchaser but also of the seller. However, the 1971 Act was problematic.

[31] A Commission of Inquiry was appointed to investigate and make recommendations regarding the efficacy of the 1971 Act and the succeeding Development Schemes Bill of 1977. Its recommendations were incorporated into the Alienation of Land Bill (Bill) and would inform the current Act. The purpose of the Bill was to afford purchasers of land sufficient protection. In order to carry the protection to its logical conclusion, purchasers became entitled to cancel the contract if, for whatever reason, the seller was unable to give transfer.

[32] A significant protection introduced by the Bill found its way into s 20 of the Act, in terms of which the deed of alienation defined as a contract was to be recorded in the deeds office. This gave purchasers the preferent claim over any mortgagee whose mortgage bond was registered against the title of the seller if the latter were insolvent or if the land were sold in execution. Moreover, s 27 of the Bill (later retained as part of the Act) afforded purchasers of land more protection when certain jurisdictional facts were met. The registration of transfer, in terms of s 27(1) of the Act, is conditional upon the registration of a first mortgage bond over the property to secure the balance of the purchase price, plus interest, in favour of the seller. I deal with this in more detail shortly when I interpret s 27(1) to determine whether Ms Botha is entitled to transfer of the property."

30. The genesis and purpose of the ALA was therefore to protect purchasers. This view was reinforced in the recent judgment of the Constitutional Court in *Amardien v Registrar of Deeds* supra, where the Court held at paragraph 41 as follows in this regard:

"[41] In Wary Holdings, this court held that statutes must be interpreted with due regard to their purpose and within their context. The purpose of the ALA is to regulate the alienation of land in certain circumstances, and also to fulfil the need for protection of vulnerable purchasers and imbuing good faith and fairness into contractual relationships relating to land."

31. It seems that in determining whether the legislature intended to visit nullity on a contract which does not comply with the provisions of section 6(1) of the ALA, it is not necessary for me to determine whether the legislature intended the requirements of section 6 to be peremptory nor whether such requirements are material terms of the agreement. Rather it is merely necessary to determine whether applying the provisions of section 24(1) of the ALA, the legislature intended non-compliance the requirements of section 24(1) of the ALA to render the contract voidable at the instance of only the purchaser and then only in certain circumstances. I should add however, that on a consideration of the various subsections of section 6(1) of the ALA, it is difficult to see how certain of those provisions could ever have been

considered to constitute material terms of an agreement. In this regard, I refer for example to the provisions of section 6(1)(l) of the ALA dealing with the place for payment of the instalments. Whilst this may be useful for the purchaser to know where it must make payment, it could hardly ever be considered a material term of any such agreement. However, as I have stated above, in light of the view I take of section 24(1) of the ALA, it is not necessary to determine this issue.

32. It is also clear that when interpreting section 24(1) of the ALA I must do so through the prism of the primary purpose of the ALA, namely the protection of purchasers. Section 24(1) of the ALA provides as follows:

"*Relief that court may grant in respect of contracts*

(1) Notwithstanding the provisions of any law to the contrary but subject to any other powers that any court may have, if a contract does not substantially comply with any one of the provisions of section 5 or 6, a court within whose area of jurisdiction the land referred to in the contract is situated, is, if appropriate proceedings are instituted by the purchaser within a period of two years from the date upon which the contract was concluded, competent-

(a) to reduce the rate of interest payable by the purchaser in terms of the contract to such rate as it may deem just and equitable in the circumstances;

(b) to grant an order for rectification of the contract;

(c) to declare the contract to be void ab initio; or

(d) to grant such alternative relief as it may deem fit."

33. Section 24(1) of the ALA seems *prima facie* to allow a purchaser only to approach a court within two years from the date that the contract was concluded and *inter alia*

to apply to declare the contract to be void *ab initio* if the provisions of sections 5 or 6 of the ALA were not complied with. However, once analysed, section 24(1) itself raises further questions. Does the reference to "declare the contract to be void *ab initio*" mean that the contract is void *ab initio* or that it is voidable at the instance of the purchaser? If it is indeed void *ab initio*, why is only the purchaser entitled to make such application and only if it does so within two years from the date of conclusion of the contract? What is the status of the contract if the purchaser elects not to do so (as *in casu*)?

34. However, once the purpose of the ALA is applied to these questions and the need for protection of the purchaser is taken into account, it seems to me that in respect of non-compliance with the provisions of sections 5 and 6 of the ALA, the legislature intended to afford only to the purchaser the remedy of escaping the contract by having it declared void *ab initio*, and then only if the purchaser institutes such appropriate proceedings within two years from the date of conclusion of the contract. If the purchaser does not do so, then the contract stands. It does not lie in the mouth of a seller to apply at any time to declare the contract void *ab initio* due to non-compliance with the requirements of section 6 of the ALA. If that had been the intention of the legislature it would not have referred only to the purchaser in the context of a section which deals with the relief that a court may grant in respect of contracts that do not comply with sections 5 and 6 of the ALA. My interpretation of the provisions of section 24(1) read with section 6(1) of the ALA is confirmed in *The Practitioner's Guide to the Alienation of Land Act* ADJ Van Rensburg and SH Treisman (1982) at pages 143 – 144, in which the learned authors hold the same

views that the contract may only be declared void *ab initio* at the instance of the purchaser.

35. A useful analogy is the matter of *Section Three Dolphin Coast Medical Centre CC and Another v Gowar Investments (Pty) Ltd 2006 (2) SA 15 (D)* dealing with non-compliance with the requirements of section 2(2A) of the ALA and whether such non-compliance renders the agreement void *ab initio*. In that matter Olsen AJ held that it did not and that it rather rendered the contract voidable at the instance of the purchaser. He did so in essence on the basis that the legislature did not intend to visit an agreement with nullity in respect of a protection that was afforded only to the purchaser (being the protection under section 29A of the ALA) and he therefore found that non-compliance with section 2(2A) rendered the contract voidable at the instance of the purchaser. The decision was confirmed on appeal in *Gowar Investments (Pty) Ltd v Section 3, Dolphin Coast Medical Centre CC and Another 2007 (3) SA 100 (SCA)*. I find a similar intention by the legislature in relation to non-compliance with sections 5 and 6 of the ALA.

36. There are indeed very few decision dealing specifically with section 6 of the ALA. In fact, there are only two. Neither are instructive in regard to the issue with which I must grapple. However, there is a dictum in *Mulder v Van Eyk 1984 (4) SA 204 (SE)*, which is supportive of the interpretation I have placed on section 6 read with section 24(1) of the ALA. At page 206I – 207A of *Mulder v Van Eyk* supra, Smalberger J (as he then was) states as follows:

"The agreement does not comply with this provision. The respondent seeks to rely upon such non-compliance to have the agreement declared null and void ab initio in

terms of the competence granted a Court in s 24 (1) (c) of the Act. It is apparent, however, from the provisions of s 24 (1) of the Act that the relief provided for therein is only available to a purchaser if there has not been substantial compliance with any of the provisions of s 6 of the Act. There can be no bar to the purchaser waiving such rights. The seller (respondent) is given no rights under s 24 (1) and can therefore not avail himself of the provisions of s 24 (1) (c) of the Act because of non-compliance with the provisions of s 6 (1) (k) thereof. In the present matter the respondent is limited to attacking the agreement on the basis that it does not comply with the provisions of s 2 (1) of the Act."

37. There is no indication that the Applicant has not complied with the provisions of section 2(1) of the ALA. It is true that *Mulder v Van Eyk* was not followed in this division in the matter of *Just Names Properties 11 CC v Fourie 2007 (3) SA 1 (W)* where the late Judge Jajbhay declined to follow *Mulder v Van Eyk*. However, that case is distinguishable on its facts and did not follow *Mulder v Van Eyk* in regard to whether the non-inclusion of a term relating to occupational rental was a material term that should be included in the agreement and whether the failure to do so visited nullity on the agreement in terms of section 2(1) of the ALA. The learned judge had no quibble with the aforesaid extract from *Mulder v Van Eyk*.

38. In the circumstances, I find that a contract for the alienation of land in which the purchase price is payable in instalments, which does not comply with the requirements of section 6(1) of the ALA, is voidable at the instance only of the purchaser and on condition that appropriate proceedings are instituted within two years from the date of conclusion of the agreement and then only if the contract does not substantially comply with the requirements of sections 5 or 6 of the ALA.

39. In the present matter, the agreement does not substantially comply with the requirements of section 6(1) of the ALA as fully set out above. Nonetheless, the agreement was concluded on 11 July 2012 and no appropriate proceedings to have it

declared void *ab initio* due to non-compliance with the requirements of section 6 of the ALA were instituted by the Applicant within two years after such date. In the circumstances the contract must stand and is enforceable.

40. The Applicant is therefore entitled in terms of section 27(1) of the ALA to registration of transfer of the property into his name. The section is however silent as to who bears the burden of paying for such registration of a first mortgage bond over the property. In my view and since registration of the first mortgage bond is a condition to obtaining such transfer and since in terms of clause 8 of the agreement, the parties have agreed that transfer shall be effected by the Respondent's conveyancer and the Applicant has agreed to pay all costs incidental to registration of transfer, including transfer duty, VAT, and stamp duty, which is payable on demand, it seems to me that the cost of registration of such first mortgage bond is an incidental cost to transfer and must be borne by the Applicant (if indeed it seeks registration of transfer pursuant to the provisions of section 27(1) and not on the basis that it has paid the full purchase price – this issue is dependent on whether the Applicant has proved or will prove in the hearing of oral evidence referred to below, that it has paid the full purchase price).

41. That being so, the Applicant is entitled to the relief sought in prayers 2, 3 and 4 of its notice of motion. However, mindful of the right of the Respondent to simultaneously have a first mortgage bond registered over the property for the outstanding balance of the purchase price (if any) and mindful of the dispute concerning whether the full purchase price has been paid and if not, what amount remains outstanding and in respect of which the Respondent is entitled to register a first mortgage bond and that

the requirements of the registration of a first mortgage bond in terms of section 27(1) of the ALA are dependent on whether the Applicant has indeed paid the full purchase price or whether it has paid at least 50% of the purchase price, I must modify the order I propose granting in order to cater for the various possibilities and findings by the court hearing the referral to oral evidence on the aforesaid issue of whether the Applicant has paid the full purchase price and if not, what remains outstanding. I propose to do so.

42. In relation to the costs order I propose to make, it seems to me that both parties approached this matter without due consideration of the provisions of the ALA and much time was wasted in the respective affidavits addressing issues which were not really issues at all. Nevertheless, it seems to me that the Applicant has been substantially successful in the application and particularly in respect of avoiding the purported cancellation of the agreement and obtaining an order for registration of transfer. Therefore the Respondent must pay the Applicant's costs of the application, save for the costs of the hearing of oral evidence, which costs shall be reserved for the court hearing the oral evidence and should be dependent on which party is correct in its contentions regarding the purchase price and the balance thereof (if any). If the Applicant was indeed correct in contending that it had paid the full purchase price, then it should obtain an order for the costs of the hearing of oral evidence and *vice versa*. However, I shall leave the costs incurred in the hearing of oral evidence in the discretion of the court hearing such oral evidence.

43. Lastly, I am compelled to mention that the cause of the dispute occasioned in this matter lies largely at the door of legal practitioners and estate agents who do not

appear to have acquainted themselves with the provisions of the very legislation that governs their respective clients' legal relationships. A cursory study of the provisions of the ALA could have avoided much heartache and concomitant and unnecessary costs occasioned by legal proceedings. Legal practitioners and also estate agents are warned to have due regard to the facts of the matters they are dealing with and to read and study the legislation that governs their professions and the transactions involved therein. In this matter, for example, the estate agent and the attorneys should have ensured that the provisions of section 6 of the ALA were complied with when the agreement was prepared and presented to the lay clients for signature and ensured the recording of the agreement with the relevant registrar of deeds. At a later stage when the new attorneys became involved, they too should have realised that section 20 required recordal of the agreement with the relevant registrar of deeds and that failing such, no cancellation of the agreement by the seller could take place. Much time was wasted in these papers fixating on whether the Respondent was entitled to have cancelled the agreement due to non-payment when ultimately this was a non-issue having regard to the provisions of the ALA as set out in this judgment.

44. In the circumstances, the following order is made:

44.1 It is declared that the agreement of sale between the parties dated 11 July 2012 ("the agreement") is valid and enforceable.

44.2 The Respondent is ordered to take pay all outstanding rates and taxes for the property situate at Erf 1015, South Crest Extension 7, Labor Village,

Eeufees Road, South Crest ("the property") up to the date of registration of transfer of the property into the name of the Applicant.

44.3 It is declared that the Applicant is entitled to registration of transfer of the property into his name.

44.4 In the event that the court hearing the referral to oral evidence referred to below, determines in its judgment that the Applicant has paid the purchase price of R430 000.00 in full, then and in that event the Respondent is ordered to take all steps necessary to effect registration of transfer into the name of the Applicant forthwith after the judgment in the referral to oral evidence (including any appeals).

44.5 In the event that the court hearing the referral to oral evidence referred to below, determines in its judgment that there is an outstanding balance due to the Respondent in respect of the purchase price of the agreement and the amount of such outstanding balance, then and in that event the Respondent is ordered to take all steps necessary to effect registration of transfer into the name of the Applicant against the simultaneous registration of a first mortgage bond in favour of the Respondent for the amount of outstanding balance of the purchase price as determined by the Court in the hearing of the referral to oral evidence.

44.6 The Applicant shall make payment of all costs incidental to the registration of transfer, including transfer duty, VAT and stamp duty and if necessary,

the cost of the registration of the first mortgage bond in favour of the Respondent in the event that it is found that there is an outstanding balance of the purchase price.

44.7 In respect of the issue of whether the Applicant has paid the full purchase price in terms of the agreement or only a portion thereof and the outstanding balance of the purchase price due to the Respondent (if any) and whether the registration of transfer must take place in terms of the provisions of section 27(1) of the Alienation of Land Act, 68 of 1981, the following issues are referred to the hearing of oral evidence on the following terms:

44.7.1 The matter is referred for the hearing of oral evidence, at a time to be arranged with the Registrar, on the question whether or not the Applicant has paid the full purchase price in respect of the agreement and if not, the amount of the outstanding balance of the purchase price;

44.7.2 The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 44.7.3 hereof;

44.7.3 Save in the case of persons who deposed to affidavits in support of the respective parties, neither party shall be entitled to call any witness unless:

44.7.3.1 it has served on the other party at least 15 court days before the date appointed for the hearing a statement wherein the evidence to be given in chief by such person is set out; or

44.7.3.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

44.7.4 Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

44.7.5 The fact that a party has served a statement in terms of paragraph 44.7.3.1 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

44.7.6 Within 20 court days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in paragraph 44.7.1 above, which are or have at any time been in the possession or under the control of such party.

44.7.7 Such discovery shall be made in accordance with Rule of Court 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

44.8 The costs of the application to date shall be borne by the Respondent.

44.9 The costs of the hearing of oral evidence and costs incidental thereto are reserved for determination by the court hearing the referral to oral evidence.

G Kairinos
Acting Judge of the High Court: Gauteng Local Division

For the Applicant:

Adv I Mureriwa

Instructed by:

SE Kanyoka Attorneys

For the Respondent:

Adv L Van der Merwe

Instructed by:

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Dates of Hearing: 13 June 2019