

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

**CASE NO: 2957/09
DATE HEARD: 18/03/10
DATE DELIVERED: 4 MAY 2010**

In the matter between:

**THE NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

APPLICANT

And

AFRICAN CATHOLIC CHURCH

1ST RESPONDENT

**APOSTOLIC EVANGELIST FREE CHURCH
IN ZION OF SOUTH AFRICA**

2ND RESPONDENT

APRIT MINISTRIES

3RD RESPONDENT

**ETHIOPIAN CATHOLIC CHURCH OF
SOUTH AFRICA**

4TH RESPONDENT

**THE NEW AFRICAN HOLY APOSTOLIC
FAITH MISSION CHURCH OF SOUTH AFRICA**

5TH RESPONDENT

CHURCH OF ZION OF SOUTH AFRICA

6TH RESPONDENT

**THE ACTS OF THE APOSTIOLIC CHURCH
IN SOUTH AFRICA**

7TH RESPONDENT

NOMZOLISI BRIDGING COLLEGE

8TH RESPONDENT

KHANYA PRESCHOOL

9TH RESPONDENT

THOMAS WILLIAM SMITH-SHEDDEN

10TH RESPONDENT

RONEL SMITH-SHEDDEN

11TH RESPONDENT

ANDRE FREDERIC VAN NIEKERK

12TH RESPONDENT

JUDGMENT

DAMBUZA J.,

1. The applicant seeks an order setting aside as invalid, agreements of sale between itself as the seller and certain entities and/or individuals as purchasers. It maintains that the agreements are invalid for want of compliance with provisions of section 2 (1) of the Alienation of Land Act, Act 61 of 1981 (The Act or the Alienation of Land Act). Only three of the 12 respondents oppose the application.

2. The first to seventh respondents are religious or faith entities. They are, **The African Catholic Church**, the **Apostolic Evangelist Free Church in Zion of South Africa**, the **Aprit Ministries**, the **Ethiopian Catholic Church of South Africa**, the **New African Holy Apostolic Faith Mission Church of South Africa** and the **New Orphanage Widows Apostolic Church in South Africa**. Their legal status is not set out in the papers. They are all located within Uitenhage.

3. The eighth and ninth respondents are Educational entities, also located within Uitenhage. They are, **Nomzolisi Bridging College** and **Khanya Preschool**. Their legal status is also not set out in the papers.

4. The ninth to twelfth respondents who oppose the application are, **Thomas William Smith-Shedden**, **Ronel Smith-Shedden** and **Andre Frederick van Niekerk**. They live in Uitenhage and jointly bought, from the applicant, the property that is the subject matter of their agreement of sale.

5. The agreements which are the subject-matter of this application relate to sale of various immovable properties by the applicant to the respondents through the applicant's Uitenhage Office. Some of the agreements were concluded in 1999, others in 2001 and the one in which respondents nine to twelve are purchasers, was concluded in 2004. According to the applicant, this application is a consequence of a discovery, during 2005, by the applicant of corrupt and/or irregular land sales at its Uitenhage Housing Unit by one of the applicant's erstwhile employees, **Stan Fitchett**. According to the founding affidavit deposed to by Dawn Carol McCarthy who is employed by the applicant as a Director in the Land Planning And Management Department, the irregularities in the sale agreements include sale of the land below market value, failure "to follow (municipal) procedures", failure to keep proper records of payments and failure to verify the legal status of the purchasers where such purchasers are not natural persons.
6. In the main however, as I have stated, the applicant contends that each these agreements is invalid for want of compliance with the formalities prescribed by Alienation of Land Act. More particularly, in each agreements, the number and amount of instalments by which the balance of the purchase price is to be paid is not set out in the agreements. There is also no stipulation as to when such instalments are due and payable, when the purchaser shall take occupation or possession of the property and when the purchaser shall be liable for rates and taxes on the property.

7. Clause 3 of each agreement sets out the purchase price and certain “preliminary expenses” payable in respect of the property concerned and then goes on to provide that:

“(a) At least 10% of the said purchase price shall be paid in cash on the date of sale:

- (b) The balance of the purchase price plus interest calculated at the standard rate of interest as determined in terms of Section 214 (1) of Ordinance 20 of 1974 from date of sale to date of payment together with expenses referred to above shall be paid to the Municipality in cash within a period of _____ months calculated from the date of issue of instructions for transfer by the Town Clerk’s office to the attorneys concerned provided that the said attorneys shall not under any circumstances lodge transfer documents with the Registrar of Deeds for registration nor shall the MUNICIPALITY’S Town clerk complete any power of attorney to pass transfer on behalf of the MUNICIPALITY unless the balance of the purchase price plus interest and expenses as aforesaid has been paid in cash or the PURCHASER has lodged with the MUNICIPALITY a guarantee acceptable to the MUNICIPALITY’S Town Treasurer in terms of which the full amounts due to the MUNICIPALITY will be paid against registration of transfer or on expiry of the said period of _____ whichever shall be sooner.”

8. Clause 5 of the agreement provides that:

“ Possession of the property, subject to existing tenancy, if any, shall be given and taken on _____, from which date the property shall be at the sole risk of the PURCHASER; provided that should the purchase price not have been secured by then, the SELLER’S insurable interest shall be protected as follows:

(a) The PURCHASER shall be compelled to insure all improvements on the property comprehensively at his expense and to cede policy of insurance to the SELLER as collateral security.”

9. Clause 6 provides that:

“The PURCHASER shall be responsible for rates and taxes on the property as from _____, from which date he shall further be liable for all outstanding road and curbing charges, if any, levied, or that may be levied against the property.

Interim rates and/or liquidated damages, if any, for the year, shall be borne in the same proportions, save that the SELLER shall be entitled to any rebate recoverable thereon and save that the purchaser shall be liable for all rates on improvements effected on the property after the signature hereof”

10 As is evident from the above extracts, although the agreement provides that the method of payment of the purchase price shall be by payment of a 10% deposit followed by instalments, the (blank) spaces relating to the number of months within which the balance of the purchase price shall be paid or a bank guarantee is to be provided, the date on which possession of the property shall pass to the purchaser, when risk shall pass to the purchaser, and the date on which the purchaser shall become liable for payment of rates and taxes in respect of the property were never completed.

11 It was submitted on behalf of the applicant that because these blank spaces relate to material and/or essential terms of the agreements, the agreements are inchoate and unenforceable in law.

12 Respondents nine to twelve contend that their agreement is valid in law as it stipulates a purchase price payable in respect of the property and the deposit payable in respect thereof. They contend that the defects relating to the date of possession of the property by the purchaser and the date from which the purchaser will be liable for payment of rates and taxes does not render the agreement invalid as the law provides that in instances such as these (where no date is stipulated), possession of the property by the purchaser and liability for payment of rates and taxes in respect thereof follows ownership of the property.

13. Section 2 (1) of the Alienation of Land Act provides that:

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

14 It has been said that the general approach to be adopted in deciding whether the contents of a written contract are sufficiently full and certain to comply with Section 2(1) is the following:

“The section being directed against uncertainty, disputes and possible malpractices, meticulous accuracy in the description of the subject matter of the sale, the parties, the price and the method of payment is not required. *Certum est quod certum redid potest*. This does not mean that the court is to make out a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty. In endeavouring to ascertain the intention of the parties no recourse can be had to evidence from the parties as to their negotiations and *consensus*, but evidence of identification or of an explanatory nature is admissible. The point is that, to fulfil the intention of the legislature, the written

contract must place the essentials of the contract of sale, and all the material matters with which it deals, out of range of the clash of will of the parties.”¹ (emphasis supplied)

15 The essentials of a written contract of sale of land are; the subject-matter of the sale, the parties thereto and the price of the land sold. As the price is an essential term of any contract of sale, the method of payment of the price is also an essential or, at least, a material term thereof. So a written contract that leaves the method of payment vague or leaves it over for further negotiation is void and cannot be rectified.² The method of payment may be made sufficiently certain by implied terms, provided those terms can be implied from the document itself. Evidence to prove a contemporaneous oral agreement or a subsequent oral variation relating to the method of payment is inadmissible.³

16 Counsel for both the applicant and the ninth to twelfth respondents referred to the case of *Johnston v Leal* 1980 (3) SA 927 (AD) in which the Supreme Court of Appeal considered the validity of an agreement of sale of land where blank spaces in the written agreement of sale had not been completed. **Corbett JA**, as he then was, held, at 939H-940F, that:

“Where, as in this case, and as is often the case, a contract for the sale of land is reduced to writing by the completion of a printed form supplied either by one of the parties to the contract or the agent who negotiated the contract, it sometimes happens that the blanks are left in the completed form. Where these blanks relate to material terms of the contract, or rather to what would be material terms if completed and incorporated in the contract, then problems

¹ Christie RH ; The Law of Contract; 5th edition, at 118-119; (The wording is that Holmes JA in **Clements v Simpson** 1971 (3) SA 1 (A) 7-8).

² Christie; *Supra* at 122; **Patel v Adam** 1977 (2) SA 653 A; **Engelbrecht v Nel** 1991 (2) SA 549 (W) 552A-D

³ **Neethling v Klopper** 1967 (4) SA 459 (A) 465B; **Sidali v Mpongolwana** 1990 (4) SA 212 (C)

may arise as to whether the contract is complete or merely inchoate and also as to whether the contract complies with s 1 (1) of the Act. *Ex facie* the document and disregarding any extrinsic evidence, there are, it seems, at least three possible constructions to be placed on the fact that a material clause in the printed form of contract (such as clause 11 in annexure “A”) has not been completed, in the sense that blank spaces left for insertion of essential particulars in the clause have not been filled in. They are: (i) that the parties did not intend the clause to form part of their contract (this situation is, of course, not likely to arise in the case of a clause providing for one of the *essentialia* of the contract); (ii) that they intended the clause to form part of their contract, but that at the time when the contract was signed the essential particulars had not yet been settled and that these particulars were consequently left open for future agreement between the parties; and (iii) that the parties had intended the clause to form part of their contract and had agreed upon the particulars in question, but for some reason they had omitted to fill the particulars into the blank spaces. If factually (i) be the position, then the clause must be regarded as *pro non scripto*, and provided that the contract is otherwise complete and contains the *essentialia* of a contract of sale the contract is valid and enforceable and complies with s 1 (1). *Blundell v Blom* 1950 92) SA 627 (W) at 632-3; *Miller and Miller v Dickson* 1971 (3) SA 581 (A) at 589E-H. If the facts be as in (ii) above, then, in accordance with the principles discussed above, the writing itself does not constitute a valid, enforceable contract, and, probably does not comply with the provisions of s1(1). *King v Potgieter (supra)* is an apt illustration of this. Moreover a subsequent oral agreement settling these particulars will not assist; only a further agreement in writing will suffice. Further if (iii) above reflects the factual situation, then subject to a possible claim to rectification in certain circumstances (see however, in this regard, *Magwaza v Heenan (supra)*), the contract would appear to be invalid in that it has failed to record in writing in whole what had been agreed to between the parties and was intended by them to be incorporated in the writing.

It is thus evidence that where a contract of this nature contains blanks relating to material terms-or what would be material terms if incorporated into a contract-it is vital to know why the blanks were left in the printed form or, in other words, to know which of the actual postulated above actually obtains. ”

- 17 I do not intend to speculate on why the spaces in the agreements were left blank. But I am persuaded that for each of the agreements to be valid the clause relating to payment of the purchase price had to be complete or set out the required particulars. Details relating to the number of months or the period within which the balance of the price had to be paid (or by which a guarantee had to be furnished) form part of the *essentialia* of the agreements and had to be specified at the time of the conclusion of the agreements.
18. In **Patel v Adam** 1977 (2) SA (A) 653 the agreement of sale of immovable property provided that “the purchase price shall be paid in monthly instalments free of interest”. The Appellate Court confirmed a decision by the Court *a quo* holding that the agreement was void for uncertainty on the basis that the agreement left it to the appellant alone, as the purchaser, to decide what amount he wished to pay every month, with the result that the court would not be able to determine the monthly amount to be paid by him. My view is that the same situation obtains in this matter. If, for example, the applicant would instruct conveyancers’ to pass transfer of the properties or anyone of them as provided in clause three of the agreements, and the respondents failed to make payment for some time thereafter, a court would not be able to determine whether payment should have been made at a particular point in time and/or how much should have been paid at that time.
19. The fact that the full purchase price may have been paid by the ninth to twelfth respondents, as they contend, is irrelevant. Section 28 (2) of the Alienation of Land Act provides that an otherwise invalid agreement will be valid *ab initio*

only in the event of both payment in full and transfer of the land having taken place. In this case it is common cause that the land in question has not been transferred to the respondents.

20. Contrary to the submission on behalf of the ninth to twelfth respondents I do not agree that extrinsic evidence may be admitted to give meaning to the defective terms of the agreements. Unlike in *Johnstone v Leal* the defective Clause 3 of the agreements is not ambiguous or capable of more than one meaning. It is incomplete and any evidence led to complete it would, in my view be an attempt to make an agreement for the parties.

21. Consequently, I agree with the submission on behalf of the applicant that, insofar as the method of payment of the purchase prices is not stipulated in the agreements under consideration, the agreements fall foul of the provisions of not only the provisions Alienation of Land Act but also the general principles of law relating to purchase and sale agreements. The effect of non-compliance with the requirements of S 2(1) of the Act is that the contract shall not “be of any force or effect”. “A transaction which has no force or effect is necessarily void *ab initio*, and can under no circumstances confer any right of action.”⁴ For this reason alone the application must succeed.

22. That being my view, I do not consider it necessary to deal with the submissions on behalf of the ninth to twelfth respondents regarding to clauses

⁴ **Wilken v Kohler** 1913 AD 135 AT 143; see also **Jammine v Lowrie** 1958 (2) T where the court held that a contract which is void *ab initio* (for failure to specify interest payable on a second bond taken over a fixed property) cannot be validated by tender of method of performance which differs from that specified in the contract itself.

relating to possession of the properties and liability for rates and taxes in respect thereof.

23. The following order shall therefore issue:

1. The agreements of sale annexed to the affidavit of Dawn Carol McCarthy as annexures “A” to “J” are declared invalid and of no force and effect;
2. The Ninth to Twelfth respondents are ordered to pay the applicant’s costs occasioned by their opposition to the application.

N.DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv Rorke instructed by Gray Moodliar

For the Respondent: Adv P Scott instructed by Lee Strydom Fourie Inc.