IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE HIGH COURT, PORT ELIZABETH)

CASE NO: 2958/09

Date Heard: 20 May 2010

Date Delivered: 10 August 2010

In the matter between:

THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	Applicant
and	
ZACCARIAS JOHANNES FOURIE	1st Respondent
CRONJE BOUWER	2nd Respondent
LAUWRENCE ELIAS KILIAN	3rd Respondent
CORNELUIS KRUGER	4th Respondent
DELIA RUDMAN	5th Respondent
FREDERICK VAN NIEKERK	6th Respondent
NOELEEN VAN NIEKERK	7th Respondent
LUYANDA LEONARDO VINQI	8th Respondent
KEVIN ADAMS	9th Respondent
CLYDE CLEVEDON CANNON	10th Respondent
ZAMUXOLO PHILLIP MAHLAHLA	11th Respondent
DAPHNE PHILANDER	12th Respondent

MARIO RUDMAN	13th Respondent
AUBREY GEORGE WARREN	14th Respondent
WINEFRED MATILDA ADAMS	15th Respondent
MAGGIE EACHELLS	16th Respondent
MARGARET FORTUIN	17th Respondent
JONATHAN LLEWELYN GROOTBOOM	18th Respondent
SARIE JACOBUS	19th Respondent
VERONICA HOPE LANGLEY	20th Respondent
NOMBEKO ANGELINA MAFA	21st Respondent
VERA FREDRICKA MAHONA	22nd Respondent
NDYEBO ANTHONY NDABAMBI	23rd Respondent
NTOBEKO PHALTHROMAN NYANDA	24th Respondent
CORNELIUS PRINS	25th Respondent

JUDGMENT

Y EBRAHIM J:

[1] The applicant seeks an order in the following terms:

‘(a) Declaring that the agreements annexed to the founding affidavit of Dawn Carol McCarthy as annexures “R1” to “R25” are invalid for want of compliance with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981.

(b) That there be no order as to the costs of this application, save that any Respondent who opposes the application be ordered to pay the costs occasioned by his or her opposition;

(c) That this Honourable Court grant to the Applicant such further or alternative relief as it may deem fit.'

[2]The application is opposed by the first, second, ninth, seventeenth and twenty second respondents.

[3]In the founding affidavit the applicant asserts that serious allegations of corruption and malpractice were made during 2005 about 'a former contract employee of the Applicant' regarding the 'Budget and Treasury/Housing Land Unit (Uitenhage)'. The employee, a Mr Stan Fitchett, had 'circumvented and manipulated the Applicant's land sale system in the Uitenhage Housing Unit, thereby prejudicing the Applicant and potential land owners.'[1] As a consequence a number of agreements for the sale of land did not comply with the formalities stipulated in the Alienation of Land Act[2] and the agreements were invalid for want of compliance with the provisions of s 2(1)[3] of the Act. The applicant's claim of invalidity is disputed by the respondents.

[4]It is trite that all the material terms of the sale must be set out in a written contract. 'The material terms of a contract of sale are not confined to those prescribing the *essentialia* of

1 Page 9 of the papers

2 Act No. 68 of 1981

3 Section 2(1) prescribes: '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.' See also *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008 (1) SA 654 (SCA) at para [7]

a contract of sale, viz the parties to the contract, the *merx* and the *pretium* but include, in addition all other material terms.'[4]

[5]The parties are *ad idem* that the purpose of s 2(1) 'was to avoid, as far as practicable, uncertainty and disputes …... regarding the contents of contracts for the sale of land …… and to counter possible malpractices, including perjury and fraud in connection therewith.'[5]

[6]Clause 2 in the agreements of sale stipulates that the purchase price and various preliminary expenses are due and payable by the purchaser and sets out two options for payment of the amounts with the direction that one of the options be deleted.[6] The

---

4 *Johnston v Leal* 1980 (3) SA 927 (A) at 937H;

5 See *Hirschowitz v Moolman* and Others 1985 (3) SA 739 (A) at 757I to 758A where the Court, in relation to the Formalities in respect of Contracts of Sale of Land Act, 71 of 1969, said: 'The object of the subsection and its predecessors was to avoid, as far as practicable, uncertainty and disputes (possibly leading to litigation) regarding the contents of contracts for the sale of land (recognising that such contracts were, as a rule, transactions of considerable value and importance) and to counter possible malpractices, including perjury and fraud in connection therewith (see *Estate Du Toit v Coronation Syndicate Ltd and Others* 1929 AD 219 at 224; *Neethling v Klopper and Andere* 1967 (4) SA 459 (A) at 464E-F; *Ferreira and Another v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A) at 246B-D). What the subsection requires is that (at least) all the material terms of the contract be reduced to writing and signed by the parties.'
See also *Clements v Simpson* 1971 (3) SA I (A) at 7A where the Court said: 'The section is directed against uncertainty, dispute and possible malpractices.' What the Courts said in these cases applies equally to the corresponding provision in the Alienation of Land Act, No. 68 of 1981.
See, further *Jurgens and Others v Volkskas Bank Ltd* 1993 (1) SA 214 (A) at 218F-G; *Kriel and Another v Le Roux* [2000] 2 All SA 65 (A) at para [3]; *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 343A; *Phillmatt (Pty) Ltd v Mosselbank Developments CC* 196 (2) SA 15 (A) at 25C

6 All the agreements have similar provisions except that the amount of the purchase price and preliminary expenses differ in some agreements. In Annexure R1.1, at page 46 of the papers, Clause 2 reads:
'2. **PAYMENT OF PURCHASE PRICE**
The following amounts shall be due and payable to the **MUNICIPALITY**
PURCHASE PRICE: ……………….. R12209-50
Preliminary Expenses:
(i) Survey and general Township Expenses R 300-00
(ii) Advertising costs re Auction Sale R 50-00
(iii) Administrative Costs 2½% of Purchase Price R 305-24
(iv) VAT R1801-06
The said amounts shall be paid as follows by the Purchaser to the Municipality:
OPTION 1
(a) At least 10% of the said purchase price shall be paid in cash on the date of the 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 the date of sale to date of

purchaser had therefore to elect which option would be applicable and the other had to be deleted. Due to the failure to delete one of the options it is unclear whether the purchase price and other amounts were to be paid in terms of option 1 or option 2.

[7]In stipulating two options for payment of the purchase price it is evident that the parties intended that the method of payment be an essential, or at least a material, term of the agreement and consequently such term had to be recorded in writing.[7]

[8]The applicant contends that the absence of consensus regarding the method of payment of the purchase price renders the agreements invalid. The respondents, while acknowledging the factual position, contend the agreements are valid as there was consensus in respect of the option the purchaser had elected in each instance. The parties are in agreement though in respect of the legal principles that must be applied in determining the issue in dispute.

---

payment together with expenses referred to above shall be paid to the Municipality in cash within a period of eighteen (18) 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 eighteen (18) months whichever shall be the sooner.

OPTION 2

(a) A cash deposit of R300,00 (Three Hundred Rand) will be paid on the date of sale. A guarantee acceptable to the Town Treasurer will be produced for the full amount plus interest (calculated at the standard rate) within a period of 30 (thirty) days after date of sale.

(DELETE OPTION NOT APPLICABLE)'

[7] *Jammine v Lowrie* 1958 (2) SA 430 (T) at 431A; *Kuper* v *Bolleurs*, 1913 T.P.D. 334; *van der Berg* v *van Leggelo*, 1935 T.P.D. 304; *Neethling v Klopper en Ander* (*supra* fn 5) at 465B; *Sidali v Mpolongwana* 1990 (4) SA 212 (C); and see Christie R H - *The Law of Contract in South Africa* (5th Ed.) at p 122

[9]Mr Rorke, in his submissions on behalf of the applicant, referred to a number of cases in which s 2(1) (and similar preceding enactments) had been considered by the Courts. What emerges clearly from these decisions is that 'the disputes, the possibility of which the Legislature seeks to avoid or minimize, are disputes concerning the terms of the contract in question.'[8] The contract, it has been said, should place 'the fact of consensus out of the range of the clash of will of the parties'.[9] Whether an agreement complied with the requirements of the Alienation of Land Act had to be determined 'without recourse to evidence from the parties as to their negotiations and *consensus.*'[10]

[10]The deficiency that each contract suffers from, as I have stated, is that it is uncertain what agreement the parties had reached regarding the manner in which the purchase price had to be paid. I agree with Mr Rorke that this is precisely the mischief that s 2(1) seeks to proscribe.

[11]In regard to the purchase price, where the terms of payment are still to be arranged[11] or to be agreed upon[12] or a material term has been left over for further negotiation[13] there is no valid contract. An agreement in which the amount was to be paid in

[8] *Ferreira and Another v SAPDC (Trading) Ltd* 1983 (1) SA 235 (A) at 246A-C – (although a minority judgment, the majority did not disagree with the minority's findings)

[9] *Clements v Simpson* (supra fn2) at 8A – (the Court dealt with a similar preceding provision but what was said applied equally to s 2(1)

[10] *Clements v Simpson* (*supra* fn 2) at 7F; *Benkenstein v Nesius and Others* 1997 (4) SA 835 at 846J

[11] *Rutstein v Elandsheuwel Farming (Pty) Ltd* 1971 (1) SA 268 (T) at 270G-H

[12] *Rutstein v Elandsheuwel Farming (Pty) Ltd* (*supra* fn 10) at 275B; *Engelbrecht v Nel* 1991 (2) SA 549 (W) at 552A; *The Nelson Mandela Bay Metropolitan Municipality v African Catholic Church & Others* – Eastern Cape High Court, Port Elizabeth (Case No. 2957/09) at para [15] of unreported judgment delivered on 4 May 2010

[13] *Margate Estates Ltd* v *Moore* 1943 T.P.D 54; *Scammell* v *Ouston* 1941 (1) A.E.R. 14 (H.L); *Jammine v Lowrie* (*supra* fn 9) at 431B

instalments but interest had still to be agreed upon was held to be invalid.[14] Similarly, an agreement which stated that the purchase price was payable in monthly instalments but did not specify the amount of the instalments or the period within which the purchase price had to be paid was held to be invalid.[15]

[12]During argument, Mr Paterson informed the Court that the first and second respondents were not pursuing the issue of estoppel (raised in the heads of argument). The first and second respondents had also abandoned the submission that the method of payment of the purchase price was not a material term of the contract.

[13]Mr Paterson and Mr Naidu (who appeared for the ninth, seventeenth and twenty second respondents) submitted that the applicant's reliance on the judgment of Dambuza J was misplaced as what had been in issue there differed materially from the issue in the present matter. The issue there was blank spaces in the agreements whereas in the present matter it was the method of payment of the purchase price.

[14]While the agreements in the two matters exhibit different deficiencies, Mr Rorke's submission was that the same legal principles that Judge Dambuza had applied in the application before her were also applicable in the present matter. This, the respondents have not disputed. There is no question, therefore, that the same principles must be applied in determining the dispute regarding validity of these agreements.

---

[14] *Jammine v Lowrie* (*supra* fn 9) at 431C

[15] *Patel v Adam* 1977 (2) SA 653 (A) at 665G-H and 666A-H to 667A

[15]Mr Paterson contended that the agreements complied in all respects with s 2(1) of the Alienation of Land Act and were valid and the applicant had not produced any evidence to gainsay that there had been consensus there would be two options. The options were not irreconcilable and any difficulties that arose from the discarded option not being deleted could be remedied by construction and interpretation.[16] There had been a lack of oversight on the part of applicant's authorised representative that one of the options be deleted and the Court should lean in favour of an interpretation of validity of the agreements.[17] The documents of the first and second respondents showed they had paid at least 10% of the purchase price. They had therefore elected option 1 as the

16 *Blundell v Blom* 1950 (2) (SA) 627 (W) at 632 and 633; *Oosthuizen v Wentzel* 1957 (1) SA 653 (W) at 655D; *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) at 589G-H; *First Consolidated Holdings (Pty) Ltd v Bissett and Others* 1978 (4) SA 491 (W) at 496G-H; 1979 (1) SA 69 (A) at 80H-81A

17 *Steyn v McDonald* 1965 (3) SA 693 (O)

method of payment and, in accordance with what was said in *Johnston v Leal*,[18] rendered option 2 *pro non scripto*.

[16]I do not find merit in Mr Paterson's argument. I agree with Mr Rorke that the two options are mutually exclusive. The fact that the method of payment in each is different, and read with the stipulation that one be deleted, clearly indicates the options are not reconcilable. In addition, the election by the purchaser had to take place when the deed of alienation was signed and could not be deferred to some future date.[19]

[17]In regard to interpretation of the written agreement, whether or not the parties had reached consensus must be determined from the language expressed therein. The language in clause 2 of the agreements is plain and unambiguous. In my opinion it permits of no other interpretation than the purchaser having to elect one of the options

[18] In *Johnston v Leal* (*supra* fn 3) the Court stated: '*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 a printed form of contract (such as clause 11 in annexure "A") has not been completed, in the sense that blank spaces left for the 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 regard to 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 that for some reason they had omitted to fill these 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): cf *Blundell* v *Blom* 1950 (2) SA 627 (W) at 632-3; *Miller and Miller* v *Dickinson* 1971 (3) SA 581 (A) at 589E-H. If the facts be as under (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 s 1 (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 for 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 the whole of what had been agreed between the parties and was intended by them to be incorporated in the writing.'

[19] See the cases cited *supra* at fns 10, 11, 12, 13 and 14

and the other having to be deleted. The submission by Mr Paterson that clause 2 is reasonably capable of being interpreted as valid is without merit.

[18]The parties cannot have recourse to extraneous evidence for the purpose of proving whether or not there was consensus regarding the method of payment.[20] It is not open to the respondents to rely on evidence of payments they effected to the applicant, whether this was done before or after the conclusion of the agreement, to support their claim that they had reached consensus on this issue.[21]

[19]The submission that option 2 be regarded as *pro non scripto* is unsustainable. The options were an integral element of one of the *essentialia* of the contract and it is clear that the parties intended the options to be part of their contract. It was only on deletion of an option that such option no longer formed part of the contract.

[20]The cases cited[22] by Mr Paterson do not provide support for the defence raised by the first and second respondents. In each case the Court dealt with omissions, in various forms, from a contract. In *First Consolidated Holdings (Pty) Ltd v Bissett and Others* and *Pizani and Another v First Consolidated Holdings (Pty) Ltd* these concerned deeds of suretyship and not agreements for the sale of land. More pertinently, in the present application all the material terms in regard to the sale of the land are in the agreement and a term agreed upon by the parties has not been omitted.

[20] *Neethling v Klopper and Andere* (supra fn 5) at 465B; J*ohnson v Leal* (supra fn 3) at 938C
[21] *Clements v Simpson* (*supra* fn 2) and *Johnston v Leal* (*supra* fn 3) at 938B-F
[22] The Court had to rectify the citation of each case as Mr Paterson had provided incomplete citations

[21]It is the two irreconcilable options in the agreements that create the ambiguity and not the purported omission of any term. The wording of clause 2 permits of no other interpretation than the intention of the parties being that one of the options should be deleted. The first and second respondents admit there was a failure to delete one of the options at the time the contract was concluded but place the blame for this on the applicant's representative. This does not assist them as they signed the agreements cognisant of the fact that such deletion had not been implemented. The onus was on both parties to ensure that the agreement correctly reflected the consensus they had reached in respect of each of the material terms therein.

[22]There is no merit either in the submission that *Magwaza v Heenan*[23] provides authority for rectification of the agreements should the Court conclude the agreements were *ab intitio* void. In my reading of the judgment of Hoexter AJA (as he then was) I do not find support for this. On the contrary, what is evident from the judgment is that if a contract for the sale of land failed to comply with the prescribed statutory provisions, which is the position with the agreements in the present matter, it was void *ab initio* and cannot be rectified.[24] In any event, as the respondents have not applied for rectification I do not deem it necessary to comment further on this aspect.

---

[23] 1979 (2) SA 1019 (A)

[24] See *supra* fn 21 at 1025A-H and 1026A-C; *Jammine v Lowrie* (*supra* fn9) at 431E; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at paras [9] and [10]; See *The Law of Contract in South* Africa (*supra* fn 7) at pp 122 and 123, for a brief discussion on the issue of rectification

[23]It was contended by Mr Naidu that the agreements contained all the materials terms but the parties failed to omit option 2 and had not intended it should be part of the contract. His clients effected certain payments to the applicant prior to signature of the agreements and had paid 10% of the purchase price. There had been consensus therefore that option 1 was applicable. He contended that extrinsic evidence could be led, as stated in *Johnston v Leal*, for the purpose of enforcing the contact but not to contradict or add to it.[25] However, this was not necessary since there was documentary proof that option 1 had been chosen.

[24]These submissions are devoid of merit. Consensus cannot be established by recourse to 'evidence to prove a contemporaneous oral agreement or a subsequent oral variation relating to the method of payment.'[26] Reliance may not be placed on documentary evidence except a further agreement in writing executed by the parties.[27] Consensus must be evident from the contract itself. In certain circumstances a Court may have recourse to extraneous evidence regarding the intention of the parties. This, however, is manifestly not the position here, as is evident from what I have stated previously.

[25]The respondents represented by Mr Naidu admitted that neither option had been deleted when the agreements were concluded but say they were under the impression that the applicant's representative would attend to the necessary deletion. There is no doubt, therefore, that the parties had not reached consensus on the method of payment

[25] *Johnston v Leal* (*supra* fn 3) at 938E
[26] See *The Law of Contract in South Africa* (*supra* fn 7)
[27] *Johnston v Leal* (*supra* fn 3) at 940E

of the purchase price. The submission that option 2 should be deleted by the Court is misconceived as this would amount to the Court creating a contract for the parties.[28]

[26]In the circumstances, I am satisfied that each of the agreements is invalid for want of compliance with s 2(1) of the Alienation of Land Act. The applicant is therefore entitled to the order that it seeks.

[27]There has been a delay in instituting this application. Mr Rorke conceded this was regrettably so but said it did not mean the agreements were valid. The applicant, even though a party to the agreements, was obligated to bring the application so as to assist in ensuring open and transparent government as required by the Constitution.[29] While the motives of the applicant are commendable, I am concerned that the delay may have lulled the respondents into a false sense of security. Some have erected homes and other structures on the land and, if compelled at this stage to vacate the land, would be rendered homeless and suffer financial loss. I trust that whatever further legal steps the applicant intends pursuing, that it acts with compassion and is open to negotiating compromises that would avoid the respondents facing an uncertain future.

[28]In regard to costs, it is trite that in the absence of persuasive reasons to order otherwise, costs should follow the result. As much as I appreciate that the respondents

---

[28] *Kriel and Another v Le Roux* (supra fn 5) at para [3]

[29] Nelson Mandela Bay Municipality v Africsec Strategic Solutions (Pty) Ltd – Eastern Cape High Court, Port Elizabeth (Case No. 865/07) at para [34] of unreported judgment of Froneman J dated 26 June 2007

may feel aggrieved at the applicant's delay in launching the application it is not sufficient reason to deny the applicant the costs of the application.

[29]In the result, there is an order in the following terms:

(a) The agreements annexed to the founding affidavit of Dawn Carol McCarthy as annexures "R1" to "R25" are declared invalid for want of compliance with the provisions of section 2(1) of the Alienation of Land Act, 68 of 1981; and

(b) The first, second, ninth, seventeenth and twenty second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the application.

Y EBRAHIM

JUDGE OF THE HIGH COURT **10 AUGUST 2010**

Counsel for the Applicant: S C Rorke

Attorneys for the Applicant: Gray Moodliar Attorneys

PORT ELIZABETH

Counsel for 1st & 2nd Respondents: N M Paterson

Attorneys for 1st & 2nd Respondents: Van Niekerk, Huisamen & Van Wyk Attorneys

PORT ELIZABETH

Counsel for 9th, 17th & 22nd Respondents: V Naidu

Attorneys for 9th, 17th & 22nd Respondents: Justice Centre

UITENHAGE