

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case No.: 2644/2018

Date Heard: 1 August 2019

Date Delivered: 27 August 2019

REPORTABLE

In the matter between:

ERROL KENNETH KRETZMANN

Excipient
(Defendant in the action)

and

LESLIE ANDRE KRETZMANN

First Respondent
(First Plaintiff in the action)

PETRA KRETZMANN

Second Respondent
(Second Plaintiff in the action)

JUDGMENT

EKSTEEN J:

[1] This is an exception which raises the question of the application of s 2(1) of the Alienation of Land Act 68 of 1981 (the Act) to an agreement of option for the sale of immovable property. I shall refer to the parties herein as in the action.

[2] In their Particulars of Claim the plaintiffs alleged that during 2013 they attempted to purchase a property being Plot No. 8 of the farm 23 Kragga Kamma Road, Port Elizabeth. Notwithstanding the signature of an agreement of sale they were unable to raise a bond to enable them to purchase the property. In the circumstances they alleged that they concluded an oral agreement with the

defendant in terms of which the defendant undertook to raise the capital and to purchase the property in his own name, but for their benefit, which he duly did. The property was accordingly registered in the name of the defendant. The particulars of the plaintiffs' claim recorded:

"6. After being unable to raise the necessary finance to purchase the property as aforesaid, on or about 31 August 2013, and at Port Elizabeth, the Plaintiffs, acting personally, entered into an oral option agreement with the Defendant, acting personally, the material express, alternatively implied, alternatively tacit terms of which were *inter alia* as follows:

6.1 ...

6.2 The Defendant gave to the Plaintiffs an option to purchase the property, for a period of 5 years from the date of transfer into his name, by entering into a written agreement of sale with him for its purchase, for a price consideration equal to the amount owing on the associated mortgage bond at the exercise of the option.

6.3 The Plaintiffs undertook to pay:

6.3.1 the transfer and conveyancing costs of the property;

6.3.2 to the sellers, occupational rental should they take occupation prior to the property's transfer into the Defendant's name;

6.3.3 building insurance for the property;

6.3.4 the property's municipal rates; and

6.3.5 the Defendant's mortgage bond payments.

7. ...

8. ...

9. The transfer of the property into the Defendant's name was registered on 17 January 2014.

10. In compliance with all their obligations in terms of the oral agreement, the Plaintiffs paid:

10.1 ...

11. On or about 13 July 2018, and at Port Elizabeth, and whilst it was in full force and effect, the Plaintiffs, acting personally, duly exercised their option as aforesaid by providing, via email, and in person, to the Defendant, a signed agreement of sale for the property reflecting a purchase price of R2 550 000,00, being the amount owing by the Defendant to Investec Private Bank in respect of the property at the exercise of the option."

[3] The plaintiffs' case as pleaded, is therefore founded on an oral agreement in terms of which the defendant granted them an option for a period of five years to purchase the property on certain terms which were orally agreed upon by them. On the strength of the agreement they purported to exercise the option by the delivery of a signed deed of sale. (The alleged "Deed of Sale" is annexed to the Particulars of Claim. It is, more correctly, an offer to purchase, signed by the plaintiffs which was rejected by the defendant.)

[4] The defendant, in taking exception, alleged that the Particulars of Claim lack averments necessary to sustain a cause of action, *inter alia*, because:

- '1. The Plaintiff's case is premised on an "oral option agreement" in terms of which it is alleged that the Defendant gave the Plaintiffs an option, for a period of five years from the date of transfer of the property in question, to purchase the property on certain conditions;
2. Section 2(1), read with the definition of "alienate", of the Alienation of Land Act, 68 of 1981 ("the Act") provides as follows:

"No alienation of land after the commencement of this section shall ... be of any force of effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."
3. ...
4. In the circumstances the alleged agreement falls foul of section 2(1) of the Act and does not disclose a cause of action, in that it was not reduced to writing and signed by the parties.'

[5] The sole issue which arises at this stage is whether the agreement contended for is required by law to be in writing for it to be enforceable. Their contention that the oral agreement is binding and enforceable is based squarely upon the recent decision in *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC). In *Mokone* the Constitutional Court was required to decide whether a right of pre-emption in respect of the sale of land had to be in writing. Madlanga J, writing for the majority, formulated the question before it thus:

"... whether a *pactum de contrahendo* (loosely, a contract whose aim is to conclude another contract) that could lead to a sale of land — like the

right of pre-emption — must comply with the formalities contained in s 2(1) of the Alienation of Land Act.”

[6] In a footnote he explained that his rough translation of the Latin phrase *pactum de contrahendo* should not be understood to suggest that it is obligatory that the other contract to which the pact relates be concluded. He referred, by way of example, to an option and noted that in such a case the envisaged sale may or may never take place. Reliant on this footnote Mr *Bands*, who appears for the plaintiffs, argued that it was the intention of the Constitutional Court to deal with all types of contracts which have as their aim the conclusion of another contract. This, it was argued, renders the agreement pleaded valid and enforceable. The submission requires closer scrutiny of the nature of the agreements in issue.

[7] *Mokone* was concerned only with the right of pre-emption. A right of pre-emption is a *pactum de contrahendo* of a particular kind. It is a preferent conditional right to purchase which affords the grantee the right to purchase upon the fulfilment of the condition. Usually the condition is that if the grantor decides, desires or proposes to sell he shall offer the property to the grantee first. A right of pre-emption does not compel the grantor to sell: it only requires him to give the grantee preference in the event that he does sell and thus prevents him from selling to a third party during the existence of the right. (Graham Glover: *Kerr’s Law of Sale and Lease* (4th ed) p. 551; G B Bradfield: *Christie’s Law of Contract in South Africa* (7th ed) p. 67; Van der Merwe, Van Huyssteen, Reinecke and Lubbe: *Contract General Principles* (4th ed) p. 72-73.) In *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (AD) at 932E Nicholas JA explained:

“In the case of a right of pre-emption, there is no offer at the time of the grant, and the grantor is not obliged to make an offer unless and until he wishes to sell the property.”

(See also *Hirschowitz v Moolman and Others* 1983 (4) SA 1 (TPD) at 6D-E.)

[8] In such a case there is therefore no offer which, upon its acceptance, could result in the sale of the property. The alienation only arises when the offer is made (and accepted) which, in turn, will only occur if and when the offeror decides to sell.

[9] In *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (AD), however, the Supreme Court of Appeal (then the Appellate Division) held, on the facts of that case, that whereas the right of pre-emption in issue related to immovable property the right of pre-emption (the *pactum de contrahendo*) itself was required to comply with the Formalities in Respect of Contracts of Sale of Land, Act 71 of 1969 (the Formalities Act)(in particular s 1(1) thereof). (The Formalities Act was the forerunner to the Act.) Section 1(1) thereof provided:

“No contract for the sale of land or cession in respect of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this section unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority.”

It was this conclusion which was the subject of the challenge in *Mokone*.

[10] In *Mokone* the Constitutional Court referred with approval to comments by Lubbe in “*Law of Purchase and Sale*” 1985 *Annual Survey of South African Law* (p. 133 at 1401) referring to *Hirschowitz* where he recorded:

“This passage is ... not free from difficulty. It must, it seems, be read as referring to the contract granting the right of pre-emption, for a right of pre-emption as such is not something that can be governed by the formalities of legislation. An action for specific performance of a grant of pre-emption seeks an order on the grantor to make a valid offer to the grantee. In the present context this means an offer complying with the prescribed formalities, which if accepted by the grantee, in accordance with the statutory requirements, will result in a perfectly valid contract. It is difficult to see how such a procedure can undermine the legislative object with regard to alienations of land.”

[11] This accords with the reasoning in *Rogers v Phillips* 1985 (3) SA 183 (E) where Kannemeyer J considered the possible impact of the wording of both the Formalities Act and the Act on a right of pre-emption. The Constitutional Court, approving of the approach adopted by Kannemeyer J referred to his judgment in the following terms:

“The court proceeded to deal with the question regardless of which Act was applicable. This is how it concluded:

'(N)either in terms of s 1(1) of [the Formalities Act] nor in terms of s 2(1) of [the Alienation of Land Act] does a right of pre-emption in respect of land have to be in writing in order to be valid.'

[50] This is how the court got there:

'(A) right of pre-emption gives the pre-emptor no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is

completed then, and not before, will he have a right to claim transfer of land, so that it is the agreement which must be in writing."

[12] On this basis the majority in the Constitutional Court concluded that *Hirschowitz* was wrongly decided in this respect and that a right of pre-emption relating to land need not be in writing for it to be binding.

[13] An option to purchase, however, is a different phenomenon. An option to purchase is comprised of two distinct parts: an offer to purchase; and an agreement to keep that offer open, usually for a fixed period (*Boyd v Nel* 1922 AD at 421; *Hersh v Nel* 1948 (3) SA 686 (A) at 695; *Brandt v Spies* 1960 (4) SA 14 (E) at 16F-17C; *Venter v Bircholtz* 1972 (1) SA 276 (A) at 283G-284B; *Wasmuth v Jacobs* 1987 (3) SA 629 (SWA) at 633D; G B Bradfield p. 66; and Glover p. 125). The undertaking to keep the offer open (the option agreement) is of course a *pactum de contrahendo*. It is not an alienation as envisaged in the Act and is not required to be in writing (Glover p. 66 and Van der Merwe *et al* p. 70). The offer, however, which the *pactum* has undertaken to keep open, must be a firm offer which will result in a binding contract when it is accepted (*Efroiken v Simon* 1921 CPD 367 at 370; *Finestone v Hamburg* 1907 TS 629 at 632; *Venter v Bircholtz*; *Aris Enterprises (Finance)(Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 425 (A)). By virtue of the provisions of s 2(1) of the Act an offer resulting in the sale of land can only bring about a binding agreement upon acceptance if it is in writing.

[14] The issue was authoritatively articulated by O'Hagan J in this court in *Brandt*, which was approved in the Supreme Court of Appeal in *Venter*, where he stated at 16F-17C:

“It is implicit in these decisions that an option is comprised of two distinct parts - one is an offer to sell the property, and the other is a contract to keep that offer open for a certain period. Through the option the grantee acquires the right to accept the offer to sell at any time during the stipulated period; and if this right is exercised a contract of purchase and sale is immediately brought into being. It follows that the offer must be one which is capable of resulting in a valid contract of sale from the fact of acceptance by the person to whom the offer is made ... it is clear that when a party relies upon a contract flowing from acceptance of an offer, and the law prescribes that writing is essential to the validity of the particular contract, it must be shown that both the offer and the acceptance are in writing. If the offer is not in writing there is nothing which the offeree can accept so as to create a *vinculum juris* between himself and the offeror. An undertaking to keep open an offer which is incapable of forming the basis of a valid contract can itself confer no right upon the grantee - for in law there is nothing to keep open.”

[15] Mr *Bands*, however, has referred me to footnote 58 in *Mokone* where the Constitutional Court referred with approval to the passage in *Van der Merwe et al* at p. 70 which records:

“In principle, formalities prescribed for the substantive contract ought not to apply to option agreements relating to such a contract It has been stated, however, that, as a general rule, *pacta de contrahendo* have to conform to formalities prescribed for the substantive contract envisaged by the parties and that therefore option contracts to purchase land must conform to the applicable statutory formalities [citing *Moolman*]. This view may be in keeping with a construction of preliminary agreements known to continental systems of law, but quite apart from whether its application may be warranted in respect of other types of *pactum de contrahendo*, it

is doubtful whether there is any need to apply the construction to option contracts in South African law.”

[16] I agree with the learned authors. In this passage, however, where the authors refer to “option agreements” it is intended as reference only to the *pactum de contrahendo*, not to the substantive offer to which the option agreement is inextricably bound. This is borne out by the authors themselves where they state at p. 69-70:

“An option contract must satisfy the requirements generally applicable to contracts. Thus the option agreement may fail for lack of certainty where the substantive offer to which it relates is ineffective.”

This, they explain in footnote 193 on p. 70, maybe because the offer does not comply with the formalities prescribed for the substantive contract (see also G B Bradfield p. 125).

[17] In the result, whilst an option agreement (the *pactum de contrahendo*) relating to the sale of land, need not be in writing, it can only be validly enforced if the offer to which it relates complies with the provisions of section 2(1) of the Act. In this case, however, the plaintiffs’ case, as pleaded, is that both the option agreement and the agreement relating to the terms upon which the sale would occur were orally concluded. An option of that nature relating to land cannot be validly exercised, whether orally or in writing. The option agreement must therefore fail.

[18] In the result:

1. The exception is upheld and paragraphs 6 and 11 of the plaintiffs' Particulars of Claim are set aside.
2. The plaintiffs are afforded thirty (30) days to amend their Particulars of Claim, if so advised.
3. The plaintiffs are ordered to pay the costs of the exception.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

Excipient

(Defendant in the action): Adv N Mullins SC instructed by Joubert
Galpin & Searle, Port Elizabeth

For Respondents:

(Plaintiffs in the action): Adv D Bands instructed by Chris Harding
Attorneys, Port Elizabeth