THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 474/05

In the matter between:

GOWAR INVESTMENTS (PTY) LTD **APPELLANT**

and

SECTION 3 DOLPHIN COAST MEDICAL CENTRE CC **1ST RESPONDENT**

MARLENE ANITA CAMERON **2ND RESPONDENT**

CORAM: **FARLAM, MTHIYANE, BRAND, HEHER JJA *et* COMBRINCK AJA**
DATE OF HEARING: **7 November 2006**
DATE OF DELIVERY: **30 November 2006**

Summary: **Sale of land – non-compliance with ss 2(2A) of Alienation of Land Act 68 of 1981 – agreement voidable at instance of purchaser *Sayer v Khan* 2002 (5) 688 (C) overruled.**

Neutral Citation: This judgment may be referred to as Gowar Investments v Section 3 Dolphin Coast and Cameron [2006] SCA 162 (RSA)

JUDGMENT

COMBRINCK AJA/….

COMBRINCK AJA:

[1] Sub-section 2(2A) of the Alienation of Land Act 68 of 1981 ('the Act') provides:

'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.'

Is a deed of alienation which does not reflect the right to revoke or terminate void as decided in *Sayers v Khan* 2002 (5) SA 688 (C) or voidable at the instance of the purchaser as held (per Olsen AJ) in the present case (reported at 2006 (2) SA 15 (D))? This appeal concerns the answer to that question.

[2] The background facts are not in dispute. The appellant accepted that they were correctly recorded in the judgment of the court *a quo*. For ease of reference I quote the relevant passages:

'[1] When this application was launched there were two applicants, each representing the interests of a medical practitioner who had decided to buy his rooms on sectional title. Each set of rooms is situated in a double-storey commercial development. One of the practitioners formed a close corporation, the first applicant, which concluded an agreement with the respondent to acquire the proposed sectional title unit. The wife of the other practitioner is the second applicant. She concluded a similar agreement with the respondent to acquire the proposed unit which is occupied by her husband. This application was launched to secure an order compelling the respondent to complete the opening of the sectional title register, and to compel transfer of the units.

. . . .

[4] The second applicant signed an offer to purchase the proposed unit (that is to say her husband's rooms) for R148 000 on 21 August 2001. The respondent accepted the offer over two months later, by signing the offer document on 6 November 2001. The parties are agreed that the proposed unit qualifies as "land" for the purposes of s 29A of the Act. (See, in this regard, para *(d)*(i)*(dd)* of the definition of "land" in s 1 of the Act.) The price of the proposed unit being less than R250 000, and none of the other exceptions set out in ss 29A(5) being applicable, the second applicant therefore had the benefit of the so-called "cooling-off" period allowed by s 29A of the Act.

[5] However, the agreement made no reference to s 29A of the Act, nor to the rights of the purchaser under that section . . . .'

To this I may add that it was only on the 29th November 2004 when appellant's answering affidavit was received by second respondent was she notified that the appellant considered the agreement to be null and void – some three years after conclusion of the agreement. The first respondent is not a party to the appeal. By virtue of ss 29A(5)(b) the provisions of s 29A(1) are not applicable to its transaction (the first respondent not being a natural person), and at the hearing of the matter appellant consented to the grant of the order sought against it.

[3] The rights referred to are in essence contained in ss (1) of section 29A. It reads as follows:

'**29A. Purchaser's right to revoke offer or terminate deed of alienation** – (1) Subject to subsection (5), a purchaser or prospective purchaser of land may within five days after signature by him or her, or by his or her agent acting on his or her written authority, of

(a) an offer to purchase land; or

(b) a deed of alienation in respect of land,

revoke the offer or terminate the deed of alienation, as the case may be, by written notice delivered to the seller or his or her agent within that period.'

The judgment of the court below contains a summary of the remaining sub-section (2) to (10) inclusive of section 29A (paras [8], [9] and [10]).

[4] Before continuing it will be appropriate to set out the reasoning in *Sayers* case as Olsen AJ in his judgment in the court below deals with that case and indicates where he disagrees with the reasoning and conclusion.

[5] It was, as in the present case, the seller in the *Sayers* matter who by way of a special plea sought to have a deed of sale of a vacant piece of land in Cape Town declared null and void. It was accepted that the land was to be used for residential purposes and that ss 2(2A) of the Act applied. The deed of sale did not comply with that sub-section. Van Heerden J took as her departure point that

the general rule of statutory interpretation is that non-compliance with a statutory prescription results in a nullity. She correctly pointed out, however, that the crucial issue is the intention of the Legislature (P690G). She then by use of the semantic and jurisprudential guidelines sought to determine such intention (at 691A-693A). She concluded:

'The so-called "semantic guidelines" for the determination of the intention of the Legislature in enacting s 2(2A), as discussed above, point in different directions. Thus, while the wording of s 2(2A) has an imperative character ("the deed of alienation *shall* contain" – my emphasis), the provision is expressed in positive language. As regards the abovementioned "jurisprudential guidelines", the Act contains no criminal sanction for non-compliance with the provisions of s 2(2A). On the other hand, s 29A(7)*(b)* expressly provides that a waiver by a purchaser or prospective purchaser of the rights conferred upon him or her in terms of this section is null and void (see too s 29 of the Act).' (At 693C-D.)

The learned judge then gives three reasons for finding that the Legislature intended visiting voidness on a deed of alienation which does not contain a reference to the rights in s 29A. Firstly she concludes that the object of the Legislature in inserting ss 2(2A) read with s 29A would be frustrated or seriously inhibited in a number of ways which she then enumerates:

- 'it would increase the likelihood of litigation by purchasers who were unaware of the "cooling-off right" because it was not reduced to writing, in circumstances where they would have wished to exercise such right within the time period specified, had they been aware thereof;

- a burden would be placed on purchasers or prospective purchasers extraneously to have knowledge of the contents of s 29A of the Act. The ordinary, plain and grammatical meaning of the wording of s 2(2A) indicates that this is precisely what the Legislature wished to prevent by providing for the "cooling-off right" to be expressly included in the written deed of alienation;

- if the "cooling-off right" as contained in s 29A is not expressly written into the deed of alienation, then the purchaser or prospective purchaser who has no knowledge of the provisions of s 29A and who therefore fails to exercise the "cooling-off right" within the

> prescribed period of five days, is effectively deprived of the protection afforded by this right. This result is contrary to the intention of the Legislature, as indicated, *inter alia*, by the prohibition on a waiver by a purchaser or prospective purchaser of the "cooling-off right".' (At 694F-H.)

Secondly she finds support in the provisions of s 5 and 6 of the Act which relate to the purchasers right to choose the language in which the contract is drawn up and the material terms which the contract 'shall' contain. In terms of s 24 substantial non-compliance with s 5 and 6 could result in the purchaser obtaining the relief set out in ss 24(1)*(a)(b)(c)* or *(d)* from the court. There is no equivalent to s 24 for non-compliance with ss 2(2A). This, so the judge concludes, is a further indication that non-compliance was to be visited with nullity (at 694I to 695E).

Thirdly she points out that the Credits Agreement Act 75 of 1980 also provides the purchaser with a 'cooling off' period (s 13). The wording of this section 'shall' appear in the credit agreement. It is, however, specifically provided in the proviso to ss 5(2) that on non-compliance (the contract) 'shall not merely for that reason be invalid'. There is no corresponding provision in the Alienation of Land Act which indicates, so was concluded, that non-compliance with ss 2(2A) results in nullity (at 695F-H). The result was that the special plea was upheld and the deed of sale was declared null and void. (For an analysis of the judgment see Lötz 2003 *De Jure* 446.)

[6] I turn now to the judgment in the court below. The judge disagrees with the proposition in *Sayers* that the intention or purpose of the Legislature with the enactment of ss 2(2A) is best served by a construction which results in the automatic invalidity of the deed of alienation which does not comply with that sub-section. He also disagrees with the view expressed in that case that a different construction would frustrate or seriously inhibit the object of the legislation (para 31). The judge's reasons for these conclusions are fully set out in the judgment. I shall attempt merely to summarize them. His departure point is the purpose sought to be achieved by s 29A of the Act and the fact that its

provisions operate wholly in favour of the purchaser (para 6). After referring to the relevant considerations in interpreting statutory provisions of this nature laid down by this court in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at 146F he reasons as follows:

(i) The language used in ss 2(2A) is in marked contrast to that used in ss 2(1). Whereas the latter commences with 'No deed of alienation . . . shall . . . be of any force and effect', the former reads 'The deed of alienation shall contain . . . .'
Why if the Legislature intended non-compliance with ss 2(2A) to be visited with nullity was the same language not used as in ss 2(1)? (Para 14.)

(ii) Sub-section 2(1) creates enforceable rights whereas ss 2(2A) deals with rights created by s 29A which are already enforceable by virtue of that section. There was therefore no necessity for the Legislature to require that they be set out in the deed of sale to make them enforceable. The sole intention with the enactment of ss 2(2A) was to bring the right of revocation and termination to the knowledge of the purchaser (paras 15 and 17).

(iii) It is clear that it was considered that an identified class of persons, the purchasers enumerated in s 1*(d)(i)* required special protection. Automatic nullity claimed by a seller where the purchaser seeks to proceed with the sale would result in 'cognizable impropriety or inconvenience'. No reason exists to conclude that the Legislature while seeking to protect the uncertain purchaser of a small residential property would visit the same result on the decisive purchaser. Logically the intention of the Legislator would rather be that the agreement was voidable at the instance of the party for whose benefit the provision was enacted (paras 18 and 19).

(iv) The benefit of the rights under s 29A is restricted to purchasers and it must be concluded that the Legislature considered that sellers require no

protection. To allow the seller to withdraw from the agreement against the will of the purchaser would not accord with the Legislature's intention (para 22).

(v) One would have expected where non-compliance with a relatively obscure provision results in automatic nullity that the Legislature would have made it clear that this was its intention. It should not be imputed if the benefit does not match the price paid for it. The judge expressed it thus:

'In my view s 29A of the Act, read with ss 2(2A), has not achieved the all-embracing protection in exchange for which the Legislature might have considered it worthwhile to interfere with the common law of sale to the extent that it would have done by rendering void all contracts not in compliance with ss 2(2A) of the Act.' (Paras 23 and 24.)

(vi) Section 29A through-out draws the distinction between a signed offer by a purchaser and a deed of sale signed by him/her. Sub-section 2(2A) requires that only the latter must contain reference to the rights in terms of s 29A. To be valid an offer need not contain a reference to the s 29A rights. This reinforces the reasoning that the object of ss 2(2A) is not to create rights but to bring to the attention of the purchaser the existence of rights (paras 25-29).

It was accordingly held that the agreement was voidable at the instance of the purchaser. He had chosen to abide by it and was therefore entitled to the order of specific performance sought. (For a more complete summary and discussion of the case see the article by D J Lötz and C J Nagel in 2006 (69) *THRHR* 501.)

[7] The principal attack on the judgment by the appellant is that it was not the intention of the Legislature to bring the attention of s 29A rights to the purchaser only. It was intended that the seller should also be told of the existence of the rights. Whereas s 29A was enacted solely for the benefit of the purchaser, it does not follow that ss 2(2A) was similarly so intended. It is important, so the submission went, that a seller also be aware of the 'cooling off' period. He may on the strength of the sale within the 5 days period commit himself to the

purchase of another property. The seller may thus be as vulnerable and in need of protection as the purchaser. If the court's reasoning is correct and the purchaser ignorant of the s 29A rights could avoid the contract at any stage up to the date of transfer, the seller who conducts his affairs in the belief that he has a valid agreement could be placed in an invidious position.

The appellant further, argued that the court below failed to have regard to where ss 2(2A) was placed in the Act by the amending legislation. By placing it in the chapter dealing with 'Formalities in Respect of Deeds of Alienation' the Legislature clearly indicated that the provisions of ss 2(2A) were formal requirements for validity and non-compliance would have the same result as would non-compliance with s 2(1). Furthermore the aim of s 2(1) was to minimize disputes and litigation. This will not be achieved by allowing the purchaser the right to elect to abide by the agreement or declare it void as was held by the court below.

[8] Both in the *Sayers* case and the present case the judges sought to determine the intention of the Legislature by the use of the well-known criteria to be used in the interpreting of statutes. Case law authority for the criteria to be applied is extensively quoted in the *Sayers* judgment. Less so in the court *a quo*. It will serve no purpose to repeat the reference to these cases.

[9] I consider the point of departure to be to look at what the Legislature said its purpose was with the amendment which it brought about to the Act. Section 29A and ss 2(2A) were introduced by Act 103 of 1998. The definition of 'land' in s 1 was also amended. The long title of the amending Act reads:

'so as to confer on a purchaser or prospective purchaser of land the right to revoke an offer to purchase or to terminate a deed of alienation in certain circumstances.'

The purchasers which the Legislator had in mind can be gathered from the amended definition of 'land' in s 1 and in the new ss 29A(5). They are purchasers

(a) of property not exceeding R250 000;

(b) who are purchasing:

(i) land used or intended to be used for residential purposes;

(ii) an interest as defined in the Housing Development Schemes for Retired Persons Act 1988 (Act 65 of 1988);

(iii) a share in a share block company which confers the right to occupy land used mainly for residential purposes;

(iv) a sectional title unit

(c) who are natural persons (trusts, companies, close corporations and the like are excluded).

Regrettably the Legislature failed to restrict (iv) above to units for residential purposes. Read *eiusdem generis* with the other provisions this was probably the intention. The clear wording does not however allow for such interpretation. Hence the agreement by the parties that despite the premises having been purchased for medical rooms, s 29A applied.

This is a typical piece of consumer protection legislation which is aimed at protecting the vulnerable uninformed small buyer of residential property. The protection is afforded by altering the common law by giving the purchaser a 'cooling off' period within which he may reconsider and withdraw his offer or resile from the agreement without penalty. A 'cooling off' period is not a novel concept and is well-known in both this country and internationally. (See D J Lötz; Koper van Grond se Afkoelreg: Warm Patat of Koue Pampoen? *De Jure* 2000 327 at 328.)

[10] Section 29A distinguishes between the signature by the purchasers of 'an offer to purchase' (obviously emanating from him) and his signature to 'a deed of alienation' (an offer emanating from the seller, on signature accepted by the purchaser). The five day *spatium deliberandi* commences to run in the case of the offer on the day succeeding the signing thereof by the purchaser (ss 29A(2)) and will continue running and will expire five days later even if the offer is accepted within the five day period. It is not intended that if the deed of alienation

comes into being by acceptance of the offer by the seller within the five day period the purchaser would have a further five days following on that date to resile from the agreement. This explains why ss 2(2A) refers to the revocation of an offer even after acceptance – which juridically is nonsensical.

[11] As correctly pointed out in the court below, s 29A created rights solely for the purchaser and the intention of the Legislature in ss 2(2A) was to bring those rights to the attention of the purchaser. He expressed it thus:

'[17] In my view, having established the right of a purchaser, to a cooling-off period, the Legislature's intention in enacting ss 2(2A) was to bring the right of revocation or termination (as the case may be) to the attention of the purchaser. As it is expressed in s 29A of the Act, the right has a finite life which is not dependent upon or affected by a purchaser's knowledge of it. There is every reason to make provision for steps directed at seeing that a purchaser has knowledge of the certain and indisputable right to a cooling-off period established under s 29A.'

[12] There is no indication in either of the sections or elsewhere in the Act to support the appellant's argument that it was intended that the purchaser's 'cooling-off' rights be brought to the notice of the seller too. Apart from stating the general proposition that it would be inequitable if the seller were not afforded the same notice, counsel was unable to refer to any provision in the Act which supported him. He was constrained to argue that such right had by necessary implication to be read into ss 2(2A).

[13] Destructive of the appellant's argument is the clear distinction drawn in ss 2(2A) between an offer and a deed of alienation. It is the latter which 'shall' contain the revocation or termination right and not the former. As the judge observed, the distinction is so clear that it is difficult to attribute it to legislative oversight (para 27). Once it is accepted that to constitute a valid offer it does not have to make reference to the s 29A rights it must follow that the Legislature did not intend to afford the seller the same right of notice as the purchaser. As remarked in the court below, an offer not containing reference to the s 29A right

can be amended by the seller inserting such reference and a binding agreement will come about. The insertion will not amount to a counter-offer. The addition of a clause to a contract which merely reflects the existing state of the law cannot be construed as a counter-offer (para 29). A seller adding to a deed of sale already signed by the purchaser that the sale is *perfecta* on signature and that the risk passes is not making a counter-offer.

[14] The appellant's further argument that the placing of ss 2(2A) in the chapter dealing with formalities and the knowledge that non-compliance with ss 2(1) results in nullity is indicative of the fact that non-compliance with ss 2(2A) was also intended to be visited with nullity is in my view met by the reasoning referred to in para [6ii] above. In short, to repeat what was said in the court below, if the Legislature intended this consequence why did it not commence ss 2(2A) with the same words as ss 2(1).

[15] The perceived potential prejudice to the seller if it is held that the purchaser in the given circumstances has a right to avoid the contract is more illusionary than real. Parties who conclude agreements of sale of land invariably see an attorney to have a formal document drafted. They in any event are obliged to see a conveyor to effect transfer. If ss 2(2A) has not been complied with and the five day period has expired the attorney or conveyencer would be expected to draw to the attention of the purchaser his choice to abide by or to resile from the agreement. The seller could then be able to place the purchaser on terms to make an election within a reasonable period – five days would be reasonable – and the purchaser would then be bound by his election.

[16] I consider that *Sayers* case was wrongly decided. A narrow semantic and linguistic approach was adopted in interpreting the section instead of as in this case, determining in the first place the overall intention of the Legislature and seeking to interpret the section in such a way as to give effect to such intention. It would appear from a reading of the *Sayers* judgment that voidability at the

instance of the purchaser on non-compliance was not considered. Had it been it would, I think, have assuaged the judge's fears that the object of the Legislature would be frustrated or seriously inhibited if the deed were to be valid (see para 5 above). The reasons given in the court below for not accepting the *Sayers* judgment are persuasive. It was said (*inter alia*):

'The construction of ss 2(2A) approved in *Sayers* allows a seller the opportunity to withdraw from a contract against the will of the purchaser. Such an outcome does not accord with the restriction of the benefit of rights under s 29A to purchasers only. Sellers also have second thoughts, and may also fall victim to unfair practices where commissions are to be earned. Notwithstanding that, the Legislature left sellers out of the reckoning in s 29A, and a construction of ss 2(2A) in conformity with that is to be preferred.' (Para 22.)

[17] Apart from the argument referred to in para [14] above, the appellant did not seek to rely on any of the other ground found in the *Sayers* judgment to justify the interpretation that the agreement is void. Nor did he attack any other of the reasons given by the court below for reaching its conclusion.

[18] The court *a quo* gave cogent and compelling reasons for reaching its finding. The grounds relied upon are more fully articulated in the judgment. The brief summary in this judgment does not do the careful and logical reasoning justice. The full judgment should be read in conjunction with this judgment.

[19] The answer to the question posed at the beginning of this judgment is therefore that a deed of alienation which does not comply with ss 2(2A) is not *ipso facto* void but at the instance of the purchaser.

[20] The deed of sale made provision for costs on the attorney and client scale in the event of litigation.

The appeal is dismissed with costs. The costs are to include the costs of

two counsel and shall be on the attorney and client scale.

P C COMBRINCK
ACTING JUDGE OF APPEAL

CONCUR:

FARLAM JA
MTHIYANE JA
BRAND JA
HEHER JA