REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 66477/20

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

DATE: 26 SEPTEMBER 2025

SIGNATURE OF JUDGE:

In the matter between:

NGWAKO THOMAS THOBAKGALE	1st Applicant
LEAH NANDI THOBAKGALE	2nd Applicant
NANDI TRANSPORT (PTY) LTD	3rd Applicant
And	
EVANS JESAYA CHABALALA	1st Respondent
CONSTANCE CHABALALA	2nd Respondent
MS MOFFAT ENTERPRISE (PTY) LTD	3rd Respondent

ORDER

1. The exception is upheld.

2. The Plaintiffs are granted 20 (twenty) days to amend their amended particulars of claim.

3. Each party to pay their own costs.

JUDGEMENT

FLATELA J

Introduction

[1] This is an opposed exception to the Plaintiff's amended particulars of claim on the ground that it lacks the averments necessary to sustain the relief sought, in that the oral sale agreement concluded with the Plaintiffs to purchase the property described as ERF 1[…], Silverton Extension 7, Township, Gauteng Province, owned by the First Defendant (the property) is invalid as it does not comply with the requirements of Section 2(1) of the Alienation of Land Act[1] (the Act) read together with the definitions of the Deed of Alienation. This judgment concerns the exception to Claim A.

[2] On 12 December 2022, the Plaintiffs instituted action proceedings against the Defendants for an order *inter alia* requiring that the Defendants take all necessary steps to comply with and effect the transfer of the property described as ERF 1[…], Silverton Extension 7, Township, Gauteng Province, owned by the First Defendant (the property), to the Plaintiffs. If the Defendants fail to do so within 30 days of the Judgement or Court Orders, authorise the sheriff with jurisdiction within the area of the property to assist in signing on behalf of the Defendants or to take such necessary steps on their behalf.

[3] The claim is based on an oral sale agreement concluded by the parties in 2012. The Plaintiffs argue that they fulfilled the contract's conditions by paying the

[1] Alienation of Land Act, 1981 (Act No. 68 of 1981).

full purchase price of R900,000 (Nine Hundred Thousand), with R600,000 paid to the First Defendant's home loan account and R300,000 to the First Defendant's personal account.

[4] The Defendants admitted that an oral agreement for the sale of their property was made with the Plaintiffs; however, they argue that the sale agreement does not meet the statutory requirements, specifically that it was not put in writing and is therefore invalid.

Parties

[5] The First Plaintiff is Evans Jesaya Chabalala, a male, residing at 9[…] B[…] Street, Silverton, Pretoria, Gauteng Province. The Second Plaintiff is Constance Chabalala, a female, residing at 9[…] B[...] Street, Silverton, Gauteng Province. The Third Plaintiff is M.S Moffat Enterprise (Pty) Ltd, a company with limited liability and incorporated in terms of the Companies Act 71 of 2002, with its registered address at 02716 Mamelodi West, Pretoria, Gauteng Province.

[6] The First Defendant is Ngwako Thomas Thobakgale, an adult male businessman and resident at 2[…] C[…] Sable Hill, Roodeplaat, Gauteng Province. The Second Defendant is Leah Nandi Thobakgale, an adult female businesswoman and resident at 21 C[…], Sable Hill, Roodepoort, Gauteng Province. The Third Defendant is Nandi Transport (Pty) Ltd, a company with limited liability and incorporated in terms of the Companies Act 71 of 1977.

Factual Background

[7] The Plaintiffs issued a combined summons on 12 December 2020. They seek various relief against the Defendants. The Plaintiffs assert that in June 2012, at Silverton, Pretoria, the First and Second Plaintiff entered into an oral contract of sale with the First Defendant to purchase the property owned by the First Defendant at a price of R900,000.00 (Nine Hundred Thousand Rand). It is alleged that the terms of the agreement were as follows:

i. R600,000.00 (Six Hundred Thousand Rand) was to be paid into the Standard Bank Home Loans and Bond Account/ Home Loans, held in the names of the First Defendant.

ii. The remaining R300.000.00(Three Hundred Thousand Rand) was paid into the First Defendant's personal Bank Account.

[8] It is further alleged that the First and Second Plaintiffs complied with the payment terms of the sale agreement, as a total of R600,000.00 (Six Hundred Thousand Rand) was paid into the First Defendant's Standard Bank Home Loans Account, number 2[…], on 19 and 20 September 2014. The remaining R300,000.00 (Three Hundred Thousand Rand) was paid into the First Defendant's personal account.

[9] The Plaintiffs allege that on or about 12th May 2015, the First and Second Defendants were issued with a title deed or deed of transfer for the property, and the Bonds registered over the property were cancelled. Despite the demand, the First Defendant refuses to transfer the property to them.

[10] On 4 March 2021, the Defendants filed a notice of intention to except the particulars of claim on the ground that it lacks the averments necessary to sustain the relief sought, in that the oral sale agreement they entered into with the defendants to purchase the property described as ERF 1[…], Silverton Extension 7, Township, Gauteng Province, owned by the First Defendant (the property), is invalid as it does not comply with the requirements of Section 2(1) of the Alienation of Land Act (the Act), read together with the definitions of the Deed of Alienation.

[11] On 23 April 2021, the First and Second Plaintiff filed their amended particulars of claim. In their amended particulars of claim, they averred as follows:

6.

"The First and Second Plaintiffs demanded the passing and transfer of the property, and despite commissioning a professional conveyancer, who agreed to assist in the transfer of the property, the defendants rejected and refused to sign the relevant documents in compliance with the legal transfer of property.

7.

"Wherefore the First and Second defendant be compelled to sign the relevant transfer documents before a conveyancer appointed by the Plaintiffs for the transfer of the property"

[12] The defendant filed an exception in terms of Rule 23 of the Uniform Rules, excepting the Plaintiff's Claim "A" of the amended particulars of claim served on 26 April 2021, as lacking averments to sustain the relief sought in paragraph 7 on the following grounds:

1. The First and Second Plaintiff's reliance upon an alleged oral contract of sale in paragraph 4 of their particulars of claims does not comply with the requirements of Section 2(1) of the Alienation of Land Act No.68 of 1984(the Act read together with the definitions of the Deed of Alienation and contract where such are found in Section 1 of the Act.

2. By not having complied with Section 2(1) of the Act as aforesaid, no agreement came into effect *ab initio*

3. In the premises aforesaid, the First and Second plaintiff cannot compel the First and Second to agree to transfer immovable property, nor can the Plaintiff request the court to create an agreement by authorising the relevant sheriff to sign an agreement on the defendant's behalf

4. In the further premises aforesaid, prayer (1) of paragraph 11 of the first and second plaintiff's amended particulars is equally legally unsustainable.

[13] In response to the exception, the Plaintiff submitted that, notwithstanding non-compliance with the provisions of section 2(1), the oral sale agreement is valid *ab initio* in terms of Section (28)(2) of the Act in that the Plaintiff performed in terms of the contract.

The parties' contentions The Plaintiff's contention

[14] The plaintiffs argue that Section 2(1) of the Act recognises contracts in any form, including verbal or oral agreements. The Plaintiff further contends that Section 2(1), read together with Section 28(2), validates non-compliant alienations if the alienee has fully performed and the land has been transferred. The Plaintiffs further assert that they have fully performed the terms of the deed of alienation and the contract.

[15] To support the argument that the oral agreement, which would otherwise be invalid under the Act, has been validated by section 28(2), the Applicant submitted the following:

> "4. The Plaintiffs submit that a proper case has been made in "Claim A", in that there was an agreement between:
>
> 4.1 Owner and seller being the Plaintiffs and Defendants.
>
> 4.2 The object of sale is the residential house at: ERF 1[…] SILVERTON EXTERNTION 7 TOWNSHIP, REGISTRATION DIVISION: GAUTENG PROVINCE
>
> 4.3 Agreement as to price payable was duly paid.
>
> 4.4 The plaintiffs have been in occupation since 2012.

[16] The plaintiffs relied on the matter of McKelvey *v. Cowan, NO. 1980 (4) SA 525 (Z) at 526 D-E,* emphasising that a pleading is not excusable if evidence could disclose a cause of action.

[17] The plaintiff prays for dismissal of the exception application with costs, as statutory compliance is allowed in terms of Section 28(2) of the Act.

The Defendant's contentions

[18] The defendants argue that the plaintiffs' claim based on an oral contract for the sale of land is excipiable under Rule 23(1) due to non-compliance with section 2(1) of the Alienation of Land Act (the Act). This section requires that contracts for the alienation of land be in writing, signed by the parties or their agents with written

authority; therefore, oral contracts for the sale of land are null and void.

[19] The Defendants further argue that the plaintiffs have neither pleaded nor can they plead that the property has been transferred to their names or that there is a valid deed of alienation. The Defendants contend that, without a valid deed of alienation, the payments claimed by the plaintiffs cannot be regarded as fulfilling a contract of alienation.

[20] The defendants contend that the oral contract is void due to non-compliance with the statutory formalities, and therefore, no cause of action exists for the plaintiffs regarding claim A. They further argue that the only legal basis for enforcing such a contract would be compliance with the Alienation of Land Act or a valid deed of alienation, neither of which applies in this case.

[21] The defendants contend that the plaintiffs cannot invoke Section 28(2) of the Alienation of Land Act, which offers an exception when a purchaser has paid the full purchase price, and the property has been transferred to them. Since no transfer has occurred to the plaintiffs, this exception does not apply to their claim. The defendants rely heavily on the matter of *Legator McKenna Inc. and Another v Shea and Others*.[2]

[22] The defendants seek an order dismissing the plaintiff's claim A with costs.

Issue

[23] The issue to be determined is whether the alienation of land through an oral agreement of sale *remains valid ab initio* under section 28(2) of the Act, despite non-compliance with section 2(1). If it is valid, then the exception must be dismissed. If the alienation is void *ab initio* due to non-compliance with section 2(1), the exception should be upheld.

[24] Section 2 (1) provides as follows:

[2] *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at 44 para [21]

"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".

[25] Section 28 (2) reads as follows:

Any alienation which does not comply with the provisions of section 2 (1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee".

Discussion

[26] The courts have had numerous occasions to examine the legal requirements of a contract of purchase and sale under the Act. It is now settled that one of the formal legal requirements is that the material terms of the contract must be reduced to writing.

[27] Dealing with the predecessor of the Act, more than 40 years ago, in *Johnston v Leal*[3] Corbett JA said the following regarding the legal effect of this legal requirement:

' It had been held and in my opinion correctly so -that what section 1(1), or its predecessors , require is that the whole contract of sale, or at any rate all the material terms thereof [must] be reduced to writing…The material terms of the contract are not confined to those prescribing the *essentialia* of a contract of sale, viz the parties to the contract, the *merx* and the *pretium*, but include, in addition, all other material terms. It is not easy to define what constitutes a material term. Nor is it necessary in the present case to do so since clause 11, upon which the dispute turns and which has the effect (if operative) of suspending the whole contract pending fulfilment of a condition as to the procurement of a loan on the security of a first mortgage bond to be passed

[3] 1980 (3) SA 927 (AD)

over the property sold and also of causing the contract to be "automatically cancelled" in the event of such a loan not being obtained, would clearly constitute a material term of the contract.'

[28] The learned judge stated in the following paragraphs that:

"the result of non-compliance with section (1)(1) is that the agreement concerned is of no force and effect -void ab initio and cannot confer any right of Action. (see Wilken v Kohler[4] 1913 AD 135, at pp. 142 -3, 149

[29] In *Wilken*[5] the court held that:

"[a] transaction which has no force or effect is necessarily *void ab initio* and can in no circumstances confer any right of action."[6]

[30] In the subsequent paragraph, the learned judge said:

"It by no means follows that because a court cannot enforce a contract which the law says has no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms."[7]

[31] Most recently in *Cooper N O and Another v Curro Heights Properties(Pty) Ltd*[8] Meyer JA, writing for the unanimous court, said:

"Section 2(1) requires the whole contract of sale – its material terms – to be reduced to writing signed by or on behalf of the parties. The material terms of the contract are not confined to those prescribing the *essentialia* of a contract

[4] Wilken v Kohler 1913 AD 135
[5] *Wilken v Kohler* 1913 AD 135
[6] *Wilken at* p. 143
[7] *Wilken* at p. 144
[8] *Cooper N O and Another v Curro Heights Properties (Pty) Ltd* (1300/2022) [2023] ZASCA 66 (16 May 2023)

of sale, namely the parties to the contract, the *merx* and the *pretium*. Generally speaking, these terms, and especially the *essentialia*, must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, and also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral *consensus* between the parties.[9] Whether a term constitutes a material term is determined with reference to its effect on the rights and obligations of the parties.[10]

[32] To substantiate their claim that the transaction is valid, the plaintiffs rely on Section 28(2) of the Act. The plaintiffs assert that they have paid the purchase price in full and have been occupying the property since 2012, maintaining that they have fulfilled their obligations under the contract. They argue that the contract has been validated in accordance with Section 28(2).

[33] Bloem J, dealing with the provisions of section 28 (2) of the Act, in *Bester N.O v Van Wyk*[11] , held that:

"[7] The use of the words "or contract" in section 28(2) indicates that the legislature made provision for an instrument as an alternative to a deed of alienation in terms of which land may be alienated. The subsection refers to performance by the alienee in terms of a deed of alienation or a contract. I understand section 28 (2) to mean that an alienation of land will, notwithstanding non-compliance with the provisions of section 2 (1), be valid if:

(a) the alienee had performed in full in terms of the deed of alienation; or

(b) the alienee had performed in full in terms of the contract; and

(c) the land in question has been transferred to the alienee.

[9] *Johnstone* fn 9 above at 937G-938C.
[10] *Rockbreakers* fn 9 above para 8.
[11] Bester N.O v Van Wyk (2845/2012)[2016 ZAECGHC 37

[34] In paragraph 8 of the judgment, the learned judge held that:

"The alienation shall be valid if the defendant had performed in full in terms of the oral contract. In terms of section 1 of the Act, "contract":

"(a) means a deed of alienation under which land is sold against payment by the purchaser to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year;

(b) includes any agreement or agreements which together have the same import, whatever form the agreement or agreements may take".

[9] A contract accordingly includes any agreement or agreements which have the same import as a deed of alienation under which land is sold against payment by the purchaser to the seller of an amount of money in more than two instalments over a period exceeding one year. Furthermore, in terms of the definition of "contract", it is immaterial whether it is in the form of an oral or written contract".

[35] In that case, an oral agreement was concluded between a mother and a daughter, where the mother sold her property for R300,000, and a registration of the property had taken place, despite the purchase price not being paid in full. The learned judge held that the purchase price was not paid in full; therefore, the requirements of 28(2)(b) were not met even though the property was already transferred to the defendant.

[36] Recently, In *Daniels and Fourie and others*[12], Eksteen J, dealing with the requirements of sec 28 (2), he said:

"That's 28 requires full performance by all parties to the contract. Partial performance, or full performance by one of the parties, would not suffice to clothe the transaction with validity.[13]

[37] Based on the evidence before me, it is clear that not all parties involved have

[12] *Daniels and Another v Fourie and Others (24932/2019) 2023 ZAECPEHC 50*

[13] *Christie's: The Law of Contract in South Africa* (8^{th} ed) p. 158

fully performed. The Plaintiffs argue that they paid the full purchase price and, therefore, they have fully fulfilled their obligations under the contract. Unfortunately for the plaintiff, Section 28(2) does not assist their case because the property had not yet been transferred to them; hence, Section 28(2) is not applicable. Section 28(2) affirms the validity of a sale that might otherwise be invalid if the parties had not fully performed according to the oral agreement. For example, in this case, if the plaintiff had paid the full purchase price and the Defendants had transferred the property to the Plaintiffs, section 28(2) would legitimise the transaction. In the current case, the parties had not fully performed; therefore, the alienation is void ab initio due to non-compliance with section 2(1).

[38] The Plaintiff also relied on the decision of this division in a matter of *Masango v Masango and Another* [14] where the Full Bench of this division set aside the court's order, which had upheld the exception.

[39] The Masango case is distinguishable from the current case in that, in the Masango matter, the appellant's pleaded case is summarised at paragraph 10 of the judgment as follows:

> " [10] In the case pleaded by the appellant, the orders sought by him are: *"an order that the 1st and/or 2nd Defendant take all necessary steps to uphold and give effect to the oral agreement reached between the Plaintiff and the 1st Defendant. . ."* The order that is sought by him is not for the transfer of any immovable property but rather in its terms, an order for specific performance in respect of the oral agreement pleaded and for the second respondent to give effect to it.
>
> [11] The Court *a quo* proceeded from the premise that the case pleaded was one which had as its "effect" the alienation of immovable property which can only be effected in terms of a written agreement as provided for in section 2(1) of the Alienation of Land Act."[15]

[14] *Masango v Masango N.O. and Another (A296/2020) [2023] ZAGPPHC 602.*
[15] 68 of 1981.

[40] In the current case, the Plaintiff is seeking an order that the First and Second Defendants be compelled to sign the relevant transfer documents before a conveyancer appointed by the Plaintiffs for the transfer of the property. The effect of this order is the alienation of the immovable property, which can only be affected in terms of a written agreement as provided for in sec 2(1) of the Act.

[41] In my view, for the reasons set above, the exception must succeed.

[42] As a result, I make the following order:

1. The exception is upheld.

2. The Plaintiffs are granted 20 (twenty) days to amend their amended particulars of claim.

3. Each party to pay their own costs.

FLATELA LULEKA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 26 September 2025.

Appearances

Counsel for the Applicant:	Adv M.L Khomola
Instructed by:	Mashiyi S Attorneys
Counsel for the Respondents:	Adv L.J.L Mokoape
Instructed by:	Mwim Attorneys
Date of the Hearing:	11 February 2025

Date of the Judgement: 26 September 2025