IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR199/2024

CASE NO: 829/2022P

In the matter between:

BLUE GUM ESTATE (PTY) LTD **APPELLANT**

and

ZENITH ESTATES CC **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS **SECOND RESPONDENT**

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Annandale AJ, sitting as court of first instance):

The appeal against the judgment and order of the court a quo declaring that the respondent validly exercised the option to purchase is dismissed with costs on scale C

JUDGMENT

Mathenjwa J (Chetty J and Hadebe J concurring)

Factual background

[1] This is an appeal against the judgment and order of Annandale AJ in which the learned Judge declared valid the first respondent's (the respondent) exercise of the option to purchase contained in the agreement of sale of Commercial Timber Farming Enterprise concluded between the appellant and the respondent. The court a quo directed the appellant to take all necessary steps to effect the transfer of the immovable properties described as Erf 1450, Erf 1451, Erf 1452, and Erf 1453 to the respondent, against payment of the purchase price of R900,000.

[2] The matter arose from an agreement of sale of commercial property concluded by the respondent and appellant on 11 August 2006, in terms of which the respondent sold to the appellant, the Commercial Timber Farming Enterprise, comprising the land and timber farming business on the Zenith Estate (the respondent). In terms of clause 6.1 of the sale agreement, the appellant granted the respondent the sole and exclusive right and option to purchase the House Sub-division, which is a component of the Commercial Timber Farming Enterprise, as the new owner, for the purchase price of R900,000. The House Sub-division ('the property') was defined as the subdivision portion 1 containing the existing homestead as described on the layout plan Ref 6065/2006, scale 1:3000. The option to purchase would terminate on 31 July 2015 or 90 days after the appellant furnished the respondent with the approved subdivisional diagrams of the property whichever was the earlier of the aforesaid two dates.

[3] On 2 September 2013, the appellant and the respondent concluded a written addendum to the agreement of sale in terms of which the date by which the respondent was required to exercise the option as set out in clause 6.1.1 of the sale agreement was extended to 31 July 2020. On 31 July 2015, Mr Pillay, the respondent's attorney, addressed an email to the appellant advising them that their client, the respondent, exercises their right and option to purchase the House Sub-division from the appellant. In addition, the attorney further attached an agreement signed by the respondent in respect of the purchase of the House Sub-division. The

agreement provided that the respondents purchased four subdivisions, namely Erf 1450, 1451, 1452, and Erf 1453, in accordance with clause 6.1 of the offer contained in the sale agreement. The reason being that the appellant had subdivided the property referred to as the House Sub-division into four erven. However, the appellant contended that the respondent's purported exercise of the option was invalid because it related to a different property than the one that was offered for purchase. Dissatisfied with the appellant's action, the respondents launched a court application for an order declaring that the option to purchase was validly exercised, and the court a quo granted judgment in favour of the respondent.

Issues before this Court

[4] The grounds of appeal before this court are mainly based on the contention that the court a quo erred in finding that the respondent had validly exercised the option to purchase the property in terms of the agreement between the parties. The appellant also raised a point of law stating that in the event that this Court finds that the option to purchase was properly exercised by the respondent, then the exercise of the option did not comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981 ('the Act'), since, there was no evidence that the attorney was authorised in writing to exercise the option on behalf of the respondent.

[5] The respondent opposed introduction of the new point of law on appeal, but alternatively contended that in the event this Court decided to entertain the new point of law, the respondent would apply for leave to adduce further evidence to show that the attorney was authorised by the respondent in writing to convey to the appellant that the respondent had taken a resolution to exercise the option to purchase the property. The appellant opposed the application to adduce further evidence based on the grounds that the engagement letter, which purported to authorise the attorneys to advise the appellant that the respondent had exercised the option does not constitute the authority required by s 2(1) of the Act and therefore it is irrelevant to the question of whether or not the respondent had ever exercised the option.

[6] Therefore, the issues for consideration in this appeal are:

a) Whether the court should entertain the new point of law raised by the appellant on appeal;

b) Whether this court should grant leave to the respondent to adduce further evidence;

c) Whether the respondent had validly exercised the option to purchase the property;

d) If so, whether the exercise of the option complies with the requirements of s 2(1) of the Act; and

e) In reaching the conclusion that the option was validly exercised, this court will have to make a finding that the exercise of the option relates to the same *merx* that was offered for sale and that the terms incorporated in the proposed agreement by the respondent do not constitute a counter-offer.

Parties' contentions

[7] Mr *Pammenter SC* for the appellant submitted that the letter addressed by Pillay from the respondent's attorneys to the appellant advising that the respondent had exercised the option constituted an exercise of the option by Pillay. It was contended that such exercise of option by Pillay was not binding because it is not contained in a deed of alienation signed by the parties or by the parties acting on their written authority. Furthermore, it was argued on behalf of the appellant that the exercise of the option does not coincide with the offer contained in the agreement in that the appellant had offered to sell a House Sub-division to the respondent, and the respondent had exercised the option to purchase four subdivisions.

[8] It was further submitted on behalf of the appellant that the creation of the four subdivisions and the provision of services thereto resulted in considerably greater costs to the appellant as the property developer and the parties could never have contemplated that the respondent would be entitled to the benefit of purchasing the four subdivisions at the same price as the single House Sub-division. It was contended on behalf of the appellant that the proposed agreement imposed additional obligations on the appellant which were not contained in the offer to purchase. Firstly, the proposed agreement provided that the purchaser was entitled to occupation pending transfer of the sale of the property, whereas such obligation was not included in the option. Secondly, the appellant was obligated to do all things necessary to obtain approval of the relevant authorities for the development of the entire scheme, whereas in terms of the original agreement, the appellant was

required to arrange for the subdivision of the whole property into divisions, one of which was to be the House Sub-division. The third point is that the type of servitude outlined in the option was significantly different from what was proposed in the agreement. The parent property was intended to be encumbered by a servitude benefiting a single property, the House Sub-division. In contrast, the proposed agreement specified that the property would be encumbered by a servitude benefiting four properties, the four subdivisions.

[9] Ms Mills, representing the respondent, argued that the option was not exercised by the attorneys of the respondent and that it complies with section 2(1) of the Act. She asserted that the option was exercised by the respondent itself through a written resolution that was signed by it.[1] The respondent submitted that the draft agreement clarified that the option property was divided into four erven in the identical land that was the subject of the option. Each of the option terms, which is the property, price, and payment thereof, remained unaltered.

[10] With regard to the proposed additional terms, it was argued on behalf of the respondent that while the additional proposals were not a precondition to the exercise of the option, some of the proposals were terms implied by law, and some were proposed solely to the benefit of the appellant.

Analysis and applicable legal principles

[11] The new issue raised by the appellant on appeal is that the exercise of the option by the respondent to purchase the property does not comply with the law. It is appropriate to state upfront that a party cannot raise an issue on appeal that was not raised in the court a quo unless it is a pure question of law.[2] The rule regarding the raising of a new point of law on appeal is not without limitations. A new point of law may be raised if the pleadings covered the point, and the entertainment of the point must not prejudice the other parties.[3]

---

[1] The directors of the first respondent signed the resolution to exercise the option to purchase the property.
[2] *DB v CB [2024] ZACC* 9; 2024 (5) SA 335 (CC) para 45.
[3] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC) para 109.[please check the spelling of the parties' names]

[12] There is no doubt that the issue of whether the respondent's exercise of the option complies with the requirement of the law is an issue of law. The respondent had stated in their pleadings that the attorneys conveyed the message by means of a letter to the appellant, which communicated that the respondent had exercised the option to purchase the property. Therefore, the involvement of the respondent's attorneys in transmitting the exercise of the option by the respondent to the appellant is material and was traversed in the pleadings. Furthermore, the court's entertainment of the point of law would not prejudice the respondent because it had been afforded the opportunity to respond, and it had applied for leave to adduce evidence to deal adequately with the point of law.

[13] This then brings me to the reception of new evidence on appeal. The requirements formulated by the Supreme Court of Appeal for the reception of new evidence on appeal are as follows:[4]

> '…(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
>
> (b) There should be a *prima facie* likelihood of the truth of the evidence.
>
> (c) The evidence should be materially relevant to the outcome of the trial'.

From the affidavit filed by the respondent in the application to adduce further evidence, it is evident that the evidence is aimed at showing that the attorney who advised the appellant about the respondent's exercise of the option had the authority to act on behalf of the respondent in this regard. The evidence sought to be led was not led in the court a quo because the appellant did not raise the lack of authority from the respondent's attorney to represent them. The evidence is material and relevant to the outcome of the case because it will either support the appellant's or the respondent's version on the issue of whether the attorney had the authority to act on behalf of the respondent or not. Accordingly, the respondent is allowed to adduce the evidence to counteract the appellant's submissions on an issue that was not raised in the court a quo.

---

[4] *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011 (1) SA 16 (SCA) para 12; *S v De Jager* 1965 (2) SA 612 (A) at 613B-E.

[14] The enquiry on the validity of the exercise of the option must commence with the question of whether the option was exercised by the attorney of the respondent or not. If it was exercised by the attorney, then the question is whether the attorney had the authority to do so. A piece-meal interpretation of the documents pertaining to the exercise of the option would defeat the basic principle of interpreting a document which was spelt out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[5] where it was held that 'an interpretation is the process of attributing meaning to the words used in a document, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence'.[6]

[15] The respondent's attorney clarifies in the letter that they were advising the appellant about the respondent's exercise of the right of option to purchase the House Sub-division. The attorney further attached the resolution adopted by the respondent to exercise the option duly signed by its members, and an agreement in respect of the purchase of the property duly signed by the respondent's shareholders. The wording of the attorney's letter stating that they were advising the appellant of the decision taken by the respondent to exercise the option, coupled with the resolution adopted by the respondent and the agreement of purchase signed by the respondent's shareholders, clearly shows that the option to purchase was exercised by the respondent, not by their attorneys.

[16] Having found that the option was not exercised by the attorneys, the issue of whether the attorneys had the authority to exercise the option has become moot. However, for the sake of completeness of the discussion about the role of the respondent's attorneys in the exercise of the option a reference to the letter of engagement signed by the respondent where it is recorded that the attorneys were authorised to correspond with the appellant, prepare the exercise of the option agreement and attend to the transfer of the property shows that the attorney had the mandate from the respondent to deal with the matter including communicating with the appellant on the exercise of the option by the respondent.

---

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 1; 2012 (4) SA 593 (SCA).

[6] Ibid para 18.

[17] This then brings me to the appellant's contention that the property in respect of which the respondent exercised the option to purchase was not the same thing offered by the appellant to the respondent. It is appropriate to point out that the point in issue was raised and thoroughly ventilated in the court a quo. It is trite that when a seller grants an option to a buyer to purchase a thing, the contract of sale comes into existence upon the purchaser exercising the option when it is still open.[7] In this matter, the respondent exercised the option to purchase while the offer was still open. Apart from the description of the House Sub-division in the layout plan, the sale agreement does not describe the content of the property, nor does it specify its shape, whether it will be constituted by one or more than one erven. However, it is discernible from clause 7.2 of the agreement that the House Sub-division includes a residence and land forming part of it. The property that the respondent had exercised the option to purchase is clearly identifiable on the layout plan attached to the agreement. It is the same property in terms of the location and size that was offered by the appellant to the respondent. Therefore, the court a quo was correct in finding that the option was validly exercised to purchase the same *merx* that was offered to the respondent for sale.

[18] The appellant's contention that the property was different because the respondent accepted an offer to purchase four erven, whereas the appellant had offered to sell one property, the House Sub-division, does not hold water. The reason being that the appellant subdivided the property into four subdivisions when it had granted the respondent the sole and exclusive right to exercise the option to purchase the property while such option was still open to the respondent. It is trite that the essence of an option is that it is binding on the option grantor. It is an offer, in this case to sell property, which cannot be revoked. It is the option holder that has the choice whether to exercise its right.[8]

[19] Clause 6.2 of the sale agreement requires the appellant to disclose to interested parties in the event it alienates or advertises for the disposal of any part of the property before the option terminates. Therefore, during the existence of the

---

[7] *Hersch v Nel* 1948 (3) SA 686 (A) at 699.

[8] *Du Plessis NO and Another v Goldco Motor & Cycle Supplies Pty (Ltd)* [2009] ZASCA 62; 2009 (6) SA 617 (SCA) para 15.

option, the appellant would be prevented from dealing with the property in a manner that would alter its character from that which was offered to the respondent without prior disclosure of the intended action to the respondent, who is an interested party. For that reason, the subdivision of the property into four erven would not frustrate the respondent from accepting the offer to purchase the property in its current shape, provided that the new shape did not change the *merx*, which is the subject of the agreement of sale between the parties.

[20] I digress to the appellant's contention that they offered the land for a different price, and the respondent had exercised the option to purchase at a different price. That point was ventilated and correctly decided by the court a quo, which determined that the inclusion of an offer to pay additional amounts alongside the option price in the proposed agreement does not indicate that the respondent had failed to exercise the option as outlined in the offer. The additional costs to the original purchase price, which the appellant complains about, are costs in favour of the appellant. The additional costs include the costs incurred by the appellant for subdividing the property into four erven. The additional costs do not constitute a counteroffer nor invalidate the offer. The contract of sale would still be enforceable on its original terms without the additional costs if the appellant did not accept payment of additional costs by the respondent.

[21] Furthermore, the appellant's contention that the acceptance of the offer creates an additional burden to the respondent because it makes provision for the respondent to take occupation of the property before the property was transferred to it; pay for the development of the property, and create four right of way servitudes in respect of the four erven is not sustainable. These matters are provided for in the sale agreement between the parties. Firstly, clause 7.1 of the agreement of sale provides that until the date of registration of the House Sub-division, the appellant would lease the property to the respondent. Therefore, the respondent's occupation until registration of the property in their name is an implied term of the agreement. Secondly, the payment of costs by the appellant for developing the property is provided for in clause 6.4 of the agreement of sale, where it is recorded that the appellant was liable for all the costs for the creation of the House Sub-division,

including survey and compliance with all conditions of approval required in law to give effect to the registration of the House Sub-division.

[22] Clause 6.5 of the agreement requires the appellant to register, over the whole of the property sold, a right-of-way servitude in favour of the respondent, granting them full access to the House Sub-division from the public road as well as access to electricity and water. The creation of the right-of-way by means of four servitudes in respect of each of the four erven was necessitated by the appellant's own conduct in creating four erven within the House Sub-division. The servitude sought to provide each of the four with equal access to the public road and other services. Finally, even if the disputed terms were not contained or implied in the parties' contract, the fact that the respondent incorporated terms that are proposed in their acceptance of the offer does not make the acceptance a counteroffer. If the proposed terms are unacceptable to the appellant, that does not mean that the offer is not binding, since the contract must still be enforced on the essential terms embodied in the offer.[9]

[23] What remains is the issue of whether the exercise of the option to purchase the property complies with s 2(1) of the Act, which provides that:

'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.'

The Act requires that the offer and acceptance of alienation of land to constitute a valid contract should be in writing.[10] It is trite that the test applied in determining whether the sale of land complies with s 2(1) of the Act, is 'whether the land alienated can be identified on the ground by reference to the provisions of the contract without recourse to evidence from the parties as to their negotiations and consensus.'[11]

[24] It is not in dispute that the respondent took a resolution in writing to exercise the option to purchase the property as it was identified in the layout plan in the sale

---

[9] *Du Plessis NO and Another v Goldco Motor & Cycle Supplies Pty (Ltd)* fn 7 above para 18.
[10] *Brandt v Spies* 1960 (4) SA 14 (E) at 17A-B.
[11] *JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* [2009] ZASCA 3; 2009 (4) SA 302 (SCA) para 19.

agreement containing the offer to sell the property. The resolution was signed by the shareholders of the respondent. Furthermore, the shareholders of the respondent authorised to sign the agreement relating to the purchase of the property by the respondent, had signed such agreement, which was then conveyed by the respondent's attorney to the appellant. Thus, the resolution, the agreement of sale of the property duly signed by the authorised shareholders, together with the letter by the respondent's attorneys conveying the exercise of the option to the appellant, squarely complied with the requirements of the Act. The mere fact that the proposed agreement of sale was not signed by the appellant would not render the acceptance of the offer invalid, given that the offer was signed by the appellant and the acceptance thereof was signed by the respondent.

[25] For this reason, the appeal should fail. There is no reason to depart from the principle that costs follow the result[s]. Given the complexity of the matter, the appellant should pay the respondent's costs on scale C.

Order

[26] In the premises, the following order is made:

The appeal against the judgment and order of the court a quo declaring that the respondent validly exercised the option to purchase is dismissed with costs on scale C

Mathenjwa J

I agree.

Chetty J

I agree.

Hadebe J

Date of hearing:	13 June 2025
Date of judgment:	21 November 2025

Appearances:

Applicant's counsel:	
Instructed by:	Cox Yeats Attorneys
	Umhlanga Ridge
First Respondent's counsel:	Ms L M Mills
Instructed by:	Simon Chetwynd-Palmer Attorneys
	Kloof