

**AN ANALYSIS OF THE PURCHASER'S PROTECTION IN TERMS OF  
CHAPTERS TWO AND THREE OF THE ALIENATION OF LAND ACT 68  
OF 1981**

**By**

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## **SUMMARY**

Chapters II and III of the Alienation of Land Act 68 of 1981 contain various measures which are intended to protect a purchaser who has entered into a contract for the sale of land. This dissertation will consider the various sections of these Chapters to indicate what protection the purchaser is offered, whether this protection offered is to the advantage of the purchaser, and also what the purchaser must do to be afforded this protection.

The different sections are split into different chapters which will cover rights which are applicable in general, rights which are applicable when a mortgage bond is still registered over the land, and also the rights which a purchaser has if the owner of the land should become insolvent before the land is transferred to the purchaser.

It is important that the purchaser should be aware of these rights because they are intended for his benefit. Some sections are excessively verbose which is not to the advantage of a purchaser who probably cannot afford legal assistance since he cannot obtain a mortgage bond to assist with the purchase of the property and as such some sections can be criticised. Where possible, suggestions for easier understanding have been provided.

The aim of the dissertation is to inform purchasers of what rights they have at their disposal when they enter into a contract and to ensure that he understands the rights which he has so that he can actually attempt to rely on the Act if the need arises.

## DECLARATION OF ORIGINALITY

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3. I have not used work previously produced by another student or any other person to hand in as my own.
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## **ACKNOWLEDGEMENTS:**

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“See, God has come to save me. I will trust in him and not be afraid. The LORD GOD is my strength and my song; he has given me victory.”

Isaiah 12:2 NLT

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## CHAPTER 1: INTRODUCTION

The purpose of the Alienation of Land Act 68 of 1981 (hereinafter “the Act”)<sup>1</sup> is “to regulate the alienation of land under certain circumstances and to provide for matters connected therewith.”<sup>2</sup> One such circumstance is the sale of land by way of instalments which is specifically regulated by Chapter II. The purpose of Chapter II is to mainly provide protection for the purchaser of land sold against the owner of the land’s insolvency or the attachment of the land. <sup>3</sup> Since the purpose of the Act is the regulation of alienation of land, it is assumed that the Act will regulate the whole of the contract entered into under the Act. Whether this is the case will become apparent during the course of this research.

Considering the Act is intended to regulate the alienation of land and an entire chapter of the Act is dedicated to the sale of land on instalments, it is inevitable that most persons intending to sell or purchase land on instalments will have to comply with the requirements of the Act. Understanding this legislation and what is required from the parties to the contract is not as simple as just looking up the various sections of the Act and repeating the content of those sections. The Act is not recently invented legislation and life now is a very long way from what life was at the time when the Act was enacted. The task of interpreting legislation is not easy and combining that with the effect of changing times is a monumental task for those who must comply with the Act.

Since the purpose of Chapter II is the protection of the purchaser, this research project aims to answer the following main question: how does the Act provide protection for the purchaser of land which is sold on instalments?

To assist in answering the main question, the following sub-questions can be asked: what information must be contained in a contract that is entered into for the sale of land on instalments; what rights are provided for in the Act that protect a purchaser; what happens

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<sup>1</sup> All references to sections and Chapter I, II or III must be construed as being a reference to the Act unless otherwise specified.

<sup>2</sup> Preamble to the Act.

<sup>3</sup> Van Rensburg ADJ and Treisman SH *The Practitioner’s Guide to the Alienation of Land Act 2<sup>nd</sup> Edition* (1984) 91 91.

in the event that the land sold is encumbered by a mortgage bond; what happens when the owner of the land becomes insolvent or the land is attached; and what happens where a contract is declared void or is terminated? These questions can be grouped into the following categories that will then form the basic structure of this mini-dissertation: the contents of the contract; the general rights of a purchaser in terms of the Act, rights of a purchaser where land is encumbered by a mortgage bond and the rights of a purchaser in the event of the insolvency of the owner.

Relevant general provisions, such as certain sections of Chapter III,<sup>4</sup> and definitions may require discussion as they relate to the provisions of Chapter II and these will be discussed where necessary.

Having considered the headings of the sections in Chapter II, a basic idea can be formed of what matters are provided for in the Act regarding sale of land on instalments.

The Act is abundantly clear on what information must be contained in a contract when the “thing” sold is land and the purchase price is paid by way of instalments.<sup>5</sup> This information must be in each and every contract. Without this information a contract may be invalid. If a contract does not comply with the Act in terms of the content, parties are entitled to approach the court for relief.<sup>6</sup> The clauses that may not be in contracts is also provided for in Chapter II. This will be discussed in Chapter 2 below. A general overview of the most important definitions for the purposes of this research will also be considered in Chapter 2.

Rights of the parties are also specifically provided for, over and above those that may be provided for by the common law or other legislation. The duties of the seller can obviously be translated into something the purchaser has a right to claim. Duties, if not complied with, may lead to the cancellation of the contract. It is therefore important that persons should understand what is expected of them and what they can expect when the Act is applicable. What the various rights and duties are will be explored in Chapter 3 below.

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<sup>4</sup> See ss26-29A.

<sup>5</sup> S6.

<sup>6</sup> S24.

What is the position if land sold is encumbered by a mortgage bond? In Chapter 4, the topic of land sold encumbered by a mortgage bond will be considered. The importance of this cannot be stressed enough because if the seller should default in the repayments of the mortgage bond, the purchaser could be drastically affected.

The purchaser could also be drastically affected if the owner of the property becomes insolvent or if the land sold is attached before the transfer of the property to the purchaser. The position of the purchaser will be considered in Chapter 5.

The Act came into operation before the Constitution<sup>7</sup> came into operation. The Constitution is considered to be the supreme law of the country. All laws and conduct which does not conform to the Constitution are considered invalid.<sup>8</sup> Any legislation that requires interpretation must be interpreted in line with the Constitution and must “promote the spirit, purport and objects of the Bill of Rights.”<sup>9</sup> In terms of section 39(3) of the Constitution, rights in terms of common law or legislation are valid as long as they are consistent with the Bill of Rights. Contracts entered into in terms of the Act must also be interpreted in terms of the Constitution if these contracts come into question before a court. A recent court case<sup>10</sup> has highlighted the need for constitutional values to be present in contracts entered into and this may form a very important basis for future contracts and the way the Act is interpreted in future. This court case will be discussed and also how the values of the Constitution play a role in the contracts that are entered into in terms of the Act.

The Act, may contain problems that may become apparent during the course of this project. When such problems present, solutions will hopefully also be as forthcoming. Solutions may be suggested by various authors or even be rectified by the court by interpreting the legislation in a way that makes it unnecessary for an amendment of the legislation by

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<sup>7</sup> The Final Constitution of South Africa Act 108 of 1996 (hereinafter the Constitution).

<sup>8</sup> S2 of the Constitution.

<sup>9</sup> S39 of the Constitution.

<sup>10</sup> *Botha v Rich NO* 2014 (4) SA 124 (CC).

parliament. It is hoped that there will be a minimum number of problems to ensure legal certainty.

One way to ensure that the Act and the rights provided to the purchaser are better understood is to consider various legal texts and information that is available. A critical analysis of the relevant provisions of the Act is required. The point of departure for interpreting the Act, is therefore the Act itself and will be the primary literature for this research project.

Considering too that textbooks on the topic of the Act as a whole are not widely available, information on dealing with the Act must be a sought after commodity. There are, however, a few textbooks which must be considered in the pursuit of explaining the Act.

The authors Van Rensburg and Treisman<sup>11</sup> have written a rather extensive textbook on deciphering the Act and as such is an important textbook to consult. The book is, however, outdated considering the date of publication. To compare their viewpoints and thus to choose the best possible interpretation of the Act, I have also decided to also consider the book written by De Jager.<sup>12</sup> These textbooks will be studied critically in conjunction with the Act.

There have been amendments to the Act since these books were written and thus these books do not provide a complete picture of the Act. Books dealing with general principles of contract law will also be considered since contracts entered into in terms of the Act are also contracts that are subject to general law principles. The books dealing with general law principles are updated more regularly and may provide newer information on the interpretation of the contracts entered into under the Act.

Journal articles and case law will provide invaluable insight into the meaning of the Act as they provide viewpoints of different authors and also provide insight as to how the courts

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<sup>11</sup> Van Rensburg ADJ and Treisman SH, *The practitioner's guide to the Alienation of Land Act* (second edition), Durban: Butterworths 1984.

<sup>12</sup> De Jager T, *Vervreemding van grond, Alienation of land*, Cape Town, Juta 1982.

and other experts will interpret the legislation at hand. Journal articles should provide a more updated understanding of the Act.

Since case law sets a precedent for future cases, case law is also vital for understanding the Act and the rights provided by it.

The interpretation of statutes is not the topic under discussion. The topic under discussion is the Act and how it provides protection for the parties to the contract for the sale of land sold on instalments. Therefore the rules to interpret statutes will not be discussed. This is intended to serve as a guide to answering the research question and not a guide on how to interpret all legislation. Furthermore, since the research question deals with how the Act provides protection for the purchaser, not all sections in Chapter II may require discussion and as such will only be referred to if necessary. Sections which are relevant will only be quoted if and where necessary.

At the end of this research project, one should have a better understanding of the working of the Act and what effect it will have on the sale of land by way of instalments. One should be aware of the protection that is offered to both the purchaser and what the duties of the seller/owner are towards the purchaser in ensuring these rights are protected. It is imperative that the Act is fully understood to avoid misunderstandings that may result in a contract being declared void by the court.

## CHAPTER 2: RELEVANT CONCEPTS AND CONTENTS OF THE CONTRACT

Before one can go into the details of what rights the purchaser has in terms of Act, one must be aware of the important definitions contained in the Act and the contents of the contract that is entered into in terms of the Act. The Act is clear on what additional information is required,<sup>1</sup> over and above the information required for a valid deed of alienation.<sup>2</sup> A failure to comply with the requirements regarding the content of the contract could result in a purchaser applying to court for the appropriate relief.<sup>3</sup> The Act also states what clauses would be invalid in a contract and thus these clauses should be avoided by parties to avoid having part of the contract severed.<sup>4</sup>

These provisions will be discussed below.

### *2.1 Important definitions*

The Act provides definitions for a vast array of terms in section 1. Since this research is focused on Chapter II and a part of Chapter III, not all these definitions are relevant. Only the definitions which pertain to this mini-dissertation will be discussed and it must be noted that only some parts of the relevant definitions may be discussed as they relate to Chapters II and III as some definitions are important, but only certain sections thereof relate to this study.

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<sup>1</sup> Ss6 and 23.

<sup>2</sup> S2(1) requires that a deed of alienation must be in writing and signed by the parties to the deed of alienation or their agents acting under their written authority. A contract is also a deed of alienation and must comply with these requirements as well as the requirements of s6.

<sup>3</sup> S24 lays out the relief that the court can grant to a purchaser if the contract does not comply with ss5 and 6. The contents of s24 will be discussed in par 2.4 below.

<sup>4</sup> S15.

The Act defines a deed of alienation as “a document or documents under which land is alienated.”<sup>5</sup> Although a “deed of alienation” is as such not important for Chapter II, the relevant document that alienates land in Chapter II is a “contract”.

A “contract” is defined in the Act in section 1(1) as a deed of alienation where land is sold by the “seller” to “purchaser”. The purchase price is paid in three or more instalments and is paid over a period longer than one year. Van Rensburg and Treisman<sup>6</sup> emphasise the fact that Chapter II will only apply in cases where the land is not yet transferred to the purchaser. Although this is not apparent from the definition, it can be assumed based on the fact that the purpose of Chapter II is to protect a purchaser from an insolvent “seller” or “intermediary”. If the land is already registered in the name of the “purchaser”, there would be no need to protect the “purchaser”.<sup>7</sup> The “contract” can be embodied in more than one document. A “contract” where the seller is the State, Community Development Board, National Housing Commission or a local authority is excluded from the scope of Chapter II.<sup>8</sup>

“Land” sold in terms of a contract, for the purposes of Chapter II, must be used or intended to be used mainly for residential purposes.<sup>9</sup> “Land” does not include any interest in land,<sup>10</sup> agricultural land, land part of a scheduled Black area, land reserved for Coloureds or land forming part of a trust which is held on behalf of a person by the State or a Minister.<sup>11</sup>

In terms of section 25, it is presumed that the land was indeed sold for residential purposes unless proved otherwise. It is submitted that land which is used by the “purchaser” for residential purposes and land let by the “purchaser” to others for residential purposes should qualify as “land used or intended to be used mainly for residential purposes.” In *Wimpey Homes (Pty) Ltd v Joint Liquidators Glen Anil Development Corp*,<sup>12</sup> however the court came to a different conclusion. The court held that where a person lets out the land to

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<sup>5</sup> S1(1).

<sup>6</sup> Van Rensburg ADJ and Treisman SH, *The practitioner's guide to the Alienation of Land Act* (second edition), Durban: Butterworths 1984.

<sup>7</sup> Van Rensburg 91 92.

<sup>8</sup> S4.

<sup>9</sup> S1(1) “land” subsection (c)(i).

<sup>10</sup> S(1)(1) “land” subsection (b).

<sup>11</sup> S1(1) “land” subsection (c)(ii).

<sup>12</sup> 1979 2 SA 813 (W) 820D-E.

earn an income, there is no intention to use the property for residential purposes. The “purchasers” intention is to use the land for business purposes. A contract for the sale of this land would thus fall outside the scope of Chapter II.

The land is registered in an “owner’s” name and “owner” can also refer to a successor in title of the person in whose name the land is registered.<sup>13</sup> The land will not be registered in the owner’s name if the owner acquired ownership by means of acquisitive prescription.<sup>14</sup>

A “purchaser” for the purposes of Chapter II refers to a “person to whom land is alienated.”<sup>15</sup> A “remote purchaser” refers to a person who purchased land from someone other than the owner. A “remote purchaser” will no longer be a remote purchaser when the land is transferred to the person from whom the “remote purchaser” purchased the land.<sup>16</sup>

A “seller” refers to someone who alienated land in terms of a “contract” or to a person who has the obligation to transfer the land. An obligation to transfer the land is passed to a person by way of assignment. A purchaser would have to agree to the transfer of the obligations of the seller to another person.<sup>17</sup> An “intermediary” is a person who sells land to a “remote purchaser” or a person who alienates land to another person who again alienates the land to a “remote purchaser” before the land has been transferred into the name of the first mentioned person.<sup>18</sup> An “intermediary” is no longer an intermediary when the land sold is transferred into his name.<sup>19</sup> The relationship between the intermediary and a remote purchaser will always be regulated by a contract as defined in the Act.<sup>20</sup>

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<sup>13</sup> S1(1) “owner”.

<sup>14</sup> Van Rensburg 91 101.

<sup>15</sup> S(1)(1) “purchaser”.

<sup>16</sup> S1(2).

<sup>17</sup> Van Rensburg 91 101.

<sup>18</sup> For an explanatory diagram of the relationships between a seller, intermediary or intermediaries and purchasers or remote purchasers, see Van Rensburg 91 100.

<sup>19</sup> S1(3).

<sup>20</sup> De Jager T *Vervreemding van grond, Alienation of land* (1982) 50.

## 2.2 *The contents of the contract*

Sections 5 and 6 relate to the content of the contract. In terms of section 5, a purchaser is entitled to choose the official language that the contract should be drawn up in.

Section 6(1) indicates what information must be contained in a contract for the sale of land on instalments. The information which must be contained in the contract is extensive and only those parts which are important and require explanation will be discussed.

Section 6(1)(a) requires that the parties should be identified<sup>21</sup> and their addresses, business or residential, should be included in the contract. Where a party does not have an address in the country, an address must be nominated.<sup>22</sup> Section 23 provides that the addresses stated in the contract in terms of s6(1)(a) serve as the *domicillium citandi et executandi* of the parties and that any change to such addresses must be done in writing and the other party to the contract must be notified thereof by registered post.

Section 6(1)(c) requires that where the seller of the land is not the owner of the land, the details of the owner must also be included in the contract. Section 6(1)(i) requires that where someone other than the owner sold the land to the seller, that person's information must also be provided in the contract. This is important for the purchaser to be able to request certificates for amounts outstanding and owing to other intermediaries and the owner.<sup>23</sup> Section 6(1)(d) requires that where the land is encumbered by a mortgage bond, the name and address of the mortgagee must also be included in the contract since the purchaser is under an obligation to inform the mortgagee of the existence of the contract.<sup>24</sup>

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<sup>21</sup> The identities of the parties are considered to be an essential of the contract and not simply a term of the contract. See Christie RH and Bradfield GB, *The law of contract in South Africa* (sixth edition), Durban LexisNexis 2011 109 126 and Kerr AJ, *The principles of the law of contract* (sixth edition), Durban Butterworths 2002 61 159.

<sup>22</sup> Van Rensburg 91 114.

<sup>23</sup> S10 allows a purchaser to request this information.

<sup>24</sup> S9(1). See Chapter 4 below for a discussion on s9.

If the land is not yet registrable at the time of conclusion of the contract, section 6(1)(q) requires that the contract must state the latest date at which the land will be registrable in the name of the purchaser. In terms of section 6(4), the “latest date” mentioned in section 6(1)(q) may not be later than five years from the date of conclusion of the contract. If a seller is not able to transfer the land at the date indicated, the purchaser may cancel the contract and claim compensation in terms of section 28(1); or the purchaser may abide by the contract in which case the purchaser will not be liable for the payment of interest in terms of the contract until such time as the land is transferred; or the purchaser may claim damages from the seller for failing to uphold the contract.<sup>25</sup>

Section 6(1)(t) requires that the contract must make a reference to a number of rights and obligations that the purchaser has. This shows that certain rights must be provided for in the contract itself and thus the purchaser will be aware thereof. These rights, amongst others, will be discussed below.<sup>26</sup>

### *2.3 Invalid clauses*

Section 15 provides for the invalidity of certain provisions. These clauses may not be contained in a contract for the sale of land on instalments. An agreement that contains these provisions is considered to be of no force and effect.

The following clauses are considered to be invalid:

- i. There may not be an agreement whereby anybody who acted for the seller is or will be an agent of the purchaser.<sup>27</sup> If the same person acted on behalf of both the seller and purchaser, any subsequent contract which the purchaser enters into as a result thereof will be void and the contract is not and will not be capable of ratification.<sup>28</sup>

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<sup>25</sup> S6(5).

<sup>26</sup> See Chapters 3, 4 and 5 below.

<sup>27</sup> S15(1)(a).

<sup>28</sup> Van Rensburg 91 148.

- ii. A purchaser cannot forfeit a claim for necessary expenditure incurred in terms of the preservation or improvement of the land, whether or not he obtained permission from the seller or owner, or a claim for improvements made on the land which would increase the market value thereof with consent of the owner or seller.<sup>29</sup>
- iii. A clause whereby the seller's liability to indemnify the purchaser against eviction is excluded or restricted.<sup>30</sup>
- iv. The purchaser agrees in advance to an assignment of the seller's contractual obligations.<sup>31</sup>
- v. A clause stating that the purchaser is obliged to accept a loan secured by a mortgage bond arranged on his behalf for all amounts owed in terms of the contract.<sup>32</sup> If the seller thereafter arranges a loan secured by a mortgage bond for the purchaser, the purchaser is obliged to accept that loan and sign all the required documentation.<sup>33</sup> The loan is arranged only for payment of amounts owing by the purchaser in terms of the contract as well as for transfer fees and cost of registration of the bond. The loan must cover all these amounts for the loan to be considered valid. The rate of interest which applies to the loan must be the same as other mortgages registered over similar land.<sup>34</sup> If the purchaser fails to accept the loan, section 15(4) allows the seller to cancel the contract and claim the relief provided from in section 28(1). The seller may also claim for additional damages. The debt owed by the purchaser to the seller will then be transferred to the mortgagee and the outstanding amount is claimable by the mortgagee.<sup>35</sup>
- vi. A clause providing that a purchaser cannot claim transfer of the land with simultaneous payment of all outstanding amounts owed in terms of the contract.<sup>36</sup> This section serves the same purpose as section 17 and thus serves no actual purpose other than emphasising that the purchaser has a right to claim transfer of the land against payment of outstanding amounts.

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<sup>29</sup> S15(1)(b).

<sup>30</sup> S15(1)(c).

<sup>31</sup> S15(1)(d).

<sup>32</sup> S15(1)(e).

<sup>33</sup> S15(2).

<sup>34</sup> S15(3).

<sup>35</sup> De Jager 276.

<sup>36</sup> S15(1)(f).

## 2.4 Relief offered by the courts

If a contract does not substantially comply with the provisions of sections 5 and 6, a purchaser can, within two years from date of conclusion of the contract, approach a court for appropriate relief.<sup>37</sup> The land must be situated in that specific court's jurisdiction. If jurisdiction of the court is claimed on the basis that the contract was entered into within the jurisdiction of the court, the court will be limited in the relief it may provide a purchaser. The specific relief provided in section 24 will then not be available.

A magistrate's court is entitled to provide the relief sought in terms of section 24 regardless of the value of the land involved.<sup>38</sup> This is important since the magistrate's court is a creature of statute and requires specific authority to hear a matter.

How far must a contract deviate from "substantial compliance" for the court to take action in terms of section 24? There are a number of guidelines that are suggested by Van Rensburg<sup>39</sup> and De Jager<sup>40</sup> to determine whether a court can provide relief in terms of section 24. Relief will obviously be provided based on section 5 where the purchaser was not able to choose the language of the contract.<sup>41</sup> The contract must be a valid sale. Non-compliance with section 6 could be in the form of omissions or incomplete or incorrect information required to be in the contract. The question whether there was substantial compliance or not must be answered based on the case that is before the court. Van Rensburg and Treisman suggest that the overriding factor is whether the purchaser would be unfairly prejudiced if the court refuses his request for assistance.<sup>42</sup> This does not provide a clear indication of whether there was substantial compliance or not. The courts should provide clearer guidelines on dealing with this issue. What works for one purchaser may not work for another. As it stands, the courts will have to deal with this on a case by case basis.

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<sup>37</sup> S24(1).

<sup>38</sup> S24(3).

<sup>39</sup> Van Rensburg 91 141.

<sup>40</sup> De Jager 306.

<sup>41</sup> De Jager is of the view that if a contract is not drawn up in the purchaser's language of choice the contract may possibly be declared void by the court. See De Jager 306.

<sup>42</sup> Van Rensburg 91 142.

This does defeat the purpose of the law of contract which provides that contracts must be certain, but is inevitable since legislation such as this can never be drafted in a wide enough fashion to encompass all and every case which may possibly come before the court.

Section 24 specifically provides a court with the following powers where a contract does not substantially comply with sections 5 or 6: a court is entitled to reduce the rate of interest that the purchaser is required to pay in terms of the contract to an amount the court considers just and equitable;<sup>43</sup> <sup>44</sup> a court can order that the contract be rectified or that the contract be declared void *ab initio*;<sup>45</sup> and a court is also specifically provided with the power in section 24(1)(d) to grant any alternative relief it may consider appropriate.

The court will not have an unfettered discretion to rectify the contract as it deems fit. The court cannot change the essential terms of the contract that would alter consensus between the parties. Rectification takes place only to allow the contract to substantially comply with sections 5 and 6. The court has the power to alter a date contained in the contract or also the power to correct the contract if factual errors are present.

Where a contract is set aside in terms of section 24(1)(c), section 28(1) becomes relevant. The parties can reclaim whatever they may already have performed in terms of the contract. Non-compliance with section 6 should be serious to warrant setting aside of the court. This is generally the case where important material terms were left out which could affect consensus.

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<sup>43</sup> S24(1)(a).

<sup>44</sup> Van Rensburg is of the opinion that it is not known in what circumstances a court would be willing to reduce the amount of interest payable by a purchaser to a seller since a seller cannot set the interest at an amount higher than the prescribed maximum. See Van Rensburg 91 143. In my view, since the parties to the contract are unable to get a mortgage for the land involved, it is possible that a seller who wishes to have an advantage over the purchaser will raise the rate of interest above legal limits to ensure a higher rate of return for himself. A purchaser who is desperately in need of the land and who has not sought legal assistance may not initially be aware of the prescribed maximum interest rate or may not be in a position to challenge the seller. Section 24 will come to the aid of a purchaser who finds himself in this position. The time limit of two years provided in section 24 to challenge the contract would give a purchaser sufficient time to find mistakes and anomalies and to better his position.

<sup>45</sup> S24(1)(b) and (c).

In *Mulder v Van Eyk*,<sup>46</sup> the respondent, who was the seller, wished to have the contract declared invalid because it did not comply with section 6 in that the contract did not provide for the dates and conditions upon which the purchaser would be entitled to take possession of the land. It must be emphasised that section 24 is for the protection of the purchaser and not for the seller.<sup>47</sup> If a seller therefore wants to have a contract declared invalid, it must do so on the basis of a section which he does have at his disposal and not use the sections which are intended for the purchaser.

It is important to take note that at the very least, there are only two parties involved in the sale. There is no mortgagee to ensure that the contract between the two parties is valid and it is up to the parties to seek legal assistance when drawing up the contract for the sale of land on instalments. These contracts are often used where banks are not willing to offer loans due to the uncertain nature of the project and parties risk their own finances to enter into these contracts, offering to sell the land at their own risk. A seller is not guaranteed the payment of the purchase price and nor is the purchaser guaranteed that the seller will indeed be able to transfer the land since the seller is risking his own money and will be at risk of sequestration or liquidation if the project should not be successful. A contract which is properly drawn up is thus important to avoid putting the parties at risk of having it voided by the court in terms of section 24.

## 2.5 Conclusion

The Act contains a number of definitions which are important for Chapter II. These definitions are important because they define specific situations where Chapter II may or may not apply. A deed of alienation which fails to comply with the definition of a contract would mean that a purchaser cannot rely on the protection afforded by Chapter II.

Parties to a contract should ensure that they comply with all the formal requirements set out by the Act. It is important that the contract contains all the information which the Act

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<sup>46</sup> 1984 (4) SA 204 (SE).

<sup>47</sup> 1984 (4) SA 204 (SE) at p206-207; see also Murray CM, "Review of recent cases", 1985, vol 204 *De Rebus* 38.

requires it to contain and at the same time omit the clauses it may not contain. Failing to ensure that the contract complies with the requirements of the Act could mean that the contract is set aside and although the parties have recourse to section 28, the purchaser will be without the land he intended to purchase and the seller will be stuck with land which he intended to sell.

## CHAPTER 3: GENERAL RIGHTS OF THE PURCHASER IN THE ACT

The purchaser in a contract of sale of land on instalments is provided with a number of very important rights in the Act. The seller has duties and these duties can be translated into rights which a purchaser may have. The rights a purchaser has are intended to protect the purchaser and according to section 29, these rights may not be waived.

A number of the rights will be discussed as general rights in the current chapter and a few rights will be considered in Chapters 4 and 5 as these rights really only come up in specific situations.

The rights which will be discussed in this chapter can be divided into the following broad categories: right to information, right to claim transfer of land, limitations of a seller's rights, a purchaser's cooling-off right and the consequences of terminated or void deeds of alienation. Each of these will in turn be discussed below.

### *3.1 A purchaser's right to information*

There is certain information that a seller must make available to a purchaser. This information will allow a purchaser to be aware of all the circumstances surrounding the sale of land and will also allow a purchaser to make an informed decision regarding the sale. This right to information is contained in more than one section and most of these sections also contain a "penalty" for non-compliance on the part of the person who must provide the information to the purchaser.

#### **3.1.1 Section 8**

Section 8(1) requires an intermediary to give the purchaser a certificate issued by the person who alienated the land to the intermediary and also every other person who

alienated that land to any other intermediary. The certificate must show what amounts in respect of the alienated land are still owed to the person who provided the certificate to the intermediary.<sup>1</sup> Section 8(3)(a) allows a purchaser to cancel the contract if he does not receive the certificate within 14 days after the time for delivery thereof has expired.

The way in which the purchaser must cancel the contract is not provided for and it is submitted that the purchaser can cancel the contract in any way he pleases as long as the seller is aware thereof.<sup>2</sup>

This section protects a purchaser by ensuring he will be aware of what amounts are still owed in respect of the land and will not simply purchase the land blindly. A purchaser will not have to come to the realisation at a later date that although his obligations for payment of his purchaser price are fulfilled, he cannot take transfer of the property because an intermediary in the chain failed to pay all his outstanding amounts to the person he bought the land from.

### 3.1.2 Section 10

In terms of section 10, a remote purchaser is entitled to request from the intermediaries and owner of the land an indication of the amounts which are owing in respect of the land. A failure to provide the information requested enables a remote purchaser to hold the owner liable for such failure as if he were contractually bound to provide the requested information.<sup>3</sup>

The possibility of holding the owner contractually liable for non-performance provides the remote purchaser with options for relief. Contractual remedies would apply in this case even though there is no contractual relationship between the owner and the remote

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<sup>1</sup> S8(2).

<sup>2</sup> Van Rensburg ADJ and Treisman SH *The Practitioner's Guide to the Alienation of Land Act 2<sup>nd</sup> Edition* (1984) 91 146.

<sup>3</sup> S10(3).

purchaser.<sup>4</sup> Section 10(2) allows a remote purchaser to request the above information up to three times in one year. This will ensure that a remote purchaser is aware of the amounts which are owing with regards to the property on an on-going basis.

Section 10(3)(a) reaffirms the information to which a purchaser is entitled which was initially called for in section 6. The seller has to provide the purchaser with the names and addresses of all intermediaries who may have sold the land to the seller in the first place.<sup>5</sup> There is no time frame provided in section 10(3) within which the information must be provided that this section specifically calls for. It is suggested that a “reasonable time” period is given and where the information is provided within the “reasonable time”, the normal breach of contract rules would be applicable.<sup>6</sup>

This will give the purchaser a wide overview of what transactions have taken place and allows him to be able to follow up with each and every person regarding their obligations in terms of their contracts.

### 3.1.3 Section 13

A purchaser is entitled to have a free copy of the contract handed to him or delivered at his nominated address in terms of section 23.<sup>7</sup> A purchaser is not liable for the payment of interest in terms of the contract if a seller fails to provide a copy of the contract.<sup>8</sup>

Since the purchaser is entitled to a copy of the contract, a purchaser has sufficient time to peruse the contract even after it has been concluded. This allows a purchaser to find mistakes which may allow the purchaser to have recourse to the relief provided in section

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<sup>4</sup> Van Rensburg 91 170. For discussions on contractual remedies, see Christie RH and Bradfield GB, *The law of contract in South Africa* (sixth edition), Durban: LexisNexis 2011 and Kerr AJ, *The principles of the law of contract* (sixth edition), Durban: Butterworths 2002.

<sup>5</sup> Van Rensburg 91 128.

<sup>6</sup> De Jager T, *Vervreemding van grond, Alienation of land*, Cape Town, Juta 1982 264.

<sup>7</sup> S13(1).

<sup>8</sup> S13(2). A purchaser is entitled to request the copy if it is not provided and the seller only has fourteen days to comply, where after the purchaser is not liable for the payment of the interest arising from the contract.

24.<sup>9</sup> Whether the purchaser has the necessary legal expertise and knowledge to understand the contract may be a problem. The contract does not have to be drawn up by an attorney and a purchaser must be vigilant when inspecting the contract to ensure that it conforms to the requirements as set out in the Act.

### 3.1.4 Section 16

In terms of section 16(1), a purchaser is entitled to receive a statement of account from the seller once a year free of charge. The first statement which is issued, within twelve months of the date of conclusion of the contract, must reflect the purchase price and other costs separately. In subsequent contracts, the outstanding balance must be reflected. Each and every account must further also indicate various amounts as required by section 16(2): the interest which accrued during that time; the allocation of payments made towards capital, interest and other costs; the balance of the purchase price and other costs which are owed; and amounts owed in terms of mortgage bonds are just some of the amounts which must be indicated in these statements.

This statement clearly serves to inform the purchaser of exactly what is still owed and what the amounts are for. The purchaser clearly has a right to information which could affect him! Since the monetary aspect of the sale is not necessarily dealt with by a bank as it would be in the case of a sale secured with a mortgage bond, the seller is held accountable by the purchaser because by providing this information to the purchaser, the purchase is assured that the payments made are allocated to the correct category of costs and he is not overcharged on interest or other charges.

Once again, as is the case with section 13, the seller's failure to provide the statement at the correct time or after demand thereof by the purchaser results in an indirect monetary penalty to the seller's detriment. The purchaser is not liable for the payment of interest

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<sup>9</sup> See paragraph 2.4.

arising from the contract as long as the seller remains in default.<sup>10</sup> Where the purchase price is a large amount, this could do some serious damage to a seller's bank account.

It must be noted that in *Angus v Kosviner*,<sup>11</sup> the court held that section 16 *only* means that the seller is not entitled to interest and does not entitle a purchaser to avoid his other duties. The purchaser who fails to perform his other duties will breach the contract and will be held liable for it.<sup>12</sup>

The previous Act which used to govern the sale of land on instalments, the Sale of Land on Instalments Act 72 of 1971, allowed a seller to waive his rights in terms of the Act regarding a demand to furnish an account statement. A purchaser would then simply stop paying over interest until such a time as he received the account statement as he would not be liable to pay interest because of the fact that the seller had not supplied the statement. It is suggested that the same would apply under the Act as it is presently known.<sup>13</sup>

### 3.1.5 Conclusion

A purchaser's right to information is obviously intended to ensure that a purchaser is well-informed of the monetary issues surrounding the sale. The purchaser is not only entitled to information regarding his own contract of sale, but he is also entitled to information which indicates what amounts are outstanding on previous contracts of sale. These sections also prove to hold the seller accountable towards the purchaser as the seller's non-performance of his duties could have serious consequences for the purchaser.

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<sup>10</sup> S16(3).

<sup>11</sup> 1996 (3) SA 215 (W).

<sup>12</sup> 1996 (3) SA 215 (W) at p221.

<sup>13</sup> Van Rensburg 91 193.

## 3.2 *Right to claim transfer of land*

The Act provides for certain circumstances where a purchaser can claim early transfer of the land. This can only be to the purchaser's benefit since doing so enables him to become the owner thereof much sooner and will protect the purchaser from any misfortune which may come to the seller.

### 3.2.1 Section 17

Section 17 very importantly allows a purchaser to make payments before its due date and also allows payments to be larger than the actual amount due. This inclusion in the Act is necessary otherwise a seller would be entitled to repudiate the payment based on the fact that such payment is not according to that which is contractually agreed.

This section further allows a purchaser to pay all the outstanding amounts and claim the transfer of the land if it is registrable at the time the payments are made. This means that a purchaser need not continue paying the seller month by month even though he can afford to make payment of the entire amount due. Since interest is calculated on the amount outstanding at the time payment is due, making an early payment to the seller could have a financial advantage for the purchaser.

The Act makes provisions for the transfer of the land against the payment of the purchase price. This indicates that these actions happen simultaneously and a contract which states that the purchase price must be paid before transfer will be given, can be overridden if the purchaser relies on section 17(c) instead of on the contract to claim transfer.<sup>14</sup>

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<sup>14</sup> Van Rensburg 91 184.

### 3.2.2 Section 18

Section 17 deals specifically with a purchaser. Section 17 only covers the situation where there is no intermediary involved in the sale of the contract. Section 18, on the other hand, deals with the situation where the land sold has passed through numerous hands and amounts are still outstanding on each of the contracts involved in the sale of the land.

The remote purchaser who wishes to take transfer of the land must ensure that the following three requirements have been met:<sup>15</sup>

1. The remote purchaser must fulfil all of his duties in terms of the contract;
2. The intermediaries involved in the sale must have fulfilled their obligations in terms of their contracts of sale;<sup>16</sup> and
3. The land must be registrable.

Once again, the allowance to take transfer of land at a time not specified in the contract is important. Without this inclusion in the Act, a remote purchaser would have been forced to wait until the contract had run the full term before taking transfer of the land. Early transfer means fewer instalments and less interest for the purchaser. The risk of losing the land due to the owner or seller's insolvency also disappears upon transfer of the land to the purchaser.

### 3.2.3 Section 27

Section 27 falls in Chapter III and thus applies to deeds of alienation in general and not only contracts, but it still deals with payments which are due in instalments.

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<sup>15</sup> S18(1).

<sup>16</sup> It is important to note, in terms of s18(2), if an intermediary is insolvent at the time that transfer of the property is claimed, the property must be transferred to the person to whom the intermediary sold it and not the remote purchaser who may be claiming it. It is only thereafter that it may be possible for the remote purchaser to claim the property from the insolvent estate, if the trustee should choose to continue with the contract. See Van Rensburg 91 222.

Once a purchaser has paid at least 50 percent of the purchase price, he may demand that the seller transfer the property to him on the condition that a first mortgage bond is registered at the same time.<sup>17</sup> The first mortgage bond is in favour of the seller to ensure that the remainder of the purchase price will indeed be paid.<sup>18</sup> The registration of the first mortgage bond must be on the same conditions as those which were applicable to the deed of alienation.<sup>19</sup>

A problem which does seem to arise, is the wording of the section where it is stated that the purchaser has paid 50 percent which “he has undertaken to pay” in “specified instalments”. This would point at the fact that the purchaser cannot accelerate the payments due in the first half of the purchase price since he must pay the amounts due exactly as provided for in the contract. It is thus suggested that since most purchasers take transfer of land long before he has indeed paid half the purchase price according to the contract, that section 27 probably will not be of much use to many purchasers.<sup>20</sup>

In terms of section 27(3), a purchaser may cancel the contract if the seller does not transfer the property within three months from the date of demand. A purchaser is further entitled to the recourse provided for in section 28(1).<sup>21</sup> Section 27(4) expressly states that section 27 does not apply to deeds of alienation in terms of which the State or local authority is the seller.

In *Botha v Rich NO*<sup>22</sup>, this section came before the Constitutional Court. This case centred around the question whether the respondents (JJW Trust) must transfer the land sold by virtue of section 27 and whether it is constitutional to enforce a cancellation clause in a contract where more than 50 percent of the purchase price had already been paid, the second issue only becoming relevant if the Court found that the applicant (Botha) was not

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<sup>17</sup> This section is equally important for the purchaser where the owner of the land is sequestered. See Boraine A and Delport PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 439. For a discussion on the insolvency of the owner see Chapter 5 below.

<sup>18</sup> S27(1).

<sup>19</sup> S27(2).

<sup>20</sup> Van Rensburg 91 185.

<sup>21</sup> See para 3.5 below for a discussion of this section.

<sup>22</sup> 2014 (4) SA 124 (CC).

entitled to transfer of the property. For the Court to decide this question, they had to interpret the meaning of this section. Botha, maintained that cancellation of the contract in such circumstances would be contrary to public policy.<sup>23</sup>

In 2003, Botha and the trustees of the Trust entered into an instalment sale agreement for the purchase of immovable property. Botha subsequently started to default in her outstanding payments. In May 2008, Botha demanded transfer of the property in terms of section 27. Judgment against her was taken in the Magistrates' Court in terms whereof the contract was cancelled and she was evicted because of non-payment of the instalments, municipal rates, taxes and services fees. This judgment was abandoned by the Trust. It was expressly provided in the contract of sale that Botha would forfeit all payments made if she should breach the contract.<sup>24</sup>

After Botha again failed to pay the due instalments, the Trust approached the High Court to cancel the contract. To this application Botha responded by filing a counter-application to have the property transferred to her in terms of section 27. The Court dismissed Botha's counter-application and cancelled the contract.

After failed attempts to appeal the matter, the matter eventually wound up in the Constitutional Court. The Constitutional Court found in favour of Botha as section 27 does not exclude the common law contractual remedy of specific performance. The Court stated that section 27 should be read in context of the whole Act. Section 27(3) states that a purchaser "may" cancel a contract. The word "may" allows the purchaser to cancel the contract, but does not force the purchaser to do so.<sup>25</sup> Common law allows a purchaser the remedy of specific performance and legislation only alters this if this is clear from the reading thereof.<sup>26</sup> Although the section only mentions cancellation as a remedy, it does so to enable the purchaser to cancel the contract. At common law breach of contract must be material before a purchaser can cancel the contract. Materiality of breach is often difficult

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<sup>23</sup> 2014 (4) SA 124 (CC) at [2].

<sup>24</sup> 2014 (4) SA 124 (CC) at [4(h)].

<sup>25</sup> 2014 (4) SA 124 (CC) at [35].

<sup>26</sup> 2014 (4) SA 124 (CC) at [37].

to prove and this section obviates the need to prove that breach was material before a purchaser may rely on cancellation.<sup>27</sup> Once a purchaser has cancelled the contract, the purchase may reclaim payments made to the seller in terms of section 28(1) along with interest.<sup>28</sup>

The Court held further that Botha, although being entitled to transfer of the property, must register a bond over the property to ensure payment of the outstanding amounts owed to the Trust. The Court came to this conclusion on the basis that it would be unfair to cancel the contract and deprive Botha of the considerable portion of the purchase price already paid, but that at the same time it would be unfair to allow Botha to take transfer of the property without obliging her to pay the outstanding amounts which were owed to the trust.<sup>29</sup> A contract creates reciprocal obligations and thus one party cannot expect the other party to perform without first tendering performance. If Botha does not tender payment of the outstanding amounts, the Trust would very well be able to raise her failure as a defence against their non-performance.<sup>30</sup> Section 27 requires the registration of a mortgage bond over the property which supports the idea that a purchaser must tender performance in order to take transfer of the property. It would thus be absurd to suggest that it is unnecessary to first make payment of outstanding amounts before taking transfer of the property.<sup>31</sup> The principle of good faith ensures that contracts are fair. Good faith encompasses the notions of justice, reasonableness and fairness.<sup>32</sup>

This is where the Constitution<sup>33</sup> comes into play. Since the Constitution is the supreme law of the country, all laws and conduct which must conform to the Constitution or it will be considered invalid.<sup>34</sup> Any legislation that requires interpretation must be interpreted in line with the Constitution and must “promote the spirit, purport and objects of the Bill of

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<sup>27</sup> 2014 (4) SA 124 (CC) at [38].

<sup>28</sup> 2014 (4) SA 124 (CC) at [36].

<sup>29</sup> The Constitution, in 172(1), allows a court to make any order which it deems just and equitable when it is considering a constitutional matter. The court in the present case was thus fully justified in coming to the conclusion to which it did.

<sup>30</sup> 2014 (4) SA 124 (CC) at [43].

<sup>31</sup> 2014 (4) SA 124 (CC) at [44].

<sup>32</sup> *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 651E-F and 652C-G.

<sup>33</sup> The Final Constitution of South Africa Act 108 of 1996.

<sup>34</sup> S2 of the Constitution.

Rights.”<sup>35</sup> In terms of section 39(3) of the Constitution, rights in terms of common law or legislation are valid as long as they are consistent with the Bill of Rights. Contracts entered into must also be interpreted in terms of the Constitution if these contracts come into question before a court. Since the Act seeks to ensure fairness between the parties to a contract, the provisions are in line with the Constitution in that it seeks to ensure that parties are equal, and that the right to freedom and dignity is upheld. The principle of reciprocity is based on the recognition of both parties’ dignity and freedom.<sup>36</sup>

Since the Court found that Botha was entitled to take transfer of the property, it was unnecessary to deal with the question of cancellation of the contract. The Court, did, however mention that based on the principle of reciprocity, it would be unfair of the Trust to not repay at least part of the purchase price as the penalty clause was disproportionate considering the amount already paid. For the same reasons as those on which the Court based their conclusion that Botha was entitled to take transfer of the property, namely good faith and ultimately the rights which are embodied in the Constitution, the Court would not allow cancellation of the contract leaving the penalty clause as is. The Trust was not able to justify the forfeiture clause and as such the Court would not allow cancellation of the contract in any event.<sup>37</sup>

The effect of the Court’s conclusion regarding the penalty and cancellation clause is huge. The Court in this matter itself said that where contractual principles are too rigid and would cause injustice, good faith allows fairness to govern the contract. Where a penalty clause would be disproportionately unfair, it is considered that it would also be unconstitutional and against public policy. This serves as a warning to those who draft contracts. Just because the parties initially agreed to it does not mean that a court will later uphold it. The court is going to judge the contract against the Constitution and not against whether or not there was consensus regarding the contents of the contract.

This does, however, challenge the idea that there must be certainty in contracts. This case negates the idea of certainty and until a court has finally decided on a contract, it will never

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<sup>35</sup> S39 of the Constitution.

<sup>36</sup> 2014 (4) SA 124 (CC) at [46].

<sup>37</sup> 2014 (4) SA 124 (CC) at [50-51].

actually be certain. Each and every contract will be judged according to the circumstances of the case and not just the contents thereof. This does, however, leave a question unanswered: who will public policy favour if both parties have rights that are equally important?

### 3.2.4 Conclusion

There are various ways in which a purchaser can obtain transfer of the property from the seller. Both sections 17 and 18 ensure that a purchaser's obligations are fulfilled before he can take transfer, but section 27 allows transfer of property into the purchaser's name before all of the purchaser's obligations are fulfilled.

Section 27 is by far, the most controversial of these sections as it challenges the principles on which contracts are based. Various principles are played off against each other to consider which is more important and the way the contract will go ultimately depends on whether or not the courts consider the practical effect of the contract to be fair.

### 3.3 *Limitations of a seller's rights*

Strictly speaking, the limitations of a seller's rights should not be discussed under the topic of the rights of a purchaser. These *limitations* of the seller's rights could, however, be considered as an extension of a purchaser's rights and thus warrants discussion.

The limitations of a seller's rights further serves to protect a purchaser in various ways which will be considered below.

### 3.3.1 Section 12

This section deals with the calculation of interest and also specifies what amounts a seller may recover from the purchaser. This is an important safeguard for the purchaser so that the seller does not just collect amounts as he pleases and when he pleases.

Section 12(1) clearly states that interest owing may be calculated a minimum of once a month, but not less than four times a year. The interest is calculated only on the outstanding balance as owed at the time of calculation and the rate may not exceed the rate as prescribed for the specific class of contracts.

Further, in terms of section 12(2), a seller is not entitled to obtain judgment or recover from a purchaser the amounts exceeding that which is described in subsections (a)-(d). The seller cannot expect the purchaser to pay more than the purchase price and interest owed on it as described in the contract. Until such time as the seller has incurred the following costs the purchaser will not be liable for costs incurred for drafting or recording of a contract, transfer of the land, maintenance of the property, rates and taxes or premiums on an insurance property for the land and any improvements on the property. The purchaser can expect to pay for the costs of recovery if the seller should take judgment against him and also to pay interest over and above that stated in the contract for his failure to pay any owed amounts. It must be noted that interest in terms of the contract is generally only payable on the purchase price and interest thereon. The interest which is spoken of in this section means interest on any and all amounts which may be outstanding.<sup>38</sup> These provisions do not affect the rights of a seller if the contract is cancelled.<sup>39</sup>

A court does not have any discretion to alter that which a purchaser must pay since the Alienation of Land Act clearly sets out the maximum which a purchaser has to pay.<sup>40</sup>

Both these subsections will ensure that a purchaser is never liable to pay amounts which would exceed his expectations in terms of the contract. This ensures certainty for the

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<sup>38</sup> Van Rensburg 91 194.

<sup>39</sup> S12(4).

<sup>40</sup> Kerr 2002 737 797.

purchaser, making him more likely to want to enter into a contract. His financial standing is made secure.

Interest on the contract stops accruing as soon as the purchaser has paid off the purchase price and interest owing thereon. Interest on other outstanding amounts may continue to accrue.<sup>41</sup>

If the purchaser is deemed to have cancelled the contract, subject to the fulfilment of certain conditions, and the purchaser is subject to a penalty, such penalty will be considered subject to the Conventional Penalties Act 15 of 1962.<sup>42</sup> This is usually done in terms of a “rouwkoop” stipulation which means that a person is paying money to request forgiveness for ever having concluded the contract. “Rouwkoop” clauses allow a party to the contract to withdraw from the contract without causing breach thereby.<sup>43</sup> Although “rouwkoop” stipulations do not actually fall within the scope of the Conventional Penalties Act, the Act allows it to be subject thereto so as to ensure that any clauses which are in fact penalty clauses, but disguised as “rouwkoop” clauses, are subjected to the Conventional Penalties Act.<sup>44</sup>

### 3.3.2 Section 19

This section limits the rights of a seller to take action in a matter where the purchaser has breached the contract of sale. A seller is obliged to notify the purchaser of the breach of contract and demand him to rectify this breach. The seller is only allowed to institute action to enforce the provisions of the contract to accelerate the payment of any instalment, terminate the contract or claim damages if the purchaser fails to rectify the breach.<sup>45</sup> The

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<sup>41</sup> S12(3).

<sup>42</sup> S12(5).

<sup>43</sup> De Jager 270.

<sup>44</sup> Van Rensburg 91 196.

<sup>45</sup> S19(1).

purpose of this section is to safeguard the purchaser against unforeseen risks that may arise by a single breach of contract.<sup>46</sup>

Cancellation of the contract is not allowed even if the breach is major and the performance of obligations was not prompt.<sup>47</sup> The Act limits the remedies which a seller has at their disposal without giving notification – and this is a bonus for the purchaser. Section 19(1) does not limit the choice of remedies, but merely indicates what remedies may only be used after notification has been provided to the purchaser.<sup>48</sup> A seller can claim specific performance without providing the purchaser with a notice.<sup>49</sup>

The notice, in terms of section 19(2), must be handed to the purchaser or must be delivered to the purchaser at the address provided in section 23. The notice must describe the breach of contract, allow 30 days to rectify the breach<sup>50</sup> and indicate what steps the seller will take if the breach is not rectified.<sup>51</sup> It must be emphasised that a seller may, in terms of section 19(4) claim specific performance to protect that land and need not provide the purchaser with notice thereof.

In *Merry Hill (Pty) Ltd v Engelbrecht*,<sup>52</sup> the court had to decide whether a seller had to indicate what steps they *will* take or whether it was sufficient to merely indicate what steps they *might* take.<sup>53</sup> In this case it was held that a seller's notice only had to substantially comply with section 19(2)(c) and did not have to follow the section to the letter.<sup>54</sup> A seller is entitled to indicate steps it can take, but does not have to indicate the exact step he will take. It is argued that the decision in this case should not be taken to mean that where a

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<sup>46</sup> Delport H, "Cancelling an instalment sale of land: *Merry Hill (Pty) Ltd v Engelbrecht* 2008 2 SA 544 (SCA); *Van Niekerk v Favel* 2008 3 SA 175 (SCA): Cases", 2008, vol 29, *Obiter* 302 302.

<sup>47</sup> Kerr 2002 521 602, 619.

<sup>48</sup> Kerr 2002 669 669; Delport H, "Cancelling an instalment sale of land: *Merry Hill (Pty) Ltd v Engelbrecht* 2008 2 SA 544 (SCA); *Van Niekerk v Favel* 2008 3 SA 175 (SCA): Cases", 2008, vol 29, *Obiter* 302 316.

<sup>49</sup> De Jager 284.

<sup>50</sup> The purchaser is given 30 days from the date on which the note was handed to him or sent by registered post. In terms of subsection (3), the period to rectify the breach is reduced to not less than seven days if the seller has issued such notice more than once in a calendar year at periods of not less than 30 days.

<sup>51</sup> S19(2).

<sup>52</sup> 2008 (2) SA 544 (SCA).

<sup>53</sup> Delport H, "Cancelling an instalment sale of land: *Merry Hill (Pty) Ltd v Engelbrecht* 2008 2 SA 544 (SCA); *Van Niekerk v Favel* 2008 3 SA 175 (SCA): Cases", 2008, vol 29, *Obiter* 302 303.

<sup>54</sup> 2008 (2) SA 544 (SCA) at [24].

seller has given only one consequence that the seller is not allowed to change his mind. Where a seller does change his mind, however, he should inform the purchaser thereof in a new notice. A seller will not be allowed to change his mind where the notification clearly indicates that he intends on only taking one step.<sup>55</sup>

What constitutes substantial compliance is not quite known, but what definitely does not comply was decided in the case of *Van Niekerk v Favel*.<sup>56</sup> In this case the notification in question mentioned the remedies listed in section 19 and further mentioned that the seller was entitled to take any other steps he was legally allowed to take. The notification did not emphasise the seriousness of the breach and only really meant that the seller could sue for the amounts in arrears.<sup>57</sup> The notification did not warn the purchaser that the seller could enforce the remedies provided for in section 19(1) and thus the notification was rejected as having complied with section 19.<sup>58</sup>

I submit that for a section 19(1) notification to be sufficient, the breach of contract must fall within section 19(1) and that the notification must describe the breach in detail to the purchaser, demand that the purchaser rectify the breach and then preferably state all and any remedies which the seller has any intention, no matter how slight, of using.

The court in *Howieson v Hughes*<sup>59</sup> went so far as to emphasise that section 19 even protects a purchaser who has taken transfer of the property, but has yet to pay all the instalments due.<sup>60</sup> In this case the purchaser had signed an acknowledgement of debt which would allow acceleration of payment of all amounts due where even just one instalment was not

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<sup>55</sup> Delpont H, "Cancelling an instalment sale of land: Merry Hill (Pty) Ltd v Engelbrecht 2008 2 SA 544 (SCA); Van Niekerk v Favel 2008 3 SA 175 (SCA): Cases", 2008, vol 29, *Obiter* 302 313.

<sup>56</sup> 2008 (3) SA 175 (SCA). See also *Oakley v Bestconstructo (Pty) Ltd* 1983 (4) SA 312 (T), *Miller v Hall* 1984 (1) SA 355 (D) where the courts in these cases held that a reference to the relevant clause of the contract stating what steps could be taken against the purchaser was not allowed and also that the exact remedy to be followed had to be mention. It was also held that the section was peremptory.

<sup>57</sup> 2008 (3) SA 175 (SCA) at [14].

<sup>58</sup> Schulze H, "Sale of land: the law reports", 2008, vol 30 *De Rebus* 39.

<sup>59</sup> 1992 (4) SA 603 (C).

<sup>60</sup> 1992 (4) SA 603 (C) at 608B.

paid. The seller still had to notify the purchaser of his intention to take action.<sup>61</sup> This is clearly in the purchaser's favour since in this event the purchaser still stands the chance to lose the land if he does not pay the instalments due and deserves notification that he should rectify his breach.

This section ensures that a purchaser is notified of any (impending) action against him and need not be surprised by a summons arriving at his door where he would have been more than willing to comply with the demand of the seller without the need to incur extra costs. The steps in section 19(1) are drastic and a purchaser deserves warning thereof.

### 3.3.3 Section 26

In terms of section 26, nobody is entitled to receive any money<sup>62</sup> with regards to the sale of land until the land is registrable and until a contract is recorded in terms of section 20.<sup>63</sup>

Anybody who does receive money contrary to this section is liable to either a fine or conviction. Although the conviction of this offence is sufficient punishment, the fine that can be given for this offence is rather absurd. The fine is a mere amount of R1 000 whereas imprisonment can be for up to one year! The legislature needs to consider adjusting the amount to one which reflects a more current amount. If one considers that the amount could be adjusted according to the Consumer Price Index, hereinafter "CPI", the amount of R1 000 would be worth approximately R15 000 today.<sup>64</sup> R1 000 is small change for a developer who is spending millions on developing a country estate.

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<sup>61</sup> 1992 (4) SA 603 (C) at 604. See also Luiz S, "Sale of land", 1993, vol 28 *De Rebus* 587 for a discussion of this case.

<sup>62</sup> It is only receiving counter-performance which is prohibited as a purchaser could suffer financial loss if the land does not eventually become registrable and the money is not returned to him. See Van Rensburg 79 87.

<sup>63</sup> See Chapter 4 below for a discussion on section 20.

<sup>64</sup> Amount provided by an online CPI calculator: Anon, *Inflation Adjustment Calculator*, <http://www.inflationcalc.co.za/?date1=1983-01-01&date2=2015-05-28&amount=1000> (accessed 28 May 2015).

The fact that nobody is entitled to receive money indicates that it is not just the seller who risks punishment if he does accept payment, but also an estate agent or anybody else who could possibly have received the money on behalf of the seller.<sup>65</sup>

A practitioner or estate agent is entitled to receive the purchaser price in his professional capacity if such money is paid into the trust account. A seller is also entitled to receive the money if he provides the seller with an “irrevocable and unconditional” bank guarantee wherein the money will be returned to the purchaser if the land is not registrable or the contract is not recorded within a certain stated time period.<sup>66</sup> The guarantee must be given to the purchaser before the money may be handed over.<sup>67</sup>

If the seller becomes insolvent before the land became registrable or before the contract was registered, any amount guaranteed or held in trust is immediately repayable to the purchaser.

This section is immensely important as it protects unsuspecting purchasers from handing their money over to seller who do not have an intention of ever ensuring the land becomes registrable or that the contract is actually recorded. A seller exposes themselves to a criminal case if they contravene this section. Further, the seller cannot ensure that he goes insolvent and that he scores off this behind the scenes since any money which was paid in and held on his behalf is returned to the purchaser the moment he does go insolvent.

### 3.3.4 Conclusion

The limitations of a seller’s rights have important effects on the purchaser’s protection. Any limitation on the seller is a bonus for the seller as they will always be aware of impending actions, amounts which are recoverable from them and whether they even have to pay money to the seller at all. Limiting what amounts a seller can claim from the purchaser

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<sup>65</sup> Van Rensburg 79 86.

<sup>66</sup> S26(3).

<sup>67</sup> De Jager 310.

prevents the seller from claiming more from a purchaser than the purchaser agreed to pay. Providing that the seller must also give the seller notice of impending legal action ensures that the purchaser can take steps to prevent the action. Preventing the seller from receiving money from a purchaser under certain circumstances protects the purchaser from losing both the money and the property if the property can never actually be transferred into his name.

### 3.4 *Cooling-off*

Cooling-off rights provide a purchaser with an important escape route where the purchaser realises that he does not actually want to continue with the contract. The Alienation of Land Act and the Consumer Protection Act 68 of 2008 both provide for a cooling-off right. Whether these Acts can be applied to the specific situation in which the purchaser finds himself will depend on whether or not the requirements for each section, and for the Acts, in general, are met.

#### 3.4.1 The Alienation of Land Act provisions

In section 29A, a purchaser is given the right to rescind from the contract according to the criteria provided. A purchaser has five business days to withdraw from an offer to purchase land or a deed of alienation. A written notice must be signed by the purchaser, must further identify the offer or deed which is being revoked, be unconditional and must then delivered to the seller.<sup>68</sup>

Any amounts which were received from the purchaser must refund the full amount thereof to the purchaser within ten days of the date on which the notice was received.<sup>69</sup>

For section 29A to be applicable, the following conditions should be met:

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<sup>68</sup> S29A(1),(2) and (3).

<sup>69</sup> S29A(4).

1. The purchase price or amount offered for the land should not exceed R250 000 or an amount determined by the Minister in accordance with inflation;
2. The purchaser must be a natural person;
3. The land must not have been purchased at a public auction;
4. The purchaser and seller must not have previously entered into an agreement regarding the same land on practically the same terms;
5. There should be no right to nominate another person to take over the rights and obligations of the purchaser; and
6. The land must not have been purchased by the purchaser who exercised an option which was open for at least five business days.

A problem which is not immediately apparent is the fact that the limit on the purchase price of the land is capped at R250 000. Although the Minister has been given authority to alter this amount in terms of the CPI, it has not been done. A purchase price of R250 000 is extremely low and it is doubted if there are many pieces of land which are available at that price. Once again, using an online CPI calculator,<sup>70</sup> the amount of R250 000 inflated to current prices would be in the region of about R3.8million. That amount would seem way more in line with the purpose of the Act which is intended to provide protection for the parties to the contract.

A purchaser is not liable for any damages which may arise from his exercising of the rights provided in this section and no penalty or levy may be imposed on the purchaser for the exercise of these rights. The purchaser also cannot waive his rights in terms of this section.<sup>71</sup> This is an important safeguard to ensure that the purchaser will get all his money back and will not suffer consequences as a result of exercising this right.<sup>72</sup>

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<sup>70</sup> Anon, *Inflation Adjustment Calculator*, <http://www.inflationcalc.co.za/?date1=1983-01-01&date2=2015-05-28&amount=1000> (accessed 28 May 2015).

<sup>71</sup> S29A(6) and (7).

<sup>72</sup> For a full indication of the various problems which become apparent during the dissection of s29A, see Lötze DJ, "Koper van grond: warm patat or koue pampoen?", 2000 vol 2, *De Jure* 327 327-336. To name but a few, questions arise about when the five days to withdraw from the offer start, whether the notice must be brought to the attention of the seller within that five day period and whether all the purchasers must sign the notification that is sent to the seller. See also Lötze DJ and Nagel CJ, "Nie-nakoming van artikel 2(2A) van die

In terms of section 2(2A), section 29 must appear in the deed of alienation. There has been much debate as to whether or not a deed is invalidated if it does not contain the reference to section 29. In *Gowar v Section Three Dolphin Coast*,<sup>73</sup> the Court stated that section 2(2A) serves to notify the purchaser of the rights he has in terms of section 29A and that a failure to include it in the deed of alienation will not invalidate a contract.<sup>74</sup> The Court then further said that the purchaser is entitled to have the contract voided if the contract does not make mention of section 29A,<sup>75</sup> but that the seller cannot do so since the rights are for the benefit of the purchaser.<sup>76</sup> This Constitutional Court decision made sure to override the decision in *Sayers v Khan*<sup>77</sup> where the High Court had held that a contract which did not contain a reference to section 29A was null and void and that a transfer that took place in such a case would be ineffective.<sup>78</sup>

Section 29A provides an important escape for the purchaser who realises they do not really want the property they just purchased. This section does need to be adjusted though so that more purchasers have it at their disposal since it is doubted that very many people will be able to purchase property for a mere R250 000. It is also submitted that the legislature should amend section 29A to make provision for the decision of the court in *Gowar v Section Three Dolphin Coast*<sup>79</sup> and provide in the section specifically that the contract will be voidable at the instance of the purchaser where the contract did not provide for the cooling-off right.<sup>80</sup>

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wet op Vervreemding van Grond 68 van 1981 en die effek daarvan op die geldigheid van 'n vervreemdingsakte", 2006, *THRHR* 501 509.

<sup>73</sup> [2006] SCA 162 (RSA).

<sup>74</sup> [2006] SCA 162 (RSA) at [6](iv).

<sup>75</sup> [2006] SCA 162 (RSA) at [19].

<sup>76</sup> [2006] SCA 162 (RSA) at [6](iii).

<sup>77</sup> 2002 (5) SA 688 (C).

<sup>78</sup> Moosa F, "Case note: landmark ruling in property law", 2001, vol 406, *De Rebus* 57; Schulze H, "Law reports: sale of land", 2007, vol 23, *De Rebus* 47; Lötze DJ, "Koper van grond: warm patat or koue pampoen?", 2000 vol 2, *De Jure* 327.

<sup>79</sup> [2006] SCA 162 (RSA).

<sup>80</sup> Lötze DJ and Nagel CJ, "Nie-nakoming van artikel 2(2A) van die wet op Vervreemding van Grond 68 van 1981 en die effek daarvan op die geldigheid van 'n vervreemdingsakte", 2006, *THRHR* 501 509.

### 3.4.2 The Consumer Protection Act 68 of 2008

Where the cooling-off right of section 29A of the Act does not find itself applicable to a purchaser, the Consumer Protection Act 68 of 2008 does provide for a cooling-off right, but then the contract must fall within the scope of application of the Consumer Protection Act.

Section 16 of the Consumer Protection Act provides that a consumer may rescind from a contract entered into within five business days of having entered into that contract. The contract must be as a result of direct marketing. The supplier must then return any payment received in terms of the contract.<sup>81</sup>

The problem with this arises that, according to the definition of “consumer” in the Consumer Protection Act, only contracts entered into within the “ordinary course of business” fall within the scope of application of the Consumer Protection Act and private persons who buy from private persons who do not generally sell property for a living will not be able to rely on section 16’s cooling-off right. The definition of “supplier” also provides that the supplier must supply the goods “within the ordinary course of business”. Unless the contract falls within some or other “ordinary course of business”, this cooling-off right will not be available to the purchaser.

Once again legislation provides for a possible escape for a purchaser and once again the chances may be that the purchaser cannot rely on the legislation for a way out.

### 3.5 *Consequences of void or terminated deeds of alienation*

Section 28 deals with the consequences of deeds of alienations (and in our case, contracts) which are void or have been terminated. This is an important provision of the Act to ensure that the purchaser can rely on the Act itself to collect any moneys expended by themselves in the process of purchasing land and the purchaser need not rely on common law to claim the return of payments made.

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<sup>81</sup> Lötz DJ, “The Law of Purchase and Sale: Case law”, 2011, *Annual Survey of South African Law* 996 1006.

Firstly, since subsection (1) of the section is subject to subsection (2), it is wise to look at that part before looking at subsection (1).

Subsection (2) provides that where a purchaser has performed in full in terms of the contract and the land has already been transferred to him, any alienation which did not comply with section 2(1) and could in actual fact have been declared void, is considered valid.

The effect of this subsection is enormous. The Court in *Legator McKenna Inc and Another v Shea and Others*,<sup>82</sup> held that ownership in property can transfer even if the underlying sale agreement was invalid. This means that although the reason for transferring the property, namely the contract of sale, is not valid, the act of transferring the property is considered valid. The invalid contract of sale is *not* declared valid; it is merely the transfer which is considered valid since one cannot validate that which is invalid.<sup>83</sup> The Court in *Legator McKenna Inc and Another v Shea and Others*<sup>84</sup> referred to, amongst others, the case of *Brits v Eaton*.<sup>85</sup>

In *Brits v Eaton NO*<sup>86</sup> it was held that even though the contract of sale of land was void, that ownership had passed to the Company in question in this case and that the land formed part of the insolvent estate of the company. The applicants in the matter contended that a written contract of sale was not entered into or that the identity of the purchaser could not be ascertained *ex facie* the contract.<sup>87</sup> Whether this was the case is irrelevant. Section 28(2)

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<sup>82</sup> 2009 (1) All SA 45 (SCA).

<sup>83</sup> See also *Kriel v Terblanche* 2002 (6) SA 132 (NC), where the court stated that we follow an abstract theory of transfer of ownership where the intention of the parties is considered more important than the agreement which leads to their actions as is the case with the causal theory for transfer of ownership. As long as the real agreement is valid, the subsequent transfer will also be considered valid (subject to the conditions in s28(2) having been met). The court in *Legator McKenna v Shea* 2009 (1) All SA 45 (SCA) failed to mention that for the real agreement to be valid, the seller also had to be owner of the property since one cannot transfer more rights than one has. See also Lötze DJ, "Case law", *The Law of Purchase and Sale, 2010, Annual Survey of South African Law* 1102 116. De Jager 314 states the s28 reinforces the fact that the abstract theory of the transfer of ownership applies in South Africa.

<sup>84</sup> 2009 (1) All SA 45 (SCA).

<sup>85</sup> 1984 (4) SA 728 (T).

<sup>86</sup> 1984 (4) SA 728 (T).

<sup>87</sup> 1984 (4) SA 728 (T) at 732A-D.

provides that where the purchaser has performed in full and the land has been transferred to him will mean that the contract which could rightfully have been voided, is now considered valid. The applicants in the matter could not reclaim the property due to the provisions of section 28(2).<sup>88</sup>

Section 28(2) was an acceptance of an *obiter* statement from the Appellate Division<sup>89</sup> that there was no reason to invalidate the effects of a contract where the court was unable to validate the contract itself which was invalid because of legislative requirements.

Where subsection (2) is not applicable, subsection (1) is relevant. Where performance has taken place either partially or fully and are of no force or effect, are void or have been cancelled, the parties to the contract can reclaim from the other party whatever they have performed in terms of the contract in addition to that which is set out in subsection (1)(a) and (b).

In terms of subsection (1)(a), a purchaser can reclaim the following from a seller: interest on payments made from the date of conclusion of the contract to date of recovery, reasonable compensation for necessary expenditure he incurred whether or not he had authority where it was required to preserve or improve the land and reasonable compensation for any improvements which enhances the market value of the land which were carried out by him with the consent of the owner. The seller is the one who is liable to repay the purchaser for the compensation for improvements even if he is not the owner.<sup>90</sup>

It is submitted that the interest which will be payable to the purchaser in terms of subsection (1) is the rate provided in the Prescribed Rate of Interest Act 55 of 1975 since the seller would not necessarily have such a great benefit from using the purchaser's money. It is also suggested that the purchaser should also bear some risk of the invalidity of the contract.<sup>91</sup>

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<sup>88</sup> 1984 (4) SA 728 (T) at 737G.

<sup>89</sup> *Wilken v Kohler* 1913 AD 135; see also Rodrigues F, *Transfer of ownership may be valid even though the underlying sale agreement is invalid*, <http://www.fluxmans.com/news/polPage.asp?id=37&pageid=119> (accessed 30 May 2015) and Lötze DJ and Nagel CJ, "Recent case law", 2010, *De Jure* 169 171.

<sup>90</sup> Van Rensburg 21 76.

<sup>91</sup> Van Rensburg 21 75.

The seller in turn, under subsection (1)(b), can claim reasonable compensation for occupation, use or enjoyment of the land and also compensation for any intentional or negligent damage by the alienee or persons in his charge. The damage caused here created delictual liability.<sup>92</sup> It would probably be prudent for a purchaser who is in occupation of land which is not yet transferred to him to not allow anybody in his charge to do anything to the land which may cause him to be delictually liable. It would be extremely unfortunate if a purchaser loses his claim for the return of his payments because of an enormous counter-claim.

The statutory right to claim obviates the need to rely on common law. This section will ensure that the seller and most importantly the purchaser, will be restored to the position they would have been in had the contract never been concluded.

It is argued, however, that for section 28 to take effect, there must actually have been a contract, which adversely affects those people which are ignorant. It is further argued that courts should have a discretion to decide the case based on the evidence, even where a contract for sale was entered into orally, so as to place everyone on equal footing. Currently, there is discretion as the courts need at least some sort of written documents to make a decision. The author argues that since ignorance of the law is an excuse in criminal matters, ignorance of the law should play some role in commercial matters too.<sup>93</sup>

I do believe that this author's viewpoint has some value as not everybody can afford to approach professionals for assistance on contracts and if, traditionally, people concluded contracts orally, they may not see the need to change their traditions, meaning that other people could in actual fact take advantage of them.

Section 28, although useful, only thus applies where there was some form of a contract. The parties that do, however, have it at their disposal, can rely fully on it to restore them to the position they would have been in had the contract not been concluded.

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<sup>92</sup> Van Rensburg 21 76.

<sup>93</sup> Nyapotse P, "Alienation of land act: placing the uneducated and ignorant at a disadvantage", 1998, vol 22, *De Rebus* 19 19.

### 3.6 Conclusion

It can be seen from this chapter that a purchaser has a vast variety of rights at his disposal to get him out of all sorts of situations. If the Act works effectively, the purchaser should always have financial information at his disposal, some sort of right to claim the transfer of the land, a right to have the rights of the seller limited, the ability to cool-off and the right to reclaim money paid to the seller where the contract does not work out as planned.

These rights ensure a purchaser is well-informed while a seller is held accountable and can claim ownership of land which is intended to be his. The purchaser can further also back-out of a contract which he no longer wants to continue with and can get all his money back where the contract fails for whatever reason. Provision for the right to cool-off is made in more than one Act, but whether the purchaser will be able to rely on either is questionable since the contract must fall within the scope of the Act.

## CHAPTER 4: RIGHTS OF THE PURCHASER WHERE LAND IS ENCUMBERED BY A MORTGAGE BOND

The reality of life is that there are people who cannot afford to purchase land without the assistance of a mortgage bond. When the property is sold to a subsequent buyer, the property may still be encumbered by a mortgage bond and without full payment of that mortgage bond, the property will not be released. The Act contains provisions on the course of action where the land which is sold under an instalment contract is still subject to a mortgage bond.

The options available to a purchaser if the land is encumbered by a mortgage bond are vital as the non-performance of the owner or seller's duties could have serious repercussions for the purchaser. Below these options will be considered. These sections cover a variety of situations such as the disclosure of information to the purchaser, seller or mortgagee, the fulfilment of the seller or owner's obligations by the purchaser and the recording of a contract against the title deed of the property.

### *4.1 Disclosure of information where land is encumbered by a mortgage bond*

There is information which must be made available to a purchaser when the land which he buys is encumbered by a mortgage bond. These sections are, however, long and tedious to go through and contain circular references which do not necessarily make a lot sense. Reliance on learned authors is necessary to make sense of these sections.

#### 4.1.1 Section 7

Where land has been sold and the land is encumbered by a mortgage bond, the seller is obliged to provide the purchaser with a certificate indicating what amount must be paid to each and every mortgagee to obtain discharge or release of the land.

The certificate which must be provided to the purchaser by the seller must be provided within 30 days from date of conclusion of contract and may not be dated more than four months before the date of conclusion of the contract. The certificate must indicate the amount of interest which is payable from the date on which the certificate was issued.<sup>1</sup> The seller can either hand the certificate to the purchaser or he can send it to the purchaser with registered post to the address as provided in terms of section 23. Where the certificate is sent via registered post, the certificate must also reach the purchaser within that 30 day period.<sup>2</sup>

The certificate which is provided in terms of section 7(1) is irrevocably binding on a mortgagee for a period of four months from the date on which the date of the certificate and such certificate can be relied on by any person who has purchased the land within that period.<sup>3</sup>

In terms of section 7(3), if the seller fails to provide the purchaser with a certificate, or the amount indicated in the certificate is more than that which is provided in the contract in terms of section 6(1)(e), then the purchaser has a right to cancel the contract within fourteen days and claim relief as provided in section 28(1). The way in which the purchaser should cancel the contract is not known as the Act does not deal with this and it is suggested that the general common law methods of cancellation apply. A purchaser must simply ensure that the cancellation is brought to the attention of the seller. It is suggested that the best way to ensure that this happens is to send a notice by way of registered post to the seller at the address provided by him for service of documents in terms of section 23.<sup>4</sup>

Section 7(4) obliges a mortgagee to provide the certificate to the seller within 21 days of the request. A failure to provide the certificate upon request means the seller can hold the

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<sup>1</sup> S7(1). It is further suggested that the certificate should indicate the address of the mortgagee as the purchaser is obliged in terms of s9 to inform the mortgagee of his address. See Van Rensburg ADJ and Treisman SH *The Practitioner's Guide to the Alienation of Land Act 2<sup>nd</sup> Edition* (1984) 91 137. See below for a discussion of s9.

<sup>2</sup> Van Rensburg 91 136.

<sup>3</sup> Van Rensburg 91 137.

<sup>4</sup> Van Rensburg 91 147.

mortgagee liable for breach of contract as if the mortgagee were contractually obliged to provide the certificate. This ensures that a seller will indeed be able to provide a purchaser with a certificate as is required by law. The seller will most certainly be able to apply to court for an order for specific performance and may claim damages for losses suffered as a result of the failure to provide such certificate.<sup>5</sup> Depending on the nature of the land which is sold in terms of the contract, the damages, which will be claimed to place the seller in the position he would have been had the contract been fulfilled, can be rather extensive.<sup>6</sup>

It is suggested that a clause is included in the contract of sale where the purchaser is not liable for the payment of any amounts before he has seen the certificate.<sup>7</sup> This may be a wise addition as the purchaser will not have to claim any money back where he chooses not to abide by the contract as a result of the amounts in terms of the certificate being more than that which he is liable for in the contract as provided for in terms of section 6.

#### 4.1.2 Section 9

Where land sold is encumbered by a mortgage bond, the purchaser is obliged to notify the mortgagee of the conclusion of the contract, his section 23 address, any change thereof, and other information which the mortgagee may request from him.<sup>8</sup> This information must be supplied as soon as possible.<sup>9</sup>

This information which the purchaser provides the mortgagee gives the mortgagee a chance to inform the purchaser of the mortgagee's intention to institute legal proceedings against

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<sup>5</sup> Van Rensburg 91 137.

<sup>6</sup> Van Rensburg 91 138.

<sup>7</sup> De Jager T, *Vervreemding van grond, Alienation of land* (1982) 252.

<sup>8</sup> S9(1). Further information which a mortgagee could reasonably request from the purchaser is the exact description of the land, the details of the current registered owner and possibly the information of the intermediaries where the purchaser has not purchased the land directly from the owner. See Van Rensburg ADJ 91 138.

<sup>9</sup> Van Rensburg 91 138. See also *McKay v Stein* 1951 (3) SA 1 (A) at 6D-E and *Sleightholme Farms (Pty) Ltd v National Farms Union Mutual Insurance Society Ltd* 1967 (1) SA 13 (R) at 17A-D for a discussion on the meaning of "forthwith" as used in s9(1).

the mortgagor.<sup>10</sup> The mortgagee must provide the purchaser at least 21 days' written notice and such notice must be sent by registered post.<sup>11</sup> Where the mortgagee did not inform the purchaser of the proceedings, the mortgagee is not entitled to add the costs of the proceedings to the amount required to discharge or release the land from the mortgage bond. Where the purchaser was informed about the proceedings at a later stage, any costs incurred after an expiry of 21 days from date of the notification may be added to the amount required to discharge or release the land from the mortgage bond.<sup>12</sup> The provisions of section 9(2) ensure that the purchaser is not liable for the costs that the mortgagee incurs in pursuance of a claim against the seller where he was not informed of the proceedings. Without this provision of the Act, the mortgagee would have been able to add the costs as he pleased and increase the amount required to be paid for the release of the land.<sup>13</sup>

A purchaser may approach the mortgagee for a certificate which indicates the amount which is owing in terms of the land.<sup>14</sup> A request for the certificate must be in writing and a fee for the certificate may be charged.<sup>15</sup> The mortgagee must provide the certificate within 21 days of the request, but the mortgagee does not have to provide the certificate more than three times in a calendar year.<sup>16</sup> As is the case in section 7(1), subsection (7) of section 9 provides that the certificate is binding on the mortgagee for a period of four months from date of issue and can be relied upon by any person who has purchased the land. It is suggested that the 21 days provided to the mortgagee to furnish the certificate should only start to run when the letter is posted. Any other interpretation may be too restrictive and

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<sup>10</sup> See Van Rensburg 91 138 where they provide that a further reason for the information which is to be provided is so that the mortgagee can inform the relevant persons of the purchaser's address if the owner is sequestered. For a discussion of the sequestration of the owner of land, see Chapter 5 below.

<sup>11</sup> S9(2)(a).

<sup>12</sup> S9(2)(c).

<sup>13</sup> Van Rensburg 91 174.

<sup>14</sup> S9(3). See Van Rensburg 91 164 for a list of other amounts which may be added to the amount which appears on the certificate. Interest, amounts spent to improve the land, maintenance thereof, insurance for the land to name but a few are some of these amounts. It is important to that the mortgagee is entitled to add the extra amounts as these expenses could add up to rather large amounts and had the land not been mortgaged then the owner would have been liable for those expenses and in any event been entitled to add such expenses to the purchase price of the land. At Van Rensburg 91 166, it is indicated the amounts which must be deducted from the basic amount which is owed. Such amounts include the amounts already paid in respect of the land.

<sup>15</sup> S9(5).

<sup>16</sup> S9(6).

be unfair towards the mortgagee if the purchaser takes too long to actually post the request.<sup>17</sup> Perhaps it could be argued that the period should start to run from a time period when the mortgagee should have received the letter. Mortgagees have thousands of bonds and information probably takes time to process. It cannot be guaranteed that a letter received today will actually be opened today or be reacted on today.

Where a contract has been recorded in terms of section 20,<sup>18</sup> a mortgagee is deemed to have consented to the release or discharge of the land if the bond was registered after the contract was recorded. This section operates in favour of the purchaser whose contract was recorded and any person who thereafter buys the land from him.<sup>19</sup> This essentially entitles a registrar of deeds to cancel the mortgage bond and transfer the land to the purchaser or his subsequent alienee. It is suggested that in such event the owner would also not be allowed to register further mortgage bonds over the property as they would provide meaningless security for the mortgagee if there is only one property, but this is not the case.<sup>20</sup> The mortgage bond would still have meaning if the bond covers more than one property and contracts have only been registered for some of those properties and where there is a single property, the mortgagee would still have a preferent claim for the balance of the purchaser price paid where such amount exceeds the amount still owing on a mortgage bond registered prior to the registration of a contract.<sup>21</sup> It is arguable whether anybody would truly accept land as security when the mortgage bond must be registered over that property to give effect to the security and the mortgage bond ranks after the contract which was recorded against the title deed of the land.<sup>22</sup>

Section 7(1) actually provides that the certificate must indicate what amount must be paid in terms of section 9, and section 9 provides that the amount indicated on the certificate may not exceed the amount which was given in section 7(1). Learned authors<sup>23</sup> find it

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<sup>17</sup> Van Rensburg 91 164.

<sup>18</sup> See par 4.3. below for a discussion on s20.

<sup>19</sup> S9(8).

<sup>20</sup> Laurens RC, "Mortgage bond: real security", 1984, vol 202, *De Rebus* 480 480.

<sup>21</sup> Van Rensburg 91 182.

<sup>22</sup> West A, "Mortgage bonds and restrictive conditions", 1994, vol 324, *De Rebus* 890 891.

<sup>23</sup> Van Rensburg ADJ and Treisman SH in Van Rensburg 91 136.

difficult to “attach any reasonable meaning” to those provisions of these sections.<sup>24</sup> If learned authors find it difficult to understand why the legislature included such phrases in the Act, how must a lay person who has no legal background understand the Act?

Perhaps the legislature should reconsider the effect of these sections and whether they actually mean anything at all. What is actually wanted is that the purchaser must receive a certificate indicating what amounts must be paid to the mortgagees for the release of the land. It should be simple enough to state that in a manner which any person, whether educated or not, can understand.

## *4.2 Fulfilment of owner or intermediary’s obligations*

Section 11 is headed “[the] purchaser or remote purchaser may fulfil obligations of owner of intermediary”. This is considered an important addition to the variety of rights which a purchaser has at his disposal.

In terms of this section a purchaser is allowed to fulfil certain obligations of an owner or intermediary under certain circumstances. The purchaser can fulfil an owner’s obligations to a mortgagee or fulfil an intermediary’s obligations to the person who alienated the land to him where such owner or intermediary fails to fulfil his obligations to the relevant party. The purchaser may also fulfil such obligations if the payment of the instalment would reduce the amount owed to the mortgagee or intermediary’s seller to less than what is required for the discharge or release of the land.<sup>25</sup> The purchaser must, when making the payment, include a notice which provides the name of the registered owner of the land or the intermediary on whose behalf the purchaser is paying, whether the payment is made on behalf of the owner or intermediary, the amount of the payment and the full names and postal address of the purchaser making the payment. This notice must be sent to the mortgagee or alienator by post or be personally handed to them.<sup>26</sup>

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<sup>24</sup> Van Rensburg 91 136.

<sup>25</sup> S11(a).

<sup>26</sup> Van Rensburg 91 177.

The information contained in the notice is important to ensure that the payment is allocated to the correct account and ultimately ensures that the purchaser will be able to take transfer of the land without having to pay extra costs of execution et cetera if such steps should be taken against the owner for failure to make payment of the amounts owed.

Making a payment on behalf of the intermediary or owner is considered to be a fulfilment of the purchaser's obligations and the owner or intermediary cannot thereafter attempt to recover that amount from the purchaser who paid the amount in good faith to the mortgagee or owner.<sup>27</sup> Where a purchaser or remote purchaser made a payment in terms of subsection (1) which is more than what he owed his seller, he becomes entitled to recover the excess from the owner or intermediary on whose behalf he had made the payment.<sup>28</sup>

This subsection does, however, cause some confusion where there are a few transactions which have already taken place in regards to the sale of the land. Where the purchaser makes payment to the owner, and the purchaser should have made payment to the intermediary, then technically the owner in any event has no claim against the purchaser for that amount as there is no contract between them. Furthermore, if the payment does not comply with the requirements of section 11, then the payment would not be to the benefit of anyone and the purchaser would not be entitled to have made the payment. This surely cannot be what the legislature intended.

This aim of this section is to allow a purchaser to make payments to someone who is owed money somewhere along the lines so that the purchaser reduces his payments and the amounts owing on the land. It is submitted that perhaps the section should simply have stated that any payments made in good faith will be considered valid.<sup>29</sup> A payment would be considered to have been made in good faith where the purchaser mistakenly paid a sum which he believed was due but was not in fact due.<sup>30</sup> Nonetheless, this section does have the advantage that the purchaser does not commit breach of contract where he makes payment in accordance with this section.

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<sup>27</sup> S11(b) and (c).

<sup>28</sup> S11(2).

<sup>29</sup> Van Rensburg 91 179.

<sup>30</sup> De Jager 266.

### 4.3 Recording of a contract

Section 20 provides for the recording of a contract of sale against the title deed of the land which is the subject matter of the sale. It must be noted that to have a contract recorded, the land which forms the subject matter of that contract must be used for mainly residential purposes.<sup>31</sup>

In terms of section 20(1)(a), a seller<sup>32</sup> is obliged to have the contract registered against the land on the condition that a previous contract has not been recorded and it is not necessary to register a previous contract.<sup>33</sup> The seller does not require the purchaser's permission to have the contract recorded since it is an obligation of the Act to have the contract registered.<sup>34</sup> The land must also be registrable. It is the seller's obligation, not the owner's,

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<sup>31</sup> Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-12. It is not always easy to determine whether the land is to be used for residential purposes. Courts will usually take a number of factors into account as to whether or not the land is used mainly for residential purposes such as the purchaser's intention, the description of the land etc. *Bouwer v Auraa (PTY) Ltd* 1991 (4) SA 622 (W) at 627 provides that the intention of the purchaser should be decisive regarding the "destiny" of the land. In the present case, the company intended to use the land for development, and although the future purchasers would intend to use the land for residential purposes, the current purchasers did not intend to do so and thus the land fell outside the scope of Chapter II of the Act.

<sup>32</sup> Where the seller is the State, they need not have the contract registered (s4). In *Katshwa and Others v Cape Town Community Housing Company (Pty) Ltd And Four Similar Cases* 2014 (2) SA 128 (WCC) at [47]-[48], it was held that a company which provides for services on behalf of the State do not actually form part of the State and thus Chapter II of the Act still applies to such companies.

<sup>33</sup> Other than the fact that the Act requires an application to be made in the form and manner required, the Act itself does not provide the manner in which the application must be made to have the contract registered and thus the Regulations apply. See regulations 4, 5 and 7. Regulation 3 provides that the application must be in the form of an affidavit. The affidavit provides that there are no prior contracts that must be registered before the one which is the subject matter of the application. This prevents persons from misleading the Registrar regarding prior contracts as the affidavit is made under oath and falsehoods contained therein could have serious consequences for the applicant. See West A, "The recording and cancellation of a contract", 1992, vol 295, *De Rebus* 453 454. The copy of the owner's title deed of the land must accompany the application and the registration must be endorsed on both title deeds. See Van Rensburg 91 234. This is obviously to ensure that someone is not in future misled by a title deed which does not show restrictions which obviously exist. See Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-16 for a description on how to lodge such an application for the recording of the contract.

<sup>34</sup> West A, "The recording and cancellation of a contract", 1992, vol 295, *De Rebus* 453 453.

to have the contract registered.<sup>35</sup> Van Rensburg<sup>36</sup> indicates that the English version of the Act was rather clumsily worded, but the proviso to this subsection becomes clear when read in Afrikaans: it must be emphasised that only one contract at a time may be registered and it is usually only the first contract which is registered.<sup>37</sup>

Where 90 days have passed from the date of the contract where the land is registrable, when the land becomes registrable or upon which the land was registered in a previous purchaser's name in terms of a preceding contract which was recorded or supposed to be recorded, and the seller has not had the contract recorded, the purchaser becomes entitled to either cancel the contract<sup>38</sup> or apply to the registrar and have the contract recorded.<sup>39 40</sup> The regulations to the Act provide for a procedure whereby both the seller and purchaser together apply for the recording of the contract. This is apparently done to avoid unnecessary delays.<sup>41</sup>

Where a contract is cancelled, the recording of such contract must also be cancelled.<sup>42</sup> Only the owner or the seller may apply to have the contract cancelled.<sup>43</sup>

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<sup>35</sup> Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-15.

<sup>36</sup> Van Rensburg 91 152.

<sup>37</sup> Van Rensburg 91 152.

<sup>38</sup> Where the purchaser elects to cancel the contract, the purchaser is entitled to the relief provided by s28(1) and may also claim additional damages where such damages have arisen because of the seller's failure to have the contract recorded – see s20(1)(b)(aa).

<sup>39</sup> Where the purchaser elects to have the contract recorded, the purchaser cannot be held liable for any costs which the seller suffers as a result of the seller also taking steps after the 90 day period has lapsed – see s20(1)(b)(bb). The Act does not specify who is actually responsible for the payment of the costs for having the contract recorded, but it is suggested that the person who has the contract recorded will be liable for the costs. See De Jager 288.

<sup>40</sup> S20(1)(b).

<sup>41</sup> Van Rensburg 91 153.

<sup>42</sup> S20(1)(c). This section does not specifically allow a claim for damages, but it is suggested that damages could be claimed where there is a breach of contract with regards to the registration of the contract. See Van Rensburg 91 153.

<sup>43</sup> Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-22B. The application consists of an affidavit which is prepared by a practising conveyancer. See further Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-22C for the procedure to be followed to have a contract cancelled.

The registrar is the one who must record the contract against the title deed of the land. The registrar may register a mortgage bond over the property against which a contract has been recorded.<sup>44</sup> The registrar may not transfer the land against which a contract has been recorded unless the person receiving the land is the purchaser in terms of the contract recorded, the person receiving transfer is an intermediary in relation to the purchaser of the land, or the recording of the contract has been cancelled.<sup>45</sup>

In terms of section 20(3), any person who is in possession of the title deed of the land must assist the purchaser or seller to have the contract recorded or cancelled, as the case may be, and where he fails he is liable the relevant person requiring his assistance as if he were bound by contract to render such assistance. Any provision on the Act which binds any person to the purchaser “as if obliged by contract” is a positive inclusion in the Act from the purchaser’s perspective. The purchaser has recourse to contractual remedies where the other person does not perform that which the Act requires of him.

Section 20(4) emphasises that any pre-emptive right which was registered before the contract was recorded will take preference over the contract. On the other hand, section 20(5) provides that a purchaser whose contract is recorded will have a preferent claim on proceeds of the sale of the land where the land was sold in execution or sold as a result of the owner’s insolvency.<sup>46</sup> The purchaser’s claim only falls after a mortgagee’s claim where the relevant mortgage bond was registered before or on the same day as the contract.<sup>47</sup> This section does not abolish the other preferent claims in respect of the land, but merely inserts the purchaser into the rank of preferent claimants as if the purchaser were a mortgagee too.<sup>48</sup>

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<sup>44</sup> S20(2)(a). Where a mortgage bond is registered against the property, the ranking clause of the bond must indicate where the bond ranks. See See Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-18.

<sup>45</sup> S20(2)(b).

<sup>46</sup> S20(5) is especially important in cases of insolvency of the owner of the land as this subsection allows a purchaser to get their money back (or at least part thereof). Their claim for repayment of the paid instalments is a preferent claim and not a concurrent claim as it would have been in terms of common law. For further discussion on the insolvency of the owner of the land see Chapter 5 below. Boraine A and Delport PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 438.

<sup>47</sup> S20(5)(a)(i).

<sup>48</sup> Van Rensburg 91 235.

The amount which the purchaser can claim in the case where the land is sold, is the amount which the purchaser can claim from the seller in terms of section 28(1) or where the purchaser is a remote purchaser, the amount he would have been entitled to pay on behalf of such owner in terms of section 11.<sup>49</sup> The mortgagee is further not entitled to claim more for the land than the amount which was required for the release or discharge of the land from the bond.<sup>50</sup>

The recording of a contract will be ineffective where the land is subdivided as the original description of the property will no longer be applicable. New contracts will have to be recorded where the parties are obliged to once again register the contracts in terms of section 20. If property is attached, the contract can still be recorded, but in such event the purchaser will have to acknowledge in writing that he is aware of the attachment.<sup>51</sup>

#### 4.4 Conclusion

The rights which a purchaser has, as discussed in this chapter, are important to protect a purchaser against the ill-effects of a seller's insolvency or the seller or intermediary's lack of dedication to the fulfilment of their obligations. These provisions ensure that a purchaser does not commit a breach of contract in the process of attempting to ensure the object of the contract is safe-guarded against another's breach of a contract wherein that person has obligations to fulfil.

It is obvious why section 9 requires the purchaser to provide the mortgagee of the information regarding the sale of the land. The mortgagor has to inform the purchaser of any legal proceedings against the seller if the land could possibly be attached. The purchaser is furthermore entitled to receive certain information from the mortgagee regarding amounts which are required to discharge the land from the mortgage bond. Where such amount exceeds the amount which the purchaser must pay for the land the purchaser is

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<sup>49</sup> S20(5)(a)(ii).

<sup>50</sup> S20(5)(b).

<sup>51</sup> Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-22A.

entitled to cancel the contract. This serves as a protectionary measure for the purchaser – nobody would want to purchase land which they cannot technically own unencumbered because somebody else still owes money. Whether these sections are actually ever put to use in practice will probably depend on who the parties to the contract are. It is questionable whether someone who already could not obtain a mortgage bond to purchase the property will even have the financial means to proceed to court to ensure that he can receive his money back which he has paid in terms of the contract.

Section 11 was a really good idea to ensure that somewhere along the lines everybody does get paid and the purchaser who stands last in line will get the land in the end. Whether a purchaser will ever be in the position to actually pay the money to the person to whom his seller owes money is unknown. Where will he get the payment details to make the payment? Will someone actually provide the details if the purchaser asks for the details? The way society is today, there is absolutely no way that anybody would provide their banking details to somebody else without seriously ensuring that it is a legitimate request. The purpose behind section 11 probably will not easily be reached.

Section 20, which provides for the recording of a contract against the title deed of land, is a great idea to ensure that it is known that the land is the subject matter of a contract of sale. Whether the contract will eventually be recorded and how long it will take to record it, is not known. A period of ninety days must expire before a purchaser can apply to have the contract recorded. A lot can happen in such a short period of time. It is questionable why only one contract is recorded against the title deed of the property, but provision is made for each and every mortgage bond.

The idea behind these provisions is a great idea. The practicality may, however, not be so great. Whether the idea will become a reality will have to depend on the parties and the circumstances surrounding the sale.

## CHAPTER 5: RIGHTS OF A PURCHASER IN CASES OF THE OWNER OR SELLER'S INSOLVENCY

Where land is sold by way of an instalment agreement, the land remains the property of the owner until such time as all the payments are made or until certain other conditions are met. What is the case should the owner become insolvent or the land is attached before transfer of the land to the purchaser?

In this chapter this scenario will be explored. Since the purpose of the Act is to advance the interests of the purchaser, it is hoped that the purchaser will be protected as far as possible from the effects of somebody else's lack of financial fortune. A very brief overview of the position of the common law will be considered as it would apply in normal situations where a contract is concluded, where after the provisions of the Act will be explained.

### *5.1 General effects of insolvency*

The law generally applicable to insolvent estates is the Insolvency Act 24 of 1936 and also further the common law. The general effect of insolvency on an unexecuted contract is considered so as to provide a better understanding of the way the Act provides protection for the purchaser of land in an instalment sale agreement. The Insolvency Act is silent on the manner in which unexecuted contracts are treated and thus we must consider the stance of the common law on unexecuted contracts where the seller (or in this case, the owner) is sequestrated.

It is a general common law rule that a contract is not automatically terminated as a result of a party's sequestration, but an individual creditor, who in this case will be the purchaser,

cannot enforce the contract if such contract will be to the detriment of the other creditors of the estate.<sup>1</sup>

A trustee may choose whether or not to enforce a contract.<sup>2</sup> The purchaser would have merely a concurrent claim for damages where the trustee chooses to not enforce the contract.<sup>3</sup> An election to not perform the contract is considered repudiation. Repudiation of the contract allows the purchaser access to contractual remedies as repudiation is considered breach of contract. All the usual remedies for breach of contract are available except for the remedy of specific performance as it would defeat the purpose of the trustee being entitled to make the election to repudiate the contract. Where a trustee chooses to perform in terms of the contract, the trustee can claim specific performance from the purchaser, but must then also be willing to comply with the duties which the seller had and perform on his behalf.<sup>4</sup>

The purchaser of land is obviously not in a good position where the owner of the property is sequestrated as the purchaser stands to lose both the land and any instalments paid.<sup>5</sup> A purchaser may not claim transfer of the land even if the entire purchaser price is paid. Relief is therefore provided in the Act in terms of sections 18 – 22.<sup>6</sup> Sections 21 and 22 are discussed below.

Where these sections do not find application, the only remedies available to a purchaser would be a concurrent claim for damages as provided for by the common law.<sup>7</sup>

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<sup>1</sup> Boraine A and Delpont PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 437.

<sup>2</sup> Boraine A and Delpont PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 437.

<sup>3</sup> *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd* 1981 (1) SA 171 (A) at 182D.

<sup>4</sup> Boraine A and Delpont PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 437.

<sup>5</sup> *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd* 1981 (1) SA 171 (A) at 183G.

<sup>6</sup> For a discussion of ss18 and 19 see Chapter 3 above and for a discussion of s20 see Chapter 4 above.

<sup>7</sup> Boraine A and Delpont PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 438.

## 5.2 *The provisions of the Act*

The Act provides certain remedies which are quite helpful to a purchaser who finds himself in the situation where the owner of the land he is buying is sequestrated. Some remedies have already been discussed above.<sup>8</sup>

The Act specifically provides a purchaser protection by giving him a right to claim immediate transfer of the land or by providing a preferent claim in regards to the proceeds where the land is sold.<sup>9</sup> Below it will be considered how the protection is provided to the purchaser.

### 5.2.1 Section 21: Notification to the purchaser

Section 21 is headed “[p]urchaser to be notified to take transfer of land when such land is attached or the owner becomes insolvent[.]” This should already give one an indication that the purchaser has a right to be notified of sequestration or execution proceedings and that the purchaser does have a right, subject to conditions, to take transfer of the land.

Section 21(1) obliges a remote purchaser to notify any owner of land that a contract for sale of land on instalments has been concluded. The purchaser must also provide his section 23 address to the owner and also the name and address of the intermediaries who are involved in the sale of the land.

Section 21(2) makes it obvious why a purchaser must provide the owner with the details as requested by section 21(1). When the land is attached by a judgment creditor or the owner becomes insolvent, the owner must inform the appointed trustee or judgment creditor within fourteen days of the appointment of such person of the names and addresses as provided to him in subsection (1).<sup>10</sup> A problem which is created is that by the time a trustee is appointed, the owner is no longer actually the owner. It is suggested that the term

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<sup>8</sup> See Chapter 3.

<sup>9</sup> Van Rensburg ADJ and Treisman SH *The Practitioner’s Guide to the Alienation of Land Act 2<sup>nd</sup> Edition* (1984) 91 206.

<sup>10</sup> S21(2)(a)(i).

“owner” is to be interpreted as the former owner of the property.<sup>11</sup> There is no penalty attached to the failure of the purchaser to notify the owner of his details as it is the purchaser who will lose out if he does not inform the owner as obliged.<sup>12</sup>

Since a purchaser is, in terms of section 9(1), obliged to inform a mortgagee of his address and name when he concludes a contract for sale of land where such land is encumbered by a mortgage bond, a mortgagee is placed under an obligation in terms of section 21(2)(a)(ii) to also notify the judgment creditor or trustee of the purchaser’s details as was provided to him. The ways in which a mortgagee can become aware of the insolvency of the owner are numerous. It is not specified how the insolvency must come to the attention of the mortgagee before he notifies the trustee or judgment creditor of the contract between the owner and purchaser and thus of the purchaser’s details. It is, however, submitted that the mortgagee must give notice of the purchaser’s details no later than 10 days after receiving the creditor’s report which is sent to creditors in terms of the Insolvency Act.<sup>13</sup> The judgment creditor should be aware of the contract of sale once the deputy sheriff informs him of the bonds and encumbrances which are registered against the land’s title deed. The judgment creditor is then obliged to inform those persons who lay first claim to the proceeds of the sale. Most likely, the mortgagee will then be aware of the sale and will in turn inform the purchaser. Where the contract has been recorded, the judgment creditor will in any event be aware thereof as the deputy sheriff will have informed him of this.<sup>14</sup>

The judgment creditor or trustee has a duty to notify any intermediary and purchaser of his right to take transfer of the land. Such right is subject to section 22(3)<sup>15</sup> and the notification must be a notice in writing which must be either hand-delivered or sent by registered post.<sup>16</sup>

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<sup>11</sup> Van Rensburg 91 214.

<sup>12</sup> Van Rensburg 91 213.

<sup>13</sup> Van Rensburg 91 216.

<sup>14</sup> Van Rensburg 91 217.

<sup>15</sup> S22(3) is discussed below.

<sup>16</sup> S21(2)(b) and (3).

Where a trustee or judgment creditor does not inform a purchaser of the impending sale of the land by sending him the notice, the trustee or judgment creditor will not incur liability towards the purchaser (or intermediary) if the failure to send the notice was not the trustee or judgment creditor's fault.<sup>17</sup> Unless the trustee or judgment creditor can prove the opposite, it will be considered the trustee or judgment creditors fault for failing to send a notice to the purchaser (or intermediary) if he was provided with notice in terms of subsection 2(a) or if he did not take reasonable steps to find the name and address of the relevant purchaser or intermediary. This does not apply where the person required to give notice is the mortgagee and the purchaser did not give the notice required in terms of section 9(1).<sup>18</sup> The judgment creditor need only take reasonable steps and at most should make a title deed search to see if there are any contracts recorded against the title deed of the land involved. The judgment creditor need not trace the purchaser who did not inform him of his details as was required.<sup>19</sup>

An owner or mortgagee who intentionally or negligently do not give notice to the purchaser as required, is guilty of an offence and can be fined R1 000 or imprisoned for up to one year or can be fined and imprisoned. Once again it must be emphasised that the fine of R1 000 is hugely inappropriate considering the value of the R1 000 from 1982 in today's terms.<sup>20</sup> This amount of R1 000 can be translated into approximately R15 000 today.<sup>21</sup> The difference between a mere R1 000 and R15 000 is rather large and thus it is suggested that the legislature should make this amount subject to the relevant Minister's discretion. Imprisonment may also not prove practical if the defaulting party is the mortgagee since most mortgagees are juristic persons and cannot be locked up.

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<sup>17</sup> S21(4)(a). This implies that an owner or mortgagee can incur delictual liability where they failed to inform the purchaser of the proceedings. See Van Rensburg 91 219.

<sup>18</sup> S21(4)(b).

<sup>19</sup> Van Rensburg 91 218.

<sup>20</sup> S21(5).

<sup>21</sup>Amount provided by an online CPI calculator: Anon, *Inflation Adjustment Calculator*, <http://www.inflationcalc.co.za/?date1=1983-01-01&date2=2015-05-28&amount=1000> (accessed 28 May 2015).

## 5.2.2 Section 22: Transfer of the land to the purchaser

Section 22 prescribes the conditions which the transfer of land is subject to where the owner becomes insolvent or the land which is the subject matter of the contract is attached.

Before section 22 even becomes relevant, the purchaser has already been informed by a line of sections of the amounts involved in the sale of land which are still outstanding. Thus a purchaser can in terms of section 11 decide to step in, take action and pay outstanding amounts on the seller's behalf. The reasons for this mainly appear to be so that the purchaser can actually make the decision to pay the amounts which are still outstanding before he has to decide to take transfer of the land under the operation of sections 21 and 22.<sup>22</sup>

Section 22(1) allows the land to be transferred to any intermediary or purchaser who arranges for the signing of all the relevant documents as well as for the payment of all the costs in connection with the transfer of the land and an amount, whichever is larger, which is equal to:

1. All amounts which are owed in terms of the deed of alienation wherein the owner alienated the land;<sup>23</sup> or
2. The sum of the costs of attachment or sequestration and administration, as the case may be, and any amount payable in terms of law and the amount required to be paid in order to release the land from a mortgage bond, if applicable.<sup>24</sup>

The arrangements for payment must be made either to the satisfaction of the deputy sheriff or messenger of the court where the land was attached before the land is sold or the trustee, liquidator or executor within a 30 day period where the owner is declared insolvent.<sup>25</sup> The Master of the High Court who is supervising the sequestration may hear a

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<sup>22</sup> De Jager T, *Vervreemding van grond, Alienation of land* (1982) 300.

<sup>23</sup> S22(1)(a).

<sup>24</sup> S22(1)(b). Where there are mortgage bonds which rank after the recorded contract, the purchaser is not obliged to arrange payments of those amounts owed as those mortgagees are considered to have consented to the discharge of the land in favour of the purchaser and any subsequent alienees. See Van Rensburg 91 230.

<sup>25</sup> S22(2)(a).

matter where the trustee, executor or liquidator fails or refuses to accept an offer by a person in regards of the arrangements he made in terms of section 22(1).

Where more than one person is prepared to take transfer of the land, and can actually take transfer thereof, the land is transferred to person who bought the land first.<sup>26</sup> The purchaser who did not receive transfer will still be able to obtain transfer in terms of his own contract of sale.<sup>27</sup> The transfer is effected by the deputy sheriff, messenger of the court, trustee, executor or liquidator, depending on the circumstances of the transfer and is effected as if it were a sale in execution or the realisation of an immovable asset of the insolvent estate.<sup>28</sup>

A remote purchaser who did not receive transfer of the land, and who wishes to take transfer of the land, must first comply with section 18(1)<sup>29</sup> in order to have the land transferred to him.<sup>30</sup>

Section 22(6) determines that the person who took transfer of the land and who paid more than they should have in terms of their specific contract of sale, may claim the excess by way of a concurrent claim against the owner.<sup>31</sup> This in effect allows a purchaser (or intermediary) to at least, in theory, only pay that which he should have paid. The drawback of this is obviously that a purchaser may become liable for sequestration costs of the owner where there is not enough money in the estate to cover the debts of the estate.

Where no satisfactory arrangements could be made for the payment of amounts as determined by subsection (1) and for the transfer of the land, the land and its proceeds will be dealt with according to the law which would have regulated it had the land and the

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<sup>26</sup> S22(3).

<sup>27</sup> Van Rensburg 91 232.

<sup>28</sup> S22(4).

<sup>29</sup> See Chapter 3 above.

<sup>30</sup> S22(5).

<sup>31</sup> Van Rensburg 91 227.

relevant contract not been subject to this Act.<sup>32</sup> The trustee can then choose to either enforce the contract or to abandon it.<sup>33</sup>

Essentially section 22 means that a trustee, liquidator, judgment creditor or executor lose the right to repudiate the contract, as they could have done in terms of common law. They must allow the purchaser (or intermediary) to take transfer of the land subject to the conditions above. The contract does not have to be registered in the deeds office in terms of section 20 of the Act, as section 22 makes no provision to that effect.<sup>34</sup>

### 5.3 Conclusion

Without sections 21 and 22 of the Act, the purchaser of land which is owned by an insolvent owner would be in a bad position as he would merely have a concurrent claim for any money paid to the seller and would lose the land. The Act provides a way out of this, subject to the fulfilment of conditions, and allows the purchaser to take transfer of the land.

These sections really do protect the purchaser in that the purchaser, although technically the first purchaser, has a right to claim transfer of the land. The common law rules regarding insolvency do not have to be relied on and the person overseeing the sequestration has no choice but to allow the transfer of the land.

In future though, considering that the Act is not as often used as was possibly intended, sections such as these that are intended to provide protection for specific situations, should rather be incorporated in legislation which deals with those situations. It is unfortunate that these principles regarding sequestration cannot also be applied to other purchasers who have bought items that do not classify as “land intended for residential purposes” bought in terms of a contract under the Act.

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<sup>32</sup> S22(7). The land is thus either dealt with in terms of law relating to sales in execution or in terms of law relating to insolvency. There is no other way in which the land can be dealt with. See van Rensburg 91 234.

<sup>33</sup> Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8) 4-22A.

<sup>34</sup> Borraine A and Delport PA, “Effects of sequestration”, Nagel CJ (Ed), *Commercial Law* (third edition) 2006 421 437.



## CHAPTER 6: CONCLUSION

The Alienation of Land Act is intended to be of assistance to purchasers who purchased property in terms of a contract. Whether this is the case is yet to be seen since there are not many cases where use is made of specifically Chapter II and Chapter III of the Act.

Lötz and Nagel<sup>1</sup> are of the opinion that section 2(1) of the Act aims to prevent litigation, perjury and fraud, but hold that the aims of the Act are, however, not realised. The relevant sections discussed above are also open to criticism in much the same way. The Act is not used as intended and thus it should be asked why. The sections are not practical in the application thereof and a purchaser who cannot obtain a mortgage for the property cannot expect that a seller would want to sell land if at the end of the day it would cause him much effort to get his money back if the purchaser defaults. Banks, and other societies providing mortgage bonds, have far more resources at their disposal to pursue claims against defaulting parties. Banks are also held to certain standards whereas the ordinary seller has nobody but the purchaser to hold him accountable for that on which he defaults.

Lötz and Nagel<sup>2</sup> suggest that the Act needs to be reconsidered and I do tend to agree. The relevant discussed sections of the Act are not used because of the impracticality thereof. The Act should be amended to make the use thereof easy to use for both purchasers and sellers. The average person does not have access to the resources that legal practitioners have access to and do not have any idea how to interpret the Act and nor do they know what the implications thereof are. The idea behind the Act is a good idea, and the idea has meaning, but the way in which the idea has been implement is ultimately probably not to the advantage of the purchaser.

In Chapter 2 we could see which of the defined terms of the Act are the most relevant for the current discussion. Already with the definitions it is clear which deeds of alienation are excluded from the scope of this analysis. Only deeds of alienation where the purchase price

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<sup>1</sup> Lötz DJ and Nagel CJ, "Recent case law", 2010, *De Jure* 169 174.

<sup>2</sup> Lötz DJ and Nagel CJ, "Recent case law", 2010, *De Jure* 169 175.

is paid in three or more instalments over a period of more than one year fall within the scope of Chapter II of the Act and are deemed worthy of being considered “contracts”.

A question to be considered though is what happens when two instalments are paid over any amount of time? Although a purchaser can rely on section 27 of the Act and claim transfer of the land, the purchaser is obliged to register a first mortgage bond over the property before the transfer will take place. The purchaser could not get a mortgage bond in the first place to finance the sale. What makes one think that they will necessarily be able to get one now? A question that follows that is what happens when that owner of the land becomes insolvent during the process? The purchaser cannot rely on sections 21 and 22 of the Act because chapter II of the Act is not for the benefit of that specific purchaser. The purchaser would have to rely on the normal rules applicable to unexecuted contracts in insolvency and risk losing the land if the trustee does not choose to complete the contract.<sup>3</sup>

The Act furthermore contains various guidelines which indicate what information must be included in the contract and what clauses may not be included in the contract. If a purchaser cannot obtain a mortgage bond, it stands to reason that the purchaser does not have the best financial background. Where a purchaser does not have the best financial background, the purchaser probably cannot afford legal fees. Who then keeps the seller in check when the contract is drafted? If the purchaser does not have the requisite legal knowledge to know what should and should not be in a contract, the seller could just about add anything he wished in the contract and the purchaser would be none the wiser. Where the purchaser does not have the financial freedom to pursue legal proceedings regarding the contract, the purchaser probably will not be able to afford to rely section 28 if a court order is needed to force the seller to return any payments already made. Never mind, where parties are merely negligent in the drafting of the contract, it could result in the contract being declared void which may not be what the parties ever intended.

Although fill in contracts are usually supposed to be avoided like the plague, it may be wise to make an example available to the public to show both purchasers and sellers exactly what may and may not be in the contract. Even experts in the drafting of legal documents probably learnt how to draft from an example that a superior somewhere provided to them.

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<sup>3</sup> See paragraph 5.1. for an overview of the common law rules regarding insolvency where a trustee must make an election regarding unexecuted contracts.

Providing parties with a draft example of what clauses to include and the language to use to ensure that all their bases are covered can only be to their benefit. This can also be to a court's benefit as the contract will be a proper contract which will reduce disputes and lessen the burden on our already overloaded court system.

Chapter 3 showed us that there are a variety of generalised rights which are applicable to the contracts of sale under discussion. A purchaser has a right to information, the right to claim transfer of the land, a right to the limitations of the seller's rights, the right to cooling-off and a right to restitution where the deed of alienation is void or terminated.

Yes the purchaser has a right to information, but how is the purchaser ever going to know if the seller actually disclosed everything to him. What is that saying that what we do not know will not hurt us? Well, in this case what the purchaser does not know may very well hurt him! If that one specific person who the purchaser has no idea of, should default, it could be disastrous for the purchaser who sits at the end of a long line of transactions. There is simply a contractual obligation to provide the information. To enforce specific performance for the disclosure of information, a purchaser needs money. The purchaser does not necessarily have money. The courts can make a costs order in favour of the purchaser, but it would require expenditure on the purchaser's account before the purchaser ever gets that specific order. It would take a massive amount of effort on the purchaser's part to actually get the ball rolling in his favour. The Act should make provision for far more stringent consequences for failure to comply with the relevant sections. A fine or imprisonment could definitely make most people think twice before withholding information.

So although the right to information is supposed to ensure that the purchaser is well-informed, it might not actually be that much of an advantage. These sections should definitely be revisited and rethought.

The purchaser's right to transfer of the property under certain conditions is probably the easiest right to really understand and is probably the right which requires the least amount of effort to understand. In simple terms these rights provide that he who pays his debt early

can become owner early. That is the simplest explanation for sections 17 and 18 of the Act. Section 27, also does not require much explanation, although it can be seen from recent case law,<sup>4</sup> that even these simple sections create disputes! At the end of the day, it depends on what judge you find in what mood and whether or not he decides that public policy is on your side or not. Black and white becomes a grey mess. What may have been fair for one party may be considered unfair to the other and the idea that parties should consider themselves bound to that which they agreed on and the idea of certainty in contract law is, it is respectfully submitted, gone with the wind. Only once the matter is decided by the Constitutional Court the decision is set in stone. The only black and white in the matter then is the black ink on white paper stating that the court orders that the contract is not what the parties intended it to be.

The Act limits the seller's rights, which should be an advantage to the purchaser, but is it really to the purchaser's advantage? Yes in actual fact it probably is, but these sections cannot really be considered a limitation of a seller's right. Anything contrary to these sections would probably result in some other section of our law coming into effect and these sections are mostly redundant. Unjustified enrichment actions ensure that sellers cannot charge more than something is actually worth or charge more than was agreed to pay and common practice is in any event to provide a letter of demand to place the purchaser in default if he does not fulfil his obligations. The only limitation of real use section 26 of the Act whereby a seller, or anybody else except certain persons specifically mentioned, is prevented from receiving any part of the purchaser price unless he feels like paying a fine or being imprisoned for it. Even this section does have criticisms though. The imprisonment is perfectly okay, but the fine is perfectly not okay. The fine is ridiculously low in today's terms and one wonders whether it has ever occurred to anybody at all to increase that amount to something more substantial. The section does protect the purchaser if used correctly, but where the seller acts in contravention thereof there may not be much of a penalty waiting for the seller.

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<sup>4</sup> *Botha v Rich NO 2014 (4) SA 124 (CC)*. See paragraph 3.2.3. in Chapter 3 above for a discussion of this case.

The Act further provides for a cooling-off right which is seemingly to the advantage of the purchaser. Place the emphasis on seemingly. The value of the land which is mentioned in the section is so absurdly low that it is a wonder if anybody can rely on that section at all considering what the property prices currently look like. The section is also only for natural persons. South Africa encourages entrepreneurs and small businesses. Should they not also be afforded the same rights? Large companies definitely do not need assistance because they have a wealth of assets to support them in any proceedings and business dealings. Small business owners do not have the same financial support. The right to cool-off is obviously important because the cooling-off right is provided for in more than one Act, but whether the purchaser will be able to rely on either is questionable since the contract must fall within the scope of the Act and meet all the relevant requirements of the section.

Section 28 of the Act should ensure that parties are restored to their positions as if the contract had not been entered into. If one party decides to be difficult, the other party will have to approach the court for assistance. Their legal fees may just end up being more than the claim itself. Once again, not everybody can afford this. Perhaps it is time that a specialised court be introduced which has simplified procedures to ensure that lay persons can approach the court without professional legal services. Complicated matters should only be referred to the higher courts if the presiding officer cannot deal with matter which comes before him.

Chapter 4 highlighted the rights of a purchaser where the land purchaser is encumbered by a mortgage bond and further indicated the need to allow the purchaser to act on behalf of the person in his chain of sellers if that seller fails to fulfil his obligations.<sup>5</sup> The purchaser who stands last in line will be the one who suffers if somebody else defaults and he had the money to remedy the situation. The purchaser is protected from a court case in that the purchaser will not commit a breach of contract by not paying the seller who sold the land to the purchaser.

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<sup>5</sup> See s11 of the Act.

Section 9 obliges a purchaser to provide a mortgagee with information regarding the sale of the land. This section is truly only for the benefit of the purchaser and if the purchaser does not do so, it is his loss. I cannot foresee that this section will ever cause much of a debate.

Section 20 of the Act provides for the recording of a contract against the title deed of land. It is a good idea to know if the land is the subject matter of another contract of sale, but why for example, can section 20 not make provision for the recording of each and every contract in the specific order in which it was entered into? In that way everybody is aware of each and every contract which is entered into with regards to that specific land.

What repercussions follow where a contract is cancelled? If a contract is cancelled between two intermediaries, the purchaser who could have received the land technically will not be allowed to receive the land either because his seller is not entitled to the land. To put it in easily understandable words, the chain of sale (as opposed to causation) is broken. Are there any provisions which indicate that upon the cancellation of a contract the person who stands last in line must be informed thereof? The Act does not make provision for any of this and the Act should! The Act is so set on informing everybody of everything else, except for this.

Chapter 5 discussed the situation where the owner of the land becomes insolvent before the property is transferred to the name of the purchaser, or any intermediary. I cannot actually criticise these sections in as much as they protect the purchasers where the deed of alienation is specifically a contract. These sections do set out to provide protection to these purchasers. As indicated above, however, what protection is afforded to purchasers in terms of an instalment sale transaction that does not comply with the definition of a contract? They are not afforded any protection in terms of this legislation where the owner becomes insolvent. Justifiably, these sections should probably rather have been included in chapter III of the Act to ensure they apply generally to all deeds of alienation to ensure that all purchasers are benefitted by these sections. Purchasers who cannot rely on these sections have to rely on common law rules and stand to lose a substantial sum of money where the contract is cancelled and their claim for restitution is merely concurrent.

The Alienation of Land Act. One has to wonder whether this Act serves any purpose at all, or rather whether it fulfils the destiny which the legislature intended it to fulfil. The Act is not always to the purchaser's advantage or in his favour. Where the Act is in the purchaser's favour the effort required from the purchaser to protect his rights is not effortless. It requires an abundance of work from the side of the purchaser to make sure that his rights are protected.

There is so much to criticise about this Act that it would be easier if the Act is reconsidered in its entirety. Legislation drafted so long ago cannot be expected to function efficiently in a field which changes constantly, where demand for different principles and procedures are required to suit the needs of a changed society. Society has suffered a moral decline and the values of society has changed. It cannot be expected that old legislation can successfully achieve the functions for which it was created so long ago. A community with different values requires legislation with different consequences and a measure to hold them accountable where some parties possibly cannot afford legal assistance.

Although the Act may possibly have functioned efficiently when it was first drafted 34 years ago, it cannot be said that the Act still functions efficiently now. Thus I would submit that the Act be revisited so that it can be redesigned in its entirety. This would ensure that parties who may want to rely on it today will be able to rely on a fully functional piece of legislation and need not wonder whether the legislation which backs their contracts will back them in court too if the disputes which arise between them should proceed so far.

**TOTAL WORDS: 24 926**

## BIBLIOGRAPHY

### Books:

1. Anon, *The consolidated practice manuals of the Deeds Office of South Africa*, Kenwyn: Juta 2006 (revision service 2014 no 8)
2. Christie RH and Bradfield GB, *The law of contract in South Africa* (sixth edition), Durban: LexisNexis 2011
3. De Jager T, *Vervreemding van grond, Alienation of land*, Cape Town, Juta 1982
4. Joubert DJ, *General principles of the law of contract*, Cape Town: Juta 1987
5. Kerr AJ, *The law of sale and lease* (third edition), Durban: LexisNexis Butterworths 2004
6. Kerr AJ, *The principles of the law of contract* (sixth edition), Durban: Butterworths 2002
7. Nagel CJ (Ed), *Commercial Law* (third edition), Durban: LexisNexis 2006
8. Van Rensburg ADJ and Treisman SH, *The practitioner's guide to the Alienation of Land Act* (second edition), Durban: Butterworths 1984

### Journal Articles

1. Delpont H, "Cancelling an instalment sale of land: Merry Hill (Pty) Ltd v Engelbrecht 2008 2 SA 544 (SCA); Van Niekerk v Favel 2008 3 SA 175 (SCA): Cases", 2008, vol 29, *Obiter* 302
2. Domingos M, Hayes S and Hoeben A, "Ubuntu and the law: a trend in judgments: contract law", 2014, vol 14, *Without Prejudice* 46
3. Laurens RC, "Mortgage bond: real security", 1984, vol 202, *De Rebus* 480
4. Lötz DJ, "Koper van grond: warm patat or koue pampoen?", 2000 vol 2, *De Jure* 327
5. Lötz DJ, "The Law of Purchase and Sale: Case law", 2010, *Annual Survey of South African Law* 1102
6. Lötz DJ, "The Law of Purchase and Sale: Case law", 2011, *Annual Survey of South African Law* 996

7. Lötz DJ and Nagel CJ, “Nie-nakoming van artikel 2(2A) van die wet op Vervreemding van Grond 68 van 1981 en die effek daarvan op die geldigheid van ‘n vervreemdingsakte”, 2006, *THRHR* 501
8. Lötz DJ and Nagel CJ, “Recent case law: Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd Case No 2/2008 SCA”, 2010, *De Jure* 169
9. Luiz S, “Last month’s law reports: sale of land”, 1993, vol 28 *De Rebus* 587
10. Moosa F, “Case note: landmark ruling in property law”, 2001, vol 406, *De Rebus* 57
11. Murray CM, “Review of recent cases”, 1985, vol 204 *De Rebus* 38
12. Nyapotse P, “Alienation of land act: placing the uneducated and ignorant at a disadvantage”, 1998, vol 22, *De Rebus* 19
13. Schulze H, “Law reports: sale of land”, 2007, vol 23, *De Rebus* 47
14. Schulze H, “Sale of land: the law reports”, 2008, vol 30 *De Rebus* 39
15. Smit S, “Is the ‘cooling-off’ period finally cool enough?”, 1999, vol 57, *De Rebus* 36
16. Stander L, “The general rule and the reservation of ownership in the case of unexecuted contracts after sequestration: will there be certainty?”, 2003, vol 15, *South African Mercantile Law Journal* 43
17. Treisman SH, “Practice Notes”, 1986, issue 222, *De Rebus* 261
18. West A, “Mortgage bonds and restrictive conditions”, 1994, vol 324, *De Rebus* 890
19. West A, “The recording and cancellation of a contract”, 1992, vol 295, *De Rebus* 453

## Cases

1. *Angus and Another v Kosviner and Another* 1996 (3) SA 215 (W)
2. *Botha and Another v Rich NO and Others* Case No 476/2009 28 March 2013 (Full Court judgment)
3. *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC)
4. *Bouwer v Auras (Pty) Ltd* 1991 (4) SA 622 (W)
5. *Brits v Eaton* 1984 (4) SA 728 (T)
6. *EC Chenia and Sons CC v Lame & Van Blerk* 2006 (4) SA 574 (SCA)
7. *Engelbrecht v Merry Hill (Pty) Ltd and others* 2006 (3) SA 238 (E)
8. *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd* 1981 (1) SA 171 (A)

9. *Gowar v Section Three Dolphin Coast* [2006] SCA 162 (RSA)
10. *Holme v Bardsley* 1984 (1) SA 429 (W)
11. *Howieson v Hughs* 1992 (4) SA 603 (C)
12. *Katshwa and Others v Cape Town Community Housing Company (Pty) Ltd And Four Similar Cases* 2014 (2) SA 128 (WCC)
13. *Kriel v Terblanche* 2002 (6) SA 132 (NC)
14. *Legator McKenna Inc and Another v Shea and Others* 2009 (1) All SA 45 (SCA)
15. *McKay v Stein* 1951 (3) SA 1 (A)
16. *Merry Hill v Engelbrecht* 2008 (2) SA 544 (SCA)
17. *Miller v Hall* 1984 (1) SA 355 (D)
18. *Mulder v Van Eyk* 1984 (4) SA 204 (SE)
19. *Oakley v Bestconstructo (Pty) Ltd* 1983 (4) SA 312 (T)
20. *Porteous v Strydom NO* 1984 (2) SA 489 (D)
21. *Rich NO and Others v Botha and Another* [2009] ZANCHC 79 (High Court judgement)
22. *Sayers v Khan* 2002 (5) SA 688 (C)
23. *Sleightholme Farms (Pty) Ltd v National Farms Union Mutual Insurance Society Ltd* 1967 (1) SA 13 (R)
24. *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A)
25. *Van Niekerk and Another v Favel and Another* 2006 (4) SA 548 (W)
26. *Van Niekerk and Another v Favel and Another* 2008 (3) SA 175 (SCA)
27. *Wimpey Homes (Pty) Ltd v Joint Liquidators Glen Anil Development Corp* 1979 2 SA 813 (W)

## Legislation

Alienation of Land Act 68 of 1981

Consumer Protection Act 68 of 2008

Constitution of South Africa Act 108 of 1996

Insolvency Act 24 of 1936

## Websites

1. Anon, *Inflation Adjustment Calculator*, <http://www.inflationcalc.co.za/?date1=1983-01-01&date2=2015-05-28&amount=1000> (accessed 28 May 2015)
2. Anon, *Internal Publications: Botha and Another v Rich NO and Others (CCT 89/13) [2014] ZACC 11; 2014 (4) SA 124 (CC)*, <http://www.schindlers.co.za/botha-and-another-v-rich-no-and-others-cct-89-13-2014-zacc-11-2014-4-sa-124-cc/> (accessed 25 May 2015)
3. Buchanan K, *I know I signed the contract, but it's not fair!*, <http://www.lexology.com/library/detail.aspx?g=d8820298-6fe9-44d5-a44d-890454235eb7> (accessed 25 May 2015)
4. Domingos M, Hayes S and Hoeben A, *Ubuntu and the law: promoting good faith and fairness in contracts*, <https://www.ensafrica.com/news/Ubuntu-and-the-law-promoting-good-faith-and-fairness-in-contracts?Id=1507&STitle=litigation%20ENSight> (accessed 25 May 2015)
5. Makallane G, *Recording of a contract*, <http://www.ghostdigest.co.za/articles/recording-of-a-contract/54205> (accessed 4 April 2015)
6. Rodrigues F, *Transfer of ownership may be valid even though the underlying sale agreement is invalid*, <http://www.fluxmans.com/news/polPage.asp?id=37&pageid=119> (accessed 30 May 2015).