

Onlangse regspraak/Recent case law

JR 209 Investments (Pty) Ltd & Another v Pine Villa Country Estate (Pty) Ltd
Case No 617/2007 (SCA)

Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd
Case No 2/2008 (SCA)

Section 2(1) of the Alienation of Land Act, description of res vendita

1 Introduction

It seems that the problems surrounding section 2(1) of the Alienation of Land Act (68 of 1981) are epic. Over the last three years no less than twelve cases dealing with section 2(1) were reported (see *Engelbrecht v Merry Hill (Pty) Ltd* 2006 3 SA 238 (E); *Just Names Properties 11 CC v Fourie* 2007 3 SA 1 (W); *Manna v Lotter* [2007] 3 All SA 50 (C); *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE); *Thorpe v Trittenwein* 2007 2 SA 172 (SCA); *Balduzzi v Rajah* [2008] 4 All SA 183 (W); *Fairoaks Investment Holdings (Pty) Ltd v Olivier* 2008 4 SA 302 (SCA); *Fraser v Viljoen* 2008 4 SA 106 (SCA); *Just Names Properties 11 CC v Fourie* 2008 1 SA 343 (SCA); *Lancino Financial Investments (Pty) Ltd v Bennet* [2008] 4 All SA 220 (SCA); *Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd* 2008 1 SA 654 (SCA); *Waterval Joint Venture Property Co (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2008] 2 All SA 700 (W)).

In *JR 209 Investment (Pty) Ltd & Another v Pine Villa Country Estate (Pty) Ltd* and *Pine Villa Country Estate (Pty) Ltd v JR 209 Investment (Pty) Ltd*, section 2(1) again raised its head in the context of an inadequate description of the *res vendita* in the deed of sale which may render it null and void.

The aim of this discussion is to analyse the facts and the conclusion reached by the Supreme Court of Appeal, to evaluate the legal consequences thereof and to make recommendations regarding possible amendment of the Alienation of Land Act (*supra*).

2 Facts

2.1 The Agreement

Pine Villa Estates (Pty) Ltd sold a certain Portion 7 of the farm Swartkop 383 (hereafter Portion 7) to JR 209 Investments (Pty) Ltd to be developed by M&T Development (Pty) Ltd into a proposed township known as Monavoni Extension 18. The proposed township consisted of a number of

properties including Portion 7. The sole shareholder and director of Pine Villa Estates (Pty) Ltd was one Oberem. Clause 11.2 of the agreement provided as follows:

“Both parties take note that a portion of this property between 5 000m² and 5 653m² in extent and including the residential house on this property is to be transferred into the name of . . . Oberem . . . as soon as sub-divisional diagrams are available to effect this transfer. The Purchaser shall be liable for all costs relating to this subdivision and hereby guarantees that these diagrams will be available not later than 7 (seven) months after date of this agreement. The Seller shall be liable for all costs regarding the transfer of this property into the name of . . . Oberem.” (hereafter the 11.2 Property).

Portion 7 was transferred to the purchaser against full payment of the purchase price. However, the purchaser was unable to make “available” the diagrams referred to in clause 11.2 within the agreed period. As a result the 11.2 Property was not transferred into the name of Oberem. Because of this breach and the purchaser’s failure to rectify same within the contractually agreed period, the seller alleged that the agreement was cancelled and claimed retransfer of Portion 7, alternatively, payment of damages (ie, the difference between the present market value and the purchase price of Portion 7).

Later, the seller launched an interdict preventing the purchaser from dealing with Portion 7 (pending the conclusion of the action proceedings) and an application to amend the particulars of claim to the effect that the agreement was invalid because it did not comply with the provisions of section 2(1) of the Alienation of Land Act (*supra*), alternatively, a failure to comply with the “guarantee” contained in clause 11.2 within the time limit.

2 2 Seller’s Argument

2 2 1 Contents of argument

Relying on *Parsons v MCP Bekker Trust (Edms) Bpk* (1978 3 SA 101 (T)), the seller argued that, although Portion 7 had been adequately identified, the area to be excluded and re-transferred to Oberem in terms of clause 11.2 was not. Therefore, the agreement was null and void *ab initio* for non-compliance with section 2(1) inasmuch as the latter piece of land could not be identified with reference to the provisions of the agreement alone.

Alternatively, the seller argued that the cause of action based on the failure to comply with the “guarantee” contained in clause 11.2 within the time limit, was an absolute obligation and for this reason it was not necessary to place the purchaser *in mora* in order to cancel.

For the purpose of this discussion we shall concentrate on the non-compliance with section 2(1).

2 2 2 Evaluation of argument and claim

The Supreme Court of Appeal (para 13) interpreted the argument to be, that the seller indirectly wished to allege that the property sold was not Portion 7 as set out above, but Portion 7 minus the 11.2 Portion and that

Oberem was the person authorised to receive transfer of the latter portion as the *solutionis causa adjectus* of the seller. Thus, the seller presumably anticipated that the purchaser would allege that the 11.2 Portion was intended to create a contract for the benefit of a third party and that Oberem (and not Pine Villa Estates (Pty) Ltd) was the person to enforce its provisions after having accepted the benefit. (It was confirmed during the interdict and notice of objection to the amendment proceedings that this was indeed the purchaser's defence.)

The Supreme Court of Appeal (para 13) further pointed out that another unexpressed reason for this argument was that the seller anticipated that the purchaser might rely on section 28(2) of the Alienation of Land Act (*supra*). Section 28(2), in accordance with *Wilken v Kohler* 1913 AD 135, provides that an alienation of land which does not comply with the provisions of section 2(1) "shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee".

For the seller's argument to be sustainable, the Supreme Court of Appeal held (para 14) that the seller had to rely on tacit terms, which were in conflict with the above express terms. These tacit terms were that, although Portion 7 less the 11.2 Property would have come into the hands of the purchaser, the parties structured the agreement in such a way that the 11.2 Property was not to be retransferred to the seller (Pine Villa Estates (Pty) Ltd), but to its sole shareholder and director, Oberem. Consequently, the Supreme Court of Appeal held (*ibid*) that it would be artificial to redefine the *merx* as suggested in the amendment. This scenario was held (*ibid*) to be analogous to the situation in *Olifants Trust Co v Pattison* (1971 3 SA 888 (W)).

In *Olifants Trust Co* (*supra*), the deed of sale provided for the alienation of a clearly defined area of 100 acres, on condition that after transfer of and payment for the 100 acres, further steps were to be taken to sever off 10 acres for religious or educational purposes, to be transferred to an organisation nominated by the seller. The court held (891C–G) that the agreement in respect of the 100 acres at all times clearly provided for the *ante omnia* sale and transfer of the entire property (100 acres) against payment of the purchase price. Only after this had been duly effected, could the necessary further steps be taken to sever off the aforementioned 10 acres. Therefore the parties envisaged that a further agreement between them could only be implemented after due transfer of, and payment for, the 100 acres had taken place. Despite the fact that the 10 acres could not be clearly defined, the court concluded that such further agreement did not infringe against section 1(1) of the General Law Amendment Act (68 of 1957 one of the forerunners of section 2(1) of the current Alienation of Land Act 68 of 1981 and almost identical to it).

2 2 3 Court's conclusion

The Supreme Court of Appeal held (para 14) that the purchaser had complied with "all obligations" in terms of the agreement relating to Portion 7 and that this requirement was irrelevant to the 11.2 Property.

These facts, so the court held, were destructive to the seller's argument and in line with the findings in *Olifants Trust Co (supra)*.

Oberem could also not have been an *adjectus* simply because the 11.2 Property had to be registered in his name and not in that of Pine Villa Estates (Pty) Ltd. One person cannot without more, receive transfer of land on behalf of another. The parties' express and clear intention was that Oberem would become the owner of the 11.2 Property on registration thereof in his name, therefore creating a contract for the benefit of a third party. As Oberem negotiated and signed the Portion 7 agreement, the court (para 15) assumed that he had accepted the benefit of clause 11.2 and that he was the only person entitled to enforce its provisions. Cancellation of the Portion 7 agreement was not an option available to him. All Oberem could claim under clause 11.2 was specific performance or damages relating to the 11.2 Property. If the benefit was declined, there was nothing Pine Villa Estates (Pty) Ltd could claim from the purchaser. Hence, there was no reason why the parties should not be held to their chosen scheme irrespective of their motives for structuring it the way they did (ie, tax or transfer duty).

For the same reasons the alternative "guarantee argument", namely, that clause 11.2 contained an absolute obligation and that it was not necessary to place the purchaser *in mora* before being able to cancel, was dismissed (para 15).

3 Section 2(1) Compliance

Section 2(1) Alienation of Land Act (*supra*) provides as follows:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

During the interdict procedure in the court *a quo*, Rabie J held that the description of the 11.2 Property, which could not be severed from the remaining part of the contract, was inadequate and did not comply with the requirements of section 2(1). Accordingly, it was found that the contract was *prima facie* void for want of compliance with section 2(1).

Botha J, however, during the amendment of pleading procedure in the court *a quo*, held that the property was adequately described. The fact that the shape and exact configuration of the 11.2 Property were left entirely to the purchaser's discretion, depending on the layout of the township, did not invalidate the agreement. Hence the contract was valid and in compliance with section 2(1).

With reference to *Clements v Simpson* (1971 3 SA 1 (A)) and *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* (1948 1 SA 983 (A)) the Supreme Court of Appeal again confirmed (para 19) that the test for compliance with the provisions of section 2(1) is whether the land alienated can be identified on the ground by reference to the provisions of the contract without recourse to evidence from the parties as to their negotiations and consensus. A faultless description of the property, couched in meticulously accurate terms, is not required (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd (supra)* 989).

Within the scope of *Clements v Simpson* (*supra*) (but see *Botha v Niddrie* 1958 4 SA 446 (A)), Harms ADP, using the same *modus operandi*, distinguished the present case from *Parsons v MCP Bekker Trust (Edms) Bpk* (*supra*) on which the seller relied.

In *Clements v Simpson* (*supra*), as was the position *in casu*, a formula to determine the configuration (ie, the area and location) of the *res vendita* was adequately addressed in the contract to satisfy the relevant statutory formality requirements. This vital aspect was absent in both *Botha* and *MCP Bekker Trust*. For the *res vendita* to be described adequately in order to comply with statutory formalities, the contract has to contain an indication as to how the configuration of the *res vendita* was to be determined. If not, the agreement will be legally ineffective.

In casu, the court held (para 22) that the formula in clause 11.2 (ie, the purchaser's right to determine, in a *bona fide* manner, the shape and size of the erf, subject to the *proviso* that the existing residence had to be included on the said erf, which had to be in the extent of between 5 000 and 5 653 square meters) to determine the *res vendita* was adequate and in compliance with section 2(1). As a result, this ground of attack had no merit. Therefore, in the courts *a quo*, Botha J correctly refused the amendment and Rabie J erred in finding that the seller had a right that could be protected by an interdict.

It is clear that the Supreme Court of Appeal's approach is one of substance over form and it would rather be the exception than the rule that a deed of alienation would be deemed null and void because of technicalities (see eg *Herselman v Orpen* 1989 4 SA 4 1000 (SEC); *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 2 SA 642 (W); *Scheepers v Strydom* 1994 3 SA 101 (A); *Ten Brink NO v Motala* 2001 1 SA 1011 (D); Lötze "Ten Brink NO v Motala 2001 1 SA 1011 (D) – koopkontrak van grond – kontrakspartye en formaliteite waar 'n verteenwoordiger namens die koper optree" 2002 *De Jure* 361). However, it remains an open question whether this approach is conducive to the legislator's aims when it comes to formalities.

4 Root of Nullity

It seems that the root of the principle, namely, that non-compliance with statutory formalities renders the alienation of land null and void, originated from *Wilken v Kohler* (*supra*) above, where a verbal agreement to purchase land was duly executed (ie, payment of the purchase price against transfer of the property). The transaction was later attacked in so far as the *res vendita* did not contain twelve morgen under cultivation, as represented by the seller, but seven.

The crux was whether the purchaser had an action *ex empto*, as section 49 of the Free State Ordinance (12 of 1906) provided as follows:

"No contract of sale of fixed property shall be of any force and effect unless it be in writing and signed by the parties thereto, or by their agents duly authorised in writing."

It seems that a forerunner to this proviso, namely, *Volksraad Besluit* 1432 of 12 August 1886, enacting that a mineral contract, unless notari-ally

executed, should be void *ab initio*, had a vital influence on the above section 49.

The trial court in *Wilken* held that a provision of this nature might be waived and that non-compliance therewith rendered an agreement voidable at the option of either party. On appeal, Innes J (142) touched on the possibility that a waiver of this nature could be tolerated if such statutory provision was for the benefit of an individual or a class and held that “a right given on those lines to treat a contract as void might be exercised or not at the pleasure of the party concerned; the agreement would in effect be voidable at his option”.

However Innes J held (142) that contracts of land were often intricate and of substantial value and importance. Therefore the legislator, in order to prevent litigation, perjury and fraud, in this instance, intended the contract to be reduced to writing. Failure to do so would render the contract void and not voidable at the option of either party. Innes J motivated this viewpoint as follows:

“Whether, all things considered, such a provision is desirable, *whether it does not create as great hardships as it prevents, is a matter upon which opinions may well differ*; but I am satisfied that the provision was adopted not for the advantage of any particular class of persons, but on grounds of *public policy*” (*ibid*; our emphasis).

As regards the meaning of “void” and the effect of public policy, Solomon J remarked as follows:

“[W]here the enactment has relation only to the benefit of particular persons, the word *void* would be understood as *avoidable* only at the election of the persons for whose protection it was made, and who are capable of protecting themselves; but that, when it relates to persons not capable of protecting themselves, or it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect” (148).

In conclusion, Solomon J also held (149) that *public policy*, in this instance the prevention of lawsuits, fraud and perjury, is the indicator to determine the contents and consequences of such legislation.

5 Recommendations

It is clear that section 2(1) (read with s 28) is a disappointment as far as the legislature’s aim with this provision, that is, to prevent litigation, perjury and fraud, is far from fulfilled. On the contrary, it seems that section 2(1) actually provokes litigation which is often unnecessary and sometimes even a hardship. Reading between the lines of many of the decisions dealing with section 2(1) it becomes clear that the section is often abused by, for example, unscrupulous sellers who regret having sold the property at the price they did and then try to rescind the contract because of non-compliance with the technical formality requirements of the Act. The same holds true for purchasers looking for a loop-hole through which to withdraw from a contract about which they later have their doubts. Therefore, we are of the opinion that this piece of legislation is in urgent need of revision, bearing in mind the original arguments in favour of its requirements regarding formalities.

Central to this type of statutory provision is public policy. It is a moot point that public policy is a changing concept. What the public policy was in 1913 when *Wilken (supra)* was decided certainly is not the same today, almost a century later. The question therefore, is whether the same noble arguments advanced for the need to have such a piece of legislation, and the protection it is supposed to provide still hold true today. To conceptualise the vague contents of “public policy” the following remarks of Ngcobo J in *Barkhuizen v Napier* (2007 5 SA 323 (CC)) offer some guidance:

“Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the foundation provisions of our Constitution make it plain: our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.” (paras 28–30)

Moseneke DCJ (in his minority judgment) went even further in asserting the importance of the public-policy threshold and held as follows:

“Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties. In effect, on the subjective approach that the majority judgment favours, identical stipulations could be good or bad in a manner that renders whimsical the reasonableness standard of public policy.” (paras 98–104)

Thus, we are of the opinion that “public policy” in this instance is under pressure in so far as section 2(1) is not within the value-parameters set for this type of legislation today. Is there, for example, still a need to protect those who cannot protect themselves in this regard?

An important factor to be considered is that most of the contracts in relation to land come into existence through agents (ie, estate agents or lawyers) who are generally not laypersons in this regard and are in a position to provide guidance to their clients. For this reason, *inter alia*, the following possible scenarios to amend section 2(1) read with section 28 are briefly suggested:

- No formalities are required;
- less strict formalities (eg only in writing);
- formalities are required and non-compliance will render the agreement voidable;
- formalities are required and non-compliance will render the agreement voidable, provided that the aggrieved party is able to prove prejudice;
- notarial execution is required;
- a statutory rectification window-period can be created along the lines of a “cooling off” provision; or
- a combination of the above.

An in-depth investigation of this problem, in our opinion, is inevitable and we recommend that the South African Law Reform Commission be tasked with re-evaluation of the legal position.

DJ LÖTZ
University of Pretoria

CJ NAGEL
University of Pretoria