

THREE AFFIDAVITS CAN ESTABLISH A VALID INSTALLMENT SALE, EVEN WITHOUT A RECORDAL OF THE TERMS PRESCRIBED IN SECTION 6 OF THE ALIENATION OF LAND ACT

Mohlala v Mashamaite and Others (2022/059691) [2024] ZAGPJHC 607 (4 July 2024)

Applying the well-known principles for the conclusion of a valid agreement of sale of land, the court concluded that an installment sale agreement had been established by virtue of three affidavits and an installment payment annexure signed by both parties. The absence of certain details required by section 6 of the Alienation of Land Act did not invalidate the agreement, as those terms were deemed non-essential and non-material. Nevertheless, the purchaser still faced challenges in claiming ownership of the property, as the judgment and summary explain.

View the [judgment](#) and summary [here](#).

FACTS

Mr. Mohlala bought a property from Mr Mashamaite during 2001. The purchase price of R8000 was payable in instalments, the final instalment being paid on 28 February 2002.

Mr. Mohlala was in occupation of the property at the time the agreement was concluded and remained in occupation thereafter. In 2002, he improved the property by constructing seven rooms which he thereafter let out to tenants. He continued to reside at the property until 17 November 2022.

Sometime in 2016 or 2017, the property was further improved by the construction of a state-subsidised house. That triggered the present dispute. It was not clear from the papers who was supposed to benefit from the housing subsidy used to construct the house (and presumably to buy the land), although it appeared that the subsidy beneficiary was likely to be Mr. Mashamaite.

Once the subsidised house was built, Mr. Mashamaite apparently felt short-changed and asserted that he still owned the property. He sought to evict Mr. Mohlala from it and in April 2022, was successful in obtaining an interim eviction order.

In December 2022, Mr. Mohlala instituted an application to the High Court for a declaration that he is the owner of the property and an order directing the Registrar of Deeds to register the property in his name.

HELD

The validity of the sale agreement

- Mr. Mohlala annexed three affidavits to his founding papers in which the material terms of the sale agreement are recorded by Mr. Mashamaite. The affidavits were commissioned at the Tembisa Police Station. Annexed to the third affidavit is a schedule purporting to record the payment of each of the instalments due under the agreement, signed by both Mr. Mohlala and Mr. Mashamaite.
- The real issue between the parties is whether the affidavits and annexure that embody the sale agreement are a “deed of alienation” for the purposes of section 2(1) of the Alienation of Land Act 68 of 1981. That provision states that “no alienation of land . . . shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority”. The Act

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defines “deed of alienation” as “a document or documents under which land is alienated”. This obviously allows for a situation in which several documents read together can constitute a valid deed.

- In *Cooper NO v Curro Heights Properties (Pty) Ltd* the Supreme Court of Appeal reiterated that there is a long line of authority supporting the notion that a valid deed of alienation under section 2(1) is one in which the material terms of the agreement are reduced to writing and signed by the parties or their representatives. Depending on the circumstances, the material terms may extend well beyond the essentials of the contract – the parties, the price and the thing sold – to any other term that “materially affects the rights and obligations of the parties” to the particular agreement.
- Read together, the three affidavits and the annexure upon which Mr. Mohlala relies constitute a “deed of alienation” in this sense. They contain the essentials of the contract, and they record the time and manner of payment of each of the instalments. They confirm that the property was “handed over” to Mr. Mohlala on 28 February 2002. The schedule of instalments annexed to the third affidavit was signed by both parties. Neither party identified in their papers any other material term that was not recorded in the affidavits and the annexure.

Section 6 of the Alienation of Land Act, 1981 (‘the ALA)

- Section 6 of the ALA prescribes what information must be included in a contract for the sale of land in instalments. Many of these details were not recorded in the 3 affidavits and annexure. Did this render the agreement invalid?
- If any of the terms identified in section 6 were a material part of the agreement between Mr. Mohlala and Mr. Mashamaite that had failed to find their way into the deed, then the deed would be void. But that would not be because of non-compliance with section 6, but because, contrary to section 2 (1), material terms agreed between the parties had not been reduced to writing.
- In the present matter, the parties did not suggest that any of the terms set out in section 6 were of that nature.
- Does section 6 of the ALA void a deed of alienation merely because the deed fails to contain all the terms prescribed in section 6, notwithstanding that those terms were not material to the parties’ rights and obligations under the agreement?
- No. As was held in previous judgments, non-compliance with section 6 of the ALA does not in itself render a deed of alienation void from the outset, but merely voidable at the election of the purchaser. The purpose of section 6 is to protect the interests of the purchaser. Assessed in light of that purpose, the effect of non-compliance with section 6 cannot be to void a deed of alienation a purchaser wishes to enforce merely because the deed leaves out a term that section 6 prescribes, but which is not material to the agreement between the parties.
- It follows that the deed of alienation on which Mr. Mohlala relies is a valid one for the purposes of the ALA.

Remedy

- There was no evidence that Mr. Mashamaite in fact owned the land at the time he purported to sell it. Mr. Mashamaite was allocated the property under the terms of the national housing subsidy scheme, but it was not established what rights that allocation gave him at the time when he sold the property to Mr. Mohlala. Moreover, section 10A of the Housing Act 107 of 1997 states that it is a condition of every housing subsidy that a “dwelling or serviced site” acquired under the subsidy will not be alienated within eight years of its acquisition, unless the property has first been offered for sale back to the relevant provincial housing department that allocated the site or dwelling to the subsidy beneficiary. The offer must be for a price not exceeding the value of the subsidy used to purchase and develop the site or dwelling. The parties accept that this did not happen before Mr. Mashamaite sold the property to Mr. Mohlala. It seems that non-compliance with section 10A does not void the sale, but rather gives the provincial government a right of recourse against the seller – in this case Mr. Mashamaite. Nonetheless, it is necessary that the provincial government be given an opportunity to raise any objections it may have to the relief Mr. Mohlala seeks.

CONCLUSION

An interim order was issued, calling on the MEC for Human Settlements (Gauteng), the local authority and the Registrar of Deeds to show cause at the next hearing date why it should not be ordered that Mr Mohlala is the owner of the property.

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