

ORAL AGREEMENT: OPTION TO PURCHASE VS PRE-EMPTIVE RIGHT

Kretzmann v Kretzmann and Another (2644/2018) [2019] ZACPEHC 54 (27 August 2019)

In 2017 the Constitutional Court declared that a pre-emptive right to purchase property need not be reduced to writing in order to be valid. This was because a right of pre-emption gives the holder thereof no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor, should the latter wish to sell. When such an agreement is completed then - and not before - will he have a right to claim transfer of land, and that it is the agreement which must be in writing. Could the same be said of an option to purchase?

The Judgment can be viewed [here](#).

FACTS

During 2013 LA and P Kretzmann (LA and P) sought to buy portion 8 of the farm 23 Kagga Kamma Road, Port Elizabeth. They were however unable to raise a bond to enable them to purchase the property. They then concluded an oral agreement with EK Kretzmann (EK) in terms of which EK undertook to raise the capital and to purchase the property in his own name, but for their benefit, which he duly did. Transfer was subsequently registered in favour of EK in January 2014.

LA and P stated that the terms of the oral agreement were to the effect that EK gave them an option to purchase the property, for a period of 5 years from the date of transfer into his (EK's) name, by entering into a written agreement of sale with him for this purchase, for a price consideration equal to the amount owing on the associated mortgage bond at the time of the exercise of the option. LA and P would also pay the transfer and conveyancing costs; occupational rental (should they take occupation prior to the property's transfer into their name); building insurance; the property's municipal rates; and EK's mortgage bond payments.

LA and P complied with their obligations in terms of the oral agreement and in July 2018, they duly exercised the option by providing EK with a signed offer to purchase for the property reflecting a purchase price of R 2,55 million, being the amount owing by EK to the bank under the mortgage.

EK refused to sign the offer and argued, amongst other things, that the option agreement was invalid as it was not reduced to writing as required by section 2(1) of the Alienation of Land Act, 68 of 1981 (the Act), which provides that "no alienation of land ... shall ... be of any force of effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

EK therefore raised an exception to the claim. LA and P, in turn, relied on the 2017 Constitutional Court decision *Mokone v Tassos Properties CC and Another* where that court held that a right of pre-emption in respect of immovable property did not have to be in writing. In a footnote, the Court stated that it should not be understood to suggest that where there is an instance of a *pactum de contrahendo* (loosely translated, a contract that has the aim to conclude another contract), it is obligatory that the other contract to which the *pactum* relates, be concluded. The Court specifically referred to the incidence of an option, where the envisaged sale may or may never take place.)

Reliant on this footnote LA and P argued that it was the intention of the Constitutional Court to deal with all types of contracts which have as their aim the conclusion of another contract. This, it was argued, renders their oral agreement with EK valid and enforceable.

HELD

- The sole issue which arose, at this exception stage, was whether the agreement contended for is required by law to be in writing for it to be enforceable.
- *Mokone* was concerned only with the right of pre-emption. A right of pre-emption is a *pactum de contrahendo* of a particular kind. It is a preferent conditional right to purchase which affords the grantee the right to purchase upon the fulfilment of the condition. Usually the condition is that if the grantor decides, desires or proposes to sell, he shall offer the property to the grantee first. A right of pre-emption does not compel the grantor to sell: it only requires him to give the grantee preference in the event that he does sell and thus prevents him from selling to a third party during the existence of the right.
- An option to purchase, however, is a different concept. This is comprised of two distinct parts: (i) an offer to purchase and (ii) an agreement to keep that offer open, usually for a fixed period.
- The undertaking to keep the offer open (the option agreement) is of course a *pactum de contrahendo*. It is not an alienation as envisaged in the Act and is not required to be in writing. The offer, however, which the *pactum* has undertaken to keep open, must be a firm offer which will result in a binding contract when it is accepted. By virtue of the provisions of section 2(1) of the Act, an offer resulting in the sale of land can only bring about a binding agreement upon acceptance if it is in writing. An undertaking to keep open an offer which is incapable of forming the basis of a valid contract can itself confer no right upon the grantee - for in law there is nothing to keep open.
- An option contract (i.e. the *pactum de contrahendo*) must satisfy the requirements generally applicable to contracts. Thus the option agreement may fail for lack of certainty where the substantive offer to which it relates is ineffective. This may be because the offer does not comply with the formalities prescribed for the substantive contract.
- In the result, whilst an option agreement (the *pactum de contrahendo*) relating to the sale of land need not be in writing, it can only be validly enforced if the offer to which it relates complies with the provisions of section 2(1) of the Act. The offer itself must therefore have been reduced to writing at the time that the option was granted.
- In this case, however, AL and P's case, as pleaded, was that both the option agreement and the agreement relating to the terms upon which the sale would occur were orally concluded. An option of that nature relating to land cannot be validly exercised, whether orally or in writing. The option agreement in this instance was therefore non-compliant.

CONCLUSION

The exception therefore succeeded.