

THE EGG OR CHICKEN FIRST?: CAN A BOND EMBODY A SALE?

Elmo-York N.O v Van Dyk and Another (67219/2019) [2020] ZAGPPHC 570 (22 September 2020)

The question that arose here was whether a purchaser can rely on a bond document to constitute, in addition, the sale agreement to which the bond relates. This, in essence, was the argument here as the seller passed away before the sale agreement was signed. What was in place, however, was a partially signed bond document which referred to the sale agreement. Was there a sale?

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

FACTS

Elmo-York is the duly appointed executor in the estate of the late Jan Serfontein (“the deceased”), who passed away in May 2019. The estate is the owner of an immovable property located in Pretoria.

During September 2018, the deceased and Van Dyk were in the process of negotiating the sale of the property. The intended sale was structured as one payable by way of instalments – as appears from a draft covering mortgage bond relative to the property. The terms of the draft bond provided, amongst other things, that Van Dyk would be indebted towards the deceased in an amount of R1,6 million “by virtue of a debt which arose or may arise from the written sale agreement between the mortgagee and mortgagor ...” which would be payable in instalments of R200,000 over a stipulated period of time. Clause 3 of the document recorded that Van Dyk would be entitled to occupy the property at an occupational rental of R10,000.

According to Van Dyk, he had paid some R225,000 “towards the purchase price” (although he failed to pay occupational rental). He explained that subsequent to him concluding a sale agreement in respect of the property with the deceased during September 2018, he instructed his erstwhile attorney to prepare the “necessary legal documents (offer to purchase and mortgage agreement), in order to give effect to the parties’ intention”. (Copies of the unsigned offer to purchase and partially signed covering mortgage bond were presented to the Court.)

The covering mortgage bond contained a signature of the conveyancer, indicating that it had been prepared by her. The document recorded that Van Dyk granted a signed power of attorney in favour of the conveyancer dated 23 October 2018. Van Dyk alleged that “both parties duly signed the said agreement” on that day. It was however not evident where the deceased was alleged to have signed, although the document did indeed contain various initials. Van Dyk’s explanation was that his conveyancer prepared the “agreements” and scheduled a consultation together with him and the deceased for 23 October 2018. The parties could however only sign the covering mortgage bond on that day “due to the fact that my attorney could only print the mortgage agreement as a result of load shedding. I do however confirm that the contents of the mortgage agreement embody exactly the same terms and conditions of that of the sale agreement. Both parties duly signed the said agreement on this day”. He thus maintained that there was a valid sale in that a draft covering mortgage bond was signed, which he alleged was co-signed by the deceased, buttressed by an unsigned written offer to purchase the property.

The executor was of the opinion that there was no sale. He notified Van Dyk that, in terms of a valuation conducted in respect of the property during July 2019, the open market value of the property was R2,250,000 and that he would consider an offer from Van Dyk of R2 million on ordinary commercial terms and with the delivery of guarantees within 45 days if finance was required; and that in the event of no sale agreement being concluded in respect of the property within a certain time period, the executor would proceed with a public auction of the property. The offer was not accepted and the executor arranged for a sale by public auction. At the time, Van Dyk refused access to anyone to view the property.

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After the auction, the executor brought an application to court for the eviction of Van Dyk from the property.

HELD

Was a valid agreement of sale concluded?

- Section 2(1) of the Alienation of Land Act, 68 of 1981 (“the Act”) 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”.
- The matter boils down to a legal question which can be determined on the basis by accepting (without deciding) that the deceased did indeed sign the mortgage bond document as alleged and put up by Van Dyk. The issue for determination was whether the covering mortgage bond constituted a deed of alienation, for the purposes of the Act. This was the basis contended for in Van Dyk’s answering affidavit (and in oral argument, he sought to underscore this with the unsigned offer to purchase).
- In *Legator McKenna v O’Shea*, a similar question was addressed. The Court there said, in the context: “Although the execution of conveyancing documents could conceivably constitute an implied acceptance by conduct, such acceptance would not satisfy the requirements” of the Act.
- In addition, even if it is argued that the sale was embodied in two documents, as is possible in our law and argued by Van Dyk, this was not proven on the facts. (i) Van Dyk had not explained how he came into possession of the unsigned deed of sale. Neither is it alleged anywhere in the papers that the deceased had, in fact, been presented with the sale agreement before his death. (ii) Further, it must be borne in mind that a covering mortgage bond and a deed of sale relative to the property serve different purposes. While a mortgage bond, once registered, serves as a real right and affords security against the subject matter encumbered, in favour of the mortgagee, a deed of sale serves to record the parties’ intentions to the sale of immovable property from one to the other whereby personal rights and obligations are created. The covering mortgage bond in the present matter illustrates the distinction, recording an indebtedness for a principal sum “by virtue of a debt which arose or may arise from the written sale agreement between the mortgagee and mortgagor dated 23 October 2018”. Its terms expressly contemplated the conclusion of the deed of sale between the parties. (iii) The terms of the unsigned deed of sale are not identical to the terms of the covering mortgage bond, as alleged by Van Dyk. In this regard, many of the clauses of the unsigned deed of sale are absent from the covering mortgage bond, such as: possession and risk, professional fees; breach of contract; arbitration; transfer; fixtures and fittings; domicilium; compliance certificates – and more.
- In the result, the covering mortgage bond, whether read together with the unsigned deed of sale or not, does not constitute a valid deed of alienation for the purposes of section 2(1) of the Act.

Eviction

- If the requirements of section 4 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (the “PIE Act”) are satisfied and no valid defence to an eviction order has been raised, the Court “must”, in terms of section 4(8) of PIE, grant an eviction order and determine a just and equitable date on which the unlawful occupier must vacate the premises.
- After a consideration of the facts presented in this regard, the Court noted that it was apparent that Van Dyk

and his family would have immediate access to and be able to afford an alternative place of residence.

CONCLUSION

It ordered accordingly that it would be just and equitable that Van Dyk be ordered to vacate the property.