CANCELLING INSTALMENT SALES: DUE DATES OF PAYMENTS CRITICAL

Amardien and Others v Registrar of Deeds and Others (CCT212/17) [2018] ZACC 47; 2019 (2) BCLR 193 (CC) (28 November 2018)

The Alienation of Land Act prohibits the seller in an instalment sale to receive consideration in respect of a sale until such time as the agreement is recorded against the title deed concerned. In this case, which made it all the way up to the Constitutional Court, a seller had attempted to cancel numerous instalment sales on the basis of purchasers being in default. The seller, for having received some payments before the agreements were recorded against the title deeds, was in contravention of section 26 of the ALA. Because of this, the purchasers argued their obligations only became due and payable once the agreements were recorded, and because the NCA notices issued to them failed to inform them of the amount(s) due and the exact date of the recordal, they were unable to ascertain when the debt became due and were therefore unable to make payment as required.

The Judgment can be viewed here.

FACTS

Amardien and certain others who were also applicants in this matter, beneficiaries of government subsidised housing, concluded instalment sale agreements with the Cape Town Community Housing Company (the Company) in the period from December 2000 to February 2001. The Company, as the seller, however failed 'to cause the contract[s] to be recorded by the registrar [of deeds] concerned' within the periods prescribed under section 20(1) of the Alienation of Land Act 68 of 1981 (the ALA). The recordals only occurred on 1 April 2014. In the interim, however, the seller received instalment payments from Amardien and the other purchasers, although not regularly.

These payments however contravened section 26(1)(b) of the ALA, which provides that until such recordal is made, '(n)o person shall . . . receive any consideration'.

On 14 April 2014 the Company sent Amardien and the other applicants notices in terms of section 129(1)(a) of the National Credit Act 34 of 2005 (the NCA) advising each of them that: (i) they were in arrears with their instalments (but not stating the amount of arrears); (ii) the instalment sale agreements had been recorded under section 20 of the ALA; and (iii) unless they responded within 10 days of receipt and remedied their default within 20 days, the instalment sale agreements would be cancelled. No response was received, nor any arrears paid.

On 23 June 2014 the Company sold the land concerned to a Trust. An application to the Registrar of Deeds for the cancellation of the recordals followed in April 2015, and cancellation thereof effected on 4 May 2015. The next day the properties were transferred to the Trust. Soon thereafter the Company instituted eviction proceedings against Amardien and the other applicants. These proceedings were postponed pending the outcome of a High Court application that they had instituted for: (i) a declaratory order that the Company's cancellation of the instalment sale agreements had been unlawful; (ii) the review and setting aside of the Registrar of Deeds' cancellation of the recordals; and (iii) a declarator that the subsequent sale of the properties to the Trust was unlawful and therefore void. Amardien and the other applicants argued that they could not have been in arrears or in default when they were informed that the instalment sale agreements had been recorded. This was so, they argued, because the Company was only entitled to receive consideration after the recordal of the agreements, and because the notice failed to inform them of the exact date of the recordal, they were unable to ascertain when the debt became due and payable and were therefore unable to make payment as required.

The High Court dismissed their application, holding that all the amounts became immediately payable at the moment of recordal. It also held that it was not an essential requirement for the section 129(1) notices to set out the amounts of arrears, and that since the applicants were in breach of their payment obligations, the agreements were amenable to cancellation. One of the issues raised in the High Court was the Company's non-compliance with section 19 of the ALA, which imposes certain notice requirements before a seller of land by way of an instalment sale may take legal action against a purchaser in default. In this regard the High Court held that section 172(1) of the NCA, read with schedule 1 thereto, provides that where there was a conflict, the NCA prevailed over chapter II of the ALA, and that therefore the Company was permitted to cancel the agreement subject to compliance with only section 129(1) of the NCA (and not also section 19 of the ALA).

Amardien and the other applicants then applied for leave to appeal against the High Court's decision but this was dismissed. They were also unsuccessful in their petition to the Supreme Court of Appeal for leave to appeal. They then lodged an application for leave to appeal to the Constitutional Court.

HELD:

- It was only once the debt became due that a debtor had an obligation to make payment or perform. Where there was a statutory requirement that an agreement must be recorded, the correct position was that payments became due and payable only upon recordal of that agreement. The effect of the late recordal was clear: the payments under the instalment sale agreements were not due and payable, and

therefore the applicants were not in arrears as contended by the Company.

- Section 26 of the ALA provides a clear statutory bar to the seller receiving payments (consideration) in the event of non-recordal of the agreement. The purchasers could therefore not have been in breach of the agreement at the time of the receipt of the section 129 (1) notice. It was incumbent upon the seller to notify the purchaser when the agreement had been recorded so that the purchaser could make the necessary payments.

- Also, when making demand for payment, a seller must afford the purchaser an opportunity to pay what was due within a reasonable time. The Company should accordingly have alerted the applicants of the recordal and afforded them a reasonable opportunity to pay before moving to enforce and subsequently cancel the agreement.

- Section 19 limited a seller's right to take immediate and unilateral action by providing for certain steps to be taken before it could cancel an instalment sale agreement concluded with a purchaser, while section 129(1) of the NCA specifies certain obligations a creditor must fulfil before it may proceed to the stage of legal enforcement or unilateral cancellation. Therefore, the requirements of the ALA and the NCA were not conflicting, and there was no need to have recourse to schedule 1 of the NCA. Where they both applied, they could and should be read together: a seller must comply with the NCA in informing the purchaser of the default, and they must also inform a purchaser in terms of section 19 if they intend relying on the remedies in terms thereof.

- Even if a section 129(1) notice could additionally serve the purpose if section 19, in the present case the actual notice fell short of the requirements of section 19. It followed that the notices were premature and invalid insofar as it was relied upon as a basis for the cancellation of the instalment sale agreements. It followed that the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements were also invalid.

- Section 129(1)(a) and (b) explained the obligations that the creditors must fulfil before moving to enforce their debt. The text explicitly referred to 'the default' that must be drawn to the notice of the consumer by the creditor—and not just the fact that the consumer was 'in default'. Read in conjunction with section 130(4), which provides an opportunity to the debtor to remedy the default, section 129(1) should

be interpreted to include the amount so that a debtor would know how much to pay to avoid cancellation.

- The same applied to the notice under section 19 of the ALA. The High Court thus erred in its conclusion that it was not essential that the section 129 notices set out the amounts in which the applicants were in arrears. It must specify the default—that is, the actual amount of the arrears.

The appeal accordingly succeeded.

[Some have been quick to point out that the case also has prescription implications for debts due under instalments sale agreements of land, and also for the calculations of interest. Its most far-reaching immediate implication is probably how it affects the requirements for a valid s 129 NCA notice of default.]

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