

SUMMARY OF THE JUDGMENT

BREACHING COMMERCIAL PROPERTY INSTALMENT SALE AGREEMENT

V and Another v Coetzee (35029/2014) [2015] ZAGPJHC 102 (5 June 2015)

Chapter II of the Alienation of Land Act gives special protection only to individuals purchasing residential property in instalments. Attempts of a purchaser of industrial property in an instalment sale to insist on recordal of the agreement against the title deed and notification of the seller's bond liability, will be futile, as this judgment shows. Other measures protecting such purchasers, outside Chapter II, such as the right to demand transfer once more than 50% of the purchase price has been paid, may well become applicable for non-residential property, but then the relevant conditions must be complied with. The judgment is an illustrative case in point.

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

FACTS

In March 2011, V sold a commercial property to Coetzee in terms of an instalment sale agreement. The purchase price was R2,4 million, payable in monthly instalments.

Coetzee fell into arrears and in May 2014, V sent him a letter of demand, requesting him to rectify the breach and stating that failure to do so within 30 days would constitute repudiation of the agreement by Coetzee, in which event V would cancel the agreement.

Coetzee failed to pay and, in July 2014, V informed Coetzee that the agreement was cancelled.

Coetzee now replied for the first time. He alleged that he had already paid more than half of the purchase price and that, in terms of the Alienation of Land Act 68 of 1981 (ALA) he was entitled to transfer of the property, which V failed to effect, and which was why he (Coetzee) had stopped paying. Coetzee's letter did not address the issue of cancellation; he insisted on transfer.

V responded and mentioned that, despite cancellation of the agreement, he was prepared to agree to transfer of the property on certain conditions, including payment of the overdue instalments and registration of a bond over the property, in favour of V, in respect of the balance of the purchase price. In this communication, V asked Coetzee to indicate by close of business on 27 August whether the new offer was accepted or not, failing which V would proceed with an eviction application.

Coetzee responded with a counter-offer which was followed, two days later, by another letter in which he denied that he breached the agreement and proposed a new settlement in which he will continue with the monthly payments whilst transfer into his name takes place.

V responded, indicating that he was still willing to transfer the property to Coetzee against payment of the arrears. Coetzee was given till 12 September to revert or face eviction proceedings.

On the 12th, Coetzee responded and advised that he was seeking legal opinion and required more time. He further said that although he had signed the sale agreement in English (and had in fact requested that), he now wanted all correspondence in Afrikaans.

That was the end of correspondence between the parties and in October 2014, V commenced eviction proceedings. Coetzee defended the application and raised certain preliminary (*in limine*) issues, namely that V did not comply with certain provisions of the ALA which applied where property was sold by way of an instalment sale agreement, being:

1. section 7(1) of the ALA, in that V failed to hand to Coetzee a certificate by the mortgagee indicating the amount V owed on the property;
2. section 20 of the ALA, in that V failed to have the sale agreement recorded against the title deed of the property within 90 days after concluding the agreement; and
3. section 26(1)(b) of the ALA, in that it prohibited any person to receive consideration by virtue of a deed of alienation until the sale agreement had been recorded against the title deed as required in terms of section 20 of the ALA.

Besides the three points *in limine* attacking the validity of the sale agreement, he also argued that V's cancellation was not in compliance with the provisions of section 19(3) of the ALA and that he was not in arrears at the time that the letter of demand was dispatched to him.

HELD:

The points *in limine*

Non-compliance with requirement to deliver certificate by mortgagee (sec 7); non-compliance with requirement to have agreement recorded against the title deed (sec 20)

- Sections 7 and 20 of the Act are contained in Chapter II of the ALA.

- The definition of land for purposes of Chapter II “means any land used or intended to be used mainly for residential purposes”.
- As the property in question was industrial and not residential land, sections 7 and 20 had no application and these first two points *in limine* were accordingly dismissed.
- Regarding the alleged non-compliance with section 26(1)(b) of the ALA (not part of Chapter II), the wording of the section was relevant. It provides that:

“26(1) No person shall by virtue of a deed of alienation relating to an erf or a unit receive any consideration until –

(a) such erf or unit is registrable; and

(b) in case the deed of alienation is a contract required to be recorded in terms of section 20, such recording has been effected.

26(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R1,000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.”

- Section 26 refers to ‘erf’ and ‘unit’, the latter bearing the meaning ascribed to the terms in the Deeds Registries Act (DRA). As it was not shown that the property in this transaction was an ‘erf’ or ‘unit’ within that definition, it could not be held that this clause was applicable.

(It is, with respect, uncertain how the court came to the conclusion that the property was not shown to be an erf as defined in the DRA. The reference in the judgment showed that the property was described as “portion 1 of Erf ...” and clearly the land was therefore an erf, and within the ambit of section 26. In light of the court’s conclusion in the next bullet, nothing turns on this. Ed)

- In any event, whether or not shown to be an ‘erf’ or ‘unit’ for section 26 to be applicable, section 26(2) prescribed a form of punishment in the event of contravention of section 26(1)(b) it does not invalidate the agreement.

Coetzee’s allegation that the sale agreement was still binding and that he was entitled to take transfer in terms of section 27(1) of the ALA as he had paid in excess of 50% of the purchase price.

- It was accepted that when V sent the initial letter of demand to Coetzee in May 2014, Coetzee had already paid over 50% of the purchase price. (It had to be kept in mind that Coetzee had not been paying any instalments for a period of seven months and

then made a payment of R50,000 in April 2014, shortly before the letter of demand was dispatched to him.)

- Section 27(1) of the ALA determines that:

“Any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in future and who has paid the seller in such instalments not less than 50 per cent of the purchase price shall if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.”

- Registration of the property in the name of the purchaser is not automatic or at the instance of the seller, as Coetzee’s argument presupposes. There was an onus on Coetzee to firstly prove that he had paid not less than 50% of the purchase price and thereafter demand that V transfer the property into his name against registration of a mortgage bond. Neither of these steps were taken.

Coetzee’s defences therefore had to fail.

Cancellation and eviction

- It is clear that Coetzee breached the agreement when he, for no reason, stopped paying the agreed monthly instalments in April 2013. The cancellation letter V sent to Coetzee in May 2014 was in accordance with the provisions of clause 9(1) of the sale agreement and, as Coetzee failed to remedy the breach within the time set out or at any later stage, V’s cancellation of the agreement was valid.

The eviction application was therefore granted.

CONTACT US

■ CAPE TOWN
Tel: 021 406 9100

■ SOMERSET MALL
Tel: 021 850 6400

■ TYGER VALLEY
Tel: 021 943 3800

■ CENTURION
Tel: 012 001 1546

■ CLAREMONT
Tel: 021 673 4700

■ STELLENBOSCH
Tel: 021 001 1170

■ MENLYN
Tel: 012 348 1682

■ BEDFORDVIEW
Tel: 011 453 0577

■ FISH HOEK
Tel: 021 784 1580

■ TABLE VIEW
Tel: 021 521 4000

■ ILLOVO
Tel: 011 219 6200