THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case number : 621/06

In the matter between :

HENRY FRASER	**FIRST APPELLANT**
MAGDALENA GERTRUIDA FRASER	**SECOND APPELLANT**
and	
JOHANNA JACOMINA VILJOEN	**RESPONDENT**

CORAM :	**SCOTT, CAMERON, MTHIYANE, COMBRINCK, CACHALIA JJA**
DATE :	**7 MARCH 2008**
DELIVERED :	**27 MARCH 2008**

Summary: Sale of immovable property – authorising other party to insert material terms after delivery of uncompleted document – non-compliance with s 2(1) of Alienation of Land Act 68 of 1981

Neutral citation: *Fraser v Viljoen* (621/2006) [2008] ZASCA 24 (27 March 2008)

COMBRINCK JA/

COMBRINCK JA:

[1] This appeal concerns yet another of the seemingly unending number of cases where it is in issue whether a contract for the sale of immovable property complies with the provisions of the Alienation of Land Act, 68 of 1981 ('the Act'). The appellants seek to enforce an agreement in terms of which they purchased a flat situated at Blythedale Beach KwaZulu-Natal. The respondent claims the agreement is null and void due to non-compliance with s 2(1) of the Act[1].

[2] The question for decision is one of law and is to be determined against the following factual background. The appellants occupy a flat described as 29 Wild Waves, Blythedale Beach, as lessees in terms of a monthly lease. The respondent is the lessor and owner. In April 2003 pursuant to a telephone call in which Mr Viljoen (respondent's husband) confirmed a willingness to sell, the appellants sent an offer in the form of an uncompleted printed form relating to the purchase and sale of property held under sectional title to respondent. The names of the parties were left blank as was a description of the property. The purchase price of R180 000 was typed in in the appropriate clause as was the name and address of the appellants' conveyancer. The offer was unsigned. It was forwarded under cover of a letter in which the following was said:

'Dear Mr Viljoen

Re: Purchase and sale Agreement.

Kindly sign the enclosed agreement and post it back to me. You will notice that paragraphs 2.3. (a) is not completed as I do not have the description. Please let me have a copy of the title deed to enable us to draw the transfer papers properly. As soon as I receive the documents from you we will go ahead with the registration and transfer.

Thanking you in anticipation

Henry Fraser.'

On receipt of the document Mr Viljoen telephoned the appellants and advised that he was prepared to accept a price of R185 000. The first appellant then agreed to pay this price and requested the respondent to alter the figure and

[1] '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 both parties thereto or by their agents acting on their written authority.'

return the document. When the document was returned to the appellants, it now contained the following in manuscript:

(i) The name of the seller (respondent);

(ii) Alteration of the price to R185 000;

(iii) The signature of respondent as seller together with the date and place of signature;

(iv) The signature of two witnesses;

(v) The initialling of all alterations and each page by respondent and her two witnesses.

The document was inchoate containing neither the name of the purchasers, nor their signature, nor a description of the property. The appellants then obtained the full description of the property, inserted it in the document and they both signed it omitting, however, to record the date of signature. The document was then given to the appellants' conveyancer to effect transfer. Thereafter for more than a year the conveyancers attempted in vain to get respondent to sign the documents necessary to effect transfer. She did, however, during February 2004 send a copy of her identity document when called upon to do so. Eventually by a letter dated 18 May 2004 the respondent indicated that she was no longer interested in disposing of her property. In a subsequent affidavit she said that they were no longer interested in selling as they intended moving into the flat and spending their retirement there.

[3] The appellants on notice of motion sought a declaratory order to the effect that the contract of purchase and sale was valid and binding and that an order should issue compelling respondent to sign the necessary documents to effect transfer. The application was opposed on several grounds. The matter came before Pillay J in the Durban High Court. He dismissed the application on two grounds, first he held that the date of conclusion of the agreement was material as it impacted on other terms and the omission was fatal to the validity of the agreement. Second, he followed *Sayers v Khan* 2002 (5) SA 988 (C) and found that the omission in the agreement to reflect the provisions of s 2(2A) of the Act (the so-called 'cooling off' period) rendered the agreement null and void. (The judgment was handed down before this court held that *Sayers v Khan* was

wrongly decided – see *Gowar Investments (Pty) Ltd v Section 3 Dolphin Coast Medical Centre CC* 2007 (3) SA 100 (SCA).) Leave to appeal was granted by the court *a quo* because of the conflicting judgments in the provincial divisions in the *Sayers* and *Gowar Investments* cases (the latter reported in 2006 (2) SA 15 (D).) From the judgment of Pillay J it does not appear that the issue raised before us was argued and the learned judge obviously did not deal with it.

[4] The issue debated before us was whether in the light of the decisions of this court in *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) and *Jurgens v Volkskas Bank Ltd* 1993 (1) SA 214 (A), the agreement complied with s 2(1) of the Act. *Fourlamel* dealt with a deed of suretyship which was incomplete when signed by the surety. At that stage the name of the co-surety did not appear on the document nor had he signed it. Neither the name of the creditor nor that of the principal debtor had been filled in. These details were inserted at a later stage after signature. It was held that in order to comply with the section all the material terms had to be contained in the document at the time of signature. In *Jurgens* (also a case dealing with a deed of suretyship) greater leeway was given. In that case when the sureties signed the deeds they were incomplete and inchoate. The blank spaces were, however, filled in by secretaries after signature and then delivered to the bank for its signature. It was held that it is immaterial when the document was signed by the first party, whether before or after the missing terms had been filled in or alterations made, as long as all the material terms were in the document when it was delivered to the other party. The time of delivery to the other party for signature is therefore crucial and not the time of signature by the first party. It was common cause that the reasoning in these cases is equally applicable to incomplete deeds of sale of immovable property. (See *Just Names Properties 11 CC v Fourie* 2008 (1) SA 343 (SCA).)

[5] Counsel for the appellants conceded that on the authority of *Jurgens* there had been non-compliance with s 2(1), it being common cause that the document in question did not contain a description of the property nor the names of the purchasers when delivered to the appellants by the respondent. He argued however, that the respondent had appointed the appellants as her agent for the purpose of completing the document by inserting a description of the property

and their names as purchasers. On carrying out their mandate the agreement became valid and binding. Respondent's counsel disputed the contention that on the papers it could be found that the appellants had been given the authority contended for by them. Even if they were so authorised, so it was submitted, to allow such evidence would open the door to the very mischief the Act was intended to address.

[6] I shall accept without deciding that the respondent did authorise the appellants to fill in a description of the property. The question is, were the provisions of s 2(1) satisfied when appellants, duly authorised, completed the document when respondent had already signed it? The question was considered in *Fourlamel* where Miller JA at 344A-D had the following to say:

'What is important to note in that connection, however, is that the question left open by the Court [in the matter of *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A)] related to an alteration made by the offeror's agent, not by any other person. Here, the additions to the deed of suretyship were not made by the respondent or his agent. The suggestion made by appellant's counsel that by signing the deed in blank the respondent tacitly authorized the appellant to fill in the blanks on his behalf, is untenable. Apart from the circumstance that the appellant, in a transaction of the kind that requires the terms of the agreement to be in writing, would be acting in the dual capacity of one of the contracting parties and the agent of the other contracting party (as to which, see *Restatement of the Law*, 2nd ed., vol. 1, para. 24, comment b), there is nothing in the papers to warrant an inference that such authority was given to the appellant or any other person.'

Although *obiter*, the reasoning is persuasive. The comment in the Restatement of the Law referred to by the learned judge reads:

'(b) A party to a transaction within the Statute of Frauds cannot orally confer power upon the other party to the transaction to sign effectively a memorandum required to satisfy the provisions of the Statute.'

The same attitude seems to have been adopted in English Law. See *Wilson & Sons v Pike* [1949] 1 KB 176 at 180 where the decision in *Farebrother v Simmons* (1822) 5 B and A – 333 was quoted with approval but distinguished on

the facts. The following was quoted in *Wilson* from the head note of the latter case:

'The agent contemplated by s 17 of the Statute of Frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, where an auctioneer wrote down the defendant's name by his authority opposite the lot purchased: Held, that in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the Statute.'

The reason for adopting this approach is not difficult to find. It is sought to obviate disputes about the terms of agreements, exclude the possibility of fraud and perjury and avoid unnecessary litigation – the very mischief these types of statutes are aimed at. See in this regard *Johnston v Leal* 1980 (3) SA 927 (A) at 946H per Corbett JA:

'The other possible obstacle to the admission of extrinsic evidence in this case is s 1 (1) itself and the policy underlying it, viz as already indicated, the prevention of uncertainty and disputes concerning the contents of contracts for the sale of land and of possible malpractices in regard thereto. The main effect of the section is to confine the parties to the written contract and to preclude reliance on an oral consensus not reflected therein.'

See further *Fourlamel (supra)* at page 343A and *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 (2) SA 15 (A) at 25C-D. Were the one party to an agreement of sale of immovable property to appoint the other to be its agent for the aforementioned limited purpose of filling in a description of the property sold and the name of the purchaser the object of the legislation would be nullified. It would open the door to uncertainty as to precisely what the parties orally agreed upon and what the other party was authorised to do. The object of certainty would disappear. Had the Frasers returned the document to Viljoen for signature after the description of the property and the names of the purchasers had been inserted, there would have been a valid and binding agreement. Unfortunately this was not done. It follows that, in my view, the agreement is void for non-compliance with the Act. This conclusion makes it unnecessary to consider the question whether the date of conclusion of the agreement in this particular case was material.

[7] It follows that the appeal must fail. The following order is made:

The appeal is dismissed with costs.

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P C COMBRINCK
JUDGE OF APPEAL

Concur:

SCOTT JA
CAMERON JA
MTHIYANE JA
CACHALIA JA