



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 52/09

LUC ARTHUR FRANCE CHRETIEN
CAROL ANNE CHRETIEN

First Appellant
Second Appellant

and

LINDA STEWART BELL

Respondent

Neutral citation: *Chretien v Bell* (52/09) [2009] ZASCA 147 (26 November 2009).

Coram: NAVSA, NUGENT, PONNAN, MAYA JJA *et* TSHIQI AJA

Heard: 13 NOVEMBER 2009

Delivered: 26 NOVEMBER 2009

Summary: Alienation of Land – Purchase and Sale Agreement not stipulating time for payment – contract unenforceable for non-compliance with s 2(1) of the Alienation of Land Act 68 of 1981.

ORDER

On appeal from: High Court, Durban (Van Zyl J sitting as court of first instance).

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:
3. The application is dismissed with costs, including the costs of two counsel.

JUDGMENT

TSHIQI AJA (NAVSA, NUGENT, PONNAN, MAYA JJA concurring):

[1] The issue in this appeal is whether a written purchase and sale agreement between the appellants and the respondent, is void *ab initio* for non-compliance with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981('the Act')

[2] The appellant brought an application to the Durban High Court for an order declaring the agreement enforceable and an order for the transfer of the property into her name. Her application was upheld with costs, including the costs of two counsel and this appeal is brought with leave of the court below.

[3] On 30 March 2005, the appellants, Luc Arthur France and his wife Carol Anne Chretien, both property developers, entered into a written purchase and sale agreement with the respondent, Ms Linda Stewart Bell for the sale of immovable property known as Erf No 374, Ballitoville, South Ballito, KwaZulu Natal. The agreement was recorded in a pre-printed form normally utilised by estate agents, containing blank spaces to be completed by the parties to record specific terms of their agreement.

[4] The agreement contained the details of the parties, a proper description of the property and set out the purchase price. The effect of the terms under the heading 'Method of Payment of Purchase Price' was that no deposit was required to be paid, that no loan was required to be obtained by the purchaser, and that the full price would be paid in cash. This integral part of the agreement is reproduced hereunder:

G. METHOD OF PAYMENT OF PURCHASE PRICE

(a) A cash deposit of R NIL (N/A) to be lodged with the Conveyancers within N/A days of signature hereof. [initialled]

(b) A further cash payment of R Refer to details of payment under Special Conditions or a guarantee acceptable to the SELLER for payment of such amount on registration of transfer, to be lodged with the Conveyancers on or before 20 or within 7 (SEVEN) days of request being made therefore by the Conveyancers.

(c) The PURCHASER shall obtain a loan from a financial institution in the amount of R NIL (N/A) within N/A days of acceptance hereof by such extended date as the SELLER may agree upon.

The special conditions were inserted in manuscript in Clause M(1) and M(2) and read :

'1. The parties have entered into a separate agreement in terms of which the Seller is obliged to effect improvements on the said property to the value of R2,800 000,00 (Two Million, Eight Hundred Thousand Rand) and other terms contained therein. [initialled]

2. The Purchaser & Seller have mutually agreed that the purchase price payment details will be agreed upon in writing between the two relevant parties by not later than the 30/04/2005. This will be a cash payment. [initialled]

Conditions of Contract'

[5] The agreement provided further in Clause 2.3 that ' the Purchaser shall not be entitled to take transfer of the property until the whole of the purchase price and all other charges for which he is liable have been paid in full or secured to the satisfaction of the seller'.

[6] As Clause M(1) pertains to a separate agreement already concluded by the parties in relation to improvements to be effected on the land, the disputes that arose between the parties concerning that separate agreement are immaterial for the determination of the validity of the purchase and sale agreement. M(2) is the controversial clause, because, although it provides that the parties would conclude an agreement in writing regarding the purchase price details before 30 April 2005, no such written agreement was ever concluded.

[7] During July 2005, Ms Bell paid the purchase price in the amount of R1,3m to the nominated conveyancing attorney together with all costs and

other amounts necessary to effect transfer into her name. The first sign that the Chretiens no longer wished to continue with the agreement was conveyed by their attorney to Ms Bell's attorneys by way of a letter dated 13 June 2006.

Para 3 of the letter states:

'Our counsel has formed the prima facie view that there is no contract between your client, Mrs Bell and my clients, Mr and Mrs Chretien. The basis for his view is that the written document signed by our respective clients did not stipulate in writing the method of payment as is required by legislation. If our counsel is correct, the purported agreement would be void *ab initio*.'

This deadlock culminated in the application by Ms Bell to the court below.

[8] Section 2(1) of the Act provides:

'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.'

[9] The formal legal requirements of a contract of purchase and sale have been analysed in a number of decisions and were summed up concisely in *Dijkstra v Janowsky*.¹

'In regard to these requisites certain legal principles have been settled by our Courts:

(i) The whole contract — or at least all the material terms — must be reduced to writing (*Johnston v Leal* 1980 (3) SA 927 (A) at 937C-G).

(ii) The Court must be able to ascertain with reasonable certainty the terms of the contract. As Colman J stated in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) in a passage cited with approval in *Clements v Simpson* 1971 (3) SA 1 (A) at 7E:

"inelegance, clumsy draftsmanship or loose use of language in a commercial document purporting to be a contract will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract".

(iii) There is no valid contract where a material term has not been finally agreed upon, but is left open for further negotiations (*Jammie v Lowrie* 1958 (2) SA 430 (T) and authorities there cited).

¹ 1985 (3) 560 (C) at 564G-H and 565A.

(iv) The material terms are not confined to the *essentialia* of the contract of sale (*Johnston's case supra* at 937H).

(v) The manner of payment is ordinarily a material term (*Patel v Adam* 1977 (2) SA 653 (A) at 666A-C).'

[10] In *Patel v Adam* (*supra*) the following was said:²

'It has been held by this Court that one of the terms of a contract of sale of land which has to be in writing is the manner of payment of the purchase price. (*Du Plessis v Van Deventer* 1960 (2) SA 544 (AD) at p 551A-B; *Neethling v Kloppe en Andere* 1967 (4) SA 459 (AD) at p 465B-C.) In the agreement in issue in the present case clause 3 provides that the purchase price "shall be payable in monthly instalments free of interest". The clause contains no statement of the amount of the monthly instalments, and there are no other provisions in the agreement from which the amount, or the period in which the purchase price has to be paid, can be inferred. The agreement, it seems clear, leaves it to the purchaser alone to decide what amount he wishes to pay every month, with the result that a court of law would not be able to determine the monthly amount to be paid by him. Mr *Wulfsohn*, for the plaintiff, relying, *inter alia*, on what was said in *Dawidowits v Van Drimmelen* 1913 TPD 672, and *Towert v Towert* 1956 (1) SA 429 (W), contended that in these circumstances the agreement should be held to be void for uncertainty. . . .'

[11] There is no doubt that the time within which payment is to be made is a material term of the agreement. As appears from the agreement itself, the parties thought it so, and provided for that to be determined and to be reduced into writing. This, as stated above, did not occur.

[12] It was submitted that because the parties have stipulated that the payment will be a cash payment, in the absence of further agreement between the parties, the sellers could not have expected anything better than cash against transfer of property into the name of the purchaser. Whilst this submission echoes the position in common law, it cannot be held to apply in the present matter. It was an express term of the agreement that the purchase price was required to be paid before the obligation to transfer arose, and agreement still had to be reached in respect of the time of payment.

² 666A-C.

[13] Counsel for the respondent submitted that the term 'purchase price payment details does not refer to the time of payment but rather the manner in which the cash payment would be made ie bank guaranteed cheque, bank transfer etc. This argument is flawed because even such payments are in fact cash payments. The term therefore clearly referred to the time for payment which is logically the only outstanding issue and which is clearly a material term (*Patel v Adam supra*). Consequently; as the agreement does not stipulate the time of payment; it does not comply with s 2 (1) of the Act and is unenforceable.

[14] I accordingly make the following order:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted as follows:
3. The application is dismissed with costs, including the costs of two counsel.

Z L L TSHIQI
ACTING JUDGE OF APPEAL

Appearances:

Counsel for Appellant: W Singh SC

Instructed by
Legator McKenna Incorporated, Durban
Matsepes Inc, Bloemfontein

Counsel for Respondent: A Horwitz SC

Instructed by
Michael Werner & Associates, Sandton
E G Cooper Majiedt Inc, Bloemfontein