

SOUTH AFRICA / JUDGMENT

Christ the King Primary School CC v V.F. Group Trust (3668/2022) [2023] ZAECKMKHC 132 (28 November 2023) [2023] ZAECKMKHC 132

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee

CASE / FILE NUMBER

3668/2022

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FLYNOTES:

ADMINISTRATIVE – Tender – Bid
specifications deficiencies –
Parking
management services – Applicant unhappy that tender required
bidders to adopt cashless parking revenue collection
system –
Alleges bid specifications did not impose minimum revenue that was
to be collected – Bid specifications
set not in compliance
with regulation requirements and City's supply chain
management policy – City failed to
assess functionality and
preference claimed by successful bidder by conducting proper risk
analysis of its bid and verifying
its status – City's
omissions constituted material irregularities – Occurred
pursuant to a breach of mandatory
provisions – Appropriate
relief considered – Tender award reviewed and set aside –
Regulation 51 of the
Supply Chain Management Regulations.
IN THE HIGH COURT OF

SOUTH AFRICA
(EASTERN CAPE
DIVISION, MAKHANDA)
Reportable
Case no: 3668/2022
In

the matter between: CHRIST
THE KING PRIMARY SCHOOL CC
APPLICANT
and
V.F.
GROUP TRUST
(Registration
No.: IT2[...]
Represented

by: PRAKASH
VALLABH N.O.
FIRST
RESPONDENT
RENUKA
VALLABH N.O.
SECOND
RESPONDENT
BAREND
JOHANNES SAHD N.O.
THIRD
RESPONDENT

JUDGMENT

Govindjee J

- [1] This application is premised on the provisions of the Alienation of Land Act 1981[1] ('the Act'). It concerns the purchase of land by way of instalments and raises the following key issues: can a purchaser who has paid more than 50 per cent of the purchase price demand transfer of the land from the seller notwithstanding the seller's purported cancellation of the sale agreement due to the purchaser's default? If so, when does the demand for transfer prescribe, and is this affected by the seller's acceptance of instalment payments subsequent to the purported cancellation?
- [2] The applicant is a duly registered and incorporated close corporation carrying on business as a primary school ('the school')
- in Komani (formerly known as Queenstown). It seeks to compel the respondent ('the trust') to comply with a written

agreement entered into between the parties on 16 March 2016 ('the agreement'). It seeks an order directing the trust to take steps to cause transfer of certain immovable property ('the property') in the name of the school, against tender of the balance of the purchase price.[2]

The facts

- [3] Most of the facts presented in the papers are common cause. The parties entered into the agreement during March 2016. In terms of the agreement, the purchase price was R1,85 million. The school made payment of R500 000 on 14 March 2016 and took occupation.[3] The balance was to be paid by way of six half-yearly instalments of R225 000, commencing by no later than 31 August 2016. The school paid a total of some R1,175 million by 11 June 2018. In terms of an express term of the agreement, transfer of the property would only be registered in the school's name once the purchase price and transfer costs had been paid in full.
- [4] It was also an express term that, in the event of default on the part of the school, the trust was entitled to cancel the agreement by way of notice and retain any monies that had already been paid. It was then open to the trust to act against the school for the recovery of the whole of the purchase price together with any amount payable by the school in terms of the agreement.
- [5] The school admitted defaulting on the last three payments due, resulting in the trust delivering a letter of demand, dated 13 July 2018, and notice of cancellation of the agreement on 31 January 2019. The validity of the trust's cancellation of the agreement is in dispute. Of relevance is that the trust, despite purported cancellation, accepted two further payments of R225 000 each, on 15 May 2019 and 3 December 2020.
- [6] The crux of the school's claim is that the agreement falls within the ambit of the Act. As the agreement was never recorded with the Registrar of Deeds, the school's first argument is that the trust's actions were premature and that the purported cancellation violated the provisions of the Act. Considering that some 85 per cent of the purchase price had been paid, the school's further argument is that it is entitled to registration of the property in its name.

Does Chapter II of the Act regulate the agreement?

- [7] The Act regulates the alienation of land in certain circumstances.[4] Its purpose extends to 'fulfil the need for protection of vulnerable purchasers and imbuing good faith and fairness into

contractual relationships relating to land'.[5] The notion of 'land' is defined. For purposes of s 3(2) and Chapter II, it 'means any land used or intended to be used mainly for residential purposes', excluding certain land regulated by other legislation. The Act includes the following

sections:

‘20. Recording of contract.

1.

(a) A seller, whether he is the owner of the land concerned or not, shall cause the contract to be recorded by the registrar concerned in the prescribed manner provided ...

26. Restriction on the receipt of consideration by virtue of certain deeds of alienation.

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

...

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

[8] It is immediately apparent that the receipt of consideration prohibition in s 26(1) is restricted to a contract that, courtesy of s 20, is required to be recorded.[6] While s 26 of the Act forms part of Chapter III, s 20 is contained in Chapter II. As indicated, for purposes of that chapter, ‘land’

is defined to mean any land used or intended to be used mainly for residential purposes. In other words, it is only a seller of such land, as defined, that is obliged to cause the registrar to record the contract in the prescribed manner, failing which no consideration shall be received.

[9] The difficulty for the school is that there is no allegation in the founding papers that the usage, or intended usage, of the property was for residential purposes. The trust pertinently raised the point in its answering papers, indicating that the school operated for profit and conducted its business operations from the property, so that Chapter II of the Act was inapplicable. There was no reply to these averments. On the papers, therefore, it must be accepted that the property was not used or intended to be used for

residential purposes at the time of the agreement. As such, there was no statutory obligation on the trust to cause the registrar to record the contract, and no prohibition in respect of receipt of consideration in terms of the agreement.

[10] This approach to Chapter II of the Act, and the proper approach to its interpretation, has been confirmed by the SCA in *Merry Hill (Pty) Ltd v Engelbrecht*: [7]

‘Let me start with a proposition which appears to be beyond contention, namely that the purpose of chapter 2 of the Act, which includes s 19, is to afford protection, in addition to what the contract may provide, to a particular type of purchaser – a purchaser who pays by instalments – of a particular type of land – land used or intended to be used mainly for residential purposes. In this sense, chapter 2, like its predecessor, the Sale of Land on Instalments Act 72 of 1971, can be described as a typical piece of consumer protection legislation ... The reason why the legislature thought this additional statutory protection necessary is not difficult to perceive. It is because experience has shown this type of purchaser, generally, to be the vulnerable, uninformed small

buyer of residential property who is no match for the large developer in a bargaining situation ...'

[11] These sentiments were endorsed by in *Sarrahwitz v Maritz NO*.^[8] The Constitutional Court highlighted that aspect of the definition of 'land' that entitled any instalment purchaser, however wealthy, to benefit from the Act's protection when purchasing residential property. The majority added that the statutory

confinement of protection from hardship to 'residential property' was a strong pointer that only 'vulnerable

purchasers' were the targeted beneficiaries of the legislative intervention, and that the Act probably required amendment.^[9]

[12] As Mr Smith, for the trust, pointed out, there is also authority from other Divisions confirming the position in respect of the interplay between

both sections relied upon by the school. Those judgments confirm that '...the purpose of the relevant sections, such as ss 20 and 26, is to protect vulnerable, financially disadvantaged and relatively unsophisticated purchasers from private companies ...'.^[10] What is decisive, for purposes of determining whether the sale to the school constituted a 'contract' in terms of the Act, is the intended use of the property by the purchaser at the time the agreement was entered into.^[11] On the papers, the ineluctable conclusion is that the school, as purchaser, did not propose to use the property for any residential

purpose.^[12] There is also no reference on the papers to suggest that it was being used for residential purposes at the time of sale. Following the cited authorities, the result is that the agreement is not regulated by Chapter II of the Act and that the school's arguments in that respect are rejected.^[13]

Should the Court order transfer of the property to the school?

[13] The remaining issue to be addressed is whether, notwithstanding purported cancellation, the school is entitled to the relief premised on s 27 of the Act. That section provides as follows:^[14]

'27. Rights of purchaser who has partially paid the purchase price of land.

(1) 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 the future and who has paid to 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.

(3) If for whatever reason the seller is unable, fails or refuses to tender transfer within three months of the receipt of the demand referred to in subsection (1), the purchaser may cancel the relevant deed of alienation, in which case the parties are entitled to the relief provided for in section 28(1): Provided that nothing contained in this subsection shall detract from any additional claim for damages which the purchaser may have.'

[14] The interpretation to be given to this section has been authoritatively determined. In *Botha and Another v Rich NO*[15] ('Botha'), the applicants' main contention was that the enforcement of the cancellation clause, where more than 50 per cent of the purchase price was paid, and in the face of a demand for a transfer pursuant to s 27, was contrary to public policy. The Constitutional Court considered this to be an alternative enquiry, the primary issue being whether, under s 27(1), the respondent was obliged to register the property in the applicants' name against registration of a mortgage bond in their favour.[16] Answering that question required proper interpretation of the section.

[15] It is unnecessary, for present purposes, to repeat the analysis of contractual obligations in the context of the Constitution as

reflected in *Botha*. It suffices to state that the Constitutional Court confirmed that s 27 must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights.[17] *Nkabinde J*, on behalf of the majority, held that a plain reading of s 27(1) revealed that it sought to protect the right of a purchaser who had paid not less than half of the purchase price. Successful reliance on that subsection required the presence of the following

jurisdictional facts:[18]

- a) First, the purchaser must have undertaken to pay the purchase price in specified instalments;
- b) Second, the purchaser must have paid to the seller in such instalments not less than 50 per cent of the purchase price;
- c) Third, the property in question must be registrable.

[16] Reading s 27(1) together with s 27(3), the learned judge held that a lower court had been incorrect to hold that specific performance, in the form of compelling the respondent to register the property and sign all documents necessary for transferring the property into the name of the applicant, was not an available remedy. Such a conclusion was held to be inconsistent with the proper approach to interpretation of the section.[19]

[17] *Botha* also considered whether a party was entitled to claim specific performance, in the context of the Act, despite being in arrears, and whether the respondent could raise the *exceptio non adimpleti contractus* as a defence to the demand for transfer.[20] The court held that they could, but that a rigid application of the principle of reciprocity may result in injustice in certain

circumstances. The law of contract, based as it is on the principle of good faith, contained the necessary flexibility to ensure

fairness. This was achieved in Botha as follows:[21]

‘In my view, to deprive Ms Botha of the opportunity to have the property transferred to her under section 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees. Accordingly, an appropriate order in this regard will be made. The condition that Ms Botha must pay the arrears and all municipal balances, set out in our order, on top of the statutory requirement that a bond be registered, constitutes an equitable exercise of the discretion a court has to avoid undue hardship to the Trustees.’

[18] In refusing the respondent’s prayer for cancellation, the court added as follows:[22]

‘For the same reasons mentioned above, granting cancellation – and therefore, in this case, forfeiture – in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach.’

[19] Mr Smith sought to distinguish Botha on the basis that: firstly, the school had invoked a term implied by law only after the cancellation of the agreement of sale; and secondly, the enforcement of the implied term was conditional on a preceding demand.

[20] These arguments appear to be without merit. It is so that a paragraph of the contract in Botha expressly incorporated s 27(1). Considering that s 27(1) has been held to create a contractual right implied by law, this feature of the case is immaterial for present purposes. [23] Our law recognises that the terms of the contract – express, tacit or implied – determine the obligations parties to a contract owe to each other.[24]

[21] On the facts in Botha, the respondent had successfully instituted proceedings against the applicants in the magistrate’s court for cancellation of the contract, eviction and forfeiture of amounts already paid by the applicants, obtaining judgment on 3 April 2008. Only on 21 May 2008 did the applicant exercise her rights by demanding transfer in terms of s 27(1) of the Act.[25] In other words, as in the present circumstances, a term implied by law was invoked only after the purported cancellation of the agreement of sale. The Constitutional Court’s views as to the cancellation itself support the conclusion that whether the s 27(1) right was invoked before or after purported cancellation is not determinative of the issue.

[22] As for the second argument raised, there is authority that the right to specific performance flows from the contract itself, so that a creditor in the position of the school may, therefore, institute proceedings by summons or notice of motion claiming such performance without first putting the debtor in mora by way of a separate notice.[26] Accepting that authority as correct, the need for a ‘demand’ in the form of a notice, as seemingly argued by the trust,

may be read to relate only to the other possible remedies, as flowing from s 27(3) and s 28(1) of the Act. The decision in *Chetty v Erf 311, Southcrest CC* is direct authority for the proposition that a 'demand' for transfer in terms of s 27(1) may be made for the first time in a notice of motion, and without a preceding notice, thereby interrupting prescription. Following a survey of decided cases, the court in that matter concluded that there was no reason why a claim for specific performance without a prior demand (i.e. *interpellatio extra iudicialis*) would be prohibited where such 'demand' is contained in the notice of motion itself.[27]

[23] Service of the notice of motion, in other words, constitutes a demand for purposes of s 27(1) based on the contractual right implied by that section. That occurred on or about 20 October 2022. There was no need for an extrajudicial notice of demand absent a contractual or statutory basis for this.[28]

[24] In my view, the wording of the Act, and the decision in *Botha*, supports this interpretation. For example, unlike s 19 of the Act, s 27(1) makes no provision for the 'demand' to be issued by way of 'letter' or 'notice', and does not refer to any specific manner of communication. [29] *Botha*, in detailing the necessary jurisdictional prerequisites, makes no reference to a separate, preceding demand.

[25] It might be added that the trust noted, in a single sentence contained in supplementary heads of argument, that the third jurisdictional fact (i.e. that the property was registrable) had not been pleaded. In my view it is unsurprising that the point was not pressed. There is nothing on the papers to suggest that the property in question is not registrable. It would be wholly inappropriate to construe the pleadings strictly so as to deprive the school of the relief it seeks purely on this basis, and in circumstances where it has paid, and would likely forfeit, some 85 per cent of the purchase price.

[26] The decision in *Botha* has been the subject of extensive consideration, also by the Constitutional Court itself. *Beadica 231 CC and Others v Trustees, Oregon Trust and Others*[30] ('*Beadica*') concerned the proper constitutional approach to the judicial enforcement of contractual terms and the public policy grounds upon

which a court may refuse to enforce these terms.[31] Theron J, on behalf of the majority, noted that *Botha* had caused some controversy, and therefore considered that judgment in detail.

[27] The summary of *Botha* in *Beadica* confirms that the present matter fits closely with the circumstances that persuaded the court in *Botha* to rule as it did. That decision offers a rich basis for approaching the present application. This is because of the school's attempt to rely on the statutory regime created by s 27(1) of the Act, rather than placing reliance on s 27(3), in circumstances where there had been default of payment of purchase price, and where the contract contained a cancellation clause coupled with forfeiture of any payments already made.[32] *Botha* confirms that the section affords the school that relief.[33] As was the case in *Botha*, a substantial part of the purchase price, more than 50 per cent, had been paid prior to the litigation. The present matter is different in that two payments of R225 000 each

had been made subsequent to the purported cancellation, and because the trust relies on prescription.

Prescription

[28] What remains is to consider the timing of the s 27(1) demand, in the context of prescription. It is the party relying on prescription that must allege and prove the date of the inception of the period of prescription.[34] The trust alleges the date of purported cancellation of the contract, namely 31 January 2019, as the date of inception.

[29] While the act of cancellation is frequently performed by the non-defaulting party absent judicial involvement, a prayer claiming cancellation is normal when this remedy is relied upon. As Bradfield notes, the desirability of having an order of cancellation so that the status of the contract is not in doubt is well recognised.[35] There is good reason for this approach, as evinced by the facts and judgment in Botha. While cancellation without the need for a court order may be a practical approach to enable the general flow of commerce, various

authorities confirm that courts would be asked to declare that the cancellation was effective if litigation ensued.[36] It must be reiterated that in Botha the respondent had successfully instituted proceedings against the applicants in the magistrate's court for cancellation, eviction and forfeiture. Following the Constitutional Court's approach, and for reasons that follow, it would be expected of future litigants in the position of trust to consider issues of cancellation and forfeiture together, and to seek an order from this court confirming cancellation, so that any possible issues of disproportionality may be properly ventilated.

[30] The trust rightly acknowledged that the validity of its purported cancellation remained in issue.[37] Its papers are silent as to forfeiture of the amounts it has received. It does not dispute the payments allegedly made by the school, that it accepted two payments of R225 000 each after the purported cancellation, and that the consequence of such acceptance

was that the school had made payments in the amount of R1,625 million, constituting over 85 per cent of the purchase price. The

school relies on this, in its founding papers, to argue that the purported cancellation violated the provisions of the Act.[38]

[31] That argument finds strong support in Botha. On that authority, it is fundamentally erroneous to de-link questions of forfeiture and restitution from the question of the fairness of upholding the cancellation.[39] The question of forfeiture and restitution is not independent of, and logically anterior to, the question of cancellation.[40] There is no suggestion on the papers that the right to claim forfeiture has been waived. Accepting a valid cancellation on the

purported date in such circumstances, and where over 85 per cent of the purchase price has been paid, would be 'a disproportionate

penalty for the breach’.[41] Absent a valid cancellation on 31 January 2019, the plea of prescription, which is centred on cancellation on that date, must fail.[42]

[32] In the event that this conclusion is erroneous, or that a more relaxed approach is required in respect of the pleaded date of prescription, there appear to be three separate pathways for arriving at the same conclusion.

[33] Firstly, following *Ethekwini Municipality v Mounthaven*,^[43] the school’s claim for transfer of the property in the name of the trust is a claim to deliver goods in the form of immovable

property, which qualifies as a ‘debt’.[44] The running of prescription commenced only as soon as the debt ‘is due’.[45] The Prescription Act does not define this notion, so that the implied term requires interpretation in the usual manner, including the unitary exercise of consideration of the words of the statute in combination with context and apparent purpose.[46]

[34] On an ordinary interpretation, s 27 affords the purchaser of land by way of instalments an important right.[47] Provided the land is registrable, and that at least 50 per cent of the purchase price has been paid, any such purchaser ‘shall ... be entitled to demand’ transfer of the land from the seller. The stipulated condition is registration of a first mortgage bond over the land in favour of the seller, to secure the balance of the purchase price and interest, simultaneous with the registration of transfer. Properly construed, the earliest possible time that the debt became ‘due’, for purposes of prescription, was the moment that 50 per cent of the purchase price was paid by the school.[48] This accords with the authority that where the day on which a debt becomes due may be unilaterally determined by the creditor, the debt is deemed to be due on the earliest day which the creditor may determine.[49]

[35] Even assuming, in favour of the trust, that this is the position,^[50] the acceptance of instalment payments had the effect of interrupting the running of prescription. The views expressed in *Lamprecht v Lyttleton Township (Pty) Ltd* clarify the point:[51]

‘Where however a time is fixed for performance at a future date the position is altered. The seller, having given the purchaser credit, has no right to payment of the purchase price until the prescribed time, and prescription begins to run against him in respect of his action for such price only from the date fixed for payment – in the case where payment by instalments is agreed, in respect of each instalment from its appropriate date, not being bound (unless otherwise provided) to pass transfer or effect delivery until payment of the full price. On the other hand the purchaser, except in the infrequent case of the instalment arrangement being equally for the seller’s benefit, has the right to pay up the full price at any time and claim transfer or delivery, though not compellable so to do. It is consequently open to argument that extinctive prescription in respect of the purchaser’s action for transfer or delivery runs against him as from the date of sale, and is only interrupted from time to time by a payment of an agreed instalment...’ (Own emphasis.)

[36] A sensible interpretation, drawing on this decision, would consider the debt to be due from the time that 50 per cent of the purchase price has been paid, but interrupted from time to time by the seller's acceptance of payment of an agreed instalment.[52] As Ms Teko emphasised in her supplementary heads of argument, the trust accepted two additional payments after purporting to cancel the contract. The trust failed to deal with the legal effect of this in its supplementary submissions. Those payments could only have been accepted in terms of an extant agreement and as partial-payment of the purchase price, and belie the purported preceding cancellation. On the facts, that is an additional basis for rejecting both the trust's reliance on its purported cancellation, as well as the claim of prescription.[53] Considering the agreement in its proper context and subsequent events, including the payments made and received, also after the purported cancellation, it cannot be said that the claim had prescribed at the time of the demand. [54]

[37] Secondly, s 14(1) of the Prescription Act provides that the running of prescription is interrupted by an express or tacit acknowledgement of liability by the debtor.[55] There is authority as to the proper weight to be given to 'tacit':[56]

'...full weight must be given to the Legislature's use of the word "tacit" in s 14(1) of the Act. In other words, one must have regard not only to the debtor's words, but also to his conduct. In one's quest for an acknowledgement of liability. That, in turn, opens the door to various possibilities. One may have a case in which the act of the debtor which is said to be an acknowledgement of liability, is plain and unambiguous. His prior conduct would then be academic. On the other hand, one may have a case where the particular act or conduct which is said to be an acknowledgement of liability is not as plain and unambiguous. In that event, I see no reason why it should be regarded in vacuo and without taking into account the conduct of the debtor which preceded it. If the preceding conduct throws light upon the interpretation

which should be accorded to the later act or conduct which is said to be an acknowledgement of liability, it would be wrong to insist upon the later act or conduct being viewed in isolation. In the end, of course, one must also be able to say when the acknowledgement of liability was made, for otherwise it would not be possible to say from what day prescription commenced to run afresh ... Thirdly, the test is objective. What did the debtor's conduct convey?'

[38] Any sort of conduct may provide the necessary material to reveal the debtor's state of mind as one intending to admit the existence of the debt and liability therefore.[57] It must be emphasised that the context in which the payments were made, and accepted, was the agreement to sell the property and the express undertaking to transfer same once the purchase price and transfer costs had been paid in full.[58] If the school's payment of instalments towards the agreed purchase price constituted a series of tacit acknowledgements of

liability, so that prescription was interrupted on the date of each payment and commenced running again from those dates,[59] the trust's continued acceptance of such payments must operate with similar effect in the context of the agreement, including the term implied by s 27(1).

[39] Finally, completion of the period of prescription is also delayed in certain circumstances in terms of the provisions of the Prescription Act. Section 13(2) reads as follows:

'A debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal

debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.'

It is clear that in the case of a contract for a sale of land with the purchase price payable by instalments, the seller's debt to the purchaser to transfer the property and the purchaser's debt to the seller to pay the price are 'reciprocal debts'. [60] Botha confirms the position:

'...there is a presumption that obligations in bilateral contracts are reciprocal. The presumption is not rebutted here. If anything,

section 27(1) indicates that the seller's obligation to give transfer and the purchaser's obligation to pay instalments

timeously are intimately interconnected. That is why the purchaser is entitled to transfer only "on condition that simultaneously

with the registration of transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchaser price and interest". The section thus recognises that it would be unfair for the purchaser to maintain her rights in the property if she falls into arrears. It follows inexorably that the provision does not allow the purchaser to obtain rights in the property unless she first purges her arrears.'

[40] In the case of debts payable in instalments, prescription runs in respect of each instalment as it falls due.[61] Leaving aside the purported cancellation, having accepted the final payment made by the school on 3 December 2020, the trust's

entitlement to claim the outstanding balance, or subsequent instalment, would not have prescribed for a three-year period from

that date, at the earliest. In the normal course of events, a debt is due when it is 'claimable' by a creditor, and as the corollary thereof, is payable by the debtor.[62] The effect of s 13(2) is that the reciprocal debt to transfer the property, an implied contractual term relied upon by the school, does not prescribe until that point in time.[63]

[41] In conclusion, it may be added that this is not one of the cases where a creditor seeks to postpone the commencement of prescription based on their own failure to perform in order to delay the running of prescription.[64] Prescription, it must be remembered, is aimed at penalising negligent inaction, rather than innocent inaction.[65] The continued attempts at

payment distinguish the matter from cases where a negligent creditor ‘failed to take or initiate any steps’ to satisfy its reciprocal obligations.[66] The acceptance of the instalments paid on 15 May 2019 and 3 December 2020 must be viewed in the context of an invalid attempt to cancel the agreement on 31 January 2019. The demand for transfer of the land, based on the contractual right implied by s 27(1), occurred on or about 20 October 2022, when the application was served on the respondent’s attorneys.[67] Botha explains that, in terms of s 27(3), the school enjoyed the option to cancel the deed of alienation in terms of s 27(3) and to claim the relief included in s 28(1) of the Act, should the seller be ‘unable, fails or refuses to tender transfer within three months of the receipt of the demand’. In addition, based on that authority, it was entitled to invoke s 27(1) directly and demand transfer of the property, as it did.[68] There is no basis to refuse to exercise the discretion to award specific performance in the circumstances.

[42] In all the circumstances, the school is entitled to the relief it seeks, modified in accordance with Botha to ensure that the trust is not disproportionately affected as a result. The usual order as to costs is appropriate. Although counsel were directed to furnish further heads, this was primarily due to the failure to address the Botha judgment in earlier heads of argument. No special direction in that respect is warranted.

Order

[43] The following order is made:

1. The respondents (‘the Trustees’) are ordered to sign all necessary documents to effect the registration and transfer of the remainder of Erf 4[...] Queenstown and remainder of Erf 1[...] Queenstown, held by deed transfer number T56[...] (‘the property’) into the name of the applicant, against the simultaneous:
 - (i) Payment of any arrears owing and outstanding amounts levied in respect of municipal rates, taxes and service fees under the instalment sale agreement, by the applicant to the VF Group Trust IT2[...] (‘Trust’);
 - (ii) Registration of a first mortgage bond over the property in favour of the Trust to secure the balance of the purchase price and interest thereon in terms of the agreement; and
 - (iii) Payment of all costs of transfer.
2. The Trustees are ordered to pay the applicant’s costs.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 07 September 2023 Delivered: 28 November 2023 APPEARANCES: For the Applicant: Adv A E Teko St George's Chambers, Makhanda Instructed by: Z E Sontshi & Associates Applicant's Attorneys Suite 1, 14 Prince Alfred Komani Tel: 045 838 3460 Email: sontshize2@gmail.com C/O: Yokwana Attorneys New Street Makhanda For the Respondent: Adv D.A Smith Chambers, Gqeberha Instructed by: Mr Wesley Hayes Incorporated 5 Gray Street Komani Tel: 045 805 0081 Email: sec1@wrhlaw.co.za C/O: Neville Borman & Botha Inc. 22 Hill Street Makhanda

[1] Act 68 of 1981.

[2] The order was sought in the following terms: (a) 'The Trust be compelled to comply with the written agreement entered into between the Applicant and the Trust on 16 March 2016, to purchase the immovable property known as:

1. Remainder of Erf 4[...] Queenstown Situate in the Lukhanji Municipality Division of Queenstown Province of the Eastern Cape In Extent: 455 (four hundred and fifty-five) square metres
2. Remainder of Erf 1[...] Queenstown Situate in the Lukhanji Municipality Division of Queenstown Province of the Eastern Cape In Extent: 169 (one hundred and sixty-nine) square metres The 2 (two) properties held by deed transfer number T56[...]('the property')' (b) An order directing the Trust to cause the transfer of the property to be effected in the name of the Applicant against payment by the Applicant of the balance of R200 000,00 to the respondent, with interest, and all costs of transfer. (c) Costs of the application on the scale as between attorney and client.' (d)

[2] The order was sought in the following terms:

(a) 'The Trust be compelled to comply with the written agreement entered into between the Applicant and the Trust on 16 March 2016, to purchase the immovable property known as:

1. Remainder of Erf 4[...] Queenstown

Situate in the Lukhanji Municipality

Division of Queenstown

Province of the Eastern Cape

In Extent: 455 (four hundred and fifty-five) square metres

2. Remainder of Erf 1[...] Queenstown

In Extent: 169 (one hundred and sixty-nine) square metres

The 2 (two) properties held by deed transfer number T56[...]('the property')

(b) An order directing the Trust to cause the transfer of the property to be effected in the name of the Applicant against payment by the Applicant of the balance of R200 000,00 to the respondent, with interest, and all costs of transfer.

(c) Costs of the application on the scale as between attorney and client.’

(d)

[3] It may be noted, for the sake of completion, that the school has since been evicted from the property by the magistrate’s court. An appeal against that decision was unsuccessful. A petition for leave to appeal to the SCA is pending.

[4] Preamble to the Act.

[5] *Amardien and Others v Registrar of Deeds and Others* [2018] ZACC 47; 2019 (2) BCLR 193 (CC) 2019

(3) SA 341 (CC) para 10.

[6] Both the notions of ‘consideration’ and ‘contract’ are defined in s 1 of the Act. ‘Consideration’, in relation to a sale of land under any deed of alienation, means the purchase price and interest thereon, excluding rent or occupational interest constituting a reasonable compensation for the use and enjoyment of the land by the purchaser. ‘Contract’ means a deed of alienation under which land is sold against payment by the purchase to, or to any person on behalf of, the seller of an amount of money in more than two instalments over a period exceeding one year. It is defined to include any agreement or agreements which together have the same import, whatever form the agreement or agreements may take. In *Sarrahwitz v Maritz NO and Another* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) (‘*Sarrahwitz*’) para 78, the Constitutional Court read the words ‘including residential property paid for in full within one year of the

contract, by a vulnerable purchaser’ into the definition of ‘contract’ at the end of s 1(a), adding the following

definition: ‘vulnerable purchaser’ means a purchaser who runs the risk of being rendered homeless by a seller’s

insolvency.’

[7] *Merry Hill (Pty) Ltd v Engelbrecht* [2007] ZASCA 60; 2008 (2) SA 544 (SCA) para 13.

[8] *Sarrahwitz* above n 6 paras 34, 39.

[9] *Ibid* para 35. See G Muller, R Brits, JM Pienaar and ZT Boggenpoel Silberberg and Schoeman’s *The Law of Property* (6th Ed)

(2019) at 484.

[10] *Katshwa and Others v Cape Town Community Housing Co (Pty) Ltd and Four Similar Cases* 2014

(2) SA 128 (WCC) para 45.

[11] Bouwer v Aural (Pty) Ltd 1991

(4) SA 622 (W) at 626H--I.

[12] Ibid at 626I-627D.

[13] Cf Amardien above n 5 paras 45-46 and Chetty v Erf 311, Southcrest CC 2020

(3) SA 181 (GJ) ('Chetty') paras 10-13.

[14] S 28 deals with consequences of deeds of alienation which are void or are terminated, in part, as follows: '(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2(1), or a contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract ...'

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[15] Botha and Another v Rich NO and Others [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC) ('Botha').

[16] Botha above n 15 paras 21 and 23.

[17] Botha above n 15 para 28.

[18] Botha above n 15 para 34.

[19] Botha above n 15 para 41. Botha considered and rejected the argument that cancellation, in terms of s 27(3), followed by the relief in s 28(1), was the only remedy when demand for transfer was refused: paras 36 and 37. This was due to the common law entitlement to specific performance in respect of any contractual right, coupled with the creation of an implied contractual right, courtesy of s 27(1), in circumstances where there was no indication that the legislature intended to depart from the common-law position. That a purchaser 'may cancel' the contract of sale, in terms of s 27(3), was not to be construed to exclude specific performance, especially when considering the legislature's demonstrated concern for the protection of the rights of a purchaser who had partially paid the purchase price of immovable property: paras 39 and 40.

[20] Botha above n 15 para 43.

- [21] Botha above n 15 para 49 footnotes excluded.
- [22] Botha above n 15 para 51.
- [23] Botha above n 15 para 37.
- [24] See the judgment of Froneman J in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2017] ZACC 32; 2017 (12) BCLR 1562 (CC); 2018 (1) SA 94 (CC) ('Trinity') para 157, and the authorities cited there.
- [25] Botha above n 15 paras 6 and 8. By that time, she had already paid instalments in excess of half of the purchase price.
- [26] ADJ Van Rensburg et al 'Contract' (3rd ed) in WA Joubert and JA Faris *LAWSA* (3rd ed) (vol 9) (2014) para 391. In other words, the need for a 'demand', referenced in s 27(1), may be read to relate only to the possible remedies flowing from ss 27(3) and 28(1). Also see the judgment of Corbett J in *Theron v Theron* 1973
- (3) SA 667 (C).
- [27] Chetty above n 13 para 17.
- [28] Chetty above n 13 para 16. Also see *Win Twice Properties (Pty) Ltd v Binos and Another* 2004
- (4) SA 436 (W) at 441C–444B.
- [29] What constitutes a valid demand in law is a question of fact: see *Kragga Kamma Estates CC v Flanagan* [1994] ZASCA 137; 1995 (2) SA 367 (A) ('Kragga Kamma Estates') at 374E–G, cited with approval in *Trinity* above n 24 para 74.
- [30] *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* [2020] ZACC 13; 2020 (9) BCLR 1098 (CC); 2020 (5) SA 247 (CC) ('Beadica').
- [31] *Beadica* above n 30 para 1.
- [32] Clause 6 of the agreement provides as follows: 'In the event of this sale being cancelled by reason off any default on the part of the purchaser, all amounts paid by the purchaser up to the point of cancellation shall be forfeited by and not be refundable to the purchaser. The seller retains the right to claim damages from the purchaser for breach of contract in terms of clause 18 hereof.' See *Beadica* above n 30 para 49: Botha principally concerned the interpretation and application of s 27 in the context of a contract of an instalment sale, in particular a contract of sale that contained a cancellation clause, which provided for forfeiture.
- [33] Botha above n 15 para 41.
- [34] *Gericke v Sack* 1978
- (1) SA 821 (A) at 827H–828A.

- [35] See GB Bradfield Christie's The Law of Contract in South Africa (8th Ed) (2022) at 673.
- [36] Sonia (Pty) Ltd v Wheeler [1958] 2 All SA 38; 1958 (1) SA 555 (A) at 560-561, citing Lebedina v Schechter and Haskell 1931 WLD 247.
- [37] Para 3.1 of the answering affidavit.
- [38] The trust's supplementary heads of argument appear to suggest that the school had failed to plead a justiciable right of action for which it was obliged to answer. That submission is factually incorrect. The founding affidavit specifically pleaded reliance on chapter 3 of the Act, and went so far as to quote s 27(1).
- [39] Botha above n 15 para 51.
- [40] Ibid.
- [41] Botha above n 15 para 51.
- [42] Santam Ltd v Ethwar [1998] ZASCA 102; 1999 (2) SA 244 (SCA) at 256F-H; [1999] 1 All SA 252 (A).
- [43] Ethekewini Municipality v Mounthaven (Pty) Ltd 2019 (4) SA 394 (CC) ('Ethekewini').
- [44] Ethekewini above n 43 para 8.
- [45] S 12(3) of the Prescription Act 68 of 1969 ('the Prescription Act').
- [46] See Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 8. A debt to perform contractual obligations generally becomes due in accordance with the provisions of the contract, properly interpreted: Bradfield above n 35 at 594.
- [47] On the benefits afforded to purchasers, and the corresponding burdens or restrictions on the rights of sellers, in terms of the Act, in general, see Van Niekerk and Another v Favel and Another 2008 (3) SA 175 (SCA) para 10. As already indicated, following Botha, the remedy for specific performance remained available to the school notwithstanding the provisions of s 27(3) of the Act. In accordance with the general principles applicable to reciprocal obligations, an applicant claiming specific performance must perform, or, as in the present instance, tender to perform, its own reciprocal obligations: Bradfield above n 35 at 664 and 665; Crispette and Candy Co Ltd v Michaelis NO and Another 1947 (4) SA 521 (A). Also see Muller et al above n 9 at 484.

[48] The Constitutional Court has upheld as a ‘fundamental principle of prescription’, and based on the wording of the current act in comparison to the 1943 legislation, that ‘it will begin to run only when the creditor is in a position to enforce his right in law, not necessarily when that right arises: *Trinity* above n 24 para 40, read with paras 95, 99 and 100. The Prescription Act provides that prescription ‘shall commence to run as soon as the debt is due’, to be contrasted with the earlier legislation that prescription shall run ‘from the date on which the right of action first accrued against the debtor’:

s 5 of the Prescription Act 18 of 1943. Also see *Phasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000

(2) SA 455 (W) (*Phasha*) at 463G–464A; 468H–469C. See, for example, *Dongwe NO v Slater-Kinghorn NO and Another* 2009 JDR 1341 (KZP) (*Dongwe*) para 2.

[49] See the judgment of Van den Heever J in *Benson and Another v Walters and Others* 1981

(4) SA 42 (C) (*Benson*), cited with approval in *Santam Ltd v Ethwar* above n 42 at 256A–B.

[50] The SCA has confirmed that there is a difference between the coming into existence of a debt, on the one hand, and the recoverability

thereof, on the other: *Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd* [2016] ZASCA 91; 2017 (1) SA 185 (SCA) para 24. There is also authority that a debt may only be due after the occurrence of some future event: *Mtati v Whitesides Attorneys* [2018] ZAECGHC 32 para 17. Based on such decisions, and the general approach in *Botha*, it may, for example, be open to argument that a purchaser was not in a position to claim transfer. Bearing in mind the exception *non adimpleti contractus*, and the specified condition of registration of a mortgage bond in s 27(1) of the Act, the debt would then not be ‘due’ in terms of s 12(1) of the Prescription Act.

[51] *Lamprecht v Lyttleton Township (Pty) Ltd* 1948

(4) SA 526 (T) at 530–531. Also see *MM Loubser Extinctive Prescription* (2nd Ed)

(2019) at 139.

[52] The benefit afforded by the section would be negated if a purchaser was not able to decide when to trigger its effect, and was restricted to claiming the entitlement at the moment that 50 per cent of the purchase price was paid. There may be various reasons for invoking the implied term at a much later point in time, for example once the purchaser was able to secure the necessary financial backing to comply with the stipulated condition of simultaneous registration of a first mortgage bond.

[53] It may be noted that the agreement included the following waiver clause: ‘No indulgence, latitude or extension of time which may be allowed by the seller to the purchaser in respect of any payment

provided for herein or any matter or anything which the purchaser is bound to perform in terms hereof, shall be deemed to be a waiver of the seller's right at any time and without any notice to require strict and punctual compliance with each provision and term hereof.' No arguments were advanced in respect of the relevance of this, if at all, for the issues under consideration.

[54] On the role of context, including the parties' subsequent conduct in implementing their agreement, in interpretation of a contract, see the judgment of Wallis JA in *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transports (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA); [2014] 1 All SA 517 (SCA) para 12 and *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 para 15.

[55] S 14(2) provides: 'If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt, from the date upon which the debt again becomes due.' See Loubser above n 51 at 225.

[56] *Cape Town Municipality v Allie* NO 1981

(2) SA 1 (C) at 5G–H, cited with approval in *Investec Bank Limited v Erf 436 Elandspoort (Pty) Ltd and Others* [2020] ZASCA 104 ('Investec'); 2021 (1) SA 28 (SCA) para 29.

[57] *Benson* above n 49 at 50F–H.

[58] On the importance of context, see *Investec* above n 56 para 43.

[59] See *Investec* above n 56 para 33.

[60] *Dongwe* above n 48 para 27, and the authorities cited there.

[61] *Bradfield* above n 35 at 595.

[62] *Standard Bank v Miracle Mile Investments* [2016] ZASCA 91; [2016] 3 All SA 487 (SCA); 2017 (1) SA 185 (SCA) para 24. A debt is due when the creditor acquires a complete cause of action for the recovery of the debt, i.e. when the entire set of facts which the creditor must prove in order to succeed with their claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditor to institute action and to pursue their claim: *Truter and Another v Deyssel* [2006] ZASCA 16; 2006 (4) SA 168 (SCA) para 16.

[63] *BBS Empangeni (formerly ZTC Cashbuild CC) v Phoenix Industrial Park (Pty) Ltd and Another* [2011] ZAKZDHC 1 para 11.2. Also see *Dongwe* above n 47 para 32: the claim for transfer is enforceable as soon as a tender of payment can be made, but prescription will not set in until the reciprocal claim for payment of the instalments has prescribed.

[64] See *Benson* above n 48 and the authorities cited therein, as cited in *Phasha* above n 47 at 469E–470A.

[65] *Macleod v Kweyiya* [2013] ZASCA 28; 2013

(6) SA 1 (SCA) para 13.

[66] See *Uitenhage Municipality v Molloy* [1997] ZASCA 112;) [1997] ZASCA 112; ;

[1998] 1 All SA 140 (A) 1998 (2) SA 735 (SCA) at 743B. Cf *Phasha* above n 47 at 473D–G.

[67] It may be noted that, unlike s 19 of the Act, s 27(1) makes no provision for the ‘demand’ to be issued by way of ‘letter’ or ‘notice’, and does not refer to any specific manner of communication. What constitutes a valid

demand in law is a question of fact: see *Kragga Kamma Estates* above n 29 at 374E–G, cited with approval in *Trinity* above 24 para 74.

[68] *Botha* above n 15 para 41.

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