THE LAW OF PURCHASE AND SALE

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LEGISLATION

There was no legislation affecting this branch of the law during 2013.

CASE LAW

Purchase and Sale

Formalities

Compliance with section 2(1) of the Alienation of Land Act 68 of 1981

Section 2(1) of the Alienation of Land Act 68 of 1981 once again raised its ugly head in *Osborne and Another v West Dunes Properties 176 (Pty) Ltd and Others* 2013 (6) SA 105 (WCC).

The first plaintiff, Mr PJ Osborne, concluded a deed of sale for a farm situated at Farm 1581, Paarl in the Drakenstein Municipality, ('the formal agreement') on behalf of the second plaintiff, PJ Osborne (Edms) Bpk, as the purchaser, with the first defendant, West Dunes Properties 176 (Pty) Ltd, as the seller. This formal agreement was subsequently signed by Mr PJ Osborne on behalf of PJ Osborne (Edms) Bpk and Mr Le Roux on behalf of West Dunes Properties 176 (Pty) Ltd. However, it appeared that the intended purchaser was, in fact, an unidentified, registered shelf company, represented by Mr PJ Osborne, the name of which would afterwards be duly changed ('the true agreement').

Acting on the instructions of Le Roux, Osborne then paid the amount of R2 500 000, as part payment of the purchase price of R17 500 000, to the third defendant, Kleinevalleij Wedding and Conference Estate (Edms) Bpk.

Subsequently, the plaintiffs alleged that Le Roux, acting on behalf of the defendants, fraudulently failed to disclose certain material facts about the property, and instructed their attorney to

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cancel the transaction and recover the R2 500 000 from the defendants.

Four exceptions were raised against the plaintiff's particulars of claim, one of which was that the particulars of claim were based on an agreement of sale that was void for non-compliance with s 2(1) of the Alienation of Land Act, and secondly, for vagueness as the true purchaser (the shelf company) had not been identified in or signed the deed of alienation.

In order to succeed with this claim, it was necessary to rectify the 'formal agreement' to reflect the 'true agreement'. In other words, PJ Osborne (Edms) Bpk had to be replaced as the purchaser, by the unidentified registered shelf company.

Blignault J held at the outset that Mr PJ Osborne had acted as a representative in both the 'formal agreement' and 'true agreement' (para [22]). For this reason he was not a party to any of the agreements and all rights and obligations vested in his principals, PJ Osborne (Edms) Bpk or the unidentified shelf company (ibid).

The court again confirmed the trite common-law principle that all material terms of an agreement must be identified with adequate certainty to escape the agreement being void for vagueness (para [27]; *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd* 1992 (1) SA 566 (A); *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A)).

In *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A) it was held that the identity of the parties is one of the essential terms of an agreement. In the present matter, although the purchaser in the 'formal agreement' was sufficiently identified, the same could not be said of the actual purchaser in the 'true agreement' which had only been identified as a shelf company with no identifiable name or registration number (para [29]). Blignault J therefore held that in terms of the above common-law principle, the alleged 'true agreement' was void for vagueness as the true purchaser was unidentifiable (ibid).

Furthermore, and notwithstanding the common-law hiccup, the plaintiffs faced two further complications based on s 2(1) of the Alienation of Land Act (para [31]). Section 2(1) provides that

> No alienation of land . . . shall be of any force and effect unless it is contained in a deed of alienation *signed by the parties thereto* or by their agents acting on their written authority (own emphasis).

Blignault J pointed out that although the identity of the parties is often regarded as an essential term, the real nature of the identity of the parties that are the parties to an agreement are the persons that create the legal tie (*vinculum iuris*) between them which is the fundamental legal source of the agreement (para [32]). Consequently, the identity of the parties is often portrayed as an 'essential part' rather than an 'essential term' of an agreement (ibid; *Godfrey v Paruk* 1965 (2) SA 738 (D); *Redemeyer v Hughes* 1946 OPD 430).

Nevertheless, although the distinction between the description of the identity of the parties as an 'essential part', as opposed to an 'essential term' of an agreement, may usually be of little significance, it is, according to Blignault J, meaningful to draw this distinction in the application of s 2(1) when the rectification of an agreement is to be considered (para 33). Blignault J substantiated his reasoning as follows

> The reason for this is that the statute itself uses the term 'parties', as opposed to the term 'alienation'. The latter I would suggest, encompasses the ordinary terms of the agreement (para [33]).

The court confirmed the established principle that a written agreement may be rectified if it does not correctly echo the parties' real intention, provided that the formal agreement is valid *ex facie* the document (para [34]; *Magwaza v Heenan* 1979 (2) SA 1019 (A); *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA)). Blignault J also, correctly, indicated that an agreement cannot be rectified if the rectification would result in an invalid agreement (para [34]).

Section 2(1) requires the deed of alienation to be signed by '*the parties thereto*'. The court held that this undoubtedly implies that the true and not the formal parties to the deed of alienation must sign it, since no legal tie (*vinculum iuris*) between the formal parties has come into existence (para [35]). It is therefore crucial that the true parties be identified in the written document (ibid).

In the present matter only the formal and not the true party — ie the unidentifiable shelf company — was identified (ibid). For this reason no legal tie (*vinculum iuris*) existed between the shelf company and first defendant (ibid). As the 'formal agreement' did not identify the true purchaser, it was void and consequently not capable of rectification (para 37; PM Nienaber 'Oor die beskrywing van partye in 'n koopkontrak van grond' P van Warmelo (ed) *Huldigingsbundel Prof Daniel Pont* (1970) 250).

In conclusion, Blignault J held that the 'formal agreement' did

not comply with the provisions of s 2(1) of the Alienation of Land Act for two reasons: *(a)* it did not identify the parties to the agreement; and *(b)* neither the 'formal agreement' nor the 'true agreement' was signed by the true purchaser to the agreement(s) (paras [37], [38]).

Consequently the 'formal agreement' was not susceptible to rectification (para [41]).

A possibility which the court could, in my view, also have contemplated is that the 'formal agreement' could not be rectified since the 'true agreement' did not necessarily reflect the mutual, true intention of all the parties.

To put the signature prerequisite of s 2(1) in perspective, the following principles must be kept in mind: *(a)* It is not necessary to indicate who signed the deed of alienation and in what capacity, provided that it can be determined *ex facie* the document who signed as seller and who signed as purchaser (*Herselman v Orpen* 1989 (4) SA 1000 (SE)); *(b)* in order to determine whether this statutory requirement has been complied with, the contract as a whole must be interpreted (*Cook v Aldred* 1909 TS 150; *Van der Merwe v Kenkes (Edms) Bpk* 1983 (3) SA 909 (T); *Chisnall and Chisnall v Sturgeon and Sturgeon* 1993 (2) SA 642 (W); *Ten Brink NO v Motala* 2001 (1) SA 1011 (D); *(c)* merely looking at the signatures and their description in that specific portion of the contract would be a blinkered approach (ibid); *(d)* the signature requirement in s 2(1) raises two questions: who are the parties to the deed of alienation? — the answer to which can be found in the deed of alienation itself; and did the parties sign the deed of alienation? — which is a question of fact (ibid); *(e)* the question of compliance with s 2(1) cannot be determined by *a priori* rules, but only with reference to the facts of each individual case and previous decisions on this aspect must therefore be treated with circumspection and in such a way that the factual circumstances of each case are distinguished from those of other cases (ibid); *(f)* unless the relevant statute introduces specific requirements, signing is achieved by a mark or marks appended 'with the function of making the document an act of the writer' and intended to signify the assent of the signatory to that which is embodied in the relevant contract of sale (ibid); *(g)* this assent to the contents of the contract must not be determined objectively (ibid); *(h)* the capacity in which a person signs a contract need not be indicated, and an incorrect designation added to the signature should not, as a general rule,

detract from the validity of the signature (ibid); *(i)* a single signature may, in appropriate circumstances, indicate assent to one or more contracts or capacities (ibid).

Voster & others v Voster & others (ECG 10 January 2013 (case CA366/2011), unreported) brilliantly illustrates that co-ownership remains the mother of inevitable conflict.

In this matter the co-owners of a property known as Erf 3686 Korsten Port Elizabeth, were R Voster and E Voster who were married in community of property, MJL Eades and GD Eades also married in community of property, and S Voster. Each co-owner owned a one-third undivided share in this property on which they had conducted a steel manufacturing business since 1995. It was common cause that the relationship between R Voster and E Voster ('the appellants') on the one hand, and MJL Eades and GD Eades and S Voster ('the respondents') on the other hand, had deteriorated beyond reconciliation to the extent that both the applicants and respondents filed claims and counter-claims for the termination of the co-ownership.

On 4 March 2011 the appellants concluded a deed of alienation with SC Bresler in terms of which they sold their one-third undivided share in the property to Bresler. However, on receipt of Bresler's offer, the appellants approached the respondents with a counter-proposal to sell their one-third share to them at the price Bresler had offered. This proposal was rejected by the respondents as, according to them, the price was unrealistic and the agreement with Bresler was void for non-compliance with s 2(1) of the Alienation of Land Act 68 of 1981.

The respondents raised two arguments regarding non-compliance with s 2(1). First, the description of the property was deficient, and secondly, that the deed of alienation had not been co-signed by the respondents in their capacity as co-owners.

The description of the property appeared in the preamble to the agreement as: 'I the undersigned . . . hereby offer to purchase . . . the fixed property being Erf No 3686 Korsten . . .'.

The respondents submitted that this description of the property was inadequate as a one-third undivided share, and not the whole of the property was being sold, and the reference in clause 18 of the deed of alienation which recorded that: '[T]he purchaser buys only a (one third) of the abovementioned property. . .', was of no significance and did not cure the defect in so far as it contradicted the intention of the parties as expressed in the preamble to the deed of alienation.

The trial court agreed with the above submissions by the respondents and declared the deed of alienation between the appellants and Bresler null and void. In addition, the trial court held that the respondents had a right under the *actio communi dividundo*, and issued an order interdicting the appellants from alienating their one-third share in the property until the pending claim and counter-claim for the termination of the co-ownership by the appellants and respondents had been finalised.

In *Robson v Theron* 1978 (1) SA 841 (A) the court described the *actio communi dividundo* as a *bona fide* two-sided action for the division of common property by those who hold the property generally by particular title, or those who hold the property in undivided shares, whether they are direct or beneficial owners. It follows that the purpose of the *actio communi dividundo* is to effect the division of the property and payment of the *preastationes personales* relating to the profits or expenses (para [22]; Voet 10.3.1; D10.3.2; D10.3.30).

On appeal, Dambuza J reiterated the general position that the courts are flexible when considering the legitimacy of written agreements governing land provided that the objectives of the legislator to provide certainty, preventing litigation, fraud and perjury are not undermined (para [13]; AJ Kerr *The law of sale and lease* 3 ed (2004) 91; *Wilken v Kohler* 1913 AD 135; *Van der Merwe v Cloete and Another* 1950 (3) SA 228 (T); *Grobler v Naude* 1980 (3) SA 320 (T)).

The court of appeal agreed with the statement by Watermeyer CJ in *Van Wyk v Rottcher Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A), where he held that a written contract does not comply with the statutory requirements, unless the mere reading of the document is sufficient to identify the land sold without invoking the aid of any evidence to establish the identity of the *res vendita* (para [13]).

Accordingly, Dambuza J held that there is no valid reason for the above clause 18 to be severed from the (preamble) to the agreement as the clause definitely recorded the context in which the agreement was concluded and the intention of the contracting parties (para [15]). Consequently, clause 18 amplified the description of the property sufficiently to comply with the prerequisites of s 2(1) of the Alienation of Land Act as defined in *Clements v Simpson* 1971 (3) SA 1 (A) 98G.

The test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to

evidence from the parties as to their negotiations and *consensus* (para 16]).

The court of appeal therefore found that the trial court had erred in finding that the description of the *res vendita* was inadequate and rendered the deed of alienation void (para [17]).

Dealing with the respondents' second attack on the deed of alienation — that they had not co-signed it — Dambuza J emphasised that the land sold was an '*undivided share*' as an undemarcated portion of the entire property (para [19]). With reference to HS Nel *Jones Conveyancing in South Africa* 4 ed (1991) 117, Dambuza J held that a '*share in land*' as defined in s 102 of the Deeds Registries Act 47 of 1937, refers to an '*undivided share*' and it may not be understood to represent a defined portion of land to which the owner of the undivided share holds a separate title (para [19]). As a result, and since the appellants only sold their one-third undivided share in the property, it was pointless for the co-owners (respondents) to be signatories to the deed of alienation (para [20]). However, if the whole of the property was alienated, as was the situation in *Docrat v Willemse and Others* 1989 (1) SA 487 (N), the signatures of all the co-owners would have been a compliance requirement in terms of s 2(1) of the Alienation of Land Act (ibid).

Dealing with the above interdict of the trial court barring the appellants for proceeding with the sale of the property to Bresler, the court of appeal underlined the fact that the appellants had afforded a right of first option to the respondents to purchase their one-third undivided share of the property, which they had rejected (para [21]). The court of appeal held that in the absence of a specific agreement, a co-owner has no automatic pre-emptive right by operation of law to purchase a co-owner's undivided share in property. To impede a co-owner from alienating his or her undivided share in these circumstances would make no sense (paras [22]–[24]). Disagreement on the purchase price between co-owners is not a valid ground for prohibiting the alienation of an undivided share to a third person (ibid). Therefore, the *actio communi dividundo* does not allow the respondents to acquire the appellants' one-third undivided share at their price (para [24]).

The right of a co-owner freely to alienate his or her undivided share is appropriately cemented in our law (ibid). In conclusion, the court of appeal held that the effect of the interdict granted by the trial court prohibiting the appellants from proceeding with the

sale to Bresler, recognised a right which the respondents never had (para [25]).The appeal succeeded. All things considered, I think one should spare a sympathetic thought for poor Mr Bresler who was prepared to stick his nose into this family feud.

Warranties against latent defects

A leaking thatch roof was the bone of contention in *Banda and Another v Van der Spuy and Another* 2013 (4) SA 77 (SCA). It was common cause that although the respondents had made repairs to the roof before the sale, the roof continued to leak after the sale. In order to encourage the appellants to proceed with the transaction, an addendum was added to the deed of sale specifying that the: 'Seller [would] transfer guarantee on the thatch roof to the purchaser from the contractor.' However, the problem with the leaking roof persisted.

In the trial court, the appellants' claim for a reduction in the purchase price was based on the *actio quanti minoris*, alternatively, a fraudulent misrepresentation derived from an invalid roof repair guarantee and the *actio ex empto*. All these claims were dismissed by Boruchowitz J as the appellants could not prove the existence of the latent defects *and* the respondents had been aware of these defects *and* had fraudulently failed to disclose them to the appellants.

The crux of the matter on appeal was whether the appellants had proved the respondents' essential knowledge of the latent defects in the roof, which they had then fraudulently concealed from the appellants. In determining this, the fact that it was common cause that the respondents had effected repairs to the roof also had to be taken into account to establish whether they had had sufficient knowledge that the repairs had not properly or adequately rectified the defects so as to prevent the roof from leaking (para [6]).

The Supreme Court of Appeal held that an objective evaluation of the facts is essential in ascertaining whether the respondents knew of the latent defects and had, with intent to defraud the appellants, concealed these defects from them (para [11]). Any conclusion must be drawn exclusively from the facts revealed by the evidence (ibid).

Central to this enquiry was, first, the evidence of two expert witnesses who testified that the reasons for the leaks in the roof were an ineffective roof support structure — of which the respondents were properly aware – and an inadequate roof pitch of 30

degrees instead of 45 degrees — of which the respondents were unaware. Secondly, the evidence substantiating that the above addendum to the deed of sale concerning the contractor's roof guarantee, which had already expired when it was furnished, was misleading and fraudulent, and finally, confirmed that the respondents knew that the repairs to the roof were incomplete (paras [8]–[10], [13]–[19]).

Referring to *R v Myers* 1948 (1) SA 375 (A) where it was held that

> (A)bsence of reasonable grounds for belief in the truth of what is stated may provide evidence that there was in fact no such belief . . . [T]hough in fact entertained by the representor may have been itself the outcome of a fraudulent diligence in ignorance — that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires, and is determined to and afterwards does (in a sense) believe (382–3),

and *Hamman v Moolman* 1968 (4) SA 340 (A) where it was added that

> The fact that a belief is held to be not well-founded may, of course, point to the absence of an honest belief, but this fact must be weighed with all the relevant evidence in order to determine the existence or absence of an honest belief (347).

Swain AJA held that the first respondent had avoided obtaining a clear picture of the extent of the latent defect and the sustainability of the repairs, and his conduct clearly construed a 'wilful abstention' from the truth (paras [12], [20]–[22]). Taking all the above into consideration together with the fraud relating to the invalid contractor's roof guarantee, Swain AJA further concluded that the first respondent did not honestly believe in the adequacy of the repairs to the roof and consequently had a duty to disclose the latent defect to the appellants (para [22]). The fact that the respondents were unaware that the roof leaks were caused by an inadequate roof pitch of 30 degrees instead of 45 degrees did not influence the fact that their conduct was fraudulent. This resulted in the forfeiture of the protection of the voetstoots clause (paras [23], [24]). In these circumstances, and as it is trite that the seller is liable for all latent defects which render the *res vendita* unfit for the purpose for which it was intended to be used, the appellants were entitled to the difference between the purchase price of the house and its value with

the defective roof (paras [24], [25]). As no evidence was led as to the market price of the house with the defective roof at the time of the sale, the court was (as decided in *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T)) entitled to take the repair cost as a gauge to determine the amount to be awarded (para [25]). In this instance an amount of R449 499 plus interest was awarded (para [34]).

The Supreme Court of Appeal also held that the alternative delictual claim based on a fraudulent or negligent misrepresentation had to succeed (paras [26]–[32]). (For a detailed discussion of Swain AJA's reasons see the chapter 'The Law of Delict'.)

In a very interesting article, 'Koop van 'n saak vir sy normale of vir 'n bepaalde doel. En die een en ander oor *winkeldochters*' (2013) 1 *TSAR* 1 JM Otto discusses the content of a seller's duty to deliver a thing sold that is fit for the purpose that it is normally used, or for the purpose that the purchaser, with the knowledge of the seller, intends to use it, in the context of the Dutch *Burgerlijk Wetboek* and the Consumer Protection Act 68 of 2008. He concludes that the rights created by the Consumer Protection Act are not exclusive or exhaustive and co-exist with any remedies the consumer may have in terms of the common law and contractual warranties otherwise provided by the seller.

It should be kept in mind that the courts were long divided on what should be proved before a *voetstoots* clause can be impugned. On the one hand, there is authority that the mere non-disclosure of the latent defect of which the seller was aware at the time of the making of the contract will nullify his or her protection in terms of the *voetstoots* clause. On the other hand, authority exists for the proposition that a purchaser can only divest a seller of the protection afforded by a *voetstoots* clause if he or she is able to prove that the seller was, in fact, aware of the existence of the latent defect at the time of the making of the contract and that he or she, with the intention to defraud (*dolo malo*), concealed its existence from the purchaser. It was only in 1991 that Supreme Court of Appeal approved the latter view (*Van der Merwe v Meades* 1991 (2) SA 1 (A)).

Then again, an interesting approach in this regard was followed in *Truman v Leonard* 1994 (4) SA 371 (SE) where the court held that a contractual undertaking resulting from fraud would, on grounds of public policy, not be enforceable in law. Therefore, where the seller deliberately (fraudulently) conceals the latent defect, one cannot simply think away the *voetstoots* clause. The

clause remains, but the seller is entitled to rely on it only to the extent that he acted honestly. With reference to *Voet* 21 1 10, the court further held that a seller who has knowledge of the latent defect but fails to disclose it to the purchaser, would still be liable under the aedilitian actions, despite the presence of a *voetstoots* clause. Further, if the purchaser has suffered because of the seller's deliberate (fraudulent) concealment of a latent defect, the cause of action, despite the *voetstoots* clause, can be based either on the aedilitian actions or in delict, on the ground of fraudulent misrepresentation.

Scope of conveyancer's mandate in the execution of a deed of sale

A long-standing issue is whether a conveyancer acts only on behalf of the seller or for both the seller and purchaser. In addition, the scope of a conveyancer's mandate is often a bone of contention. Both these questions were addressed in *Nortje v Fakie* 2013 (1) SA 577 (KZP).

The deed of sale between Nortje and Fakie stipulated that all amounts due by the seller would be paid in accordance with the written directions of the conveyancer, and if the purchaser delayed the transfer, he or she would be held liable for interest from the date on which the purchaser was notified of the delay in writing by the conveyancer.

In order to place Fakie in *mora* and set up a claim for cancellation and damages, a letter of demand compelling Fakie to rectify his breach was sent by Nortje's attorney, who was not the appointed conveyancer. Fakie did not respond to this letter of demand, and a claim for the cancellation of the deed of sale and contractual damages — or alternatively delictual damages — was brought against him in the magistrate's court.

The magistrate dismissed these claims and held that the notice claiming cancellation and contractual damages was invalid as it had not been given by the appointed conveyancer. Nortje's alternative claim for damages based on delict was also unsuccessful as it was, according to the magistrate, not sustainable in law. Nortje appealed against this decision.

It was held on appeal that both the seller and the purchaser entrusted the conveyancer with the right and discretion to determine, on the basis of a value judgment, when performance was due bearing in mind that the conveyancer is the person best qualified to conclude whether there has been a delay and at whose door it could be laid (paras [6], [7]). Consequently, the

seller had waived the right to furnish this notice himself or to instruct anyone other than the conveyancer to do so (para [8]). Accordingly, Nortje's attorney was not entitled to give the notice in an attempt to place Fakie in *mora* so that he could claim cancellation and damages (para [10]).

It is worth noting that if a purchaser is in *mora* for not paying the purchase price punctually, a seller remains entitled to be compensated for interest *a tempore morae*, notwithstanding the absence of a contractual obligation to pay interest or the lack of proof that he or she has suffered a loss (*Linton v Corser* 1952 (3) SA 685 (A); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA); *Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga and Others* 2013 (2) SA 259 (SCA)). Where a default clause has been agreed on, it is irrelevant whether a seller may have had the benefit of the property for the interim breach period, and this benefit will also not constitute a defence to a purchaser's deliberate default (*Crookes Brothers Ltd* above).

The court of appeal also held that the fact that the conveyancer is nominated by the seller does not imply that he or she acts exclusively as an agent for the seller (para [8]). With reference to *Basson v Remini and Another* 1992 (2) SA 322 (N) and *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A), it was further held that by accepting appointment as conveyancer, the conveyancer becomes the agent of both the seller and the purchaser and is compelled to exercise an independent professional judgement (ibid).

In order to establish the scope and context of a conveyancer's duty, it is in my view also necessary to take the following general principles into consideration: *(a)* A conveyancer must secure and safeguard payment of the purchase price. *(b)* A conveyancer has a fiduciary duty to scrutinise the relevant deed of sale thoroughly in order to clarify how and when the purchase price will be paid. *(c)* Registration of transfer and payment of the purchase price are usually effected *pari passu*. *(d)* A conveyancer has a duty to point out the risks of, and to advise a purchaser against payment of, any advances to a seller before the registration of the property in his or her name. *(e)* Although it is an exception to well established conveyancing practices, guidelines, procedures and rules, it is not uncommon, but remains inadvisable, that advances to a seller on the purchase price are made before registration. *(f)* Finally, clause 4.2.2 of the Guidelines for Conduct of Property

Law Matters compiled by the Property Law Committee in conjunction with the Ethics Committee of the Law Society of South Africa, instructs that the relationship between the conveyancer and purchaser requires that a conveyancer must

> Inform the purchaser of his/her obligations in terms of the deed of sale and, in particular, explain to him/her the legal consequences of the material conditions.

It would be grossly negligent of a conveyancer to be instrumental in the drafting or execution of a deed of sale that is not in compliance with the above practices. (See *Coetzee v Wilsenach Van Wyk Goosen en Bekker Inc* GNP 4 December 2013 (case 57161/11), unreported.)

Since Nortje already had effective contractual remedies available to deal with any breach, the alternative claim for delictual damages founded on the contention that Fakie owed Nortje a duty of care to disclose that there might have been a delay in the registration of the transfer arising out of the winding-up of the estate of Fakie's late husband, was also dismissed on appeal in accordance with the guiding principles laid down in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A). These guiding principles, inter alia, necessitate that a court should be reluctant to extend the law of delict into a contractual area, thereby eliminating provisions which the parties considered necessary or desirable for their own protection (paras [12], [13]).

The scope of a conveyancer's rights and duties were again considered in *Margalit v Standard Bank of South Africa Ltd and Another* 2013 (2) SA 466 (SCA) where a transfer was delayed when the deeds office twice rejected mortgage bond cancellation documentation as a result of its incorrect and negligent preparation by the appointed conveyancer.

The Supreme Court of Appeal held that not every mistake made by a conveyancer is to be tainted with negligence (para [23]). In order to succeed with a claim against a conveyancer based on negligence it must be proved — as was directed in *Van der Spuy v Pillans* 1875 Buch 133 — that the conveyancer's mistake resulted from a failure to exercise the degree of skill and care that would have been exercised by a reasonable conveyancer in the same position (ibid). In this instance no hard and fast rules can be prescribed (para [25]). However, in the case of a conveyancer, it is inevitable that any mistake which may lead to the delay of the registration of a transaction will always have adverse

financial consequences for one of the parties to the transaction (ibid). To avoid such harm, Leach JA emphasised that conveyancers should be meticulous in their work and take due care in the preparation of their documents in order to comply with their obligations imposed by s 15A read with regulation 44 of the Deeds Registries Act 47 of 1937 (para [26]). Both these statutory provisions oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds they prepare.

Sale of agricultural land

Section 3 of the Subdivision of Agricultural Land Act 70 of 1970 provides that 'no portion of agricultural land' shall be sold or leased, unless the Minister has consented thereto in writing. Failure to obtain such consent before the conclusion of a sale or lease relating to a portion of agricultural land to be subdivided, will render the agreement void, whether or not it is subject to a suspensive condition relating to the Minister's consent (*Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA (CC); Lötz & CJ Nagel '*Geue & Another v Notling* [2003] 4 All SA 553 (SCA): Verbod op die verkoop van landbougrond sonder die Minister se toestemming kragtens artikel 3*(e)*(i) van die Wet op Onderverdeling van Landbougrond' (2004) 67(4) *THRHR* 702).

In *Adlem and Another v Arlow* 2013 (3) SA 1 (SCA), the appellant leased the 'Remaining Extent of Portion 3 and Remaining Extent of Portion 16 (a Portion of Portion 3) of the farm Knoppieskraal 73 JP North West Province' from the respondent. It was common cause that the respondent held both pieces of land in terms of Deed of Transfer T2426/2004.

The gist of the respondent's argument was that s 3 relates to 'a portion of agricultural land' meaning any portion of agricultural land — registered or unregistered — and that the term 'a portion' should be interpreted widely and given its general dictionary meaning. For this reason, so it was argued, the lease agreement was void as it was linked to 'a portion' of agricultural land to the leasing of which the Minister had not consented in writing. The consequence of this argument is that a piece of agricultural land that has already been subdivided and registered in the Deeds Registry could not be sold or let in terms of a long lease without the consent of the Minister.

The Supreme Court of Appeal was not persuaded by this argument and held that the purpose of the Subdivision of

Agricultural Land Act 70 of 1970, as confirmed its long title, was not to control both the subdivision and the use of agricultural land, 'but the subdivision and, *in connection therewith*, the use of such land' (para [12]). The Act consequently does not empower the Minister to control the use of agricultural land in general, but only in instances where a subdivision of agricultural land, in the literal sense, is envisaged in accordance with ss 3*(a)* and *(e)*(i) of the Act, or in the extended sense as contemplated by ss 3*(d)* — a lease for ten years or longer — and 3*(e)*(ii) — a real right for ten years or longer (ibid).

Cloete JA came to the conclusion that the word 'portion' in s 3 means

> [A] piece of land that forms part of a property registered in the Deeds Registry; and . . . the prohibition is aimed at preventing physical fragmentation of the property, and the use of a part of the property under a long lease — as well as, I would add, the granting of a right for an extended period in respect of the property. In other words, the word 'portion' in, inter alia, s 3*(d)* must be interpreted as meaning a part of a property (as opposed to the whole property) registered in the Deeds Registry, and not as having the meaning used in the deeds registry to describe the whole property (para [13]).

Therefore it was held that although the appellant leased the Remaining Extent of Portion 3 and Remaining Extent of Portion 16 (a Portion of Portion 3) of the farm Knoppieskraal 73 JP North West Province from the respondent, s 3*(d)* did not apply to the lease as the whole of the property owned by the respondents, and not a portion of it, was leased to the appellants (para [14]).

Sale in execution: Rights of a bona fide *purchaser*

Knox NO v Mofokeng and Others 2013 (4) SA (GSJ) deals with: *(a)* the rights of a *bona fide* purchaser at a sale in execution where the judgment in terms of which the sale was carried out has subsequently been rescinded; and *(b)* the validity of the transfer of the immovable property to successive *bona fide* purchasers in these circumstances.

The applicant was the appointed executor of the estate of his late mother, Mrs Knox. At the time of her death, her house in Troyeville, Johannesburg, was bonded to FirstRand Bank Ltd. The bond payments fell in arrears while the applicant was in the process of finalising the estate. However, the claim of FirstRand Bank Ltd was included in the final distribution account of the estate, and the bank was duly informed that their claim would be settled upon final conclusion of the estate.

This notwithstanding, FirstRand Bank Ltd continued with legal action and obtained default judgment and a writ of execution, after which the property was sold in execution to the second respondent, who, in turn, sold it to the first respondent, Mofokeng. Unfortunately the applicant did not receive any of the court documents, as they had been served at the *domicilium* noted in the bond and not at the applicant's known address. It was only once the property had been transferred to Mofokeng, that the applicant became aware of the state of affairs. He then successfully launched a rescission application setting aside the default judgment in favour of FirstRand Bank Ltd.

Following the rescission of the default judgment, Mofokeng vacated the property and returned physical possession to the applicant. Nevertheless, the property remained registered in Mofokeng's name. In the meantime, Mofokeng as mortgagor fell in arrears with his bond payments to Standard Bank of South Africa Ltd who had registered a first mortgage bond over the property. Standard Bank of South Africa Ltd successfully obtained judgment against Mofokeng and a writ of execution against the property, and the Sheriff of the High Court was instructed to sell the property at a sale in execution. The applicant then launched a successful urgent application to stay the sale in execution on condition that he apply for a court order for the retransfer of the property to the estate of the late Mrs Knox within 30 days. Against this background, the application under discussion was brought before Van der Merwe AJ.

Standard Bank of South Africa Ltd, the only party who opposed the application, raised two defences: that the application had not been not launched within the 30-day time frame; and that the first respondent, Mofokeng, remained the owner of the property as it was still registered in his name.

The applicant argued that because the default judgment obtained by FirstRand Bank Ltd had been rescinded, the subsequent sale in execution to the second respondent was invalid. In addition, it was contended by the applicant that the sale in execution was in contravention of s 30 of the Administration of Estates Act 66 of 1965. Section 30 provides that no person charged with the execution of any writ or other process shall sell any property in the estate of any deceased person which has been attached before or after his or her death, unless that person could not have known of the death of the deceased. The purpose of s 30 is to ensure that every creditor and heir receives what they

are entitled to, without preference (*De Faria v Sheriff, High Court, Witbank* 2005 (3) SA 372 (T)).

It has been accepted by the courts (*Vosal Investments (Pty) Ltd v City of Johannesburg and Others* 2010 (1) SA 595 (GSJ); *Jubb v Sheriff, Magistrate's Court, Inanda District and Others; Gottschalk v Sheriff, Magistrate's Court, Inanda District and Others* 1999 (4) SA 596 (D); *Joosub v JI Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd) and Others* 1992 (2) SA 665 (N)) that where a judgment is rescinded after a sale in execution but before transfer or delivery of the property to the purchaser, the owner of the property is entitled to an order setting aside the sale in execution and interdicting the transfer or delivery of the property to the purchaser (para [2]). Once the default judgment has been rescinded, the writ of execution and sale in execution has no legal foundation and the judgment debtor is entitled to have the *status quo ante* restored (para [3]; *Lottering v SA Motor Acceptance Corporation Ltd* 1962 (4) SA 1 (E); *Maisel v Camberleight Court (Pty) Ltd* 1953 (4) SA 371 (C); *Jasmat and Another v Bhana* 1951 (2) SA 496 (T)).

Where the sale in execution has been perfected by delivery of movable property or transfer of immovable property and the purchaser had, before delivery or transfer, knowledge of the proceedings instituted by the owner for rescission of the judgment, the owner will still be entitled to recover the property notwithstanding that there has been delivery or transfer of the property (para [5]; *Vosal Investments (Pty) Ltd v City of Johannesburg and Others*, above).

Where a sale in execution has been perfected by delivery or transfer to a *bona fide* purchaser who had no knowledge of the rescission proceedings, or where the transfer or delivery has been effected before the institution of the rescission proceedings, the owner of the property will not be entitled to recover possession of the property *unless* he or she can prove that the judgment or sale in execution was a nullity (para [5]). For example, where the sale in execution failed to comply with the peremptory provision of uniform rule 46(3) in so far as the sheriff did not notify the owner in writing of the intended sale in execution (para [16]; *Joosub v JI Case SA (Pty) Ltd* above; *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA)). Why the owner in the latter scenario may recover his or her property from a *bona fide* purchaser who was unaware of the rescinding procedures — notwithstanding that there has been delivery or transfer

— is that the sale in execution was invalid (para [18]). Consequently, the sheriff has no authority to conduct the sale in execution and transfer or deliver the property (ibid) and both the obligatory (sale) and real (transfer) agreements are invalid (ibid; *Menqa and Another v Markom and Others* above; *Campbell v Botha and Others* 2009 (1) SA 238 (SCA); *Meintjes NO v Coetzer and Others* 2010 (5) SA 186 (SCA)). However, if the real agreement is valid, the owner is not be entitled to recover his or her property, notwithstanding the fact that the obligatory agreement may be invalid (para [21]; *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA)).

The legal foundation for the above conclusions is dictated by the application of the abstract theory which was again endorsed in *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA) para [5]. In the latter case the Supreme Court of Appeal held that where registration of a transfer of immovable property is effected on the basis of fraud or a forged document, ownership of the property does not pass to the person in whose name the property is registered after the purported transfer (para [12]). It is an absolute prerequisite for ownership to pass to the transferee, that the real agreement is valid (*Nedbank Ltd v Mendelow and Another NNO* above paras [13]–[15]).

Our deeds registration system is a negative system which does not guarantee the title that appears in the deeds register, and is only intended to protect the real rights of those persons in whose name such rights are registered in the Deeds Office (*Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A)).

In order to determine the merit of the defence of Standard Bank of South Africa Ltd, Van der Merwe AJ held that the validity of the real agreement between the second and first respondent (ie the first sale and transfer in execution) be scrutinised to establish whether the first respondent, Mofokeng, had become the owner of the property (para [23]).

It was held in *De Faria v Sheriff, High Court, Witbank* (above) that non-compliance with the provisions of s 30 of the Administration of Estates Act 66 of 1965 resulted in a nullity as the wording of s 30 was clearly embedded in peremptory and negative language and linked to a criminal sanction imposed by s 102(1)*(h)* of the Act (para [26]; *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C)).

Since the property fell within the estate of the late Mrs Knox, Van der Merwe AJ held that the present matter was indeed

subject to the provisions of s 30 (para [27]). Moreover, as the applicant was cited in the summons in his capacity as executor of the estate of the late Mrs Knox, the sheriff should have been aware of the death of Mrs Knox (ibid). Consequently, the sale in execution was a nullity, and the sheriff had no authority to enter into the real agreement for the transfer of the property to the second respondent on the basis of the purported sale in execution (ibid). Given that the transfer of the property to the second respondent was invalid, the subsequent sale and transfer to the first respondent, Mofokeng, was also invalid, as the application of the *nemo plus iuris ad alium transferre potest quam ipse haberet* doctrine prevents the second respondent from becoming the owner of the property (ibid; *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA)). The applicant was consequently entitled to claim vindication of the property (para [28]).

It should, in general, be kept in mind that in the mortgage foreclosure context, s 26 of the Constitution of the Republic of South Africa, 1996, places a responsibility on courts to consider all the relevant circumstances before granting an execution and so to ensure that no person suffers an unjustified limitation of his or her right to access to adequate housing (*Jaftha v Schoeman; Van Rooyen v Stolz* 2005 (2) SA 140 (CC); *Gundwana v Steko Development* 2011 (3) SA 608 (CC); R Brits 'Sale in Execution of Property at Unreasonably Low Price Indicates Abuse of Process *Nxazonke v Absa Bank Ltd* [2012] ZAWCHC 184 (4 October 2012)' (2013) 76 *THRHR* 451).

Purchase of a non-existing exclusive use area

The applicant in *McKersie v SDD Developments (Western Cape) (Pty) Ltd and Others* 2013 (5) SA 471 (WCC), bought a sectional title unit together with an exclusive-use area from Mr Humphrey during 2005. During 2012, the applicant discovered that the exclusive use area had not been ceded (transferred) from the developer to Humphrey and from Humphrey to him. To aggravate matters, the applicant could not trace Humphrey and it was also established that the developer had been deregistered. Consequently, the applicant brought the current application under s 33(1) of the Deeds Registries Act 47 of 1937.

Section 33(1) provides that any person who has acquired the right to ownership of immovable property registered in the name of any other person and who is unable to procure its registration

in his or her name in the usual way, may apply to the court for an order authorising registration of the property in his or her name.

The first hurdle was whether s 33(1) could be applied to exclusive use areas as they are not 'immovable property' in the strict or conventional sense of the term. Nevertheless, the court held that in terms of s 27(6) of the Sectional Titles Act 95 of 1986, a registered right to an exclusive use area is for all purposes deemed a right to immovable property, and is therefore not excluded from s 33(1) of the Deeds Registries Act (para [21]).

The second obstacle was whether s 33(1) could be applied in the present circumstances, as the application of this section is only appropriate where registration cannot be procured *in the usual manner*.

Taking the provisions of s 27(1)*(c)* of the Sectional Titles Act into consideration, the court held that as no sectional title units were any longer registered in the developer's name and he had therefore ceased to be a member of the body corporate, any right to an exclusive use area still registered in the developer's name, vested in the body corporate free from any mortgage bond (paras [16], [31]–[33], [36]). It follows that neither Humphrey nor the applicant had the right to compel the body corporate to cede (transfer) the exclusive use area to either of them as there was no contractual relationship between these parties (ibid).

Given that the body corporate became the holder of the right to the exclusive use by operation of law under s 27(1)*(c)* of the Sectional Titles Act, and the applicant had no proof that he was unable to obtain cession (transfer) in the usual manner from the body corporate, who was cited as a party to these proceedings and who had raised objection, the court correctly held that it is in these circumstance barred to grant the order requested by the applicant under s 33(1) of the Deeds Registries Act (paras [34], [35]).

Sale agreement and the actio ad exhibendum

In Roman law the *actio ad exhibendum* (action for the production of property) went hand in hand with the *rei vindicatio* (JC van Oven *Leerboek van Romeinsch Privaatrecht* 3 ed (1948) 101). In Roman-Dutch law the *actio ad exhibendum* was no longer applied to bring a *res vendita* before the law, but was used as an action to recover damages from a thief or *mala fide* possessor who had alienated or consumed the *res vendita* (P Gane *Selective* Voet (1955) 6 1 10; 61 32). The latter application of the *actio*

ad exhibendum was accepted by the South African law (*Leal and Co v Williams* 1906 TS 554; *John Bell and Co Ltd v Esselen* 1954 (1) SA 147 (A); *Alderson and Flitton (Tzaneen) (Pty) Ltd v EG Duffeys Spares (Pty) Ltd* 1975 (3) SA 41 (T); and recently applied in *Rossouw NO and Another v Land and Agricultural Development Bank of South Africa* (SCA 13 September 2013 (case 794/12), unreported).

In the above matter ten centre pivots and the appurtenances thereto were sold at an inflated price by Andrag Agrico (Pty) Ltd ('Andrag') to the Land and Agricultural Development Bank of South Africa ('the Bank'), who then concluded an instalment sale agreement with the SJP Family Trust ('the Trust') in terms of which the Bank reserved ownership of the pivots until the purchase price had been paid in full by the Trust. The instalment sale agreement was further subject to a confirmation declaration by Andrag and the Trust that the pivots had been delivered and properly installed. However, this confirmation declaration was falsified as only six pivots were delivered to the Trust who had meanwhile sold them to a *bona fide* third party and failed to pay any instalments to the Bank. Consequently the Bank cancelled the instalment agreement and had to rely on the *actio ad exhibendum* to recover damages. The trial court granted an order for payment of R1 710 000 calculated on the market value of the ten pivots, based on the sale price paid by the third party.

The Supreme Court of appeal held that in order to succeed with the *actio ad exhibendum* the Bank had to prove that: *(a)* the Bank was the owner of the pivots at the time the Trust sold them to the third party; *(b)* the Trust had been in possession of the pivots when it disposed of them; *(c)* the Trust acted intentionally in that it had knowledge of the Bank's ownership when it parted with possession of the pivots; and *(d)* that the Bank was entitled to delictual damages and the extent of these damages (para [4]; *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 (3) SA 385 (A)).

Majiedt JA held that the Bank had complied with all these requirements and was consequently entitled to the relief as provided for by the *actio ad exhibendum*. He further found that in the absence of any evidence to the contrary, the extent of the damages had to be computed on the market value of the six pivots at the date of the alienation, this being R1 026 000 and not R1 710 000 as determined by the trial court (paras [9]–[13]).