AN ADDITION TO THE ARSENAL

By Aidan Kenny, Director

LEGAL BRIEF
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Immovable properties are normally sold by virtue of a deed of sale in terms whereof the full purchase price is paid on date of registration of transfer of the property in the name of the purchaser, with no funds being received by the seller prior to date of registration of transfer. The Alienation of Land Act 68 of 1981 (the Act) does however provide for instalment sale transactions with regard to immovable property which deviates from the normal situation. An instalment sale transaction can basically be defined as a transaction where the purchase price is paid to the seller in specified instalments over a period of time in the future.

INTRODUCTION

Instalment sale transactions with regard to immovable property provide the purchaser with certain rights; namely the rights in terms of section 27(1) which reads as follows:

“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.”

This enables the purchaser to request transfer of the property if more than 50% of the purchase price has been paid and also the right to request cancellation in terms of Section 27(3) of the Act and claim damages from the seller in terms of Section 28(1) of the Act if the seller refuses to effect transfer after a period of 3 (three) months has expired from the date of request from the purchaser.

QUESTIONS TO CONSIDER

The first question which arises with regards to such an immovable property instalment sale transactions is whether the purchaser has the right to claim specific performance in terms of Section 27(1) if the three requirements have been complied as set forth in Section 27(1). Secondly, will the court enforce a forfeiture clause, stating the purchaser will forfeit all his funds if the purchaser is in breach? The aforementioned issue becomes more important if firstly the principle of the constitution is applied with regard to the interpretation of Section 27(1) of the Act, secondly if the rigid application of a defence to a claim for specific performance is relaxed by having regard to constitutional values and thirdly if the disproportionate effect of a forfeiture order must be addressed by having regard to the constitutional values prior to a court granting a forfeiture order.
CONCOURT CASE STUDY

The Constitutional Court recently had the opportunity to deal with the aforementioned issues in the case of Botha and Another v Rich No and others [2014] ZACC11.

THE FACTS ARE BRIEFLY AS FOLLOWS:

The property was sold by the Trust to Ms Botha, who had to pay the purchase price in instalments. The terms of the contract included, inter alia, that Ms Botha was responsible for payment of all amounts levied in respect of municipal rates, taxes and service fees. Ms Botha was entitled in terms of Section 27(1) of the Alienation of Land Act 68 of 1981 to claim transfer of the property after half of the purchase price has been paid. However in the event of breach of the agreement by Ms Botha, the Trust would be entitled to cancel the agreement and Ms Botha would forfeit in favour of the Trust all payments effected in terms of the agreement.

Ms Botha demanded transfer of the property after more than half of the purchase price was paid by her; but she was in arrears with the instalments. After much correspondence the Trust reminded Ms Botha of the terms of the contract and the breach thereof, and demanded payment of the arrear instalments, to which Ms Botha did not respond. The Trust addressed another letter and requested Ms Botha to vacate the property on an urgent basis and of their intention to cancel the agreement. The applicants responded in which they tendered payment of the arrear instalments, to which Ms Botha did not respond. The Court held that Section 27(1) of the Act adds to the arsenal of the Trust against registration of a mortgage bond in their favour. The Constitutional Court had to decide firstly, whether under Section 27(1) of the Act creates reciprocal obligations and the party, the Trust, from who specific performance is claimed, could raise the failure of counter performance as a defence - which defence is well known as the “exceptio non adimpleti contractus”. For the principle of reciprocity to apply, the obligations of the parties must be mutual in the sense that performance of the one cannot be enforced without performance of the other. The presumption is that obligations in bilateral contracts are reciprocal. The perception was not rebutted by Section 27. The section recognises that it would be unfair for the purchaser to maintain her rights in the property if she falls into arrears and only obtain rights if she first purges her arrears. The Trust could thus raise the defence exceptio non adimpleti contractus. However, the Constitutional Court recognised that our law of contract based on the principle of good faith contains the necessary flexibility to ensure fairness to the extent that the rigid application of the principle of reciprocity may lead to injustice. The Court then proceeded and indicated the Act seeks to ensure fairness between sellers and purchasers. The provisions of the Act were found to be in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of the contracting parties.

The principle of reciprocity falls squarely within the understanding of good faith and freedom of contract, based on one’s own dignity and freedom as well as respect for the dignity and freedom of others. In this case the court stated that good faith is given expression through the principle of reciprocity and the exceptio non adimpleti contractus. The Court noted that Ms Botha had made a written tender for payment of the arrear instalments and municipal balance the Court found is important; otherwise an offer to transfer the property without cure would still leave Ms Botha in immediate breach.

The Court held that to deprive Ms Botha of the opportunity to have the property transferred into her name in terms of Section 27(1) and in the process cure her breach with regard to the arrears would be a disproportionate sanction in relation to the considerable portion of the purchase price she had already paid and would thus be unfair. The other side of the coin was that it would be equally disproportionate to allow registration of transfer in the name of Ms Botha without making it conditional upon payment of the arrears.

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This however leads the court to the principal of reciprocity. The Court went on to state that section 27(1) of the Act creates reciprocal obligations and the party, the Trust, from who specific performance is claimed, could raise the failure of counter performance as a defence - which defence is well known as the “exceptio non adimpleti contractus”. For the principle of reciprocity to apply, the obligations of the parties must be mutual in the sense that performance of the one cannot be enforced without performance of the other. The presumption is that obligations in bilateral contracts are reciprocal.

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FORFEITING YOUR FORFEITURE

Was the Trust entitled to cancel the contract with Ms Botha forfeiting the funds she had already paid?

The Court stated that it is another principle of reciprocity that where a contract has been lawfully cancelled, mutual obligations are to restore the respective performances. Relying on the forfeiture clause in the contract, the Trust made no tender of repayments of what it received. In the application for cancellation, the Trustees did not address the disproportionate burden the claim for cancellation and forfeiture would have on Ms Botha. The Court held that forfeiture in the circumstances where three-quarters of the purchase price had already been paid would be a disproportionate penalty for breach. The trustees could not justify the relief sought and the claim for forfeiture was not allowed.
CONCLUSION

The drafters of instalment sale transactions with regard to the sale of immovable property will have to amend their drafting checklist by having regard to, *inter alia*, the following principles:

- A claim of specific performance is allowed in terms of Section 27(1) of the Alienation of Land Act 68 of 1981;
- Addressing the issue of disproportionality with regard to a forfeiture clause and the mutual obligation to restore perspective performance; and
- The relaxation of a defence to specific performance to prevent disproportionality and ensure fairness.

The abovementioned factors will have to be incorporated in the deed of alienation bearing in mind that constitutional principles apply as set forth in the aforementioned case with regard to instalment sale transactions of immovable property and generally contracts, if regard is had, to defences raised against specific performance and forfeiture clauses.

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