

REAL ESTATE LAW ALERT

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IN THIS ISSUE

Read and conclude sale agreements with due consideration

In the enthusiasm of concluding an agreement of sale to purchase a property one must take care to carefully read and understand the clauses of the agreement of sale, as failure to do so may cost you the property. This was reiterated in the recent case, *City of Johannesburg v Pitse* NO [2022] ZAGPJHC 682 at [16]-[29] under appeal.

Share block schemes and the rights afforded

Share block schemes are defined in the Share Blocks Control Act 59 of 1980 (SBC Act) as “*any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property*”. In a nutshell, share block schemes can be described as an alternative form of property ownership and allow a single company – referred to as a ‘share block company’, to own a particular development. Individuals who become shareholders within the share block company are allowed to buy the right to use a specific unit or space within the development.



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FACTS

Briefly, the facts of the matter are:

Mr Pitse (the purchaser), pursuant to an invitation for public tenders to acquire a vacant stand in Orlando East, Soweto (the property), submitted a tender to the City of Johannesburg (the council) for an amount of R108,000. The council accepted the tender, and an agreement of sale was concluded between the council and the purchaser on 4 October 2001 (sale agreement).

The sale agreement made provision for the following:

- The council's conveyancers were to effect transfer of the property to the purchaser, who would be liable for all costs of transfer (Clause 5).
- The purchaser was to commence construction of a building on the property for business purposes within one year from the date of signing of the sale agreement and the first phase of the building was required be ready for occupation within 18 months of the signature date of the sale agreement (Clause 7.1).
- A pre-emptive right was reserved in favour of the council should the purchaser fail to comply with the building requirements as set out Clause 7.1 (Clause 7.2).
- The purchaser could not dispose of the property before a building had been erected on the property, except to the council (Clause 7.3).
- Should the purchaser fail to comply with any of the obligations imposed on the Purchaser, and fail to remedy any breach after notice from the council, the council would be entitled to, amongst other remedies available to it, cancel the sale agreement (Clause 8).

After the conclusion of the sale agreement the purchaser paid the purchase price and took occupation of the property but failed to commence construction of a building on the property in breach of Clause 7.1.

The council did not transfer the property to the purchaser.

The purchaser passed away in 2006 and their estate remained in possession and occupation of the property.

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FAILURE TO COMPLY

Following proceedings to evict the current tenant, a church, from the property, the council's attorneys in June 2015 addressed a letter to the estate of the purchaser, placing the estate on terms due to the purchaser's failure to comply with the requirements of Clause 7.1.

The estate's attorneys denied that there was a breach of the sale agreement, averring that it was the council that had breached the sale agreement as it had failed to transfer the property to the purchaser within a reasonable time. The letter also stated that the purchaser required the local authority's prior approval before construction could commence and that building plans with the title deed had to be submitted by the registered owner of the property for approval by such local authority, and if no title deed was available, proof was required that the transfer had been commenced with.

The council refused to transfer the property to the estate of the purchaser and cancelled the sale agreement in a letter dated 6 August 2015. In the cancellation letter the council pointed out that the transfer of the property to the purchaser and compliance with Clause 7.1 were totally unrelated and that the purchaser and/or the executor of his estate could have taken the necessary steps to transfer the property to the purchaser or to sell the property back to the council in terms of the sale agreement. The letter further pointed out that the National Building Regulations Act 103 of 1977 does not require transfer of ownership before building plans are submitted for approval. The letter also stated that no building plans had been submitted for approval and no steps were taken to comply with the aforementioned act. The council tendered to refund the purchase price to the estate of the purchaser.

The purchaser's attorneys rejected the cancellation and persisted with the claim that the property be transferred to the estate of the purchaser, referring to *Botha v Rich NO* [2014] (4) SA 124 CC in which the Constitutional Court held that where a contract between parties creates reciprocal obligations, a party cannot enforce performance from the other without having also performed in terms of such contract.

FINDINGS

The court *a quo*, adopting the purposive interpretation, held that in order for the sale agreement to make sense, the council must transfer the property to the purchaser before construction of the building could commence.

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The appeal court, however, held that the council had validly cancelled the agreement on 6 August 2015 on the following bases:

- Clause 7.1 clearly states that the time period from which the purchaser was obligated to commence construction was the date of signature and not the date of transfer. The completion of and occupation of the first phase were also clearly stated as being within 18 months of the date of signature, not transfer.
- *Botha v Rich* related to an instalment sale agreement and a demand by Botha to transfer that property into her name in terms of section 27(1) of the Alienation of Land Act 68 of 1981 (Act). Section 27(4) of the Act states that the provisions of section 27 do not apply to deeds of alienation (sale agreements) where the state or a local authority is the seller of the property. Accordingly, Botha could not be applied to this case.
- The principal of reciprocity did not apply to Clauses 5 and 7 of the sale agreement.
- No proof had been furnished as to the existence of the building plans or that the plans had been submitted to the local authority for consideration.
- The property was sold to the purchaser to construct a building for business purposes, not the operation of a church, which contravened the town-planning legislation of the local authority.
- The court cannot make contracts for parties. The court will only imply a tacit term if it is satisfied that, after consideration in a reasonable and business-like manner of the terms of the contract and any admissible evidence of surrounding circumstances, such tacit term is necessary to convey that which the parties had intended to contract. The court could find no reason to do so in this case.
- The parties had of their own free will concluded the sale agreement fully aware of its terms and conditions, which were accordingly binding and enforceable.

It is vital that a party to a sale agreement read the terms and conditions with understanding, especially those conditions which impose obligations on the party. The party must be sure that they will be able to comply with such obligations. If the party is not sure that they will be able to timeously comply with the obligations, they should rather renegotiate the relevant condition before signing the sale agreement. Once signed, the party will be held liable to meet the obligations imposed.

NATASHA FLETCHER

Share block schemes and the rights afforded

Share block schemes are defined in the Share Blocks Control Act 59 of 1980 (SBC Act) as “any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property”. In a nutshell, share block schemes can be described as an alternative form of property ownership and allow a single company – referred to as a ‘share block company’, to own a particular development. Individuals who become shareholders within the share block company are allowed to buy the right to use a specific unit or space within the development.

Purchasers individually buy a grouping or block of shares which grants the holder specific rights. The share block company acquires ownership and title to the property by means of a registered title or by renting the land from the owner. These companies must specifically include the expression “share block” or “aadeleblok” in their names. In its basic form, the arrangement can be described as follows – the company holds the immovable property while the shareholders hold shares in the company and a right to use some or all of the property exclusively.

RIGHTS AFFORDED

As purchasers of a specific unit in the share block become shareholders in the company, usage rights in respect of the land are then conferred by the company. This is governed in terms of the memorandum of incorporation and a use agreement is entered into between the parties. The use agreement must clearly define which portion of the property

the shareholder has the right to use and occupy. One of the duties as a shareholder in this arrangement is the purchase of an “allocated loan”. The shareholder essentially takes over a portion of the liability and pays monthly instalments which go toward paying the general expenses of the scheme.

The shareholder is thus the owner of the shares in the company that owns the immovable property and does not acquire ownership of the immovable property itself. Confirmation of this concept was held in the recent judgment of *Trustees for the Time Being of the Hunter Family Trust v Duin-en-See (Pty) Ltd and Others* (5035/2017) handed down by Judge Binns-Ward on 26 July 2022 (read the full transcript [here](#)).

In this case, a dispute arose between the current shareholders holding shares in the share block scheme known as Duin-en-See where the company sought to dispose of the “share block property” known as

Erf 13009 Plettenberg Bay. The company was incorporated in 1958 and had an issued share capital of 500 shares with five original shareholders. It was incorporated as a “vehicle to acquire and hold immovable property for the benefit of the original shareholders, who would by means of such shareholding be entitled” to the benefit and exclusive use of a defined portion of land. The current shareholders, who are cited as defendants in the matter, are thus the successors in title of the original shareholders. In 1961, the shareholding held by a H Schlotz was divided into two shareholdings and then sold in a number of transactions to Mrs Hunter. Later in 1995, Hunter transferred what would be the plaintiff’s shares to the trustees of the Hunter Family Trust, for which shareholders’ consent was granted and approved.

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CONTINUED

Duin-en-See as the defendant pleaded an exception on the ground that the plaintiff – the trustees of the Hunter Family Trust – did not aver compliance with section 7(2) of the SBC Act. This particular provision outlines specific requirements such as a use agreement. They argued that the plaintiff's particulars lacked the averments to sustain the presumption in section 4 of the SBC Act, wherein a company is presumed to operate a share block scheme. The second exception pleaded by the defendant, and of particular interest for this article, is the 1995 transfer of rights and obligations over what is described as the "plaintiff's parcel of land" did not comply with requirements outlined in the General Law Amendment Act 68 of 1957 or the Alienation of Land Act 68 of 1981. The question then turns to whether the occupation rights of purchasers in a company operating a share block scheme constitutes an "interest in land" for the purposes of formalities in respect of the Contracts of Sale of Land Act 71 of 1969.

FINDINGS

The court outlined that the agreements relied on between the plaintiff in their particulars of claim was a shareholders' agreement and the antecedent transactions in 1961 and 1995 were not contracts in respect of the sale of land or for the cession of rights in land. It held that the company did not cede its right in its property under those transactions and when the sale of the shares agreements were implemented, the sellers – when they transferred their shares to their respective successors in title, did so as an "integral part of the transaction ceded their rights in the shares". The court went further to explain that the shareholders' agreement determined that the company was to operate a share block scheme and how it was to conduct itself in this manner but that it did not alienate any of the company's rights in the land. Further, a shareholder has a personal right which can be exercised against the company, but this did not give them any interest in the

immovable property of the company. An explanation provided was that if the company were liquidated, the shareholders' agreement would not prevent or inhibit the liquidator in any manner from disposing of the property or afford the shareholders any rights in the company's property that they could then exercise against its successor in title to the property.

SECTIONAL TITLE SCHEMES V SHARE BLOCK SCHEMES

Sectional title units allow for individual ownership which is then registered at the Deeds Office. Share block schemes existed prior to sectional title schemes and were seen as the closest thing to "ownership" available to occupiers of specific parts of buildings at the time. Many share block schemes have since been converted into sectional title schemes in terms of the Sectional Titles Act 95 of 1986.

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