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DETERMINING IF AN AGREEMENT OF SALE IS BINDING IN CERTAIN CIRCUMSTANCES – A DISCUSSION OF A RECENT CASE

In the case of *Terry and Another v Solfafa and Others* (2263/2019) [2019] ZAFSHC 143 (29 August 2019) the applicants (Mr. and Mrs. Terry, hereinafter referred to as the “**Purchasers**”) requested that the court order that a property they purchased be transferred into their name. The respondent (Ms. Solfafa – hereinafter referred to as the “**Seller**”) denied that there was a valid agreement in place between the parties.

Facts of the case

The Purchasers are married to each other in community of property. Mr. Terry signed an offer to purchase the Seller’s property for the amount of R 2 600 000.00 on 27 February 2019. The agreement was not signed by Mrs. Terry. The agreement stated on the offer document that “this constitutes an Agreement of Sale upon acceptance by the Seller”.

The Seller upon presentation of her attorney signed acceptance of the offer to purchase on 1 March 2019. The Seller contends that she called her attorney about 30 minutes after she had signed the offer, instructing her to withdraw the agreement and terminating the mandate of the attorney at the same time.

The second purchaser, Mrs. Terry, only co-signed the offer to purchase on 10 April 2019. The sale agreement was subject to two suspensive conditions, one relating to the successful sale of the purchaser’s property and the other in relation to the purchasers obtaining bond finance.

The Seller claimed the agreement was invalid on three grounds:

1. The Purchasers are married in community of property and didn’t both sign the agreement; the second purchaser only signed after the seller had signed;
2. The Seller withdrew her acceptance of the agreement before the Purchasers were notified of acceptance; and
3. The suspensive conditions were not fulfilled and the agreement lapsed.

Each of these arguments as rejected by the Court are discussed below. The Court held that the Matrimonial Property Act 88 of 1984 leaves no doubt that the joint estate of spouses married in community of property is administered by both spouses concurrently, with the result that both husband and wife have equal capacity to perform juristic acts and equal powers to manage the joint estate, which powers can in most cases be exercised without the consent of the other spouse. The Act governs in which specific instance the written consent of the other spouse is required. One of these events is where one of the spouses, as a purchaser, enters into a contract as defined in the Alienation of Land Act 68 of 1981. However, the Court advised that a “contract” as defined in the Alienation of Land Act relates to instalment sale agreements, where an agreement is concluded and two or more instalments are payable over a period of 12 or more

months. The Court ruled that the written consent of the other spouse is required for instalment sale agreements and not for the sale of immovable property concluded in the ordinary course. The first alleged ground of invalidity failed.

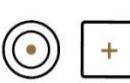
The court held in respect of the second argument that on acceptance and signature by the Seller of the agreement that a valid and binding agreement was concluded. The agreement itself in terms of its wording provided that upon acceptance by the Seller a binding agreement would come into place. On signature of the agreement by the Seller the Seller became bound to the agreement irrespective of when the Purchasers were notified of such acceptance.

On the third ground the bond approval was obtained in time so this was not in dispute. The Seller alleged that the suspensive condition relating to the “successful sale” of the Purchasers’ property was not fulfilled as the transfer of the Purchasers’ property did not take place within the time period provided for the fulfilment of this suspensive condition. The Court considered existing case law and stated that the term successful sale meant “*the successful signing of the deed of sale, and not the completion of the transaction and the payment of the purchase price*”. The Court held as the agreement relating to the sale of the Purchasers’ property had been signed by the parties thereto within the time period provided for in the agreement that the suspensive condition had been fulfilled. The Purchasers were successful and the property they purchased was ordered to be transferred into their names.

Please note however, that if a **seller** is married in community of property and the property forms part of the joint estate, the written consent of both spouses is required and both spouses should be a party to and sign the agreement in order for it to be valid (please see sections 15(2)(a) and 15(2)(b) of the Matrimonial Property Act).

In addition, if the deal is not a cash deal and any portion of the purchase price is subject to bank finance and a mortgage bond is to be registered over the property then the written consent of both parties is required.

Further, practically the Banks will require the agreement of sale to be signed by both parties married in community of property even if it’s not currently a legal requirement in terms of this case.



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