THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO:314/06

Reportable

In the matter between

EXDEV (PTY) LTD	**APPELLANT**

and

YEOMAN PROPERTIES 1007 (PTY) LTD	**1ST RESPONDENT**
ROYAL ALBATROSS PROPERTIES 185 (PTY) LTD	**2ND RESPONDENT**
JACOBUS JOHANNES STEYN	**3RD RESPONDENT**

CORAM: NAVSA, LEWIS, and MLAMBO JJA

HEARD: 24 AUGUST 2007

DELIVERED: **19 SEPTEMBER 2007**

SUMMARY: **An option for the purchase of immovable property is not invalid merely by reason of its silence on the terms of payment of the purchase price. In the absence of express agreement the law implies these terms.**

Neutral Citation: This judgment may be referred to as Exdev v Yeoman Properties [2007] SCA 107 (RSA)

LEWIS JA

[1] This appeal is against an order of the Pretoria High Court (Makhafola AJ) refusing an interdict *pendente lite.* The appeal is not opposed, and other litigation between the parties is still pending. Leave to appeal against the refusal of the interdict was granted by the high court.

[2] The appellant (Exdev) had exercised an option to purchase immovable property from the first respondent (Yeoman Properties). Before transfer was effected to Exdev it discovered that Yeoman Properties had sold the same property to the third respondent, acting for a company to be formed, the second respondent (Royal Albatross). Exdev accordingly applied for an interdict to prevent the transfer of the property to Royal Albatross pending the final adjudication of the litigation. The interdict was refused on the basis that the option was invalid, being silent as to the terms of payment.

[3] The day after leave to appeal was granted to Exdev, Yeoman Properties transferred the property to Royal Albatross pursuant to the second sale. Exdev instituted action in the Pretoria High Court against both Yeoman Properties and Royal Albatross claiming transfer to it of the property or alternative relief. The respondents have raised numerous defences, both to the initial application and to the action. Only one is germane to this appeal – the validity of the option granted by Yeoman Properties to Exdev. Related to this are the pleas of *res judicata* raised by the respondents (as defendants) in the action. They plead that the validity of the option was determined by the high court when it refused the interdict *pendente lite*. Since the raising of this plea (and also the defence of *lis alibi pendens*, that is, the appeal to this court), no further steps have been taken in the action. This court was informed from the bar, however, that the property in issue has been sold and transferred yet again.

[4] The sole issue determined by the court below is the validity of the option and that, as I have said, is the only issue before us. But now that the property has in fact been transferred to other parties, and the relief sought –

restraining the transfer of the property – is no longer possible, it may be argued that the issue is academic and that we are precluded from considering the appeal by s 21A of the Supreme Court Act 59 of 1959. The appeal may thus, on that basis, have no practical effect.

[5] In my view, however, the issue of the validity of the option is still live between the parties: the mere fact that the plea of *res judicata* has already been raised leads to the conclusion that the decision of the court below may well preclude the trial court, in the action between the parties, from reconsidering the question of the validity of the option on the same basis. The reason for the decision of the court below is open to doubt and thus should be clarified. Moreover, although it is not desirable that issues between parties, and appeals, should be heard on a piecemeal basis, especially where the appeal will not be dispositive of all the issues, in this case an injustice to Exdev may well be prevented by a decision of this court on the legal point at issue.

[6] I turn thus to the issue to be decided. When the application for the interim interdict was argued, Yeoman Properties raised a point *in limine*: the option to purchase the property, it contended, was invalid because it was silent on the method of payment of the price and as to when payment had to be made. The high court accepted this argument. Regrettably it did not have regard to the basic principle, applied consistently in our law, that in the absence of express agreement on the time for and method of payment, the price is payable in cash against delivery – that is, in the case of immovable property, transfer.[1] The court thus erred in finding on this basis, and its finding should not prejudice Exdev in subsequent litigation.

[1] See, for example, *Breytenbach v Van Wyk* 1923 AD 541 at 546; *Slomowitz v Van der Walt* 1960 (4) SA 270 (T) at 275-276; *Pienaar v Fortuin* 1977 (4) SA 428 (T) at 429G-H and *Kennedy v Botes* 1979 (3) SA 836 (A). Contrast *Patel v Adam* 1977 (2) SA 653 (A), where the contract included a term relating to the payment of the price in instalments, but was held to be invalid because the amount of the instalments to be paid was left to the purchaser to determine.

[7] I must emphasise that this court is not in a position to determine the validity of the option, given the other defences raised by Yeoman Properties, which are based on the facts. Only the trial court will be in a position to consider those. But on the point of law I consider that Exdev is entitled to succeed in its appeal. An option to purchase immovable property (and of course a simple contract for the sale of immovable property), is not invalid merely because it does not set out the method of and time for payment. In the absence of express agreement the law implies these terms.

[8] The appeal is upheld, with costs on an unopposed basis.
The order of the court below is replaced with the following:
'The point *in limine* is dismissed with costs.'

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C H Lewis

Judge of Appeal

Concur: Navsa and Mlambo JJA