

07 December 2020

MUST AN OPTION TO PURCHASE BE REDUCED TO WRITING TO BE ENFORCEABLE?

This question was answered in *Krezmann v Kretzmann and Another* where the issue arose whether an option to purchase is required by law to be in writing for it to be enforceable.

In this case an oral agreement was concluded between the defendant and the plaintiffs in terms of which the defendant gave the plaintiffs an option to purchase a property on terms that were orally agreed to by them, for a period of five years. A few years later, the plaintiffs exercised their option and provided the defendant with a signed offer to purchase for the property.

The defendant refused to sign the offer to purchase and argued that the option agreement was not binding because it was not in writing as required by section 2(1) of the Alienation of Land Act 68 of 1981 and was therefore invalid.

The plaintiffs in turn relied on the 2017 Constitutional Court decision where the court declared that a right of pre-emption does not need to be reduced to writing. They argued that it was the intention of the Constitutional Court to deal with all types of contracts which have as their aim the conclusion of another contract – such as the option contract.

The court found that an option to purchase was a concept that comprised of two distinct parts: (i) an offer to purchase and (ii) an agreement to keep that offer open, usually for a fixed period. The option agreement is not an alienation as defined by section 2(1) of the Alienation of Land Act and therefore does not have to be in writing. The offer to purchase on the other hand, must be a firm offer that will become valid and binding upon acceptance, and such offer must be in writing and comply with section 2(1) of the Act at the time that the option was granted.