

SOUTH AFRICA / JUDGMENT

Abdul v Williams and Others (CA227/2018) [2019] ZAE CGHC 103 (29 October 2019) [2019] ZAE CGHC 103

COURT

Eastern Cape High Court, Grahamstown

BEFORE

E Revelas, J W Eksteen, M Rusa

CASE / FILE NUMBER

CA227/2018

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION – GRAHAMSTOWN
Case
No.: CA 227/2018
In

the matter between:

NADIA
ABDUL
Appellant
and
BENJAMIN
CECIL WILLIAMS
First
Respondent
ANGELA
WILLIAMS
Second Respondent
COLIN
ABEL PERSENSIE
Third Respondent
NELSON
MANDELA METROPOLITAN MUNICIPALITY
Fourth Respondent
REGISTRAR
OF DEEDS, CAPE TOWN
Fifth

Respondent

JUDGMENT

REVELAS J

Introduction

- [1] This appeal, with leave of the court a quo, concerns a dispute about the ownership of a state-subsidised property in Gelvandale, Port Elizabeth, described as Erf 5495 Gelvandale, also known as 133 A Deverell Road, Gelvandale (‘the property’). The primary question to be determined in this appeal is the interpretation of section 10A of the Housing Act 107 of 1997, as amended by the Housing Amendment Act, Act 4 of 2001 (‘the Housing Act’).
- [2] The court a quo (Dawood J) dismissed an application by the appellant (a prior purchaser of the property) for orders to the effect that the sale of the property by the first and second respondents to the third respondent on 10 January 2014 be set aside; that the transfer of the property to the third respondent on 3 June 2014 be set aside; and that the fifth respondent, the Registrar of Deeds, be directed to cancel the registration of the property in the name of the third respondent, and amend its records to reflect that the appellant was the registered owner of the property. The appellant also sought a costs order against the third respondent, the only respondent who opposed the relief sought by her.

Factual Background and the Applicable Legislation

- [3] On 28 February 2007 the first and second respondents concluded a written agreement of sale with the appellant in terms whereof the property was sold to the appellant for the amount of R50 000, 00. The appellant paid the aforesaid sum into the trust account of Mr Rakesh Sam, the conveyancing attorney who attended to the transfer of the appellant’s erstwhile property in Bethelsdorp which she sold to a Mr O L Martin and used the proceeds of that sale to pay the first and second respondents for the property under consideration in this appeal. On 6 June 2007 the appellant signed a consent form permitting Mr Sam to transfer the sum of R50 000, 00 held in trust by his firm into the account of the first and second respondents. Mr Sam was also instructed to attend to the transfer of the property from the first and second respondents to the appellant.
- [4] The property obtained by the first and second respondents could not be registered into the name of the appellant pursuant to the sale thereof because the deed of transfer of the property into the names of the first and second respondents was endorsed with a restrictive condition which read:

“C. SUBJECT to the following condition imposed by the Provincial Housing Department in terms of section 10 A and 10 B of the Housing Amendment Act, Act No. 4 of 2001, for its benefit and enforceable by it: -

- a) The transferee or his/her successors-in-title shall not sell or otherwise alienate the property within a period of 8 (eight) years from date of sale without the written consent of the relevant Provincial Housing Department or its successors-in-title or its assigns first having been had and obtained.
- b) The transferee's successors-in-title or creditors in law (other than creditors in respect of credit-linked subsidies) shall not sell or otherwise alienate the property unless the property has first been offered to the relevant Provincial Housing Department at a price not greater than the subsidy which the transferee received for the property."

[5] Section 10A of the Housing Act referred to in the aforementioned clause provides as follows:

"10A Restriction on voluntary sale of state-subsidised housing

- (1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that person unless the dwelling or site has first been offered to the relevant provincial housing department.
 - (2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.
 - (3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property."
- [6] It was common cause that the restrictive period of eight years referred to in the title deed endorsement would only expire on 8 December 2014 at the latest. The appellant and the first and second respondents were intent on pursuing the sale, despite the restriction. Instead of immediately restoring the status quo, when learning of this prohibition against the sale and transfer of the property, the parties simply concluded a further agreement (drafted by Mr Sam) in respect of the property. This agreement ('the second agreement') was signed on 10 August 2007, provided that the appellant would lease the property from the first and second respondents 'until 8 December 2014, or until the Provincial Housing Department waivers (sic) the 8 (eight) year clause which prohibits the transferor from selling the property within eight years from sale without the consent of the Provincial Housing Department. This agreement shall terminate on which ever (sic) event occurs first, thereby transferring title and interest to the tenant (emphasis added)'. This agreement further provided that the sum of R50 000.00 paid by the appellant to the first and second respondents, would constitute

‘occupational rental’. This amount was also referred to as a ‘deposit’ elsewhere in the agreement. The second agreement required the appellant to pay an additional amount of R16 724.20, owed by the first and second respondents, to ‘a certain Financial Service Provider’. In addition, the appellant was liable for the payment of any municipal accounts in respect of rates, water, electricity, and sanitation.

- [7] The appellant did not comply with the last mentioned obligation in terms the second agreement. She defaulted on her payments to the Nelson Mandela Metropolitan Municipality (‘the municipality’). During February 2012 the municipality issued summons against her, claiming the amount of R4103.04. However, in the same month the appellant and the municipality came to an arrangement in terms whereof she could pay off the amount claimed by the municipality in monthly instalments.
- [8] On 30 September 2013, Mr Sam, now acting on behalf of the first and second respondents, wrote to the appellant, advising her that she was in breach of clause 11 of the second agreement (the lease) ‘by failing to pay the rates levied by the municipality every month.’ As owners of the property the first and second respondents were held liable for the payment of rates and taxes. The appellant was further advised that the unpaid rates have ‘reached the exorbitant amount in excess of R15 000,00’ and that unless she remedied her breach of the second agreement within seven days, the lease of the property would be cancelled and she would have to vacate the premises. The appellant did not remedy the breach within the time stipulated and the first and second respondents regarded the lease agreement as cancelled and proceeded to look for a new purchaser to buy the property.
- [9] Following the receipt of Mr Sam’s letter of 30 September 2013, the appellant reported him to the then Cape Law Society (now known as Legal Practice Provincial Council) for alleged unprofessional conduct. Her allegations and complaints may be summarised as follows:
- (a) Mr Sam represented the first and second respondents in a sale of the property to a third person, whereas he ought to have attended to the transfer of the property into the appellant’s name, in terms of the agreement of sale she had concluded with the first and second respondents;
 - (b) At no stage prior to his letter of 30 September 2013 did Mr Sam advise her that she was not the legal owner of the property, but a mere tenant. Consequently, through his conduct, she had been ‘tricked’ out of R50 000, 00.
 - (c) The appellant also made mention of a letter written by Mr Sam to a ward councillor to whom she had complained about her situation regarding the property. Mr Sam, upon enquiry from the councillor, reported to the latter that he was indeed attending the transfer of the property into the appellant’s name, whereas that allegation was factually incorrect. This letter was attached to the appellant’s founding affidavit, but not to her letter to the Law Society.

- [10] In response to her complaints, the Cape Law Society advised the appellant on 29 November 2013 that ‘the issues involved are legal rather than disciplinary’ and ‘we therefore intend closing our file unless you can persuade us that there was indeed unprofessional conduct on the part of Mr Sam.’
- [11] The appellant alleged that during December 2013, the third respondent came to look at the property. She said that on this occasion she had told him that she was the owner of the house and that it was not for sale. The third respondent disputed that such meeting between himself and the appellant took place. On his version, the first and second respondents had shown the property to him during December 2013, as they intended to sell it, and he was advised by them that the appellant was their tenant. He was also shown the second agreement. Satisfied that the appellant had no legal entitlement to the property and that he was within his rights to purchase it, the third respondent bought the property on 10 January 2014 for the amount of R45 000, 00 and it was registered in his name on 3 June 2014.
- [12] The appellant refused to vacate the property and the third respondent successfully applied for an order for her eviction from the property which was eventually issued on 17 June 2015 in the Magistrates’ Court, Port Elizabeth. The appellant refused to comply with the court order and was subsequently held to be in contempt of court on 18 August 2016.

The Appellant’s Arguments

- [13] The court a quo found that the agreement of sale of the property was void ab initio, and thus a nullity because its conclusion contravened the restrictive provisions of section 10A of the Housing Act.

” It is clearly not the mere fact that the deed of sale was signed within the eight-year period that renders the sale void without any further enquiry. The question is whether the Housing Department’s right of pre-emption has been respected before the property is transferred. The endorsement on the title deed or the recordal of the restrictive condition therein will obviously ensure that transfer cannot take place without the necessary assurance from the relevant Housing Department that there has been compliance with the restrictive condition. In that way, the objective of the Housing Act is to an extent realised. Nowhere is it indicated in the Housing Act that the mere disposal of the property on its own (without transfer being effected), or even the rental thereof to a person other than the beneficiary within the eight-year period, attracts any punitive measure”.

- [21] The aforesaid observations were made obiter and we are thus not bound by it. However, I wish to point out with respect, that the main purpose of the Housing Act is not to protect the Government’s assets, as stated in the paragraph cited. Although it is an important consideration, the main purpose of the Act is to provide for the facilitation of a sustainable housing development process by, inter alia, the financing of national housing programmes. [6] The objectives of the national housing programmes are the measures and arrangements ”to assist persons who cannot independently provide for their own housing needs”, “to facilitate housing delivery” and “rehabilitate and upgrade existing housing stock including

municipal services and infrastructure.”[7] In other words, the main purpose of the Act is to provide housing for indigent persons.

- [22] The absence of punitive measures in the Housing Act in respect of a contravention of section 10A thereof, referred to in the Nkokheli Jokoleza judgment, does not bolster the appellant’s case either. On the contrary, the absence of punitive measures rather strengthens the interpretation that the sale or any other form of alienation of state-subsidised property is a nullity. A fine would not necessarily constitute a deterrent for property speculators. One could also assume that the legislator did not intend to criminalise ordinary, but prematurely concluded agreements of sale in the context of assisting the poor with owning their own homes. It would be far more practical to regard such agreements in contravention of section 10A of the Housing Act, as simply null and void.
- [23] The peremptory language and the repeated use of the word “shall” in sections 10A and 10B are further significant indications supporting a stricter interpretation of the sections in question. That means that the sale, lease or other type of alienation of state-subsidised property is strictly prohibited and the conclusion of transactions in breach of the restrictions present in those sections are a nullity.
- [24] The appellant’s interpretation of section 10A of the Housing Act as advanced on appeal, would lead to absurd results. The appellant’s present unenviable situation is a text book example of precisely the type of situation that section 10A of the Housing Act seeks to prevent. The strict interpretation of section 10A is indeed inconvenient for the appellant, but permitting parties to flout the aforesaid restrictive provisions would result in dire consequences for many indigent persons as illustrated. The restriction in section 10A of the Housing Act clearly constitutes an absolute bar to the sale or alienation of any state-subsidised-housing in breach of section 10A. It must also be remembered that the appellant paid for the property in cash with the proceeds of the sale of her previous house and had money left over.
- [25] The third respondent contended that because of the appellant’s breach of the second agreement (the lease), she no longer had rights in the property. The appellant disputed that she ever was a tenant or that the second agreement was a lease agreement. It hardly matters. The terms of the second agreement as drawn up by Mr Sam are entirely contrary to the provisions of section 10A of the Housing Act. The conclusion of a lease agreement in respect of property which fell in the category of state-subsidised properties, constitutes the alienation thereof, which is prohibited by section 10A of the Housing Act. The second agreement is furthermore couched in terms clearly designed to circumvent the provisions of the Housing Act, and thus amounts to no more than a simulated agreement, the terms of which are unenforceable.
- [26] The purchase of the property by the third respondent, in derogation of the rights of the appellant, as she alleged, and with knowledge of such rights, would not have defeated any rights the appellant may have had, if the doctrine of notice was applicable to the present

situation. The doctrine is not applicable in this matter because the appellant, for the reasons outlined above, never acquired any rights in the property, not as a purchaser nor as a tenant. Ownership of the property reverted to the relevant department of housing when the first and second respondents moved out of house and both agreements concluded between the appellant and the first and second respondents on the advice of Mr Sam, constituted a nullity.

Conclusion

[27] In view of the considerations and for the reasons as set out above, the appeal cannot succeed.

Costs

[28] Unfortunately the appellant's misfortune in this matter was largely of her own making. The appellant was advised by the Port Elizabeth Justice Centre as far

back as 21 July 2015, that the only cause of action open to her at the time was to institute an action for damages against the first and second respondents. She shunned this advice and persisted with her stance that she was the owner of the property and she pursued that course ever since. The only appropriate costs order that can be made in the circumstances is that costs must follow the result.

The Eastern Cape Legal Practice Provincial Council

[29] The evidence in this matter suggests that possibly many lay persons and attorneys are not aware of, or choose to ignore the provisions of section 10A of the Housing Act. It is necessary to urge the Eastern Cape Legal Practice Provincial Council to discourage its members from assisting persons to conclude agreements contrary to, and designed to circumvent the prescripts of the Housing Act. All provincial offices of the Legal Practice Council in the country should endeavour to make legal practitioners, and in particular

conveyancing attorneys, aware of the predicaments that can befall their clients who wish to sell and lease properties in contravention

of section 10A of the Housing Act.

Order:

In the circumstances, the following order is made:

1. The appeal is dismissed with costs.
2. The Registrar is directed to ensure that a copy of this judgment is served on the Eastern Cape Provincial Office of the Legal Practice Council in East London.

E REVELAS

Judge of the High Court

J W EKSTEEN

M RUSA

Acting Judge of the High Court

Appearances:

For the Applicant: Adv AC Barnett, instructed by Liston Brewis & Co, c/o Huxtable Attorneys, Grahamstown.

For the Third Respondent: Adv Ndamase, instructed by Chantal du Plessis Attorneys, c/o Cloete & Co. Attorneys, Grahamstown.

Date heard: 12 August 2019

Date delivered: 29 October 2019

[1] 1925 AD at 274

[2] 2012

(4) SA 593 (SCA)

[3] 2001(1) SA 46

[4] Section 26 of the Constitution of South Africa

[5] Case Number CA 137/2014 (ZAEGHC) dated 14 April 2014

[6] Preamble to the Housing Act

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