

SOUTH AFRICA / JUDGMENT

Abigak 1 General Trading & Investment CC v Gani and Another; Gani and Another v Balkin and Others (1184/16; 6620/16) [2017] ZAGPJHC 126 (5 May 2017)

[2017] ZAGPJHC 126

COURT

South Gauteng High Court, Johannesburg

BEFORE

A E Bham

CASE / FILE NUMBER

1184/16; 6620/16

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REPUBLIC

OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

CASE NO. 1184/16

In

the matter between:

ABIGAK
1 GENERAL TRADING & INVESTMENT
CC Applicant
and
GANI,
SHABBIR
AHMED First
Respondent
GANI,
ZUBAIR Second
Respondent
CASE
NO. 6620/16

In the matter between: GANI,
 SHABBIR
 AHMED First
 Applicant
 GANI,
 ZUBAIR Second
 Applicant
 TREVOR
 MICHAEL
 BALKIN First
 Respondent
 HARRY
 GOODMAN
 JANKS Second
 Respondent
 GISHEN-GILCHRIST
 ATTORNEYS
 Third
 Respondent
 ABIGAK
 1 GENERAL TRADING & INVESTMENT CC Fourth
 Respondent
 THE
 REGISTRAR OF DEEDS, JOHANNESBURG
 Fifth
 Respondent

JUDGMENT

: IN CASE NOS. 1184/16 AND 6620/16

BHAM AJ

- [1] This is a judgment in both case number 1184/16 and case number 6620/16. The applicants in case number 1184/16 seek an order for the eviction of the respondent's in that application from the immovable property erf [...] Malvern Township, Registration Division I.R. Province of Gauteng situate at [...] J. Street, Malvern, Johannesburg ("the property"). Case number 1184/16 is referred to as "the eviction application". The applicants in case number 6620/16 seek an order declaring the sale of the property to the fourth respondent in that application as invalid and for ancillary relief. Case no. 6620/16 is referred to as "the setting-aside application".
- [2] I heard the eviction application and the setting-aside application together and deliver a single judgment in respect of both applications having justifiably been requested by both the parties to deal with the applications together. The central issue in both applications is the same. Both applications substantially turn on and can be decided by reference thereto.

[3] For ease of reference I shall refer to the parties as follows –

o The applicant in the eviction application, which is the fourth respondent in the setting-aside application, as "Abigak";

o The first and second respondents in the eviction application, who are the applicants in the setting-aside application, as "the Ganis";

o The first and second respondents in the setting-aside application as "Balkin" and "Janks".

[4] The papers in the two applications are unnecessarily voluminous. The issue upon which both applications turn is a narrow issue of law. The principle relating to that issue was established by the Appellate Division (as it then was) as far back as 1985 and has subsequently been followed by a Provincial Division of the High Court and by the Supreme Court of Appeal.

[5] On 21 January 2015, Abigak purchased the property from Balkin and Janks for a purchase price of R450 000,00 pursuant to a written Deed of Sale which complied in all respects with section 2(1) of the Alienation of Land Act, 68 of 1981 ("the Land Act"). This agreement is hereinafter referred to as "the Property Sale Agreement".

[6] Subsequent to the conclusion of the Property Sale Agreement, Janks refused to take the necessary steps to give effect to the transfer of the property to Abigak. Consequently, Balkin brought an application in this Court under case no. 16050/15 seeking, inter alia, that Janks be ordered to take the necessary steps to pass transfer of the property to Abigak.[1] Prior to judgment in Balkin's application, attorneys acting for the Ganis addressed a letter to the third respondent in the setting-aside application, from which it was clear that the Ganis were fully aware of Balkin's application. Yet, the Ganis took no steps to intervene in that application.[2]

[7] On 11 June 2015, an order was granted in Balkin's application in terms of which, inter alia, Janks was ordered to take the necessary steps to pass transfer of the property to Abigak. Balkin was always willing himself to take such steps. In the result, the property was transferred to Abigak under Deed of Transfer T000041282/2015.

[8] Abigak consequently contends that it is the lawful owner of the property. It has brought the eviction application because the Ganis are presently in occupation of the property and, despite having been requested to do so, refuse to vacate the property.

[9] The Ganis have defended the eviction application and thereafter brought the setting-aside application because they contend that on account of an oral agreement, they have an entitlement to the conclusion of "... a formal written agreement [to] be entered into between the parties in order to transfer the property into [their] nominated family trust."

[10] Thus, in addition to resisting the eviction application in the setting-aside application the Ganis seek an order declaring the sale

of the property by Balkin and Janks to Abigak to be invalid, and setting aside that sale. They also seek consequential relief thereupon, including an order directing Abigak "... to facilitate the transfer of the property into the name of the [Ganis] nominated trust upon the finalisation of ..." the setting-aside application.

[11] The essence of the contention on behalf of the Ganis is that sometime during 2007 they concluded an oral agreement with Balkin and Janks ("the oral agreement"). The oral agreement they contend for is said to have numerous terms relating to beneficial occupation, obligations for restoration of the property, the payment of outstanding rates and taxes, the payment of an outstanding overdraft and maintenance of the property and a further term (material to these applications) which is stated as follows in both the eviction application and the setting-aside

application –

"It was an express and agreed condition that upon payment of all of the amounts referred to ..., a formal written agreement will be entered into between the parties in order to transfer the property into our nominated family trust." ("the material oral agreement term").

[12] A formal written agreement as envisaged in the material oral agreement term has never been concluded.

[13] Understandably then, the riposte from Abigak was narrow and pointed. Abigak contended that even if the oral agreement was concluded and even if the Ganis had performed their obligations in terms thereof (which Abigak does not concede), the oral agreement is unenforceable for want of compliance with section 2(1) of the Land Act.

[14] Counsel for Abigak, advocate Leysath, in relation to this central issue, relied on the judgment in *Hirschowitz v Moolman and Others*[3] in contending that the central defence raised by the Ganis in the eviction application and the central point relied upon by them in the setting-aside application was legally untenable and that this was dispositive of the matter.

[15] In *Hirschowitz*, the following was stated:

"In general a pactum de contrahendo is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves. .."[4]

[16] *Hirschowitz* was followed in *Docrat v Willemse*[5] and by the SCA in *Du Plessis N.O and Another v Goldco Motor & Cycle Suppliers (Pty) Ltd*[6] and in *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd*.[7]

[17] In the present case, the Ganis do not contend that prior to the conclusion of the property sale agreement, Abigak had any knowledge

of the purported oral agreement. Nor do they suggest that the terms of the oral agreement were registered against the title deed of the property. Consequently, they do not and cannot contend that in the context of their attack against Balkin and Janks (or one of them) on various grounds, there was any complicity or involvement by Abigak. Abigak, at the time it purchased the property, was an innocent purchaser which concluded an agreement for the purchase of the property which complied with the provisions of section 2(1) of the Land Act. In response to Abigak's legal contention in relation to the purported oral agreement, the Ganis contention was summed up as follows at the hearing of the matter by their counsel, advocate Felgate as follows:

"... such argument loses sight of the fact that the pactum de contrahendo entered into by the Gani brothers, Janks and Balkin had as its very purpose the conclusion of a written agreement to effect the 'alienation' of the property, which would have resulted in compliance with the Act."

[18] That submission on behalf of the Ganis though misses the point. The very problem faced by the Ganis is that the material oral agreement term, at best for the Ganis, constitutes a pactum de contrahendo (and I make no finding on whether it actually does, as I need not make such a finding) which was required to comply with the requisites

for validity, including in relation to form, which would have been applicable for the sale of the property by Balkin and Janks to the Ganis "nominated family trust". Such requisites are set out in section 2(1) of the Land Act. They were not complied with in terms of the oral agreement nor subsequent to conclusion thereof.

[19] In the result, the reliance by the Ganis on the material oral agreement term (as an enforceable pactum de contrahendo) as a defence to the eviction application and as the foundation for the relief sought in the setting-aside application, is unsustainable

in law.

[20] Accordingly, I make the following orders –

20.1. In case no. 6620/16 –

20.1.1. the application is dismissed;

20.1.2. the applicants, jointly and severally, are ordered to pay the fourth respondent's costs.

20.2. In case no. 1184/16 -

20.2.1. An order is granted for the eviction of the first and second respondents and all persons holding occupation through and under them from the immovable property referred to and legally described as erf [...] Malvern Township, Registration Division I.R., Province of Gauteng situate at [...] J. Street, Malvern Johannesburg, Gauteng ("the property").

20.2.2. The first and second respondents and all those who occupy the property through and under them are ordered to vacate the property and to remove all vehicles parked by them on the property within a period of fifteen court days from the date of the grant of this order.

20.2.3. If the first and second respondents and any person who occupies the property through and under them have not vacated the property and removed the vehicles parked by them from the property within a period of fifteen court days from the date of the grant of this order, the Sheriff of this Court is hereby authorised and directed to carry out the eviction order at any time after the expiry of the fifteen-day period by removing from the property the first and second respondents and any such persons occupying the property through them and under them and all the vehicles parked by them on the property.

20.2.4. The first and second respondents are ordered to pay the costs of the application, jointly and severally.

A E BHAM AJ

Heard: 25 April 2017

Judgment

delivered: ____ May 2017

Appearances:

Under case no. 1184/16, which is the fourth respondent under case no. 6620/16 – Advocate L C Leysath, instructed by Gishen-Gilchrist Incorporated.

For Respondents, under case no. 1184/16 who are the applicants under case no. 6620/16 – Advocate N Felgate, instructed by N M Aboo Attorneys.

[1] Abigak and the Registrar of Deeds, Johannesburg were also cited as parties to that application.

[2] The significance thereof will be apparent from the stance adopted by the Ganis in the central issue in this matter.

[3] 1985 (3) SA 739 (A).

[4] At B-C.

[5] 1989 (1) SA 487 (N) 491-492.

[6] 2009 (6) SA 617 (SCA) para [19].

[7] 2016 (3) SA 532 (SCA) at paras [15]-[16].

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