

SOUTH AFRICA / JUDGMENT

B.K v Z.K and Others (515/2017) [2018] ZAECHGC 16 (1 March 2018)

[2018] ZAECHGC 16

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Malusi

CASE / FILE NUMBER

515/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION-GRAHAMSTOWN)

Case

No: 515/2017

In

the matter between:

B
K Applicant
and
Z
K First
Respondent
PENSILER
TRADING CC
Registration
Number: 2010/09264/13 Second
Respondent
MZWABANTU
CROMWELL MAJOLA Third
Respondent
ENOCH

MGIJIMA
MUNICIPALITY Fourth
Respondent
NEDBANK
LTD Fifth
Respondent
REGISTRAR
OF DEEDS, CAPE TOWN Sixth
Respondent

JUDGMENT

MALUSI J:

- [1] This is an application to set aside a sale of immovable property and other ancillary relief. The application is opposed by all the respondents save for the fourth and sixth respondents. The fifth respondent has filed a conditional counter application for the second respondent to be ordered to make payment of the balance of the loan it advanced to him to purchase the immovable property. The conditional counter application is not opposed. Whenever reference is made to ‘the respondents’ in this judgment, such is to the exclusion of the fourth and sixth respondents.
- [2] The material facts were largely common cause and no disputes related to these. Despite this, the affidavits filed were plagued by prolixity. Such diffuse pleadings are to be discouraged. It is necessary to provide a chronology of events for a better appreciation of the issues that arise in this matter.
- [3] Shorn of all verbiage, the material facts are that the applicant had been married to the first respondent in community of property.

The first respondent initiated divorce action against the applicant. The regional court sitting in Queenstown issued a decree of divorce on 26 May 2015. It also ordered division of the joint estate.

- [4] It appears there was difficulty in effecting the division of the joint estate. On 1 September 2015 the first respondent launched an application in the regional court for the appointment of the third respondent as a receiver of the joint estate. The powers sought to be conferred on the third respondent by the regional court were specified in thirteen sub-paragraphs listed in the notice of motion.
- [5] The applicant and the first respondent were owners of immovable property situated at erf [...], Queenstown (‘immovable property’) which formed part of the joint estate. Whilst the application was pending, on 2 October 2015 the third respondent, ostensibly ‘in his capacity as liquidator of the joint estate and by virtue of a court order issued by the regional court, Queenstown’, concluded a deed of sale in respect of the immovable property with the second respondent. Among the terms of the deed of sale it provided that the purchase price would be paid by way of a deposit of R200 000.00 on 4 October 2015 and the balance on

transfer of the property into the second respondent's name.

- [6] On 6 October 2015 the regional court heard the application for the appointment of the receiver. It granted the relief sought in the notice of motion. It also granted further powers to the third respondent that were neither sought in the notice of motion nor was the applicant given any prior notice that these would be sought in the following terms:

“2.4 To be authorised to sell, transfer and sign all/any transfer documentation which may be necessary for the transfer of erf [...], Queenstown, situated in the Lukhanji Municipality, Division of Queenstown, Province of the Eastern Cape, in extent 960 square metres;

...

3. To ratify and/or hereby ratifies any sale agreement of the immovable property at issue concluded prior to the appointment date of the Receiver or Liquidator.”

It is not clear on the papers at whose instance the regional court granted the further powers to the third respondent.

- [7] On 11 November 2015 the third respondent informed the applicant of his appointment as the receiver of the joint estate. Crucially, he omitted to inform her of the sale of the immovable property and the further powers granted to him by the regional court.
- [8] On 28 January 2016 the third respondent sent to the applicant a letter of demand to vacate the immovable property not later than 30 January 2016 as it had been sold. It was the first time the applicant learnt of the sale. The applicant instructed a firm of attorneys to do what was necessary to defend her rights. It appears the attorneys did not carry out her instructions.
- [9] On 21 September 2016 the property was transferred into the name of the second respondent on the instructions of the third respondent.

Simultaneously a mortgage bond for the sum of R774 884.00 which was the balance of the purchase price was registered in favour of the fifth respondent. The mortgage bond was security for the loan in the aforesaid sum that the fifth respondent had advanced to the second respondent.

- [10] On 14 October 2016 the second respondent launched an application in the magistrate's court in Queenstown for the eviction of the applicant from the immovable property. The applicant defended that matter which is presently in abeyance pending the finalization of this application.
- [11] On 1 February 2017 the applicant launched this application to set aside the sale of the immovable property and other ancillary relief.
- [12] At the hearing, applications for condonation of the late filing of the answering affidavits by the first and fifth respondents

respectively were not opposed. Likewise, the application by the applicant for condonation of the late filing of his replying

affidavit was not opposed. I granted condonation to all the aforementioned parties without any cost orders.

[13] The respondents' respective counsel raised as a point in limine that the order of the regional court, whether wrongly granted or otherwise, stands until it is set aside. It was contended the applicant has failed to apply for rescission in the regional court or bring a review application in terms of Uniform Rule 53 in this Court. It was argued that the deed of sale remained valid as it was ratified by the regional court order which still stands. The second respondent had set out these points in limine in a Rule 6 (5)(d)(iii) notice.

[14] In my view the points in limine are inextricably linked with the merits of the application. The points in limine will be best addressed in the determination of the merits. I intend to follow that approach.

[15] Ms Veldsman, who appeared for the applicant submitted that the deed of sale was null and void. This was due to the third respondent not having authority to enter into the agreement. She argued that the purported ratification of the sale by the regional court was a nullity in itself.

[16] The respondents' respective counsel submitted that even if it were found that the deed of sale was invalid, the transfer should be regarded as valid according to the abstract theory of transfer. In the alternative, the respondents placed reliance on section 28(2) of the Alienation of Land Act 68 of 1981 ("The Act") to contend that the alienation was valid ab initio.

[17] It is worthwhile to restate that on the undisputed facts the third respondent concluded the deed of sale ostensibly in a representative

capacity. He misrepresented that he was the receiver of the joint estate and was authorized by a regional court order. This was a misrepresentation on both counts as at the relevant time he was neither a receiver nor was there any regional court order authorising him.

[18] Furthermore, it is not in dispute that the third respondent had no authority from neither the applicant nor the first respondent as owners of the immovable property to conclude the deed of sale on 2 October 2015. In my view, the third respondent was acting contrary to the provisions of section 2(1) of the Act which provides that a sale of land can only be valid if contained in a written deed of alienation, signed by both parties or agents acting on their authority. Clearly, the third respondent was acting in contravention of the Act resulting in the deed of sale being null and void.

- [19] In my view the deed of sale was null and void for lack of authority of any kind by the third respondent. Neither the owners of the immovable property nor the regional court had granted him authority to conclude the deed of sale at the time he signed it. He was simply a third party misrepresenting that he had authority when in fact he had none whatsoever. Consequently, the ownership of the immovable property remained vested with the applicant and the first respondent despite the deed of sale and registration of transfer.
- [20] The respondents contend that the deed of sale was ‘ratified’ by the order of the regional court. Implicit in that contention is an acknowledgement that on its own the deed of sale is invalid. On this contention it could only come into life by the order of the regional court.
- [21] I find no merit in the contention. A court order cannot revive a nullity. In *Kourie v Bean* it was stated in categorical terms:
- “If the decision is correct that the deed which was signed did not in fact comply with the provisions of the law, it was a nullity, as was pointed out by Innes JA in Wilken v Kohler (1913, AD 135 at page 141). Being a nullity it could not be rectified so as to become a valid contract. Nor does the fact that the defendant was allowed to occupy the property help to identify it for purposes of validating the deed of sale. As was said by Innes JA in Wilken’s case at page 143: This agreement, being of no force and effect in law, cannot, it seems to me be validated by reason of the fact that it had been partly carried through.”*[1]
- [22] A court order that purports to revive an act that is null and void is a nullity in itself. The headnote in *Van der Merwe v Van der Merwe and Andere* states the following:
- “The general point of departure in the interpretation of statutes is that, in the absence of a contrary legislative intention, an act committed in contravention of a statute is void. Where the wording of section ... is manifestly peremptory, ... the result [is] that a juristic act performed by a person without the required authority is null and void. Once it has been accepted that the unauthorised act of a trustee is void, it follows that it cannot be ratified.”*[2]
- [23] A considerable amount of time was expended by all the parties on the status of the regional court order purporting to ratify the deed of sale. The applicant’s counsel, Ms Veldsman, submitted that it is a nullity and must, without more, be disregarded. The respective counsel for the respondents were in unison that the regional court order stands until set aside by another court.
- [24] The general rule in our law is that an order of court stands as valid and effective, until it is set aside or rescinded.[3] It appears the rule is based on public policy to provide certainty and finality in legal proceedings.
- [25] An exception to the general rule is that when a judgment and order is a nullity, invalid and of no effect it may be disregarded. A pronouncement or setting aside by a court is unnecessary. [4] Clearly such an order has no standing in law. It may be treated as if it was never issued by a court.

[26] Ms Veldsman submitted that the failure to give prior notice of the two further orders rendered them invalid. She argued that the applicant ought to be regarded as not having been cited as a party as far as the two orders are concerned. It is not necessary to come to a decision on this submission as it has already been found that the regional court order is a nullity.

[27] In summary, I have already found that the deed of sale was a nullity. The order by the regional court that purported to ratify a nullity is null and void itself. As such there is no need to either rescind or set aside the regional court order.

It may simply be disregarded as it has no standing in law.

[28] However, that is not the end of the matter as the finding on the invalidity of the deed of sale is the first enquiry. The second enquiry is whether the transfer should be regarded as valid despite the invalidity of the underlying sale which was the causa for the transfer.

[29] It is settled law that the abstract theory of transfer applies to immovable property.[5] The abstract theory has two requirements for ownership to pass to the transferee. The first is delivery which is effected by registration of transfer in the deeds office. The second is a 'real agreement' whose main element is an intention by the transferor to transfer ownership coupled with a corresponding intention of the transferee to become owner of the property. According to the theory, ownership may pass despite the underlying sale being invalid but it will not pass if there is a defect in the real agreement.

[30] It is common cause that transfer of the immovable property has been registered in the deeds office in the second respondent's

name. This was effected on 21 September 2016. Consequently, the first requirement of the abstract theory is fulfilled.

[31] There is no dispute that the owners of the immovable property, certainly the applicant, had no intention to transfer ownership to the second respondent. The applicant has stated categorically that she intended to transfer ownership to herself to the exclusion of the first respondent. The intention on the part of the first respondent is irrelevant as he had no authority to transfer the property. The applicant and first respondent could not lose ownership in these circumstances and they remain owners despite registration of transfer to the second respondent.

[32] The second and fifth respondents sought to rely on Legator McKenna (supra) for the contention that there was a real agreement in this matter. The facts in Legator McKenna are distinguishable from the present matter. McKenna had already been appointed by the High Court as curator bonis. All that was outstanding was for the Master of the High Court to issue him with letters of executorship. He concluded the deed of sale in the period before such letters were issued to him. Importantly, it was stated by the SCA that the High Court 'had granted him permission to sell the house beforehand subject to the approval of the Master of the High Court'. Clearly, McKenna had the proper authority to form an intention to

transfer the property. This was the reason the SCA held that there was a real agreement.

[33] Brand JA stated, with characteristic clarity, in an obiter dictum in McKenna, that in circumstances where ‘the legislature intended a contravention of an Act to be void, a sale by a curator without letters of curatorship would be invalid; so would a real agreement; and transfer by a curator without letters of curatorship would therefore not pass ownership to the transferee.’[6] The facts are similar in this matter and the statement by Brand JA finds application. In casu the real agreement was also defective.

[34] In the alternative, the respondents relied on section 28(2) of the Act. The section deals with an alienation not in compliance with section 2(1) requirements for a valid deed of alienation. The section provides that a non-compliant alienation will be valid ab initio if the alienee had performed in full in terms of the deed or contract and the land in question has been transferred to the alienee.

[35] In my view, section 28(2) is irrelevant in this matter as the transfer was effected on a deed of sale and other documents not

signed by the owners of the immovable property but by a person without authority.[7] The purpose of section 28(2) of the Act is to validate alienation which is in all other respects compliant with the Act save for non-compliance with the requirements of section 2(1). It is not to revive a null and void deed of sale which has not been signed by the owners or their authorized agent.

[36] Brand JA has stated at para 26 that section 28(2) of the Act is the codification by the legislature of the so-called ‘rule in Wilken v Kohler’.[8] The rule provides that if both parties to an invalid agreement have performed in full, neither party can recover his or her performance

purely on the basis that the agreement was invalid[9]. Clearly, this relates to parties who are entitled to sell the property to each other but have merely not complied with the legislative requirements.

[37] It appears to me that the third respondent acted illegally in selling immovable property he neither owned nor was authorised to sell. Shongwe JA in Meintjies held that courts should not countenance illegal contracts as they are contrary to public policy and constitutional principles. He added that courts should decline to enforce or give life to contracts that are in conflict with

constitutional values.[10]

[38] The fifth respondent filed a conditional counter application in the event the applicant was successful. It is manifest from the above that I hold the view that the applicant must succeed. The counter application sought an order that the second respondent must be ordered to make payment to the fifth respondent in the sum of R761 425. 20 together with interest thereon.

[39] The fifth respondent was not involved in the sale of the immovable property other than having granted loan finance to the second

respondent. The funds procured through the loan agreement were utilized by the second respondent to pay the balance of the purchase

price of the immovable property. The loan agreement was concluded on 3 February 2016. The fifth respondent registered a mortgage bond over the immovable property as security for the loan it provided to the second respondent.

[40] The loan agreement contained the standard conditions usually embodied in this type of agreement. The most pertinent condition for present purposes is that in the event the second respondent be dispossessed of the immovable property for any reason then it would repay the balance owing at the time despite not being in breach of any provision of the loan agreement. That dispossession will occur on delivery of this judgment.

[41] The deponent on behalf of the fifth respondent averred that it is not necessary to invoke the provisions of section 129 of the National Credit Act 34 of 2005. The reason proffered was that the second respondent was not in breach of his obligations as his monthly payments were up to date.

[42] I find merit in the averment. Section 129 (1)(a) stipulates procedures to be followed 'if the consumer is in default' and the parties to the agreement either intend to resolve any dispute 'or develop and agree on a plan to bring payments under the agreement up to date'. In my view, the section finds application when there is a dispute or payments are in arrears and not in the present circumstances. On the facts of this matter, there is no dispute between the second and fifth respondents. It is common cause that there are no arrears. In these circumstances, I agree that section 129 of the National Credit Act is not applicable.

[43] The second respondent did not oppose the counter application. Neither was argument advanced by counsel why the relief sought by the fifth respondent against the second respondent should not be granted. I am satisfied that a proper case has been made out by the fifth respondent for the relief sought in the counter application.

[44] The applicant sought that costs be awarded on a punitive scale, especially against the third respondent. The basis was that the third respondent was an attorney and should have known better.

[45] In my view, it will not be fair and just to award cost on a punitive scale. It has not been shown that the respondents acted mala fide. Their opposition of the application appears to have been actuated by a misunderstanding of the law. A punitive costs order is not warranted on the facts of this matter.

- [46] I intend to order that the sixth respondent reverse the registration of transfer of the immovable property and register it in applicant and first respondent's names. Should costs be warranted to effect the reversal, then the third respondent will be personally liable for those. He is the person solely responsible for the misrepresentation which led to this application. It is only fair that he bears the costs.
- [47] The fifth respondent submitted that the applicant must be liable for the costs of the counter application. No basis was provided for the submission.
- [48] I find no merit in the submission. The applicant was only an interested party in the counter application as it pertained to an agreement between the second and third respondent. He did not know of the sale until 28 January 2016. He then instructed attorneys within a reasonable time to protect his interests. By that time the loan agreement had already been concluded. It will be unfair to mulcate the applicant with costs in these circumstances.
- [49] In the result, the following order will issue:
1. The sale of the property known as ERF [...] Queenstown, situated at no [...] O Crescent, Westhof, Queenstown, Eastern Cape is set aside.
 2. The sixth respondent is ordered to cancel Deed of Transfer no T5763/2016 within 4 (four) weeks from date of service of this order in terms of section 6(2) of the Deeds Registry Act 47 of 1937.
 3. The sixth respondent is ordered to transfer the property known as ERF [...] Queenstown, situated at no [...] O. Crescent, Westhof, Queenstown, Eastern Cape to the name of the applicant and the first respondent, within 4 (four) weeks from date of service of the order.
 4. The third respondent is ordered to pay de bonis propriis the transfer and registration duties and/or fees, if any, within 7 (seven) days from date of demand, to give effect to paragraph 2 and 3 above.
 5. It is declared that the property known as ERF [...] Queenstown, situated at no [...] O. Crescent, Westhof, Queenstown, Eastern Cape is jointly owned by the applicant and the first respondent
 6. The second respondent's notice in terms of Rule 6(5)(d)(iii) is dismissed.
 7. Judgment is granted in favour of the fifth respondent against the second respondent for:
 - 7.1 Payment of the amount of R761 425. 20;
 - 7.2 Interest thereon calculated at the rate of 13% per annum, compounded monthly in arrears from 1st July 2017 to date of final payment, both days inclusive, being the amount outstanding, due and owing to the fifth respondent;
 - 7.3 Costs of the counter application.

8. The first respondent (from her separate estate), the second respondent, the third respondent and the fifth respondent are ordered jointly and severally, the one paying the others to be absolved, to pay the costs of the application.
9. The first, second, third and fifth respondents are ordered jointly and severally, the one paying the others to be absolved, to pay the wasted costs occasioned by the postponement of 1 June 2017.

T. MALUSI

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: Advocate Veldsman

Attorneys for the Applicant : Dold and Stone

10 African Street

Grahamstown

Ref: Mrs Wolmarans/Mori-Lee

Counsel for the 1st and 3rd Respondent : Advocate Mpahlwa

Attorneys for the 1st and 3rd Respondent: Mgangatho Attorneys

119 High Street

Ref: Mr Mgangatho

Counsel for the 2nd Respondent : Advocate Olivier

Attorneys for the Applicant : Nolte Smit Incorporated

Ref: Frans/AGB1/0001/JK

Counsel for the 5th Respondent : Advocate De La Harpe

Attorneys for the 5th Respondent : Weeldon Rushmere and Cole

Ref: Mr Brody/Glyn/S18343

Date Heard : 12 October 2017

Date Delivered : 1 March 2018

-
- [1] 1949 (2) SA 567 (T) at 572; See also *Friends of the Sick Association v Commercial Properties (Pty) Ltd and Another* 1996 (4) SA 154 at 158 A; *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167 at 170; *Mathipa v Vista University* 2000 (1) SA 396 (T) at 400F – 410D.
- [2] 2000 (2) SA 519 (C)
- [3] *Clipsal Australia (Pty) Ltd v GAP Distributors (Pty) Ltd* 2009 (3) SA 305 (W) at 311I-313E; *Colverwell v Beira* 1992 (4) SA 490(W) at 494A-C; *Bezuidenhout v Patensie Sitrus Befeerdeed Bpk* 2001 (2) SA 224 (E) at 229B-C.
- [4] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* 2012 (3) SA 325 (SCA) para 11-15 and the authorities cited therein.
- [5] *Legator McKenna Inc & Another v Shea & Others* 2010
- (1) SA 35 (SCA) para 21 & 22; *Du Plessis v Prophitus & Another* 2010
- (1) SA 49 (SCA); *Meintjies NO v Coetzer & Others* 2010 (5) SA 186 (SCA) para 8.
- [6] McKenna *ibid* at para 25
- [7] *Meintjies N.O*, *ibid* at para 12
- [8] 1913 AD 135.
- [9] *Legator McKenna* *ibid* at para 26 and 27
- [10] *Meintjies NO* *ibid* at paragraph 15
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2018/16.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/bk-v-zk-and-others-unknown-topic-aecghc-2018--6a3ea5163b1caa912980d603>

Prepared on 13 October 2026 · Esheria