

SOUTH AFRICA / JUDGMENT

Chetty and Chetty and Others (3297/07) [2008] ZAKZHC 69 (9 September 2008)

[2008] ZAKZHC 69**COURT**

High Courts - Kwazulu Natal

BEFORE

Msimang

CASE / FILE NUMBER

3297/07

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Source record**IN THE****HIGH COURT OF SOUTH AFRICA REPORTABLE****NATAL PROVINCIAL DIVISION****CASE NO: 3297/07****In**

the matter between:

VASADEVAN CHETTY

Applicant

SHAMAL

MOHAN SATHNARAYAN (in his

personal

capacity and in his capacity as

representative

of BUZTRADE 102 CC) First Intervening Party

AYESHA

BIBI KHAN Second

Intervening Party

and

ROOKMONEY

CHETTY First

Respondent

ROOKMONEY

CHETTY N.O. Second Respondent

THE

REGISTRAR OF DEEDS Third

Respondent

ESSOP

OSMAN

Fourth Respondent

JUDGMENT**MSIMANG, J:**

At all times material hereto the first respondent in this matter was married in community of property to one Raymond Perumal Chetty and, by virtue of that marriage, they, in equal shares, jointly owned a certain immovable property described as Portion 85 Shortts Retreat, Registration Division FT, Province of KwaZulu-Natal, the physical address of which is 18 Walter Hall Road, Shortts Retreat, Mkondeni, Pietermaritzburg ("the property"). When the first respondent's husband died, she was appointed executrix in his estate. It is as a result of her alleged attempts to dispose of the property that litigation has resulted.

This litigation commenced with an application launched by the fourth respondent (applicant in those proceedings) on an urgent basis, citing the first respondent and the estate of the late Raymond Perumal Chetty, as the first and second respondents respectively, and the Registrar of Deeds as the third respondent. The relief sought in that application was in the form of a rule nisi with an interim interdict restraining the first and second respondents from alienating, encumbering or, in any manner, disposing of their right, title and interest in the property to any other person or entity and restraining the third respondent from effecting transfer of the property to any other person and/or entity. An order was also being sought directing the applicant to institute proceedings for the transfer of the property within a period of thirty days of the date of granting the order.

The grounds upon which the above-mentioned relief was sought were briefly that on 1 April 2006 the fourth respondent had concluded a Deed of Sale with the first respondent in her personal capacity and in her capacity as executrix in the estate of her late husband, for the sale of the property for the purchase price of R380 000,00 payable by depositing a sum of R57 223,45 with Msunduzi Municipality, which amount would be in respect of payment for the rates due on the property and by paying a sum of R22 500,00 to Vathers Attorneys in settlement of a loan which the first respondent had earlier obtained from those attorneys. The balance of the purchase price, namely, a sum of R300 278,50 would, in terms of the Deed, be payable upon transfer of the property into fourth respondent's name. It was a further term of the Deed of Sale that, should the fourth respondent fail to pay or guarantee any portion of the purchase price referred to above and remain in default for a period of ten (10) days after a date of delivery or despatch by a prepaid registered post of a written notice requiring him to make such payment or to provide such guarantee, the first respondent would be entitled to cancel the agreement. According to the fourth respondent, he duly performed in terms of the agreement but when, during April 2007, he advised the first respondent that he was ready to pay the balance of the purchase price and that, as against the said payment, he required transfer of the property into his name, the first respondent demurred, declaring that she was no longer certain that she wished to sell the property. First respondent's conduct raised a suspicion in fourth respondent's mind that the first respondent was probably involved in an attempt to dispose of the property to a third party. Subsequent investigations made at the Deeds Office confirmed fourth respondent's suspicions for

they revealed that, on 30 March 2007, papers had been lodged with that office for the transfer of the property into the name of a third party. It was for this reason that the fourth respondent launched the application for urgent relief.

The application was not opposed and, on 16 April 2007, the rule nisi was granted and confirmed on 24 April 2007. Indeed, on 22 May 2007 and pursuant to that Order, the fourth respondent instituted action against the first respondent in her personal capacity and in her capacity aforesaid, in which action he seeks an order directing her to sign all transfer documents in order to effect transfer of the property into his name or, alternatively, authorising the Sheriff to sign those transfer documents.

It would appear that, in the meantime, the applicant, in the present application, got wind of the fourth respondent's earlier application and of the fact that the rule in that application had been confirmed. He, on 21 May 2007, launched the present application citing the first respondent as the first respondent and as the second respondent, in her aforesaid capacity, the Registrar of Deeds as the third respondent as well as the fourth respondent and alleging that, on 30 June 2005, he had entered into a Sale Agreement with the first respondent for the sale of the property and that the said Agreement remained valid and binding. Clearly therefore, he continued to contend, the Sale Agreement allegedly later concluded between the first respondent and the fourth respondent cannot be valid. Furthermore, the applicant submitted that when the fourth respondent launched his application for urgent relief, he was less than candid with and that he, in fact, misled the Court. He also expressed doubt as to the veracity of the Sale Agreement allegedly concluded by and between the first respondent and the fourth respondent and, for the above-mentioned reasons, sought an Order setting aside the Order granted on 24 April 2007 confirming the rule nisi. Like in the earlier application, an order is, in this application, also being sought directing the applicant to institute proceedings for the transfer of the property into his name within thirty (30) days of the granting of the Order.

However, unlike the case in the earlier application, this application is fiercely opposed by the first, second and fourth respondents who have filed answering affidavits. They, inter alia, took a point in limine, contending that the two agreements attached to applicant's founding affidavit, marked "VC1" and "VC2" respectively, and on the basis of which he declares that he had purchased the property from the first respondent, are invalid for failure to comply with the provisions of Section 2(1) of the Alienation of Land Act. 1

In addition, another party ("the intervening party") has launched a substantive application, in his personal capacity and in his capacity as a sole member of his close corporation, for an order granting him leave to intervene in the proceedings and, upon such leave being granted, giving notice that he will seek an order as prayed in paragraphs 1 and 6 of the applicant's Notice of Motion.

When the matter came before Court on 17 April 2008, the intervening party's application was unopposed. I accordingly granted him leave to intervene in the proceedings and reserved the question of costs. Regarding the main application, I was persuaded by Counsel for the first,

second and fourth respondents that the issue raised in the point in limine is so crisp and far removed from the conflict of fact that it would be fair for me to allow argument thereon ab initio. It was for that reason that a ruling to that effect was made. The matter was accordingly adjourned to another date for that purpose.

In his founding affidavit the applicant deposed that during 2004 he was approached by the first respondent with an offer to purchase the property for a purchase price of R40 000,00. On 21 February 2004 he was away from Pietermaritzburg and, as a result, a manuscript Agreement of Sale in respect of the property was drafted at the attorneys' offices and signed by the first respondent and one Ayesha Bibi Khan ("Ayesha"), applicant's domestic partner and common law wife with whom he had earlier discussed the above-mentioned offer. The manuscript agreement was attached to applicant's founding affidavit and marked "VC1". According to the applicant, a typed Agreement was later drafted and signed by him on 30 June 2005 and by the first respondent on 1 July 2005. This Agreement was also annexed to the founding affidavit and marked "VC2".

In the manuscript Agreement the seller is described as "Rookmoney Chetty" and it is recorded that the Agreement of Purchase and Sale was being entered into by and between her and Ayesha. However, paragraph 1 of the preamble records that :-

"The seller and the Estate of her late husband are the owners of"

the property. The description of the property, the purchase price, the manner of payment thereof and the date of registration of transfer are then given. Then follows the following clause 7 :-

"A full and proper agreement is be (sic) prepared next week and which agreement will be signed by both parties".

The typewritten Agreement, in its original form, bears the name "Ayesha Bibi Khan" as the purchaser. A line is, however, drawn with black ink across the said name and the name Vasudevan Chetty in manuscript is substituted therefor. First respondent's signature appears against this alteration and her name is reflected on the Agreement as the seller. The following two recital clauses appear at the beginning of the Agreement :-

"WHEREAS the Purchaser and Seller concluded an agreement of Purchase and Sale which is annexed hereto marked "A".

AND WHEREAS the Purchaser and Seller wish to enter a further agreement concerning certain additional monies."

Copy of "VC1" was then attached to "VC2", the contents of which having been incorporated into "VC2" by reference.

Then follow clauses dealing with the purchase price and the manner for payment thereof. Another clause which bears relevance to the issue to be determined is clause 5 which reads as follows :-

“This agreement does not in anyway amend, novate and/or in any manner whatsoever effect the purchase and sale agreement that is annexed hereto.”

In his replying affidavit, for the first time, the applicant attempted to make out a case that when Ayesha signed as a purchaser on “VC1” she did so on his behalf.

As already stated elsewhere in this judgment, the first, second and fourth respondents attacked the validity of “VC1” and “VC2” for failure to comply with the provisions of Section 2(1) of the Alienation of Land Act. Developing the argument, based on this point, Mr. Roberts, who appeared for the first and second respondents, advanced a number of grounds.

Firstly, he submitted that the Agreement embodied in “VC1” clearly states that Ayesha purchased the property in her own name. Ex facie “VC1” the Agreement does not contain any clause whereby the purchaser could nominate someone else in her stead. The conditions of “VC2” therefore constitute a new contract and all the formalities contained in the Act had to be complied with. Also, a proper interpretation of “VC2” itself, dispels all notion that the same constitutes a substitution by the applicant of Ayesha.

Again, upon perusal of clause 7 of “VC1”, it becomes clear that the parties contemplated that further material terms of the Agreement had still to be added. Mr. Roberts referred to a number of decisions which provide authority for the proposition that where, in the course of negotiating a contract, the parties reach an agreement but indicate that there are a number of outstanding matters material to the contract upon which the parties have not yet agreed, that may well prevent the Agreement from having contractual force.² The effect of the provisions of clause 7 of “VC1” is therefore that, upon signing the same, the parties thereto lacked

animo contrahendi.

Thirdly, Mr. Roberts continued to contend, the first respondent is the executrix in the Estate of her late husband. At the time when “VC1” and “VC2” were signed, the property was registered in the name of the Estate of the late Raymond Perumal Chetty. However, nowhere in both documents is reference being made to the fact that the first respondent was selling the property in her representative capacity as an executrix in the said estate.

“VC2” standing on its own, can also not pass muster for, so it was further argued, it is not clear from the perusal of the same, whether the purchaser is the applicant or Ayesha.

The aforesaid imperfections go to the root of those agreements and relate to the material terms thereof. It accordingly follows that any extrinsic evidence to cure them would be inadmissible. For instance, any evidence by the applicant in an attempt to prove that there was, in fact, a substitution of the applicant as purchaser in “VC1”, to show that the first respondent acted in a representative capacity or to prove the identity of the purchaser in “VC2” would be precluded by the parole evidence rule since that information, material as it is, should be manifest from the Deed of Alienation itself. It is therefore for this reason that Mr. Roberts urged the Court to find for the first, second and fourth respondents on the point in limine.

It is appropriate at this stage of the judgment to briefly deal with the relevant section of the Act. Section 2(1) of the Act provides as follows :-

“No alienation of land after the commencement of this Section shall, subject to the provisions of s.28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

In regard to the interpretation of this provision the following legal principles are now taken as settled :-

“(i) The whole contract – or at least all the material terms – must be reduced to writing.

The Court must be able to ascertain with reasonable certainty the terms of the contract.

There is no valid contract where a material term has not been finally agreed upon but is left open for further negotiations.

The material terms are not confined to the essentialia of the contract of sale.” 3

The concept “material term” has been characterised as including :-

“..... every term on which the parties have come to an agreement and which have a bearing on

the content or subject-matter and properties of every performance which has to be rendered in terms of the contract,

the time when, place where and manner in which performance has to be rendered

any conditions, modus or supposition attached to the duty to perform,

the co-operation required from each party towards performance by the other party, and

special remedies which a party will have if the other commits breach of contract, as well as the prerequisites for their enforcement. “ 4

or as a term :-

“.....which the parties regard as important enough to insert in their contract. 5

In Jones (supra) it was held that, in order to decide whether a term of a contract is material for purposes of Section 2(1) of the Act, the following questions require to be answered positively :-

“(a) did the parties apply their minds to the term?

did they agree, either expressly or impliedly,

that the term should form part of their contract; and

be binding on them.” 6

Applying the above-mentioned definitions, there is no doubt that the imperfections of which Mr. Roberts complained pertain to the material terms in “VC1” and “VC2” and I did not understand Mr. Choudree (who appeared for the applicant) or Mr. Shaw (who presented the case for the intervening party) to contend otherwise. Mr. Shaw, however, disavowed any reliance upon “VC1” and submitted that the intervening party’s case will stand and fall by the contents of “VC2” standing on its own. Mr. Shaw’s aforesaid submission accordingly had the effect of removing all the wind from the sails of the boat upon which Mr. Roberts’ first and second grounds were journeying.

Regarding the third ground, it is clear from clause 1(1) of the preamble to “VC1” that the owners of the property were the first respondent as well as the estate of her late husband. It must then be evident from that clause that not only the first respondent was the seller of the property, but also the estate of her late husband. In *SAI Investments v van der Schyff NO and others*, 7 though the name SAI Investments had been recorded as the purchaser on the Deed of Sale, a person who had signed as a purchaser had not indicated that he had signed in a representative capacity. In holding that extrinsic evidence would be admissible to explain the capacity in which the signatory had signed Nicholson J remarked as follows :-

“In the sale agreement it was recorded that the purchaser is SAI Investments. The capacity of the signatory can be determined by

extrinsic evidence”. 8

The same reasoning seems to have been behind the dismissal of an exception in *van der Merwe v Kenkes*, 9 where the Court pronounced itself as follows on the subject :-

“Net so sou eisers ekstrinsieke getuienis kon aanbied ten aansien van moontlikheid (b), inderdaad die werklike feite in hierdie saak, dat die onleesbare geskrif nie haar handtekening is nie, maar die van haar eggenoot D P van der Merwe wat handelende op haar skriftelike gesag sy handtekening op die ooreenkoms by die koper-ruimte aangebring het om eiseres as kontraksparty – as koper – tot die uitvoering van die ooreenkoms te verbind.

Die wysiging sal dus na my mening nie ten gevolg hê dat die identiteit van die koper deur ekstrinsieke getuienis gewysig word nie en behoort dus toegelaat te word.” 10

What is then left for determination is the issue raised in Mr. Roberts’ fourth ground, namely, that “VC2”, standing on its own, can also not pass muster as it is not clear therefrom who the purchaser is. Developing this ground during argument Mr. Roberts referred to the first of the two recital clauses appearing at the beginning of “VC2” and submitted that the effect of that clause was to incorporate by reference “VC1” into “VC2”. In terms thereof the purchaser (who is the applicant in “VC2”) had concluded an agreement of purchase and sale embodied in “VC1”. That could not be the true factual situation as the person who had done so as a purchaser in “VC1” was “Ayesha”.

It only needs a moment's reflection to realise the lack of substance in this submission. Two of the principles enunciated by Holmes JA to be applied in considering a legislative provision of this nature are that meticulous accuracy in the description of the res vendita is not required and that, though the Court should not make a contract for the parties where their intention cannot be ascertained with a reasonable degree of certainty, it is equally true that :-

“inelegance, clumsy draftsmanship or loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract”. 11

Much as “VC2” is not a model of good draftsmanship, upon perusing the same it is evident that the parties intended that the applicant would, in terms thereof, be the purchaser of the property. The incorporation of “VC1” by reference into that document was not intended to bring with it “Ayesha” as the purchaser in terms of the new agreement. Clearly what was being incorporated by reference, though in an inelegant and clumsy fashion, were the terms of the agreement as set out in “VC1”. To find as Mr. Roberts has suggested I should, would be

“,,, an encouragement to a dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases where there was not a dispute at all between the parties”. 12

The sentiments expressed in the above passage apply with equal force to cases, like in the present case, dealing with the description of the parties.

For the foregoing reasons I have concluded that the agreement of sale on the basis of which the applicant declares that he purchased the property from the first respondent does not run foul of the provisions of section 2(1) of the Alienation of Land Act 68 of 1981.

In the premises I make the following Order :-

First, second and fourth respondents' point in limine is accordingly dismissed.

Those respondents are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the applicant and those of the intervening party.

In the case of the latter, they are ordered to pay also those costs occasioned by the employment of two counsel.

For the Applicant : Adv. R B G Choudree SC (instructed by Sangham Incorporated)

For the Intervening Party: Adv. D J Shaw QC with Adv. R Padayachee SC (instructed by Austen Smith)

For 1st and 2nd Respondents: Adv. M G Roberts SC (instructed by Anand Pillay & Associates)

For 4th Respondent : Adv. Y N Moodley SC (instructed by Sameera Cassimjee Attorneys)

Matter argued: 14th August 2008.

C A V

Judgment

delivered: 9th September 2008.

1 68 of 1981;

2 See, for instance, CGEE Alsthom Equipments et Entreprises Electriques, South African Division v GKN Sankey (Pty) Ltd 1987(1) SA 81 (A); Pitout v North Cape Livestock Co-operative Ltd 1977(4) SA 842 (A);

3 Jones v Wykland Properties 1998(2) SA 355 (C) at 357 I – 358 A;

4 Van Rensburg Treisman – The Practitioner’s Guide to the Alienation of Land Act – 2nd edition at 51-52;

5 Phillip Maurice Wulfsohn – Formalities in respect of Contracts of Sale of Land Act at 75

6 Jones at 358 I – 359 A;

7 1999(3) SA 340 (N);

8 Ibid. at 347 A;

9 1983(3) SA 909 (T);

10 Ibid. at 916 G-H;

11 Clements v Simpson 1971(3) SA 1 (AD) at 7 A-F; The quoted passage was taken from the judgment of Colman J in Burroughs Machines Ltd v Chenille Corp. S.A. (Pty) Ltd 1964(1) SA 669 (W) at 670 G-H and was quoted with approval by Holmes JA in Clements at 7 C-D;

12 This dictum was taken from the judgment in van Wyk v Rottcher’s Saw Mills (Pty) Ltd 1948(1) SA 983 (AD) at 989 and was also quoted with approval in Clements at 7 E;

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