

SOUTH AFRICA / JUDGMENT

Dawood v Khan and Others (9105/2021) [2021] ZAGPPHC 131 (8 March 2021)

[2021] ZAGPPHC 131**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

9105/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****REPUBLIC****OF SOUTH AFRICA****Case****Number: 9105/2021****Not****Reportable****In**

the matter between:

MOHAMMED

KHAROOSH DAWOOD

Applicant

And

FARHANA

KHAN

First

Respondent

SHUABE

ABOO

Second

Respondent

REGISTRAR

OF DEEDS

Third

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant seeks an order restraining the first and second respondents from disposing of an immovable property situated at Erf 2133, Erasmia, Registration Division JR held by Deed of Transfer T 91939/1999 situated at 374 Van der Wall Street, Erasmia, Centurion (“the property”).

Applicant’s case

- [2] The applicant, Mohammed Kharoosh Dawood (“Dawood”), alleges that he purchased the property during January 2017 from the first applicant, Farhana Khan (“Khan”). In concluding the agreement, Khan was represented by the second respondent, Shuabe Aboo (“Aboo”) who is a friend to both Dawood and Khan.

- [3] The material terms of the agreement were as follows:

3.1 the purchase price was R 2 200 000, 00 payable in 22 equal monthly instalments of R 100 000, 00, the first payment to be made at the end of February 2017;

3.2 Dawood will be entitled to occupy the property from the date of the first instalment;

3.3 Dawood would be entitled to make improvements to the property without the prior consent of Khan;

3.4 Dawood would pay the monthly municipality account, which included the rates and taxes on the property;

3.5 Dawood and Khan will sign the necessary documentation to complete the transaction and to transfer the property into the name of Dawood.

- [4] Dawood states that Khan’s husband passed away during October/November 2016 and that Khan requested him to give her time to grieve before dealing with the formalities of the transaction.

- [5] In the meantime and in pursuance of the oral agreement, Dawood duly paid the monthly instalments in respect of the purchase price and the last payment was made on 20 November 2018. Dawood attached the cheques made out to Khan as proof of the payment of the purchase price.

- [6] Dawood and his family took occupation of the property during July 2017 and are still in occupation of the property. Dawood paid the monthly municipal accounts and the account is paid to date. Dawood attached the latest municipal account as proof that the account is paid up to date.

- [7] Dawood effected the following improvements to the property to the value of R 1 863 400, 00:

7.1 extension of wall/outbuilding

R 450 000, 00

7.2 ceiling and downlights

R 143 400, 00

7.3 plumbing, tiling and labour

R 350 000, 00

7.4 burglar bars

R 275 000, 00

7.5 paint and labour

R 175 000, 00

7.6 painting of pavement

R 10 000, 00

7.7 down lights outside

R 15 000, 00

7.8 Air-conditioning

R

150 000, 00

7.9 renovation of swimming pool

R 55 000, 00

7.10 electrical work

R 50 000, 00

7.11 replacement of geysers

R 15 000, 00

7.12 cupboards

R 85 000, 00

7.13 glass work R

20 000, 00

7.14 marble work

R 50 000, 00

7.15 tree felling/gardening

R 10 000, 00

7.16 renovation of roof

R 10 000, 00

[8] The only outstanding term of the agreement was the signing of the necessary documentation to effect the transfer of the property into the name of Dawood.

[9] That would prove to be more difficult than expected.

[10] Dawood alleges that he had raised the issue with Khan on various occasions without any success. On 4 February 2021 Dawood, once again, attempted to discuss the transfer of the property with Khan. Khan referred Dawood to Aboo.

[11] On 5 February 2021 Dawood sent a sms to Khan reminding her of their telephonic conversation on 4 February 2021. Khan did not respond.

[12] On 19 February 2021 Mr Muthray, Dawood's attorney of record, addressed a letter to Khan confirming the agreement and stating the following:

"5. It is furthermore our instructions that our client has approached you on numerous occasions in an attempt to finalise the transaction and to have the property transferred to his name, with no success.

6. On Thursday 18 February 2021, it came to our client's attention that Mr Shuabe, who acted as your agent when the aforementioned agreement was entered into,

acquired the Title Deed to have the property transferred to an unknown 3rd party.

7 In light of the above, it is our instruction to request you, which we hereby do, to provide our client with an undertaking that the property will not be transferred to any 3rd party, other than our client.

8. Should we not receive such an undertaking before close of business on Monday 22 February 2021, our client will have no other remedy than to approach the High Court for an interdict on an urgent basis."

[13] On 21 February 2021 Khan contacted Dawood's attorney and according to Dawood's affidavit, the following transpired:

"On Sunday 21 February 2021, the 1st Respondent contacted my attorney and confirmed the terms of the agreement and that she has, on advice of the 2nd Respondent, provided the 2nd Respondent with the Title Deed and the mandate to transfer the property. She furthermore referred my attorney to the 2nd Respondent and indicated that she does not want to participate in these proceedings."

- [14] A confirmatory affidavit of Mr Muthray is attached in confirmation of the aforesaid conversation.
- [15] Further attempts, thereafter, to communicate with Khan and Aboo, were fruitless and prompted this application by Dawood to protect his rights.

Respondents' case

- [16] Aboo deposed to the answering affidavit whilst Khan merely signed a confirmatory affidavit confirming Aboo's version.
- [17] According to Aboo he entered into a written sale agreement in respect of the property with Khan on 30 January 2017. A copy of the written agreement is attached to Aboo's affidavit. Aboo professes to have no knowledge whatsoever of the oral agreement referred to by Dawood in his papers and confirmed by Khan to Mr Muthray.
- [18] In terms of the agreement Aboo purchased the property for R 1 200 000, 00, which amount has been fully paid by him. Aboo attached cheques issued by him to Khan in confirmation of the payment of the purchase price.
- [19] Aboo states that although Khan is still the registered owner of the property, he is the factual owner and transfer of the property into his name is pending.
- [20] Aboo then relies on the provisions of the Alienation of Land Act, 68 of 1981 and more specifically on section 2(1) which provides that an agreement for the alienation of land that is not in writing is null and void. Even if there was an oral agreement, Dawood would, according to Khan, not be entitled to transfer because the agreement is, in terms of the Act, null and void ab initio.
- [21] According to Aboo, Dawood would not suffer irreparable harm if the property is transferred into Aboo's name as Dawood still has a claim for damages against Khan.
- [22] Responding to the factual allegations, Aboo states that the payments in respect of the property referred to by Dawood, was paid into his account and was in relation to a separate business transaction between them.
- [23] Aboo denies that Dawood effected improvements at the property and once again states that Dawood, in any event, has a right to claim compensation for the improvements.
- [24] Aboo admitted that Khan's husband passed away during October 2016 and that he has been assisting Khan in dealing with her husband's estate. In respect of Dawood's occupation of the property Aboo states the following:

"It is correct that Applicant took occupation of the property during July 2017 and was responsible for the utilities and related expenses in relation to the property, however this does not entitle him to ownership of the property, and should it become necessary for him to vacate the property he certainly has rights which he can enforce through normal court processes. The occupation of the property by the Applicant occurred with my knowledge and permission."

[25] Khan's affidavit in response to the allegations contained in Dawood's affidavit, is confined to the following:

“

2.

I confirm that there was never any agreement of sale between the Applicant and Myself. If there was any such agreement as alleged by the Applicant, it would have been reduced to writing. The property in question was sold by me to the Second Respondent.

3.

I further confirm that I received no payments in any form from the Applicant, for whatsoever reason.”

Interim interdict

[26] In order to succeed the applicant needs to establish:

26.1 a prima facie right;

26.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

26.3 a balance of convenience in favour of the granting of the interim relief; and

26.4 the absence of any satisfactory remedy.

[See: Setlogelo v Setlogelo 1914 AD 221 at 227]

Prima facie right

[27] The approach to a prima facie right has been described in Webster v Mitchell 1948(1) SA 1186 W at 1189 as follows:

“[T]he right to be set up by an applicant for an interim interdict need not be shown by a balance of probabilities. If it is “prima facie established though open to some doubt” that is enough...”

[28] Bearing the aforesaid in mind, I proceed to deal with the conflicting versions of the parties.

[29] The version of Khan and Aboo that serves as a denial of the applicant's version of events raises various questions in respect of the probability of their version.

[30] Firstly, Khan's denial that she received any payment from Dawood coupled with Aboo's version that the payments he received from Dawood were in respect of a business transaction, does not explain why the cheques were made out to Khan.

- [31] Surely if Dawood had to pay Aboo for whatever reason, the cheques would have been made out in his name. Dawood's version that the cheques were for the payment of the purchase price coupled with the fact that the payments stopped when the purchase price was paid, is far more probable.
- [32] One would not expect that a single business transaction would result in the payment monthly instalments over a period of time. Aboo, conveniently, did not give any details of the alleged "business transaction".
- [33] The reason for Dawood's occupation of the property from July 2017 to date has not been explained by either Khan or Aboo. According to the version of Khan and Aboo, Dawood occupied the property rent-free, which does not make sense and more so if one takes into account that Aboo is clearly an astute businessman.
- [34] It is also unclear why Dawood would pay the tax on the property if he had no claim to the property. This is also conveniently not explained by Khan or Aboo.
- [35] Dawood has detailed the renovations he had effected to the property. The renovations amount to approximately R 1, 8m. Save for a bare denial by Aboo, Aboo does not deal with each of the listed renovations to explain his denial. The property, according to his version, belonged to him since January 2017, but he is clearly not in a position to explain when each of the renovations was done and who paid for same.
- [36] Dawood's version that he effected the renovations in terms of his agreement with Khan is much more probable.
- [37] A disturbing feature of Khan's version is her failure to deal with the conversation she had with Dawood's attorney. Khan, although she had the opportunity to do so, does not deny the conversation. It is significant that the conversation confirms Dawood's version of events and is undisputed on the papers.
- [38] The conversation is also in direct conflict with the so-called written agreement that was purported signed by Khan and Aboo on 31 January 2015.
- [39] If Khan did sell the property to Aboo as alleged it is strange that Dawood only became aware of the sale when he launched the present application.
- [40] In view of the aforesaid, I am satisfied that Dawood has established a prima facie version of facts for the purpose of the granting interim relief.
- [41] The next question is whether Dawood has established a prima facie right to the relief claimed in the notice of motion. Mr Coetzee, Counsel for Khan and Aboo, is quite correct that the oral agreement in respect of the sale of the property is void ab initio for lack of compliance with the Act. Section 28(2) also does not assist Dawood, because Khan has not given transfer of the property to him as yet.

- [42] Ms de Lange, counsel for Dawood, submitted that Dawood has established a lien over the property insofar as the renovations to the property is concerned. A lien is however, only a dilatory defence to Dawood, in the event that Khan endeavours to dispossess him of the property.
- [43] The amount of R 2 200 000, 00 that Dawood paid to Khan for the property was, however, and in view of the fact that the sale agreement is void ab initio, sine qua non.
- [44] This would entitle Dawood to institute an enrichment claim based on the condition sine qua non against Khan.
- [45] Dawood may also institute an enrichment claim for the renovations he has effected at the property.
- [46] In the result, Dawood has established a prima facie right to an interim interdict to protect his right until finalisation of an action to be instituted against Khan.

Well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted

- [47] It is clear that Khan is in the process of alienating the only security Dawood has for his claim against her. This pertains more specifically to his enrichment claim in respect of the renovations he had effected at the property. Should Khan be allowed to transfer the property to a third party, Dawood would lose his only security he has in respect of his aforesaid enrichment claim.
- [48] I am satisfied that this will cause Dawood irreparable harm as required for the purposes of an interim interdict.

Balance of convenience in favour of the granting of the interim relief

- [49] The balance of convenience no doubt favours Dawood. Dawood and his family have been residing in the property for the past almost four years. It is their family home and their security. Dawood has taken care of the property both financially and physically.
- [50] Khan, to the contrary, could suffer no prejudice. She has received the sum of R 2 200 000, 00 from Dawood and he is taking good care of her property.

Absence of any satisfactory remedy

- [51] Pending the finalisation of the action to be instituted against Khan, Dawood has no other remedy to protect his rights. Mr Coetzee submitted that Dawood has an alternative remedy in that he could institute a claim for damages against Khan. In view of the conduct of Khan amply assisted by Aboo, I am not convinced that a claim for damages would assist Dawood.

[52] The conduct of Khan has been less than honourable to date and the possibility of Dawood getting his money back through a damages claim is cold comfort to him at this stage. His only remedy to safeguard the monies he paid to Khan and expended on the renovations to the property, is the property itself.

ORDER

[53] In the premises, I grant the following order:

1. The first respondent is interdicted and restrained from disposing, dissipating or in any manner whatsoever effect transfer of the property situated at Erf 2133, Erasmia, Registration Division JR held by Deed of Transfer T 91939/1999 situated at 374 Van der Wall Street, Erasmia, Centurion pending institution of action by the applicant

against the first respondent.

2. Should the applicant fail to institute action within 30 days from date of the order, this order shall lapse.
3. The first and second respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

3 March 2021

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 08 March 2021

APPEARANCES

Counsel for the Applicant: Advocate E. De Lange

Instructed by:

Muthray & Associates Incorporated

Counsel for the First and Second Respondents: Advocate SJ Coetzee SC

Instructed by:

Ngwane Mamod Incorporated

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