

SOUTH AFRICA / JUDGMENT

## Essack N.O v Thangavelu (D9022/2007) [2023] ZAKZDHC 26 (27 March 2023)

[2023] ZAKZDHC 26

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Msiwa

CASE / FILE NUMBER

D9022/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D9022/2007

In

the matter between:

YUSUF

MOHAMMED ESSACK N.O

APPLICANT

and

VINO

ADAMS THANGAVELU

RESPONDENT

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**JUDGMENT**

MSIWA AJ

**Introduction**

- [1] The applicant, Mthwalume Trust represented by Mr Yusuf Mohamed Essack, is the owner of section 78 hereinafter described fully on Sectional Plan 5[...] 1[...] in the scheme known as W[...] C[...] and whose physical address is flat 105 W[...] C[...],1[...] V[...] E[...], Durban, KwaZulu-Natal ("Flat 105").
- [2] The respondent is Vino Adams Thangavelu, the owner of a flat abutting that of the applicant being section 77 hereinafter described on Sectional Plan No 5[...] 1[...] in the Scheme known as W[...] C[...] and whose physical address is Flat 104, W[...] C[...] 1[...], V[...] E[...], Durban, KwaZulu-Natal ("Flat 104").
- [3] Historically, Mr CJ Van Rooyen Botha ('Mr Botha') owned flats 104 and 105 together with P19 and P20 respectively which he subsequently sold to the respondent and to Mr David Westbrook ('Mr Westbrook'), as will be demonstrated hereunder.
- [4] On 4 July 1997, the applicant purchased flat 105. As far as the applicant was concerned, such sale included an exclusive use of parking bay No.20 (referred hereunder as 'P20') according to the information by Mrs Davids, the manager of W[...] C[...]. In June 2002, the respondent purchased flat 104 with exclusive use of parking bay No.19 (referred hereunder as 'P19') attached to flat 104.
- [5] Since June 1997, the applicant enjoyed the exclusive use of P20, and in lieu thereof, paid the levies for it to the Body Corporate of W[...] C[...] ('the Body Corporate'). On or about December 2006, the applicant discovered that P20 had never been transferred to its name. Instead, according to the Deeds Registry Office in Pietermaritzburg,
- it is registered in the respondent's name.
- [6] It is recorded by both counsels that it is common cause facts, that on 25 April 1996 the cession in respect of exclusive use rights for P19 and P20 was registered with the registrar of deeds by the W[...] C[...] Body Corporate to Botha ("C").[1]
- (a) On or about 4 July 1997 and at Durban the applicant and David Westbrook, duly represented by GO Westbrook, concluded a written agreement of sale in respect of section 78 and the exclusive rights in respect of P20 to the respondent.
- (b) On 25 July 2002 Mr Botha signed a power of attorney authorizing transfer of section 77 as well as the use rights for parking bays P19 and P20 to the respondent.
- [7] The registrar of deeds has also filed a report regarding who the owner of P20 is according to his records. It confirms that P20 is currently registered in the respondent's name.

- [8] It is apposite to state that ownership of P20 has passed hands: the applicant, as a Trust of Mthwalume, purchased flat 105 from Mr Westbrook in 1997 who is in United States of America and whose testimony was procured by video-footage during the hearing of the matter.
- [9] His testimony in material respects is to the following effect: He bought flat 105 from Mr Botha for R155 000. The Deed of Transfer was signed by the Pietermaritzburg registrar of deeds on 17 February
1995. In 1996, Mr Westbrook sold the same flat to the applicant, Mthwalume Property Trust, represented by Mr Yusuf Mohammed Essack. I may point out that in the Deed of Transfer for flat 105, P20 is not mentioned at all.
- [10] On 15 April 1996, a notarial cession of exclusive use rights No 162/985 ('Cedent') in terms of s 27(3) of the Sectional Titles Act 95 of 1986 ('the Act') was done and executed with a unanimous resolution of the members of the Body Corporate. According to the notarial deed of cession in terms of s 27(4) of the Act, Mr Botha ceded the exclusive use of areas/s to the cessionary, the respondent.[2]
- [11] The applicant claims that it owns P20 notwithstanding the notarial deed of cession between Mr Botha and the respondent. Further, the applicant contends that, when flat 105 was sold, it was sold together with the exclusive use of P20. Consequently, it also acquired ownership of P20.
- [12] The applicant also states that when effecting transfer of flat 105 into the applicant's name, an error was occasioned in the office of the conveyancing attorney and/or the registrar of deeds office in that P20 was not registered accordingly in its name. As a result, the applicant approaches this court for a declaratory order that it be declared the owner of P20 with ancillary relief.[3]
- [13] He argued that the purchase agreement was comprised of flat 105 and P20. Consequently, according to Mrs Davids, he has been enjoying exclusive right over P20 and in lieu thereof paid the levies for it to the Body Corporate, in terms of the agreement with Mrs Davis.
- [14] It is apparent that there has been an honest belief on the part of the applicant that when it purchased flat 105 such sale included P20 according to Mrs Davis.
- [15] It is common cause that on 11 May 1994, the Body Corporate sold to Mr Botha, for a sum of R30 000, rights to exclusive use areas described as P19 and P20.
- [16] The applicant's counsel argued that the Body Corporate's non-registration of P20, when it was sold to Mr Botha does not, however, affect Mr Botha's title to it. It did not nullify existing contractual rights to P20. Mr Botha remained the owner of P20 and validly passed ownership to Mr Westbrook when he sold it to him in October 1994 by way of purchase and sale agreement.

- [17] The applicant's counsel further argued that according to the unchallenged evidence of Mr Westbrook, the Body Corporate was aware that Mr Westbrook acquired ownership of P20, by virtue of payment of levies charged due to transfer from Mr Botha to Mr Westbrook. According to the applicants' version, an error presents itself when the Body Corporate ceded rights of P20 to Mr Botha.
- [18] It is also argued that Mr Botha had, by then, already validly passed ownership of P20 to Mr Westbrook in 1994 by way of a sale agreement. Thereafter, Mr Westbrook sold P20 to the applicant by way of a purchase and sale agreement and subsequently, delivery of P20. It is the applicants' case that when flat 105 was transferred into its name, P20 was mistakenly not transferred to it.
- [19] The respondent contends that she is the 'true and lawful' owner of the exclusive use of P 20. Her argument is that:
- (a) Transfer of ownership of a flat is subject to the provisions of the Alienation of Land Act 68 of 1981 and such transfer is registered by means of a deed of transfer in terms of the said Act.
  - (b) Areas may be delineated within the common property area and a right in respect of that common property for its exclusive use may be transferred from the Body Corporate to an owner by way of registration of a Notarial Deed in terms of cession in terms of s 27(3) of the Act.
  - (c) The issue of ownership does not arise with exclusive use areas as the area remains part of the common property which is owned by the owners in the Sectional Scheme in undivided shares. All the owner acquires is a real right in respect of his exclusive use area which is registered with the registrar of deeds.
  - (d) An owner of a section in whose favour the right to exclusive use of part of the common property is registered may transfer his interest in the right to the owner of another section by registration of a notarial deed of cession with the registrar. Accordingly, the relevant document in terms of which the right is sold is the notarial deed of cession.[4]
- [20] According to the applicant, when he was approached by Mrs Davids about the sale of flat 105, she informed him that P20 formed part of the sale of flat 105. It was an incentive for the applicant to have P20 because the parking space is a premium in the complex. Further the sale price of flat 105 was higher in value than the market price of flats without parking in the complex.
- [21] The court has to determine whether, in May 1994, when the Body Corporate sold to Mr Botha for a sum of R300 000, rights to exclusive use of areas described as P19 and P20, did the corporate transfer P20 legally with exclusive use. Secondly, did the applicant also acquire the right of exclusive use of P20 legally on purchasing flat 105 from Mr David Westbrook.
- [22] Section 27(2) of the Act provides how a delineation of the sectional plan is done.[5] It is common cause that the delineation of the W[...] C[...] was done in 1995.

- [23] In 1994 when the Body Corporate sold to Mr Botha, exclusive use of P19 and P20 could not be transferred to him as the parking was not delineated. Therefore, the parking consequently could not be transferred by notarial deed of cession as legally required. Mr Botha sold flat 105 to Mr Westbrook in 1994. They did not sign any notarial deed of cession regarding P20. On 15 July 2022, Mr Botha ceded his exclusive use of right of P19 and P20 to the respondent by notarial deed of cession. The notarial deed of cession was subsequently registered with the registrar of deeds in Pietermaritzburg.
- [24] Cession constitutes a real agreement between the parties whenever a cessionary cedes his/her rights for the exclusive use to transfer any portion of his land. It was argued that absent the notarial deed of cession, the cedent does not acquire any rights thereof.[6]
- [25] The respondent's claim is predicated upon exclusive use of P20 after signing her sale documents for flat 104 and having been shown by her attorney that P20 is hers according to the notarial deed of cession, which she had signed with Mr Botha. The respondent had been myopic of her ownership of P20 throughout until apprised by the attorney.
- [26] The exclusive right registered over common property does not constitute land for the purposes of Land Alienation Act and therefore has no application to the sale of P20.
- [27] The applicants' contention is that on acquiring ownership of flat 105, it also acquired P20, because it subsequently paid levies as well for it. Consequently, it also acquired a right to exclusive use of P20. This contention is unfortunate and lacks legal basis. It is clear that Mr Botha did not sign a notarial deed of cession regarding P20 when selling flat 105 to Mr Westbrook.
- [28] In 2002, Mr Botha legally transferred P19 and P20 to the respondent through registration of a notarial deed of cession with the registrar of deeds. This happened after the delineation of space in W[...] C[...] in 1995.
- [29] It stands to reason that Mr Westbrook never acquired the right of exclusive use of P20 from Mr Botha. Consequently, a purported sale of P20 by Mr Westbrook to the applicant is a nullity and void, albeit, an alleged honest mistake by either the conveyancing attorney or by the registrar of deeds.
- [30] It is trite that areas may be delineated within common property area and a right in respect of that common property for its exclusive use may be transferred from the body corporate to an owner by way of registration of a Notarial Deed in terms of s 27(3) of the Act. Accordingly, in these proceedings, it is clear that in 1995 at W[...] C[...] there was a delineation of Parking Bays to various owners, and as a result Mr Botha acquired ownership of both P19 and P20 legally.

[31] When the Body Corporate sold the flats to Mr Botha, he could not have rights of exclusive use of P19 and P20 transferred to him as the common space was not delineated. I find logic that when Mr Botha sold flat 105, such sale excluded P20. As a result, thereof no notarial deed of cession regarding P20 could be registered with the registrar of deeds.[7]

[32] On 20 September 2002 in terms of the Notarial Deed of Cession, in terms of s 24(4) of the Act, Mr Botha ceded to the respondent an exclusive area described as P19 measuring 13 square metres, being as such part of the common property and comprising the land and the scheme known as W[...] C[...] in respect of the land and building or buildings situate at Durban, as reflected and fully described on section plan NO 1[...] held by certificate of Real Rights SK 1[...]; and

'An exclusive use area described as P20 measuring 12 square metres being

As such part of the common property comprising that land and the scheme Known as W[...] C[...] in respect of the land and building or buildings situate At Durban, as reflected and fully described on sectional plan 1[...] held by Certificate of Real Rights SK

1[...].'[8]

[33] The respondent accepted the said cession and a valid control between her and Mr Botha was concluded regarding P20.

[34] An argument that the applicant acquired ownership rights of P20 through a transfer of ownership of flat 105 with subsequent exclusive use of the P20 for a long period and payment of levies for the exclusive use of P20 by it, does not vest any legal right to the applicant over P20. Plainly, the applicant's contention in this regard is unfortunate and not supported by any reasoning. Accordingly, I am also not convinced that there was any honest mistake either by the attorney or registrar of deeds during the registration of notarial deed of cession for the transfer of P19 and P20 to the respondent in September 2002 by the instructed attorney of Mr Botha.

[35] Further, Mr Botha could not have obtained a "unanimous resolution" of the members of W[...] C[...] in any way. Before, delineation took place, a right is void ab initio to Mr Westbrook. Equally, when Mr Westbrook purportedly transferred the right to exclusive use of P20 to the applicant herein, such was void ab initio.[9]

[36] I am not satisfied that the applicant has discharged the onus resting upon it to prove that it has acquired the right for the exclusive use of P20 purely because of transfer of ownership of flat 105 as advised by Mrs Davids.

[37] In the result the following order is issued. The applicant's claim is dismissed with costs.

ACTING JUDGE OF THE HIGH DURBAN

APPEARANCES

Case Number: D9022/2007 Applicant: YUSUF MOHAMMED ESSACK N.O. Represented by: ADVOCATE MOODLEY C.J Applicant attorney: ANDREW PEENS & ASSOCIATES Respondent: VINO ADAMS THANGAVELU Represented by: ADVOCATE EADES D Respondents attorney: DICKINSON & THEUNISSEN INC Date of Hearing: 01 FEBRUARY 2023 Date of Judgement: 27 MARCH 2023

[1] "Accordingly to the records of this office: 2.1 The property described as Unit 78 in the Sectional title scheme known as W[...] C[...] NO ss 1[...], IS registered In the names of Mthwalume Property Trust NO IT 9[...]. The property is held under title deed NO ST1[...]. There are no mortgage bonds over this property and there are no interdicts noted against the property nor the registered owner. 2.2) The property described as Unit 77 in the sectional title scheme known as W[...] C[...] NO ss 1[...], is registered in the names of VINO THANGAVELU, ID NO 6[...], unmarried. The property is held under the title deed NO ST 5[...]."

[1] "Accordingly to the records of this office:

2.1 The property described as Unit 78 in the Sectional title scheme known as W[...] C[...] NO ss 1[...], IS registered In the names of Mthwalume Property Trust NO IT 9[...]. The property is held under title deed NO ST1[...]. There are no mortgage bonds over this property and there are no interdicts noted against the property nor the registered owner.

2.2) The property described as Unit 77 in the sectional title scheme known as W[...] C[...] NO ss 1[...], is registered in the names of VINO THANGAVELU, ID NO 6[...], unmarried. The property is held under the title deed NO ST 5[...]."

[2] Now therefore the appearer on behalf of the Cedent hereby cedes in terms of Section 27(4) of the Sectional Tittles Act, 9[...] to the cessionary: - 1. An exclusive use area described as No. P19 measuring 13 (Thirteen) square metres being such part of the common property comprising the land and the scheme known as W[...] C[...] in respect of the land and building or buildings situate in Durban as shown and more fully described on Sectional Plan No 1[...] held by certificate of Real Rights SK 1[...].'

[2] Now therefore the appearer on behalf of the Cedent hereby cedes in terms of Section 27(4) of the Sectional Tittles Act, 9[...] to the cessionary: -

1. An exclusive use area described as No. P19 measuring 13 (Thirteen) square metres being such part of the common property comprising the land and the scheme known as W[...] C[...] in respect of the land and building or buildings situate in Durban as shown and more fully described on Sectional Plan No 1[...] held by certificate of Real Rights SK 1[...].'

[3] Applicant's notice of motion page 2.

[4] Brayton Carlswald (Pty) Ltd and Another v Brews 2017 (5) SA 498 (SCA).

[5] Section 27(2) states: 'A body corporate may, subject to the provisions of section 5(1) of this Act and section 5(1)(d) of the Sectional Titles Schemes Management Act, request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3)(f) for the exclusive use by the owner or owners of one or more sections: Provided that no such delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.'

[5] Section 27(2) states:

'A body corporate may, subject to the provisions of section 5(1) of this Act and section 5(1)(d) of the Sectional Titles Schemes Management Act, request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3)(f) for the exclusive use by the owner or owners of one or more sections: Provided that no such delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.'

[6] Brayton *supra*; the contract is thus void ab initio.

[7] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA).

[8] Notarial deed of cession.

[9] Laco Parts (Pty) Ltd t/a Aca Clutch v Turners Shipping (Pty) Ltd

[2007] ZAGPHC 200; 2008 (1) SA 279 (W).

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