

SOUTH AFRICA / JUDGMENT

Essop v Abdulah (266/1986) [1987] ZASCA 103 (25 September 1987)

[1987] ZASCA 103**COURT**

Supreme Court of Appeal

BEFORE

Rabie, Joubert, Viljoen, Botha, Jacobs

CASE / FILE NUMBER

266/1986

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Source record**LL Case No 266/1986****IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION****In the matter between:**

ISMAIL ESSOP Appellant

and

ZUBEIDA ABDULLAH Respondent

CORAM: RABIE ACJ, JOUBERT, VILJOEN, BOTHA
et JACOBS JJA

HEARD: 28 AUGUST 1987

DELIVERED: 25 SEPTEMBER 1987

JUDGMENT

/BOTHA JA ..

2.

BOTHA JA:-

This is an appeal against an order made by AARON AJ in the Cape of Good Hope Provincial Division, in terms of which he dismissed, with costs, an application brought on notice of motion by the appellant against the respondent for an interdict restraining the respondent from disposing of certain immovable properties pending the determination of an action to be instituted by the appellant against the respondent. Leave to appeal against the order having been refused by AARON AJ, the appellant petitioned the CHIEF JUSTICE and was thereupon granted leave to appeal to this Court.

The judgment of AARON AJ has been reported; see *Essop v Abdullah and Another* 1986 (4) S A 11 (C). In a passage of his judgment which appears at 13 P-I of the report the learned Judge observed that the papers in the application raised several disputes of fact which could not be resolved without hearing oral evidence, but

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as the application was one for a temporary interdict it was necessary for the applicant to show on his own papers, inter alia, that prima facie he had a right to the relief which he would claim in the main action. The learned Judge proceeded to point out that the right on which the appellant relied was clearly based on contract, according to the allegations contained in the appellant's founding affidavit, and recorded that counsel for the parties were requested to deal first with the question whether the agreement relied upon was not illegal and whether, even if the Court were to accept as correct all the allegations made by the appellant, he would not in any event be precluded from founding a cause of action thereon. This question the learned Judge went on to examine in the rest of his judgment. He came to a conclusion on it which was adverse to the appellant. It was upon that footing that the appellant's application was dismissed.

It is accordingly necessary to advert to the

/allegations ...

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allegations made by the appellant in his founding affida-vit. For convenience I quote the relevant parts of the affidavit (the respondent in this appeal is referred to therein as the first respondent; the second respondent in the Court a quo, who was the Registrar of Deeds, is not a party to this appeal):

"6. On 21st November 1960, I purchased the two erven referred to in prayer 1.1 of the Notice of Motion from one FRANCINA PLAATJIES, in her capacity as Executrix Dative in the Estate of the late HENDRIK PLAATJIES, for a purchase consideration of R1 100,00. However, because the said erven were situate in an area zoned for the Coloured Group only, I, being a member of the Indian Group, was unable to have the said erven registered in my own name. As a result of this inability, First Respondent and I (First Respondent being my sister-in-law), entered into an oral agreement whereby the said erven would be registered in her name, she to hold the properties for and on my behalf and as my trustee. It was agreed that I would pay the full purchase price and all expenses incidental to the transfer of the said property into the name of First Respondent and also all expenses, such as rates and taxes, which she, as registered

/owner ...

5. owner, would incur from time to time. It was further agreed that, when called upon by me to do so, First Respondent would sign all documents and take all steps necessary to enable the said erven to be registered in my name after I had obtained the requi-site permit, or in the name of such other person to whom I had sold the erven.
7. Pursuant to the terms of the aforesaid agreement, the said erven were duly regis-tered in the name of First Respondent and I paid the purchase consideration together with all costs and expenditures referred to in the preceding paragraph.
8. The aforesaid agreement between First Res-pondent and myself was accepted and given effect to from the date of registration of transfer of the said erven into the name of First Respondent until 1983 when First Res-pondent's husband was killed in a robbery attack. Since then, there has been con-tinual friction between First Respondent and myself. First Respondent has made claims to ownership of the aforesaid erven and from time to time threatened to sell the said erven.
9. Pursuant to First Respondent's threats, I instructed my attorneys to take the neces-sary steps and to launch the necessary pro-ceedings to have transfer of the said erven registered into my name from First Respon-dent. I instructed them to take such steps

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as may be necessary to obtain the necessary

permit from the Group Areas Board which would entitle me to have transfer registered into my name. Should I fail to obtain such permit, I intend selling the said erven to a person qualified to take transfer of the said erven.

10. On 23rd October 1984, it came to my attorneys',and subsequently to my, attention that FirstRespondent had sold the said erven and thatdocuments to effect registration of transferhad been drawn up and have now been lodgedwith Second Respondent. The sale of the

said erven and the steps taken subsequent to the sale in order to register transfer to the purchaser were taken without my consent and in fact, without my being advised thereof.

11. In my respectful submission, First Respondentis clearly in breach of the agreement whichwas entered into between her and myself, theterms of which have been fully set forthabove. It is my respectful submission thatshe is not entitled to sell and transfer thesaid erven except with my consent and fór mybenefit.
12. It is, with respect, clear that I will sufferirreparable prejudice should the transfer ofthe said erven be effected. I have no de-sire to sell the erven and am, in fact, averseto the sale of the said erven at the presenttime. Should my application for the re-quisite permit be successful, I submit thatthere will then be no bar to my acquiring

/registration ...

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registration of ownership of the said erven into my name.

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15. I have instructed my attorneys to take the necessary steps, including taking such steps as may be necessary to obtain the requisite permits, and thereafter to institute such proceedings as may be necessary to obtain registration of transfer of the said erven from First Respondent to myself. In fact, I am advised that Counsel has been instructed to draft Particulars of Claim to give effect to the foregoing."

In paragraph 1.1 of the notice of motion the appellant

claimed an interdict restraining the (first) respondent

"from registering the transfer of the herein-

after mentioned properties to any person pending the final determination of an action which Applicant is to institute against First Respondent in which Applicant seeks an order, inter

alia, that First Respondent effect transfer of

the hereinafter mentioned properties to Applicant on the requisite permit being obtained in terms of the provisions of the Group Areas Act,

No. 36 of 1966:

1.1.1 Erf 12097, Parow, Cape Division, held by Deed of Transfer No. T.17596/1966 1.1.2 Erf 12098, Parow, Cape Division, held

/by ...

8. by Deed of Transfer No. T. 17596/1966."

In this Court, at the commencement of the hearing of the appeal, counsel for the appellant applied for an amendment of paragraph 1.1 of the notice of motion, as quoted above, by the addition at the end of it of certain words comprising a proposed alternative cause of action for relief in the contemplated action to be instituted by the appellant against the respondent. This Court's decision on the application for amendment was deferred and counsel for the appellant was allowed to argue the appeal both on the basis on which the case was decided in the Court a quo and on the basis of the amendment sought here. It will be convenient to leave the amendment applied for in abeyance until later in this judgment and to deal first with the appeal on the record as it stands.

In November 1960, when the agreement between the appellant and the respondent is alleged to have been entered

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into, the Group Areas Act 77 of 1957 was in force. The question of the illegality of the agreement, AARON AJ said (at 13 I), arose because of the provisions of section 36 of the 1957 Act, which read:

"No person shall acquire or hold on behalf or in the interest of any other person any immovable property which such other person may not lawfully acquire or hold in terms of this Act."

The 1957 Act was repealed by the Group Areas Act 36 of 1966, but the provisions of section 36 of the 1957 Act were re-enacted in section 40 of the 1966 Act, which applied at the time when the application was heard in the Court a quo. Other provisions of the 1957 Act which are relevant in this case were also re-enacted in the 1966 Act, as will be noted in due course. In the result the legal position in which the parties found themselves was the same at all relevant times.

An analysis of the judgment of AARON AJ reveals

that his reasoning rested crucially on the finding that,

/in ...

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in terms of the agreement alleged by the appellant, the appellant and the respondent had agreed that the respondent should do precisely that which was forbidden by section 36 of the 1957 Act and section 40 of the 1966 Act, namely; that she should acquire and hold the immovable property on his behalf- see the reported judgment at 14 D, 14 F, 16 D/E and 17 B-C (in the first-mentioned passage at 14 D the reference to section 11 is an obvious error; the learned Judge clearly intended to refer to section 36 of the 1957 Act). This finding was the main target of attack of counsel for the appellant on the judgment of the Court a quo. It was contended that the finding was wrong in law, the argument being that the respondent's undertaking in terms of the alleged agreement did not constitute a contravention of the prohibition contained in section 36 of the 1957 Act and section 40 of the 1966 Act. This argument was based on the provisions of section 24 (1) (a) of the 1957 Act and its counterpart,

/section ...

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section 27 (1) (a) of the 1966 Act. The latter section is wider in ambit than the former, but that is of no significance in the context of the present case. The wording on which counsel relied in support of his argument is the same in both sections. In both it is provided that, in an area which has been proclaimed a group area for ownership,

"no disqualified person shall acquire any immovable property situate within that area except under the authority of a permit

The words I have emphasized formed the crux of counsel's argument. Before I proceed to deal with it, however, it is advisable to say something about the applicability of the provisions in question to the facts of this case.

In his judgment AARON AJ said (at 13 J - 14 A) that it was not clear on the papers whether the two erven in question were situated in a group area, although that appeared to be the case, but that it would have made no

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difference if they were in the controlled area, and in this regard he referred to the prohibitions contained in sections 11 and 24 of the 1957 Act. It may be observed in passing that the prohibition in section 11 (1) of the 1957 Act was not couched in the same form as that in section 24 (1) (a) of the 1957 Act. It is not necessary, however, to examine the view expressed by the learned Judge in this regard, for in argument before this Court counsel for the appellant, in response to questions from the Bench, stated unequivocally that the appellant's case was based on the fact that the erven in question were in-deed situated in a group area, and he submitted that the allegations in the appellant's founding affidavit were to be understood in that sense. I accept this submission. It seems to me to be clear that the appellant's allegation in paragraph 6 of his founding affidavit that the erven "were situate in an area zoned for the Coloured Group only", when read in the context of the affidavit as a whole, was

/intended ...

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intended to be an allegation that the area concerned had been proclaimed a group area for coloured ownership. Accordingly section 11 (1) of the 1957 Act can be left out of consideration and we need concern ourselves only with section 24 (1) of the 1957 Act and section 27 (1) (a) of the 1966 Act. On the wording which is common to these sections, as quoted above, the appellant, who was and is a disqualified person as defined in section 1 of the 1957 Act and in section 1 of the 1966 Act, was prohibited from acquiring the erven in question, except under the authority of a permit. As a matter of fact the appellant at no relevant time had such a permit. On the basis of that factual situation AARON AJ was justified in saying (at 14 A/B) that it was common cause that the appellant was unable to acquire the erven himself or to have them registered in his name. But the appellant's inability in that respect is not absolute: it could be removed and would fall away if he obtained the requisite

/permit ...14. permit.

Reverting to the argument of counsel for the appellant, it was based, as I have said, on the words "except under the authority of a permit" occurring in section 24 (1) (a) of the 1957 Act and in section 27 (1) (a) of the 1966 Act. It was always, and still is, open to the appellant, counsel said, to apply for and to obtain a permit in terms of section 18 of the 1957 Act or section 21 of the 1966

Act, authorizing him to acquire and to hold the erven in question. There was nothing in either Act to preclude the issuing of such a permit to the appellant, it was said, and upon such issuance the appellant could lawfully acquire and hold the erven. In view of that possibility, counsel argued, the conclusion must follow that the appellant was not a person who could not lawfully acquire or hold the erven in terms of the 1957 or the 1966 Act; or, to use the words of section 36 of the former and section 40 of the latter Act, the erven in question

/were ...

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were not "immovable property which such other person". -being the appellant in this case - "may not lawfully acquire or hold in terms of this Act", with the result that the agreement alleged by the appellant did not entail a contravention of the prohibition contained in sections 36 and 40.

In my view this argument cannot be sustained. Its premise is correct, but its conclusion not.' The possibility of the appellant obtaining the requisite permit did and does exist by virtue of section 18 (1) (a) (i) of the 1957 Act and section 21 (1) (a) (i) of the 1966 Act, the relevant provisions of which are identically worded, as follows:

"(1) The Minister may, subject to the provisions of sub-section (2), in his discretion, on written application made therefor —

(a) direct that a permit be issued

authorizing —

(i) the acquisition or holding of immovable property in a group area"

/For ...

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For present purposes the prominent feature of these provisions is that no limitation of any kind is placed on who may apply for and obtain a permit in terms thereof. Subsection (2) fetters the exercise of the Minister's discretion in certain respects, but not in a manner that can have any bearing upon the present enquiry. Ex hypothesi, any disqualified person can at any time apply for a permit of the kind in question. The appellant's position is no different from that of any other disqualified person. That being so, if, as was postulated in counsel's argument, the mere possibility of obtaining the requisite permit were sufficient to preclude the operation of section 36 of the 1957 Act and section 40 of the 1966 Act, it would mean that these sections would be wholly deprived of any efficacy whatever. Counsel sought to meet this difficulty by suggesting that the sections would apply if a disqualified person had applied for but had been refused a permit. I can see no warrant, however,.

/for ...

17for interpreting the sections in the manner suggested. In my opinion the Legislature clearly intended that the concept of a person who "may not lawfully acquire or hold" the immovable property in question in a given case, should be applied with reference to that moment of time which is relevant in the particular enquiry which is being under-taken. So, if A acquired immovable property in a group . area on behalf of or in the interest of B, and the enquiry is whether A's conduct constituted a contravention of the statutory prohibition, the decisive question is simply whether B was a disqualified person who was not in possession of the requisite permit at the time when A acquired the property. The word "acquire" is defined in both the 1957 and the 1966 Acts to mean "become the owner of", which is related to a particular point of time. The word "hold" is not defined in either the 1957 or the 1966 Act, but in the context of sections 36 and 40 it obviously means "hold as owner", which has a continuous connotation.

/But ...

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But in this context, too, it is possible to test the operation of section 36 or section 40 with reference to a particular time. So, in the present case, when the matter was heard in the Court a quo, the respondent was holding the erven in question on behalf or in the interest of the appellant (on the basis of the latter's allegations); at that time, the appellant, being a disqualified person, . did not have the requisite permit, and accordingly he was then a person who "may not lawfully acquire or hold" the erven. Consequently the respondent's holding of the erven at the critical time constituted a contravention of the statutory prohibition. Moreover, the respondent's holding would have continued to be in violation of the prohibition for as long as the appellant did not have a permit to acquire or hold the erven for himself. That position could not be detracted from by the mere possibility of the appellant obtaining a permit at some time in the future.

/It ...

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It follows, therefore, in the first place, that the Court a quo was correct in finding that the respondent, in terms of the agreement alleged by the appellant, undertook to do exactly that which was and is forbidden by section 36 of the 1957 Act and section 40 of the 1966 Act respectively; and in the second place, that the latter section was being continuously contravened at the time of the proceedings in the Court a quo by the respondent's ongoing holding of the erven on behalf of the appellant whilst the latter lacked the requisite permit.

This conclusion is really decisive of the out-come of this appeal, for reasons which, in the view I take of the matter, can be stated in a few words. Under the 1957 Act a contravention of section 36 was made a punishable offence by section 42 (1) (a). In the 1966 Act the effect of section 46 (1) (a) is that a contravention of section 40 constitutes a criminal offence carrying a maximum penalty of a fine of R400 or imprisonment for 2

/years ...

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years or both. Thus, the contractual performance to which the respondent bound herself in terms of the agreement al-

leged by the appellant was to commit an illegality. It is a fundamental truism that a contract for the performance of an unlawful act will not be enforced by the Courts. The

reason for the principle is self-evident: no Court will

compel a person to perform an illegality. But that is

the very object which the appellant sought to achieve by

means of the interdict that he applied for in the Court a

quo. The order prayed for, as quoted earlier, was couched

in negative terms, i.e. restraining the respondent from

passing transfer of the erven in question to any person,

but it could only be justified, in principle, on the basis

that its object was to prevent the respondent from com-

mitting a breach of contract vis-à-vis the appellant,

and that, in turn, of necessity entailed the enforcement

of the contract. In effect, therefore, the appellant

sought an order of the Court compelling the respondent to

/continue ...

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continue with the performance of a contract which comprised the doing of an unlawful act. On that ground alone the Court a quo was right in dismissing the appellant's application, and the appeal must fail.

On this view of the case it is not necessary to express any opinion on the validity or otherwise of the cause of action foreshadowed in respect of the action which the appellant contemplated instituting against the respondent, and pending the determination of which he sought an interdict. Indeed, it would be wrong to decide that issue now, for further litigation between the parties on that score might yet eventuate. During the hearing of this appeal counsel informed the Court that the sale of the erven by the respondent to a third party had fallen through, so that the transfer of the erven out of her name was no longer imminent; and the appellant alleged in his founding affidavit that he had set in train an application for a permit authorizing him to acquire and hold the erven.

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for himself. The actual or potential fate of that application is unknown, but if it has been successful, or is likely to succeed, the appellant would presumably wish to proceed with an action against the respondent. With that possibility in mind, I consider that it should be made clear that I do not regard the judgment of the Court a quo as having decided definitively that the appellant could not obtain any relief against the respondent in an action to be instituted, based on the alleged agreement. It is true that AARON AJ referred to the relief which the appellant would claim in the main action (at 13 G), and that there are passages in the judgment suggesting that the appellant was precluded absolutely from obtaining any relief based on the agreement (e g at 16 E and 17 E), but on analysis it appears that the learned Judge, with respect, did not consider pertinently the situation which would arise if the appellant succeeded in obtaining the requisite permit (c f at 17 C-D and 18 D), and that the real ratio

/decidendi ...

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decidendi of the Court a quo was that the appellant was not entitled to the interdict he was seeking, as such (see at 14 E-F, 17 B-C and 18 D). Moreover, it would appear that the learned Judge regarded the alleged agreement as an illegal contract (see at 13 H, 14 F and 18 E). With respect, I would not categorize it as such. The contract itself was not prohibited, as the learned Judge himself pointed out (at 14 B); it was the performance agreed upon that was unlawful, and for that reason the contract was unenforceable, at least as long as the appellant did not have the requisite permit. The learned Judge referred also to considerations of public policy (e g at 14 C and 17 E). In a broad and general sense it could no doubt be said that public policy will not allow the enforcement of an illegal contractual undertaking, but otherwise considerations of public policy do not appear to me to play an active role in that context. (A conceivable exceptional case might have presented itself if the appellant had been

/able ...

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able to show, for instance, that his application for a permit had already been approved and would have been issued within a couple of days; but since that is not the factual situation here, I express no view on it.) The position with which we are dealing in this case is an unusual one. The contractual performance alleged to have been undertaken by the respondent was illegal, since the appellant did not have the requisite permit. If the appellant can succeed in obtaining a permit now, can it be found that the respondent's contractual undertaking is thereby validated, with the consequence that it becomes enforceable by the appellant against the respondent? As I have indicated, an answer to this question is not called for in this appeal. The remarks set out above have been made with the sole object of showing that this aspect of the matter has not been decided against the appellant and that it is left open.

The conclusion as to the narrow basis on which

/this ...

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this appeal falls to be decided, as stated earlier, followed upon a consideration of the main thrust of the argument of counsel for the appellant. In view of the conclusion reached in that regard, the other arguments advanced by the appellant's counsel do not arise for consideration. So, for example, the cases of *Karjieker v Karjieker* 1978 (2) S A 499 (C) and *Ornelas v Andrews Cafe and Another* 1980 (1) S A 378 (W), relied on by counsel in this Court as in the Court below, need not be examined, since neither of them touched upon the vital issue discussed earlier. Similarly, cases such as *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) S A 181 (A) and the other authorities cited in *Joubert, General Principles of the Law of Contract* (1987) at 131 note 16, to which counsel referred us, are not in point.

It remains to deal with the amendment to the appellant's notice of motion, for which his counsel applied, as mentioned earlier. The amendment, as finally formulated

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by counsel in the course of his argument, was to substitute a comma for the full stop at the end of paragraph 1.1.2 of the prayer, as quoted earlier, and to add thereafter the following words:

"and in which action the Applicant will, in the alternative, claim in terms of the *condictio ob turpem vel iniustam causam* against the First Respondent that transfer of the said properties be effected to the Applicant upon the Applicant obtaining a permit or to a person designated by him in terms of a deed of sale who is qualified in terms of the said Act to take transfer."

A strange feature of this amendment is that, although the alternative cause of action postulated for the action to be instituted is now a *condictio*, the appellant still seeks to achieve thereby exactly the same relief as he would have obtained by means of specific performance of the contract. But there is no need to dwell on that aspect of the amendment, nor on the fact that the respondent has not been afforded an opportunity of dealing with the suggested cause of action in her affidavit. In my view

/the

27.

the obviously fatal objection to the amendment is that it does not remove the obstacle in the way of the appellant being granted the interdict that he seeks, as discussed above. Whatever the basis may be of the claim to be put forward in the main action, the interdict applied for would still have the effect of compelling the respondent to continue with the unlawful performance of the alleged contract, and that remains the reason why it cannot be granted.

Arguing in support of the amendment, counsel for the appellant relied upon the decision in *Beg v Lodewick* 1945 (2) P H M49. The circumstances of that case and the nature of the decision given therein are explained in the judgment of the Court a quo (at 17 G - 18 B). The amendment seems to have been designed to meet the difficulty of AARON AJ (at 18 B/C) that the appellant's claim, as it was presented on the papers before him, was not a *condictio*. But it does not meet the difficulty in regard

/to ...

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to the granting of the interdict as such. That difficulty was not, it seems, addressed in *Beg v Lodewick*, and on that ground I share the view of AARON AJ that the case was wrongly decided.

In the result the appeal is dismissed, with costs.

A.S. BOTHA JA

RABIE ACJ

JOUBERT JA

CONCUR VILJOEN JA

JACOBS JA

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