

SOUTH AFRICA / JUDGMENT

Madisha and Another v Greater Tubatse Municipality and Others (65898/2012)

[2014] ZAGPPHC 611 (15 August 2014)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Bredenkamp

CASE / FILE NUMBER

65898/2012

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC

OF SOUTH AFRICA)

CASE

NO. 65898/2012

Date: 15 AUGUST 2014

In

the matter between:

MAKONKO

DANIEL

MADISHA.....

FIRST APPLICANT

ELIZABETH

POPPY

MATHELELE.....SECOND

APPLICANT

and

GREATER

TUBATSE

MUNICIPALITY.....FIRST

RESPONDENT

MEC

FOR LOCAL GOVERNMENT & HOUSING,

LIMPOPO.....SECOND

RESPONDENT

HENRIK

DUIKER

N.O.....
THIRD RESPONDENT
ROSEMARY
MOLAPO.....FOURTH
RESPONDENT
CHARLENE
DAVIDS.....FIFTH
RESPONDENT

JUDGMENT

BREDENKAMP AJ:

[1] The applicants in this matter seek an order declaring that the provisions of the Limpopo Housing Act, 2 of 2006 are not applicable

to the agreement of sale entered into between the applicants and the Late Griet Duiker in respect of Erf 342\1, Ext 10, Burgersfort, and that the first respondent do all things necessary to effect transfer of the property into their names

[2] In a counterclaim the first respondent seeks a declarator stating that the said agreement of sale was concluded in contravention of Section 13(1) of the Limpopo Housing Act, 2006 and in contravention of Section 10(A) (i) of the National Housing Act, 1997 and accordingly null and void.

[3] THE AGREEMENT of sale was entered into on 5 August 2004 and the applicant paid the full purchase price on 5 August 2005. The services deposit was paid on 26 November 2010. First respondent refused to agree to the transfer of the immovable property into the name of the applicants, pointing out, the restrictions contained in the Limpopo Housing Act 2 of 2006 and more specifically Section 14(1) thereof. The latter stipulates that no one must sell or let or otherwise encumber such dwelling for the period of 8(eight) a year

from date on which it was acquired from the department responsible for housing matters in the province.

[4] The 2006 Housing Act, published in the February 2007 repealed the Northern Province Housing Act 8 of 1998 in its entirety (compare Section 19 thereof). It was pointed out by counsel for the applicant that there is a strong presumption against retrospectivity of a statute, and therefore its operation should be construed as prospective unless the Legislature clearly expressed a contrary intention. (Compare Protea International (PTY) LTD v Peat Marwick Mitchell & Co 1990(2) SA 566 (A) at 570 B-C.

[5] When the agreement of sale was concluded between the late Ms Duiker and applicants, the 1998 Northern Province Housing Act was still in effect. It was correctly pointed out by the counsel for the applicant, that the 1998 Act does not contain restrictions similar to those contained in Section 13 and 14 of the 2006 Limpopo Housing Act. However, what has to be

considered is the applicable Section 10 A of the Housing Act 107 of 1997 which is titled “Restriction on voluntary sale of state-subsidised housing”. Section 10A was inserted into the Act by:

“Virtue of the Housing Amendment Act 4 of 2001 which came into effect on 1 February 2002 by Publication of regulation 5 of 2002 in Government Gazette No 230.” This Act enjoys national application.

- [6] Consequently, Section 10 A of the Housing Act 107 of 1997 was in operation, when the agreement of sale between Ms Duiker and the applicants was entered into on 5 August 2004 and of which the full purchase price was paid on 5 August 2005. A further factor that has to be taken into account is that the property in casu was never transferred into the name of Ms Duiker although it was allocated to her on 29 November 2001. It was then sold to the applicants by Ms Duiker although she was not the registered owner thereof.
- [7] The relevant Section 10 A referred to above provides as follows:
- (1) Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy, as defined in the Code, granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired by that person unless the dwelling or site has first been offered to the relevant provincial housing department.
- [8] Before commenting on the provisions of that section it has to be noted that sub paragraph 2 of section 10 A provides that once a person vacates his/her property, the relevant Provincial Housing Department shall be deemed to be the owner of the property. It was then argued on behalf of the respondent that the late Ms Duiker has indeed vacated her property and therefore the Provincial Housing Department of the province of Limpopo is deemed to be the owner of the property.
- [9] The words “shall not sell or otherwise alienate” contained in sub section 1 of section 10 A indicates that, these provisions are of a peremptory nature.
- [10] Section 10 1 A was already on the statue book when the Northern Province Housing Act 1998 was still in force and in effect. As pointed out above, the 1998 Provincial Act did not contain the same restrictions as appeared in the new Provincial Act of 2006 and is also contained in Section 10A of the National Housing Act 107 of 1997.
- [11] It is important to take note of the following portion of Section 10 A (1), namely that:
- “(1) Notwithstanding any provisions to the contrary in any other law,... “

This is an indication , that the Housing Act enjoy precedence above similar housing Acts contained in provincial legislation.

- [12] The question is then whether the approval of the allocation of the state subsidized housing to Ms Duiker on 20 November 2001, amounts to “Acquiring.” This word is not defined in the Housing Act.
- [14] Had she registered the property in her own name, she would have obtained it by her own exertion. However, no transfer took place. Consequently Ms Duiker, is therefore still affected by the restrictions in the above mentioned section.
- [15] In view of the above, the application of the applicant cannot succeed. It had to be offered to the relevant department first. As far as the counterclaim is concerned and the relief sought therein it is clear that the agreement of sale was not concluded, (in view of what was stated above). In contravention of Section 13 (1) of the Limpopo Housing Act of 2006. It is in contravention of Section 10(A) of the Housing Act of 1997. However, to make a declaratory order to this effect would merely of academic interest as I have already indicated, that the application of the applicants cannot succeed. Consequently, no order in terms of the counter application is made.
- [16] For the reasons stated above, the application of applicant's cannot succeed and it is dismissed with costs.

BREDENKAMP IM

ACTING JUDGE OF THE HIGH COURT.

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