

SOUTH AFRICA / JUDGMENT

## Mkhize v Jonkers and Others (1387/2019) [2020] ZANCHC 89 (4 December 2020)

[2020] ZANCHC 89

COURT

Northern Cape High Court, Kimberley

BEFORE

N Mayet

CASE / FILE NUMBER

1387/2019

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1387/2019

Heard on: 12/06/2020

Delivered on: 04/12/2020

NOT REPORTABLE

In the matter between

MKHIZE SBONISO Applicant

and

JONKERS LADIA 1st Respondent

ID NO: [...]

NGCALUZA JOSEPH 2nd Respondent

NGCALUZA PANDRONOMIA ANNA 3rd Respondent

REGISTRAR OF DEEDS 4th Respondent

MEC FOR HUMAN SETTLEMENTS, WATER 5th Respondent

AND SANITATION, NORTHERN CAPE

DAWID KRUIPER LOCAL MUNICIPALITY 6th Respondent

## JUDGMENT

### A. introduction

1. This is an application to set aside the sale and transfer of a state subsidized house situate at [...] street, Upington (“the property”) and to return the property to the housing pool of the Fifth and Sixth Respondents for consideration of allocation to the Applicant alternatively the re-allocation of subsidized housing.
2. The First Respondent is the erstwhile registered owner of the property. The title deed of the property was endorsed in terms of section 10A(1) of the Housing Act 107 of 1997 (“the Housing Act”) with the condition that the property could not be sold or alienated for eight years after acquisition, unless first offered to the relevant provincial housing department.
3. The property was transferred to the First Respondent on 29 March 2012 and within eight years after acquisition, the First Respondent entered into two sale agreements:
  - 3.1. In 2012 with the Applicant, without first offering the property to the relevant provincial housing department (“the first sale”); and
  - 3.2. In 2018 with the Second and Third Respondents, with consent from the relevant provincial housing department (“the second sale”).
4. The Applicant concedes that the first sale is null and void as it contravenes section 10A(1) of the Housing Act. The Applicant attacks the validity of the second sale. The Applicant contends that the First Respondent contravened section 10A(1) by alienating and vacating the property in the first sale and this triggered section 10A(3) “When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property...” The Applicant thus challenges the consent granted in terms of section 10A(1) for the second sale on the basis that the true state of affairs was not known to the relevant provincial housing department and the second sale is tainted by fraud and must be set aside.
5. The Second and Third Respondents oppose this application on the grounds that they are bona fide purchasers and the property was transferred and registered into their names after compliance with all statutory prerequisites. To this end, they submit that the Applicant’s interpretation of section 10A is misguided, the section 10A(1) consent is an administrative decision which is valid until set aside and the Applicant has not discharged the onus to establish fraud.
6. The First Respondent did not enter an appearance but filed a confirmatory affidavit in support of the Second and Third Respondents. The Fourth, Fifth and Sixth Respondents did not enter an appearance.

7. Some disputes of fact exist but the Applicant elected to argue the matter on the basis that he is entitled to the relief even if the facts alleged by the Second and Third Respondents are correct. The approach to be taken to factual disputes when final relief is sought on notice of motion is set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) and for purposes of this decision, the facts alleged by the Second and Third Respondents will be accepted. I proceed to elaborate on both the common cause as well as those facts which, in accordance with the aforesaid approach, also have to be taken into account.

#### B. factual context

8. The origin of this application began with the first sale on 15 September 2012 when the Applicant and the First Respondent entered into a written agreement of sale without first offering the property to the relevant provincial housing department notwithstanding the title deed endorsement which reads:

*“SPECIAAL ONDERHEWIG aan die volgende voorwaarde ten gunste van die Noord-Kaap Behuising ontwikkeling- Bestuurskomitee:*

*“Die binne gemelde eiendom mag ingevolge Artikel 7 van die Noord-Kaapse Interim Wet op Behuising, Nr 6/1998 en Artikel 10A(1) van die Behuisings Wysigings Wet 107 van 1997 nie vir n tydperk van 8(agt) jaar vanaf datum van verkryging deur die Transportnemer(s) verkoop of vervreem word sonder dat die erf eers aan die Noord-Kaap Behuisings ontwikkelings-Bestuurskomitee aangebied is nie.”*

9. The Applicant was unaware that the first sale contravened the Housing Act. The Applicant made payment of the agreed purchase price of R40 000.00 and the First Respondent vacated the property and informed the Applicant that transfer would occur after the expiry of the eight year condition.
10. The First Respondent claims that in 2013, the Applicant agreed to pay an increased purchase price of R60 000.00. The Applicant avers that in 2016 or 2017, the First Respondent demanded an additional amount because the value of the property had increased. The Applicant refused to make any additional payment and as a result, the First Respondent unilaterally cancelled the first sale.
11. On 4 May 2018, the First Respondent entered into the second sale with the Second and Third Respondents for a purchase price of R80 000.00.

The property was offered to the Department of Housing and Local Government, Province Northern Cape, who declined and granted consent

for the second sale. The property was registered in the names of the Second and Third Respondents on 5 September 2018 and eviction

proceedings were instituted against the Applicant.

#### C. section 10a

12. This application requires an analysis of section 10A.[1] Section 10A was inserted by amendment on 1 February 2002 and is titled “Restriction on voluntary sale of state-subsidised housing”. The composite scheme constructed by section 10A(1), (2), (3) and
- (4) form part and parcel of the regime governing state subsidised houses and operate in conjunction with one another. When considering section 10A, the appeal court in *Abdul v Williams* [2019] JOL 46180 (ECG) stated:

*“[19] The interpretation of Section 10A of the Housing Act must therefore be viewed in the context of the Government’s constitutional obligation to provide adequate housing for indigent persons. Judicial cognisance can be taken of the fact that the demand for state-subsidised houses in this country exceeds its supply.*

Consequently, there are long waiting lists for such houses. The absence of the restrictions provided for in section 10A of the Housing Act would permit persons who were not indigent, to buy state-subsidised houses meant for the poor, to profit from the sale or lease of such properties on the open market. Thus indigent persons on a waiting list would be deprived of the opportunity to obtain state-subsidised housing. Clearly that would frustrate the objectives of the Housing Act.”

13. Section 10A(1) inserts a condition that the property must first be offered to the relevant provincial housing department before it can be sold or otherwise alienated. Section 10A(1) creates a right of first refusal. In the context of a sale, the court in *Van der Hoven v Cutting* 1903 TS 299 held that this “right of first refusal” is called a “right of pre-emption.” *Ogilvie-Thompson JA in Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 316G-H described a right of pre-emption as:

*“...what is of the essence of the obligation of a grantor of a right of pre-emption who desires to sell the subject of that right,*

*namely to refrain from selling it to any third party before offering it, upon the terms stated in the contract constituting the right, for sale to the holder of the right of pre-emption. It is only if the latter declines to exercise his right to purchase that the lessor (appellant) may, without breach of her obligations under clause 7, conclude a contract of sale of the premises to a third party.”*

14. The inherent nature of a right of pre-emption is a right to a first offer but it does not create an obligation to accept such offer. The wording of section 10A(1) does not provide for instances where the provincial housing department declines the property offered. To deal with the lacuna which would otherwise arise, when the relevant provincial housing department declines the offer, consent in terms of section 10A(1) is required to effect the transfer of a state subsidised house. In *Jokozela v Ngece and Another* (CA137/2014) [2017] ZAECHGHC 54 (13 April 2017), Hartle J makes the following observation:

*“[Footnote 11]:*

The endorsement in the title deed, or the recordal of the restrictive condition therein, will obviously ensure that transfer cannot take place without the necessary assurance from the relevant housing department that there has been compliance with the restrictive condition.”

15. Section 10A(2) deals with situations where the property has been offered and accepted. In these circumstances, the provincial housing department

is required to endorse its records that the person wishes to vacate the property and such person is entitled to remain on the beneficiary

waiting list for beneficiaries requiring subsidised housing.

16. Section 10A(3) provides that when the registered owner vacates the property, the provincial housing department will be deemed to be the owner of the property and application must be made to the Registrar of Deeds to have the title deed endorsed to reflect the department’s

ownership of the property.

17. Lastly, section 10A(4) states that the registered owner will not receive any purchase price for the property but will be eligible to receive another state subsidised house in the future.

18. In the full bench decision in *Abdul supra Revelas J* after considering the sentiments expressed in *Jokozela supra* that the restriction in section 10A is aimed to prevent beneficiaries from selling state subsidised houses for profit held:

*“[21] However, I wish to point out with respect, that the main purpose of the Housing Act is not to protect the Government’s assets, as stated in the paragraph cited. Although it is an important consideration, the main purpose of the Act is to provide for the facilitation of a sustainable housing development process by, inter alia, the financing of national housing programmes. The objectives of the national housing programmes are the measures and arrangements ”to assist persons who cannot independently provide for their own housing needs”, “to facilitate housing delivery” and “rehabilitate and upgrade existing housing stock including municipal services and infrastructure.” In other words, the main purpose of the Act is to provide housing for indigent persons.”*

19. With this in mind, I turn to consider:

19.1. whether the first sale and the vacating of the property in contravention of section 10A(1) triggers section 10A(3) and the provincial housing department is deemed to be the owner; and

19.2. whether section 10A(3) can be interpreted to mean “when the person vacates” registered ownership lapses automatically and the relevant provincial housing department is deemed to be the owner the property.

D. Does section 10A(1) “sell or otherwise alienate” trigger section 10A(3)?

20. As I understand the Applicant's submission, "sell or otherwise alienate" in section 10A(1) should be interpreted to include "vacates" so that when the First Respondent contravened section 10A(1) in the first sale and vacated the property, this triggered section 10A(3) and the provincial housing department was deemed to be the owner.
21. The Housing Act does not define "sells or otherwise alienate" and to this end, I make reference to the constitutional court dealing with a right of pre-emption in *Mokone v Tassos Properties CC and Another* [2017] ZACC 25 where the court held:

*"[46] The Alienation of Land Act defines "alienate" thus— "alienate", in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning".*

[47] In the case of a right of pre-emption, an alienation – as defined – takes place only when that right is exercised and a sale comes into being. Merely affording someone that right is not an alienation because that is simply not a sale, exchange or donation. In sum, I do not see why section 2(1) of the Alienation of Land Act should apply to a right of pre-emption.

[48] To the extent that it relates to a "contract of sale", section 1(1) of the Formalities Act is comparable. It applies to a sale of (a) land or (b) any interest in land. Although the Formalities Act does not define "sale", I see no basis on which it can be gainsaid that – absent any mishaps- a sale results in the alienation of land or interest in land. To this extent, its meaning is similar to that of "alienate" in the Alienation of Land Act"

22. From *Mokone supra* it is evident that a sale or alienation only takes place when the sale, exchange or donation comes into being and transfer is effected.

This approach aligns with *Crous NO v Utilitas Bellville* 1994 (3) SA 720 (C), where the court found that a testamentary disposition was not an alienation contemplated in the right of pre-emption and held that the generally accepted meaning of the word "alienate" is the transfer of ownership. Similarly, in *Jokozela supra* Hartle J concludes that alienation requires transfer of ownership:

*"[Footnote 9]:*

The tautology in the phrase "or otherwise alienate" after the words "sell", and the specific reference to the beneficiary's relocation from or vacating the dwelling or site, seems to suggest that the legislature wishes to avoid any act by which the beneficiary is displaced from the home allocated to him, even, for example, by way of letting it. Since any formal alienation of property is not complete unless transfer passes from the seller to the purchaser, the purported objective of ensuring that the beneficiary doesn't find himself homeless again within the restrictive pre-emptive period is lost by the parties holding transfer over until after 8 years have passed, or by simply not registering the sale formally."

[Emphasis added]

23. In addition, the endorsement in the title deed of the property, makes use of the Afrikaans verb "vervreem" which Grobler v Trustee Estate De Beer 1915 AD 265 at 274 interpreted to mean the act of transferring ownership.
24. The word "vacates" on the other hand, is defined in Merriam-Webster dictionary as "to give up occupancy." Having regard to the authorities to which I have made reference as well as the title deed of the property, it is evident that the words "sells or otherwise alienate" in section 10A(1) indicates transfer of ownership and this is not simply the surrender of possession or occupancy of the property so as to equate to "vacates" in section 10A(3).
25. If I attempt to apply the interpretation in the manner contended by the Applicant, it gives rise to an anomaly as a registered owner who "sells or otherwise alienates" his property in contravention of section 10A(1) but who remains in occupation will not be deprived of ownership but a registered owner who vacates the property will be deprived of ownership by triggering section 10A(3). As Hartle J points out in Jokozela supra:

Nowhere is it indicated in the Housing Act that the mere disposal of the property on its own (without transfer being effected) or even the rental thereof to a person other than the beneficiary within the eight-year period, attracts any punitive measure."

26. The Applicant's contention also results in bona fide purchasers who complied with section 10A(1) and obtained consent from the relevant provincial department being at risk of being deprived of the property in terms of the deeming provision in section 10A(3).

0.21cm; line-height: 200%">27. I digress to mention that the Applicant's contention has merit but only in circumstances when section 10A(1) is contravened and the provincial housing department enforces its right of pre-emption. This is because in Mokone supra, the constitutional court considering a breach of a right of pre-emption held that:

*"[56] In the event that the conduct of the grantor of the right of pre-emption has culminated in the sale of land to a third party, it seems necessary to understand the import of the so-called Oryx mechanism. This was expressed thus: "In the event that a seller concludes a contract of sale with a third party in breach of a right of pre-emption, the [holder of the right of pre-emption] may, through a unilateral declaration of intent, step into the position of the third party. A contract of sale is then deemed to have been between the seller and the holder of the right of pre-emption." [Emphasis added]*

28. By enforcing its right of pre-emption, the contract of sale is deemed to have been between the seller and the provincial department

and as a result, the provincial housing department acquires the right to make application that the title deed be endorsed to reflect its ownership of the property in terms of the Deeds Registries Act 47 of 1937.

29. This interpretation is not at variance with the appeal court in Abdul supra when it held that:

*“[26] Ownership of the property reverted to the relevant department of housing when the first and second respondents moved out of the house and both agreements concluded between the appellant and the first and second respondents on the advice of Mr Sam, constituted a nullity.”*

30. Notwithstanding use of “reverted”, the appeal court was no doubt aware that the right of pre-emption is not a reversionary right. In the section 10A(1) consent form, which is presumably standardised, reference is made to the provincial housing department having “acquired a right of reversion.” In my view, it is this process to which the court in Abdul supra made reference when the right of pre-emption is enforced in terms of section 10A(1) and “a contract of sale is then deemed to have been between the seller and the holder of the right of pre-emption” whereafter the provincial housing department is able to make application to the Registrar of Deeds to have the title deed endorsed to reflect the department’s ownership.

31. This approach accords with Mokone supra where Madlanga J writing for the majority, held:

*“[57] I see no reason in principle why the notion of the holder of the right “stepping into the position of the third party” cannot be achieved in a manner that does not bypass the requisite formalities. That may be achieved either consensually or through coercion by court. The idea of a “unilateral declaration of intent” is understandable in the circumstances. It is consonant with the notion that, subject to whatever the law may be held to be on ordering or not ordering specific performance, the grantor of the right is liable to coercion.*

[58] I am addressing myself only to situations where coercion will be warranted. I consciously eschew the debate whether, in this context, there is room for the exercise of discretion by courts whether to grant specific performance.”

32. In this regard, the recourse inherent in the nature of the right of pre-emption is for the provincial housing department, first, to enforce its right and in so doing, a contract of sale is deemed to have been between the recalcitrant registered owner and the provincial housing department, and second, to make application for

formal endorsement of the title deed in terms of in section 10A(1) to reflect the department’s ownership. But as Hartle J in Jokozela supra points out:

*“[Footnote 9]*

It is unfortunate that the provision doesn’t unequivocally provide what is supposed to galvanize the housing department into action in order to protect its housing development investment.”

33. Thus the Applicant’s contention with regard to the provincial housing department being deemed to be the owner can only find

application when the provincial housing department enforces its right of pre-emption, which unfortunately, is not applicable to the facts in this application.

34. Whilst I agree that the First Respondent's actions in this matter are reprehensible. I am fortified by the appeal court in Abdul supra that section 10A(1) seeks to discourage the informal sale of subsidised houses by nullifying agreements which are contrary to and designed to circumvent its prescripts, not registered ownership:

*"[22] The absence of punitive measures in the Housing Act in respect of a contravention of section 10A thereof, referred to in the Nkokheli Jokoleza judgment does not bolster the appellants case either. On the contrary, the absence of punitive measures rather strengthens the interpretation that the sale or any other form of alienation of state subsidised property is a nullity. A fine would not necessarily constitute a deterrent for property speculators. One could also assume that the legislator did not intend to criminalise ordinary, but prematurely concluded agreements of sale in the context of assisting the poor with owning their own homes. It would be far more practical to regard such agreements in contravention of section 10A of the Housing Act, as simply null and void.*

- [23] The peremptory language and the repeated use of the word "shall" in sections 10A and 10B are further significant indications supporting a stricter interpretation of the sections in question. That means that the sale, lease or other type of alienation of state-subsidised property is strictly prohibited and the conclusion of transactions in breach of the restrictions present in those sections are a nullity."

35. Having regard to the authorities to which I have made reference as well as the general operation of the right of pre-emption, I am not persuaded that the words "sell or otherwise alienate" can be interpreted to equate to "vacates" and as a result, I remain unconvinced by the Applicant's contention that a contravention of section 10A(1) triggers section 10A(3).

E. Can section 10A(3) "vacates" be interpreted ownership automatically lapses?

36. I turn to examine whether section 10A(3) can be interpreted to mean that the First Respondent's ownership automatically lapses "when the person vacates" and the relevant provincial housing department is deemed to be the owner of the property.
37. It is artificial and unrealistic to appraise section 10A(3) in isolation heedless of the system with which it is coupled and calibrated. Reading section 10A as a whole, it appears to me that the true construction is that section 10A(2) envisions a registered owner who wishes to return the property and who gives notice of intention to vacate then section 10A(3) provides for when such person vacates the property and is linked to section 10A(2) the property having been first offered and accepted and it then follows that the relevant provincial housing department has knowledge when the person vacates and in these circumstances, the relevant provincial housing department is deemed owner and must make application for the title deeds of the property to be endorsed. The interaction of sections 10A(2), (3) and (4) are inextricably linked. Candice Pillay "RDP Housing and the pre-emptive clause- A rights perspective" astutely describes this system as "a return and exchange policy."

38. The Applicant's interpretation of section 10A(3) results in loss of registered ownership in vacuo as the registered owner would be deprived of ownership whilst still having a title deed registered in their name and the provincial

housing department would acquire ownership without its knowledge and without having to take steps to have the title deed endorsed to reflect its ownership. As the court in Jokozela supra states:

*"[15] A formal endorsement by the Registrar of Deeds in favour of the Eastern Cape Housing Department would also be expected to flow from any declaratory relief sought relieving the deceased from his title to the property as a result of any supposed illegal sale of the property by him."*

39. I agree with the Second and Third Respondents' submission that section 10A(3) should be interpreted restrictively so as to require the provincial housing department to make application to have the title deed endorsed before registered ownership can lapse. This approach aligns with the definition of "housing development" in the Housing Act which includes "security of tenure". As a result, I am not persuaded that when the person vacates the property, section 10A(3) has the effect that registered ownership automatically lapses without the provincial housing department making application to the Registrar of Deeds to have the title deed endorsed to reflect the provincial housing department ownership.

#### F. fraud

40. The Applicant submits that the consent is tainted by fraud as the First Respondent failed to disclose the first sale and that the Applicant was in possession of the property since 2012. If fraud or fraudulent misrepresentation is shown to have been perpetrated in obtaining consent, then the second sale is tainted and must be set aside. In this regard, there are two aspects that must be considered: whether there was a duty to disclose the first sale and whether there was a duty to disclose that the First Respondent vacated the property in 2012.

#### Duty to disclose first sale

41. The Applicant relies on the confirmatory affidavit from Corne Van Zyl, the attorney responsible for the registration and transfer of the property in the second sale as evidence of prior knowledge of the first sale. The Applicant also relies on the conduct of the First, Second and Third Respondents as evidence of prior knowledge of the first sale.
42. The first agreement of sale is invalid and unenforceable whether it was extant or cancelled and there is no duty to disclose a nullity. As Abdul supra states:

*"[26] The purchase of the property by the third respondent, in derogation of the rights of the appellant, as she alleged, and with knowledge of such rights would not have defeated any rights the appellant may have had, if the doctrine of notice was applicable to the present situation. The doctrine is not applicable in this matter because the appellant, for the reasons outlined above, never acquired any rights in the property, not as purchaser nor as a tenant."*

43. The Second and Third Respondents have not suggested that they were ignorant of the first sale between the Applicant and the First Respondent. The Second and Third Respondent's answering affidavit as well as the confirmatory affidavit from the First Respondent and Corne Van Zyl confirm the information received from the First Respondent was that she had cancelled the first sale with the Applicant.
44. The Second and Third Respondents version supported by the First Respondent as well as the conveyancing attorney that the First Respondent informed them that she cancelled the first sale, is not as far-fetched and clearly untenable to be rejected outright. In any event, there is no duty to disclose the first sale which the Applicant concedes is null and void. In this regard, there is no evidence before this court to discharge the onus to establish fraud or fraudulent non-disclosure of the first sale.

#### Duty to disclose vacated property

45. The Applicant contends that the consent is tainted for want of knowledge of the true facts as there was no disclosure that the First Respondent had vacated the property in 2012 with the first sale. Silence in circumstances where there is a duty to speak amounts to fraudulent non-disclosure. It is designed concealment when as a result of the underlying circumstances in any situation there is a duty to disclose. Where non-disclosure is alleged, the facts giving rise to the duty to disclose must be sufficient to justify an inference of fraud. [Gollach & Comperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978 (1) SA 914(A) at 915B]
46. The Applicant relies on Tapala v Tlebetla 2019 JDR 0393 (GP) in support of the submission that the First Respondent's ownership of the property lapsed when she vacated and the provincial housing department was deemed to be the owner. Tapala supra is distinguishable as fraud was admitted.
47. The complicating factor for the Applicant, is that in the absence of review, this court must accept that the provincial housing department investigated the circumstances, obtained the relevant information and ascertained that First Respondent had entered into the first sale and vacated the property and nevertheless elected to grant consent in terms of section 10A(1).

0.21cm; line-height: 200%">48. The consent obtained from the relevant provincial housing department has not been reviewed and set aside. In Oudekraal Estates (Pty) Ltd v City of Cape Town & Others (2004) 6 SA 222 at 242A-C) the court held that:

*“until the administrator’s approval, and thus also consequences of the approval, is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question”.*

49. In the unreported judgment of Comfort v Munzhedzi (case 28227/2011), Madima AJ stated:

*“[20] It is indeed surprising that the First Respondent raised the above provisions of the Housing Act as a defence against his eviction when he himself is a party to a sale and purchase that is prohibited by the Housing Act. First Respondent has no clean hands. Our courts are very clear in this regard. If First Respondent and indeed the Provincial Housing Department are of the view that the sale and purchase of the property was unlawful, and therefore the transfer should not have been effected, then they should have both the sale to and the transfer into Applicant’s name be reviewed and set aside. Unless and until this has been done, the sale and transfer remain valid.”*

50. Unless and until the consent is set aside, it is a valid administrative decision. The remedy is for the Applicant to review the consent and if this is found to be irrational and set aside, then application can be made for the second sale and transfer into Second and Third Respondents name to be set aside. [Senne v Munzhedzi and Others (28227/2011) [2013] ZAGPJHC 235 (31 July 2013)]
51. The Second and Third Respondent were aware that the Applicant was in occupation of the property and in the answering affidavit the Second Respondent states that prior to the signature of the second sale, he telephonically informed the Applicant of the intended transaction.
52. There was no submission by the Applicant that the statutory body charged with the duty of considering the first offer of the property and issuing the consent to the second sale did not investigate the circumstances, obtain the relevant information and evaluate all evidence.
53. A factual basis must be established for any allegation of fraud. It is not sufficient to raise speculative propositions or advance arguments on probabilities which might indicate fraud. [Nedperm Bank v Veribri Projects CC 1993 (3) SA 214 (W)]. A general allegation of fraud is insufficient; particulars must be given. [Breedt v Elsie Motors (Edms) Bpk 1963 (3) SA 525 (A)] In the absence of evidence and review, this court cannot assume that the Fifth and/or Sixth Respondents did not have knowledge that the First Respondent vacated the property in 2012. In this regard, the Applicant has not discharged the onus to establish fraud or fraudulent non-disclosure. The consent is valid until set aside and as a result, the second sale is valid and there is no basis for cancellation of the transfer.

#### G. relief

54. The meaning of the statute having been ascertained, the merits do not present difficulty. But the equities are incongruous. I have spent countless hours traversing the old authorities, pursuing creative legal possibilities and consulting with astute colleagues in a desperate attempt to assist the Applicant. My foray to balance the equities by crafting an innovative legal solution have proved futile. I am led back to one inescapable conclusion: this application must fail.

55. Having regard to the current National State of Disaster and the fact that the Applicant is a soldier, a member of our society who risks his life for our safety and whose services are essential in the lockdown period, this court very deliberately, extended the date of delivery of this judgment in order to grant the Applicant latitude from imminent eviction.
56. Due to the peculiar circumstances which arise in this matter, especially since this court must accept that the Fifth and/or the Sixth Respondents in granting consent and waiving the right of pre-emption, did so after having investigated the circumstances, obtained the relevant information and presumably ascertained that First Respondent had entered into the first sale and vacated the property in 2012, nevertheless elected to grant consent in terms of section 10A(1).

0.21cm; line-height: 200%">57. Therefore, the Fifth and/or the Sixth Respondents should, in light of this judgment, consider the Applicant for the allocation of a subsidised house, of the same size, value and in same area of the property with which this application is concerned. I am not able to make an order in this regard as this was not part of the relief contained in the notice of motion served on the Fifth and the Sixth Respondents. A copy of this application together with its annexures, the judgment and the order should be served on the Fifth and the Sixth Respondents for consideration.

58. This entire dispute was created by the actions of the First Respondent. Although the First Respondent did not enter an appearance to defend, she did attest to a confirmatory affidavit. The First Respondent took advantage of the Applicant and unduly benefitted from the first sale as well as the second sale. As a consequence, the First Respondent is ordered to pay the costs of this application.

04 December 2020.

Order

1. Application is dismissed.
2. First Respondent to pay the costs.

N. MAYET, AJ

NORTHERN CAPE DIVISION

Mkhize

For the Applicant: Adv. Mitchley

Engelsman Magabane Inc.

For the Respondents: Adv. Olivier

VW Haddad Attorneys

[1] Section 10A reads:

- (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.

- (2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.
- (3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.
- (4) No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor.”

[1] Section 10A reads:

- (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.

- (2) The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.
- (3) When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property.

- (4) No purchase price or other remuneration shall be paid to the person vacating the property but such person will be eligible for obtaining another state-subsidised house, should he or she qualify therefor.”
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**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZANCHC/2020/89.html>

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