

SOUTH AFRICA / JUDGMENT

Nader v Grobler (4692/05) [2006] ZAGPHC 177 (26 April 2006)

[2006] ZAGPHC 177

COURT

High Courts - Gauteng

BEFORE

Murphy

CASE / FILE NUMBER

4692/05

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HIGH

COURT OF SOUTH AFRICA

(TRANVAAL

PROVINCIAL DIVISION)

NOT

REPORTABLE CASE NO: 4692/05

DATE:

26/4/2006

In

the matter between:

ERICA

NADER

Applicant

and

JOHANNA ELIZABETH GROBLER

Respondent

JUDGEMENT

MURPHY J

1. The applicant seeks a declaratory order confirming the existence of a usufruct in favour of her in respect of house number 2 situated on plot 196 Waterval, known as portion 196, Waterval 273 JR, held in accordance with title deed T12066/1993, with effect from 1 December 1996. She further seeks an order authorising the Registrar of Deeds to register the usufruct.

2. The applicant was married to the respondent's son, who died on 6 July 1996. Two children were born of the marriage.
3. The respondent is a widow and the owner of plot 196 Waterval.
4. After the death of the applicant's husband, she elected to reside with the two minor children on plot 196 Waterval in house number 2. She claims to have effected improvements to the home to the value of approximately R220 000,00.
5. The relationship between the applicant and the respondent deteriorated after a few years and she became concerned about her investment in the property. Accordingly she instructed her attorneys to address a letter to the respondent. The letter dated 14 July 1999 reads as follows:

“Ons tree hierin op namens mev Nader wie ons versoek het om hierdie skrywe aan u te rig.

Kliënt deel ons mee dat u oorlede eggenoot voor sy afsterwe bepaal het dat die onroerende eiendom bekend as Plot 196 Waterval na sy afsterwe aan sy drie kinders bemaak sou word. As gevolg van 'n problem met sy testament kon die bemaking egter nie realiseer en is die eiendom uiteindelik op u naam geregistreer met die onderneming van u dat die eiendom by die afsterwe aan die drie kinders bemaak sou word. Intussen is ons kliënt se eggenoot, u seun, ook oorlede, en is ons kliënt aangewys as sy enigste erfgenaam. Die gevolg hiervan is dat die derde aandeel in die onroerende eiendom na ons kliënt moet vererf soos wat dit aanvanklik bedoel was.

Om die situasie nog meer te kompliseer het ons kliënt na die afsterwe van haar eggenoot verskeie verbeterings aangebring en onder andere 'n woonhuis op 'n gedeelte van die plot gebou. Daarbenewens deel kliënt ons mee dat haar verhouding met u en haar skoonfamilie ook sodanig versleg het, dat sy nou bekommerd is oor haar aandeel in die onroerende eiendom, en veral die verbeterings aangebring en die finansiële inset wat sy gelewer het.

Soos die posisie op die oomblik daar uitsien is die onroerende eiendom op u naam gerigistreer en het ons kliënt geen bewys of versekering dat haar belang in die eiendom beskerm is, of sal word nie. Om hierdie rede is dit ons instruksies om van u te eis dat ons kliënt se een derde belang in die eiendom, met die verbetering daarop aangebring nou omskryf en verseker word.

Om hierdie doel te bereik is daar natuurlik verskeie alternatiewe en nooi ons u vriendelik uit om met ons te korrespondeer ten einde die mees gepaste opsie te vind. Moontlikhede wat dalk oorweeg kan word is onder andere:

1. Onderverdeling van die onroerende eiendom;
2. Om die plot in 'n deeltitel ontwikkeling te omskep;
3. Om die plot in 'n trust oor te dra waarvan die drie kinders die begunstigdes is;
4. U koop mev Nader uit vir haar belang in die plot met die verbetering daarop.

Kliënt deel ons verder mee dat sy maandeliks 'n bedrag van R120.00 bydrae as synde een derde bydrae vir 'n lewenspolis wat op u naam uitgeneem is. In hierdie verband ontvang ons graag u skriftelike bevestiging, en onderneming dat u sy steeds as begunstigde op hierdie polis aangeteken is en dat u haar nie as begunstigde van die polis sal skrap nie. Ons verneem ook graag of die polis steeds van krag is, en of die paaielemente tot op datum vereffen is.

U spoedige terugvoer sal waardeer word.”

6. There does not appear to have been any immediate response to this letter. However, some eighteen months later Vally Attorneys, purporting to act on behalf of the respondent, addressed a letter to the applicant in the following terms:

“Ons tree op namens ons kliënt, mev J E Grobbelaar, in bogenoemde aangeleentheid.

Dit is ons instruksie om u skriftelik mee te deel dat ons kliënt in haar testament voorsiening gemaak het vir 'n lewenslange vruggebruik ten gunste van uself onderhewig aan die volgende finansiële bydraes:

1. Helfte van die huisversekering maandeliks aan ons kliënt te betaal.
2. Helfte van die erfbelasting maandeliks aan ons kliënt te betaal.
3. U sal verantwoordelik wees vir die helfte van alle onderhoudskostes ten opsigte van die gesamentlike boorgat soos wat van tyd tot tyd nodig mag blyk te wees.
4. Helfte van die water en ligte rekening maandeliks aan ons kliënt betaal.

Dit staan u vry om, indien u sou besluit om nie van die vruggebruik persoonlik gebruik te maak nie, die woining met die omheinde gedeelte tot die huis, te verhuur en sal u geregtig wees om die inkomste daarvan vir u eie gewin aan te wend.

Ons vertrou dat u bogenoemde in orde sal vind.”

7. The applicant contends that this letter is proof of an intention to grant a usufruct in respect of the house. However, at this stage, it should be noted that the second paragraph of the letter simply states that the respondent had made provision in her will for a lifelong usufruct in favour of the applicant subject to certain financial contributions being made. The letter does not state when the usufruct will become effective.
8. The applicant contends that she met the four financial conditions set out in the letter in that she paid the house insurance of R210,00 and a portion of the rates electronically, as well as the water and electricity, and that she was not required to make any contribution to the borehole.
9. It is common cause that to date no usufruct has been registered. The applicant resided in the house from December 1996 until January 2004. From 1 January 2004 the house was leased to tenants. Clause 2 of the lease entered into between the respondent and the tenants deals with the rental as follows:

“2. HUURGELD

Die huurgeld betaalbaar is as volg:

2.1 R 3000-00 (DRIEDUISEND RAND) vanaf 1 JANUARIE 2004 tot 31 DESEMBER 2004.

2.2 R 3300-00 (DRIEDUISEND DRIEHONDERD RAND) vanaf 1 Januarie 2005 tot 31 DESEMBER 2005.

Die huurgeld is maandeliks vooruitbetaalbaar voor of op die 3de dag van elke kalendermaand. Die VERHUURDER verleen hiermee toestemming dat huurgeld betaal word aan Mev. ERICA NADER, I.D. NR. 640103 0002 087 te Bankrekening by STANDARD BANK, Gezina, Rek. Nr. 410935212

MEV. JE GROBBELAAR MEV. E NADER

2.3 Alle huurgeld betalings soos uiteengesit is INKLUSIEF van BTW.

2.4 Eskalasie sal jaarliks bereken word op 10% (TIEN PERSENT).

2.5 ‘n Deposito gelykstaande aan een maand se huur (R 3000-00 DRIEDUISEND RAND) is betaalbaar aan Mev. Erica Nader met aanvang van die ooreenkoms.”

10. The applicant contends that clause 2 of the lease confirms her rights as a usufructuary by virtue of it granting her ownership of the fruits of the property.
11. On 2 June 2005, attorneys acting for the respondent addressed a letter to the applicant as follows:

“Ons kantore bevestig dat ons optree namens Mev. Grobbelaar in die aangeleentheid, en bevestig ons dat ons instruksies ontvang het om u kantore te verwittig dat u kliënt se voormelde regte ten opsigte van die verhuuring van die woonhuis vrygewiglik en sonder kontrak ons kliënt se perseel opgerig is, tot einde kom met effek 1 Julie 2005, dien ooreenkomsstig gaan ons kliënt vanaf daardie datum haar regte en opsigte van haar totale perseel uitoefen en die perseel onder haar eie hand verhuur.

Ons vertrou dat dieselfde in orde sal wees.”

12. Attorneys acting on behalf of the applicant replied to this letter on 12 July 2005 as follows:

“U skrywe gedateer 2 Junie 2005 geadresseer aan Werner Prinsloo Prokureurs verwys. Geliewe kennis te neem dat ons optree namens me. Erica Nader en dat hierdie kantoor voortaan alle korrespondensie ten aansien van hierdie aangeleentheid namens ons kliënt sal ontvang.

Dit wil voorkom asof u kliënt u nie ten volle op hoogte gebring het met betrekking tot wat die reeling tussen ons onderskeie kliënte is ten aansien van die eiendom nie.

Ons heg hierby aan 'n skrywe vanaf u kliënt se eertydse prokureurs, die inhoud waarvan vanself spreek, en onder die omstandighede versoek ons dan dat u kliënt Julie-maand se huur onmiddelik aan ons kliënt oor betaal asook ons kliënt se regte hierin erken by versium ons kliënt geen ander keuse gelaat word as om die nodige dringende regshulp te bekom nie.

Ons stel verder voor dat ons kliënt se vruggebruik hierin ook formeel in die Akte kantoor geregistreer word ten einde enige toekomstige misverstande te vermy.

Ons verneem dringend van u.”

13. The respondent's attorneys responded to this letter on 2 August 2005 stating simply that the respondent stood by her instructions to them.
14. The respondent denies that any agreement was concluded between her and the applicant in terms whereof a usufruct was conferred upon the applicant. In addition she denies that improvements to the value of R220 000,00 were effected to the house. Most importantly though, she denies ever giving Vally Attorneys instructions to act on her behalf or to conclude any agreement conferring a usufruct upon the applicant. She admits, however, that her daughter had discussed the matter with Vally Attorneys. She furthermore denies that the applicant ever complied with the conditions stipulated in Vally's letter. She also deposes that she has been advised that the agreement was in any event a pactum successorium, and that such is invalid in our law. Finally, the respondent submits that the applicant was guilty of breach of contract, if indeed such a contract had been concluded, in that she had not complied with the requirements of the letter. She drew attention to the fact that the applicant had not furnished any proof that the payments had been electronically made. She averred that the applicant stayed on the property rent free for seven years and also that the intention of the clause in the lease paying the rental to the applicant was to repay her for the improvements effected to the house.
15. In her replying affidavit the applicant set out detailed information regarding the improvements and the payments made in terms of the letter written by Vally Attorneys. I do not propose to deal with them in any detail, other than to say they contribute significantly to a number of disputes of fact and raise material that ought to have been dealt with in the founding affidavit
16. There appear to me to be a number of disputes of fact that cannot be resolved on the papers. They include:

Was an agreement conferring a usufruct ever concluded between the parties either expressly or tacitly?

Were Vally Attorneys mandated to conclude an agreement of usufruct between the parties?

If Vally Attorneys were indeed mandated, what were the terms of the usufruct? In particular, when would the usufruct commence? Was it intended that the usufruct would commence only on the death of the respondent or before?

Was the applicant in breach of contract as a result of not making the financial contributions set out in Vally's letter, thus entitling the respondent to raise the defence of *exceptio non adimpleti contractus*?

Did the rental agreement confer an entitlement on the applicant to the fruits or was it merely an agreement to reimburse her for improvements?

Did the agreement referred to in the letter of Vally's Attorneys amount to an unenforceable *pactum successorium*?

Was the applicant's right one of usufruct or *habitatio* and whether different consequences would flow from such an arrangement?

17. Thus it is clear that the respondent denies most of the material allegations by the applicant and alleges facts which the applicant herself disputes.
18. Most evidently the letter of 24 January 2002 is ambiguous about whether the usufruct would be conferred during the lifetime of the respondent or only after her death. Furthermore the mandate of the attorney has been brought into question by the respondent denying that the firm had her permission and the authority to conclude such an agreement. That disputed fact alone cannot be resolved on the papers.
19. Neither party has requested that the matter be referred for evidence or to trial, and clearly the facts stated by the respondent together with the admitted facts in the applicant's affidavit do not entitle the applicant to the relief that she seeks. Moreover, the replying affidavit raises new facts which ought properly to have been pleaded in the founding affidavit, and accordingly a referral to trial relying upon the existing pleadings would not be appropriate in this instance. Furthermore, the disputes of fact ought properly to have been foreseen by the applicant. In the premises, the application falls to be dismissed. There is no reason why costs should not follow the result.
20. Accordingly the application is dismissed with costs.

J MURPHY

JUDGE OF THE HIGH COURT

Counsel for the applicant, Adv M Klein, Pretoria and counsel for the respondent Adv.Z Schoeman, Pretoria.

Attorney for the applicant, Van Huysteens Commercial Attorneys, Pretoria and attorney for the respondent, M Schoeman Attorneys, Pretoria.

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