
SOUTH AFRICA / JUDGMENT

Nano and Another v Mosima and Others (53521/15) [2017] ZAGPPHC 163 (8 February 2017)

[2017] ZAGPPHC 163

COURT

North Gauteng High Court, Pretoria

BEFORE

Raulinga

CASE / FILE NUMBER

53521/15

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION

CASE

NO: 53521/15

8/2/2017

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

SIPHO
JERRY
NANO 1ST
APPLICANT
BONGILE
LINAH
KUMALO 2ND
APPLICANT
And
TSHOKOLO
HERMAN
MOSIMA 1ST
RESPONDENT
KEBOGILE
EURITU
SCOTT 2ND
RESPONDENT
CITY
OF JOHANNESBURG METROPOLITAN MUNICIPALITY 3RD
RESPONDENT

JUDGMENT

RAULINGA J,

1. In this application the applicants seek relief in the following terms:

1.1. Declaring that the Deed of Sale entered by and between the applicants and the respondents dated 4 September 2012 is null and void ab initio;

1.2. Declaring that the Memorandum of Agreement entered by and between the applicants and the respondents dated 8 October 2012 is null and void ab initio,

1.3. That the first and second respondents pay the amount of R233 000.00 together with interest calculated at the rate of 9% per annum from 26 November 2014 until date of final payment, to the applicant;

1.4. That the first and second respondent or any other persons found to be occupying the immovable property situated at Portion 2 of Holding 119, President Park Agricultural Holdings, Registration Division J.R; Province of Gauteng and known as Stand 2/119, Boshoff Road, President Park, Halfway House, Midrand, Gauteng (herein referred to as "the immovable property") by themselves or through the said respondents be ordered to vacate the immovable property within fourteen(14)calendar days form the date upon which the order is granted, alternatively such other date as may be determined by this Court;

1.5. Should the first and second respondents or any other such persons fail and/or refuse to vacate the immovable property within 14 days or such other period, the Sheriff of this Court or a Sheriff as authorized by this Court, be authorized and directed to forthwith enter the immovable property and evict them forthwith;

1.6. That no order as to costs be made, except if any of the respondents oppose the relief sought, in which event the respondent(s) so opposing be ordered to pay the applicants' costs on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved; and

1.7. Such further and/or alternative relief as may be required to be granted to the applicants.

2. The first and second applicants will be referred to as the applicants and the first and second respondents as respondents.
3. During August 2012 the respondents approached the applicants with a proposal to buy a portion of the applicant's immovable property. During the same month of August 2012, the respondents attended at the applicants' home and handed them a pro forma Hortor's offer to purchase (which would constitute a Deed of Sale) which the applicants completed but unsigned by the respondents.
4. The applicants signed the agreement on 13 August 2012. The respondents only signed the agreement on 4 September 2012 after the first part of the purchase price, R100 000 00 had been paid into the account of the applicants. The total purchase price agreed upon was R200 000 00. No agreement was reached on how the outstanding balance of R100 000 .00 would be paid, however the understanding was that it would be paid in monthly installments.
5. During September 2012 the respondents commenced with the construction of a house on the immovable property which was completed by end October 2012.
6. In December 2012 and in accordance with the oral agreement and understanding between the parties the respondents were supposed to pay the outstanding purchase price of R100 000.00 in monthly installments. After numerous demands for payment, the respondent attempted to sell the house they built, during January 2013 to a third party. The applicants objected to such sale due to the mortgage bond with SA Home Loans which was not settled yet and would therefore make transfer of the relevant part of the immovable property to another purchaser impossible.
7. In March 2013, it was orally agreed between the parties that the applicants would buy back the property from the respondents and that the applicants would pay R20 000.00 per month. From March 2013 until September 2014, the applicants had paid the respondents

the amount of R33 000.00 but due to financial constraints, the applicants failed to continue further payments.

8. As a consequence, another agreement was reached on 8 October 2014 on the instance of the respondents, as set out in the memorandum of understanding which is annexed as "SN3". It was agreed between the parties that the applicants would pay a purchase price of R532 000.00 for the immovable property, payable with a first installment of R300 000.00. The remainder of the purchase price was payable in unspecified installments but after the amount of R33 000.00 would have been deducted.
9. On 10 October 2014, pursuant to the agreement signed on 8 October 2014, the applicants paid the amount of R300 000.00 to the respondents. Proof of payment is annexed as "SN4".
10. On 18 November 2014, the respondents through their attorneys addressed a letter to the applicants demanding immediate payment of the amount of R219 000.00 in terms of the agreement. Subsequent to that, on 26 November 2014 the applicants through their attorneys addressed a letter to the respondents informing them that the agreements were illegal and void ab initio, and that the respondents were in unlawful occupation of the premises. The respondents were also advised that the agreements did not comply with statutory provisions. The exchange of letters culminated in the present application.
11. It is trite that any transaction that infringes on a statutory prohibition is void ab initio. In casu, the sale transaction infringes on section 5 of the Agricultural Holdings (Transvaal) Registration Act, 22 of 1919(as amended), which prohibits the sale and/or subdivisions of an agricultural holding (which prohibition is also recorded in the title deed of the immovable property). n the

alternative, the purported deed of sale central to the transaction, does not comply with section 2(1) of the Alienation of Land Act, 68 of 1981 (as amended).

12. The title deed conditions pertaining to Agricultural Holdings provides as follows:

"Subject to the following further conditions:

- (a) The holding is held as an agricultural holding and it may be used only for the purpose contemplated by the definition of that term contained in the Agricultural Holdings (Transvaal) Registration Act 1914.

That definition reads as follows:

'Agricultural Holdings shall mean a portion of land not less than 8565 square metres in extent used solely or mainly for the purpose of agricultural or horticulture or for breeding or keeping of domestic animals, poultry or bees'.

- (b) (i) The holding may not be subdivided nor may any portion of it be sold, leased or disposed of in any way without the written approval of the Board first had and (sic)obtained".

13. "5. Restrictions on giving out or sub-dividing lots –

- (1) While a certificate granted under this Act remains in force as regards any area of land, it shall not be lawful for the owner thereof to, lease or dispose of any lot or portion otherwise than in accordance with the general plan submitted to the Board without the written approval of the Board nor shall the owner of any part of his lot or portion without the written approval of the Board and that approval shall not be granted if in the opinion of the Board the proposed sub-division of the lot or portion would render it

unsuitable for occupation as an agricultural holding or if after the proposed sub-division or any part of such lot or portion would be less in extent than one morgart'.

14. It is important to highlight the definition of "agricultural land" for purposes of the Sub-division of Agricultural Land Act, 70 of 1970 (as amended, excludes "land which forms part of any subdivided in terms of the Agricultural Holdings(Transvaal)

Registration Act, 1919(Act No.22 of 1919). The said Act is not applicable to the transaction.

15. The contention by the respondents that the applicants were aware of the prohibition and that any defect was "cured and substituted"

by the "memorandum of understanding" dated 8 October 2014, cannot be sustained on the basis the sale transaction in respect of a portion of the immovable property was entered into without approval by the Board. The said sale transaction and any sub-division of the immovable property was prohibited by the statute.

16. On perusal of the papers, it is evident that the purported deed of sale is a pro-forma contract obtained from Hortors Stationary. The said deed of sale does not comply with statutory formalities in that:

16.1 The particulars of the applicants (the sellers) are specified under the "purchasers" section;

16.2 The identities and particulars of the respondents (as purchasers) are not recorded on the contract;

16.3 The description of the land sold is vague, not identifiable and is not ascertainable from the wording of the contract eg "selling

portion of our 25 X 20 Square metres in our property".

17. Section 2(1) of the Alienation of Land Act, 68 of 1981(as amended) provides:

"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in deed of alienation signed by the parties thereto or by their agents acting on their written authority".

18. I agree with the submission of the applicants that the section cannot be waived by a seller or a buyer and that it must be strictly

interpreted. See in this regard Wilken v Kohler 1913 AD 135 - 142.

19. The effect of non-compliance with the requirements of section 2(1) of the above Act is that the contract shall "not be of any force or effect." Any transaction which has no force or effect is necessarily void ab initio, and can under no circumstances confer any right of action, - Wilken V Kohler 1913AD supra at 143. Such is the case in the instant matter. Further to that, the position in law is that a rights holder cannot transfer more rights than the rights he or she holds. Consequently, the sale transaction between the parties is illegal and unenforceable. This is despite the submission by the respondents that the applicants as well as the respondents were not aware of the conditions in the Deed of Transfer.
20. It is now trite law that the identity of the parties is as essential a term of the contract as is the subject matter. Parol evidence is not admissible to vary the provisions of a written alienation of land in so far as they identify parties -Christie's Law of Contract in South Africa page 127.
21. The evidential consequence in this matter is that subject to section 2(2) of the Alienation of Land Act, any party who has performed partially or in full in terms of alienation of land which is of no force or effect in terms of section 2(1) or contract which has been declared void in terms of the provisions of section 24(1)(c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract. Therefore any of the parties may still have a remedy to recover any money that might have been lost.
22. It is not disputed that the respondents paid the applicants the amount of R100 000.00 during October 2012 pursuant to the purported deed of sale. By 10 October 2014, the applicants had paid the total amount of R333.000.00 pursuant to the "memorandum of understanding".
23. Since the respondents have raised no defence against the applicants' claim in the amount of R233.000.00, therefore the applicants are entitled to payment of R233.000.00 being the net difference between their performance of R333,333.00 and the performance by the respondents in the amount of R100 000.00.
24. It is not in dispute that the applicants are the registered owners of the immovable property. It is my considered view that the respondents

are in unlawful possession of a portion of the property. The applicants have already notified the respondents that the agreements

are void. The respondents should therefore vacate the immovable property within sixty (60) days of the order being granted. Moreover

the applicants have since complied with the provisions of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998(as amended).

25. Accordingly I make the following order:

25.1 The two agreements concluded between the parties are declared null and void for infringing statutory prohibitions and for lack of statutory compliance.

25.2 The respondents are ordered to pay to the applicants an amount of R233.000.00 on or before the 30 March 2017.

25.3 The respondents are ordered to restore possession of the immovable property to the applicants within 30 days of this order.

25.4 The respondents are ordered to pay the costs of this application on party and party scale.

JUDGE OF THE GAUTENG HIGH COURT

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