

SOUTH AFRICA / JUDGMENT

Pillay and Another v Bisnath and Others (6793/2010) [2011]

ZAKZDHC 83 (14 December 2011)

[2011] ZAKZDHC 83

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Ploos van Amstel

CASE / FILE NUMBER

6793/2010

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IN THE KWAZULU-NATAL HIGH
COURT, DURBAN
REPUBLIC OF SOUTH AFRICA
CASE NO 6793/2010

In the matter between:

VASUDEVAN ARNAJALA
PILLAYFIRST
PLAINTIFF
VARSHA PILLAY
.....SECOND
PLAINTIFF
and
D BISNATH
.....FIRST
DEFENDANT
G BISNATH
.....SECOND
DEFENDANT
REGISTRAR OF DEEDS
.....THIRD
DEFENDANT
Order
[1] The plaintiffs'
claim is dismissed with costs.
[2] The plaintiffs are
ordered to pay the costs of the interdict proceedings.

JUDGMENT

Date:14 December 2011

PLOOS VAN AMSTEL J

- [1] The plaintiffs seek an order for the transfer to them of an immovable property which the first plaintiff purchased from the first and second defendants in terms of a written agreement dated 18 January 2002. I will refer to them herein as ‘the defendants’. The third defendant, who is the Registrar of Deeds, played no part in the proceedings. The property is described as 894 Phoenix and is situated at 14 Fieldhaven Place, Forest Haven, Phoenix, Durban. The defendants in turn seek an order declaring the agreement to have been validly cancelled, the ejectment of the plaintiffs from the property, occupational rental and damages for holding over.
- [2] The defendants raised three special pleas and contended in the alternative that the agreement had been cancelled. The special pleas were, firstly, that the claim for transfer of the property has been extinguished by prescription, secondly, that the agreement is invalid for want of compliance with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981 and, thirdly, that the agreement is invalid in terms of s 15 of the Matrimonial Property Act 88 of 1984 as it was concluded without the written consent of the second plaintiff, to whom the first plaintiff is married in community of property.
- [3] I propose to deal only with the issue of prescription because the conclusion to which I have come disposes of the matter. For the sake of brevity and convenience I refer to Mr Pillay as the plaintiff and to Mr Bisnath as the defendant. The agreement was concluded on 18 January 2002. The purchase price was the sum of R95 000, which was payable on the date of registration of transfer. The obligation of a seller to give transfer of an immovable property pursuant to an agreement of sale is a debt which is subject to the provisions of the Prescription Act 68 of 1969. In terms of s 11 (d) of the Act the period of prescription is three years.
- [4] The plaintiffs’ answer to the prescription point is that the defendant gave repeated undertakings from about February 2002 until the year 2009 that the property would be transferred to them. As a result, they contend, the running of prescription was interrupted and prescription commenced to run afresh in terms of s 14 (2) each time such an undertaking was given.
- [5] The defendant disputes that he gave any such undertaking after 20 March 2003, which is the date on which he says he cancelled the agreement. The background against which this dispute should be considered is the following.

- [6] Clause 9 of the agreement provides as follows: 'All expenses of and incidental to the preparation and registration of the transfer and of the Bond (if any), shall be borne by the purchaser and transfer shall be passed by the seller's conveyancers after the purchaser has paid all amounts due in terms of this agreement and has also furnished the guarantees herein referred to. The purchaser undertakes within 7 (seven) days after being called upon to do so, to pay to the said conveyancers the estimated costs including transfer and stamp duty and the proportion of rates for which the purchaser is liable and to provide all such information and to sign such documents as may be required for the purposes of transfer.'
- [7] The plaintiff was not able to pay these costs from his own funds. His application for a loan was for an amount of R105 000, while the purchase price was R95 000. The difference was intended to cover the transfer costs. The loan was however only approved in an amount of R95 710. On 5 March 2003 the plaintiffs signed an acknowledgment of debt in favour of Sunitha Bisnath Attorneys, who had been appointed as the conveyancers responsible to deal with the transfer. In terms thereof the plaintiffs undertook to pay the transfer and associated costs to the attorneys in instalments of R500 per month 'on each salary date'.
- [8] The defendant testified that the plaintiff had undertaken to arrange for a debit order against his bank account in respect of the instalments of R500 to cover the transfer costs. He failed to do so, as a result of which the defendant gave him written notice that he was in breach of his obligation to pay the costs, and that if he failed to do so within seven days the agreement would be cancelled. The costs were not paid and on 20 March 2003 the defendant gave the plaintiff notice of the cancellation of the agreement.
- [9] The action was instituted by the plaintiffs on 30 August 2010 and the summons was served on 1 September 2010. It is plain that by then the claim for transfer would have been extinguished by prescription, unless prescription began to run afresh as alleged by the plaintiffs. The onus is on the plaintiffs to establish this on a balance of probabilities.
- [10] The plaintiff testified that after they had signed the acknowledgment of debt he asked the defendant on numerous occasions when the house would be transferred to them. The defendant always told him not to worry as the transfer was in progress. He once mentioned that he was waiting for a response from Pietermaritzburg. This continued until 2010. In June 2010 the plaintiff became aware that the defendant was in the process of selling the property to someone else, and he obtained an interdict preventing that, pending the outcome of this action.
- [11] The defendant confirmed that the plaintiff was unable to pay the transfer and other costs as required by clause 9 of the agreement. He said the conveyancer, who was his daughter, offered to assist the plaintiff by allowing him to pay the costs in instalments. This was why the plaintiffs signed the acknowledgment of debt. She required him to arrange for a debit order against his bank account, which would be paid monthly on the date when he received his salary. After they had signed the acknowledgment of debt the plaintiff went to the bank

to arrange the debit order. He returned a while later and said he had not arranged one. This caused the defendant to give the plaintiff a notice that he was in breach of the agreement and calling on him to pay the transfer costs within seven days. The plaintiff failed to do so and on 20 March 2003 the defendant cancelled the agreement.

[12] The plaintiff denied that he received either the breach notice or the notice of cancellation. He confirmed however that he did not sign any documents other than the agreement of sale, the application for a loan and the acknowledgment of debt. In other words, he never signed the bond or the transfer documents.

[13] The plaintiff's assertion that the defendant assured him until 2009 or 2010 that the transfer was in progress does not seem to me to accord with the probabilities. The sale agreement was signed on 18 January 2002. The loan was approved by Standard Bank in an amount of R95 710, which was insufficient to cover the transfer costs in addition to the purchase price. The acknowledgment of debt was signed on 5 March 2003. Although it does not in terms refer to a debit order it seems plain that one was contemplated. That is why the document refers to the plaintiff's bank account, an instalment on each salary date and an undertaking by him not to close the account. The plaintiff confirmed in his evidence that he did not arrange for a debit order. This led to the defendant putting him on terms and cancelling the agreement on 20 March 2003. On 18 June 2003 the plaintiff wrote to the conveyancer and urged her to proceed with the transfer. She responded by fax on 25 June 2003, recording that he had been advised that the sale had been cancelled and advising him to seek legal advice as he was being held liable for wasted costs and damages. On 14 August 2003 the defendant sued the plaintiffs in the Magistrates Court for arrear rentals. The action was later dismissed for a procedural reason. On 16 January 2004 a further breach notice was addressed to the plaintiffs, for reasons which were not explained in the evidence. The notice was followed by a further letter of cancellation on 30 January 2004. On 16 February 2004 the defendant's

attorney gave the plaintiffs notice to vacate the property and stated that she was in the process of attaching the plaintiff's salary in payment of the wasted costs and outstanding rental. On 28 February 2004 Standard Bank wrote to the conveyancer and confirmed that the plaintiffs no longer required the bond to be registered and requested that 'all documentation be closed'. On 23 July 2008 the defendant instituted a further action against the plaintiffs in the Magistrates Court for arrear rental. This action was also later dismissed for a procedural reason. On 29 January 2009 the plaintiffs' attorney wrote to the defendant and demanded that the transfer be proceeded with, failing which an application would be brought in the High Court. The response by the defendant's attorney on 3 February 2009 was that the agreement had been cancelled and that an application to compel transfer would be opposed.

[14] Against this background it seems inherently improbable that the defendant would have given assurances about the transfer being in progress. The plaintiff made no payment towards the transfer costs, he signed neither the bond documents nor the transfer documents, the bank had closed its file and the defendant regarded the agreement as having been cancelled. I am not now concerned with the question whether the cancellation was

valid. The point is that the defendant regarded the agreement as having been cancelled. There is no reference in any of the correspondence to the assurances which the defendant allegedly gave with regard to the transfer. While neither the plaintiff nor the defendant was a flawless witness there is no basis for suggesting that the plaintiff's evidence should be accepted in preference to that of the defendant.

- [15] I conclude that the plaintiffs failed to establish on a balance of probabilities that the defendant had given undertakings or assurances which caused prescription to start running afresh. The result is that the claim for transfer has been extinguished by prescription. It is unnecessary in the light of this conclusion to consider the other defences raised by the defendants.
- [16] It emerged during the trial that the defendants had obtained a default judgment against the plaintiff, in a separate action, for occupational rental. The parties accordingly agreed that the counterclaim should be adjourned sine die. The eviction order was not pursued as the defendants need to comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
- [17] The costs of the interdict obtained by the plaintiffs on 20 August 2010 were reserved for determination by this court. It was an interdict restraining the defendants, pending the finalization of this action, from transferring the property to someone else. It is inevitable, having regard to the outcome of the action, that the plaintiffs must be ordered to pay those costs.
- [18] In the result I make the following order:
- The plaintiffs' claim is dismissed with costs.
- The plaintiffs are ordered to pay the costs of the interdict proceedings.

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