

SOUTH AFRICA / JUDGMENT

Savannah Country Estate Homeowners Association v Sero Plus trading 194 (Pty) Ltd and Others (43842/13) [2019] ZAGPPHC 1018 (10 December 2019) [2019] ZAGPPHC 1018

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

43842/13

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE:

NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)
REVISED
CASE
NO: 43842/13
10/12/2019
In

the matter between:

SAVANNAH
COUNTRY ESTATE
HOMEOWNERS
ASSOCIATION
PLAINTIFF
and
ZERO
PLUS TRADING 194 (PTY) LTD
FIRST DEFENDANT
MARIO
BROWN PRETORIUS
SECOND DEFENDANT
UNIVERSITY
OF PRETORIA
THIRD DEFENDANT
TSHWANE
METROPOLITAN MUNICIPALITY
FOURTH DEFENDANT
COMPANIES
AND INTELLECTUAL
PROPERTY
COMMISSION
FIFTH DEFENDANT
D.N.
MALEBYE
SIXTH DEFENDANT
T.P
HLONGWANE
SEVENTH DEFENDANT
B.S
HLONGWANE
EIGHT DEFENDANT
I.
MKHABELA
NINTH DEFENDANT
LP
MONEI
TENTH DEFENDANT
LC
MANAMELA
ELEVENTH DEFENDANT
D.MATABUTA
TWELFTH DEFENDANT
N.M.I
BOOI
THIRTHEENTH DEFENDANT
MASSIVE
TRUST
FOURTHEENTH DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

1. The Plaintiff instituted action against the defendants seeking a declaratory order, declaring the sale agreement dated the 27th April 2007 concluded between the plaintiff and the first defendant unlawful, null and void ab initio.
2. In addition, the plaintiff seeks an order setting aside the registration of Erf 445 Savannah Country Estate Extension 5 Township and an order that the first defendant should sign all documents necessary to set in motion the process to transfer Erf 445 Savannah Country Estate Extension 5, to the plaintiff.
3. At the commencement of the proceedings, the parties requested the court for a hearing and determination of paragraphs 3.1 to 3.3 of the first and second defendants' special plea read with paragraph 6.3 of the third defendant's plea. Accordingly, and in terms of Uniform 33(4) the court ordered such a separation.
4. At the outset it should be mentioned that the parties had made an election not to present viva voce evidence before this court concerning the adjudication of the special pleas, but merely argued the special pleas based on the common cause facts that are apparent from the pleadings and the applicable law as it stands.

FIRST AND SECOND DEFENDANTS' THIRD SPECIAL PLEAS

5. The first and second defendants third special plea reads as follows:

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"3.1 Erf 445 is zoned for and has been developed with 100 sectional title units, most of which have been sold by the First Defendant.

3.2 The common property forming part of the sectional title development on Erf 445 has been transferred to the body corporate of the sectional title development.

3.3 The First Defendant is no longer the owner of any of the common property or of most of the sectional title units which form part of Erf 445 and accordingly it is an impossibility for the First Defendant to comply with the relief sought in the particulars of claim.

WHEREFORE the First and Second Defendants pray that the Plaintiff's claim be dismissed with costs."^[1]

THIRD DEFENDANTS PLEA: RE PARAGRAPH 6.3

6 The Third Defendant pleads that it is in any event impossible for the First Defendant to restore the 32 sectional title units described more fully in Annexure "A" hereto to the Plaintiff, as the Third Defendant is the registered owner of the said units.

PLAINTIFF'S OPPOSITION TO THE SPECIAL PLEAS

7. The plaintiff seeks to resist the special plea on the following grounds:

The argument was advanced on behalf of the plaintiff that at the time when the second defendant, sole director of the first defendant, sold Erf 445 to the first defendant, the plaintiff had 280 members, none of which received notification when the decision of the sale of Erf 445 was taken.[2] It is on this basis that the plaintiff contends that the sale of Erf 445 was unlawful and in conflict with the provisions of section 228 of the Companies Act and the plaintiff's Memorandum of Association and consequently it is null and void.

8. In support of its argument, the plaintiff relied on the judgment of Legator McKenna Inc v Clare Veronica Shea 143/2008 ZASCA 144

paragraph [22] which reads as follows:

'[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely delivery-which in the case of immovable property, is effected by registration of transfer in the Deeds Office-coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership of the transferee to become the owner of the property..... ..Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass-despite registration of transfer-if there is a defect In the real agreement (see eg Preller v Jordaan 1956 (1) SA 483 (A) 496; Klerck NO v Van Zyl and Maritz NNO (supra) 274A-B; Silberberg and Schoeman op cit, 79-80.'

9. As there was no intention on behalf of the plaintiff to sell Erf 445, Mr. Kela had argued that a valid sale agreement could not have been concluded and as such this court will be entitled to declare the sale agreement in respect of Erf 445 null and void.

ARGUMENTS ADVANCED ON BEHALF OF THE FIRST AND THIRD DEFENDANTS

10. On behalf of the First and Third defendants the following arguments were advanced by Mr Putter and Mr Vorster respectively:

10.1 The transfer of this property is impossible in circumstances where a sectional title scheme has been established on Erf 445 and registered in terms of the provisions of the Sectional Title Act, 95 of 1986.

10.2 The First and Second Defendants further pleaded that Erf 445 is zoned for and has been developed with 100 sectional title units on it and that the common property forming part of the sectional title development has been transferred.

10.3 As a result of the fact that the first defendant is no longer the owner of the common property, or all of the sectional title units which form part of Erf 445, it is impossible for the first defendant to comply with the relief sought.

10.4 The third defendant echoes this plea of impossibility in paragraph 6.3 of its plea,[3] and as the third defendant is now the owner of units 1-32 the sale agreement bringing about such registration cannot now be declared

null and void. In support of this contention the third defendant had placed reliance on the decision *Goudini*

Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993(1) SA 77, wherein it was held that the best evidence to prove title/ownership to a property is the title deed.

10.5 In relation to the Conveyancer's certificate presented before court, Mr Putter had further submitted that Erf 445 was transferred to Savannah Country Estate Home Owners Association, under Deed of Transfer No. T29695/2007 during 2007 pursuant to and in terms of the Conditions of Establishment filed in the office of the Registrar of Deeds, Pretoria.

10.6 On 9 July 2007 it was subsequently transferred by the Homeowners Association to Zero Plus Trading194 (Pty) Ltd (First Defendant) in terms of Deed of Transfer No. T89238/2007.

10.7 On 10 March 2009 a servitude of usus was registered in perpetuity over a Portion of Erf 445 as set out in Notarial Deed No. K2092/2009 as shown on SG diagrams 6255/2008 and 6256/2008.

10.8 On 15 May 2009, the first defendant, as developers, opened a Sectional Title Register on Erf 445 which scheme is known as Savannah Crescent SS 285/2009 and SS 286/2009. The sectional title plans for these schemes are D1047/2008 and D1264/2008.

10.9 At the time when the first defendant made application to the Registrar of Deeds for the opening of the Sectional Title Register, they filed with the Pretoria Registrar of Deeds a "schedule certified by a conveyancer setting out the servitudes and conditions of title burdening or befitting the land and the other registrable conditions imposed by the developer. "

10.10 The Savannah Crescent Sectional Title Scheme comprises of 106 units, which units and owners are identified in the Deeds Office.

10.11 In terms of Provincial Gazette Extraordinary, No 278 dated 9 February 2007, Savannah Country Estate Extension 5 was proclaimed a Township in terms of the provisions of the Town planning and Township Ordinance 15 of 1986 for permission to establish a township on Portion 146 of the Farm Zwartkoppies 346 JR.

10.12 Mr Putter on behalf of the second defendant further submitted that upon the establishment of the township the land was removed from the farm register and entered into the township register, resulting in the farm ceasing to exist.[4]

10.13 The first defendant as the registered owner of Erf 445 and as township developer, then caused draft sectional plans in terms of section 7(1) of the Sectional Titles Act to be approved by the Surveyor General and then it had applied to the Registrar of Deeds, Pretoria for the opening of a Sectional Titles Register.

ANALYSIS OF LAW

11. For present purposes, the transfer of Erf 445 by the Homeowners Association to Zero Plus (Pty) Ltd and the subsequent opening of a Sectional Titles register on Erf 445 are all common cause facts between the parties.
12. So too is the legal effect of registration of the sectional title plan in that Erf 445 and the buildings are deemed to be divided into sections and common property in accordance with the sectional plan, resulting in the land being moved out of the township register and into a Sectional Titles register. In this way, specific portions of the building which could not be the subject of independent rights before

registration, become independent legal entities which may be dealt with separately after registration.[5]

13. The alienation, mortgage or lease of these units may now be registered and in the present instance alienation of units 1-32 indeed took place and it was subsequently registered into the names of the individual owners as reflected by the Registrar of Deeds, Pretoria. This is all common cause facts between the plaintiff and the third defendant.

14. Section 13 of the Sectional Titles Act, specifically provides as follows:

"S 13(1) Upon the registration of a sectional title plan the buildings and land shown thereon, shall subject to the provisions of this Act, be deemed to be divided into sections and common property as shown in the sectional title plan. 13(2) A sectional plan together with the schedule of servitudes and conditions referred to in section 11(3) (b), shall upon registration of such plan be deemed to be part of the sectional titled deed, and an owner's title to his or her undivided share in the common property shall be subject to or shall be benefitted by the servitudes, other real rights or conditions (if any) which burden or benefit the land shown on the sectional plan, and shall also be subject to any registrable condition imposed by the developer in terms of section 11(2).

13(3) Upon the registration of a sectional plan, any mortgage bond, lease, other real right or condition then registered against or affecting the land shown on the sectional plan, shall be deemed to be converted into bond, lease, other real right or condition registered against or affecting the sections and common property shown on the sectional plan."

15. It is apparent from the above, that a sectional title register operates like a conventional township register. It is only upon termination of the sectional scheme, that the land will revert to the conventional land register. If this was to occur, then in such event all owners in the scheme will cease to be owners in separate sections, but they will remain co-owners of the land in undivided shares proportionate to the quotas of the respective sections previously owned by them.
16. As mentioned previously, at the commencement of the proceedings, the parties had elected to argue their respective cases on the common cause facts that are apparent from the pleadings and the applicable law as it stands. As such, no viva voce evidence was presented by any of the parties. In as far as the pleaded case of the plaintiff is concerned and more specifically the allegation pleaded in paragraph 21.3 of its particulars of claim, it is alleged that at the time when the sale agreement was concluded the plaintiff had 280 members and that none of its members received notification when the decision of the sale of Erf 445 was taken. In this regard the plaintiff had merely alleged such averment without presenting evidence in support of this assertion and in order to obtain a finding that indeed grounds existed to declare the sale of Erf 445 unlawful and consequently the sale agreement null and void, it was incumbent upon the plaintiff to present such evidence before this court to prove that the plaintiff had no intention to conclude a sale agreement of Erf
445. This the plaintiff had failed to do and, in the absence, thereof this court is simply unable to sustain a finding that the sale of Erf 445 was unlawful and consequently null and void.

ORDER

17. Consequently, the following order is made by the court:

17.1 The first and second defendant's third special plea is upheld with costs including costs consequent upon the employment of senior counsel.

17.2 The third defendants' plea as per paragraph 6.3 is upheld with costs, including costs consequent upon the employment of senior counsel.

17.3 . The plaintiff's claim is dismissed with costs, including costs consequent upon the employment of senior counsel.

COLLIS J

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

Appearances:

For the Plaintiff

: Adv. D.Z Kela

Attorney for the Plaintiff : Matojane Malungana Inc

For the First and

Second Defendants

: Adv. L.G Putter SC (First Defendant)

Attorney for the First

and Second Defendants : Klagsbrun Edelstein Bosman De Vries Attorneys

For the Third Defendant : Adv. J.P Vaster SC

Attorney for the Third Defendant : Tim Du Tait Inc.

Dates of Hearing

: 17 April 2019

Date of Judgment

: 10 December 2019

[1] Amended Index to Pleadings p 59

[2] Particulars of Claim para 21.3

[3] Third Defendant's Plea p 66 Amended Index

[4] Florida Hills Township v Roodepoort -Maraisburg Municipality Town Council 1961(2} SA 386 (TPD) .

[5] Van Der Merwe Sectional Titles, Share Blocks and TIme-sharing Vol 1 para 6.4.6 Effect of Registration

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