

SOUTH AFRICA / JUDGMENT

Widside Investments CC v Mbayi and Others (D5570/2024) [2024] ZAKZDHC 97 (29 October 2024)

[2024] ZAKZDHC 97

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Gwagwa AJ

CASE / FILE NUMBER

D5570/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D5570/2024

In

the matter between:

WIDSIDE
INVESTMENTS CC
APPLICANT
and
SITHULILE
SAVIOUR MBAYI
FIRST RESPONDENT
MATTHEW
ADAM FAIRFOOT
SECOND RESPONDENT
DEEDS
REGISTRY OFFICE
THIRD RESPONDENT

ORDER
The

following order is granted:

1.
The relief set out in para 2.1, 2.2 and 2.3 of the notice of motion are granted
2.
Costs are awarded against the second respondent on scale B

JUDGMENT

GWAGWA AJ

Introduction

- [1] The applicant is Wildside Investments CC, a close corporation registered and incorporated in accordance with the laws of the Republic of South African, with its registered business address at Number [...] B[...] Road, Port Shepstone, KwaZulu-Natal Province.
- [2] The first respondent is Sithulile Saviour Mbayi an adult female who resides at number 1[...] M[...], Cnr L[...] and F[...] Drive, Lonehille Ext.42, Sandton, Gauteng Province, who entered into a sale agreement with the applicant (hereinafter referred to as purchaser).
- [3] The second respondent is Matthew Adam Fairfoot, a practicing attorney and admitted conveyancer, whose place of employment is at 7[...] C[...] Drive, Durban North, KwaZulu-Natal Province.
- [4] The third respondent is the Chief Registrar of Deeds, appointed in terms of s 2(1)(a) of the Deeds Registries Act[1] whose principal place of business is at 3[...] P[...] Street, Pietermaritzburg, KwaZulu-Natal Province.

Nature of the case

- [5] The applicant and the second respondent entered into a sale agreement on 22 January 2024 which was only signed by the seller. The applicant sold its property described as Portion-Erf 9[...] Umtentweni, KwaZulu-Natal.
- [6] However, the second respondent signed the sale agreement electronically on the 8 June 2024 and her signature appeared as dubious. The applicant was advised that in order for the sale agreement to be valid, it must comply with section 2 of the Alienation of Land Act[2] ('the ALA'). The ALA requires that an agreement for alienation of immovable property must be in writing and signed by the parties or their duly appointed representatives.
- [7] The applicant was further advised that in terms of s 4(4) of the Electronic Communications and Transactions Act[3] ('the ECTA') certain agreements may not be concluded electronically. These include:

1. An agreement for alienation of immovable property as provided for in the Alienation of Land Act, 1981 (Act 68 of 1981).
 2. An agreement for the long-term lease of immovable property in excess of 20 years as provided for in the Alienation of Land Act, 1981 (Act 68 of 1981).
 3. The execution, retention and presentation of a will or codicil as defined in the Wills Act, 1953 (Act 7 of 1953).
 4. The execution of a bill of exchange as defined in the Bills of Exchange Act, 1964 (Act 34 of 1964).
- [8] The applicant was further advised that s 2(1) of the ALA provides that there will be no valid sale of land unless contained in a written deed of alienation signed by both parties.
- [9] The applicant subsequently instructed Qwabe Attorneys to cancel the sale agreement. Consequently, a letter was drafted to Fairfoot Attorneys advising them of such cancellation.
- [10] The applicant was forced to make an urgent application for purposes of interdicting the transfer of the property. The rule nisi was issued in court on 24 May 2024 before Harrison AJ. The order was granted as follows:
- '1. The rules relating to forms, service and time periods, as prescribed by the Uniform Rule of court are dispensed with and this matter is heard as an urgent application.
- 2 A Rule nisi is issued calling on the Respondent to show cause on the 20th day of June 2024 at 09:30 or so soon thereafter as the matter may be heard, why an order in the following terms should not be made.
- 2.1 The 3rd Respondent is hereby interdicted and restrained from effecting transfer of the property described as Ptn 8 Erf 9[...] Umtentweni, Hibiscus Coast, KwaZulu-Natal, to the 1st Respondent.
- 2.2 The Agreement of sale entered by the applicant and 1st Respondent on 22nd January 2024 and 8th June 2023 is hereby declare null and void.
- 2.3 The sale agreement of the immovable property entered into by the applicant and the 1st Respondent on 22nd January 2024 and 8th June 2023 is declared validly cancelled.
- 2.4 The 1st and 2nd Respondent are ordered to pay the cost to this application only on unsuccessful opposition.
- 3 That para 2.1 above shall operates as an interim order with immediate effect
- 4 The Applicant is ordered and directed to deliver replying affidavit, if any, on or before 31st May 2024.
- 5 The parties are directed to file Heads of Argument and practice by 10 June 2024.'

Issue to be decided

[11] The issue that must be decided by this court is whether the applicant has validly cancelled the sale agreement for want of the purchaser's signature, with the purchaser having electronically signed the agreement, taking into consideration the requirements of s 2(2) of the ALA.

The law

[12] In *POTGIETER V VILLAGE SFW AND OTHERS*,^[4] the court emphasised that:

'As can be seen from section 2(1) of the Alienation of Land Act, quoted above when acting through an agent, as both applicant and first respondent were acting through their respective attorneys, there

would have to be written authority for both attorneys to bind their respective principals to a valid agreement to sell land.'

[13] The case of *CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY AND ANOTHER V PITSE NO AND OTHERS*^[5] involved a purchaser failing to meet specific obligations under the sale agreement. The court upheld the seller's right to cancel the agreement when the buyer did not comply with the key terms, thereby underscoring the importance of fulfilling contractual obligations.

COOPER AND ANOTHER NNO v CURRO HEIGHTS PROPERTIES (PTY) LTD^[6] the court came to a conclusion that "...the declarator that the agreement is of no force or effect for noncompliance with s 2(1) of the Act. The section reads thus:

'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 a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

The result of noncompliance with s 2(1) is 'that the agreement concerned is of no force or effect. This means that it is void ab initio and cannot confer a right of action.'

[14] Advocate Nako for the applicant argued for the nullification of the sale agreement. She argued that the applicant made an urgent application for an interdict to stop the Registrar of Deeds from registering the property at the Deeds Office.

[15] She argued that such sale agreement must be declared null and void from the inception. She stated that the first respondent did not oppose the application to declare the agreement null and void. Furthermore the second respondent should not have opposed the application to declare the agreement null and void.

- [16] The main bone of contention was the electronic signing of the sale agreement, by the first respondent Ms Nako argued that s 4(4) of the ECTA does not provide for the electronic signing of the sale agreement, furthermore, there was no consensus between the applicant and the respondents regarding the signing of the agreement.
- [17] The first respondent failed to comply with some of the terms and conditions of the sale agreement. Advocate Nako referred to annexure "FAAA2" which is the clause dated 1 February 2024 where the first respondent failed to comply with the sale agreement where it stated that the offer was subjected to all purchasers requirements to be met by 1 february 2024 . Furthermore annexure "FA3" which is a letter written by Nelson Borman and Partners on behalf of the applicant which was addressed to second respondent ,thus advising the second respondent that the signature of the first respondent appears to have been signed electronically . She further referred to the correspondence dated 18 April 2024, again showing the first respondent's failure to comply with the terms and conditions of the agreement. The aforesaid correspondence was written by Subhash Maikoo @ associates on behalf of the applicant, it was addressed to the second respondent thus cancelling the sale agreement . The main cause of cancellation emanated from the issue of encroachment of Portion 8 to Portion 9 , it appears that there was a need for consolidation of Portion 8 and 9 respectively, which was not incorporated in the sale agreement, therefore the sale agreement had to be cancelled pending the registration of the two mentioned Portions . The sale agreement couldn't be enforceable due to such non- compliance as mentioned above .
- [18] Furthermore, Advocate Nako referred the court to page 110 of the applicants replying affidavit, which refers to the acknowledgment of cancellation of the sale agreement by the first respondent , where first respondent confirmed cancellation subject to the applicant bearing the costs . She argued for the relief sought and an order as per the notice of motion in particular para 2.1, 2.2 and 2.3 respectively and costs order to be awarded against the second respondent
- [19] In contrast, counsel for the second respondent advocate Lennard argued that the applicant has failed to cite Standard Bank as one of the interested parties. Standard Bank was in the process of foreclosing the applicant's immovable property. Advocate Lennard disputed the clause in the sale agreement dated 1 February 2024 that it constituted a breach of the sale agreement. She argued that, there was no cancellation of the agreement that exists from the applicant's papers. Counsel for the respondent advocate Lennard further argued that the applicant has failed to cancel the existing sale agreement, however if the applicant so wishes to do so, she was entitled to cancel it at any point in time and also bear the costs of such cancellation thereof.

Analysis

- [20] The real bone of contention is whether the applicant has validly cancelled the sale agreement pursuant to the first respondent's non-compliance with the terms and conditions of the agreement. Counsel for the applicant advocate Nako has argued that such agreement was cancelled owing to non-compliance of the sale agreement.
- [21] Advocate Nako argued that the sale agreement was signed electronically, which rendered such sale agreement null and void. It must be noted that the applicant instructed various attorneys mentioned above, which included Qwabe Attorneys who was instructed to interdict the third respondent from registering the applicant's immovable property into the name of the first respondent. It was on the verge of being registered, fortunately the applicant applied for the interdict against the third respondent which was granted by the Court (see Court order in para 10 above) it was granted by AJ Harrison on the 24 May 2024. It is also noteworthy to mention that,
- Qwabe attorneys also wrote a letter to the second respondent advising them that the sale agreement remained cancelled. It appears that all efforts to cancel the sale agreement were ignored by the second respondent, hence the applicant applied for an interdict which was granted on the 24 May 2024. the second respondent was hell-bent to register the applicants property was it not for the interdict, surely it could have been registered against the will of the seller.
- [22] It is further noted that, the first respondent signed the sale agreement, electronically which in itself is contrary to s 4(4) of the ECTA. The ECTA states that electronic signatures cannot be used for agreements dealing with the sale of immovable property. This is clearly set out in s 4(4) in reference to schedule 2 which specifically mentions agreements entered into in terms of the ALA as being excluded. If that is the case, the applicant has raised the issue of signing the sale agreement electronically by the first respondent. Such exercise is also contrary to s 4(4) of the ECTA, thus making such sale agreement null and void. Counsel for the applicant has argued that the agreement was cancelled, thus referring to the letter dated 18 April 2024, which counsel for the second respondent advocate Lennard, disputes that such letter cannot be referred as a cancellation letter. In essence, it is no longer the desire of the applicant to proceed with the sale agreement.
- [23] Counsel for the respondent Advocate Lennard argued that the applicant failed to cancel the sale agreement. Furthermore, she also argued that there is no cancellation of the sale agreement that appeared in the applicants founding affidavit. However, the correspondence drafted by Qwabe Attorneys and other attorneys mentioned in paragraph 17, bear testimony or glaringly show clear evidence that the sale agreement was cancelled. Therefore, the argument that the applicant has failed to cancel the sale agreement is ludicrous.
- [24] It must be noted that the first respondent did not oppose the application for the cancellation of the sale agreement or to declare the sale agreement null and void ab initio, but the second respondent did, who are the parties to such sale agreement? Does it involve the second

respondent? , who gave the mandate to the second respondent to oppose the cancellation of the sale agreement? The first respondent only signed the confirmatory affidavit not answering affidavit. Can the court deprive the right of the applicant to cancel the sale agreement ? The court agrees with the decision taken in the case of City of Johannesburg and Pitse ,also in the case of cooper and another mentioned in paragraph 13 supra .the non - compliance with certain requirement of the sale agreement rendered such agreement null and void and unenforceable .[7] Therefore , the sale agreement was null and void from its inception . The court also agrees with the submission of advocate Nako that ,there was no meeting of minds between the applicant and the first respondent , therefore the sale agreement cannot be enforceable , which is in line with case of Cooper and another NN v Curro Heights properties (PTY) , case appears in para 13 above .

[25] In view of the above, the sale agreement was validly cancelled by the applicant. Accordingly, the transfer cannot proceed at the deeds office.

Order

[26] I therefore make the following order·

1. The orders in para 2.1, 2.2 and 2.3 of the notice of motion are granted
2. The costs are awarded against second respondent on scale B.

APPEARANCES

DATE OF HEARING: 22 AUGUST 2024

DATE OF DELIVERY: 29 OTOBER 2024

FOR THE APPLICANT - ADV N NAKO INSTRUCTED BY W.A MPANZA INCORPORATED

FOR THE RESPONDENTS - ADV U. LENNARD INSTRUCTED BY FAIRFOOT ATTORNEYS INC

[1] Deeds Registries Act 47 of 1937.

[2] Alienation of Land Act 68 of 1981.

[3] Electronic Communications and Transactions Act 25 of 2002.

[4] Potgieter v Village SFW and Others

[2022] ZANCHC 1.

[5] City of Johannesburg Metropolitan Municipality and Another v Pitse NO and Others

[2022] ZAGPJHC 682.

[6] 2023 (5) SA 402 (SCA)

[7] See City of Johannesburg Metropolitan Municipality fn 5 above; Canton fn 6 above.

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