

SOUTH AFRICA / JUDGMENT

Zamisa v Kali and Others (15249/2009) [2011] ZAKZDHC 10 (17 February 2011)

[2011] ZAKZDHC 10

COURT

Kwazulu-Natal High Court, Durban

BEFORE

K. Swain

CASE / FILE NUMBER

15249/2009

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 15249/2009

In the matter between:

THOKOZILE PRINCESS ZAMISAAPPLICANT

and

DONALD BONAR MALIZO KALIFIRST RESPONDENT

DANANA SARAH ZAMISASECOND RESPONDENT

SANDILE MASONDOTHIRD RESPONDENT

THE REGISTRAR OF DEEDS,

KWAZULU-NATALFOURTH RESPONDENT

JUDGMENT Delivered on 17 February 2011

SWAIN J

- [1] The applicant seeks an order setting aside the sale of a certain immovable property, by the first respondent, in his capacity as the duly appointed Executor in the estate of the late Zephaniah Zamisa to the third respondent, and the setting aside of the transfer of the property to the third respondent, in pursuance of the agreement. Thereafter, the applicant seeks an order directing the first respondent to transfer the property into the name of the applicant.

- [2] It is common cause that the property in question formed part of the estate of the late Zephaniah Zamisa (the deceased) and that in terms of the will of the deceased, the first respondent was obliged to sell the property and divide the proceeds of the sale, amongst certain named beneficiaries.
- [3] The third respondent resists the claim of the applicant on the basis that the third respondent purchased the property from the first respondent, in terms of a written agreement of sale for a purchase price of R138,000.00. The third respondent alleges that he fully performed his obligations in terms of the agreement and consequently the first respondent effected transfer of the property into his name.
- [4] In order to assess the competing claim of the applicant to transfer of the property, it is necessary to examine the validity of the agreement upon which the applicant relies. This is because the applicant in reply to the second respondent's answering affidavit, does not dispute the averments made by the second respondent that:
- [4.1] The third respondent offered to purchase the property for R138,000.00, and that the first respondent and the second respondent accepted the offer and duly signed the written agreement.
- [4.2] The third respondent signed the written agreement on 12 August 2007 whilst the first respondent signed it on 13 November 2007. The second respondent alleged that the first respondent inadvertently wrote the year 2000 on the agreement, which was clearly incorrect.
- [4.3] The written agreement is annexed to the second respondent's answering affidavit marked "Z3".
- [5] As will become apparent the date when this agreement was concluded, decisively determines the validity of the applicant's claim.
- [6] As regards the second respondent's evidence of the correct date upon which the first respondent signed the agreement, it is clear that a clause in a written contract recording the date on which it purports to have been signed, is not a term of the contract, but is no more than the recording of an objectively determinable fact. If this fact is wrongly recorded, evidence of the true fact may be given and the parol evidence rule has no application

Christie – The Law of Contract – 5th Ed pg 204

Otto v Heymans 1971

- (4) SA 148 (T) at 154 A
- [7] That the first respondent signed the agreement on 13 November 2007 and not in November 2008, is borne out by the fact that the first respondent, together with the second respondent, signed the consent to pass transfer to the third respondent on 25 January 2008.
- [8] It is therefore clear on the papers that the agreement of sale was concluded between the first and third respondent on 13 November

2007. The first respondent, I would have thought, could have placed this issue beyond any doubt, by dealing with this in his affidavit. The first respondent, who is an attorney, has however chosen to play a completely supine role in the present dispute, saying that his only interest in the matter is that the property is sold for not less than R138,000.00 and that “for that reason, I do not believe that I should say anything relating to the merits of the disputes in which the parties are embroiled”.

As will become apparent, the cause of the dispute between the parties is in fact, the conduct of the first respondent.

[9] Before dealing with the validity of the applicant’s claim, it is necessary to deal with the dispute between the parties, as to the need for the second respondent to consent to any sale of the property. The second respondent maintains that her consent, as the surviving spouse of the deceased to whom she alleges she was married in community of property, was required before the property could be sold. The applicant takes issue with the second respondent’s assertion that the marriage was one in community of property, asserting that in terms of the provisions of the repealed Section 22 (6) of the Black Administration Act No. 38 of 1927, civil marriages of black persons, were automatically out of community of property. In order to bring about community of property and of profit and loss, where no ante-nuptial contract was entered into and registered, black persons were obliged to make a declaration in this regard before a marriage officer, one month prior to the celebration of the marriage. The second respondent consequently alleges that the agreement of sale, concluded between the applicant and first respondent is invalid and unenforceable in the absence of her consent. The applicant in turn alleges that “the second respondent had no business in signing the agreement of purchase and sale” concluded between the first respondent and the third respondent. I find it unnecessary to resolve this dispute, because its resolution is irrelevant to decide the matter between the parties. If the consent of the second respondent to the sale of the property was not required, then the fact that she furnished her consent to the sale of the property by the first respondent to the third respondent, by signing the agreement, can have no effect upon its validity. In such a case the signature of the second respondent, would be superfluous and regarded as *pro non scripto*. As regards the absence of the second respondent’s consent to the sale of the property by the first respondent to the applicant, it is not necessary to decide this issue, because the applicant’s claim cannot succeed in any event, for the reasons set out below:

[10] The applicant alleges that:

[10.1] During November 2006 she offered the first respondent R45,000.00 for the property which was accepted.

[10.2] The amount of R45,000.00 was paid to the first respondent on 18 November 2006.

[10.3] The first respondent made her complete the first part of the sale agreement and sign the deed of sale. The first respondent advised her that he would complete the rest of the document and he would favour her with it as soon as he had completed it. The applicant did not complete the date and place portion of the sale agreement. A copy of the sale agreement is annexed to the applicant's founding affidavit marked "TPZ4".

[10.4] In December 2007 the applicant learnt that the first respondent had sold the property to another person. The applicant's attorneys consequently wrote to the first respondent by letter dated 13 December 2007, advising that he had sold the house to the applicant, that the sale of the property to anybody else would be unlawful, and demanding transfer. The first respondent replied to this letter by way of a letter dated 18 January 2008 stating inter alia, the following:

"Mr. Zamisa's second wife insists on the sale of house Q336 Umlazi for much more than the amount of R45,000.00 agreed upon with Mr. Zamisa's first wife. And she did indeed find a buyer who was prepared to pay R138,000.00. In the circumstances, there was no way in which the Executor could reject the second buyer's offer".

In this context the "first wife" is the applicant and the "second wife" is the second respondent and Mr. Zamisa is the deceased.

[10.5] In a later letter dated 01 April 2008, the first respondent wrote to the applicant's attorneys stating the following

"Please note that the house at Q336 Umlazi was sold long ago, but that it has not been transferred. The only way, in our view, that you can bring the transfer process to a halt is to reach an agreement with the buyers or obtain a Court order".

[10.6] The applicant in her replying affidavit in answer to the allegation made by the second respondent, that the third respondent purchased the property for R138,000.00, stated that she was not aware that the property had been placed in the open market for sale and added the following

"As soon as I became aware that the property had been offered to the third respondent I immediately approached the first respondent which resulted in the amendment of the agreement of purchase and sale to reflect the purchase price as R138,000.00".

[11] When the written agreement relied upon by the applicant is examined, it is clear that the amount of the purchase price is R138,000.00, and this figure has never been altered to delete an original purchase price of R45,000.00. Indeed the fact that the agreement of sale in question never reflected such a purchase price, is made clear by the fact that the following is recorded in the agreement

"R48,000.00 has been paid; the balance to be paid on or before 14 May 2008".

The applicant alleges that after the first respondent agreed to a purchase price of R45,000.00 she paid to him this sum, plus an additional amount of R3,000.00, in respect of transfer costs.

[12] In terms of the Alienation of Land Act No. 68 of 1981, the material terms of an agreement of sale must be reduced to writing and signed by both parties.

Van Leeuwen Pipe & Tube (Pty) Ltd. v Mulroy

1985 (3) SA 396 (D)

The essential terms of a contract of sale are the subject matter, parties and price

Levin v Drieprok Properties (Pty) Ltd.

1975 (2) SA 397 (A) at 408A

Consequently, a written contract for the sale of land which does not fix the price is void.

Coronel v Kaufman

1920 TPD 207

The contract is in terms of the Act of no force and effect, with the result that it is void ab initio and can under no circumstances confer any right of action.

Wilken v Kohler

1913 AD 135 at 143

[13] It is therefore clear that because the purchase price of R45,000.00 was never included in the written agreement of sale, which the applicant says she signed during November 2006, no valid agreement of sale was concluded at the time.

[14] The earliest date at which a valid agreement of sale was concluded between the applicant and the first respondent, is the date reflected upon the agreement relied upon by the applicant, which is 02 April 2008. Although the applicant maintains that the agreement of purchase and sale was “amended” to reflect the purchase price as R138,000.00, it is quite clear that this could never have happened.

[15] By virtue of the supine attitude displayed by the first respondent, there is no explanation advanced by him as to how it came about that the agreement relied upon by the applicant was concluded on 02 April 2008 and most importantly, on what basis he was entitled to conclude such an agreement, when he had already concluded a valid and binding sale agreement with the third respondent, on 30 November 2007. In addition, what is left unexplained is how the first respondent believed he was entitled to conclude such an agreement, when he had on 25 January 2008, signed the consent to transfer the property to the third respondent. It is also left unexplained by the first respondent, on what basis he signed the consent to transfer the property to the applicant dated 13 February 2009, when he knew he had concluded the agreement of sale with the third respondent, and had already signed a consent to transfer the property to the third respondent, a year before.

[16] By virtue of the fact that the sale of the property by the first respondent to the third respondent, preceded the sale of the property by the first respondent to the applicant, the third respondent was entitled to obtain transfer of the property. Transfer was effected into the name of the third respondent on 08 May 2009. Delivery of the property has accordingly been effected with the result that the sale is perfecta and may not be challenged. Mr. Kuboni, who appeared for the applicant, submitted however that the applicant would be entitled to have the transfer of the property into the name of the third respondent set aside, because the first respondent, after signing the consent to transfer into the name of the third respondent, never had the intention to transfer the property to the third respondent. However, at no stage prior to transfer of the property, did the first respondent instruct the conveyancers not to transfer the property to the third respondent. Indeed, it is difficult to understand how the first respondent would have been entitled to do so, having signed the written consent to transfer on 25 January 2008. The first respondent, in his letter dated 17 April 2008, addressed to both of the Zamisa and Masondo families simply asked “may the transfer process be held in abeyance in the meantime?”

In this context, I find it incomprehensible that the first respondent alleges in his letter dated 14 May 2009 that the transfer “was done behind my back”. As stated by the conveyancer, attorney Ramchunder, the first time she saw the agreement between the first respondent and the applicant was on receipt of the application papers. In addition, the agreement between the first respondent and the third respondent was never cancelled and the consent to pass transfer by the first respondent, was never revoked.

[17] The application must accordingly fail. However, of grave concern to me is that the dispute between the parties and this application was caused by the inexplicable conduct of the first respondent, in concluding contracts of sale for the property, with both the applicant and the third respondent. The first respondent has chosen not to explain his conduct to this Court and I have given serious consideration to ordering the first respondent to pay the costs of all of the parties involved, but have decided that in the absence of any explanation by the first respondent, it may be unfair to do so.

The order I make is the following :

- (a) The application is dismissed.
- (b) The applicant is ordered to pay the costs of the second and third respondents.

K. SWAIN J

Appearances /...

Appearances:

For the Applicant : Mr. W. S. Kuboni

Instructed by : Ndwandwe & Associates Durban

For the 2nd & 3rd Respondents : Mr. D. D. Naidoo

Instructed by : Zondi & Partners

Durban

Date of Hearing : 14 February 2011

Date of Filing of Judgment : 17 February 2011

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Prepared on 12 October 2026 · Esheria