SUBSIDISED HOUSING: DOES CONTRAVENTION OF THE CONDITION NOT TO ALIENATE IN AN 8 YEAR PERIOD RENDER A SALE VOID?

Abdul v Williams and Others (CA227/2018) [2019] ZAECGHC 103 (29 October 2019)

This judgment concerns a dispute about the sale of a state-subsidised property in contravention of a title condition that prohibited the alienation of the property to a third party before the expiry of 8 years. Here the current owner first 'sold' and then leased the property to the purchaser and received 'rental' in lieu of a 'purchase price'. Was it the intention of the legislature in the Housing Act of 1997 that such an agreement is void?

The Judgment can be viewed here.

FACTS

In February 2007 Mr and Mrs Williams sold their home to Ms Abdul for the amount of R50,000. Ms Abdul paid this sum into the trust account of her conveyancer who was, at the time, attending to the transfer of her current home.

In June 2007 Ms Abdul signed a consent form permitting her conveyancer to transfer the purchase price from his trust account to the account of Mr and Mrs Williams. This conveyancer was also instructed to attend to the transfer of the property from the Williams' to Ms Abdul.

However, it then transpired that transfer could not be effected due to the existence of a condition in the Williams' title deed, imposed by the Provincial Housing Department in terms of section 10A and 10B of the Housing Amendment Act 4 of 2001. It provided that "the transferee or his/her successors–in–title shall not sell or otherwise alienate the property within a period of 8 (eight) years from date of sale without the written consent of the relevant Provincial Housing Department … first having been had and obtained."

The restrictive period of eight years referred to in the title deed endorsement would only expire on 8 December 2014 at the latest. The Williams' and Ms Abdul were however intent on pursuing the sale, despite this restriction and therefore concluded a further agreement ('the second agreement') in August 2007. In this agreement they provided that Ms Abdul would lease the property from the Williams' until after expiry of the prohibition period after which title and interest to the property would pass to Ms Abdul. This agreement further provided that the sum of R50,000 already paid would constitute 'occupational rental' in the meantime. The second agreement also required of Ms Abdul to pay certain additional amounts, including the municipal rates and taxes.

Ms Abdul fell into arrears with the municipal rates and taxes. In September 2013, the same conveyancer, now acting on behalf of the Williams', wrote to Ms Abdul and advised her that she was in breach of the second agreement by failing to pay the municipal rates and taxes, which the Williams' were still liable for as owners of the property; and unless Ms Abdul paid the R15,000 owing to the municipality and thereby remedy the breach of the second agreement within seven days, the lease of the property would be cancelled and she would have to vacate the premises. Ms Abdul did not remedy the breach within the time stipulated and the Williams' regarded the lease agreement as cancelled and proceeded to sell and transfer the property to a third party.

Ms Abdul refused to vacate the property and the new owner successfully applied in the Magistrate's Court for her eviction. Ms Abdul refused to comply with the order and was subsequently held to be in contempt of court. Ms Abdul then appealed to the High Court. She argued, amongst other things, that: (i) there was no express provision in the Act to the effect that agreements concluded in breach of section 10A will result in a nullity; (ii) the court a quo ought to have considered the inconvenience and impropriety caused by holding the agreement of sale to be a nullity; and (iii) that the third party buyer knew of her rights to the property.

Relevant legislation

Section 10A of the Housing Act provides as follows:

"10A Restriction on voluntary sale of state-subsidised housing

1) *Notwithstanding any provisions to the contrary in any other law, it shall be a condition of every housing subsidy … granted to a natural person in terms of any national housing programme for the construction or purchase of a dwelling or serviced site, that such person shall not sell or otherwise alienate his or her dwelling or site within a period of eight years from the date on which the property was acquired … unless the dwelling or site has first been offered to the relevant provincial housing department.*

2) *The provincial housing department to which the dwelling or site has been offered as contemplated in subsection (1) shall endorse in its records that the person wishes to vacate his or her property and relocate to another property and is entitled to remain on a waiting list of beneficiaries requiring subsidised housing.*

3) *When the person vacates his or her property the relevant provincial housing department shall be deemed to be the owner of the property and application must then be made to the Registrar of Deeds by the provincial housing department for the title deeds of the property to be endorsed to reflect the department's ownership of that property."*

HELD

- The court *a quo* found that the agreement of sale of the property was void *ab initio*, and thus a nullity because its conclusion contravened the restrictive provisions of section 10A of the Housing Act.

- The circumstances attendant upon section 10A and 10B of the Housing Act coming into existence are significant. The Housing Act seeks to give effect to section 26 of the Constitution. The first of the general principles which the Housing Act seeks to promote is encapsulated in section 2(1)(a) of the Act which provides that " national, provincial and local spheres of government must give priority to the needs of the poor in respect of housing development." The Constitutional Court has subsequently handed down judgment holding that, on a proper construction of section 26(1) of the Constitution, the State is obliged to take positive action to meet the needs of those living in extreme poverty, homelessness or intolerable housing. It went on to hold that the extent of the State's obligation was defined by three key elements: (a) the obligation to take reasonable legislative and other measures; (b) to achieve the progressive realization of the right and (c) within available resources.

- Section 10A and 10B were introduced into the Housing Act almost immediately thereafter by the passing of the Housing Amendment Act, 4 of 2001, apparently consequent upon the aforementioned judgment.

- The interpretation of Section 10A of the Housing Act must therefore be viewed in the context of the Government's constitutional obligation to provide adequate housing for indigent persons. Judicial cognisance can be taken of the fact that the demand for state-subsidised houses in this country exceeds its supply. Consequently, there are long waiting lists for such houses. The absence of the restrictions provided for in section 10A of the Housing Act would permit persons who were not indigent, to buy state-subsidised houses meant for the poor, to profit from the sale or lease of such properties on the open market. Thus indigent persons on a waiting list would be deprived of the opportunity to obtain state-subsidised housing. Clearly that would frustrate the objectives of the Housing Act.

- The absence of punitive measures in the Housing Act in respect of a contravention of section 10A thereof does not bolster Ms Abdul's case. On the contrary, the absence of punitive measures rather strengthens the interpretation that the sale or any other form of alienation of state-subsidised property is a nullity. A fine would not necessarily constitute a deterrent for property speculators. One could also assume that the legislator did not intend to criminalise ordinary, but prematurely concluded agreements of sale in the context of assisting the poor with owning their own homes. It would be far more practical to regard such agreements in contravention of section 10A of the Housing Act, as simply null and void.

- The peremptory language and the repeated use of the word “shall” in sections 10A and 10B are further significant indications supporting a stricter interpretation of the sections in question. That means that the sale, lease or other type of alienation of state-subsidised property is strictly prohibited and the conclusion of transactions in breach of the restrictions present in those sections are a nullity.

- Ms Abdul’s present unenviable situation is a text book example of precisely the type of situation that section 10A of the Housing Act seeks to prevent. The strict interpretation of section 10A is indeed inconvenient for Ms Abdul but permitting parties to flout the aforesaid restrictive provisions would result in dire consequences for many indigent persons as illustrated.

CONCLUSION

The appeal therefore failed.

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