

ONE MESSY TRIO: SELLER SARS WOES; DOUBLE SALE; 1ST PURCHASER REFUSING TO VACATE

Narainsamy and Others v Nel and Another (15281/2014) [2020] ZAKZPHC 5 (28 February 2020)

Living in an upmarket unit in central Cape Town almost for free for approximately six years due to the seller's inability to procure SARS clearance for the transfer, this judgment deals with the purchaser's resistance to an eviction when the property was subsequently sold and transferred to a third party. It illustrates the position in our law, especially in circumstances where the second purchaser had some knowledge of the existing issues with SARS.

The Judgment can be viewed [here](#).

FACTS

Narainsamy and his late wife were the owners of a unit in Wembley Square, Cape Town.

In October 2012 the Narainsamys sold the unit to Nel for the amount of R1,6 million. It was agreed that the purchase price would be transferred to the conveyancer's trust account upon the date of the last signature of the sale agreement, pending registration of transfer. The agreement also contained a clause in terms of which occupation and possession shall be given upon registration of transfer.

Shortly after and at the time when the parties expected that transfer would take place within six to eight weeks (it was in essence a cash sale, the full purchase price having been paid into the trust account of the conveyancer), the parties entered into two further addendum agreements: Firstly to effect that possession and responsibility of the property shall pass to Nel with immediate effect and that Nel would not be liable to pay any occupational rent; and secondly, that Nel accepted liability and undertook to pay all levies and other costs due to the body corporate, from the date of registration of transfer.

Nel moved into the property in February 2013.

Transfer of the property did not take place. Whilst in the process of attempting to effect transfer, the conveyancer was unable to secure the necessary transfer duty receipt from SARS, apparently as a result of Narainsamy owing money to SARS. The conveyancer was issued with a so-called section 179 Notice by SARS, which she believed, rightly or wrongly, to be an impediment to effect transfer. The notice stated that the conveyancer was "legally appointed in terms of section 179 of the Tax Administration Act to withhold and immediately pay over to SARS all available funds, not exceeding R249,391.73", which was apparently Mr Narainsamy's tax liability at the time. As there was not going to be sufficient funds upon registration of the property after paying the existing bondholder, the transfer could not proceed. (Nedbank had already obtained judgment against the Narainsamys in May 2012 in the amount of approx. R 1,5 million, together with an order declaring the property specially executable.)

In January 2014 the conveyancer addressed a letter to Nel, requesting her to now commence paying occupational rent due to the long and unexpected delay in the transfer of the property, which no one had foreseen at the time of concluding the addendum. Nel refused.

In July 2014 the conveyancer addressed another letter to Nel wherein she purported to cancel the sale agreement. Nel was requested to immediately vacate the property. Nel did not accept the cancellation and in November 2014, issued summons for an order that Narainsamy must take all steps necessary to effect transfer of the property to her. In response, the Narainsamys filed a plea claiming some R140,000 in respect of occupational rent and/or damages for holding over and another R120,000 in respect of rates and levies as well as cancellation of the agreement and

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eviction of Nel.

Prior to the trial, the parties concluded a settlement agreement. Narainsamy was however unable and/or failed to comply with the terms thereof. Subsequently a further settlement agreement was reached which was made an order of court ("the Court Order"). It was ordered (by consent) that the property will be transferred, contingent on, amongst other things, SARS agreeing to issue a tax clearance certificate necessary for the transfer of the property. The Narainsamys would furnish Nel with copies of the written representations which have previously been made to SARS together with a detailed breakdown of the Narainsamys' indebtedness to SARS. The breakdown will contain sufficient particularity to enable Nel to meaningfully supplement the representation. Nel would be entitled to provide any written submissions to both Nedbank and SARS to be incorporated in written representations to be made by the Narainsamys to SARS and Nedbank. The parties specifically agreed to co-operate together in order to resolve the issues with SARS. The parties' accountants would liaise with one another in order to finalise the representations to SARS. In the event of SARS not agreeing to issue the necessary tax clearance certificate after these efforts and SARS having issued a ruling in this regard, the agreement of sale will be deemed to be cancelled.

Through all this time Nel had been in occupation of the property, without paying occupational rent, levies or rates. At some stage the conveyancer utilized some of the funds kept by her in trust for Nel to pay arrear levies but was forced to refund Nel out of her own pocket, subsequent to a complaint laid against her by Nel with the KwaZulu-Natal Law Society.

In June 2018 Narainsamy sent an email to the conveyancer wherein he informed her that SARS had rejected the compromise offer and that in terms of the Court Order, the agreement was therefore cancelled. He attached various communications from SARS in this regard. Nel rejected the cancellation. A flurry of correspondence between the conveyancer and Nel's attorneys followed. (It emerged that Narainsamy was also the appointed representative tax payer of a company and liable for payment of R751 million odd to SARS. SARS apparently wanted payment of the full amount outstanding in respect of Narainsamy's "personal tax".)

It was apparent that Narainsamy did not furnish Nel with copies of previous written representations made to SARS and that he did not make any written representations to SARS subsequent to the order being granted. Instead he went to see the officials at SARS personally and did not allow any input from Nel's side.

In an email dated 3 August 2018, the conveyancer advised Nel that she needed to vacate at the end of August 2018. This was not adhered to, Nel arguing that Narainsamy had not complied with the Court Order.

In August 2018 a friend (Soni) phoned Narainsamy and enquired about the status of the property. This friend was previously interested in buying the property from Nel, but no sale eventuated. Narainsamy explained the whole saga to his friend. He advised him that the status was that in terms of the settlement agreement, that he believed the agreement to have been cancelled, and that whilst he was at liberty to sell the property, it was in reality, Nedbank, the bondholder at that stage, that was actively driving the process to sell the property, not him. He advised that the bank phoned him daily and that they were eager to proceed with a sale in execution. Narainsamy also advised Soni of his substantial indebtedness to SARS and that "SARS was likewise presently unwilling to compromise and/or reduce to facilitate the possible sale" of the property.

According to Narainsamy, Soni then offered to talk directly to Nedbank to "possibly do a deal" to purchase the property from Nedbank. Narainsamy and Soni thereafter, in August 2018, concluded a sale agreement, Narainsamy being informed that a signed agreement of sale was necessary to allow Soni to commence discussions with Nedbank. In terms of the agreement the property was sold to Soni for the amount of R1,7 million.

Soni subsequently instructed his attorney, AY, to deal with Nedbank. Narainsamy had no further involvement in the process and left it to Soni to deal with Nedbank through AY. The latter negotiated a successful compromise. AY was also able to successfully facilitate payment to SARS and obtain a transfer duty receipt to successfully effect transfer to

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Soni. AY was aware of the previous issues experienced by the erstwhile conveyancer, but had no similar problems. AY assumed that it was as a result of no nett proceeds accruing to Narainsamy and the fact that only Nedbank, as bondholder and a secured creditor, would be receiving payment. Transfer was registered in December 2018 and Soni thereafter sought to evict Nel from the property.

Nel's attorney immediately responded and claimed, amongst other things, that the sale to Nel had not been cancelled and that any eviction proceedings would be opposed. (It also now transpired that Nel was no longer in occupation of the property but was living in London. Her sister now resided in the property, with her permission, without paying occupational rent, rates and taxes or levies.)

During May 2019, Soni demanded that Narainsamy secure free and undisturbed possession of the property for Soni. Narainsamy thereafter applied to court asking that it be declared that the condition in the previous agreement (the Court Order) could not be complied with and that the agreement had fallen away; or in the alternative, that Nel was in unlawful occupation of the property.

Nel filed a counter-application asking for transfer into her name and stating that the Court Order was never complied with and that the agreement is still operational and that the agreement with Soni was fraudulent because he had knowledge of the existing agreement and Court Order.

The crux of the matter was whether Soni acquired ownership despite the fact that a Court Order was in place in terms of which Nel would be able to take transfer upon certain events happening, especially in light of the resolute condition regarding co-operation between Narainsamy and Nel in respect of the submissions to SARS.

HELD

- In terms of the abstract theory of transfer, the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction, such as the contract of sale. The requirement for the passing of ownership is delivery (which is effected by transfer), coupled with a real agreement. Where parties are under an honest belief, perhaps mistaken, that their sale agreement is valid, then a subsequent transfer will not be jeopardised.
- In the present matter there was no proof that the agreement between Soni and Narainsamy was tainted by fraud and/or would be contra bonos mores, as argued by Nel. Soni acknowledged that he was advised that the previous sale had been cancelled and that according to Narainsamy the destiny of the property was in the hands of Nedbank, the execution creditor. It was on that basis Soni commenced negotiations with Nedbank directly, albeit through his attorney.
- It was so that the Court Order was contingent upon inter alia "SARS agreeing to issue a tax clearance certificate necessary for the transfer of the property." Narainsamy was adamant that SARS had refused to entertain him and had in fact rejected a compromise offer made by him. Narainsamy had been attending on SARS personally on various occasions and clearly did not follow what was agreed upon and made an order of court in May 2018. It was his belief that it would not have made a difference as he simply did not have the funds available to settle his indebtedness to SARS. That these actions were not 100% compliant with the Court Order, was not known to Soni, although it was to Narainsamy. Soni remained a *bone fide* purchaser in the circumstances.
- The position of the bank was also relevant. It had already obtained a judgment and execution order in respect of the property. There is case law that has held that in the case of an execution sale it does not follow that because an inference of fraud on the part of a second purchaser is drawn from the mere fact of knowledge of a prior sale, that an inference of fraud likewise has to be drawn from such knowledge on the part of an

execution creditor who attaches property which his debtor has sold in execution of a judgment. The validity of such a sale will not be affected.

CONCLUSION

An order was accordingly made in favour of Narainsamy.