IMMOVABLE PROPERTY TRANSACTIONS ARE NOT CHILD'S PLAY

Helm Construction (Pty) Ltd v Noortman and Another (22605/2018) [2020] ZAGPJHC 245 (21 September 2020)

This judgment deals with a dispute between a tenant and landlord who entered into, what they phrased, a "provisional sale agreement" regarding a piece of agricultural land. No purchase price was determined, nor was it decided and recorded how it should be paid, when the final agreement will be concluded or when transfer should take place. The purchaser had paid in excess of R2 million towards the purchase price when the wheels came off, culminating in a (successful) court action by him against the seller to get his money back. "Penny wise, pound foolish" comes to mind considering that much trouble, cost and loss could have been avoided had the parties first consulted with property law attorneys.

The Judgment can be viewed here.

FACTS

Helm Construction (Pty) Ltd ('Helm') leased property from Mr and Mrs Noortman. When the lease commenced, the premises were vacant agricultural land and a nominal rental was agreed upon. During its tenancy, Helm erected buildings on the property from where it conducted its activities.

During this time, in 2009, the Noortmans applied for and received approval to establish a township on the property, together with a change in zoning. The municipality approved zoning to residential without commercial use. The Noortmans had hoped to receive approval for zoning to residential with commercial rights. The development conditions were therefore not welcomed by the Noortmans who had in the interim erected 300 square metres of office space and 1200 square metres of storage and related buildings on the property. The zoning of the property did not allow for such usage.

In January 2011, the Noortmans entered into a "provisional sale agreement" with Helm in terms of which it was agreed that Helm would purchase the property and that they would conclude a deed of sale agreement in the future. Helm paid a deposit of R200,000 to ensure that the Noortmans did not offer the property to any other buyers. The agreement made provision for further payments to be made 'when necessary'. No other conditions were agreed upon regarding the price of the property or when a deed of sale would be concluded.

Over time, Helm had paid various sums to the Noordmans. In terms of the agreement, Helm paid the R200,000; in addition, it paid rental and certain extra amounts, to secure the purchase of the property. The money paid towards the purchase price amounted to R2,016 million. It also erected building on the property, valued in excess of R3 million.

When Helm received an infringement notice from the municipality for using the property for commercial purposes, in contravention of the zoning, it vacated the premises.

Helm thereupon instituted proceedings in the Gauteng High Court seeking an order that the agreement was void *ab initio* because it did not comply with the requirements of the Alienation of Land Act ('ALA'), and return of the full R2,016 million paid to the Noortmans. It argued that the Noortmans had represented to it that the property had been rezoned for residential use with commercial rights use and that it was not informed that the premises had been rezoned for residential use without commercial rights.

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The Noortmans returned the amount of R1million to Helm, but retained R 1,016 million which they contended was for market-related rental. They argued in this regard that the rental they had charged was never market-related, as Helm was going to purchase the property; and since the sale was no longer proceeding, they were therefore entitled to retain the R1,016 million as a retrospective market-related rental.

The ALA provides in section 28(1) as follows:

"(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2 (1), or a contract which has been declared void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and …"

HELD

- There was only a provisional agreement to purchase the property. No price was determined and no date was set to conclude the deed of sale. The agreement was akin to a right of pre-emption which does not give the pre-emptor a right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is completed then, and not before, will the pre-emptor have a right to claim transfer of land. It is the latter agreement (the sale agreement), not the former (granting of the right of pre-emption), that must be compliant with the ALA in order to be valid and binding.

- The parties appeared to have concluded an agreement in terms of which Helm would commence payment of certain sums towards the purchase price of a sale agreement to be concluded in future. The agreement was without doubt not an agreement that was compliant with the requirements of the ALA, but was not required to be either, as it did not constitute an agreement for the sale of immovable property.

- In any event, the Noortmans maintained that it was a *pactum* (which is an agreement to agree) to purchase the property at a later date. This was not enforceable at their behest, but at the instance of Helm, the right holder in terms of the *pactum* (and presuming that the *pactum* herein was valid).

CONCLUSION

As a result, in the absence of a valid sale agreement, Helm was entitled to receive back what it had paid to the Noortmans in respect of the purchase price.

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