



CONSTITUTIONAL COURT OF SOUTH AFRICA

Riaan Mogamat Amardien and Others v Registrar of Deeds and Others

CCT 212/17

Date of hearing: 07 August 2018

Date of judgment: 28 November 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 28 November 2018 at 10h00 the Constitutional Court handed down judgment in an appeal against an order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The High Court had dismissed an application to set aside the cancellation by the Cape Town Community Housing Company (Pty) Limited (CTCHC) (and subsequently by the Registrar of Deeds) of the Instalment Sale Agreements (ISAs) concluded between each applicant and the CTCHC in relation to certain properties and the subsequent sale of those properties to the S & N Trust (Trust).

In 1998, the City of Cape Town established a government subsidised housing programme. This programme was administered by the CTCHC to indigent members of the Cape Town community. The applicants entered into the ISAs for subsidised housing with the CTCHC as the seller, between 2000 and 2001. In terms of the ISAs, CTCHC was obliged to record the ISAs. In turn, the applicants were required to make payments in monthly instalments for a period of four years. They did so irregularly for various reasons including that the instalments due were higher than expected; the building standards were of inferior quality; and that the CTCHC had failed, on numerous occasions, to respond to their complaints. The applicants contended that the CTCHC was obliged to record the ISAs before receiving any payments under the ISAs as required by section 26 of the Alienation of Land Act 68 of 1981 (ALA), but failed to do so at the time that the ISAs were concluded. Despite this, it continued to receive payments from those applicants who continued paying.

The CTCHC only recorded the ISAs in April 2014, more than ten years after the conclusion of these agreements. Within a month after the recordal, the CTCHC issued

notices in terms of section 129(1) of the National Credit Act (NCA), stating that the applicants were in arrears and that they should remedy the default within 20 days failing which the ISAs would be cancelled. The applicants failed to pay. On 23 June 2014, the CTCHC sold the applicants' homes to the Trust. However, the ISAs were only cancelled by CTCHC on 4 May 2015 and the properties were transferred to the Trust on 5 May 2015. The Trust then instituted eviction proceedings against the second to sixth applicants in the Mitchells Plain Magistrates Court, and have expressed an intention to evict the seventh to twelfth applicants.

Subsequent to this, the applicants instituted proceedings in the High Court, challenging the lawfulness of the cancellation of the ISAs by the CTCHC and later by the Registrar of Deeds and the lawfulness of the sale of the properties to the Trust, which they sought to be declared void. The High Court held that although the instalment amounts under the ISAs only become payable upon the recording of the ISAs, this did not prevent them from becoming due at the time of the conclusion of the ISAs. Section 26 of the ALA only applied to prevent a creditor from receiving consideration until it had promptly recorded the ISAs; it did not prevent such amounts from becoming due. Therefore, the cancellation of the ISAs by the CTCHC was held to be valid as the applicants were in arrears at the time of recordal. The High Court also held that the CTCHC had fulfilled its obligations under section 129(1) of the NCA by providing evidence of delivery of notices to the applicants, and that it was not essential for notices in terms of section 129(1) to set out the amount of the arrears. The applicants were able to determine for themselves how much they owed – and in an event of uncertainty, they could consult with CTCHC to determine the amount. The High Court thus dismissed the application with costs and refused leave to appeal, as did the Supreme Court of Appeal.

The applicants applied to this Court for leave to appeal against the High Court's judgment and argued that this matter impacts on their right to housing. They submitted that the late recordal of the ISAs by CTCHC meant that in terms of section 26 of the ALA, they could not be in default until after recordal of the ISAs. The applicants submitted that a proper interpretation of section 129 of the NCA is that a credit provider is required to state the arrear amount owing in a notice to a consumer.

The CTCHC supported the judgment of the High Court and submitted that the payments would be due retroactively where an ISA is recorded late. Regarding the section 129(1) notices, CTCHC submitted that these contained the arrear amounts but in any event, the inclusion of the amount in the section 129(1) notice is not a legal requirement. The CTCHC submitted that the cancellation of ISAs was thus valid and the section 129(1) notice was sufficient.

The Women's Legal Centre Trust (WLC) was admitted as *amicus curiae*. It submitted that section 129 of the NCA must be interpreted in line with the right to housing in section 26 of the Constitution. Furthermore, it must be viewed through a gendered and feminist lens as the cancellation of the ISAs will have an adverse impact on women and affect their right to access housing.

In a unanimous judgment by Mhlantla J, this Court held that in terms of section 20 read with section 26 of the ALA, the payments under the ISAs are not due and payable, and the seller is statutorily barred from receiving payments, until the ISAs are recorded with the Registrar of Deeds. Therefore the applicants were not in arrears as contended by the CTCHC and no fault could be imputed to them during the period when the ISAs were unrecorded.

The Court further held that section 19 of the ALA and section 129 of the NCA serve different purposes. Section 19 provides steps that a seller must take before cancelling an ISA, whereas a section 129 notice would ordinarily only be served subsequent to a section 19 notice. Thus the section 129 notice served on the applicants was premature when the CTCHC claimed cancellation as it did not satisfy the requirements of the section 19 ALA notice. Since CTCHC took more than ten years to record the ISAs, it should have advised the applicants of the recordal and given them time to pay the instalments. The Court, for clarification purposes, also decided the question of whether the arrear amount owing had to be stated in the section 129 notice. This Court held that the phrase “draw the default to the notice of” in section 129(1) meant that the amount owed must be clear and specified in the notice.

In the result, this Court granted leave to appeal and upheld the appeal. The CTCHC’s cancellation of the ISAs and cancellation of the recordal by the Registrar of Deeds, were set aside.