



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 613/2010

In the matter between:

JOSEPH SIMILANIE & ELIZABETH SIMILANIE

Appellants

and

LEON KUSWAYO & REGINA KUSWAYO

Respondents

Neutral citation: *Similanie v Kuswayo* (631/2010) [2011] ZASCA 79
(27 May 2011)

Coram: Navsa, Cloete and Malan JJA

Heard: 12 May 2011

Delivered: 27 May 2011

Summary: Sale of land – effect of restraint against alienation registered against title deeds – waiver of registered condition.

ORDER

On appeal from: Northern Cape High Court, Kimberley (Bosielo AJP and Steyn AJ sitting as court of appeal):

- a) The appeal is upheld with costs including the costs of the application for leave to appeal.
- b) The order of the court below is set aside and replaced by the following:
'The appeal is dismissed with costs.'

JUDGMENT

MALAN JA (Navsa and Cloete JJA concurring)

[1] The O’Kiep Copper Company owned the farm Nababeep on which the mining town with the same name was developed. When the company ceased mining operations it donated the land and houses in the town to the Namakwa municipality. The municipality resolved to donate the land and houses in the town to the persons who occupied them at that time. One of the houses was donated to the respondents, Mr and Ms Kuswayo, on 17 November 2003. The latter sold it to the appellants, Mr and Ms Similanie, on 6 November 2006. The purchase price was R50 000 and a deposit of R15 000 was paid by the appellants. At the time of the conclusion of the agreement of sale the property was not yet registered in the name of the respondents. Registration only occurred on 22 May 2007. The deed of transfer contains the following condition:

‘G ONDERHEWIG VERDER aan die volgende voorwaarde opgelê deur die Namakwa Distrikmunisipaliteit vir sy voordeel, welke voorwaarde soos volg lees, naamlik:

Bogemelde eiendom mag nie deur die Transportnemer of sy/haar opvolgers in titel binne ‘n tydperk van 5 (vyf) jaar gereken vanaf datum van skenking (17 November 2003) van die eiendom verkoop of andersins vervreem word nie.’

[2] The appellants complied with their obligations in terms of the agreement of sale and tendered payment of the balance of the purchase price on registration of transfer. The respondents, however, offering to return the deposit paid, contend that the agreement of sale is invalid by reason of the condition cited above and registered against the title deeds of the property. The respondents alleged that at the time of entering into the sale agreement they were unaware of the condition cited. To this the appellants countered that the municipality had waived its rights and, in this respect, they rely as part of the replying papers on the affidavit of Ms Jolene Faro, an administrative official of the municipality, concerned with housing matters who said that she was duly authorised to represent the municipality. She referred to the donation of the mining town to the municipality and the subsequent donation to the persons who occupied the houses. She continued that the donation to the occupants was subject to certain conditions one of which was that the property could not be sold or alienated to a third party for a period of 5 years unless it was first offered for sale to the municipality:

‘Ook in die geval van mnr en me Kuswayo, die respondente, is daar so ‘n persoonlike serwitut opgelê ten gunste van die Namakwa Distriksmunisipaliteit. Die Raad het besluit om nie die verkoopsreg uit te oefen nie, en daarvan afstand te doen. Wat die Namakwa Distriksmunisipaliteit dus aanbetref verval die beperkende voorwaarde ten gunste van die Namakwa Distriksmunisipaliteit soos genoem in die transportakte. Die Raad het ook geen beswaar indien die eiendom ter sprake verkoop word aan iemand anders nie. Sien die afdruk van die brief gedateer 25 Januarie 2008 hierby aangeheg wat ek in opdrag van die Raad geskryf het.’

[3] The letter of 25 January 2008 referred to reads:

‘Hiermee om u mee te deel dat die Raad nie die woning sal koop nie en dus hiermee afstand doen van sy voorkoopsreg t.o.v. die woning geleë te erfno. 558, Nababeep. Die voorwaarde soos genoem in die transportakte verval dus.

Geliewe net daarop te let dat u geensins in die toekoms vir enige staatsubsidie vir behuising sal kwalifiseer nie.’

[4] The appellants applied to the magistrate’s court of Springbok for an order that the respondents sign the required transfer documents and deliver the original deed of transfer failing which the sheriff be empowered to sign them and the appellants authorised to obtain a duplicate deed of transfer. The magistrate upheld the claim and

granted the order prayed for. He held that the condition reflected in the title deed was inserted for the benefit of the municipality and that it could and did waive it as reflected in Ms Faro's letter of 25 January 2008. His reasons for judgment were succinct and to the point and the criticism advanced in this regard in the court below was unwarranted.

[5] On appeal Steyn AJ and Bosielo AJP upheld the appeal by the sellers (the respondents in this court) and set the order aside with costs. In her judgment Steyn AJ found that condition G involved an absolute prohibition against the sale or alienation of the property within a period of 5 years from the date of donation rendering the agreement of sale between the appellants and the respondents invalid. She further found that, because no resolution of the council of the municipality accompanied Ms Faro's letter, there was no evidence that the municipality had in fact passed such resolution. Leave to appeal to this court was granted by Majiedt AJP and Williams J.

[6] In contending that the agreement of sale was invalid, the respondents relied on *Strauss v De Villiers* 1981 (2) SA 163 (NC).¹ In his judgment in that case Basson J held that a prohibition against alienation that was registered against the title deeds of immovable property constituted an encumbrance on the property and that a sale of the property in conflict with the prohibition was void. To my mind, one should rather distinguish between the validity of an agreement and its enforceability, as was done in *Strauss'* case on appeal.² It is common cause that both the sellers and the purchasers were unaware of the condition at the time of contracting. Transfer of the property in the name of the respondents was only registered after the agreement of sale was entered into. The validity of an agreement must be considered in view of the circumstances existing at the time it is concluded.³ No impediment to the validity of the agreement of sale existed at that time. To hold that it is invalid would be to deprive the purchasers of any remedy they may have for damages by reason of a failure by the sellers to perform, ie transfer the property sold. An analogous case is the sale of a *res aliena*.⁴ Nor can the agreement be said to be invalid because of an initial impossibility of performance

1 See also *Opperman v Uitvoerende Komitee van die Verteenwoordigende Owerheid van die Blankes* 1991 (1) SA 372 (SWA).

2 *Strauss v De Villiers* 1983 (1) SA 1 (A) at 10B-H.

3 *Strauss v De Villiers* 1983 (1) SA 1 (A) at 9F-G.

4 *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 581A-B.

because the restrictive condition may be waived.⁵

[9] In the present case the appellants rely on a waiver of the condition by the Namakwa municipality. The condition in the title deeds was inserted for the benefit of the municipality. It expressly provides that the condition was imposed 'vir sy voordeel'. Being a condition for its benefit it may be waived by the municipality – also informally.⁶

[10] The waiver is contained in the letter by Ms J Faro which was attached to the respondents' answering affidavit and in her replying affidavit. Whether or not the condition was a right of pre-emption does not matter. The letter makes it clear that the condition as a whole was waived: 'Die voorwaarde soos genoem in die transportakte verval dus'. Even if the municipality misconceived its rights, its intention to waive whatever rights it had appears clearly from Ms Faro's statement in her replying affidavit:

'Wat die Namakwa Distriksmunisipaliteit dus aanbetref verval die beperkende voorwaarde ten gunste van die Namakwa Distriksmunisipaliteit soos genoem in die transportakte. Die Raad het ook geen beswaar indien die eiendom ter sprake verkoop word aan iemand anders nie.' (Emphasis added).

[11] The respondents, however, contend that the waiver was not retrospective, only raised in the replying affidavit and not proved by way of a resolution of the municipality's council. The fact that the waiver was not expressed to be retrospective is immaterial and cannot affect the validity of the agreement of sale. Moreover, the letter, as I have said, was annexed to the respondents' answering papers. If the respondents intended to question the validity of the waiver or Ms Faro's authority they should have raised the questions in their answering affidavit. They did not do so and cannot do so now.⁷

[12] It follows that the appeal should succeed. The following order is made:

- a) The appeal is upheld with costs including the costs of the application for leave to appeal.
- b) The order of the court below is set aside and replaced by the following:

5 Cf R H Christie assisted by Victoria McFarlane *The Law of Contract in South Africa* 5 ed (2006) p 93.

6 Cf *Bezuidenhout v Nel* 1987 (4) SA 422 (N) at 428B-G.

7 *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 17.

'The appeal is dismissed with costs.'

F R MALAN
JUDGE OF APPEAL

APPEARANCES:

For Appellants:

P J T de Wet

Instructed by:
Elliott Maris Wilmans & Hay
Kimberley

Lovius-Block
Bloemfontein

For Respondents:

S J Reinders

Instructed by:
Venter Joubert Inc
Kimberley

Rosendorff, Reitz, Barry
Bloemfontein