

SUMMARY OF THE JUDGMENT

SELLING A PROPERTY IN CONTRAVENTION OF SECTION 10 OF THE HOUSING ACT

Tapala and Another v Tlebetla and Others (89400/16) [2019] ZAGPPHC 46 (22 February 2019)

In a complex set of facts where there was fraud and the sale of a property to two different purchasers, issues arose regarding the correct interpretation of section 10 of the Housing Act. This section of the Act finds application in the sphere of sustainable housing developments and it has a prohibition against the sale of a property within a period of 8 years if it was not first offered to the relevant provincial housing authority. The question the court had to determine here was what happened where a sale and transfer occurred in contravention of these principles.

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

FACTS

Mr Moropo sold his property to Tapala in 2006 and then, fraudulently, sold it to Mr Tlebetla in 2013. Tapala took occupation of the property after the sale to him (but transfer never took place) and was still in occupation at the time of formal registration of transfer of the property to Tlebetla.

Mr Tlebetla then brought proceedings to evict Mr Tapala from the property.

The title deed to the property contained a condition to the effect that the property could not be lawfully alienated within eight years of transfer without the consent of the relevant provincial housing department, and unless it had first been offered to the relevant provincial housing department (in compliance with section 10A(1) of the Housing Act that applied to the relevant housing scheme). Mr Moropo sold and transferred the property within this eight year period, but without complying with this condition.

At the time of the proceedings, Mr Moropo had passed away.

In defending the claim, Tapala argued that the deceased could not transfer more rights than he had, and that he had no right to sell the property because of the restrictions on sale contained in section 10A of the Housing Act. Secondly it had been proved by Tapala that the sale of the property to Tlebetla, after it was first sold to him, was tainted with fraud and therefore, as a result of the fraud, notwithstanding registration in the deeds office, was void *ab initio* and had to be set aside. The property should then revert back to the provincial housing department who could decide, anew, to whom it should be awarded.

Tlebetla countered that at all material times he was not aware of the sale to any other party or disputed ownership and he denied that there was fraud. He argued further that because the abstract theory of transfer applies to immovable property, the requirements thereof had been fulfilled in the sale. This theory states that there are two requirements for ownership to pass to the transferee. The first is delivery which is effected by registration of transfer in the deeds office. The second is a real agreement whose main element is an intention by the transferor to transfer the ownership and the intention of the transferee to become the owner of the property.

HELD:

Prohibited sales

- It was undisputed that the deceased had failed to comply with section 10A(1) of the Housing Act in both sales. As the sale was prohibited, the agreements were void. The invalidity of the deed of sale was however not the end of the matter. It was still necessary to determine whether the formal registration of transfer was valid despite the invalidity of the underlying sale agreement.
- In this regard Tapala argued that the abstract theory of transfer of property meant that the validity of a sale did not depend on the validity of the underlying transaction. However, if the sale was tainted by fraud, ownership will not pass despite the registration of transfer.
- On the facts in the present matter, the sale of the property to Tlebetla was in fact tainted by fraud. The deceased had earlier pleaded guilty to fraud admitting to having sold it to Tapala with intent to defraud and he was convicted accordingly.
- Previous judgments have confirmed the principle that ownership will not pass, despite registration of transfer, if the underlying transaction was tainted by fraud, or where the essential requirements of the so-called "real agreement" and intention on the part of the transferor to transfer ownership of the property, and on the part of the transferee to become the owner thereof, were not met. The Court held as follows: *"This court ... confirmed that the abstract theory of transfer applies to movable as well as immovable property. According to that theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction. However, the passing of ownership only takes place when there has been delivery effected by registration of transfer coupled with ... a 'real agreement' [T]he essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. As has already been mentioned, a valid underlying*

agreement to pass ownership, such as in this instance, a contract of sale, is not required. However, where such underlying transaction is tainted by fraud, ownership will not pass despite registration of transfer."

- As the sale to Tlebetla was tainted by fraud, ownership had not passed despite registration of the transfer into the name of Tlebetla.

Ownership of the property

- Section 6 of the Deeds Registries Act provides that upon cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond, the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.
- The deceased's title deed will however not be revived by the cancellation of the transfer to Tlebetla if the property had, prior to his death reverted to the provincial housing department as is contended by Tapala.
- Section 10A(3) of the Housing Act states that:

"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 the property."

- The facts showed that at the time of the sale to Tlebetla, Mr Tapala had occupation of the property. They erected an RDP house on the property and later also added further bedrooms. Ownership is however not synonymous with occupation.
- However, as the deceased had vacated the property at the time of sale to Tlebetla, his ownership had lapsed and the relevant provincial housing department was the deemed owner.

The Court ordered the setting aside of the sale and transfer to Tlebetla which will result in the property reverting to the provincial housing department as deemed owner.

Furthermore the Court ordered that an 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 the property.

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