



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 674/08

PHILANI-MA-AFRIKA
RESIDENTS OF ANGUS
MANSIONS

First Appellant

Second to Sixty Eighth Appellants

and

W M MAILULA
TRUST FOR URBAN HOUSING FINANCE
J N BHANA & ASSOCIATES
REGISTRAR OF DEEDS
THE CITY OF JOHANNESBURG

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

Neutral citation: *Philani-Ma-Afrika & Others v W M Mailula & Others*
(674/08) [2009] ZASCA 115 (25 September 2009)

Coram: FARLAM, NAVSA, MLAMBO, SNYDERS JJA et
TSHIQI AJA

Heard: 26 MAY 2009
Delivered: 25 SEPTEMBER 2009

Summary: Sale of property – Failure to establish sale and transfer of property duly authorised – order putting eviction order into operation – whether appealable.

ORDER

On appeal from: Johannesburg High Court (Willis J sitting as court of first instance)

The following order is made:

1. The appeal is allowed with costs including those occasioned by the employment of two counsel.
2. The order made by the court *a quo* in case 2008/14341 (the Philani application) is set aside and replaced by the following order:
 - '1. The sale of erf No 4562 Johannesburg, situated at 268 Jeppe Street, Johannesburg, is set aside.
 2. The Fourth Respondent is ordered to cancel Deed of Transfer no T033425/07.
 3. It is declared that the property referred to in paragraph 1 is owned by the Applicant.
 4. The First and Second Respondents are ordered to pay the Applicant's costs.'
3. The order made by the court *a quo* in case 2008/4453 is set aside and replaced by the following order:

'The application is dismissed with costs'.

JUDGMENT

FARLAM JA (Navsa, Mlambo, Snyders JJA et Tshiqi AJA concurring)

[1] This is an appeal against a judgment delivered by Willis J on 5 November 2008 in the Johannesburg High Court. In his judgment the learned judge dealt with two applications which were argued together before him. One was an application brought by the present first appellant, a company registered in terms of s 21 of the Companies Act 61 of 1973, Philani-Ma-Afrika, which I shall call in what follows 'Philani', in which it sought orders (a) setting aside the purported sale of a property known as Angus Mansions, situated at Erf no 4562, Johannesburg, the street address of which is 268 Jeppe Street, Johannesburg, to the first respondent, Mr William Marofane Mailula, (b) ordering the Registrar of Deeds, Johannesburg, the fourth respondent, to cancel Deed of Transfer no T033425/07 (in terms of which the property was transferred from Philani to Mr Mailula) and (c) declaring the property to be owned by Philani. As additional respondents were cited the Trust for Urban Housing Finance, the second respondent, which is the mortgagee of the property under a mortgage bond registered over the property to secure a debt owed by Mr Mailula, and as third respondent J N Bhana and Associates, the firm of conveyancers responsible for bringing about the transfer of the property to Mr Mailula. The City of Johannesburg was cited as fifth respondent.

[2] The other application was one brought by Mr Mailula, as owner of the property, for an order evicting 67 named occupiers of the property. They feature in this case as the second to 68th appellants. The 68th respondent in the eviction application was described as 'the remaining unlawful occupiers of Angus Mansions'. They are not represented before this court.

[3] Willis J dismissed the application brought by Philani and granted the eviction application brought by Mr Mailula against the first to 68th respondents before him. He granted them and Philani leave to appeal to this court against his judgment and the orders he made. Subsequently he granted Mr Mailula leave to execute against the respondents whose eviction he had ordered (except for the 9th, 16th, 18th, 32nd and 65th respondents, who are respectively the 10th, 17th, 19th, 33rd and 66th appellants before us and who are all

members of Philani): in what follows I shall call this order 'the execution order'. The respondents whose eviction had been ordered, including those against whom leave to execute was not given, applied to the Constitutional Court for an order replacing Willis J's execution order with an order dismissing the execution application.

[4] On 4 December 2008 the Constitutional Court granted an order in the following terms:

'1. The order of Willis J in the Johannesburg High Court on 13 November 2008, granting the First Respondent leave to execute an eviction order against 62 of the applicants on 15 December 2008, is suspended pending the final determination of the appeal in the Supreme Court of Appeal, pursuant to leave granted to the applicants by the High Court on 5 November 2008.

2. The application for leave to appeal against the High Court's order of 13 November 2008 is referred to the Supreme Court of Appeal to be adjudicated, to the extent it may be so adjudicated given the provisions of section 20 of the Supreme Court Act 59 of 1959, simultaneously with the appeal referred to in sub-paragraph 1 hereof.

3. Costs are to be costs in the appeal.'

[5] It was common cause at the hearing of the appeal that if the Philani appeal succeeded the appeal against the order in the eviction case would also have to succeed.

[6] Philani was incorporated in 1996 to serve as a corporate vehicle through which the National Housing Board, through the Gauteng Provincial Housing Board, subsidised and assisted underprivileged people collectively to acquire Angus Mansions for their own occupation.

[7] Its Memorandum of Association states that its main business is 'to acquire, hold, develop or improve [Angus Mansions] with a view to enabling the community of residents, of which at least 75% . . . of the adult members are persons who earn less than R1500 per month . . . to acquire such land, and/or right thereto so as to occupy the land and buildings wholly or mainly for residential purposes . . .'. Its powers include the power to sell or deal with its property, ie, Angus Mansions, 'but always in accordance with the main object'

(which was identical with its main business). Its income had to be applied solely towards the promotion of its main and ancillary objects (which were limited to those 'necessary to achieve its main object') and no part of it might be paid or transferred directly or indirectly to its members. On winding up its assets have to be given or transferred to some other association or institution 'having objects similar to its main object'.

[8] In terms of its articles only residents of Angus Mansions are eligible for membership and membership is a pre-condition of occupation of a flat in the building. Only members are eligible for election as directors. At all times there have to be at least seven directors and if the number falls to below seven the remaining directors 'may only act to call a general meeting for the election of additional directors'.

[9] Philani acquired Angus Mansions and it was registered in its name on 18 February 1997. The administration and record-keeping of the company were neglected and as the appellants' counsel put it, 'fell into disarray'. The register of members was never updated with the result that its only registered members are the eight original subscribers to the memorandum of association. Of these two have died and one has moved away so that Philani has only five registered members left, the appellants in respect of whom the execution order was not made. The appointment of the directors and the functioning of the board have also been neglected. CM 29 returns have been furnished to the Registrar of Companies reflecting resignations and the appointment of new directors but the new appointments are clearly invalid because the persons allegedly appointed were not members and were accordingly ineligible for election as directors (even if elections were held). Indeed it is clear that it is not possible for Philani to have a board of directors whose members can do nothing other than call a general meeting.

[10] On 7 August 2006 a deed of sale was signed by Mr Mailula, as buyer, and a Mr Mkhumbuzi, purportedly on behalf of the seller. The deed reflected the sale of Angus Mansions to Mr Mailula for R3.5m. Mr Mkhumbuzi signed the deed 'by virtue of a Power of Attorney - copy attached'. No copy was

attached. Neither Mr Mailula nor Mr Mkhumbuzi (from whom an unsigned document purporting to be an affidavit was filed) state whether a power of attorney in fact existed. If it did, it could not have been valid because the remaining directors could not validly have passed a resolution authorising the sale. The estate agent who handled the sale did not make an affidavit nor did the conveyancing attorney, who, as I have said, was a party.

[11] As counsel for the appellants contended the only document disclosed in the evidence upon which Mr Mkhumbuzi could have relied was a document described during argument as 'the Madisha document'. The copy of the document annexed to the papers reads as follows:

'PHILANI MA AFRICA
PHILANI MA AFRICA

ANGUS MENSSION NO 268 JEEPE STREET [sic]
JOHANNESBURG
2001

PO BOX 85
WITS
2000

RESOLUTION BY DIRECTORS OF PHILANI MA AFRICA

BUILDING SITUATED AT CORNER JEPPE AND END STREET

A meeting was on the 12th April 2006 held between the Directors and disposal of property with immediate effect at an agreed price.

Shares and equity between the members for their own interest and an amount of R100.000.00 to be paid.

Directly to Solly Madisha.

Disolution of partnership and appointments of interim directors.

Dated on Johannesburg on this 12th day April 2006.

Directors: Solly Madisha'

(The document bore a signature.)

[12] This is the only document from which Mr Mkhumbuzi claimed to have derived his authority to sell Angus Mansions on behalf of Philani. Counsel for the appellants submitted (a) that it was inadmissible because the copy was not proved to be authentic; (b) that there was every reason to suspect that it might be a forgery; (c) that it was incoherent on its face; (d) that, if admissible and genuine, it did not prove a valid resolution because none of the persons alleged to have adopted the resolution could have validly been elected as director of Philani (because none was registered as a member) and (e) in any event, even if they were validly appointed directors, they had no power to do anything other than call a general meeting, for the reason given earlier. But there is an even more telling criticism. It did not authorise anyone to implement it on behalf of Philani.

[13] Apart from the Madisha document, Mr Mailula relied on a further document, which, although it was only in manuscript, purported to be a copy of a minute of a meeting of residents of Angus Mansions held on 9 October 2006 (two months after the deed of sale relied on by Mr Mailula was signed). It reads as follows:

'Meeting held at Philani Ma Afrika with Housing Dept
Agenda.

1. Housing Dept introducing Vusani

1. We told housing that we don't need Vusani to manage us, or to do renovations for us.

2. We told housing that we don't trust them anymore because during the past years they introduce Cope housing to manage Philani and they put us into problems. So now we the declaratory order need any agent brought by housing.

3. Housing Dept told us that if we don't want Vusani its fine because everything is up to us as tenants.

4. We tenants we give Philani the authority to appoint or sell the property to a company that will run the property in a standard form of good management.'

[14] No evidence was led as to the authenticity of this document. Counsel

for the appellants contended that it was, in any event, a forgery and referred in this regard to the evidence of Philani's witnesses, who say that there was a meeting of residents on 9 October 2006 for another purpose and the disposal of the building was not discussed.

[15] It is unnecessary to make any finding on these issues because, even if the document is authentic and evidences a resolution in the terms set out, this still will not assist Mr Mailula in establishing that Mr Mkhumbuzi was authorised to sell the building or to sign the conveyancing documents for the property to be transferred to Mr Mailula.

[16] Counsel for the appellants attacked the validity of the sale and transfer on other grounds also but it is clear from what I have said that Philani has clearly established that the sale and transfer of its property were invalid and that it is entitled to the relief it seeks in its notice of motion.

[17] Counsel for Mr Mailula conceded that the documentation purporting to authorise the sale was, as he put it, 'a sham' but submitted that the case should be sent back to the court *a quo* so that there could be either a reference to evidence under rule 6(5)(g) of the Uniform Rules or a reference to trial. The purpose, he submitted, was so that a full enquiry into the history of the management of Angus Mansions could be conducted and the circumstances leading up to the sale could be explored. He submitted further that inner city housing as a whole should be investigated. All of this is far beyond the legal issues we are required to address. But this request was in any event made far too late. In the court below Mr Mailula was content for the case to be dealt with on the papers and the evidence adduced in that court was not sufficient to raise a valid defence to Philani's claims, even if believed.

[18] Counsel for the second respondent submitted that Philani was precluded from obtaining the relief it sought by virtue of the application of the *par delictum* rule. He submitted that, if there was a fraud perpetrated on Philani (as counsel for the appellant submitted), it was as much part of the fraud as anyone. In this regard he contended that at all material times Philani

had a board of directors and there was accordingly what he called 'corporate intelligence' and the directors 'must have known' what was happening. While I do not think that it is correct to say that Philani (in any recognisable form) can be regarded as complicit in the fraud that was perpetrated, it is unnecessary to give further consideration to the point raised because I am satisfied that, as counsel for the appellants contended, the *par delictum* rule does not apply in the circumstances of this case.

[19] It follows from what I have said that the appeal must succeed and the orders made by the court *a quo* must be set aside and replaced with orders in the Philani application granting Philani the relief it sought and in the eviction application refusing the relief sought.

[20] It remains for me to deal with the issue referred to this court by the Constitutional Court. The application was brought in the Constitutional Court because it was believed that the execution order was not susceptible to appeal to the Full Bench of the High Court or to this Court. That belief was erroneous. It is clear from such cases as *S v Western Areas* 2005 (5) SA 214 (SCA) at paras 25 and 26 at 226A-E that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. See also *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para [8] at 411A-B. The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be regarded as appealable in the interests of justice. Counsel were agreed that if the appeal on the merits of the eviction order were to succeed no further attention need be paid to the application for leave to appeal against the execution order – the latter being premised on the former. In any event, in view of the suspension of the execution order by the Constitutional Court the point, as counsel agreed, became moot. In the circumstances no order is required in respect thereof.

[21] The following order is made:

1. The appeal is allowed with costs including those occasioned by the employment of two counsel.
2. The order made by the court *a quo* in case 2008/14341 (the Philani application) is set aside and replaced by the following order:

- '1. The sale of erf No 4562 Johannesburg, situated at 268 Jeppe Street, Johannesburg, is set aside.
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3. The order made by the court *a quo* in case 2008/4453 is set aside and replaced by the following order:
'The application is dismissed with costs'.

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IG FARLAM
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: W H TRENGOVE SC
Ms C STEINBERG

Instructed by
Jerry Nkeli & Associates Inc Johannesburg
Matsepes Inc Bloemfontein

FOR FIRST RESPONDENT: D A KUNY SC
R G COHEN

Instructed by
Mervyn Joel Smith Attorneys Johannesburg
Lovius Block Bloemfontein

FOR SECOND RESPONDENT: J G SMIT

Instructed by
Cliffe Dekker Hofmeyr Inc Johannesburg
Du Toit Louw Botha Inc Bloemfontein

FOR FIFTH RESPONDENT: B L MAKOLA

THIRD, FOURTH AND FIFTH RESPONDENTS REFERRED TO ONLY FOR
RECORD PURPOSES.