In the High Court of South Africa

KwaZulu-Natal Division, Pietermaritzburg.

(Heard in Durban).

H/C Case No: 9987/2014

Appeal Case No: AR390/2019

In the matter between:

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| Nadia Suleman Moosa | Appellant |
| and | |
| Albemarle Court Share Block (Pty) Ltd | First Respondent |
| Shanthee Ragunanan Maharaj | Second Respondent |
| H Meer | Third respondent |
| and 16 Others | the Further Respondents |

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Judgment

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Lopes J

[1] This is an appeal from the High Court, sitting in Durban. The matter was an application for mandatory and other relief. It concerned the rights of the appellant, Mrs Moosa, to the use of a garage situated in a block of flats, operating under the Share Blocks Control Act, 1980 ('the Act').

[2] The relevant history of the matter may be summarised as follows:

(a) A block of flats named Albemarle Court was constructed in Old Fort Road, Durban in approximately 1931. Each flat was allocated a parking garage. Prior to 1957, an extension was built extending the number of flats to 41. Extra garages were not built. This meant, according to the Articles of Association, 1957 ('the articles') that there were 41 flats, 30 of which had an accompanying garage.

(b) Prior to June, 2004, Mrs Alida Vera Boote ('Mrs Boote') was the owner of 910 fully paid up shares (class 29) in the share block scheme, entitling her to the use of flat 29. In addition, she was the owner of 35 fully paid up shares (class 69) entitling her to the use of garage 28. This is confirmed by the Schedule of Shares attached to the 1957 articles. Attached to the sale agreement put up in the papers by Mrs Moosa is a layout plan entitled 'Approved Municipal Plan of Albemarle Court, dated 1935'. Notable on that plan is 'SB 69' and below that note '28'. Although dating back to 1935, the plan shows that the use of garage 28 was allocated to share block 69. It is disputed that this plan was ever part of the articles of Albemarle.

(c) Whatever the physical location of garage 28 may have been, it is clear from the papers that it was an 'inside' garage. This was because the garage was situated in the driveway into the flats, and one had to pass through a gate in order to access garage 28. There were a number of other garages, some of which were outside the driveway. These outside garages were regarded as less desirable because, after using an outside garage in Gresham Place/Old Fort

Road, one has to walk around the building before being able to enter through the gate to gain access to one's flat. This was accepted by all.

(d) On the 3rd June, 2004, Mrs Boote, knowing that she was about to sell her share block shares, concluded an agreement with the second respondent ('Mrs Maharaj'). The agreement was that they would swop the garages which had hitherto been allocated to them, and which they had used for some considerable time. The purpose of the agreement was that Mrs Maharaj would gain the use of Mrs Boote's inside garage, and Mrs Boote would sell to the person who purchased her class 69 shares, the outside garage owned by Mrs Maharaj. This agreement was concluded in writing, and the numbers above the garage doors swopped.

(e) The next day, the 4th June 2004, Mrs Boote signed a sale agreement in terms of which she sold her class 29 and class 69 shares to Mrs Moosa.

(f) Mrs Moosa purchased those shares having never viewed the property. At a later date, she arrived at the property and was shown the outside garage which now had the number '28' above the door. There is no clarity regarding the date she did so, and there is some dispute about how this occurred, and about the person to whom Mrs Moosa spoke.

(g) In April 2014, Mrs Moosa decided to let flat 29 and the outside garage to a tenant. On the 8th April 2014, Mrs Moosa received a letter from Wakefields, the managing agents of Albemarle Court Share Block. The letter referred to the swopping of garages, which had been taking place since 1993. Shareholders were asked to

confirm the location of their garages with a view to assisting the directors in having the cession and share certificate documents reflect the correct position.

(h) Mrs Moosa replied, recording that she had not checked the garage allocation against what she referred to as 'the title deeds', and that the garage used by her was allocated to her upon her purchase of flat 29. She reserved the right to claim the correct garage 'should that be different to the garage currently allocated'.

(i) Mrs Moosa subsequently claimed the inside garage which had previously been allocated to Mrs Boote, before her swop with Mrs Maharaj. This led to the application in the court a quo.

(j) Pursuant to an interlocutory application, the fourth to nineteenth respondents were joined because of their interests in the past allocations of garages, some of which, after having been exchanged, had been improved by the addition of electric doors, shelving, etc. None of these respondents have elected to deliver affidavits, nor have they played any part in the application.

[3] The relief claimed by Mrs Moosa in the application was as follows:

(a) Prayers 1 to 4, seeking declaratory orders regarding her ownership of the class 29 and class 69 shares as well as her exclusive right to garage 28 (the original inside garage 28).

(b) Prayers 5 to 6, seeking interdictory relief relating to the passing of a special resolution (approving a revised garage plan) at an annual

general meeting which was to have been held on the 28th August 2014.

(c) Prayers 7 to 10 seeking the return of access control devices in the possession of the first respondent, and the reversal of a fine, allegedly unfairly imposed upon Mrs Moosa by Albemarle.

[4] The learned judge a quo made the following order:

'1. The first respondent is directed to reverse/refund/credit the R500 fine levied against the applicant.

2. I make no order in respect of paragraph 1.5 (sic) of the Notice of Motion.

3. The rest of the application is dismissed with costs.'

[5] I assume that the reference by the learned judge a quo to 'paragraph 1.5' is in fact a reference to prayers 1 to 5 of the Notice of Motion.

[6] On the 14th May 2019, Mrs Moosa was granted leave to appeal to 'the full bench (sic) of KwaZulu-Natal Division'. A joint practice note was submitted prior to the appeal, with the parties recording, inter alia:

(a) That the annual general meeting of the 28th August 2014 proceeded and the special resolution approving the amended garage plan was passed and registered.

(b) In the event of this court upholding the appeal relating to setting aside the resolution, then an appropriate order was set out in paragraph 5 of the Appellant's Practice Note.

[7] Mr *South SC*, who appeared for Mrs Moosa, submitted in his heads of argument that the principal issue in the appeal is whether the informal 'swopping' of garages allocated to specific shares in a share block scheme is valid. He submitted that the relief sought in prayers 1 to 4 of the Notice of Motion should have been granted because it was not disputed, and it resolved the dispute relating to the numbered garage which Mrs Moosa is entitled to use. This is because the number 28 was registered on the deed of cession, the transfer duty application form and the directors' consent. It is common cause that the original location of garage 28 was such that it was an inside garage.

[8] Mr *South* submitted that the swopping of the garage door numbers did not change the physical location of the garage attached to share block 69. Any 'swop' had to comply with the articles, entailing the cession of the share block shares, or an amendment to the articles. The 'swop' agreement between Mrs Boote and Mrs Maharaj has no effect on the articles, or to a *bona fide* third party such as Mrs Moosa. Mr *South* referred to s 16 of the Act, which provides:

> 'Formalities in respect of contract relating to a share and a use agreement.-
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> A contract for the acquisition of a share and a use agreement entered into, and any amendment or cession of any such contract or agreement after the commencement of this Act, shall be reduced to writing and signed by the parties thereto or by their representatives acting on their written authority, failing which the contract, agreement, amendment or cession, as the case may be, shall, subject to the provisions of section 18, be of no force or effect.'

Mr *South* also referred to the provisions of s 17 which provides that any contract for the acquisition of shares shall set out the matters required in Schedule 2 of the Act and be accompanied by the documents referred to in that schedule. He also referred to s 18(2) which does not afford restitution under s 18(1) of an

agreement which substantially complies with s 16 or s 17. Sub-section 18(2) provides:

> '(2) The provisions of sub-section (1) shall not apply in respect of a contract for the acquisition of a share which substantially complies with the provisions of sections 16 and 17, and a contract for the acquisition of a share which does not comply with the provisions of section 16 or 17, whether or not in a substantial respect, shall not be affected by such defect if the purchaser has discharged his obligations in terms of the contract and the seller has transferred the relevant share to the purchaser, and shall in such case be deemed from the conclusion thereof not to be affected by the defect.'

In the circumstances, the 'swop' agreement was void for want of the formalities set out in the Act, including the prohibition of a waiver of the right to the exclusive use of the property, which is prohibited in terms of s 22 of the Act.

[9] Mr *Pitman*, who appeared for the respondents, submitted in his heads of argument that the principal factual issue in the application was whether Mrs Moosa had established that she was entitled to a garage in a different position to the one she purchased in 2004. The relief sought in prayers 1 to 4 of the Notice of Motion had never been disputed by the respondents, and the relief in prayers 5 to 10 resolved themselves before or during the hearing. No determination of the physical location of the garage was sought by Mrs Moosa, nor is it sought in the appeal before us. Prayers 7 to 9 of the Notice of Motion were denied by the respondents, and could not be decided on the papers. No request was made for a referral to oral evidence. Mr *Pitman* submitted that Mrs Moosa knew and accepted that she had purchased an outside garage, both at the time of concluding the agreement and for the next ten years'. She obtained that for which she had bargained.

[10] Mr *Pitman* further submitted that Mrs Moosa has alleged that she is entitled to garage 28 in terms of the 1957 articles, but led no evidence to establish exactly where garage 28 was situated in 1957. The rights relied upon by Mrs Moosa arose from her agreement with Mrs Boote. Any right of action relied upon by Mrs Moosa could only be against Mrs Boote, and Mrs Boote was not joined in the application. No agreement was concluded between Mrs Moosa and Mrs Maharaj or Mrs Meer (who apparently now occupies the original garage 28). Mr *Pitman* submitted in this regard that the garage sought by Mrs Moosa (the inside garage) was not even one of the garages involved in the 'swop' agreement between Mrs Boote and Mrs Maharaj. As Mrs Meer was not involved in any of the agreements, no relief can be sought against her. At best for Mrs Moosa, she has established a 'common mistake' in her agreement with Mrs Boote, which does not entitle her to any relief against the respondents.

[11] What then, is the legal right relied upon by Mrs Moosa? She has not alleged fraud or even a misrepresentation by any party. Her case is that she purchased 35 fully paid-up class 69 shares, which shares entitled her to the exclusive use of the garage allocated to those shares. There seems no doubt that, prior to the 3rd June 2004 an inside garage was the garage attached to those shares. Which garage that was, is not entirely clear. Mrs Moosa had not inspected the property prior to the sale, and when she eventually enquired (after the sale), was shown an outside garage which she used for ten years'.

[12] Mrs Moosa's complaint is not against Mrs Boote, with whom she contracted. It is against the first respondent Albemarle Court Share Block (Pty)

Ltd (Albemarle), and Mrs Maharaj and Mrs Meer. The basis for her claim against Mrs Maharaj and Mrs Meer is that she is entitled to relief because of something which happened prior to her purchase of shares, but no allegations are made justifying the relief sought against them.

[13] Section 7 (2) of the Act provides that:

> 'The articles of a share block company shall provide that a member shall be entitled to the use of a specified part of the immovable property in respect of which the company operates the share block scheme, on the terms and conditions contained in a use agreement entered into between the company and such member.'

[14] It is clear from the 1935 Municipal Plan put up by Mrs Moosa, the sale agreement itself (on the basis that the number '35' under the heading 'Parking Bay/Garage No' was a bona fide error and should have read '28'), the cession, the Securities Transfer Form and the Transfer Duty Declaration, that Mrs Moosa purchased shares entitling her to the use of garage 28. The problem is that there is no certainty as to what physically constituted garage 28 when she purchased her shares.

[15] According to the numbers allocated to the shares as reflected in the share certificates in the papers, Mrs Boote sold to Mrs Moosa the same shares which she claims she owned prior to the 3rd June 2004 (the date when she swopped shares with Mrs Maharaj). The share certificates are dated the 17th May 2004, presumably obtained by Mrs Boote when she formed her intention to sell her shares. As the share numbers are the same as those reflected on Mrs Moosa's shares, the swop of shares owned by Mrs Boote and Mrs Maharaj was not

registered before the sale agreement (and not since then either), despite the suggestion in the letter of the 11th June 2014 by Mr Akburally (Albemarle's attorney) that 'The terms of the agreement were then recorded onto the plan signed by the then directors of the Shareblock in July 2004, and filed with Wakefields Property Management'. A plan was annexed to the notice of the annual general meeting, called for the 28th August 2014, showing Mrs Maharaj and Mrs Meer as having inside garages, and Mrs Moosa as having an outside one. Mr A K I Docrat, the deponent to the respondents' answering affidavit, avers that this plan was not accepted by the shareholders because it was inaccurate. He avers further that the garage which was formerly garage 28 is now occupied by Mrs Meer; that the swop between Mrs Boote and Mrs Maharaj was with the consent of Albemarle; and that such swops 'are apparently a long standing practice'.

[16] Although the application revealed disputes of fact in relation to a number of issues, as pointed out by the learned judge a quo, no application was made for the hearing of oral evidence. The learned judge was then, in accordance with the formula set down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C, obliged to grant final relief only if the averments of the respondents, together with those averments of the applicant which were admitted by the respondents, justified final relief. The most significant of those disputes was the location of garage 28. There seems no dispute that it was, when used by Mrs Boote, an inside garage. This, however, is not enough. Mrs Boote explains how she agreed to swop with Mrs Maharaj, and produces a written agreement (as inelegantly worded as it is) to prove it. Mr Docrat confirms that the swop agreement was approved by Albermarle, as was the renumbering of the outside and inside garages. As per the wording of the swop agreement, so did Wakefields Property Management.

[17] What then, is the effect of the swop agreement, if the shares have never been transferred? As Mrs Moosa now owns the shares, there is no prospect that she would agree to the share register being changed. But how does that fact nullify the rights acquired by Mrs Maharaj or Mrs Meer? No explanation is given for how Mrs Meer came to occupy the garage formerly used by Mrs Boote (if that is the case). The rights of use to the property assigned to the shares passed from Mrs Boote to Mrs Moosa on the sale of the shares cannot be greater than the rights that Mrs Boote held, and she believes she would only have had the rights to an outside garage after her agreement with Mrs Maharaj. Given the wording of the swop agreement, Mrs Boote appears to have sought to protect her position if the sale to Mrs Moosa had fallen through ('on sale of flat 29').

[18] What has actually occurred is that, instead of changing the share block and the share allocations, Albemarle changed the use or allocation plan which should form an annexure to the articles. In my view, no question of a waiver arises in the circumstances of the swop. I also do not believe that the provisions of s 18 are applicable in this matter because they apply to disputes between the contracting parties, which, in the swop agreement were Mrs Maharaj and Mrs Boote, but they are not in dispute.

[19] Accordingly, the learned judge a quo was correct in dismissing Mrs Moosa's claim to the inside garage, because the case made does not accurately identify the garage, the use to which had in any event been given to Mrs Maharaj or, more recently, Mrs Meer. With regard to the further relief sought, a

declaratory order should only be granted if it is necessary in order to clarify a right claimed. There was no necessity to grant the order sought in prayers 1 to 4 of the Notice of Motion, because the declaration sought would not have clarified the physical location of the inside garage sought by Mrs Moosa. As Mr *South* submitted, the relief in prayers 1 to 4 are not contested. What is contested is the physical location of garage 28, and no relief in the prayers in the application sought to remedy that situation. In those circumstances, prayers 5-6 also had to fail. In accordance with the order a quo and what has been agreed between the parties, it appears that the relief in paragraphs 7 to 10 has been resolved.

[20] What remains is the question of costs. There is no reason to disturb the costs order made by the learned judge a quo, and the costs of the appeal must follow the result.

[21] I make the following order:

'The appeal is dismissed with costs'

Lopes J

I agree.

Henriques J

I agree.

Masipa J

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| Date of judgment: | 22nd May 2020. |
| For the appellant: | A G South SC (instructed by Strydom Britz Mohulatsi Inc). |
| For the first to third respondents: | M B Pitman (instructed by Omar & Ass). |