IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 26186/09

AYESHA SOLARIE	Applicant
v	
EBRAHIM SOLARIE	First Respondent
THE CITY OF CAPE TOWN	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent

REASONS – 24 AUGUST 2010

FORTUIN, J:

I INTRODUCTION

[1] This is an application, interdicting the City of Cape Town (the second respondent) from passing transfer of Erf 30509, Belhar, also known as 59 Newton Street, Belhar, Bellville, ("the property") solely to Ms Ayesha Solarie (the applicant) and Mr Solarie (the first respondent) in equal shares when transfer becomes due.

[2] The applicant and the first respondent were married in terms of Muslim rites on 23 October 1983. On 29 July 1998, the applicant was granted a

fasaq (divorce) by the Islamic Unity Convention. The applicant desires to transfer the house into her name for, *inter alia*, the following reasons:

- she resides at the property with four of her children;
- the first respondent no longer resides at the property;
- applicant makes payment in respect of the property to the City of Cape Town, and maintains the property.

[3] The City of Cape Town is the registered owner of the property. The City's Policy determines that it would sell a dwelling only to:

3.1 a married male;

3.2 a single person with dependants residing permanently with him or her; or

3.3 a married female who is the breadwinner of her family and who has dependants residing permanently with her.

[4] As a result of this policy, transfer of the property will only be to the first respondent. The first respondent did not oppose the application and the City indicated that it will abide by the decision of the Court.

II <u>THE FACTS</u>

[5] The applicant works as a trauma counsellor at various schools in the Western Cape. She lives at the property at 59 Newton Street, Belhar, together with four of her children.

[6] The applicant and the first respondent were married in terms of Islamic rites on 23 October 1983. Until 1990 the applicant and the first respondent, together with their children, lived with friends and family, and in rental accommodation provided by the City.

[7] During 1989, the applicant applied to the City for admission to its self-help scheme for a house in Belhar. She obtained the application form, completed it, and had it delivered to the Council's office in Bellville.

[8] The applicant and the first respondent were subsequently called to the Council's office in Bellville where they were told that the applicant could not apply for the housing benefit in her own name, as she was not the 'working partner' in the relationship, and that the application had to be made in the first respondent's name. The official tore up the application form which the applicant had completed, and a new application was then completed in the first respondent's name.

[9] In that application, the first respondent is reflected as the applicant. He is described as married, and the applicant in this matter is referred to as his wife.

[10] The applicant and the first respondent were subsequently advised that the application had been approved. On 8 March 1990 the City entered into an agreement solely with the first respondent in respect of the property. In terms of this agreement:

10.1 the purchase price and loan are R27 435.00, payable over 30 years;

10.2 the participation fee, water service fee and monthly administration fee total R408.10 per month;

10.3 transfer will occur once the loan has been paid in full or reduced by an amount not less than 10 percent and the unpaid balance secured by means of a first mortgage bond in favour of the City, and subject to certain additional conditions.

[11] The parties and their children occupied the property together from January 1991. The applicant assisted the first respondent with the construction of the house.

[12] From about 1992, the applicant and the first respondent experienced problems in their marriage. These related primarily to his extra-marital affairs, and to his emotional, psychological, physical and financial abuse of the applicant.

[13] During 1997 the first respondent left the property. On 29 June 1998, the Islamic Unity Convention granted the applicant a *fasaq* (divorce).

[14] The first respondent returned to the property from 2002 until 2003, when he remarried. He again returned to the property from 2006 to 2008. He is currently living with his daughter at her home in Manenberg.

[15] The first respondent has repeatedly threatened to force the applicant out of the property. There is a history of threatening behaviour by the first respondent, the details of which are, for the purpose of this judgment irrelevant, save to say that these threats made the applicant's tenure even more insecure.

[16] During 1997, the applicant approached the City and asked whether she was eligible for state assisted housing. She was informed that her subsidy had already been used in respect of the Belhar property.

[17] The applicant asked the City whether she can take transfer of the property into her name. She was informed that this can not be done without the first respondent's consent. The City has not offered her any other housing assistance.

[18] The applicant has over the years contributed to the property, both directly (by paying instalments and service charges) and indirectly (by paying the family's other monthly expenses). She has made payments on account of the arrears in respect of the property.

[19] The position at present is as stated in paragraph [2], coupled with the fact that the City remains the registered owner of the property.

III THE ISSUES

[20] The issues to be determined are:

20.1 is the policy of the City of Cape Town discriminatory?

21.1.1. Is the discrimination lawful?

20.2 is the applicant entitled to the remedy she requires, i.e. transfer the property in both her and the first respondent's name?

[21] As stated in 3 above, the City's policy, in effect, means that a man is entitled to buy and let property if he is married, whilst women qualify to buy or let from the City only if she has dependants living with her or she is married and the breadwinner of the family. Men do not have to comply with these requirements.

[22] The next question to be answered is whether this policy is discriminatory.

[23] In order to determine whether the policy is discriminatory or not, it is necessary to deal with the law on discrimination in South Africa.

[24] This Court has pointed out that "*even a cursory perusal of our constitutional jurisprudence shows, equality is not merely a fundamental right; it is a core value of the Constitution.*"[1] This has been emphasised by the Constitutional Court:

> *"The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of*

[1] (See **Minister of Education and Another v Syfrets Trust Ltd NO & Another** 2006 (4) SA 205 (C)).

equality is not only a guaranteed and justifiable right on our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance".[2]

[25] Section 9 (1) of the Constitution, Act 108 of 1996 ("the Constitution") states that "*everyone is equal before the law and has the right to equal protection and benefit of the law*".

[26] Sections 9(3), (4) and (5) state as follows:

"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[27] The well-established test for unfair discrimination was set out by the Constitutional Court in **Harksen v Lane NO and Others** 1998 (1) SA 300 (CC) para 53:

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[2] See **Minister of Finance and Another v Van Heerden** 2004 (6) SA 121 (CC) para 22.

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness

focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution).”

[28] Although **Harksen** dealt with section 8 of the Interim Constitution, the Constitutional Court has stated that its jurisprudence in interpreting that section applies equally to section 9 of the 1996 Constitution.[3]

IV APPLYING LAW TO THE FACTS

[29] The policy and its implementation self-evidently discriminate unfairly against women. The policy provides that a woman qualifies to buy or let from the City only if she:

29.1 has dependants living with her; or

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[3] See **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** 1999 (1) SA 6 (CC) at para 15.

29.2 is married and is the breadwinner of the family,

whereas men are entitled to buy and let if they are married. Men are not required to be the breadwinner in order to acquire ownership of a home.

[30] It is in any event discriminatory against women to make "breadwinner" status a requirement for a benefit. Overwhelmingly it is women who undertake family and domestic responsibilities, including child care. These frequently prevent them from taking up paid employment, or paid employment with the consistency and at the levels which are possible for men, who generally do not undertake those responsibilities.[4] Women are thus prevented from being the "breadwinners". It is discriminatory to disqualify them from acquiring a benefit as a result of that social fact and practice.

[31] The unfair discrimination against the applicant is illuminated and compounded by the following considerations:

31.1 it unfairly discriminates to limit ownership to the husband in circumstances where a housing benefit has been jointly applied for;

31.2 it unfairly discriminates to limit ownership to the husband where (as in this instance) the existence of a spouse is a prerequisite for the granting of such a benefit. The very basis upon which the first respondent was eligible in terms of the Policy was that he was married to the applicant, or that she and their children

[4] See **Bannatyne v Bannatyne** (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC) at para [29]; **Fish Hoek Primary School v GW** 2010 (2) SA 141 (SCA) at para 13.

were his “dependants”, and that they resided permanently with him;

31.3 the applicant is reflected on the City’s database as a recipient of a housing benefit. This indicates that the City regards both the first respondent and the applicant as recipients of that benefit. However, only the first respondent has a right to ownership of the house;

31.4 the applicant was instrumental in securing the property, yet she is excluded from the right to ownership which resulted from those efforts;

31.5 if the property is now transferred to the first respondent, to the exclusion of the applicant, this will have the effect of the applicant losing the home in which she has lived with her family for the last 18 years, which she was instrumental in obtaining and maintaining, and for which she has made payment.

[32] The Policy’s additional “breadwinner” criterion for women bears no rational connection to any legitimate government objective. It serves only to underline and accentuate existing inequality. It is in breach of section 9(1) of the Constitution and therefore it is discriminatory.

[33] The discrimination occurs on a listed ground in terms of section 9(3) of the Constitution, *viz*, gender. In terms of section 9(5) of the Constitution, such discrimination is presumed to be unfair.[5]

[34] The City is part of the state. (Section 40(1) of the Constitution.) The state is obliged by section 7(2) of the Constitution to "*respect, protect, promote and fulfil*" the rights in the Bill of Rights. If the City were to transfer the property to the first respondent, it would act directly in breach of sections 9(3) and 7(2) of the Constitution, by discriminating against the applicant. It is accordingly impermissible.

[35] Should the City pass transfer of the property solely to the first respondent, it would violate the applicant's right of access to adequate housing in section 26 of the Constitution, by:

35.1 discriminating against her by creating an additional criterion

for her to obtain access to housing;

35.2 rendering her vulnerable to eviction at the instance of her former husband and thereby failing to protect, and in fact undermining, her security of tenure, which is an element of the right to housing.[6]

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[5] See generally **Prinsloo v Van der Linde and another** 1997 (3) SA 1012 (CC) at para 28; **President of The Republic of South Africa and Another v Hugo** 1997 (4) SA 1 (CC).

[36] As I have pointed out, the City is part of the State:

36.1 The State is under a duty, in terms of section 26(2), to take reasonable measures to give effect to the right to adequate housing. To act in a discriminatory manner with regard to access to housing is a clear contravention of the duty to take reasonable measures.

36.2 In terms of section 26(1), it may not act in breach of the applicant's right to security of tenure, which is part of her right of access to adequate housing. The City would be in breach of its duties under section 26 and 7(2) of the Constitution if it were to transfer the property to the first respondent.

[37] Such conduct is accordingly impermissible.

[38] It is a settled rule of our law that a contractual term that is contrary to public policy is unenforceable.[7]

[39] The Constitutional Court has held definitively that for the purpose of determining whether contractual provisions are enforceable, the requirements of public policy are now informed by the Constitution.[8]

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[6] See **Jafta v Schoeman and others**; **Van Rooyen v Stoltz and Others** 2005 (2) SA 140 (CC) at paras 28-29.

[7] See **Napier v Barkhuizen** 2006 (4) SA 1 (SCA) at para 7.

"[28] Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'.

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable. [Emphasis added]

[40] It can not be doubted that the relevant provision of the agreement, giving the first respondent a sole right to ownership of the property, is contrary to the values enshrined in our Constitution. It is accordingly unenforceable.

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[8] See **Barkhuizen v Napier** 2007 (5) SA 323 (CC)

[41] The question may be raised as to whether this principle is affected by the fact that the agreement was entered into before the Constitution came into effect, at a time when public policy permitted discrimination, and there was no constitutional right to housing. The answer to this question is to be found in **Minister of Education and Another v Syfrets Trust Ltd NO and Another** 2006 (4) SA 205 (C).

[42] In that case, the court had to deal with a challenge to the validity of certain discriminatory terms in a charitable trust set up under a will. The will had been executed, and the deceased had passed away, long before the advent of the constitutional era.

[43] The Court found that the provisions of the trust were contrary to public policy, and therefore unenforceable. The Court noted that public policy is not a static concept, but changes over time as social conditions evolve and basic freedoms develop, and that since the advent of the constitutional era, public policy is rooted in our Constitution and the fundamental values it enshrines.[9]

[44] The Court pointed out that the position in determining the validity of a testamentary trust is analogous to the position in the law of contract, where questions of public policy have to be determined with reference to the time when the court is being asked to enforce or give effect to the provisions of a

[9] Ryland v Edros 1997 (2), SA 690 (C); Minister of Education and Another v Syfrets Trust Ltd NO and Another, *supra.*

contract or will, and *"not the time when the contract was concluded or the will executed".*[10] (See para 26)

[45] The Court found that the testamentary provision constituted unfair discrimination and was therefore contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality. It was therefore unenforceable in the constitutional era, even though the trust had been established and in fact conducted on a continuing basis in the pre-Constitutional era.

[46] In my view, the facts in *casu*, by giving transfer to the first respondent only, is similar, if not more compelling than the facts in **Minister of Education and Another**, supra. The City's policy is therefore unenforceable because it is contrary to public policy.

V REMEDY

[47] This court considered the remedy prayed for and took the following decisions into account:

47.1 **Fose v Minister of Safety and Security** 1997(3) SA 786 (CC), where Ackerman, J said the following:

> "*[A]n appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values*

[10] Compare **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (AD) at 894G; **Garden Cities Incorporated Association not for Gain v Northpine Islamic Society** 1999 (2) SA 268 (C) at 271(A).

underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."

47.2 **Pretoria City Council v Walker 1998 (2) SA 363 (CC**), where Langa DP (as he then was) said:

"… appropriate relief should be relief which is tailored to the needs of the particular case."

[48] No application was made for the relevant section of the City of Cape Town's policy to be declared unconstitutional.

[49] This court considered whether the remedies sought by the applicant could be considered to be "appropriate"[11]. The relief prayed for unfortunately did not go far enough in my view, as it did not include a prayer for transfer of the property to be passed to the applicant only. The relief prayed for would result in the applicant once again relying upon the first respondent as co-owner of the property to consent to registration in her name only.

[50] In the light of the facts of this particular case I am of the view that the case was presented in a manner which requires only the limited relief sought and I am therefore granting the limited relief prayed for.

[51] In the circumstances, the following order is made:

[11] Pretoria City Council v Walker, 1998 (2) SA 363 (CC)

1. the second respondent is interdicted from passing transfer of Erf 30509, Belhar, more commonly known as 59 Newton Street, Belhar, Bellville solely to the first respondent;

2. the property is to be transferred to both the applicant and the first respondent in equal shares when transfer becomes the first and the second respondents in respect of the property.

3. No order as to costs.

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FORTUIN, J