



Applicant sought that a caveat or an endorsement of the title deeds in terms of Section 16(G) of the Deeds Registry Act, 1969 be made so that the interest of any third parties shall be safe guarded.

It appears after her desertion from the matrimonial home Gama entered into a mortgage bond for monies lent and advanced and caused mortgage bond no. 440/1995 to be registered over the property Lot No. 2275 Mbabane Ext. No. 21 on the 13th July, 1998. The Swaziland Building Society ("The Intervening Party") also caused a collateral surety mortgage bond no. 441/95 to be registered over the property described as Lot No. 2554 situated in Mbabane Extension No. 11.

The said Gama at times was with one Xaba when these transactions took place. They failed to make payment timeously in terms of the Mortgage agreement and the Swaziland Building Society obtained a judgement in this court on the 14th June, 1996 under High Court Case No. 1044/1996. In pursuance of the said judgement Lot. No. 2275 was attached.

The Swaziland Building Society then intervened in these proceedings in order to oppose the granting of a final order which would severely prejudice its rights as outlined above.

These then are the essential facts in this case.

It was contended on behalf of the applicant that the fundamental principle is that a woman married in community of property has no contractual capacity. She is a minor, under the marital power of her husband. She has no power to enter into any contract and bind herself, her husband or the joint estate without the knowledge or consent of her husband. If she purports to do so, the contract is void (see S.A. Merchantile & Company Law (4 ED) at page 34). It is alleged by the applicant, and not denied by the Intervening Party that the applicant was married in community of property to Ivy Busisiwe Gama ("Gama") on the 19th September, 1976 and such marriage still subsists. Gama purported to borrow money from the Intervening Party

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and register Mortgage Bond No. 440 and 441 of 1995 during the subsistence of the marriage and without consent of the applicant.

It is contended for the applicant that the contract of loan and the aforesaid Mortgage Bonds are prima facie null and void ab initio in law. A woman married in community of property likewise has no locus standi in judicio She cannot be sued in her own name unless authorized and assisted by her husband and she cannot waive her incapacity (see Witle's Principles of S.A. Law (7th ED) page 106). Any judgement obtained against a woman married in community of property without her husband's knowledge and assistance is a nullity.

See Harms: Civil Procedure in the Supreme Court (Commentary at C3) Hahlo: S,A. Law of Husband and Wife (4th ED) at pages 200 - 201.

Even if a contract is binding on the joint estate, and the wife herself concluded it, any action arising from the contract must be brought against the husband.

See Harms: Commentary at C3

The Intervening Party sued Gama without the knowledge or assistance of the applicant, and obtained default judgement on the 14th June, 1996 under Case No. 1044/96. It is contended for the applicant that the said judgement is a complete nullity and must be set aside as prayed by the applicant.

Mr. Dunseith submitted that regarding the validity of the mortgage bonds entered into by Gama without the applicant's knowledge or consent, the Intervening Party appears to concede that these bonds are prima facie null and void but raises two issues, viz the joint estate between the applicant is not the owner of the properties registered in Gama's name at the Deeds office because the consent of the Land Control Board to the purchase of such properties was never acquired and secondly, the applicant is estoppel from denying that Gama owns the properties in her personal capacity as a major spinster.

The onus of proof in establishing either or both these issues rest squarely upon the Intervening Party.

On the issue of the Land Control Board's consent it is contended on behalf of the applicant that the Intervening Party does not allege as a matter of fact that consent of the Land Control Board was not obtained. On this ground alone, the Intervening Party must fail on this issue.

It is submitted that the sale of land to Gama was in any event not a "controlled transaction" as alleged the joint estate purchased the properties in the name of Gama, with the consent and assistance of the applicant. Gama was at all material times a Swazi citizen. A woman married in community of property can contract in her own name with her husband's consent or assistance. She is not acting on behalf of her husband but in her own personal capacity, even though the benefit accrues to the joint estate. The court was referred to the cases of *Cross v Pienaar* 1978 (4) S.A. 943 and that of *Nedbank vs Van Zyl* 1990 (2) S.A. 469 AD to buttress this point. Once

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transfer was registered, ownership of the properties in question passed to the joint estate. Our law, following a long line of South African cases, applies the abstract theory of ownership. I was referred to the case of *Mvusi vs Mvusi No and others* 1995 (4) S.A. 994 (TKS). This theory provides that registration of transfer has the effect of passing ownership, even if the underlying contract is void, provided that:

- a) The transferor had the capacity to pass transfer and intended to do so, and;
- b) The transferee had the capacity to receive and intended to do so.

Mr. Dunseith contended that in the premises, even if the sale was a controlled transaction (which is denied) and even if the consent of the Land Control Board was not obtained (which is neither alleged nor admitted), the alleged nullity of the sale is irrelevant to the ownership of the properties by the joint estate and to the present proceedings.

The Intervening Party's issue as to the lack of the Land Control Board consent is also self defeating since if neither Gama nor the joint estate acquired ownership of the properties in question, then the Intervening Party's Mortgage Bonds over such properties must also be nullities.

On the issue of estoppel it is contended on behalf of the applicant that it is conceded that the registration of the property in the name of Gama did not comply with Section 16 (3) of the Deeds Registry Act No. 37 of 1968 such lack of compliance with Section 16 (3) does not however invalidate the registration. The result of an estoppel must be legal. A party cannot be estopped from alleging that an act is illegal or ultra vires, (see *Houpefeisch vs Caledon Division Council* 1963 (4) S.A. 53 © at 59 E -F), Similarly, estoppel cannot be invoked to deny the incapacity of minors or married women. I was referred to the case *Rand Wholesale Outfitters vs Cassels* 1955 (2) S.A. 66 (w) and *Hoffman: South African Law of Evidence* (2nd ED) page 249. The Intervening Party relies upon a representation of the applicant that Gama owned the properties as a major spinster by virtue of the registration of the properties in Gama's name and the description of her in the title deeds as a major spinster. At best for the Intervening Party, such representation could only be taken to apply at the date of registration of transfer of properties.

The status of a registered owner may, and frequently does, change after registration, and no person is entitled to rely upon the status set out in a title deed as applying subsequently to the date of registration. The representation relied upon must be unequivocal (see *Hoffman op cit* page 251). The Intervening Party cannot rely upon a statement of fact as to status contained in a title deed as an unequivocal representation.

Finally, it was submitted on behalf of the applicant that the relief being sought is the confirmation of the rule nisi and an order as set out at page 77 of the pleadings, but only in respect of the collateral surety Mortgage Bond No. 441/95.

The applicant has no objection to the sale in execution of property Plot 2275, Mbabane, Mbangweni Extension 21, for the following reasons: The joint estate was unduly enriched by the acquisition of a half share of this property, notwithstanding

that applicant did not consent to such acquisition and the said property was purchased with funds acquired by mortgage loan from the Intervening Party.

Per contra it is contended on behalf of the Intervening Party represented by Mr. Flynn that the only aspect to be determined in this matter is the issue of the consent of the Land Control Board. The balance of the properties falls to be governed by the Act particularly Section 2 and Section 8. Applicant in his replying affidavit ought to have replied as to whether consent was sought in terms of the Act. Mr. Flynn argued that the underlying contract is void and thus applicant is not entitled to the relief he seeks.

On the issue of estoppel Mr. Flynn contended on behalf of the Intervening Party that they would not press on it on the strength of the dictum in the case of *Rand Wholesale Outfitters vs Cassels* (supra) as it would be difficult for the Intervening Party to prove it. This issue thus falls off.

The only issue for determination is to whether the consent of the Land Control Board was obtained. Mr. Dunseith is correct that the Intervening Party does not allege as a matter of fact that consent of the Land Control Board was not obtained. At paragraph 10 of the affidavit of the Managing Director of the Intervening Party the following is alleged;

"It will be humbly submitted on behalf of the Intervening Party herein, that in the absence of any allegation that the requisite consent was acquired, the said sales of the said properties to the joint estate which included the applicant were void and that the applicant herein is accordingly not entitled to final relief and that the rule nisi granted herein should be discharged".

Further, Mr. Dunseith is correct that the sale of land to Gama was in any event not a "controlled transaction" in that the joint estate purchased the properties in the name of Gama, with the consent and assistance of the applicant. Gama was at all material times a Swazi citizen. A woman married in community of property can contract in her own name with her husband's consent or assistance. She is not acting on behalf of her husband but in her own personal capacity, even though the benefit accrues to the joint estate. The case of *Cross v Plenaar* (supra) is directly in point in this regard.

Once transfer was registered, ownership of the properties in question passed to the joint estate, (see *Mvusi vs Mvusi No. and others 1995 (4) S.A. 994 (TKS)*).

In sum, I agree with the applicant's contention that, even if the sale was a "controlled transaction" which is denied by the applicant, and even if the consent of the Land Control Board was not obtained which is neither alleged nor admitted, the alleged nullity of the sale is irrelevant to the ownership of the properties by the joint estate and to the present proceedings. The Intervening Party's issue as to the lack of Land Control Board consent is also self defeating, since if neither Gama nor the joint estate acquired ownership of the properties in question, then the Intervening Party's mortgage bonds over such properties must also be nullities.

The court thus confirms the rule nisi and an order in terms prayers (a), (b), (c), and (d) of the notice of counter - application against Intervening Party is granted.

S. B MAPHALALA

JUDGE