IN THE HIGH COURT OF SWAZILAND

CASE NO.2409/96

IN THE MATTER BETWEEN:

BENSON ZULU	APPLICANT
AND	
P.J. MPUNGOSE N.O.	RESPONDENT
CORAM:	MASUKU J.
For Applicant:	MR P.R. DUNSEITH
For Respondent:	MR C.S. NTTWANE

JUDGEMENT

28/01/2000

In this application, filed in the long form, the Applicant prays for inter alia:

a) Directing the Respondent to sign all documents necessary to pass transfer of certain property known as Portion 56 of Lot No.72, Sidwashini Township, Mbabane to the Applicant within 21 days, failing which authorising and directing the Registrar of the High Court to sign suck documents forthwith.

b) Costs.

The Applicant is an adult male of Mbabane, who sues the Respondent in his capacity as Executor Dative in the Estate of the late Alpheus Mlangeni. In the Founding Affidavit, the

Applicant states that the deceased, Alpheus Mlangeni, during his lifetime sold the above named property to the Applicant for the amount of E5, 000.00 (Five Thousand Emalangeni).

The Applicant then donated the said property to one Busisiwe Mlangeni (Born Zulu). The Applicant states further that the deceased and the Applicant signed all the necessary transfer documents and which documents were subsequently lodged with Attorneys Robinson Bertram and Keyter for purposes of lodgement and registration in the Deeds Registry. The property could not transferred because of difficulty in raising transfer duty and the deceased died before the transfer was fully effected.

The Applicant's prayer is for an Order compelling the Respondent, who refused or neglected to pass transfer to the Applicant to do so, failing which the Registrar of the High Court be authorised and directed to sign all necessary documents to effect the transfer. Annexed to the Founding Affidavit are the Dead of Sale, dated 2nd April, 1992, Power of Attorney by the deceased appointing Attorneys from Robinson Bertram & Keyter to transfer the property to the Applicant also dated 2nd April, 1992; the Deed of Transfer in respect of the property in question and a Declaration of Donor, in terms of which the Applicant on account of special affection and love for his cousin Busisiwe Nelly Mlangeni, donated the property in question to the said Busisiwe Elly Mlangeni.

The Respondent's opposition to the relief sought consisted firstly of a point in limine in respect of which it was correctly stated that the Master of the High Court had neither been cited nor served with the process in accordance with the requirements of Rule 6 (23) of the High Court Rules as amended.

By agreement inter paries, this point in limine was waived and the Master of the High Court was served. It is imperative to state that notwithstanding service, the Master did not file any papers in opposition to the relief sought.

The main arguments raised by the Respondent are two pronged. Both appear at paragraph 9.1, 9.2 and 9.3, which read as follows:-

I admit that I have refused to pass transfer to the Applicant. I submit that my refusal was based on the following grounds :-

9.1. I have no independent knowledge of alleged sale between the Applicant and

the deceased.

9.2. I am rather suspicious because of the allegations contained in paragraph 6 of my opposing affidavit which allegations I pray be regarded as if herein inserted. This is compounded by the fact that the Applicant who claims to have donated the property is a relative of Busisiwe (the Donee).

9.3 The power of attorney to pass transfer which should indicate the deceased 's intention to pass transfer reflects a different purchase price for the property allegedly sold to the Applicant.

The first ground is that the Respondent states that he was not personally aware of the sale between the Applicant and the deceased. There is in my view no reason why the Respondent should have had independent knowledge of the transaction since it took place before the Respondent assumed the position of Executor Dative. The Applicant has, in support of his allegation of the sale annexed a Deed of Sale, which was signed by the deceased. The Respondent does not deny the deceased's signature thereon nor does he attack the validity of the Deed of Sale. In my view, the Respondent's personal knowledge or otherwise of the sale is neither here nor there. It is irrelevant in the light of what I have stated above. There is no substance in this submission.

The Respondent also contends that there is some suspicion regarding the propriety of the sale because the Respondent alleges in paragraph 6 that the said Busisiwe Elly Mlangeni was not married to the deceased but to a Solomon's. The Respondent further contends that what exacerbates the situation is that the Applicant is a relative of the donee.

In response to this submission, Mr Dunseith correctly submitted, in my view, that whether the deceased was married to the deceased is an irrelevant consideration in view of the Applicant's claim.

The Applicant, was sold property by the deceased during his lifetime but unfortunately, the deceased died before all the necessary documents were hence Applicant an order compelling signed seeks the Executor dative to do so. This has no connection with the marriage of the deceased to the donee. I did not understand Mr Ntiwane to seriously contend this. In the premises, I hold that the question of the donee's marriage to the deceased is also irrelevant to the relief sought.

Another issue raised by the Respondent is contained in paragraph 9.3. of the Answering Affidavit, where the Respondent states that the power of attorney to pass transfer, which should indicate the deceased's intention to pass transfer reflects a different purchase price for the property allegedly sold to the Applicant. This, according to Mr Ntiwane smacks of fraud and should dissuade the Court from granting the Applicant's prayers in the Notice of Motion.

The Deed of Sale reflects that the purchase price of the property was to be E5,000.00 whereas the power

of attorney to pass transfer and declarations of donor and donee reflects a price of value of E30,000.00. This is what, according to the Respondent smacks of fraud and bears close scrutiny.

The discrepancy is explained by the deceased's conveyancer, Mr S.B. Mnisi, in an Affidavit annexed to the Replying Affidavit. According to him, the discrepancy in the figures arose because the deceased had evinced a clear intention that the property be registered in the name of the donee and further that it should not form part of the joint estate. For that reason, the deceased fixed the nominal price and value of E5,000.00, which was its value when he purchased it some years earlier.

Thereafter, the Accountant - General raised a query regarding the price and value of the property as the basis for calculation of transfer duties. This necessitated the revaluing of the property by the deceased. The property was revalued at E30,000.00. Mr Mnisi states that he then proceeded to prepare the transfer documents on the basis of the latter valuation but no alteration was made to the Deeds of Sale and Donation to reflect the revised value of the property.

In response to this, Mr Ntiwane, stated the explanation was less than convincing and does not find support in the dates reflected in the documents. Mr Ntiwane correctly argued that Deed of Sale, Power of Attorney, to Pass Transfer all bore the date 2nd April, 1992 whilst the Declarations of Donor and Donee both bore the date 3 rd April, 1992. The dates set out above do not therefor support Mr Mnisi's explanation of the discrepancy.

In reply, Mr Dunseith, in a spirited argument stated that the suspicion, if any, must be brought to the correct door. He argued that if any suspicion arises, it should not work against

the Applicant who, in his claim relies on the Deed of Sale, including the price and value there in inscribed. He argued further that the Applicant was an innocent purchaser and should not be visited with the mistakes, omissions or sins of the deceased and his conveyancers. According to Mr Dunseith, if the argument of a suspicion would be considered it would mean that the deceased defrauded his own estate which is clearly laughable. Equally laughable would be bringing the blame to Mr Mnisi's door, who according to his position in the matter had nothing to gain from the whole transaction.

In as much as I agree that no plausible explanation for the discrepancy in the documents has been disclosed, that does not and should not affect the Applicant's rights as an innocent purchaser.

Whatever the discrepancies that are, resulted from mistakes of the deceased and his conveyancer.

Furthermore, I note that Mr Ntiwane intimated that a fraud might have been perpetrated, regard being had to the discrepancy.

I must hasten to mention that it has been stated time and again that charges of fraud are, in their nature of the greatest gravity and should not be lightly made, and when made, should not only be made expressly but should be formulated with the precision and fullness demanded in a criminal case. See SHISELWENI INVESTMENTS (PTY) LTD v SWAZILAND DEVELOPMENT AND SAVINGS BANK CASE NO.2391/96 (unreported per Masuku J.) at page 7 and the cases therein cited. In casu, no relevant allegations and particulars of the fraud alleged have been made. Clearly, neither the Applicant nor the donee can be suspected of any foul play in this transaction. For that reason, I am of the view that this challenge does not disentitle the Applicant to its prayers.

Mr Ntiwane also argued that if the donee was married to the deceased as alleged by the former, then the property should accordingly vest in the joint estate since the Deed of Donation does not exclude community of property in express terms. This is not correct because a cursory glance at paragraph 7 of the Deed of Donation records as a condition that the properties are to be excluded from any community of property. No further mention needs be made of this point therefor.

I do not consider it necessary to consider the issue whether or not the donation is in this case prohibited because both parties were ad idem that this donation was voidable but could be

declared void only at the instance of a donor or his spouse or by the donor's creditor. It is however worthy of mention that H.R. Hahlo "The South African Law of Husband and Wife", 5th Edition, Juta & Co., page 148, states that donations between spouses stante matrimonio are no longer prohibited. At page 149, he states that like any donation, an executed donation between spouses is liable to be set-aside at the donor's instance if it was induced by duress, fraud or mistake. In the donor's insolvency, it is liable to be set aside as a disposition without value if the provisions of Section 26 of the Insolvency Act, 1936 are satisfied. I am however mindful of the fact that in casu, the donor is the Applicant and not the deceased.

In view of the aforegoing, I am of the view that the Respondent has failed to set out any cogent reasons why prayer (a) of the Notice of Motion should not be granted. I accordingly grant prayer (a) as set out in the Notice of Motion.

On the question of costs, Mr Ntiwane urged the Court to order each party to bear its own costs in the event it found for the Applicant because the Respondent was bona fide in its opposition. Mr Dunseith on the other hand argued that normally all Respondents are bona fide in their opposition but that does not constitute a good ground for departing from the ordinary rule that costs should follow the event. I agree.

I find no reason for departure from the normal rule in this case. The Respondent may have been bona fide in his opposition but he was bona fide wrong. Costs should follow the event.

T.S. MASUKU

JUDGE