



**THE HIGH COURT OF SWAZILAND**

**TOZI THWALA**

Plaintiff

**And**

**ESTHER FUNANI NKAMBULE N.O.**

Defendant

Civil Case No. 3050/96

Coram

For the Plaintiff

For the Defendant

S.B. MAPHALALA – J

MR. WARRING

MISS GWIJI

**JUDGEMENT**

**(23/05/2003)**

**Introduction**

This matter has a long and chequered history. Further, the tardiness of this judgment is perhaps explained, though it may not be excused by the interposing of other matters of immediate urgency which clamoured for attention. I desire to express my gratitude to counsel for their patience and understanding.

The Plaintiff was initially represented by the offices of the late Douglas Lukhele who filed the Plaintiff's combined summons on the 6<sup>th</sup> December 1996. Mr. Douglas Lukhele subsequently withdrew from being an attorney of record. The Plaintiff was then represented by Mr. J.G. Vilakati who also died some years later. Mr. C.J.Littler then became attorney of record for the Plaintiff.

The offices of P.R. Dunseith who represented the Defendant and had filed the Defendant's plea and counterclaim withdrew as attorney of record on the 10<sup>th</sup> June 1997, and *Miss Gwiji* was appointed to act on behalf of the Defendant on the 16<sup>th</sup> June 1997.

In November 1997, Mr. J.G. Vilakati who was for the Plaintiff then and *Miss Gwiji* for the Defendant held a pre-trial conference in terms of Rule 37 (1) (b) of the rules of court.

The matter came before me for trial on the 3<sup>rd</sup> April 2000, where I heard *viva voce* evidence from a number of witnesses. The Plaintiff gave evidence herself and then called one witness Mamane Sukati. She then closed her case.

The Defendant then gave her evidence being led in-chief by *Miss Gwiji* and she was cross-examined at length by Mr. Littler for the Plaintiff. The matter was then postponed to another date to be set by the Registrar of this court. I must add that the evidence in this matter took two days where substantial testimony for and against the action was heard.

The matter remained in abeyance until it was set down for continuation from the 22<sup>nd</sup> April 2002 to the 23<sup>rd</sup> April 2002 of the second session of the court. I must add that part of the reason for this long postponement was that I was indisposed for most of 2001 – 2002.

When the matter was called *Miss Gwiji* informed the court that attorney C.J. Littler had withdrawn as attorney of record by notice dated the 2<sup>nd</sup> April 2002, and Plaintiff had not furnished the Defendant's attorney with an address not being a post officer box within (5) five kilometres of the court for service of all legal process within 10 days of receipt of

this notice. The *dies* expired on the 23<sup>rd</sup> April 2002 as reflected in the certificate of posting.

*Miss Gwiji* then set the matter for default judgement in terms of Rule 31 (3) (a) of the rules of court based on the Defendant's counterclaim. It was set for 6<sup>th</sup> May 2002, where I heard *viva voce* evidence of the Defendant under oath in support of the counterclaim. Subsequently, I invited *Miss Gwiji* to address me fully on how to proceed in view of the evidence which has already been adduced in this matter. My query was based on the *dictum* in the case of *Mauritz Marais Bouers (Pty) Ltd vs Carizette (Pty) Ltd 1986 (4) S.A. 439 (o)* in which the court refused to grant default judgement on the claim in reconvention.

Before *Miss Gwiji* could make submissions on this aspect of the matter the case took another twist. The Plaintiff had instructed the offices of Warring, Simelane & Company and *Miss Gwiji* abandoned the application for default judgment and the matter then took its normal course. *Mr. Warring* went on to cross-examine the Defendant at great length. The Defendant then closed her case.

The court then heard submissions on the 25<sup>th</sup> November 2002, where both counsel filed very comprehensive Heads of Argument for which I am grateful to counsel. In view of the fact that this matter started in the year 2000 and ended two years later in the year 2002 I heard to listen to the tapes which are over 10 (ten) in number. This exercise took a considerable time and my notes are interspersed in three different Judges Notebooks which made the task even more difficult and time consuming.

### **The causa**

The combined summons by the Plaintiff were issued on the 6<sup>th</sup> December 1996 as I have already mentioned above. The Plaintiff was represented by the late attorney D. Lukhele.

The Plaintiff Tozi Thwala was suing the Defendant Esther Funani Nkambule in her capacity as the executrix *dativa* in the estate of the late Albert Msuthu Nkambule that on or about 1980 the deceased Nkambule and the Plaintiff entered into an oral contract of partnership would carry on business of moulding and selling cement blocks and buy properties necessary for carrying on the business of the partnership.

It is alleged that it was an express term of the said contract that each partner would contribute E3, 000-00 initially and that thereafter various equal sums of money towards the capital of the partnership. Pursuant to the said contract the Plaintiff avers that she contributed E3, 000-00 initially and thereafter the sum of E134, 900-00 towards the capital of the partnership and the deceased contributed similar amounts.

It was further an express term of the said contract that the profits and losses would be shared equally and assets of the partnership would be registered in the name of the deceased.

On the basis of this her contributions to the partnership the Plaintiff sought the return of items listed in annexure "A" of the summons. The assets in the main include plot no. 996/1 situate in Sidvwashini Township, Hhohho district and various motor vehicles.

**The Defendant's plea and counterclaim.**

The Defendant opposes the action and has filed her plea together with a counterclaim on the 20<sup>th</sup> January 1996. In her counterclaim she alleges that she was the lawful spouse of the deceased Albert Msuthu Nkambule and they were married to each other by civil rites on the 9<sup>th</sup> April 1976 (per annexure "B") being the marriage certificate, up until the deceased's death on the 3<sup>rd</sup> September 1995. On the 12<sup>th</sup> August 1995, at Ekupheleni, Motshane area plaintiff and the deceased purported to enter into a marriage by Swazi law and custom which purported marriage was null and void *ab initio*.

The Defendant alleges that during the deceased's lifetime Plaintiff and Deceased resided together as husband and wife at Motshane area, where the deceased built a home, which is part of the joint estate. The deceased did keep some personal effect, including some assets of the joint estate with the Plaintiff. These items include motor vehicle parts and deceased personal effects.

She avers that these items are part of the joint estate by virtue of their marriage in community of property with the deceased. Defendant alleges that the Plaintiff is in unlawful possession of these items and Defendant is the custodian by virtue of being appointed executor by the Master of the High Court on the 3<sup>rd</sup> September 1999 to wind up the deceased's estate.

The Defendant prays for an order as against the Plaintiff for (a) return of the items listed in paragraph 5 alternatively payment of the sum of E28, 430-00 being the total value of the listed items; (b) interest thereon at the rate of 9% per annum from the date of service of summons to date of payment; and (c) costs of suit.

**The evidence by the parties.**

As I have already mentioned above that the Plaintiff gave lengthy testimony in support of her claim and she was cross-examined at length by the other side. She also called a witness to support her testimony. This witness was also subjected to a lengthy cross-examination by *Miss Gwiji* for the Defendant.

The Plaintiff also gave lengthy testimony and her cross-examination was equally lengthy by *Mr. Warring* for the Plaintiff. The issue to be decided at the end of the day is whether a partnership between the Plaintiff and the deceased existed in law, if so, then the Plaintiff would be entitled to her judgement. However, if the court finds otherwise, then a judgement ought to go in favour of the Defendant. As I have already alluded to earlier in the course of this judgement I heard comprehensive arguments from counsel on these points.

The brief facts as gleaned from the various witnesses in this matter is that the defendant was married with the deceased in 1976 in terms of civil rites, in community of property. During the course of such marriage the Defendant and the deceased started a block making business at Sidvashini which was christened "Timnandi". The Defendant explained in detail how this business started from humble beginnings until it flourished such that when her husband died he was a relatively a rich man with considerable assets including trucks, motor vehicles and other assets. The Plaintiff came later into the life of the deceased first as an illicit girlfriend who used to come to Sidvashini to ask on her husband and she later graduated and got married to the deceased in terms of Swazi law and custom, albeit contrary to the Marriage Act. This marriage was entered into by the two in 1995. The Plaintiff gave evidence that during her relationship with the deceased they entered into the block making business which was situated at Sidvashini which is the same as claimed by the Defendant. The Plaintiff was able to advance money to the deceased in furtherance of the goals of the partnership because she came from a family of means. Her father was a moneyed man in his own right and would help his children especially the Plaintiff to venture into business on her own.

The bone of contention, therefore as I have stated above is whether there was partnership between the Plaintiff and the deceased or not.

#### **The Plaintiff's submissions.**

Mr. Warring argued at great length in this matter. The gravamen of his submissions is that sometime in 1980 the Plaintiff entered into an oral agreement of partnership with the deceased. The terms of the partnership were that the partnership would carry out the business of moulding and selling cement blocks and buy properties necessary for the carrying on the aforesaid business. Plaintiff also testified that the partnership would be involved in the borrowing and lending of money. The plaintiff made extensive financial contributions to the partnership. This oral agreement was on the 24<sup>th</sup> August 1997

reduced to writing. In spite of all the evidence that has been presented before court, the crux of this case is whether the deed of partnership exhibit "A" can be said to be a valid deed of partnership.

*Mr. Warring* went on to outline to the court the general legal principles applicable in the present case and cited a number of decided cases. According to him the Defendant has failed to attack the validity of the partnership deed either on the ground of i) fraud (see *Dawson vs Cape Times Ltd PD 144* ii) duress or misrepresentation (see *Janourski vs Erans 1978 (3) S.A. 16 (o)*; iii) void for mistake (see *Munnik and Munnik vs Sidney Clow and Co. Ltd 1965 (4) S.A. 313 (T)*; iv) lack of consensus or failure of a basis underlying assumption (see *Williams vs Evan 1978 (1) S.A. 1170 (c)*; v) illegally (see *Nottlee vs Credit Corporation of S.A. 1964 (3) S.A. 451* and vi) failure to comply with the terms of a statute (see *Campbell Discount Co. Ltd vs Gacl (1961) 2 AK. ER. 102*.

In *casu*, it is argued on behalf of the Plaintiff that the Defendant has simply denied the existence of a contract, in fact has made bald allegations both in pleadings and in her evidence. The result is that the signed deed of partnership is left unscathed. The general rule is that a document is conclusive as to the terms of the transaction which it is intended by law to embody. To this effect he referred the court to the case of *Union Government vs Vianini Fero – Concrete Pipes (Pty) Ltd 1941 A.D. 43 at 47*.

Even assuming that the court does not base its decision on the parole evidence rule, the court have held that a clear intention to enter into a partnership must be demonstrated (see *Deary vs Deputy Commissioner for Inland Revenue 1920 C.P.D. 541 at 547*). That in the present case, the intention may be gleaned from the existence of a written contract whose validity has not been put into issue.

*Mr. Warring* went on at length to outline partnership *essentialia* relating them to the facts in this case.

All in all *Mr. Warring* referred to the Court of Appeal case of *Thandi Elizabeth Malaza vs Margaret Lomdumo Malaza Case No. 9/93 (unreported)* where it was propounded that the degree of proof required to establish the existence of a partnership was not whether “the conduct relied upon is not only consistent with the making of the contract alleged. But is consistent with no other reasonable interpretation”. The court has held that the true inquiry “was simply whether it was more probable than not that a partnership had been reached”.

On the Defendant’s counterclaim it is contended on behalf of the Plaintiff that it is without any substance as it is based on what she was told by Albert Nkambule when he was moving some of his items. As to whether these items eventually arrived at Plaintiff’s residence she cannot confirm as Defendant in her own words has stated that Albert Nkambule had numerous other girlfriends.

No documentary evidence in terms of receipts were submitted by Defendant to show the value of the items.

#### **The Defendant’s submissions.**

*Miss Gwiji* argued *per contra*. Plaintiff claims certain assets from the executing *dative*, on the basis that she was in partnership with the deceased. The executrix *dative* is the legal wife to the late Albert Msuthu Nkambule. The partnership was allegedly formed orally. The Defendant does not dispute that a partnership can be concluded orally. However, the alleged partnership has not given its name to the court. A partnership only has the capacity to sue or sued in its name.

The Plaintiff was aware when the deceased passed on. It was her responsibility to have the partnership liquidated, for purposes of bringing her claim to court. She did not do that and from the record no account was ever opened with a bank in Swaziland which proves the existence of this partnership.

The Plaintiff cannot account why such partnership's affairs had to be registered in the deceased's name solely, but does confirm having been involved in an extra marital affair with the deceased. This does not give her the right to be involved in any way in the administration of the deceased's estate. She cannot prove her alleged contribution of E3, 000-00 nor the alleged sum of E134, 000-00 she claims to have contributed to the partnership in paragraph 6 of her Particulars of Claim.

**The law vis a vis the facts in *casu* and the conclusions thereon.**

The test to be applied in this case was elegantly enunciated in *Malaza vs Malaza (supra)* as follows:

**“Was simply whether it was more probable than not that a partnership had been reached”.**

According to writer *Robert Sharrock, Business Transaction Law (4<sup>th</sup> ED)* at para 25.1 at page 313 the nature of the contract of partnership is described in the following terms:

“Partnership is a contract between two or more parties whereby each contributes or undertakes to contribute towards an enterprise to be carried on jointly by them with the object of making a profit and of sharing it between them”.

A partnership, unlike a company, is not a legal person with an identity separate from those of its members. But for some purposes it is treated as if it has a separate identity. The Insolvency Act, for instance, provides for sequestration of the estate of a partnership in addition to the estates of the individual partners. And the rules of court allow proceedings by or against partners to be brought in the name of the partnership and require execution to be levied against partnership aspects (i.e. those owned jointly by the partners) before the estates of individual partners. Because of these features of separate legal personality, it has been held that a partner may validly bind himself as surety and co-principal debtor with the partnership for payment of a debt owned to a creditor.

In the present case it is alleged in the Plaintiff's Particulars of Claim at paragraph 3 as follows:

“On about 1980, the deceased Albert Msuthu Nkambule and Plaintiff entered into an oral contract of partnership”.

The combined summons were issued on the 6<sup>th</sup> December 1996 and there is no mention at all of exhibit “A” viz, a written partnership deed between the Plaintiff and the deceased entered into on the 24<sup>th</sup> August 1995. A document entered into 16 months before the launching of the action. It is curious that this vital document is not mentioned in the combined summons to buttress the oral agreement which was entered sometime in 1980. Exhibit “A” is written in the Siswati language and it embodies what is averred in paragraphs 4, 5, 6, 7 and also annexure “A” in the combined summons is duplicated in the written deed of partnership being the assets the Plaintiff brought into the partnership business.

It is common cause that Defendant was married to the deceased in terms of civil rites in community of property. There is no doubt that the Defendant were for all in intents and purports husband and wife with the attendant rights and obligations to each other. On the other hand evidence revealed that the Plaintiff at the time of the purported oral agreement of partnership was merely a girlfriend to the deceased who it has become apparent was a ladies' man with a number of girlfriends on the side. It would appear to me that at one point in time the relationship between the deceased and the Plaintiff was *contra bones mores* and no action could be entertained which arose from that relationship following the principle of *ex turpi causa non oritur actio*. The Plaintiff and the deceased subsequently contracted a marriage by Swazi law and custom. Clearly that marriage was bigamous and *contra bones mores*.

On a fair assessment of the facts presented before me I am inclined to rule in favour of the Defendant following the test enunciated in *Malaza vs Malaza (supra)*. I am unable to find that a partnership had been reached in *casu*. Firstly, the exclusion of exhibit “A”

being the written partnership deed between the Plaintiff and the deceased in the summons when they were launched is highly suspect. As I have said earlier on this was a vital document and there is no reasonable explanation why it was not included when the action commenced. Secondly, on the principle of *ex turpi causa non oritur actio* at the time the alleged partnership is alleged to have been entered into between the Plaintiff and the deceased the Plaintiff knew that the deceased was a married man. That hers with the deceased was an illicit affair and it was not even salvaged by the subsequent marriage in terms of Swazi law and custom which was bigamous in terms of the Marriage Act. These courts are loathe to recognise agreements which are *contra bonos mores*.

Coming to the Defendants counterclaim I am not convinced that the Defendant has proved her case on a balance of probabilities on the facts before me. The evidence of the Defendant is based on what she was told by her late husband Albert Msuthu Nkambule when he was moving some of his items. As to whether these items eventually arrived at Plaintiff's residence she cannot confirm as Defendant in her own words stated that her husband had numerous other girlfriends.

### **The court order**

The following order is accordingly recorded:

- a) The Plaintiff's action is dismissed with costs.
- b) The Defendant's counterclaim is also dismissed and no order as to costs is made in this regard.

  
**S.B. MAPHALALA**  
**JUDGE**