

THE HIGH COURT OF SWAZILAND

WANDILE GAMA

Applicant

And

SPHEPHISO GRACY SIHLONGONYANE

Respondent

Civil Case No. 1760/2005

Coram: S.B. MAPHALALA - J

For the Applicant: MR. M. THWALA

For the Respondent: MR. D. MAZIBUKO

RULING

(On points of law) (15<sup>th</sup> December 2005)

[1] By way of Notice of Motion Applicant is suing Respondent, for inter alia;

1. Compelling Respondent to forthwith deliver possession of the land measuring 2500 meter square situate at Sicelwini to the Applicant failing which the Indvuna and Inner Council of Logoba Royal FCraal be authorised

and empowered to do all that be necessary to deliver possession and occupation to the Applicant. Interdicting and restraining Respondent from continuing to collect and/or to receive any rentals from the tenants of the flats located upon the premises;

3. Directing the Respondent to pay the sum of E25, 620-00 being rentals unlawfully collected by the Respondent from the tenants of the premises post the date of payment of the purchase price;

4. Directing the Respondent to pay the sum of E2, 900-00 (Two Thousand Nine Hundred Emalangeni) being the equivalent monetary fee for the beast of allegiance due to the Chiefs Kraal at Logoba, which beast Respondent failed and/or neglected to pay while she was a resident under the Logoba Umphakatsi; the said beast is now due and payable;

5. Costs of suit at attorney and own client scale;

6. Further and/or alternative relief.

[2] The historical background as gleaned from the Applicant's Founding affidavit is that Respondent was up to the 3<sup>rd</sup> November 2004, the beneficiary owner of land situate upon Swazi nation land under the chieftaincy of Logoba, measuring approximately 2500 meter square. On the 3<sup>rd</sup> November 2004, Respondent and Applicant entered into a written agreement in terms of which Respondent sold and Applicant purchased the beneficial interest on the said piece of land together with all improvements thereon. The Deed of Sale is attached to the said affidavit marked annexure "A". In terms of and pursuant to the said Deed of Sale the Applicant paid a sum of E1 52, 000-00 being the value of the improvements thereon. The said amount was paid in full to Respondent through Manzini Estate Agents, the property agents given the mandate to find a buyer on behalf of Respondent in terms of the valuation report, a copy of which is annexed as "B".

[3] It was an express and/or implied term of the agreement that the delivery of the merx shall be effected by the introduction of Applicant as the new beneficial owner of the piece of land to the chiefs kraal at Logoba by the Respondent. At that point, Applicant had tendered a beast of allegiance to the chief as per the dictates of Swazi customary practices, thereby completing the process of delivery of the land to him by Respondent. It was a material term of the contract that Respondent was, as of the 3<sup>rd</sup> November 2004, to cease all rental collections from the tenants of the flats situate upon the premises such to accrue to his benefit in consequence of the Deed of Sale.

[4] It is averred by the Applicant that the Respondent has breached the said agreement in that firstly, Respondent has failed to take him to the chiefs kraal for the introduction and handover and secondly, he has continued to collect and receive the rent due from the tenants of the property which rentals collected amounts to E25, 62000 representing the months of December 2004 to May 2005. Upon inquiry at Logoba Royal Kraal, he discovered that respondent had khontaed for her premises but had never delivered the customary beast of allegiance payable as per Swazi traditional practice. The said cow is required by the Umphakatsi before it can entertain any matter arising from that piece of land.

[5] In opposition the Respondent has filed a Notice to raise a point of law. The said point of law is the subject-matter of this judgment. This point is formulated in the following language:

1. The application before court is based on a written Deed of Sale of a portion of Swazi Nation land measuring 2500 square metres.

1.1 Swazi Nation Land is incapable of being bought or sold. The Applicant had no legal capacity to buy and Respondent had no legal capacity to sell Swazi Nation land.

1.2 Swazi Nation Land is incapable of being owned by an individual person. No person can transfer rights and assets which she does not have.

1.3 The portion of land that Applicant claims to have purchased does not exist as a commercial entity independently of the rest of Swazi nation Land.

a) The land question has not been surveyed by a qualified surveyor.

b) The land in question has no approved sub divisional diagrams and pegs that demarcate it from the rest of Swazi Nation land. The Applicant's claim is void ab initio and unenforceable as well as the agreement of sale on which it is based

2. The Honourable Court has no jurisdiction over the Applicant's claim regarding payment of monetary fee for an alleged beast of allegiance due to a chief.

2.1 There is no legal duty on any person enforceable at law compelling a person to pay a beast of allegiance to any chief.

2.2 If such duty existed in law by statute or common law; the Applicant has no right to demand that beast as he is not chief nor is Applicant owed allegiance by Respondent.

3. The Applicant's claim has no legal basis. The Applicant's claim should be dismissed with costs.

[6] When the matter came for arguments Counsel filed Heads of Arguments for which I am most grateful. I shall address the points raised ad seriatim as they appear in the Notice afore-mentioned.

i) Whether or not the Deed of Sale is void ab initio.

[7] In this regard, it was argued for the Respondent that the Applicant's cause of action is based on an alleged sale of immovable property by the Respondent to Applicant which property is allegedly situated on Swazi nation land at or near Sicelwini. The sale of a portion of Swazi nation land is void ab initio as such land is incapable of being bought or sold by an individual. The argument in this regard is based on the saved provisions of Section 94 of the Constitution Act No. 50 of 1968 to the effect that Swazi nation land is vested in the Ingwenyama who has the power to exercise all rights of ownership over such land including powers to dispose of such land. Section 94

thereof reads in extenso as follows:

94. (1) All land which is vested in the Ngwenyama in trust for the Swazi nation

shall continue to vest subject to subsisting rights and interest which before 6<sup>th</sup> September 1968 have been granted to, or recognized as vested in, any

person.

(2)

The Ngwenyama in Libandla may exercise all rights of ownership over such land including the power to make grants, leases or other dispositions, subject to such rights and interests and to such conditions as he may think

fit:

Provided that no mortgage to such land shall be exercisable save and except by a mortgage registered against land acquired by purchase or grant.

(3) The rights and the powers conferred upon the Ngwenyama in Libandla by this section shall be subject to the provisions of any law for the time being in force in Swaziland but no such law shall operate to vest those rights or that power in any other person or authority.

For the avoidance of doubt it is hereby declared that Swazi nation land is subject to compulsory acquisition for public purposes under the law for the time being in force relating to the compulsory acquisition of land for such purposes.

[8] In view of the above cited provisions of the Constitution of 1968, it appears to me that the Respondent's argument is correct in that the Ingwenyama in the libandla may exercise all rights of ownership over such land including the power to make grants, leases, or other dispositions, subject to such rights and interests and conditions as he may think fit. Therefore the purported agreement of sale is invalid in terms of afore-mentioned Section of the Constitution.

[9] Following from the above conclusion therefore the Applicant's claim for an interdict in prayer 2 cannot succeed in view of the fact that the alleged agreement of sale, is void ab initio. The Applicant cannot enforce a void agreement. The Applicant's claim for rent is also based on the alleged agreement of sale which has been found to be void ab initio. The arguments advanced by the Applicant in the Heads of Arguments seem to apply on commercial land not on Swazi nation land which is clearly regulated by the provisions of the 1968 Constitution. It would also appear to me that the legal authority cited by the Applicant that of Gibson, South African Mercantile and Company Law, 6<sup>th</sup> Edition at page 11 does not support the Applicant's case but the Respondent's case, where the learned author states "all agreement are lawful unless they are prohibited by statute or the common law. It is a general rule that agreements are prohibited by common law if they are against public policy or contra bonos mores".

[10] Clearly as afore-stated this agreement offends the provisions of the Constitution and therefore, this point of law ought to succeed; and it is so ordered.

ii) Whether or not the court is competent to grant prayer 2 thereof.

[11] In this regard Applicant seeks an order (per prayer 4) directing the Respondent to pay the sum of E2, 900-00 being the equivalent monetary fee for the beast of allegiance due to the Chiefs kraal at Logoba, which beast Respondent failed and/or neglected to pay while she was a resident under the Logoba Umphakatsi; the said beast is now due and payable. After considering the arguments for and against in this respect, it appears to me that it would not be competent for the court to grant this prayer on the simple reason that this court has no power to order any individual to pay any allegiance to any chief. This issue appears to me to be governed by Swazi law and Custom and regulated by the Swazi Administration Order No. 6 of 1998 in Sections 4, 6, 12, 15, 20 and 22 thereof.

[12] In the result, for the afore-going reasons the point of law raised is upheld with costs.

S.B. MAPHALALA

JUDGE