IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1332/2006

In the matter between

ANDRE CHRISTO BOTHA	Applicant
And	
ABEDNEGO NTSHANGASE	First Respondent
MARTIN AKKER	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent
ATTORNEY GENERAL	Fourth Respondent

Coram: Jacobus P. Annandale, AC J

For Applicant: Adv. P. Flynn, instructed by Currie Sibandze Attorneys

For Respondents: Mr. L.R. Mamba, Mamba & Associates

JUDGMENT

30 May 2006

[1] The Applicant and the First Respondent entered into an agreement of sale in respect of certain land which belongs to the latter. The First Respondent sought to repudiate the contract and step back from it, ostensibly on the basis that their agreement would

flout the newly enacted Constitution of Swaziland alternatively that the Applicant did not perform in his contractual obligations. The dissatisfied applicant, who still wishes to purchase the property, came to Court in order to seek enforcement of their contract, disputing repudiation. Ancilliary to his application, it is further prayed that if the seller does not adhere to the agreed terms, the Deputy Sheriff (Second Respondent) be authorised to sign the relevant documentation on his behalf and further, that the Registrar of Deeds refrains from transfer of the property to anyone else than the Applicant. The Attorney General is brought onto the stage as being the legal representative of the Registrar of Deeds, also affording him the opportunity to join cause with the Applicant on the alleged Constitutional issue. The latter aspect did not materialise as the Attorney General only put up an initial appearance at the first day the m'atter came before Court. He also did not file any papers indicative of an intent to deal with a Constitutional issue, or to oppose the relief sought against the Registrar. Likewise, the Deputy Sheriff is also assumed to tacitly abide by the decision of Court.

[2] The essence of the application is stated thus:-

> "*That the First Respondent take all necessary steps to pass transfer of Portion 153 Farm 50 situated in the urban area ofManzini District to the Applicant forthwith.*"

[3] That the matter was sought to be heard as one of urgency, with the accompanying relaxation of the relevant rules and procedures bears no further ado. The aspect of urgency was not contested and it was indeed heard *ante omnia* other pending matters. Both parties also seem to be desirous to have the issue speedily settled, for different reasons.

[4] Due to various factors, mainly because of enormous pressure on the court to hear a host of disputed applications and trials, with the resultant reserved judgments, over and above other duties of this court, with not enough judges on the bench to facilitate expeditious hearing of a huge backlog of casework, exacerbated by two appeal sessions with the attendant need for secretarial and typing services, preparation of this judgment has been delayed for about a month. In addition, the Respondents' attorney did not prepare any heads of argument which is not helpful in speedy resolution, especially so when coupled with a lack of resources available to the court such as research material and current law reports.

[5] The short facts of the matter are that the Applicant (Botha) entered into an oral agreement of sale, after prior negotiations, to purchase the aforesaid fixed property from the First Applicant (Ntshangase).

[6] By all accounts, both being aware of the fact that such contract by necessity has to be in writing, concluded their transaction formally on the 15th

February 2006, when they both signed the contract. However, the contract itself is dated the 21st December 2005 and not the date when it actually was signed. I will revert to this aspect further down in this judgment.

[7] Afterwards, when the purchaser had already obtained consent of the Land Control Board to buy the land and paid in the conveyancing costs over and above a guarantee for the purchase price, which I will also revert to, and significantly, also after the seller had also already settled a power of attorney to have transfer effected, the seller revoked the power of attorney to pass transfer and also terminated the mandate of his erstwhile attorneys to continue with the transaction. Ntshangase wanted the transaction to be stopped, held out to be on the basis that he did not wish to be a party in a matter that goes against provisions of the Constitution.

[8] Tellingly however, is a different version of the reason why he actually wants to step out of the contract with Botha, namely that he had obtained a better deal.

[9] In his founding affidavit, Botha refers to an incidenton the 22nd March 2006. This date falls between the dates when Botha's attorneys wrote to the former attorneys of Ntshangase, stating that he cannot now step back from their contract and the date when Ntshangase's attorneys wrote to say the power of attorney to transfer was cancelled. On the 22nd March,

the estate agent that brought the purchaser and seller together advised Botha that Ntshangase conveyed to him that he had a different purchaser with whom he intended to sign a different Deed of Sale, the following day.

[10] The estate agent, Dube, confirms this to be so in his supporting affidavit. Dube is not accredited with also passing on the reason behind this change of heart - it is open to speculation whether the new intended purchaser offered a better price or whatever, or whether the first Respondent had the new Constitution in mind, therefore wanting to cancel the sale, as he now says.

[11] A further cause for cancellation was subsequently ventilated, namely that Botha apparently failed to furnish an appropriate guarantee for the purchase price and ancilliary costs.

[12] Botha's case is that he complied with all that was required of him, including special conditions such as Land Control approval and proper guarantees, hence his application for specific contractual performance.

[13] In his brief answering affidavit, Ntshangase points the same picture, but in different colours.

[14] Firstly, under the heading "Special Plea", he cries foul play in that the contract was actually signed on the 15th February 2006 but dated the 21st December 2005.

[15] This is common cause. In his replying affidavit, Botha deals with this aspect and states that the insertion of the date, being earlier than the date of signing, to reflect the actual date on which oral agreement was reached between them, was at the suggestion of the seller, Ntshangase. He says that all parties agreed to date the agreement in December 2005, not the actual date when they signed it. There was no application on behalf of the First Respondent to file a further affidavit to dispute this statement. As it is, it remains the only evidence on this point.

[16] Botha further clarified the matter by saying that when they reached consensus in December, Botha still awaited the return to Swaziland of the partner with whom he wanted to purchase the property. He subsequently entered into a joint venture agreement with that person, filing a copy of that agreement.

[17] Also, Botha says that Ntshangase still needed to consult with his wife, who was overseas at that time.

[18] Despite a diligent search by this Court, also by the Applicant's counsel, no authority could be found that such "backdating" of the agreement of sale would negate the contract as alleged. First Respondent's counsel likewise could not provide any authority for his contention of invalidity on this ground.

[19] It is common cause between the parties that both

understand the requirement of the need for a written contract in so far as the sale of immovable property is concerned. It is trite law, and reconfirmed to also be the position in Swaziland.

[20] Mr. Mamba relies on LANDAGE INVESTMENTS (PTY) LTD V BARRY STEPHEN REED (unreported) Court of Appeal case 6 of 1988, per Schreiner JA, where this was done. This case is however not an authority on the point argued by Mr. Mamba, namely that backdating of an agreement of sale of immovable property invalidates it. Such an act could however fall foul of the law if it is done to avoid payment of stamp duties, but it is not the position in this matter, nor was it so argued.

[21] The First Respondent dealt with a second issue in his "special plea", so stated, namely an alleged contravention of the Constitution.

[22] He says that:-

> "*In any event, even assuming that the agreement was signed on the 21st December 2005, it is invalid as it contravenes Section 211 of the Constitution of the Kingdom. Legal argument will be addressed at the hearing of the matter.*"

[23] It so turned out that his attorney directed most of his argument at the hearing on this issue. In my

view, it is a red herring held out as a smoke screen to try and cloud the issue, for the following reasons.

[24] Sub-sections 211 (4) and (5) of the Constitution, which came into effect on the 8th February 2006, reads thus:-

> "*211(4) Subject to subsection (5), all agreements the effect of which is to vest ownership in land in Swaziland in a non-citizen or a company the majority of whose shareholders are not citizens shall be of no force and effect unless that agreement was made prior to the commencement of this Constitution.*
>
> *(5) A provision of this chapter may not be used to undermine or frustrate a new legitimate business undertaking of which land is a significant factor or base.*"

[25] The Respondents' attorney argued at length about this issue. On the one hand, he argued, the backdating of the deed of sale was done to circumvent the application of section 211(4), in that the Applicant is not a Swazi Citizen. That this latter aspect is so bears no further ado as it is. common cause that the applicant had to obtain,

and did get it, approval of the Land Control Board in respect of the property. This is only done if the intended purchaser is not a citizen of Swaziland. The Applicant is not a citizen of the Kingdom.

[26] It is the first leg of this argument that requires further scrutiny.

[27] Save for the bald allegation to this effect, i.e. circumvention of a new constitutional bar to non Swazis from acquiring ownership of land as from the 8th February 2005, there is no other aspect in the papers to support this. On the contrary, the Applicant says he got word of a new sale agreement that the first respondent wanted to enter into with another willing purchaser. This was via the estate agent who facilitated the deal between Botha and Ntshangase. It remains unknown if the "new" purchaser was willing to pay more for the land and the Applicant totally failed to address this very important issue in his answering affidavit.

[28] Moreover, the Applicant persuasively convinced the Court that in any event, he is not affected by section 211 (4) as the matter falls within the ambit of section 211(5). To this effect, he had discussions with Ezulwini Town Board officials and a land surveyor for the purpose of subdividing and developing properties, subsequent to the oral agreement on the terms of the sale. He gives

more details of this in his replying affidavit.

> "*...(T)he Applicant intended to purchase the land in question for business purposes in that he intended to sub-divide the land with 7(seven) plots and thereafter construct houses on the stands for the purposes of selling and letting. He intended to develop the land together with a certain Mr. Ulrich Rademacher. However, during December 2005 Mr. Rademacher intimated that he may not be interested in the project unless it was purchased at a fair and reasonable price. When he returned from leave in January 2006 I advised him that I had reached a final oral agreement regarding the purchase of the land for the sum ofE900 000. Mr. Rademacher subsequently agreed to be part of a joint venture in order to develop the properties.*"

He continues to describe how the (filed) joint venture agreement came into being and continues:

> "*It is therefore patently clear that the property in question was purchased for a legitimate business undertaking of which the land purchased is a significant factor or base, as contemplated in section 211(5) of the Constitution.*"

The "joint venture agreement" (annexure "ACB.6") sets out how Botha and Rademacher would jointly pay for

the property, which is the same subject matter as in this application, have it registered in Botha's name after Land Control Board approval but retain equal shares in it, pay transfer costs, then to subdivide and develop the land in order to sell or let the properties. Their clear aim is to realise a profit for their mutual benefit.

I fail to appreciate the argument that in doing so, the land purchased will not be "a significant factor or base" of the new business undertaking. To subdivide land, develop it by building on it and then to sell or let the properties has as it's very literal and figurative base and foundation the land on which is built and which is subdivided into residential size stands. To hold otherwise, as the court was urged to do, would negatate the most crucial aspect of urban development as a business, namely the land which is to be so utilised. Indeed, in my judgment, that falls squarely within the ambit of the land being "a significant factor or base".

[30] If there is jeopardy in the wording of section 211 (5) of the Constitution in this matter, it falls squarely on Ntshangase, who brings the issue into the arena. The Constitution clearly prohibits that Chapter XI1 which deals with land, be used to "...undermine or frustrate an existing or new legitimate business undertaking of which land is a significant factor or base". Seemingly, this is what Ntshangase sets out to do in order to avoid transfer to Botha under the guise that "*...it has*

now become legally impossible to do so."

[31] The agreement to vest ownership of land in Botha was in any event reached prior to commencement of the Constitution. By all counts/it was the first Respondent who proposed that the subsequent formalising of their agreement into a written deed of sale be dated on the date when they reached their agreement. This much was also confirmed by the estate agent, Dube. As stated above, with reference to LANDAGE INVESTMENTS (PTY) LTD versus BARRY STEPHEN REED (supra) it is trite that an oral agreement relating to the sale of land remains invalid and requires to be reduced to writing. This principle does not negate the fact that oral agreements may nevertheless be reached by buyers and sellers of land, in which they orally agree on various aspects such as which piece of land is to be sold, at what price, how it should be paid and by when, what suspensive conditions would apply, and so forth. The oral agreement does not become binding and enforceable until such time that it is reduced to writing.

This is what both parties did in December 2005, which agreement was thereafter reduced to writing and signed in February 2006, dated the day when consensus was reached.

The sword that Ntshangase now unsheathes in order to

avoid the contract is a double edged one. The Constitution on which he relies precludes the undermining or frustration of a legitimate business undertaking, such as held out by the applicant to be the position. One of the arrows in his quiver is his attorney's argument that what Botha and Rademacher intend to do with the land is not in conformity with "land being a significant factor or base of a new legitimate business undertaking." He cannot have his cake and eat it. Also, he should not cry foul about the date entered into their written deed of sale if the suggestion to do so originated from himself - in that aspect he is estopped from doing so.

In his. answering affidavit, after stating-his position regarding the dating of the contract, Ntshangase says:-

> "*In any event, even assuming that the agreement was signed on the 21st December 2005, it is invalid as it contravenes section 211 of the Constitution of the Kingdom.*"

His attorney wanted to persuade the court that the Constitution did not come into effect on the 8th February 2006, but on an earlier date (the date of assent in July 2005). Proclamation No. 1 of 2006, headed "The King's Proclamation to the Nation" (Proclamation of 12 April, 1973) and "the King's Proclamation (commencement of the Constitution) Proclamation, 2006", reads as follows:-

> "*In exercise of the powers vested in me by the*

King's Proclamation to the Nation of 12th April 1973, I Mswati III, King and Ngwenyama of Swaziland hereby issue the following Proclamation:-

Citation and Commencement

1. This Proclamation may be cited as the Constitution of Swaziland (date of commencement) Proclamation, 2006, and shall be deemed to have come into force on the 26th July 2005.

Coming into force of the Constitution

2. The Constitution of the Kingdom of Swaziland, 2005, shall come into force on 8th February 2006".

The argument of an earlier coming into force and effect of the Constitution, as the applicant wants to have it, flies in the face of this Proclamation. The Court will not at the whim of the Applicant, in order to suit him, declare the validation of the Constitution invalid.

What is of more concern is that in the course of argument, it was twice averred that "treason" is at hand, "high treason." The first was that if Ntshangase did what Botha does, it would be "high treason", secondly, that whoever caused the publication of the

abovementioned Proclamation in the Government Gazette is equally guilty of treason. I firstly fail to follow the reason why this could be argued, secondly, in my view, it is wholly inappropriate and irresponsible to advance such outrageous allegations in the course of arguing this application. Counsel who uttered this may have done so in the heat of the moment and he wanted to retract it soon thereafter. It is totally uncalled for.

In his papers, Ntshangase tried to aim a third and equally ineffective attack on Botha. He says that the Applicant failed to provide a guarantee for the purchase price and that the guarantee is not the guarantee as contemplated in that the said guarantee provides for payment of E262 334,01 to Nedbank and E40 500 to the agent.

To this he adds that he does accept that it was "necessary" for Nedbank to be paid in order to cancel all existing bonds. I will revert to this understatement. He also adds that there is no basis on the deed of sale for the agent's commission to be paid by himself out of the purchase price since the agent was acting on behalf of the purchaser "*as* is *clear from the deed of sale and the affidavit itself* - the same deed of sale he tries to avoid so desperately.

The "Deed of Sale Agreement" was annexed to the founding papers. Clause 13 thereof reads:-

"*13. Agent's Commission*

5.5% of the cost price of the property, should be made
payable to Wenzile Investments (Pty) Ltd."

This clause does not lend support for the contention by Ntshangase.

He does not state which affidavit or which part of it lends the further support to his contention. The only further reference to the estate agents commission, over and above the Deed of Sale, is found in a letter, written on signature of Ntshangase himself, addressed to Botha, dated the 2nd March 2006 and annexed as "ACB A" to the replying affidavit of Botha, in response to Ntshangase's allegation. It reads:-

"*Re: Agents Commission. Remainder of Portion 153 farm 50 measuring 1,7859 ha (Ezulwini Town Area).*

As indicated in the signed deed of sale agreement, please remit the commission due directly to the agents (Wenzile Investments (Pty) Ltd.)

The Commission percentage is 4.5% of the purchase price. Please forward proof of the transaction for my attention and that of M.J. Manzini (lawyers).

Signed: Rev. Abednigo Ntshangase
Seller"

Again, this letter is not supportive of the allegation that agents commission has been agreed upon to be paid by the purchaser. Interestingly though is that the rate of commission, which Ntshangase asked Botha to pay directly to the agent, is stated as 4.5% on the letter, whereas the Deed of Sale has it as 5.5%. It remains unknown who persuaded the estate agent to reduce the commission.

[40] Many Deeds of Sale of Land pass through the High Court by way of litigation. Although I am precluded from taking judicial notice of a general trend, it is notable that the agents commission is usually determined to be paid by the seller and not the purchaser. Nevertheless, the purchase price is inclusive of commission, ultimately coming from the pocket of the purchaser. It is not usually the position, nor in the present matter, that the purchase price is stated to be a certain amount and that over and above it, a further amount is separately paid as a commission.

[41] In his letter to Botha, the seller requested him to remit the commission, now to be 4.5% and not 5.5% of the purchase price, directly to the agent. That he then wanted proof of the transaction is perfectly normal. Such proof of payment by Botha releases Ntshangase from his obligation.

In their letter to the seller's attorneys of the 20th March 2006, (annexure "ACB-2"), the purchasers' attorney correctly reflect the payment made to the estate agent, to be part of the payment of the purchase price due to Ntshangase.

This is done in the same manner as the deduction of the payment to Nedbank in order to cancel the existing bond over the property, given by Ntshangase in favour of the Bank. Equally so, he was thereby released from his obligation to pay it. This is reflected in the same letter of the attorneys, indicating a reduction in the purchase price that would be paid over to the seller.

A further invalid attack on the Applicant, in order to try and avoid the contract, is based on an alleged failure to provide a guarantee for the purchase price. Ntshangase says that the guarantee is not the guarantee as contemplated in that it provides for payment to Nedbank, which obligation he accepts, and also for payment to the agent, which is dealt with above.

[45] The Deed of Sale deals with the aspect of a guarantee in clause 11, which reads:

> "*11. Should the purchaser fail to pay or guarantee any portion of the purchase price referred to in clause 2 above or fail to comply with any other obligations imposed*

> *on him in terms of this agreement, and remain in default for a period of 10 (ten) days after the date of delivery or dispatch by registered post of written notice requiring the purchaser to make payment, provide a guarantee or carry out the obligation in question, the seller shall be entitled (in addition to and without prejudice to any other available (sic) to the seller at law)*
>
> *11.1 to cancel the sale...*"

[46] The seller wants to cancel the sale. In this further alternative reason for trying to do so, he calls on the guarantee aspect to justify it. It is common cause that the seller never called upon the purchaser to complain about the manner, form or amount of the guarantee, as is set out in their agreement. This has to be in writing.

[47] Seemingly, the shoe fits the other foot. The seller's bankers were not happy at all with his financial affairs. They wrote to him (annexure "ACB 7") on the 13th February 2006, saying that:

> "*Progress with regard to the sale of the properties has taken too long to be fruitful. There is also no evidence that you are making an effort towards servicing the debts as no deposits have been forthcoming*

and the accounts are now all dormant. In light of this we can only consider deferring legal proceedings upon receipt of a property guarantee from the buyers' bankers on or before 1 7th February 2006."

[48] Thereafter, on the 20th February, Rev. Ntshangase wrote to his bankers, authorising Botha to access information relating to the outstanding mortgage loan account in order for the transferring attorneys to process the required guarantee (annexure "ACB 8").

[49] One month later, Botha's attorneys then wrote to the attorneys of Rev. Ntshangase, to confirm that they hold the full purchase price for the property, part of which is to cover the existing mortgage bond with Nedbank. The guarantee is copied to the Bank.

[50] It is thus untenable for Ntshangase to now claim the form of the guarantee to be unacceptable and that it gives justification to cancel the sale. Moreover, he has not written to the purchaser, as he is required to do in terms of their contract, to seek any other form of guarantee, or to have the part of the guarantee relating to Nedbank altered or otherwise dealt with.

[51] None of these ruses of the first respondent are anything more than a smoke screen, a red herring held out in order to try and withdraw from his contract.

[52] In the course of the hearing Mr. Mamba argued that there is yet a further matter that is good cause for

the seller to withdraw. Through the backdoor, it was sought to bring the Land Control Board consent under judicial review and declare it null and void.

[53] Allegations of all sorts of underhand and untruthful deception by Botha were made. The First Respondent placed before court a copy of the Board's consent form and also the application papers, under a certificate of filing. These papers are not part of the replying affidavit. Apparently the purpose was to have the certificate of consent nullified by this court, based on the allegations of impropriety, alternatively to indicate that since Botha is not a Swazi citizen, he is barred by the Constitution from acquiring land.

[54] The latter aspect has already been dealt with. To bring the Land Control Board proceedings and outcome under judicial review requires a totally different process than what the First Applicant attempts to do. The issue has not been ventilated in the papers, the relevant interested parties have not been joined and it would be wholly inappropriate for this court, in the course of the present proceedings, to pronounce upon the Land Control Board Consent. *Prima facie,* the purchaser has complied with the need to obtain consent. He has it. It is no more than yet another feeble attempt by Ntshangase to step out of the contract.

[55] It is for these reasons that it cannot be found that the contract or deed of sale upon which the Applicant relies, is fraudulent. Also, the provisions of the

Constitution pertaining to acquisition of land do not form a bar to performance under the contract at hand. In my judgment, the Applicant has fully and properly complied with all aspects required of him in the Deed of Sale. He is not in breach as is contended by the First Respondent.

[56] At the time of hearing argument, interim relief was ordered to prevent alienation of the property to anyone else than the Applicant. That relief will now become final.

[57] The Applicant was fully justified to approach court on an urgent basis. Also, in view of the financial importance of the matter and the legal issues that had to be argued on his behalf, he was properly entitled to have counsel instructed to protect his rights.

[58] In the event, the First Respondent is ordered to take all necessary steps to pass transfer of Portion 155 of Farm 50, situate in the urban area of Manzini District to the Applicant, forthwith. Should he fail to do so within a period of seven full calender days from date of this Judgment, the Deputy Sheriff of the Manzini District, Mr. Martin Akker, is hereby authorised and empowered to sign all necessary documents to give effect to the transfer, forthwith. Should Akker not be available to do so, the Sheriff of Swaziland, Mr. Shiyumhlaba Dlamini shall then do so.

[59] The Registrar of Deeds remains interdicted from transferring the property referred to in this Order, to

any other person than the Applicant herein.

[60] Costs follow the event, on the attorney and client scale, with costs of counsel certified as envisaged in Rule 68.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE