IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO. 940/07

In the matter between:

SANDILE CYRIL MAHLALELA	**APPLICANT**
VS	
MICHAEL MTHEMBU	**1st RESPONDENT**
THE REGISTRAR OF DEEDS	**2nd RESPONDENT**
THE ATTORNEY GENERAL	**3rd RESPONDENT**

CORAM: MAMBA J

FOR APPLICANT: MR MANZINI

FOR 1st RESPONDENT: MR T. MASINA

JUDGEMENT

23rd AUGUST, 2007

[1] Sometime before the 10th day of October, 2006, Michael Mthembu, the 1st Respondent herein, purchased an undeveloped fixed property from the crown, duly represented by the National Housing Board for a sum of E8756.00. The land in question is referred to as Lot Number 2624 situate in Mbabane Township, Extension number 25, District of Hhohho (hereinafter referred to as the property).

[2] On the 10th day of October, 2006, before the Is* Respondent could finish paying for the property and have it registered in his name, he sold it through a written Deed of Sale to Sandile Mahlalela, the applicant herein for a sum of E20 000.00.

[3] I shall quote verbatim two clauses of the aforesaid Deed of Sale, which have been invoked by the applicant and the 1st Respondent in these proceedings.

Clause two inelegantly provides that:

"The purchase price is the sum of E20, 000.00 (Twenty Thousand Emalangeni) aforesaid guarantee shall be delivered to the Seller's conveyancer within 90 (ninety) days of signing hereof."

And in similar fashion or terms clause eight states that:

"Should any of the parties for any reason whatsoever commit a breach of the terms and conditions of this Deeds of Sale and remain in such breach for a period of 10 (ten) days of written demand being made to the one of the parties in breach by the one of the parties aggrieved shall have the right to declare the sale cancelled and claim any damages that such aggrieved one of the parties shall have suffered due to such breach, subject to the provisions of this deed of sale."

I shall return, to these provisions later in this judgement. I now continue with the narrative.

[4] On the 25th day of October, 2006 and unknown to the 1st respondent the applicant entered into a written agreement of sale and sold the property to Zanele Fortunate Dlamini for E65 000.00. On the 31st day of October 2006, the applicant and 1st Respondent executed or signed a document addressed to "To Whom It May Concern." This is annexure B of the applicant's Founding affidavit and it records that the applicant had that day paid a sum of E8 556.00 of his own money to the National Housing Board for and or on behalf of the 1st respondent and had also given the latter a sum of El00.00. These monies were being paid as part of the purchase price for the property. The document further records that the "balance of E10,444.10 shall be paid on registration of the title." Yet another document annexure C, in similar vein was executed by the applicant and 1st Respondent on the 23rd day of November 2006. This time a sum of E300.00 had been paid by the applicant to the 1st respondent, leaving "a balance of E10, 144.00 [which had to] be paid on registration of the "Title Deed." Seven days later, the parties signed and executed annexure D recording that the applicant had that day paid a sum of E890.00 to the Swaziland National Housing Board on behalf of the 1st respondent as transfer costs for the property to be registered into the name of the 1st respondent. The document further states that the "balance of E9254.00 shall be paid on registration of title deeds." The Housing Board issued a receipt stating that it had received the money from the 1st respondent.

[5] For a while there appears to have been a lull in the flurry of documents or correspondence being signed by the parties until the 17th day of February, 2007. When it resumed, its tenor was combative or adversative and intemperate. By letter

dated that day and received by the applicant on the 20th day of February 2007, the 1st respondent notified the applicant that he, the 1st respondent had cancelled the Deed of Sale because the applicant had failed to abide by the terms of Clause two of the Deed of Sale. A sum of E9956.00, being all monies paid by the applicant to and on behalf of the 1st respondent pursuant to the Deed of Sale accompanied the notice of cancellation.

[6] On the 21st day of February 2007, the applicant informed the 1st respondent in writing that the applicant was not in breach as alleged and the purported cancellation of the Deed of Sale was being rejected. The sum of E9956.00 was also returned by the applicant to the 1st respondent who refused to accept it. He stuck to his guns, maintaining that the cancellation was justified and irrevocable.

[7] By letter dated the 22nd February 2007 the 1st respondent amplified his reasons for cancellation by stating that the applicant was in breach of clause two of the Deed of Sale by failing to either furnish a bank guarantee for the payment of the purchase price with the 1st respondent's conveyancer or depositing a cash payment with such conveyancer within the period of ninety days calculated from the 10th day of October, 2006. He complained further about the sale of the property to Zanele Dlamini referred to above.

[8] The dispute between the applicant and 1st respondent has culminated in this application where the applicant seeks an order that:
"3 ...the 1st respondent takes all necessary steps to pass transfer of Lot 2624 situate in Mbabane Extension Number 25, Hhohho to the applicant forthwith failing which the Registrar of the High Court (Sherrif of Swaziland) be authorized to sign all relevant documents to pass the transfer to the applicant. 4. ...pending the finalization of this matter, the 2nd respondent is interdicted from transferring the property referred to in 3 above to any person other than the applicant."

[9] The applicant's case is that he is not in breach of clause two of the Deed of Sale inasmuch as when the 1st respondent purported to cancel the Deed of Sale on the 17th day of February, 2007, the period of ninety days had not expired; reckoned

from the 31st day of October, 2006. And, in any event clause two of the Deed of Sale had been amended by the annexures referred to above which provided that the balance of the purchase price shall become due and payable upon registration of transfer of the property into the name of the applicant and because such transfer had not been done, payment of the balance was not yet due. Applicant argues further that, even assuming for a moment that he was in breach as alleged, he was not given due notice by 1st respondent of the said breach and contemplated cancellation as provided in clause 8 quoted above.

[10] In his defence, the 1st respondent has advanced two grounds namely that;

(a) by making a cash payment or part payment instead of a bank guarantee, the applicant had failed to comply with the terms of clause two and

(b) as at the time of concluding the Deed of Sale (i.e. 10th October 2006), the property was not registered in the name of the 1st Respondent, the 1st Respondent was not the owner thereof and consequently could not, in law, sell it to the applicant or anyone else.

[11] The contention advanced by the 1st respondent in (a) above was persisted in by the 1st respondent's attorney in argument before me. It was argued that, as a general rule, where the agreement requires the purchaser to furnish a bank guarantee for the due payment of the purchase price to the seller, the agreement requires that and no less and no more, such that if the Purchaser were to deposit a sum in cash equivalent to that which is required by way of a bank guarantee, this would not be compliance with the obligations of the purchaser. This argument is, with due respect to counsel, irrational and untenable and I need no authority to reject it.

[12] Before considering the applicant's contention, I turn to consider the defence raised under (b) above as it has the potential to dispose of the matter altogether without considering the other points raised in the application. The property was registered and transferred into the name of the 1st respondent in March 2007 and is so registered now. I observe that the amendments to the original agreement, providing for payment on registration of transfer did excuse the applicant from

providing the bank guarantee within the stipulated period. The amendments refer to the actual payment of the outstanding amount of the purchase price and not the guarantee thereof.

[13] As a general rule, one may only sell property and transfer ownership of property of which he is the owner or is authorized by the owner thereof or the law to do so. This fundamental principle finds expression in the Latin phrase "*Nemo potest plus juris ad alium transferre quam ipse habet.*" There are exceptions to this general rule and one of such exceptions is that of estoppel, to which I shall return presently.

[14] In **GLATTHAAR v HUSSAN, 1912 TPD 322 @ 327 WESSELS J** (as he then was) stated (obiter) the principle as follows:

"...It is clear that Coetzee never was the owner of the land leased to Hussan, and therefore he could give to Hussan neither a real right nor a right of the nature of a real right. The relationship of Coetzee to Hussan remained a purely contractual relationship by which nothing of the nature of a real right could be acquired, for the simple reason that Coetzee himself had neither a real right to the land nor anything analogous to a real right; and as Coetzee could not transfer greater rights than he himself had, therefore Hussan could acquire from Coetzee nothing of the nature of a real right."

[15] The next question in the enquiry is whether or not the 1st respondent was the owner of the property on the 10th day of October, 2006 or more pertinently, did he have the right to sell it. As stated above, though on that day he had purchased it from the Housing Board, the agents of the Crown, he had not paid for it in full. The portion of the purchase price due then was paid on his behalf by the applicant after the 10th of October, 2006.

[16] In the case of **KLERCK N.O. vs VAN ZYL AND MARITZ NNO AND ANOTHER AND RELATED CASES, 1989 (4) SA 263 @ 273D-** the court had this to say:

"...there are two theories relating to the passing of ownership, viz the casual theory and the abstract theory. Simply stated, the former lays down that, if the *causa* for

the transfer of ownership is defective, ownership will not pass, notwithstanding that there has been delivery (registration in the case of immovables). In terms of the abstract theory, provided that the right to transfer ownership (the real agreement ...) is valid, ownership will in general pass pursuance and on implementation thereof, notwithstanding that the causa...is defective. In other words, all that is required is delivery (registration in the case of immovables) coupled with an intention to pass and to receive ownership. If the real agreement is defective, however, ownership will not pass. In *casu,* it would in fact not matter which theory were applied because, on an application of either, ownership in the property would not have passed to clinkscales as both the causa and the real agreement were defective. ...In regard to immovables counsel were only able to refer me to one authority where this question arose specifically for decision, viz **BRITS AND ANO. V EATON N.O. AND OTHERS, 1984 (4) SA 728 (T)** and my own researches did not uncover any further decisions. In that case Stafford J held, at 735, that in principle there is no difference, as regards the passing of ownership, between movables and immovables and that the abstract theory applies in respect of the latter as well. I am in respectful agreement ...it is important to note that, in terms of the abstract theory, what is required for ownership to pass is not only delivery, which in the case of immovables is constituted by registration in the deed registry, but also the requisite intention that ownership pass on the part of the transferor and the transferee - notwithstanding the views of some that the formal act of registration by itself is sufficient to effect ownership in immovables whatever defects there may be relating to the real right ... If, despite the formal act of registration, the real agreement in question is defective, ownership will not pass."

[17] I, with due respect, agree with the statement of the law expressed above. Implicit in these judgements, however, is the fact that whilst registration of immovables is normally the best proof of ownership, of its own, it is not decisive of the issue. That is to say, it is not conclusive proof of ownership. One may own an immovable property without that property being registered in his name, e.g. where the registration is fraudulent, or where all the prerequisites to effect the registration have been complied with but the registration has not been done. Registration is but an incident of delivery. **MICAH PASCAL MKHONZA v BELARMINO BARROCA GIL AND 2 OTHERS, CASE NO. 3466/02 (UNREPORTED).**

[18] In *casu,* on the 10th day of October, 2006 the 1st respondent had not paid for the property in full. It was still registered in the name of the Crown. It was owned by the crown. The crown had no intention then to pass ownership of the property to him, unless and until he had complied with his obligations towards it, of which included the payment of the full purchase price and transfer or conveyancing charges. He was at that time, (of the signing of the Deed of Sale with the applicant), not in a position to give transfer of ownership of the property to the applicant. He could transfer no greater right or real right than he himself had over it.

[19] The headnote in **CRAUSE EN ANDERE v OCEAN BENTONITE CO (EDMS) BPK, 1979 (1) SA 1076,** reads in part as follows:

"In all cases wherein a registered real right is to be transferred as the result of an agreement, such real right can not vest in the acquirer without an act of registration in the deeds office."

[20] What then was or is the nature of the agreement between the applicant and the first respondent herein?

[21] In this application both signatories to the agreement of sale were aware of both the factual and legal position appertaining to the property. Even if, de facto, they were not aware of the legal implications of their agreement, they are, de jure, deemed to have been aware. See in this regard HUSSAN'S case (supra) at page 328.

[22] The relationship created by the agreement of the 10th October 2006 between the applicant and the 1st respondent created or gave rise to a personal right between them. It did not confer a real right, which is a right against the whole world. The nature of this personal right was or is that the first respondent, impliedly undertook, in the words of the judgement in **MARSHALL v LMM INVESTMENTS (PTY) LTD, 1977 (3) SA 55,** "to pass transfer [of the property to the applicant] at the proper time and in the meantime to keep the contract with [the Housing Board] alive."

[23] In Marshall's case (supra) the court was dealing with an exception taken to the

summons on an alleged implied term. The facts of the case were that the plaintiff had purchased immovables from the defendant, who in turn had purchased them from a third party, Model Homes. The properties were still in the name of and owned by Model Homes, who when the defendant failed to honour its obligations under the agreement, cancelled the agreement and evicted the plaintiff from the properties. In suing the defendant, the plaintiff alleged that by failing to honour its contractual obligations to Model Homes, the defendant had ipso facto, repudiated its agreement with the plaintiff - being an implied guarantee against eviction.

[24] Without deciding that the pleaded implied term must be deemed to have been incorporated into the contract, the court dismissed the exception and held that "the facts pleaded are capable of supporting the existence of the implied terms contended for." By necessary extension, the agreement of sale was not per se void, simply because the properties were not registered in the name of the defendant at the time of the conclusion of the agreement.

[25] The first respondent in his agreement with the applicant undertook to honour his obligations to the Housing Board. He undertook to have the property transferred into his name so that he in turn could pass transfer thereof to the applicant. The property is now registered in the name of the 1st respondent. The said registration was facilitated by payments made by the applicant at the request of the first respondent and on the understanding that this was part and parcel of the transaction that would eventually result in ownership of the property being transferred to the applicant. The first respondent is estopped from saying the agreement of the 10th October 2006 is invalid. The objection based on the invalidity of the agreement must therefore fail.

[26] It now remains for me to consider whether or not the cancellation was lawful or justified.

[27] It would appear that a period of 90 days, reckoned from the 10th day of October, 2006 expired on the 15th of February, 2007. It is, however, common cause that the letter of cancellation dated the 17th of February 2007 did not comply with the terms of clause 8 of the agreement. There was no demand made by the 1st

respondent to the applicant for the latter to provide the necessary bank guarantee within 10 days of such demand; assuming of course that the 90 days had expired. A notice of breach and demand for compliance are prerequisite for a valid cancellation. **VIDE VERSAILLES ESTATES (PTY) LTD v PONISAMMY AND ANOTHER, 1972 (2) SA 566.**

[28] The other point of course is this. The applicant is required to give a bank guarantee of the purchase price, or whatever portion thereof remains unpaid, to the seller's conveyancers. The seller, the first respondent in this case has not indicated to the applicant who his conveyancers are. Until and unless he communicates this information to the applicant, he may not, in my view, contend that the applicant is in breach of that obligation (to provide the necessary bank guarantee).

[29] In the result I hold that the 1st respondent's cancellation of the contract was premature and of no force and effect. He is obliged by the contract to nominate his own conveyancers to whom the bank guarantee is to be furnished. He is obliged further to give notice to and demand compliance from the applicant if the latter is in breach before he can exercise his right to cancel the contract.

[30] It is common cause that a sum of E9956.00 remains unpaid or not secured by a bank guarantee. This is the sum that was unjustifiably returned by the 1st respondent to the applicant and until this sum is either paid in cash to the first respondent's nominee or secured by a bank guarantee this court may not order the first respondent to pass transfer of the property into the name of the applicant.

[31] The applicant has been successful in this application and perforce, he is entitled to an order for costs. The first respondent is ordered to pay the costs of this application. I am, however, not satisfied that such costs should be at a punitive scale as sought by the applicant. No special circumstances were advanced in argument before me to warrant this. The costs shall be paid on the ordinary scale.

MAMBA J