IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 2756/05**

In the matter between:

BERESFORD HOUSE (PTY) LIMITED **PLAINTIFF**

VS

ANNE TUNG LI-CHEANG **DEFENDANT**

CORAM **MAMBA J**

FOR PLAINTIFF **MR. M. MABILA**

FOR RESPONDENT **ADV. M. VAN DER WALT**

JUDGEMENT
23rd APRIL, 2009

[1] The plaintiff, BERESFORD HOUSE (PTY) LTD, a company duly registered and incorporated in accordance with the company laws of the Kingdom of Swaziland seeks an order inter alia:

> "compelling the Defendant (and whosoever duly authorized by her) to sign all requisite documentation necessary to effect transfer and registration of the property being : CERTAIN : Portion 238 of farm No. 2 situate in the Mbabane Area, District of Hhohho, Swaziland.

MEASURING : 3897^{m}^ (Three eight nine seven) square metres into the name of the plaintiff, ...failing which ... after lapse of a 14 day period, the Registrar of the High Court of Swaziland be authorized to sign the said documentation."

[2] The facts giving rise to this action have been admirably captured and summarized by the Supreme Court (then the Court of Appeal) in its judgement under civil Appeal case No. 11/2005 delivered on the
24th only of June, 2005. These are as follows:-

"...The Appellant maintained that a valid written contract of sale had been entered into by it with the Respondent in terms of which the Appellant purchased the property for the sum of one million Emalangeni. Despite this, so the appellant alleged, the respondent had "begun preparation for having the property sold and transferred to another person." That other person turned out to be the 2nd Respondent who was joined at its own instance during the proceedings. The basis for the Appellant's contention that it had purchased the property in terms of a valid deed [of] sale is that-

(i) On 14th July 2004, after the first Respondent had informed the appellant that her property was for sale and the Appellant had expressed an interest therein, the first Respondent's attorneys "Cloete Corporate in association with E.J. Henwood and M.L. Dlamini" sent a draft Deed of Sale to M.J. Manzini and Associates, the Appellant's attorneys, with an accompanying letter. The draft deed described the purchaser as "Stewart Harding" who was said to be a "boyfriend" of the deponent to the Appellant's founding affidavit. The name of the purchaser was subsequently altered to describe the appellant as the purchaser and nothing turns on this substitution.

The letter of the 14th July reads as follows:-

RE : DEED OF SALE - ANNE TUNG LI-CHENG/STEWART HARDING

We refer to the above matter and enclose the Deed of Sale in this matter for signature by your client. Our Mr. Rob Cloete has been given a Power of Attorney to sign on behalf of Mrs. Li-Cheang.

Kindly have your client sign this document together with the enclosed Land Control Board application forms which we request be filled in and returned to us by the 15th July 2004 for Land Control Board at the end of this month."

This letter purports to be signed by one Musa L. Dlamini. The deed of sale referred to the purchase price as E1,100.00.00. Because of the need to amend the deed by substituting the appellant as purchaser an amended deed was sent by the Respondent's attorneys to the Appellant's attorneys on 15th July 2004 with an accompanying letter which reads:-

"RE : DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

We refer to the above matter and enclose the amended Deed of Sale for your client's signature.

This letter, too, was written on behalf of the attorneys by Musa L. Dlamini. Thereafter, due to the fact that the Deed of Sale had not been signed and returned to the Respondent's Attorneys, there followed two letters from the latter firm both signed by Musa Dlamini. They were dated 3rd August 2004 and 23rd August 2004 respectively and read:-

"RE : DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. We refer to the above matter and must at the onset (sic) express our disappointment at the fact that the Deed of Sale has not been returned.
2. Should we not receive the signed Deed of Sale by Thursday the 5th August 2004 we shall assume that your client is no longer interested in pursuing the matter and shall accordingly seek further instructions from our client with regard to the way forward. We hope that your client will attend to this matter of signature urgently."

Despite this threat of cancellation it is not disputed by the Respondents that thereafter Harding, acting on behalf of the appellant, continued to negotiate with the 1st Respondent for the sale of the property nor indeed is it disputed that Respondent "relented and agreed to proceed with the sale, with certain changes being made." This latter statement was made in the founding affidavit and not denied. It was also not denied that thereafter discussions took place between the Appellant's attorney M.J. Manzini culminating in the following:-

(a) A written offer was made on behalf of the appellant to purchase the property for E1 million;

(b) The Appellant was to pay 10% of the purchase price upon signature of the Deed of Sale and;

(c) The balance of the purchase price was to be paid on or before the 17th September 2004. Apparently before the above was agreed upon the respondent had been in contact with another purchaser. A letter recording this and dated 23rd August 2004 was signed by Musa Dlamini and addressed to Attorney Manzini.

It reads as follows :

RE : DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. I refer to the above matter and confirm that my instructions from my client are to advise you that she has now accepted an offer from another party as your Mr Harding has failed and/or neglected to sign the Deed of Sale and/or communicate effectively with my client with regards to the way forward."

I shall later in this judgement advert to this letter and shall refer to it as "BH6".

In recording the discussions between the 1st respondent and himself in a letter dated 26th August 2004, Attorney Manzini included what he acknowledged was an improper term, namely that in the proposed written deed the purchase price would be reflected as being E900,000-00 in an effort to keep [at a lower level] the transfer costs payable on the transaction. (The words in the brackets were obviously but unintentionally omitted). The deed was duly re-drafted but the improper suggestion was not accepted by the respondent and, therefore, the purchase price was recorded as being E1 million. This re-drafted Deed of Sale was then sent to the appellant

together with a letter dated 27th August 2004 which was also signed by Musa Dlamini, calling upon the Appellant to sign the deed. This letter "BH8" reads as follows:-

RE : DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. We confirm that we have re-drafted the Deed of Sale to reflect that Beresford House is the purchaser and that it is purchasing the property for E1 million. We have added a further paragraph to state that household furniture is E60,000.00 and it will not form part of the purchase price for the land.
2. Accordingly we enclose the Deed of Sale and confirm that we have inserted an amount of E1 million (one million Emalangeni) and not the E900,00.00 (nine hundred thousand Emalangeni) suggested by your letter as you are aware that this is illegal and we cannot partake in an issue that would defraud the government of its revenue in anyway whatsoever. We have advised our client of this and she accepted that such an undertaking would be illegal and she has further instructed that we must do it the right way as she herself does not want to be held for any illegalities. Kindly advise you clients of this and have them sign the document which is enclosed herewith."

The last-mentioned letter was signed by M.L. Dlamini and the Deed of Sale with the amendments referred to in the letter, coming as they did in response to the offer made in the letter of 26th August 2004 from Mr. Manzini, the letter and redrafted Deed of Sale can reasonably by regarded as a counter-offer. It is contended by the appellant that when the terms thereof were accepted by the appellant and the re-drafted deed signed by it, a sale of the property was concluded in writing as required by Section 31 of the Transfer Duty Act which provides that no contract of sale of fixed property shall be of any force or effect unless it is in writing and singed by the parties thereto or by their agent duly authorized in writing.

In the redrafted deed there was included the stipulation that-

"The purchaser shall upon signature of this document pay E100,000-00 which amount is to be paid into Cloete Corporate Consultants Trust account for the account of the seller." On 2nd September 2004 i.e. within a week of receipt by the Appellant's attorneys of the re-drafted deed, the latter firm acknowledged by letter the receipt of BH8 and the Deed of Sale and advised the Respondent's attorneys that Harding was in the United Kingdom, that he was sending the E100,000.00 to the Appellant and that on receipt thereof the signed agreement of sale and the money would be transmitted. There does not appear to have been any demur to this. Thereafter, and on the 13th September Attorney Manzini, by letter addressed to Cloete Corporate Consultants, informed the latter that under cover of the letter they would find the duly signed Deed of Sale and the cheque for E100,000.00. It seems, however that as a result of an oversight the signed deed was not included with the cheque. This elicited the following response in a letter dated 14th September 2004 from the respondent's attorneys signed by "Musa Dlamini." It reads:-

"RE : DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. I refer to the above matter and confirm receipt of your documentation, unfortunately I am returning same as per the attachments.

2. I have received instructions from client to proceed with another sale where the purchaser has offered an amount higher than the current and they are willing to pay this amount by the end of the day.
3. In any event there was no Deed of Sale attached to your documents and although that might have been an oversight we regret to advise that there is no longer a sale between my client and Beresford House (Pty) Ltd."

The respondents' answering affidavit - filed, as is stated on the document, by "Cloete/Henwood/Dlamini & Associates (1st Respondent's attorneys)" - was deposed to by Musa Leon Dlamini. He described himself as an associate of the attorneys firm "Cloete Corporate Consultants" which is somewhat different from the name of the firm on the face of the affidavit and on its stationery. He says, also, that he, M.L. Dlamini, is duly authorized to oppose the proceedings. The position therefore is that M.L. Dlamini handled the matter throughout, that he was the author of all the relevant correspondence on behalf of the Respondent not to mention, of course, his authority to conduct the litigation on behalf of the respondent. Also in BH6 he referred to "My instructions from my client" and, as referred to above, the Power of Attorney included authority to "sign" to any one of the partners or professional assistants of the firm."

[3] After hearing the Appeal, the Supreme Court ordered that the matter be referred to oral evidence on the issue of whether or not Mr M.L. Dlamini had the necessary authority to act for the Defendant to conclude the sale and similarly whether or not Sibongile Korpu Sukati, the person who purportedly signed the Deed of Sale on behalf of the plaintiff had such authority to act for the plaintiff. During the hearing of oral evidence, I heard evidence from these individuals only.

[4] In the application that resulted in the Appeal I have referred to above, the plaintiff based its case on the premise or averment that a valid sale had been concluded between the parties because Sibongile Korpu Harding (nee) Sukati, "the person who signed the written offer on behalf of the Appellant was duly authorized to do so." Annexure BH13 is filed in support of this allegation. However, in terms of this document, which is a copy of the Resolution of a meeting of the Board of Directors of the plaintiff, held at Mbabane on the 14th July, 2004, the plaintiff resolved to purchase from the Defendant, for a sum of One million Emalangeni: CERTAIN : Portion 60 (a portion of portion 14) of farm number 1214 situate in the District of Hhohho, Swaziland

MEASURING : 29,1403 (twenty nine comma one four zero three) hectares

This property is clearly not the same as that referred to in paragraph 1 above and it is common cause that this resolution can not therefore be used as authority to purchase the property which is the subject matter of this action.

[5] Sibongile Sukati's authority or mandate to execute the Deed of Sale between the parties herein is averred in paragraph 5 of Plaintiff's particulars of claim and denied under paragraph 5.1 of the Defendant's plea. In evidence in court before me, Sibongile Sukati testified that around July, 2004 the plaintiff was in the process of looking at buying a number of immovable properties in Swaziland including one near Maguga dam in the Pigg's Peak area, District of Hhohho, known as Sobantu Guest House. Under cross-examination by counsel for the defendant, she readily and frankly stated that she had no written authority to do what she did i.e. to negotiate, conclude, sign or execute the documents for the sale and purchase of the property in question on behalf of the plaintiff. Her evidence was that such authority had been given to her verbally by the board of directors of the plaintiff.

[6] In terms of section 31 of the Transfer Duty Act Number 8 of 1902:

> "No Contract of Sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorized in writing."
>
> (The emphasis has been added by me.)

From the above provisions it is plain to me that where a company purchases any fixed property, both the Deed of Sale thereof and the authority of the Company's agent to act for or on behalf of the company, must be in writing. A failure on either count visits the purported transaction with nullity. Vide Ephraim Tova Thwala v Abel Mkhonta (unreported judgement by Hull CJ). In Rehman, David v Gule, Cyprian 1987-1995(4) SLR 211 at 214g where Browde J A stated :

> "There is no room for an equitable principle which would render valid what is invalid in terms of the statute. See Venter v Birchholtz (supra) at 286 - 287A. The voidness of the contract cannot be surmounted by a defence such as there

is no factual dispute between the parties, e.g. they know what the oral terms are, or what the property was sold for, and hence the informal sale should be treated as being valid. See in this regard Wilken v Kohler 1913 AD 135; Clements v Simpson 1971 (3) SA 1 (AD) at 9."

See also **MOHAMED, ENVER v SHILUBANE, PAUL NO & OTHERS, 1987-1995 (1) SLR 344 @ 348-349, MULLER & ANOTHER v PIENAAR, 1968 (1) SA 295 (E.C.D) BALZUN v O'HARA AND OTHERS, 1964 (3) SA 1 (TPD).**

Section 74 (1) (a) of the Companies Act No. 7 of 1912 embraces or endorses this too and stipulates that such authority shall be signed by two directors, or if there is only one director, by such single director.

[7] However, in terms of section 69(1) (a) of the South African Companies Act of 1973, such authority or mandate may be
expressed or implied "...and the only question in sales of land as in all other contracts made on behalf of a company, is whether the agent did in fact act under the company's authority." (RH Christie, The Law of Contract, 3rd ed. At 128). This is a significant distinction between our law and South African Company law on the nature or form of the company's agent's authority or mandate. In the present case, the verbal authorization granted to Sibongile Korpu Sukati to sign the Deed of Sale on behalf of the plaintiff was ineffectual; it could not and did not in law, clothe her with the required authority to enable her to conclude a contract of sale of the fixed property with the defendant.

[8] In the light of this conclusion, it is neither necessary nor desirable for me to examine the issue of whether or not Mr Musa L. Dlamini had the necessary legal authority to represent the Defendant in the sale of the property herein.

[9] For the foregoing reason, the plaintiff's action was dismissed with costs; such costs to include those of Counsel to be duly certified in terms of the applicable rules of this court.

MAMBA J