HIGH COURT OF SWAZILAND

Held at Mbabane

Gugu Fakudze
1st Applicant
Senzeko Fakudze
2nd Applicant

vs

The Principal Secretary Ministry of Enterprise & Employment
1st Respondent **Ngwenya House Allocation & Sale Committee** 2nd Respondent **The Attorney General**
3 rd Respondent **Titi Badelisile Fakudze** 4th Respondent

Civil Case No.2485/08

Coram
For the Applicant
For the Respondent
MAPHALALA PJ
MR. M. SIMELANE
MR. M.M. VILAKATI

JUDGMENT
24th November, 2009

[1] Serving before court is an application in the long form for an order in the following terms:

> "1. That the 2nd or 1st Respondent recognise the arrangement between the Applicants in that the 1st Applicant accepts the offer to purchase House No. 123 situate to Lot 134 in Ngwenya Village in lieu of 2nd Applicants withdrawal of his offer.
>
> 2. That the 2nd Respondent avails to 1st Applicant all application forms necessary for the transfer of the property into her name.
>
> 3. That any offer made by the 4th Respondent to buy the house be held to be *void ad initio* for lack of consent from 2nd Applicant.
>
> 4. That the 1st and 2nd Respondents pay costs of this application
>
> 5. That the 4th Respondent pays costs in the case of opposition.
>
> 6. Further and/or alternative relief."

[2] . The founding affidavit of the Applicant is filed where she outlines the material facts in support of her application. Relevant annexures are also filled in support of the averments in the founding affidavit.

[3] The Respondents oppose the application and have filed an answering affidavits of one Bertram Stewart who is the Principal Secretary in the Ministry of Enterprise and Employment. In the said affidavit a number of points *in limine* are raised as follows:

"4.1 I am advised by the Attorney General and verily believe that prayers 1 and 2 of the Notice of Motion are bad in law. These prayers are not cognisable in law.

The 2nd Applicant has no personal right against the Respondents capable of being delegated or ceded to 1st Applicant. Full legal argument will be advanced at the hearing.

Prayer 3 is also bad in law in that the Applicants have failed to rebut the presumption that every adult, including the 4th Respondent, has capacity to contract.

The 2nd Respondent is not a body corporate with power to sue and be sued in its own name. A copy of the legal notice establishing the 2nd Respondent is attached hereto and marked "PS1"."

[4] I must also mention that the Respondents also addressed the merits of the case and filed relevant annexures to its defence.

[5] Before proceeding any further I wish to apologise profusely to the parties in this matter for the long delay in issuing this judgment due to other urgent matter which clamoured for my attention.

[6] The facts of the matter are that from around 1980 the first applicant with her siblings and parents occupied the house in question situated at Ngwenya. They were renting the house from the Nation Housing Board. They stayed in the house and when the 2nd Applicant and 4th Respondent started their love relationship and subsequently got married they were staying in the house.

[7] Unfortunately their father and mother died in 1998 and 2001 respectfully but they continued to lease the house. Subsequent to that 1st Applicant is brother (2nd Applicant) and his wife (4th Respondent) moved out of the house. The lease was not changed from Applicant's father Andrias Fakudze

and to date the lease agreement is in his name. The 4 Respondent never contributed a cent to the rental payments.

[8] Further facts are alleged in Applicant's founding affidavit in paragraphs 12 to 29, the offshort of which is that the 4th Respondent cannot say of necessity that the house be transferred into the name of 2nd Applicant as the law provides because he had ceded the offer to the 1st Applicant nor can she sell the house to anyone else.

[9] I need to first deal with the points *in limine* raised by the Respondents and then proceed with the merits of the case in the event I dismiss the preliminary objections.

[10] I shall consider these objections *ad seriatim* as follows:

"4.1 Whether prayers 1 and 2 are not cognisable in law".

[11] The argument in this regard is that prayers 1 and 2 are not cognizable in our law. With regard to prayer 3 the Respondents have taken the position that there is no evidence before the court that the 4th Respondent is subject to the marital power of the 2nd Applicant. Alternatively, the Respondents contend that the 4th Respondent has limited contractual capacity on account of being subject to her husband's marital power; then the proceedings should be adjourned for the marital power to be tested against the equality clause being Section 20 of the Constitution of Swaziland Act No.001/2008.

[12] It is contended for the Respondents that our common law favours the utmost freedom of contract (See *Sasfin vs Beukes 1989(1) SA 1* and that of *Botha (now Grusse) vs Finanscredit (Pty) Ltd 1989(3) SA 773(A).* Freedom of contract includes the right to elect the person(s) a party wishes to contract with. The relief sought by the Applicants is an unjustifiable inroad into the freedom of contract.

[13] The Respondents further contend in this regard that the Applicants' claim that their case is based on cession is without merit as cession is the substitution of a new creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same. In the instant case, there is no contractual relationship between the 2nd Applicant and the Swaziland Government. The 2nd Applicant is not the Government's creditor and hence he is legally incompetent to cede any rights to the 1st Applicant.

[14] Furthermore, it is argued that the Applicant's cause of action cannot be characterised as a delegation which is the opposite of cession; it is an agreement between contractors that a third party be introduced as debtor in substitution for the original debtor who is discharged. In the case at hand there is no contract between the Government and the 2nd Applicant. There is absence of contract between the parties and therefore there can be no delegation. The Respondents contend in this regard that our law does not know of any procedure by which a party who reject an offer can compel the offeror to make the same offer to a third party. In the result, prayer 1 and 2 fall to be dismissed.

[15] Regarding prayer 3 the Respondents contend that they accept that a woman married in community of property or out of community of property including the marital power has limited contractual capacity.

[16] That as a general rule she cannot contract without her husband's consent. On the facts of this case it is not in dispute that the 2nd Applicant and 4th Respondents are married in terms of civil rites. However, there is no iota of evidence of the matrimonial property regime the parties entered into. Therefore, the Applicants have failed to rebut the presumption that the 4th Respondent has full legal capacity and therefore prayer 3 of the Notice of Motion should be dismissed with costs.

[17] The respondents canvass an alternative argument, in the event the court concludes that the presumption has been rebutted, is that the marital power *prima facie* runs foul of a woman's right to equality which is protected by Section 20 of the Constitution of Swaziland. In this regard the Respondents apply that the constitutionality of the common law concept of marital power and Section 16(3) of the Deeds Registry Act, 1968 be tested against Section 20 of the Constitution.

Secondly, they request the court to appoint a lawyer to represent the interests of the 4th Respondent to the constitutional matter.

Thirdly, they ask that these proceedings be adjourned and the matter be referred to the Chief Justice for His Lordship to consider whether to constitute a Full Bench to hear the matter.

In arguments before me Counsel for the Applicant answered to the above arguments by the Respondents and stated on the above points in paragraph [13] *supra* that this matter does not raise any serious constitutional issues that cannot be decided by a single judge.

On the other arguments of the Respondents advanced above Counsel for the Applicant provided thorough arguments on each point raised and I shall outline these arguments for purposes of the record.

On the points *in limine* he argued that the prayers are cognizable in law as her brother has a right to use his rights. On the points raised in paragraph 5 and 6 of the answering affidavit that these points are bad in law and have no basis at all. On the last point raised the Applicant contends that the 2nd Respondent is not acting under any body but is acting on its own. This point of law is bad in that it means all the contracts entered into are invalid.

[23] In answer to the other substantive arguments of the Respondent the Applicant applied for the amendment of prayer 1 to read:

> "(i) That the 1st and 2nd Respondents deal and/or consider the application made by 1st Applicant whereat she should be afforded a hearing in terms of the Commission of Enquiry Act of 1963 in line with legal Notice No.33 of 2006 in relation to House No.123 situate at Lot 134 in Ngwenya Village."

[24] The Applicant contends that this amendment is supported by paragraph 17, 25.2, 25.4, 27 and 28 in the founding affidavit. That no prejudice will be suffered by the Respondents which cannot be cured by an order as to costs which are tendered as the prayer does not materially change the subject matter.

[25] In my assessing of the arguments of the parties in this regard I grant the amendment sought by the Applicants with costs of the amendment against the Applicant.

[26] On the impeachment of the offer the Applicant argue that the 4th Respondent cannot contract without the assistance of her husband. The 4 Respondent despite receiving the papers is not opposing the application.

[27] The Is and 3r Respondents cannot validly oppose the grant of prayer 3.

[28] The contention in this regard is that it is the 1st Respondent's case that he knew that the 2nd Applicant and 4th Respondent are husband and wife and it has not been denied that the lease is in the name of the Applicant's deceased father, hence it was clear that they could not validly contract with the 4th Respondent. Ignorance of the law is no excuse hence the law calls upon the husband to rectify the contract in which case the 2nd Applicant is not prepared to do so.

[29] The Applicants further contend in this regard that 1st and 2nd Respondents have not filed a counter application against the 4th Respondent to compel her to be bound by the offer to buy the house which in any event has to be addressed to the 2nd Applicant. In this regard the court was referred to the legal authority of *H.R. Hahlo, The South African Law of Husband and Wife (1963)* at page 143-145 where it is stated:

> "If a woman enters into a contract within her husband's consent, the contract is not binding upon her husband or the wife herself either during the subsistence of the marriage or after its dissolution."

[30] That it is clear from the minutes attached to 1st Respondent's affidavit that the 2nd Applicant was not allowing his wife the 4th Respondent to buy the property thus the other Respondents cannot even successfully apply that she be bound by the offer or sale made to her. They are just busy bodies without any lawful justification.

[31] On the point made by the Respondents that this matter ought to be referred to a Full Bench because it raises constitutional issues in that it cannot be decided by a single judge the Applicant has taken a contrary view that a single judge can deal with the matter in that amongst other things the reliance upon Section 20 of the Constitution of Swaziland is misconceived as the relevant sections are 27, 28 and 37. That it is clear from these sections that the people of Swaziland never intended to abolish the marital power in a marriage. In this regard the court was referred to the learned author *Hahlo (supra)* at page 152 where it is stated as follows:

> "The wife's lack of capacity in respect of contracts, alienations, hypothecations and other judicial acts is cured if she acts with her husband's consent. No formalities are required and the consent may be given expressly or tacitly. Thus

> where the husband stands by and does not object to a transaction of his wife, he must be taken to have tacitly consented to it."

[32] I now proceed with the questions to be decided starting with the points *in limine* as I have stated in paragraph [8] *supra* and thereafter deal with the merits of the case in the event I dismiss the points *in limine.*

[33] Before proceeding with the determination of the points *in limine* and later the merits of the case I wish to briefly address a point by the Respondent that I refer this case to the Full Bench of this court. That the case be referred to the Chief Justice so that a Full Bench be appointed to determine the constitutional issues raised in this case. In my assessment of the arguments of the parties in this regard I agree with the Applicant that a single judge of the High Court can decide the matter. It appears to me that reliance upon section 20 of the Constitution is misconceived as the relevant sections are 27, 28, and 37.

[34] The points *in limine* in summary form deal with the very important question as to whether our law has a procedure of which a party who rejects an offer can compel the offeror to make the same offer to a third party as envisaged by prayer 1 and 2.

[35] The above question was put to the Applicants in a letter of the 12th June 2008 by the office of the Attorney-General to the following effect:

> "You should by now appreciate that for a contract to be valid and enforceable the parties conduct in concluding such contract must be voluntary, that is to say, they must not be induced by duress or other external factors which, may render the contract invalid and unenforceable. This is one of the most fundamental requirements for a valid contract."

[36] Before proceeding any further with any analysis of this question I wish to recount the two prayers in the Applicant's Notice of Motion under attack being prayer 1 and 2 for the interest of clarity. The former seeks an order that the 2nd or 1st Respondents recognise the arrangement between the Applicants in that the 1st Applicant accepts the offer to purchase House No. 123 situate at Lot 134 in Ngwenya Village *in lieu* of 2nd Applicant's withdrawal of his offer. Further on in prayer 2 thereof that the 2nd Respondent avails to 1st Applicant all application forms necessary for the transfer of the property in her name.

[37] Having considered the arguments of the parties in this very important case to the Applicant and future litigants in similar circumstances our common law favours the utmost freedom of contract (See cases of *Sasfin vs Beukes (supra)* and that of *Botha* (now *Griesser vs Finanscredit (supra).*

[38] The Applicants contend that their case is based on cession. By definition cession is the substitution of a new creditor (the cessionary) for the original creditor ("the cedent"), the debtor remaining the same (See *R.H. Christie, the Law of Contract in South Africa, 5th edition (2006)* at 463. In the present case, there is no contractual relationship between the 2nd Applicant and the Swaziland Government. The 2nd Applicant is not the Government's creditor and hence he is legally incompetent to cede any rights to the Applicants.

[39] Furthermore, I agree with the Respondents' contention that the Applicant's cause of action cannot be characterized as a delegation. As delegation is the opposite of cession; it is an agreement between contractants that a third party be introduced as a debtor in substitution for the original debtor who is discharged. In the instant case there is no contract between the Government and the 2n Applicant. In the absence of a contract between the parties there can be no delegation.

[40] I agree *in toto* with the Respondent's argument that our law does not know of any procedure of which a party who rejects an offer can compel the offeror to make the same offer to a third party.

[41] The gravamen of the applicant's case is to compel the 2nd Respondent (Ngwenya Houses Sales Committee) to accept the applicant's offer to purchase the property mentioned.

[42] The position of law illustrates that our common law favours the utmost freedom of contract is found in the two cases cited in paragraph [8] of this judgement. That of *Sasfin vs Beukes (supra)* and that of *Botha J*(now *Grusse vs Finanscredit {supra).* I find that these two cases are highly persuasive to this court.

[43] In the former judgment in an investigation into the question whether a contract or a provision of a contract is unenforceable on the grounds of public policy, there must be borne (a) that while public policy generally favours the utmost freedom of contract, it nevertheless properly taken into account the necessity for doing simple justice between man and man; and (b) that a court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the element of public harm are manifest.

In this case the court rejected a contention that a clause in a deed of suretyship which provided that the deed of suretyship shall not be cancelled save with the written consent of a creditor was contrary to public policy.

In the latter judgment which was concerned with a deed of cession executed by the Respondent Beukes, a specialist anaesthetist, in favour of, *inter alia* the appellant Sasfin a finance company, from the date of the cession and at all times thereafter, in effective control of all *Beuke's* professional earnings, to entitle Sasfin

on Notice of Cession to the debtors of Beuke's to recover all Beuke's book debts and retain all amounts recovered, irrespective of a whether Beuke's was indebted to Sasfm in a lesser amount or at all. Nor was this the full extent of Beuke's bondage to Sasfin. Beuke's was further rendered powerless to end this situation by the provision of clause 3.14 and 3.14.1 of the deed of cession which provided:

The cession shall be a continuing covering cession and shall remain of full force and effect at all times notwithstanding any intermediate discharge or settlement of or fluctuating in my/our obligations to the creditors.

The majority judgement of this Court in the *Sasfin* case held that an agreement to such effect was unconscionable; incompatible with the public interest; and unenforceable on the grounds of public policy. *Smalberger JA*, who delivered the judgment of the majority, pointed out that contrary to the common law position, however, on a proper interpretation of clauses 3.4 and 3.14 Sasfm was entitled, from the moment the deed of cession was executed, to recover all or any of Beukes' book debts, despite the fact no amount was owed by Beukes to it then, nor might be owed in the future.

[47] Later in his judgment *Smalberger JA* observed that Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end, as clause 3.14 specifically provides that "this cession shall be and continue to be of full force and effect until terminated by all the creditors". Neither an absence of indebtedness, nor reasonable notice to terminate by Beukes in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end.

[48] An agreement having this effect is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy. See *Eastwood* v. *Shepston (supra); Biyela* v. *Harris 1921 NPD 83; Raubenheimer and Others* v. *Paterson and Sons 1950 (3) SA 45 (SR); King* v. *Michael Faraday and Partners Ltd [1939] 2 KB 753 [1939] 2 ALL ER 478.*

[49] In argument before me Counsel for the Applicant stated that these points *in limine* raised by the Respondents are misconceived but did not give any reasons why the court should hold so. The fact of the matter is that the relationship between the parties is as described by the Respondents in their arguments. Therefore the principles of law as outlined above should operate in this case. To rule otherwise will be unfounded where a court forces a party to contract with another. The principles of contract between the parties are sacrosant and cannot be prescribed by a court.

[50] Freedom of contract includes the right to elect the person(s) a party wishes to contract with. The relief sought by the Applicants is an unjustifiable inroad into the freedom of contract.

[51] I wish to comment *en passant* that on the principles of equity the Applicant should be afforded a right of first preference as she has occupied this house for all of her life.

S.B. MAPHALALA

Principal Judge

[52] In the result for the aforegoing reasons the court finds that prayers 1 and 2 are not cognisable and therefore the application is dismissed with costs.