IN THE HIGH COURT OF SWAZILAND

Civil case No: 261/12

In the matter between:

SELWYN JEREMY DUNN **APPLICANT**

AND

NONHLANHLA MKHONTA **RESPONDENT**

Neutral citation: ***Selwyn Jeremy Dunn v Nonhlanhla Mkhonta (261/12) [2012] SZHC 101 (30 April 2012)***

Coram: **M.C.B. MAPHALALA, J**

For Applicant Attorney Kenneth Simelane
For Respondent Attorney Sipho Madzinane

Summary

Civil Procedure – Contract for the Sale of land – applicant has complied with terms of contract – respondent alleges contract cancelled orally by third party – Parole evidence rule applicable in the circumstances – respondent obliged to comply with contract.

JUDGMENT
30 APRIL 2012

---

[1] An urgent application was instituted where an order was sought directing the respondent to restore to the applicant the premises described as lot No. 1076, Extension 9, Fairview North Township in Manzini; the applicant further sought an order directing the respondent to comply with the terms and conditions of the Deed of Sale concluded between the parties on the 24th June 2011. She also prayed for costs at attorney and client scale.

[2] The applicant alleged that he concluded a Deed of Sale with the respondent on the 24th June 2011 in respect of property described as Lot No. 1076, Fairview North Township in Manzini. The material terms of the contract of sale were that the purchase price payable was E700, 000-00 (Seven hundred thousand emalangeni); a deposit of E180, 000-00 (One hundred and eighty thousand emalangeni) was paid on the 24th June 2011. The balance of E520, 000.00 (Five hundred and twenty thousand emalangeni) was payable on or before the 28th February 2012 in cash or bank guaranteed cheque. He alleged that he had complied with this requirement. Annexure "SJD3" is attached to the application being a bank guarantee issued by the First National Bank on the 27th January 2012 in respect of the balance of E520, 000.00 (Five hundred and twenty thousand emalangeni) payable on or before 28th February 2012.

[3] In terms of the contract, the applicant was entitled to take occupation of the property upon payment of the full purchase price. Notwithstanding the "*voetstoots clause"*, the respondent undertook to fit new water gutters, floor tiles, a veranda, roof and also paint the house by the 1st January 2012.

[4] The applicant alleged that on the 7th January 2012, the respondent gave him keys to the premises which were for the front door and the gate; and, that she further gave him a meter number to connect electricity. He also alleged that on the 31st January 2012, he registered for water with the Swaziland Water Services Corporation.

[5] He further alleged that after receipt of the keys, he started effecting renovations to the house; subsequently, the respondent changed the padlocks and denied him access to the premises. The reason she gave for changing the locks was that the tenant who was leasing the premises had instructed her to do so; in addition, she told the applicant that she was no longer selling the house.

[6] He argued that he had complied with all the terms of the contract, but, the respondent was depriving him of access to the house. He also argued that he was in peaceful and undisturbed possession of the premises when he was locked out. He further argued that the matter was urgent on the

basis that the respondent had since leased the premises to a tenant without his consent, and deprived him of the right to occupation of the premises. He further argued that spoliation proceedings are by their very nature urgent; to that end, he argued that he would not be afforded substantial redress at a hearing in due course.

[7] This application is opposed by the respondent. She alleged that sometime in December 2010 or January 2011, applicant's mother enquired from the Chief Executive officer of her workplace at the Swaziland National Provident Fund about the property and if the organisation was selling its properties at Fairview; the C.E.O referred her to the General Manager who told her that the house belonged to the respondent. The General Manager then referred her to the respondent to make her proposal; the two eventually met with each other when applicant's mother came to respondent's home at Fairview.

[8] The respondent alleged that from January 2011 until June 2011, the applicant's mother engaged her several times persuading her to sell the house to the applicant since she wanted him to stay next to her own home. She further alleged that she eventually agreed in June 2011 to sell the house for E700, 000.00 (Seven hundred thousand emalangeni).

[9] She further alleged that she met the applicant for the first time during the day of conclusion of the contract on the 24th June 2011; and, that during the period of negotiations with applicant's mother up to the end of December 2011, there was a tenant in the house. According to the respondent, the tenant vacated the house at the end of December 2011 when her lease expired; she alleged that she could not renew the lease since the house had been sold.

[10] She alleged that after the tenant had vacated the house in January 2012, applicant's mother requested the keys of the house and the gate so that she could show the house to the applicant who could decide on possible alterations after he had paid the balance in terms of the Agreement; the respondent denied that the keys were given to the applicant, and, she further denied giving the applicant possession of the house.

[11] She alleged that on the 16th January 2012, she held a meeting with applicant's mother at the latter's instance where she told her that the applicant was withdrawing from the Agreement of Sale since he could not secure funding; the applicant was not in attendance at the meeting. The meeting was held at the homestead of the respondent and attended by her husband. According to the respondent, she agreed to refund her the deposit as soon as possible.

[12] She further alleged that on the 17th and 18th January 2012 applicant's mother called them with her husband and persuaded her to reduce the purchase price failing which she would maintain that her son was withdrawing from the sale; she also alleged that the applicant's mother told her that according to her evaluations and in particular that of Roy Masina, the property was valued at E450, 000.00 (Four hundred and fifty thousand emalangeni). The respondent alleged that she told her that she had already accepted the repudiation and was working on refunding her the deposit paid.

[13] The respondent alleged that after the meeting of the 16th January 2012, she noticed that applicant's mother was still going in and out of the property with another evaluator Jeff Lowe; then she changed keys of the gate because she was not happy that people were going in and out of the property at her instance yet she had repudiated the contract.

[14] She denied giving the applicant and/or his mother possession and/or occupation of the house, and, alleged that she had given keys to the applicant's mother merely for her to show the house to the applicant so that he could decide whether he would like to make alterations. She argued that the Deed of Sale did not provide that applicant would be given possession of the house after paying the deposit and before he could pay the balance and taken transfer of the property.

[15] She further argued that it was never part of the Agreement that the applicant would carry out renovations of the house before he could pay the balance and take transfer of the property; however, she conceded that the applicant had not yet done renovations of the house. On the contrary, she said she was supposed to effect certain renovations on the house for the benefit of the applicant, but could not do so after applicant's mother had indicated to her that the applicant intended carrying out his own renovations and alterations of the house to his specifications; she alleged that she agreed verbally with applicant's mother before the 16th January 2012 that they would pay the applicant E10, 000.00 (Ten thousand emalangeni) towards renovations after he had paid the balance.

[16] The Attorney who drew the Deed of Sale called the parties to a meeting after being advised by applicant's mother that he was withdrawing from the Deed of Sale. The meeting was held on the 3rd February 2012 where applicant's mother disclosed that she had secured funding; she also alleged that applicant's mother insulted her and her husband. She further alleged that after the meeting of the 16th January 2012, she found a new tenant who moved in on the 1st February 2012.

[17] The respondent argued that the applicant has failed to satisfy the requirements of spoliation proceedings; that he has failed to plead facts

that demonstrate that he was in lawful and undisturbed possession of the property at the time it was allegedly taken by the respondent; that he has failed to plead facts that show how he acquired the alleged possession and when it was acquired.

[18] The respondent also argued that there are material disputes of fact relating to whether or not the applicant was in possession or occupation of the house. She argued that the applicant could not have been in possession or occupation of the house before the balance of the purchase price was paid and transfer effected.

[19] She further argued that there is a non-joinder of the applicant's mother or that at least she should have filed a confirmatory affidavit to set out what transpired between her and the respondent on the 16th January 2012.

[20] She argued *in limine* that the application is premature in so far as the applicant seeks an order compelling the respondent to comply with the contract of sale; and that he had failed to disclose the nature of the breach. Similarly, she argued that the applicant's prayers are not supported by the Deed of Sale on which he relies for his cause of action.

[21] She further argued *in limine* that the application was not urgent because he waited for a week after the meeting of the 3rd February 2012 to institute the proceedings.

[22] On the merits she denied that the balance of the purchase price had been paid or that transfers have been effected or that the applicant has complied with all the terms of the Contract.

[23] The respondent's husband also deposed to a confirmatory affidavit in support of the respondent; he further stated that he was seeing the bank guarantee for the first time.

[24] The applicant filed a replying affidavit stating that his mother is merely a third party to the Agreement and that it is binding between the parties. He further denied that his mother ever requested for the keys and argued that it is his wife who called the respondent requesting to see the house since the tenant had vacated the premises; and, that the respondent had agreed and was also present when the house was shown to him.

[25] He further alleged that the respondent gave them the keys and said they would need them; he also alleged that their carpenter was present and that he took measurements according to their specifications. He also alleged that the respondent excused herself while the carpenter was busy

taking measurements and said she had to rush home to do family chores. According to him, the respondent left both keys with them, and, they continued with preparations for renovations pending the approval of the loan to pay the balance of E520, 000.00 (Five hundred and twenty thousand emalangeni)

[26] He further alleged that it is his wife who called the respondent for a meeting to show them the valuation report from Mr. Roy C. Masina that it was very low; and his wife had asked for a reduction in that meeting in light of the valuation. He denied that his mother was involved or that she indicated an intention to withdraw from the sale.

[27] He further stated that, as a purchaser, he did not give a Notice of Cancellation of the Sale to the respondent as required by the Deed of Sale. He denied that the purpose of the meeting of the 16th January 2012 was to cancel the contract; and, he argued that the object of the meeting was to report on the progress of the evaluation. He further argued that if he had intended cancelling the contract, he would not have engaged the second evaluator Jeff Lowe to re-evaluate the property.

[28] He conceded that his mother played an active role during negotiations up to the time of signing the Deed of Sale; however, he insisted that she was a third party to the agreement. He further argued that the 28th

February 2012 was the date which he was given to pay the balance of the purchase price.

[29] The applicant argued that the bank guarantee was issued on the 27th January 2012 from Jeff Lowe's evaluation and, that this was communicated to the respondent before the meeting of the 3rd February 2012; he alleged that Attorney Mamba advised the respondent that the applicant had complied with all the obligations of the Deed of Sale including the payment of the full purchase price.

[30] He denied that he cancelled the contract either verbally or in writing on the 16th January 2012 or anytime thereafter; and, that on the contrary, it was the respondent who decided that she was no longer selling the house because of the problems she was encountering at her workplace with regard to the sale of the house.

[31] He argued that it was unlawful and in breach of the Deed of Sale for the respondent to lease out the premises on the 1st February 2012 when he had paid the deposit and had up to the 28th February 2012 to pay the balance of the purchase price. He confirmed finding the change of padlocks when he and his mother visited the premises with his builder to carry on with the preparations for renovations. He argued that the respondent in giving them the keys to the premises was tantamount to

giving them possession of the premises; and, that since they were given the keys on the 7th January 2012, they have been in peaceful, and undisturbed possession. He reiterated that the respondent gave them the keys to inspect the house and do alterations according to their specification; she gave a meter number to his mother to buy electricity units, and, that he registered for water on the first week of January 2012 with the Swaziland Water Services Corporation using the Deed of Sale.

[32] He denied that her mother was a necessary party to the proceedings, and, that she should have been joined. He argued that his mother merely facilitated the negotiations, and, that she was not a party to the contract.

[33] He argued that the respondent is in breach of the contract for four reasons; first, that she leased the house notwithstanding that they had concluded a contract of sale in respect of the house, and he had paid the requisite deposit; secondly, that she cancelled the contract notwithstanding his payment of the deposit; thirdly, that she locked the premises and changed padlocks; and fourthly, that the property was still registered in her name notwithstanding that he had paid the full purchase price. He argued that the contract allowed him to take occupation of the house upon payment of the full purchase price. He further argued that since he had complied with the terms and conditions of the deed of sale, the respondent ought to facilitate the process of transferring the property into this name.

[34] Eve Dunn deposed to an affidavit in which she confirmed that the meeting of the 16th January 2012 was to report on progress on the valuation of Roy Masina which was low. She denied advising the respondent that the applicant was withdrawing from the sale on the 16th January 2012 or anytime thereafter; according to her, she had indicated to the respondent that the applicant was to arrange for a second evaluation by Jeff Lowe since the one promised by the respondent had not arrived. She denied that she had a right to cancel the Agreement since she was a third party; she argued that her role was only limited to facilitating the negotiations leading to the conclusion of the contract.

[35] She denied insulting the respondent, and further confirmed that the respondent opened the premises for them on the 7th January 2012 in the presence of herself, the applicant, the applicant's wife and the carpenter who took measurements in the house.

[36] It is common cause that the parties concluded the contract of sale on the 24th June 2011 in respect of Lot No. 1076, Fairview North Township in Manzini measuring 700 square metres at a purchase price of E700, 000.00 (Seven hundred thousand emalangeni) payable as follows: a deposit of E180, 000.00 (One eighty thousand emalangeni) was payable within ten days of signature; and, the balance of E520, 000.00 (Five hundred and twenty thousand emalangeni) was payable on or before the 28th February 2012 in cash or bank guaranteed cheque.

[37] It is common cause that the deposit of E180, 000.00 (One eighty thousand emalangeni) was paid in terms of the contract within ten days of signature of the contract. Occupation of the property was to be taken by the purchaser upon payment of the full purchase price.

[38] The deed of sale provides that possession of the property shall be given to the purchaser who will be obliged to take possession from which date the purchaser will be liable for all municipal rates and taxes and/or fees payable on the property and from which date the property would be the sole risk, profit or loss of the purchaser. It is apparent from the deed of sale that possession of the property can only be given to the purchaser at the time when the purchaser has paid the balance of the purchase price; this is also the time when the purchaser should take occupation of the property.

[39] Similarly, on payment of the full purchase price, the applicant becomes entitled to the transfer of the property into his name; it is the applicant who is liable to pay all transfer costs, transfer duty and stamp duty to the seller's conveyancers who will in turn transfer the property into the name of the purchaser.

[40] It is not in dispute that the respondent gave the keys to the applicant so that they could inspect the house; the keys were left with the applicant

and his mother. However, leaving keys with them did not give them possession of the house; it could not have been the intention of the respondent to surrender possession of the house before the risk is passed to the applicant. Furthermore, possession of the house could not have passed to the applicant at the time since the deed of sale provides that occupation would only be allowed on payment of the full purchase price. It is apparent from the evidence that the applicant was never in possession and/or occupation of the house; hence, the issue of spoliation cannot arise in the absence of possession. In the circumstances prayer 2 directing the respondent to restore the premises to the applicant cannot succeed.

[41] The question whether or not there was possession and/or occupation of the premises is not a factual but a legal question to be determined in light of the contract between the parties. Similarly, the deed of sale provides that the property is sold "*voetstoots*", and, that the seller undertook to fit new water gutters, floor tiles, a veranda, roof and paint the house by the 1st January 2012. The applicant could not have effected renovations of the house before he received possession and/or occupation of the house. There are no material disputes of fact in the face of the application.

[42] The applicant's mother is not a necessary party to the proceedings, and, it is proper that she was not joined as a party to the proceedings. She does not have a direct and substantial interest in the matter. She is merely a third party to the contract; she cannot claim relief in respect of the same subject-matter. She does not have *locus standi* to claim any relief against the respondent. She cannot even approach the court to obtain an order irreconcilable with the order to be issued by the court. It is trite law that a party can only be joined in proceedings where that party has a direct and substantial interest in the matter:

- **Herstein and Van Winsen, the Civil Practice of the Supreme Court of South Africa, fourth edition, page 173, Juta & Co. Ltd**
- **Amalgamated Engineering Union v. Minister of Labour 1949 (3) SA 637 (A) at 660-1**

[43] *Herstein and Van Winsen* (supra) at page 170 state that if a third party has a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joined. Such a person is also entitled to demand as of right that he should be joined as a party. A direct and substantial

interest has been held to be an interest in the right which is the subject-matter of the litigation.

[44] His Lordship Fagan A.J.A. in the case of the Amalgamated Engineering Union v. Minister of Labour 1949 (3) SA 637 (A) at 659-660 stated the following:

> **"…the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also of course, be cases in which the court can be satisfied with the third party's waiver of his right to be joined…. It must be borne in mind, however, that even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.**
>
> **Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as *res judicata*. There may be further circumstances present which support an allegation of waiver or estoppel against him, but that is another matter."**

[45] *His Lordship Fagan A.J.A.* in the *Amalgamated Engineering Union v. Minister of Labour* (supra) at pages 172-173 employed two tests in order to decide whether a third party has a direct and substantial interest.

The first is to consider whether the third party would have *locus standi* to claim relief concerning the same subject-matter. The second is to examine whether a situation could arise in which because the third party has not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the court again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.

[46] It is apparent from the deed of sale that the applicant has not breached the contract at all; he paid the requisite deposit timeously, and, on the 27th February 2012, he furnished the respondent with a bank guarantee of the balance of the purchase price in accordance with the deed of sale. The contract expressly provides that the balance of E520, 000.00 (Five hundred and twenty thousand emalangeni) is payable on or before the 28th February 2012 in cash or bank guaranteed cheque.

[47] Clause 8 of the deed of sale provides the following:

> **"The parties agree that this Deed of Sale constitutes the entire contract between them and that there are no other conditions, stipulations, warranties or representations whatsoever made, other than such as may be included herein and signed by the parties."**

[48] Clause 9 of the deed of sale provides the following:

> **"The parties agree that this Deed of Sale shall remain suspended until the 1st January 2012 being its effective date. The Seller**

undertakes not to enter into any other Deed of Sale until the purchaser has communicated to her in writing of his intention to cancel this agreement. The Seller once having been paid the deposit of E180, 000.00 (One hundred eighty thousand emalangeni) cannot seek to cancel this agreement unless the purchaser is unable to pay the balance.

The parties agree that the Deed of Sale shall be subject to the suspensive condition that should the purchasers be unable to obtain a loan from a bank payable against the registration of a first bond over the property for the amount of E520, 000.00 (Five hundred and twenty thousand emalangeni) within a period of sixty (60) days from effective date hereof, this Deed of Sale shall lapse and that no duty to take transfer shall rest upon the purchaser. All other obligations will however remain until discharged by the purchaser."

[49] Clause 10 provides that the seller cannot bond the property in question or place same as security after the signing of this agreement. Furthermore, the contract clearly shows that it cannot be cancelled orally and/or by any other person except in writing by the parties to the contract. Similarly, the deed of sale constitutes the entire contract between the parties and no oral evidence can be adduced to prove the written contract.

[50] Inasmuch as the applicant's mother participated actively in the negotiations that culminated to the conclusion of the contract, she is not a party to the contract; and, she cannot cancel the contract as alleged or

at all. It is only the applicant who can cancel the contract by notice in writing to the respondent.

[51] It is also apparent from the contract that on payment of the balance of the purchase price, the respondent has a duty to transfer the property into the name of the purchaser. In the circumstances, it is incumbent upon the applicant to pay transfer costs inclusive of transfer duty and stamp duty to the Seller's Conveyancers in order for the transfer to be effected.

[52] The respondent has raised a number of technical objections in her Answering Affidavit which I have dealt with above. However, I agree with the principle of law applied by the Supreme Court of Swaziland with regard to technical objections. *Tebbut, JA* in the case of *Shell Oil Swaziland (PTY) Ltd v. Motor World (PTY) Ltd t/a Sir Motors* Appeal Case No. 23/2006 at pages 23-24 para. 39 and 40 stated that the current trend which is now well-recognised and firmly established is not to allow technical objections to less than perfect procedural steps to interfere in the expeditious and if possible inexpensive decisions of cases on their real merits. His Lordship stated that the court has observed a tendency among some judges to uphold technical objections *in limine* in order to avoid having to grapple with the real merits of a matter; he added that such an approach should be strongly discouraged.

[53] Quoting with approval the decision of *Plasket AJ* in the case of *Nelson Mandela Metropolitan Municipality and others v. Greyvenouw CC and others* 2004 (2) SA 81 (SE) at 95F – 96 A, para 40:

> **"Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the Rules. For instance, in *Trans-African Insurance Co. Ltd v. Maluleka* 1956 (2) SA 273 (A) at 278 *G. Schreiner JA* held that 'technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice' to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits'. In *Federated Trust Ltd v. Botha* 1978 (3) SA 645 (A) at 654 C-F *Van Winsen AJA* held that the rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts and that where one or other of the parties has failed to comply with requirements of the Rules or an order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects for which the Rules were designed…. Most recently, in *DF Scott (EP) (PTY) Ltd v. Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at para. 9 *Harms JA* held that the Rules are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right contained in section 34 of the Constitution."**

[54] The Parole Evidence Rule serves as a very important and fundamental purpose of ensuring that where parties to a contract have recorded their

agreement in writing, the resulting document becomes the sole evidence of the terms of the contract. It is trite law that when a contract has been reduced to writing no evidence may be given of its terms except the written document itself nor may the contents of such document be contradicted, altered, added to or varied by oral evidence. The written document is regarded as the exclusive memorial of the transaction. The primary objective and purpose of the Parole Evidence Rule is to prevent a party to a written contract from seeking to contradict, add to or modify the document by reference to extrinsic evidence and in the process redefine the terms of the contract. It is settled law that the exception to the Parole Evidence Rule occurs where the transaction has been tainted by mistake, fraud, illegality or duress; in those instances, the document may be added to, varied, contradicted or vitiated in whole or in part. However, the exception does not extend to cases of innocent misrepresentation as opposed to fraudulent misrepresentation.

- **Lourey v. Steedman 1914 AD 532 at 543**
- **Margquard & Co. v. Biccard 1921 AD 366 at 373**
- **Union Government v. Vianini Ferro – Concrete pipes (PTY) Ltd 1941 AD 43 at 47**
- **Johnston v. Leal 1980 (3) SA 927 (A) at 943B**
- **Soar v. Mabuza 1982 – 1986 SLR 1 at 29 – 3A**

[55] The parties concluded a written contract, and, there is no allegation and/or evidence that the contract is tainted by mistake, fraud, illegality or duress; hence, the contract constitutes the sole and exclusive evidence of the terms of the contract and no extrinsic evidence is admissible to add to or vary, modify or contradict the document. The evidence by the respondent that the applicant's mother repudiated the contract is therefore rejected. The respondent is obliged to comply with the terms of the contract.

[56] The application succeeds in part as follows:

(a) The respondent is directed to comply with the terms and conditions of the Deed of Sale signed by the parties on the 24th June 2011.

(b) The respondent is directed to transfer the property into the name of the applicant.

(c) The applicant is directed to pay transfer costs including transfer duty and stamp duty to the respondent's conveyancers in order to facilitate the registration of transfer.

(d) No order as to costs

_____

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT