



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 613/2012

In the matter between:-

**SIMILE B. DLAMINI**

**Applicant**

and

**NOAH NKAMBULE**

**Respondent**

**Neutral citation:** *Simile B. Dlamini v Noah Nkambule*  
(613/2012) [2012] SZHC148 (6<sup>th</sup> July 2012)

**Coram:** HLOPHE J

**Heard:** 29<sup>th</sup> June 2012

**Delivered:** 6<sup>th</sup> July 2012

**For the Applicant:** Mr. S. Nyoni

**For the Respondent:** Mr. S. Bhembe

**Summary:**

**Civil law - Contract of sale of land - Cancellation of same - when competent - Enforcement of contracts - Specific Performance - When order of same appropriate.**

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**JUDGMENT**

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- [1] On the 7<sup>th</sup> February 2012, the Applicant and Respondent concluded a written agreement of sale of a certain piece of land fully described as Lot No. 94, Makholokholo Township, Mbabane, Swaziland. The Respondent was the seller whilst the Applicant was the purchaser of the piece of land concerned.
- [2] In terms of clause 2 of the said agreement the purchase price was a sum of E225 000.00 which was to be secured through a bank or a Building Society guarantee to be provided to the purchaser within 30 days from date of signature to the Deed of Sale.
- [3] It would appear from the facts, at least from the Applicant's side, that even before the lapse of the 30 days period for the furnishing of the guarantee, the parties met or had occasion to discuss the matter whereupon the Respondent informed the Applicant that he had since secured a better offer for the land already sold to the Applicant and then indicated a desire to cancel the said agreement whilst indicating some reluctance to sign the transfer documents. This is alleged to have occurred on the 20<sup>th</sup> of February 2012. Of course the Respondent disputes having told the Applicant the above although he confirms his decisions to cancel the said agreement on some ground set out herein below.
- [4] It is however not in dispute that on the 23<sup>rd</sup> February 2012, the Applicant wrote a letter to the Applicant in terms of which she advised the Respondent that she was not accepting his advice that he was cancelling the Deed of Sale because of having found a better offer. The Applicant also insisted in the said letter upon transfer of the property being effected failing which proceedings to compel same would be instituted. The Applicant went on to confirm having secured a guarantee in terms of the Deed of Sale

and further advised the Respondent that that being the case, he could not purport to cancel the agreement for the reasons put forth.

[5] On the other hand the Respondent responded by letter dated the 24<sup>th</sup> February 2012. In terms thereof the Respondent confirmed previous discussions held with the Applicant and also went on to confirm its intention to cancel the Deed of Sale signed previously between the parties. Respondent clarified he was no longer keen on the agreement because family pressure had been put upon him resulting in him deciding not to continue with the sale. He stated that when he concluded the agreement of sale, he had not sought the consent of his wife, a co-owner of the property. He offered to enter into an agreement to mitigate whatever losses / damages the Applicant suffered or was to suffer as a result of the cancellation of the Deed of Sale.

[6] In response to the said letter, the Applicant on the 27<sup>th</sup> February 2012, instituted the current proceedings under a certificate of urgency in terms of which he sought an order of court *inter alia* interdicting the transfer of the property concerned to any other person other than the Applicant pending finalization of the matter as well as a rule nisi calling upon the Respondent to show cause why he should not be directed to sign and execute all documents necessary to pass transfer of the property concerned to the Applicant, failing which the Registrar of the High Court be authorized to sign and execute all documents necessary to pass transfer of the property concerned to the Applicant. There was also a prayer for costs of the Application.

[7] This application was founded on the affidavit deposed to by the Applicant herself. In terms of this application the Applicant

reiterated the foregoing facts particularly that the parties herein had concluded a written Deed of Sale in terms whereof the Applicant had purchased from the Respondent a certain piece of land, which the latter was refusing to transfer to her claiming *inter alia* that he had not sought and obtained the permission of his wife before purporting to sell same to the Applicant.

[8] Whilst the Applicant contended that the Respondent was unjustifiably refusing to sign and execute all documents necessary to pass transfer to her, notwithstanding her having complied with all her obligations in terms of the agreement, the Respondent contended in his Answering Affidavit that the Applicant had not complied with such obligations because, instead of delivering to him personally the guarantee, the Applicant had delivered same to the Respondent's attorney who was the conveyancer chosen by the Respondent. The Respondent contended that the applicant had violated the Deed of Sale by failing to deliver the guarantee personally to it. This alleged breach of the agreement by the Applicant became the centre of the Respondent's case in argument as it had been agreed his counsel be the one to address the court first. It became clear that the other grounds alleged by the applicant to be forming the basis of the intended cancellation, were not being strongly relied upon by the Respondent. This included the ground that a better offer had since been found by the Respondent and that his wife had not been consulted.

[9] In his argument, Applicant's counsel contended that the Respondent's main ground for cancellation of the agreement was an afterthought because it was not mentioned in the letter of the 24<sup>th</sup> February 2012 as the ground for cancellation. Instead, it was argued, the ground for cancellation at the time was the Respondent's having secured a better offer and later that the

Respondent's wife had not been consulted. According to the Applicant there was no merit on these grounds because firstly the Respondent was bound or obliged to pass transfer of the property in question to the Applicant as provided for in the agreement. Furthermore his having secured a better offer was not one of the grounds contemplated by the parties in terms of the Deed of Sale to be one of the grounds entitling a party to withdraw therefrom and cancel the said agreement. The same thing applied to the contention that the Respondent's wife's consent had not been obtained. The contention on this latter ground as I understood it was simply that it could not lie with the Respondent to claim that his wife's consent had not been sought and obtained before the sale, when he was the person who had signed the agreement whilst fully aware that his wife had not been consulted by him.

[10] On the ground that the Applicant had breached the agreement by not handing over the guarantee to the Respondent himself but to his attorneys, the Applicant denied any wrong doing stating that this ground was an afterthought and that the said guarantee had in any event been given to the Respondent's attorneys and conveyancers because those were the people meant to effect the transfer in terms of the agreement and the guarantee had been requested by them for such purposes. In any event, the argument further went, the Respondent was alleging a breach of the agreement by the Applicant. If this were so, the agreement was clear per paragraph 9 of the Deed of Sale, as to what should have happened where a breach of the said agreement was contended.

[11] Clause 9 of the agreement, provided as follows:-

*"Should the purchaser fail to make any payments provided for herein or otherwise commit a Breach of any of the*

*conditions hereof, and remain in the (sic) default for 7 (seven) days after dispatch of a written notice by registered post requiring her to make such payment or to remedy any other breach, the seller shall be entitled to, and without prejudice, to any other rights available at law.”*

[12] It was argued that the Respondent had not complied with the foregoing clause of the agreement such that even if there had been such a breach, there would have been a need to give the purchaser a 7 days notice as contemplated by clause 9. Since this aspect of the agreement, which is a condition precedent for any cancellation based on a breach of the agreement had not been complied with, the Respondent’s cancellation cannot stand. It was argued further, the Respondent should be ordered to sign and execute all the necessary documents in order for transfer to be passed.

[13] Having considered the submissions by both parties as well as having read all the papers filed of record, I am convinced that the purported cancellation of the agreement by the Respondent is irregular. I in fact agree with the Applicant that the breach sought to be relied upon is nothing but an afterthought which however cannot take the Respondent’s case anywhere. Clearly if such a ground was being relied upon, then the cancellation had to be done in terms of the said paragraph where a 7 days notice should have been given prior. I have no doubt a cancellation that does not follow the dictates of paragraph 9 of the agreement is improper and cannot be relied upon.

[14] Furthermore, and in so far as it concerns the then intended cancellation on the grounds that the Respondent had secured a better offer, such would not be proper as it does not amount to an

agreed ground for cancelling the agreement, which was otherwise binding between the parties and therefore had to be given effect to by this court.

[15] I agree that in so far as the Respondent sought to rely on an alleged lack of consent by his wife to the sale concerned, such cannot lie with him to raise as he is the one who concluded the said agreement fully aware of this anomaly if anomaly it is. Secondly it would amount to him lifting himself with his own bootstraps were he to be allowed. The law does not allow one to do so. In any event, it cannot be disputed that Respondent was the manager of the joint estate and therefore was entitled to take decisions that affect the welfare of the assets of the joints estate.

[16] In my view this case is about the sanctity of contracts. Once concluded, a contract should be enforced as it embodies the rules agreed upon by the parties themselves subject to its being lawful. It is for this reason that **Visser and others** in their book, **Gibson South African Mercantile and Company Law, Seventh Edition at page 9** had the following to say:-

*“It has been well said that the law of contract differs from all the other branches of the law in one remarkable respect...‘generally speaking, [the parties] are free to make their own rules’.*

[17] I have not been referred to any aspect of the contract concerned being unlawful and indeed the parties seek to rely on it except differing on what it means. As indicated above I have come to the conclusion that the contract reached by the parties provides that the Respondent sold the land concerned to the Applicant, to whom it should be transferred unless it were to be shown that he had

breached same as alleged by the Respondent. The alleged breach cannot however be relied upon given that the Respondent himself did not notify the Applicant of the alleged breach within the specified period. I now have to consider whether the order sought can be granted in view of its being in the form of specific performance which is a discretionary remedy.

[18] The position is trite that the grant of such an order is a discretionary issue for the court seized with the matter. See in this regard ***Benson v SA Mutual Life Insurance Society 1986 (1) SA 151 (T)***, as well ***LTC Harms' Amler's Precedents of Pleadings, Sixth Edition, Lexis Nexis*** 2003 at page 316.

[19] After considering all the facts of the matter, I am not convinced there exists reasons which would make the grant of the specific order sought inappropriate.

[20] Consequently I am of the view that the Applicant's application should succeed and I make the following order:-

1. The Respondent be and is hereby directed to sign and execute all documents necessary to pass transfer of certain Lot No. 94, Makholokholo Township, Mbabane, Swaziland into the name of the Applicant, which exercise he should carry out within 21 court days of the grant of his order as opposed to the 14 days sought by the Applicant.
2. Should the Respondent fail to sign and execute all such documents as mentioned in order 1 above, the Registrar of the High Court be and is hereby authorized to sign and execute all documents necessary to pass transfer of the



said Lot No. 94, Makholokholo Township, Mbabane, Swaziland into the name of the Applicant.

3. The Respondent be and is hereby ordered to pay the costs of this application on the ordinary scale.

**Delivered in open Court on this the .....day of July2012.**

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**N. J. HLOPHE  
JUDGE**