



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

Civil Case No: 206/2013

In the matter between:

**CONICAL HILL (PTY) LTD**

**APPLICANT**

**AND**

**MOTSA INVESTMENTS (PTY) LTD**

**FIRST RESPONDENT**

**THE REGISTRAR OF DEEDS**

**SECOND RESPONDENT**

**THE ATTORNEY GENERAL**

**THIRD RESPONDENT**

Neutral citation: *Conical Hill (Pty) Ltd vs Motsa Investments (Pty) Ltd & 2 others (206/2013) [2013] SZHC169 (9<sup>th</sup> August 2013)*

**CORAM:**

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

**Summary**

Contract for the sale of land – applicant seeks an order for specific performance for the transfer of property against payment of the purchase price – it further seeks an interdict restraining the first respondent from selling the property being the subject of a contract between the parties – applicant also seeks an interdict restraining the transfer of the property to an innocent third party – held that the applicant is not entitled to the specific performance sought on the basis that the property has been sold to a *bona fide* third party – held further that the applicant is not entitled to the interdict sought on the basis that it acted in breach of the contract and the first respondent is in the circumstances entitled to cancel the contract and sell the property to another person – application dismissed with costs including certified costs of counsel.

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**JUDGMENT  
9 AUGUST 2013**

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[1] This is an urgent application brought on a certificate of urgency for a *rule nisi* to issue in the following terms: firstly, that the first respondent be interdicted from selling the property known as Portion 4 (a portion of portion 1) of Farm No. 539 situated in the district of Lubombo, Kingdom of Swaziland, in extent of 100 hectares held in title by the first respondent to any third party. Secondly, directing the first respondent to comply with the Deed of Sale it concluded with the applicant and to do all such things as may be required and to sign all such documentation as may be required to effect the transfer of the property referred to in prayer 2 above into the name of the applicant against delivery by applicant of a guarantee payable to the first respondent against transfer of the property into the name of the applicant. Thirdly, that the second respondent be interdicted from effecting transfer of the property described in paragraph 2 above into the name of any party other than the applicant. Fourthly, they further sought an order directing the deputy sheriff for the Lubombo region to be authorised to sign for and on behalf of the first respondent any such documentation as may be necessary to effect transfer of the property into the name of the applicant in the event of the first respondent failing to do so. The *rule nisi* was subsequently issued.

[2] The applicant alleges that it is a locally registered company; a certificate of incorporation is accordingly annexed dated 13<sup>th</sup> December 2012 and marked annexure 'A'. Similarly, a copy of a resolution to institute legal proceedings is annexed herein and marked annexure 'B'. Its object is to purchase farming land in the country as well as related farming activities. The applicant contends that the first respondent is

currently the registered owner of portion 4 (a portion of portion 1 of Farm No. 539, situated in the Lubombo district by virtue of a Deed of Transfer No. 900/2006 dated 20<sup>th</sup> November 2006; a copy of the Title Deed is annexed hereto and marked annexure 'C'.

[3] The applicant alleges that on the 29<sup>th</sup> November 2012, the parties concluded a contract of Sale in terms of which the applicant purchased and the first respondent sold, the property at a purchase price of E4 000 000.00 (four million emalangeni). The purchase price was secured by a bank guarantee to be delivered to the first respondent within thirty working days on which the contract becomes effective on the 29<sup>th</sup> November 2012; the guarantee was to secure payment of the purchase price to the first respondent on registration of transfer of the property into the name of the applicant. Possession and occupation of the property would be given to the applicant on the date of registration of the property; and, the property was sold *voetstoots*.

[4] It was further provided that in the event that the applicant failed to make payment as provided for in the agreement or otherwise commit a breach of any conditions thereof and remains in default for seven days after despatch of a written notice by registered post requiring the applicant to make such payment or to remedy any other breach, the first respondent would be entitled to either claim immediate payment of the entire purchase price, alternatively, it would be entitled to cancel the contract and recover any damages that it might have suffered as a result of the breach of the agreement. The Deed of Sale also provided that any such notice to be given

would be deemed to be received by the addressee if such notice is posted by pre-paid registered post to such addressee five days from date of posting whilst all notices intended for the purchaser to be sent to it by the e-mail address contained in the contract.

[5] The applicant alleges that the 'dies' for delivering the bank guarantee by the applicant expired on the 16<sup>th</sup> January 2013 due to the fact that a portion of the time period during which the applicant had to deliver the guarantee fell over the festive season such that its shareholders experienced difficulties transferring funds from South Africa to Swaziland. The applicant further alleges that by the 15<sup>th</sup> January 2013, half of the purchase price was already transferred to a local bank account held at Standard Bank in Big Bend; and, the balance of the purchase price was transferred into the same bank account on the 28<sup>th</sup> January 2013, and, that on the same day, instructions were given that the bank should issue a guarantee in terms of clause 2 of the agreement.

[6] The applicant contends that the bank did not issue the guarantee as instructed; and, it was further instructed to effect the transfer of the purchase price into the Trust Account of applicant's attorneys, Howe Masuku and Nsibandze Attorneys, with an instruction to issue the guarantee. However, on the 4<sup>th</sup> February 2013, its attorneys advised that they were still not in receipt of the guarantee, and, that the first respondent was threatening to cancel the contract if it was not received before 12 noon the next day.

[7] The applicant contends further that on the 5<sup>th</sup> February 2013 at approximately 1230 hours, its attorneys were in receipt of the full purchase price, and, that they were instructed to issue the guarantee and tender payment against registration of transfer. Its attorneys allegedly arranged a meeting with the representative of the first respondent that afternoon to hand over the guarantee. It is not in dispute that the meeting took place in the afternoon after the deadline given on the previous day. At that meeting applicant's attorneys were advised that the property had already been sold. It is also not in dispute that the first respondent had advised the applicant's attorneys on the previous day that he had found other potential buyers; hence, the deadline given. The applicant contends that it subsequently learned that the property had been sold on the 31<sup>st</sup> January 2013. It further contends that the first respondent did not issue a Notice in terms of clause 7 of the contract calling upon the applicant to remedy the breach; and consequently, that the first respondent was not entitled to cancel the contract or sell the property to a third party prior to issuing the Notice in terms of Clause 7 of the contract.

[8] The application is opposed by the first respondent. In *limine* it contends that the applicant has failed to comply with Rule 6 (25) (a) and (b) of Rules of this Court; and, that the applicant has failed to make out a case in the founding affidavit to justify why this matter should be enrolled as one of urgency. The first respondent argues that no sufficient averments are set out in the founding affidavit to warrant this Court to invoke the urgency procedures.

[9] The first respondent further contends, in *limine*, that the application has been overtaken by events and thus become academic on the ground that the property has already been sold to an innocent third party, and, that the sale is *perfecta*. It further contends that in a contract of sale, ownership passes to a bona fide purchaser on conclusion of the contract, and, that the interdict sought herein is incompetent in law and academic. The first respondent argues that the possible available remedy open to the applicant is to sue for damages. The first respondent further argues, in *limine*, that there is a dispute of fact in these proceedings which render motion proceedings incompetent, and, that these disputes were foreseeable. However, it does not state the nature of these disputes.

[10] The first respondent contends, in *limine*, that the registered sole Director and proprietor of the applicant is Phila Gamedze, and, that the people who took the resolution cannot in law institute these legal proceedings against the first respondent because they do not have the requisite legal relationship with the company; and, it was further argued that only the said Phila Gamedze has the capacity to sue on behalf of the company, and that the deponent Petrus Grubbelaar is not a director of the applicant company and has no power to sue on its behalf. It was further argued that the purported resolution by the applicant does not even name the designated position of the deponent as well as the two people named in the resolution of the applicant. To that extent it was argued that the deponent has no *locus standi* to sue and that there is no evidence that he was appointed by the said Phila Dlamini; hence, the resolution is invalid.

[11] The first respondent further argues, in *limine*, that the applicant has not complied with section 34 of the Companies Act of 2009 which deals with pre-incorporated contracts, and, that the applicant in its application relies on a contract that was concluded before the company was incorporated and registered. It was argued that the Deed of Sale was signed on the 29<sup>th</sup> November 2012 prior to the incorporation and registration of the applicant; and, that in terms of section 34 (b) of the Companies Act 2009, when registering the company, any contract it concludes before incorporation should be delivered to the Registrar of Companies simultaneously with the delivery of a Memorandum and Articles of Association in terms of section 52. Section 34 (a) provides that the Memorandum must contain as one of its objects the adoption or ratification of such a contract that was entered before incorporation. It was argued that the applicant didn't comply with sections 34 and 52 of the Companies Act; hence, the contract sought to be relied upon by the applicant is invalid.

[12] On the merits the deponent who represented the first respondent in the conclusion of the contract, Moses Motsa, denies ever dealing with the applicant's deponent, Petrus Grobbelaar. He argues that he dealt with applicant's Attorney Sabelo Masuku in all negotiations relating to the procurement of the first respondent's farm and, that the founding affidavit deposed by Petrus Grobbelaar constitutes hearsay and should be struck off in its entirety. Mr. Motsa however concedes that Attorney Sabelo Masuku had disclosed that he was acting on behalf of his South African clients which he did not mention. To that extent the first respondent contends that Petrus

Grobbelaar does not have authority to depose to the founding affidavit since he does not have a legal relationship with the applicant company, and, that the resolution is invalid and cannot stand in law to support the application.

[13] The first respondent contends that prior to the conclusion of the Deed of Sale which was concluded on the 29<sup>th</sup> November 2012, it concluded an initial Deed of Sale on the 12<sup>th</sup> September 2012. In terms of this initial agreement the applicant, though still a company to be incorporated, and at that time using the name Vermaak's concession (Pty) Ltd wished to procure the same property which is the subject of this application; the applicant was represented by Attorney Sabelo Masuku. However, the initial agreement fell through because the applicant could not pay the purchase price.

[14] Mr. Motsa contends that Attorney Sabelo Masuku subsequently negotiated another contract for the purchase of the property; and, that he reluctantly concluded the Deed of Sale on the 29<sup>th</sup> November 2012 on the basis that he doubted the applicant's capacity to pay the purchase price. Mr. Motsa further contends that the contract became effective on the 29<sup>th</sup> November 2012, and, that the applicant had until the 30<sup>th</sup> December 2012 to pay the purchase price, that is thirty days of signature.

[15] Mr. Motsa further contends that at the beginning of January 2013, he had various discussions with Attorney Sabelo Masuku and made numerous demands for the purchase price to be paid; and, that on the 10<sup>th</sup> January 2013, he telephoned the said Attorney and told him that his clients were given seven days notice to remedy



their breach in terms of the agreement of sale failing which the agreement would be cancelled. The purchase price was not forthcoming, and, the first respondent concluded another Deed of Sale on the 31<sup>st</sup> January 2013 with Andrew Batchelor, representing a company to be formed, and an innocent third party.

[16] The first respondent denies as alleged that the Shareholders of the applicant had difficulty transferring funds from South Africa to a Swaziland bank account; and, that the only shareholder Phila Gamedze has not deposed to any affidavit confirming these difficulties. The first respondent further denies as alleged that as at the 15<sup>th</sup> January 2013, half of the purchase price had been transferred to Standard Bank in Big Bend. It also denies that as at the 28<sup>th</sup> January 2013, the full purchase price had been transferred to Standard bank in Big Bend, and, that the bank was instructed to issue a guarantee on the 2<sup>nd</sup> February 2013. It was argued that no reasons were advanced why the bank could not issue a guarantee when such funds belonging to the applicant were available and held by the bank. Similarly, no documentary evidence is annexed of the alleged deposits made with the bank or a confirmatory affidavit by the bank that such funds were deposited in the bank as alleged.

[17] The first respondent concedes that the agreement provides for a Notice to be sent by way of a registered post; however, it contends that the Notice given to Attorney Sabelo Masuku as representative of the applicant is sufficient and adequate on the basis that at all material times it dealt with him. Furthermore, it was argued that the applicant was not yet incorporated.

[18] The first respondent contends that the applicant failed to comply with the terms of the contract; hence, it cannot claim specific performance for the transfer of the property to itself. It was further argued that the applicant has failed to demonstrate a right entitling it to be granted an interdict to prevent the first respondent from transferring the property to an innocent third party. To that extent it was argued that the applicant has an alternative remedy of suing for damages against the first respondent.

[19] In its replying affidavit the applicant contends that the contract is still enforceable on the basis of the interim interdict issued on 18<sup>th</sup> February 2013 in terms of which the first respondent is interdicted from selling the property. However, this contention overlooks the fact that the first respondent sold the property on the 31<sup>st</sup> January 2013 to the innocent third party.

[20] The applicant denies that it had until the 30<sup>th</sup> December 2012 to pay the purchase price and argued that the thirty days working period envisaged by clause 2 of the contract of sale lapsed on or about 8<sup>th</sup> January 2013. However, this does not advance the applicant's case because it had not delivered the guarantee to the first respondent on the 31<sup>st</sup> January 2013 when the property was sold to an innocent third party.

[21] Clause 2 of the contract concluded on the 29<sup>th</sup> November 2012 provides the following:

**“The purchase price is the sum of E4 000, 000.00 (four million emalangeni). The purchase price shall be secured by a bank or building society guarantee which shall be delivered to the seller within 30 (thirty) working days from the date on which this Deed of Sale becomes effective. The guarantee shall secure payment of the purchase price to the seller on registration of transfer of the property into the name of the purchaser.”**

[22] It is apparent from a reading of clause 2 of the contract that the alleged payment into the Trust Account of the full purchase price could not comply with the agreement. Similarly, the alleged bank guarantee issued by standard Bank on the 27<sup>th</sup> February 2013 would not comply with the Agreement. The applicant concedes at paragraph 12 of the replying affidavit that it did not deliver the guarantee on time; however; it is argued that such failure does not invalidate the Deed of Sale in view of the failure by the first respondent to comply with clause 7 by giving Notice of Cancellation by means of a registered post to the applicant.

[23] Clause 7 provides the following:

**“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 default of seven (7) days after dispatch of a written notice by registered post requiring him 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.:**

- (a) Claim immediate payment of the entire purchase price provided for under this Deed of Sale, although not otherwise due by the purchaser under this Deed of Sale; or**
- (b) Alternatively to the above, the Seller shall be entitled to cancel this Deed of Sale and to recover any damage that he may have suffered as a result of the breach of this agreement by the purchaser.”**

[24] Clause 7 makes it abundantly clear that a failure to furnish a bank guarantee to the Seller within thirty working days of signature entitles the Seller to cancel the contract provided that the purchaser remains in default of seven days after a Notice requiring compliance thereof. The requirement of a written Notice by registered post is intended to ensure that the Notice reaches the purchaser. The purchaser does not dispute that the Notice came to his knowledge when it was conveyed by Moses Motsa, the representative of the first respondent. Similarly, it is not denied that the said Attorney Sabelo Masuku did not represent the applicant in the negotiations which led to the conclusion of the contract or in the present proceedings; hence, the applicant cannot rely on clause 7 to avoid the consequences of its breach of the contract.

[25] The applicant argues that it is a duly registered Swazi Company with one nominal shareholder and Director pending registration of the shareholders who will also be Directors of the company, being Petrus Grobbelaar, Dr. S.B. Pringle and Mr. M.J. Vermaak. It was contended that the applicant appointed Attorney Sabelo Masuku to negotiate with the first respondent the purchase of the property, and, that he acted on the instructions of the applicant at all material times. Applicant's attorney has deposed to a supporting affidavit in which he confirms these contentions.

He further contends that Moses Motsa, at the time of conclusion of the contract was aware that the applicant was not yet registered and that the applicant was represented by Petrus Grobbelaar.

[26] It is apparent from annexure 'D', the Deed of Sale, that the applicant is a company to be formed and duly represented by Petrus Grobbelaar by virtue of a Resolution dated 7 November 2012. In addition Petrus Grobbelaar signed the Deed of Sale on behalf of the applicant on the 29<sup>th</sup> November 2012. The attorney registered the applicant as a company on the 13 December 2012 as reflected in annexure 'B', and he disclosed that Phila Gamedze is merely a nominee of the applicant, and, that he is employed by the attorney's law firm. The Attorney concedes that he is currently attending to the registration of Petrus Grobbelaar, Jacobus Vermaak and Sydney B. Pringle as shareholders and directors of the applicant. In the circumstances the point of law raised by the first respondent of '*locus standi in judicio*' cannot succeed.

[27] Similarly, the point of law relating to the failure to comply with section 34 of the Companies Act, 2009, cannot succeed in view of annexure 'RA2', being a special resolution amending the company's main objects on the Memorandum of Association. The resolution was taken on the 18<sup>th</sup> February 2013 after the incorporation of the applicant by the Directors of the company, and, it provides *inter alia*:

**“1. It was resolved that the company's main objects on the Memorandum of Association be and are hereby amended as follows:**

Inserting a new paragraph 2.11 to read that:

**‘The Deed of Sale signed between Motsa Investments (Pty) Ltd and Conical Hill (Pty) Ltd (pre-incorporation) dated 29<sup>th</sup> November 2012 for the sale of Portion 4 (a Portion of Portion 1 of Farm No. 539, Lubombo) is hereby ratified or adopted by or otherwise made binding upon and enforceable by Conical Hill (Pty) Ltd after it has been registered as if it had been duly formed, incorporated and registered at the time when the deed was made and signed.**

**2. We hereby certify that the resolution was passed and approved by the shareholders of the company.”**

[28] The Point of Law raised by the first respondent is terms of Section 34 of the Companies Act No. 8 of 2009 cannot therefore succeed in light of the Special Resolution. Section 34 thereof provides.

**“34. Any contract made in writing by a person professing to act as an agent or trustee for a company not yet formed, incorporated or registered shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been registered at the time when the contract was made if:**

- (a) The memorandum contains as one of the objects the adoption or ratification of such contract; and**
- (b) The contract or a certified copy thereof is delivered to the Registrar simultaneously, with the delivery of the memorandum and articles of association in terms of section 52.”**

[29] It is not in dispute that the property was sold to an innocent third party on the 31<sup>st</sup> January 2013, and, that this application was lodged on the 13 February 2013. The sale cannot legally be interdicted because it has already taken place and, ownership has passed to the *bona fide* purchaser. Similarly, transfer to the innocent third party cannot be interdicted because it follows the sale as a matter of cause.

[30] The applicant has referred this Court to *Bernard v. The Lander* 1977 (3) SA 932 (C) as authority for the proposition that the Court can still interdict the transfer to a *bona fide* purchaser in favour of the first purchaser. In that case the applicant purchased a house from the respondent and on the following day the respondent sold the property to a *bona fide* purchaser. The property had not yet been transferred to the *bona fide* purchaser when the application was brought for an interdict prohibiting the transfer to the *bona fide* purchaser. The Court held that the applicant as first purchaser enjoyed a personal right ranking in preference to that of the second *bona fide* purchaser and granted the interdict prohibiting the transfer to the second *bona fide* purchaser. The Court further held that the applicant was entitled to specific performance against the respondent seller.

[31] The facts of *Bernard v. The Land* (supra) are distinguishable from the present case. In the present case the applicant has breached the contract by failing to deliver a bank guarantee as contemplated by clause 2 of the Deed of Sale. In addition the first respondent has already invoked clause 7 of the contract and cancelled the contract by giving a seven days Notice to the applicant to remedy the default but it failed to do so.

Clause 7 allows the seller in those circumstances to cancel the contract. When the first respondent sold the property to the *bona fide* purchaser, no contract existed between the parties.

[32] Whatever indulgencies which the first respondent might have given to the applicant should not be considered as a waiver to the rights of the first respondent.

Clause 8 of the Deed of Sale makes this point very clear:

**“8. Any latitude or extension of time which may be allowed by the Seller to the Purchaser in respect of any payment provided for herein or any matter or thing which the purchaser is bound to perform or observe in terms hereof shall not under any circumstances be deemed to be a waiver of the Seller’s right subsequently to require strict and punctual compliance with cash and every provision or terms hereof and failing such compliance to cancel the Deed of Sale as provided for in this agreement.”**

[33] The applicant seeks an interdict restraining the first respondent from selling the property; it further seeks an interdict restraining the first respondent from effecting transfer of the property into the name of the *bona fide* purchase. The requirements for an interim interdict are well-settled. In the case of *Reckitt & Colman SA (PTY) Ltd v. S.C. Johnson & Son (SA) (Pty) Ltd* 1995 (1) SA 725 (TPD) at 729 -730 *Southwood J* said:

**“The applicant seeks interim relief. The applicant must therefore establish:**

**(1) A clear right or, if not clear, that it has a prima facie right;**



- (2) That there is a well – grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted;
- (3) That the balance of convenience favours the grant of an interim interdict; and
- (4) That the applicant has no other satisfactory remedy....

When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court' approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts, obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant, it cannot succeed ....

Where the applicant's right is clear and the other requisites of an interdict are present no difficulty presents itself about granting an interim interdict. Where however, the applicant's prospects of ultimate success are nil, obviously the Court will refuse an interdict.”

See also *Webster v. Mitchell* 1948 (1) SA 1186 W at 1186 -1189.

[34] *Holmes JA in Eriksen Motors Ltd v. Protea Motors and Another* 1973 (3) SA 685 (AD) at 691 said:

“Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by *Innes JA in Setlogelo v. Setlogelo* 1914 A.D. 22, at 227. In general the requisites are:

- (a) A right which, though prima facie established, is open to some doubt;

- (b) A well-grounded apprehension of irreparable injury;
- (c) The absence of ordinary remedy.

**In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of 'some doubt' the greater the need for the other factors to favour him. The Court considers the affidavit as a whole, and the interrelation of the foregoing consideration according to the facts and probabilities."**

[35] It is apparent from the evidence that the applicant has failed to show that it is entitled to the interdict sought. It does not have a *prima facie* right let alone a clear right to stop the sale of the property or to prohibit a transfer of the property to the *bona fide* purchaser. The applicant breached the contract, and, the first respondent was in the circumstances entitled to cancel the contract and sell the property to another person. In the absence of a *prima facie* right, it becomes unnecessary for me to consider the other essential elements of the remedy; with regard to the requirement of a *prima facie* right, the applicant needs to demonstrate that it has prospects of success for the principal relief.

[36] Accordingly the following order is made:

- (a) The *rule nisi* is discharged.

(b) The application is dismissed with costs, including the certified costs of Counsel.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

For Applicant

Advocate D. Smith

Instructed by John Henwood

For Respondent

Advocate P. Flynn

Instructed by Attorney Sibusiso Shongwe