



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 133/2011

In the matter between:

NORMAN NGCOBO

Plaintiff

And

ANDRIES NCANE TSHABALALA

1st Defendant

REGISTRAR OF DEEDS

2nd Defendant

WELILE EMMANUEL MABUZA

3rd Defendant

THE ATTORNEY GENERAL

4th Defendant

**Neutral citation: Norman Ngcobo v Andries Ncane Tshabalala & 3 Others
(3814/2011) [2013] SZHC 23 (28th February 2013)**

Coram: M. Dlamini J.

Heard: 5th October 2012

Delivered: 28th February 2013

Sale of immovable – duty of seller to clear immovable of all encumbrance including rates – claim for specific performance arises out of the term of contract and is applicable to parties in the contract. Where a party claims prejudice as a result of conduct by 3rd parties who are not in the contract, appropriate remedy lies under damages.

Summary: The applicant purchased land from the 1st respondent. The 3rd respondent was the conveyancer who was responsible for transferring the said piece of land into applicant's name. While applicant was enjoying title to the land, the City Council of Manzini demanded arrear rates. This puzzled applicant because procedurally for the land to be transferred to him, a clearance certificate by the City Council had to be filed with 2nd respondent. As a result an investigation ensued. It was discovered that 2nd respondent's employee had uplifted a clearance certificate from the office of 2nd respondent from a file pertaining to another piece of land. The applicant claims for specific performance equal the amount of rates due to 2nd respondent's fraudulent conduct in the application proceedings against the Seller (1st respondent) the Conveyancer (3rd respondent) and the Registrar of Deeds (2nd respondent). The 4th respondent is cited in his capacity as the legal advisor and representative of the 2nd respondent.

[1] An order against 1st respondent was issued by consent. What remains to be determined is the application against 2nd and 3rd respondents.

[2] 2nd respondent strenuously opposes this application. 3rd responded did not file any papers in opposition.

[3] The applicant basis his claim against 2nd respondent on the doctrine of vicarious liability. He contends that the fraudulent conduct of 2nd respondent's employee was a *conditio sine qua* none for the registration of the property into his name.

[4] In short applicant submits that were it not for the actions of 2nd respondent's employee, he would not have received the encumbered property. For that reason, applicant prays for the following order:

“Directing the respondents jointly and or severally the one paying the other to be absolved to pay to applicant or the Manzini Municipality the sum of E32,221.74 being Manzini City Council Rates in respect of property certain Lot No.471 situate in Ngwane Park Township, Manzini District”

[5] The question I am called upon to determine crystallised is whether the 2nd respondent is vicariously liable for the actions of its employee under the circumstances?

[6] Before embarking on the *enquiry ante*, I must point out that it is not in issue among the parties that the 2nd respondent’s employee retrieved rates clearance from another file in the Registry and that it is this clearance that 3rd respondent submitted to 2nd respondent as part of the documents necessary to transfer the property from the seller to the purchaser.

[7] In his supplementary founding affidavit paragraph 6, 7, 8, 9 and 10 applicant contends in respect of 2nd respondent:

“6. At the Deeds Registry Office, I discovered that a Rate’s Clearance Certificate of Lot No.187 was used when transferring the property into my name.

7. I wish to state clearly before this Honourable Court that my property is Lot No.471 and not Lot No.187. In fact Lot No.187 is owned by a different person Mciniseli Welcome Dlamini according to the City Council records who was not party to the transaction between myself and 1st respondent.

8. *I submit that the wrong Rates Clearance Certificate was used. This was an act of dishonesty and fraud on the part of the 2nd respondent and 3rd respondent.*
9. *The 2nd respondent officer by the name of Sipho Mabuza has stated under oath that he was the examiner when this property was transferred. He took it upon himself to uplift the Rates Clearance Certificate from another file belonging to another party Mciniseli Dlamini. He then proceeded to contact the 3rd respondent. This was despite the fact that a query had been raised that the rates clearance certificate was missing. The 2nd respondent is vicarious liable for the actions of its employee.*
10. *The 2nd respondent should be held liable and can always refer the matter between itself and the said officer to the internal structures namely the Losses Committee to surcharge him.”*

[8] In *replicando*, respondents state in its supplementary answering affidavit:

“9.4 It is not the duty of the said Sipho Mabuza or any of our officers to uplift documents in the Registrar of Deeds. In essence we do no uplift documents but link them. if our officers ever uplift documents, they do so in their personal capacity.

9.6. We wrongfully registered the property concerned but we acted on the strength and misrepresentation of the 3rd respondent, bona fide proceeding to transfer the property omitting to note the different lot numbers.

9.7 *We submit further the 2nd respondent can not be held to be vicarious liable on conduct which is not on the ‘cause and scope of the employ’.*

11.2 *The 3rd respondent acted mala fide neglecting his inherent duty as an officer of the Court of trust and honesty.*

12.2 *I submit that the liability to pay arrear rates in respect of the property lies with the seller.*

12.3 *I submit further that annexure “NN1” of the applicant founding affidavit, namely clause 9 of the Deed of Sale, specifically spells out that “The Seller shall pay all the rates and taxes, which may be due and payable on the property up to date of transfer. Any amount due in respect of rates will be deducted from the purchase price”. (underlined for my own emphasis). Therefore, the applicant has to enforce the Deed of Sale.*

12.6 *I submit that the wrongful registration of the property into the name of the applicant should not be a basis for either vicarious liability of Government or personal liability of officers to pay arrear rates due to the 1st respondent.”*

[9] The applicant argued that the 2nd respondent is vicariously liable to pay the arrears rates.

[10] I doubt if it is for me to decide on the question of vicarious liability. I say this guided by the manner in which the applicant has framed his prayers:

“Directing the respondents jointly and or severally the one paying the other to be absolved to pay to applicant or the Manzini Municipality the sum of E32,221.74 being Manzini City Council Rates in respect of property certain Lot No.471 situate in Ngwane Park Township, Manzini District”

[11] It is clear that the applicant does not claim for damages but for payment of the arrear rates.

[12] 1st respondent correctly conceded from the onset that he was liable to pay rates. 1st respondent’s liability flowed from the terms of the contract of sale between applicant and himself concluded the 16th February 2009. Clause 9 of the agreement reads:

“Payment of Rates and Taxes

The seller shall pay all the rates and taxes, which may be due and payable on the property up to the date of transfer. Any amount due in respect of rates will be deducted from the purchase price.”

[13] The question before me therefore is whether it can be said that the purchaser – applicant having taken over title and the rates not paid, all the respondents are liable in terms of clause 9 of the agreement.

[14] It is clear from applicant’s prayer that he seeks to enforce specific performance of clause 9 against the respondents.

[15] I have already pointed out that liability, against 1st respondent is clear in terms of clause 9. What about 2nd and 3rd respondents? Are they also liable

under clause 9 by virtue of the alleged fraudulent conduct of 2nd respondent's employee?

[16] **Benson v S.A. Mutual Life Assurance Society 1986 (1) S.A. 776 at 783**
D-E Hefer J. A. held:

“the remedy of specific performance should always be granted or withheld in accordance with legal and public policy.”

[17] I propose to deal firstly with the “*legal policy*” as it were.

[18] The general principle on specific performance is as laid down by **Innes J.** (as he then was) **In Farmers' Co-op. Society (Reg.) v Berry 1912 A.D. 319 at 324** as follows:

“Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract.”

[19] **Kotze C. J.** in **Tompson v Pullinger I. O. R.** at 301 stated on the same principle with precision as follows:

“the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt”

[20] The above cases were cited with approval in **Tsabedze, Sipiwe v University of Swaziland 1987 – 1995 (4) S. L. R. 419** and **Nonhlanhla Tsabedze v University of Swaziland Civil Appeal No.51/2010.**

[21] In *casu*, it is clear from the deed of sale that 2nd and 3rd respondents are not parties to the contract of sale. Applicant's prayer seeks to bind 2nd and 3rd respondents and demands that they pay either to the "*applicant or City Council of Manzini the sum of E32,221.74 being Manzini City Council rates*"

[22] **Justice Moore J. A.** in **Nonhlanhla** wisely notes at page 16 that the central issue in **Tsabedze** *supra* "*was whether or not specific performance was an appropriate remedy*". The same question faces this court.

[23] **De Villiers A. J. A.** in **Haynes v King Williams Town Municipality 1951 (2) S.A. 371 at 378** stated:

"It is, however, equally settled law with us that, although the court will as far as possible give effect to a plaintiff's choice to claim specific performance, it has a discretion in a fitting case to refuse to decree specific performance and leave the plaintiff to claim and prove lis id quod interest."

[24] The duty to perform must flow from the contract. The 2nd and 3rd respondents cannot either *pro rata* or *in solidum* with 1st respondent be liable by reason that they are not parties to the contract or to put it more directly, there was never any *consensus ad idem* between the 2nd and 3rd respondents on payment of rates as applicant seeks to enforce.

[25] For this reason therefore, applicant has not established "*right to the relief*" sought.

[26] Approached from a different angle, reference is made to **Justice Moore J. A.** in **Nonhlanhla Tsabedze** *supra*, citing **Benson** *op.cit.* who states at page 15:

“Specific performance, if chosen by a plaintiff in preference to a claim for damages and where the rights to relief is established, will be granted unless it will produce an unjust result.”(my emphasis)

[27] I have already pointed out that the applicant seeks for an order for the respondents to pay over to the City Council or himself the sum of E32,221.74. Following the dictum by his **Lordship Moore J. A in Nonhlanhla** *supra*, the 1st respondent has already undertaken to pay and an order has already been entered in that regard. It will produce unjust result for the 2nd and 3rd respondents to be ordered again to pay as there would be overpayment. The argument that such amount could be given to the applicant cannot also sustain in that the amount so paid will be for the rates due to the City Council and not for the applicant.

[28] It is my considered view that applicant ought to have lodged a claim for damages instead of specific performance. It is under a claim for damages that the question on vicarious liability may be prosecuted.

[29] From the nature of this application, it is my considered view that there will be no need for an order as to costs as the matter has been decided not on merits but on the question of legal principles.

[30] For the foregoing, I make the following orders:

1. The consent order against 1st respondent is confirmed.
2. Applicant’s application against 2nd and 3rd respondents is dismissed.

3. Applicant is ordered to pay costs to the 2nd respondent only.

M. DLAMINI
JUDGE

For Applicant : **Mr. S. P. Mamba**
For Respondents : **Mr. M. M. Dlamini**