



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Civil Case No.227/2013

In the matter between:

**SINDISIWE CYNTHIA MANGO**

**Applicant**

**vs**

**GETRUDE DLAMINI & 3 OTHERS**

**Respondent**

**Neutral citation:** *Sindisiwe Cynthia Mango vs Getrude Dlamini & 3 Others*  
(227/2013)[2014]SZHC 25 (28<sup>th</sup> February 2014)

**Coram:** **MAPHALALA PJ**

**Heard:** 7th February 2014

**Delivered:** 28th February 2014

**For Applicant:** Mr. D. Manica

**For Respondent:** Ms. N. Gwiji

Summary: (i) *Application under a Certificate of Urgency directing 1<sup>st</sup> Respondent from releasing the Title Deed in the matter.*

(ii) *The 1<sup>st</sup> Respondent contends that there is a dispute of fact in that the Applicant mentioned a sum of E28,000.00 reflected*

*in the Deed of Sale but in arguments referred to a sum of E44,000.00.*

- (iii) Having considered the arguments of the attorneys of the parties I am in agreement with the Respondent that there is a dispute of fact as aforesaid.*
- (iv) Therefore, in exercise of my discretion I order that oral evidence be led on this narrow point. So it is ordered and costs are reserved for the time being.*

## **JUDGMENT**

### **The Application**

- [1] Before court is an Application under a Certificate of Urgency on Notice of Motion for an order in the following terms:

- “1. Dispensing with the forms and the time limits provided for in the rules of the above Honourable be dispensed with and that this matter be heard on urgent basis.*
- 2. Condoning Applicant for non-compliance with the Rules of this Honourable Court.*
- 3. Directing and/or ordering the 1<sup>st</sup> Respondent and her legal representative viz, N.E. Gwiji Attorneys to release the title deed forthwith to the conveyancers Sigwane and Partners and/or to Applicant’s Attorneys, Manica Attorneys of the property hereunder described to facilitate transfer of same in favour of Applicant herein.*

*CERTAIN: Lot 1938 Extension 16*  
*MEASURING: 468 (four six eight) square metres*  
*HELD: Under Deed of Transfer No.20/1998.*

4. *Directing and/or ordering the 1<sup>st</sup> Respondent to do all that is necessary to pass transfer of the property in issue in favour of the Applicant in particular signing and/or executing all the necessary documents to effect the said transfer alluded to herein.*
5. *Interdicting and/or restraining the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent or any other third party acting and/or appearing at the instance or stead of 1<sup>st</sup> and 2<sup>nd</sup> Respondent respectively from resetting or alienating the property in issue herein to any other third party save for Applicant herein.*
6. *Directing and/or ordering the Registrar of Deeds to registrar (sic) the property herein described and in issue in favour of the Applicant only and but not to any other third party save where nominated by Applicant.*
7. *Cost of suit at attorney and own client scale.*
8. *A rule nisi returnable on a date to be determined by this Honourable Court be issued calling upon the Respondents to show cause why a final order in terms of prayers 2, 3, 4, 5, 6, and 7 should not be made final.*
9. *Prayers 3, 4, 5 and 6 operate with immediate effect.*
10. *Further and/or alternative relief.”*

[2] The Founding Affidavit of the Application is filed thereto outlining the material facts in this matter. Pertinent annexures are also filed thereto.

[3] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents oppose the Application and have filed the Opposing Affidavit of the 1<sup>st</sup> Respondent were two points *in limine* are raised. However, when the matter was called the attorney for the

Respondent abandoned these points *in limine* in view of the affluxion of time. Supporting affidavits are filed therein.

- [4] The Applicant then filed a Replying Affidavit in accordance with the Rules of this court.

### **The arguments of the parties**

- [5] The matter came before me on 7<sup>th</sup> February 2014 where I heard arguments from Mr. Manica for the Applicant and Miss Gwiji for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and I reserved my judgment in the matter.

### **For the Applicant**

- [6] The attorney for the Applicant Mr. Manica filed two sets of Heads of Arguments but relied on his amplified Heads of Arguments when he addressed the court.
- [7] In the said Heads of Arguments the attorney for the Applicant advanced various topics in paragraph 1 in respect of legal issues for determination. In paragraph 3, 4, 5, and 5 dealt with points *in limine*. The gravamen of the arguments for the Applicant in the last paragraph of the Heads of

Arguments of Mr. Manica where he has cited a *plethora* of decided cases on the argument that it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear on his signature citing the case of *Tesoriero vs Bhyjo Investments Share Block (Pty) Ltd 2000 (1) SA 167* at page 176F-I.

[8] The nub of the Applicant's case is that there was a legally binding Deed of Sale prior to institution of the present proceedings. The attorney for the Applicant then cited a number of decided cases in this regard including the cases of *Glenburn Hotels (Pty) Ltd vs England 1972(2) SA 660 (RA)* and that of *Glen Comeragh (Pty) Ltd vs Colibri (Pty) Ltd and Another 1979(3) SA 210 (T)* at 214D-E.

[9] The essence of the Applicant's case is based on what is stated in the South African case of *Union Government vs Vivianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43* at 47 to the following *dicta*:

*"This Court has accepted the rules that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suite between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the content of such document be contradicted, altered, added or varied by parol evidence."*

[10] It is contended for the Applicant that the order sought herein for registration and transfer of the property is herein capable of enforcement because of the following facts:

*“The 1<sup>st</sup> Respondent is the seller in whose favour the property is registered.*

*The 1<sup>st</sup> Respondent entered into the Deed of Sale with the sole intention to pass transfer in favour of Applicant.*

*The passing of the power of attorney by 1<sup>st</sup> Respondent was specifically to pass transfer. The mandate authorising application for certified copies of the property’s title deed herein is indicative of 1<sup>st</sup> Respondent’s intention to alienate the said property herein.*

*It is submitted that by paying the purchase price as envisaged by clause (2) of the Deed of Sale. Applicant fully complied with her obligations as contractu. The legal justification for the foregoing submission is that 1<sup>st</sup> Respondent entered into a legally binding deed with sole intention, inter alia, to pass transfer of the property to Applicant.*

*In a nutshell the parties were AD idem at the time of executing the Deed of Sale.”*

[11] Lastly, the attorney for the Applicant advanced arguments on costs that costs be granted on a punitive scale as stated in paragraph 5 of the said Heads of Arguments.

**(ii) The Respondent's arguments**

- [12] The attorney for the Respondents, Miss Gwiji also filed Heads of Arguments titled **“1<sup>st</sup> Respondent's Supplementary Heads of Arguments addressing the so called Amplification on the controversies of Applicant's and Mzamo Mamba's attestation as to the actual purported sale price of the subject matter.”** Then followed an analysis of the evidence adduced in the said affidavit Mzamo showing other figures other than the purchase price of E28,000.00 being a sum of E44,000.00. That therefore there is a dispute of fact regarding this aspect of the matter and therefore this matter cannot be decided on the papers as they stand. Therefore the Application ought to be dismissed with costs.

**The courts analysis and conclusion thereon**

- [13] Having considered the affidavits filed by the parties and the arguments of the attorneys in this matter it appears to me that there is a dispute of fact on the papers which cannot be reconciled for a proper judgment on the case of *in casu*. The Deed of Sale which the Applicant relies on mentions a sum of E28,000.00 and in arguments before me the attorney for the Applicant kept on referring to the sum of E44,000.00 and thus caused confusion in my mind. I cannot make head or tail of which figure to be taken into effect.

[14] The attorney for the Respondent in her arguments has put her finger to this difficulty contending that there is material dispute of fact on the papers and therefore the Application ought to be dismissed forthwith.

[15] I have considered legal authorities to resolve this confusion including the case of *Room Hire Company (Pty) Ltd vs Jeppe Street Mansors (Pty) Ltd* 1949(3) SA 1155 at 1165 on what constitutes a real dispute of fact.

[16] The learned authors *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition* at page 241 put it this way:

*“Where, at the hearing of motion proceedings, a dispute of fact on the affidavits cannot be settled without the hearing of oral evidence, the court may, in its discretion, (a) dismiss the application; (b) order oral evidence to be heard on specific issues in terms of the rules of court; or (c) order the parties to trial. In each case the court may give such directions as to costs or filing of pleadings as it deems fit. The circumstances in which the court exercises this discretion are more appropriately dealt with in detail at a later stage in connection with the hearing of motion proceedings. The court’s function, if there is a factual dispute, is to select most suitable method of employing viva voce evidence for the determination of the dispute.*

*Every claimant who elects to proceed on motion runs the risk that a dispute of fact may be shown to exist, and the way in which the court exercises its discretion as to the future course of the proceedings in such an event will depend very much upon the extent to which the claimant is found to have been*



*justified in accepting that risk. If, for example, the applicant should have realized when launching his application that a serious dispute of fact was bound to develop, the court may dismiss the application with costs.”*

[17] Having considered the legal authorities cited above in exercise of my discretion I will not dismiss the Application forthwith but order that the matter proceed in terms of (b) mentioned above in the legal authority of *Herbstein (supra)*.

[18] I order that oral evidence be led to clarify the dispute stated in paragraph [13] of this judgment.

[19] In the result, for the foregoing reasons the matter is postponed to the next session of the court to be given 1 (one) day in the first week of the session. Costs reserved for the time being.

**STANLEY B. MAPHALALA**

**PRINCIPAL JUDGE**

