IN THE HIGH COURT OF SWAZILAND

Held at Mbabane — Case No. 1178/15

In the matter between:

MORDERN SWAZI ART (PTY) LTD	**Applicant**
and	
ESTATE LATE JOSEPH SIPHO SHABANGU EM 212/2014	**1st Respondent**
SIFISO SHABANGU N.O	**2nd Respondent**
NONHLANHLA SHABANGU N.O	**3rd Respondent**
A.S.M ENTERPRISES (PTY) LTD	**4th Respondent**
ZONKHE MAGAGULA AND COMPANY	**5th Respondent**
THE MASTER OF THE HIGH COURT	**6th Respondent**
REGISTRAR OF DEEDS	**7th Respondent**
SHERIFF OF SWAZILAND	**8th Respondent**
ATTORNEY GENERAL	**9th Respondent**

Neutral citation: *Mordern Swazi Art (Pty) Ltd Vs Estate Late Sipho Shabangu EM 212/2014 & 8 Others (1178/15) 2015 SZHC138 (26th August 2015)*

Coram:	Hlophe J
For the Applicant:	Mr. N. E. Ginindza
For the 1st, 2nd, & 3rd Respondents:	Mr. O. Nzima
For the 4th & 5th Respondents:	Mr. Z. Magagula
For the 6th, 7th, 8th & 9th Respondents:	Attorney General
Date Heard:	10 August 2015
Date Handed Down:	26 August 2015

JUDGMENT

[1] It is not in dispute that on the 18th June 2015, the Applicant as represented by one of its directors entered into a written agreement of sale of the properties fully described as Portion 66 of Farm No. 868, Manzini and Portion 67 of Farm No. 868, Manzini with their owner, the first Respondent, who was represented by its co-executors in the estate concerned being the second and third Respondents.

[2] The properties in question were sold to the Applicant for a sum of E2, 900, 000.00, which was to be payable, according to the agreement itself through a deposit in the sum of E500 000.00 being paid by the Applicant as purchaser on the day of signature to the agreement, while the balance in the sum of E2, 400, 000.00 was to be secured by means of a bank

guarantee provided by the Applicant as purchaser within 140 days from the date of signature of the agreement together with the transfer being made within the same period.

[3] Although disputed by the Respondents, the Applicant contends that he complied with the agreement and paid to the Respondents through their attorneys, and by means of a cheque, the agreed deposit in the sum of E500, 000.00. The time to furnish the required balances so as to secure the balance of the purchase price had still not expired. It is however not in dispute now that although given to the Respondent's attorney, the said cheque was never deposited by the said attorney. Although he claims to have returned it to the Applicant, this is denied. The Applicant maintains the Respondents had no right to return the cheque nor can they say it did not amount to payment of the deposit in law. It therefore insists it purchased the said properties and was in full compliance with the agreement of sale in question.

[4] The Applicant claims that it was to discover for the first time on the 27th July 2015, that the property it had purchased from the first Respondent had, on the 8th July 2015, been sold, without its knowledge, to the fourth Respondent, a company called A. S. M. Enterprises (PTY) LTD, for the same sum of money as that agreed between it and the seller, the first

Respondent, being the sum of E2, 900, 000.00. Applicant also alleges to have become aware that first Respondent had already secured bank guarantees for the sale of the property and that because of this fact, transfer of the property could occur anytime.

[5] It is significant to note that, representing the first Respondent as seller of the properties in question to the fourth Respondent were the same representatives who had represented it in the sale of the same property to the Applicant namely the first and second Respondents.

[6] It is the Applicants contention that when the properties were sold, it had complied with all the terms of the agreement and therefore that other than a fraudulent intent on the part of the Respondents aforesaid, there was no basis for selling the properties that had already been sold to it, to somebody else as it was not in breach of the agreement, which according to it has always been enforceable at its instance.

[7] The Applicant discloses further that at some stage the second and third Respondents, whilst acting on behalf of the first Respondent, had to negotiate with an entity that had attached the properties in question for non-payment of due amounts, the Swaziland Development Finance Corporation (Fincorp), to postpone a judicial sale or sale in execution of

the properties in question so as to ensure that same was transferred to the Applicant in terms of the agreement of sale of same, which the said Fincorp allegedly agreed to do. It was further alleged that, being fully aware of the current dispute, between the parties, the said Fincorp, had informed the parties to resolve their dispute by the 14th August 2015. These allegations can, in my view only confirm that Fincorp was not only aware of the dispute between the current parties in this matter but is also aware of the fact that the matter is before court over the same property and between the same parties and nonetheless had chosen not to intervene in the proceedings but instead to abide the order of court. I note therefore that in this sense, and despite not being a party to the proceedings, Fincorp cannot realistically claim not to have been heard when the properties in which it had an interest in were a subject of court proceedings nor can it claim that the properties in question cannot be sold to the Applicant because it was under attachment. The First Respondent is shown as having at some stage postponed a sale in execution because the properties in question had already been sold to the Applicant who was going to pay a sum of E2, 9000, 000.00 in terms of the agreement of sale. I am bolstered in my said belief by the fact that even when the matter was heard in court, I noted the presence of Fincorp's Legal Advisor or officer, Miss Kunene who did nothing than to kindly follow the proceedings.

[8] Having realized that the same properties had since been secretly sold to another person, the fourth Respondent, when there had been no breach of the agreement of sale of the same properties between itself and the first Respondent, the Applicant instituted the current proceedings where it sought a *rule nisi* to operate with immediate and interim effect calling upon the Respondents to show cause why the agreement of sale of the properties concluded between the first and fourth Respondents cannot be declared null and void and therefore set aside; why the first, second and third Respondents cannot be ordered to cause the property in question to be transferred to the Applicant together with them being ordered to sign all such documents as may be necessary to give effect to the said transfer; why in the event of failure by the said Respondents to give effect to the said transfer including signing all such documents as may be necessary, the Sheriff of Swaziland cannot herself be ordered to sign all such documents as may be necessary to give effect to the said transfer of the property to the Applicant as well as why the seventh Respondent cannot be interdicted from transferring the said property to the fourth Respondent or any other person pending finalization of this matter. There was further sought an order directing or compelling the first, second and third Respondents to pay the costs of these proceedings jointly and severally, one paying the other to be absolved.

[9] Although nine Respondents had been cited and served with the application it is important to mention that, only first to fourth Respondents opposed the application. The other Respondents either indicated a commitment to abide the order of court or did not appear at all confirming a non-opposition to the orders sought.

[10] In their opposition to the application, the First, Second and Third Respondents who comprised the estate of the late Sipho Shabangu and its two co-executors who were represented by the same attorney Mr. Nzima, raised several points of law per their answering affidavit. They contended among others that the deponent to the founding affidavit had attested to hearsay evidence, and that despite knowing that the property in question was under attachment by Fincorp, Applicant had failed to cite and serve, Fincorp with these proceedings. This it was contended was besides it being obvious that the latter had an interest in the matter. This interest by Fincorp was allegedly made more apparent by the fact that both parties in the matter had at different stages approached Fincorp to argue for a private sale of the properties in question to then.

[11] It was argued as well that the Applicant had failed to comply with clause 10 of the same agreement of sale it relied upon. The Respondents contended further that the agreement of sale between Applicant and first

Respondent was itself cancelled by means of a letter dated the 6th July 2015, which was allegedly served upon the other Director of the Applicant, company called Kabshnik Shin.

[12] The letter in question annexure "JS2" reads as follows after the normal salutations (it is addressed to the Managing Director of the Applicant).

> *"Dear Sir*
>
> *Re: Deed of Sale Cancellation Estate Late Sipho Shabangu and Yourselves.*
>
> 1. *The above intended sale refers and especially the telephonic conservation between your Mr. Shin and Mr. Nzima.*
> 2. *Kindly be advised that the sale transaction is hereby cancelled in view of the fact that Fincorp does not accept the terms of the Deed of Sale Agreement and that you have failed to secure the loan as previously advised.*
> 3. *Moreover you have failed to comply with clause 1 of the Deed of Sale that is payment of the deposit which we were hoping to forward to Fincorp to enhance our case for the private sale of the property which is under their attachment.*
> 4. *Thanking you for your cooperation.*
>
> *Yours faithfully*
>
> *Nzima and Associates*
>
> *Per: (Signed)*

[13] In the merits of the matter, it was averred that the Applicant had not paid any money in line with the agreement of sale of the properties concerned.

The E500,000.00 the Applicant alleged was paid, it was clarified, had not been so paid and that in fact same was merely a ruse aimed at dissuading Fincorp, the entity that had attached the property in question and placed it under sale not to continue with the sale, which allegedly worked. The cheque of E500, 000.00 was therefore meant for a certain case allegedly pending in court between the first Respondent and the said Fincorp. In any event, it was argued, the cheque in question was neither deposited nor cashed but was instead returned to the Applicant and given not to the deponent to the founding affidavit one Jang Gui-Jin, but to one Kabshnik Shin.

[14] It was stated that the Applicant in issuing the cheque concerned was only buying time to raise money, which it hoped to obtain from Korea the deponent's home country where he said he had been promised same. As Applicant could not get the said money, Fincorp is said to have then refused to enter into the private sale agreement of the property concerned. This it was said led to the cancellation of the said agreement.

[15] I can only note at this point that the first Respondent's case does not seem to be stable if one considers the foregoing paragraphs. Whereas in one breadth it is contended there was no agreement to sell the land to Applicant, and that the E500, 000.00 was merely a ruse aimed at ensuring

that the property concerned was not sold, the first Respondent also contends that the Applicant did not have any money which it had hoped to obtain from Korea and also that the agreement was later cancelled. These assertions bring about the question what was the money allegedly awaited meant to do for the Applicant if it was not meant to pay for the properties. Furtherstill why would the money pay for the properties if not in compliance with the argument of sale? Furthermore if there was no agreement of sale of the properties why did the first Respondent have to purport to cancel the sale agreement over none payment if none had been concluded. I am for now noting these in passing and I shall revert thereto later on.

[16] The second and third Respondents denied that the first Respondent committed any fraud in the sale of the property to the fourth Respondent and instead maintained that the property in question was sold after the agreement of sale of same to the Applicant had already been cancelled by means of the letter referred to and quoted in full above, annexure 'TS2' to its papers.

[17] The fourth Respondent also filed its own opposing affidavit which was attested to by one Mduduzi Vilane who states therein that even before the death of the late Joseph Sipho Shabangu, they had engaged each other

with the said Sipho Shabangu about him selling Vilane or his company, the fourth Respondent, the properties in question. Although the purchase price had allegedly been agreed upon, the Deed of Sale could allegedly not be signed because Mr, Shabagu fell ill. His subsequent death robbed them of the opportunity to finalize the sale. Upon his realization that there had now been appointed the second and third Respondents as Executors in the first Respondent he had engaged them with a view to concluding what he had started with the late Mr. Shabangu. This he says culminated in the agreement complained of being signed. This was after he had paid first Respondent the sum of E5, 000.00 required by the Master of the High Court for her to be able to issue out letters of Administration to the second and third Respondents as executors. The fourth Respondent claims not to have known that the same properties had as at that point been sold to the Applicant.

[18] The fourth Respondent clarifies that the sold properties were at the time under attachment by Fincorp, otherwise known as the Enterprise Development Fund. It was allegedly arranged that the guarantees to secure payment of the purchase price be given to the Fincorp which he says was done. On the basis of this, the fourth Respondent contends it was just and equitable that the agreement signed between it and the First, Second and Third Respondents be upheld.

[19] The Fourth Respondent contends that if Applicant complained of a breach of the agreement between it and the first Respondent by the latter, it was clear in terms of paragraph 10 of the agreement what had to happen. In such a situation the Applicant as the aggrieved party, it was submitted had to claim back the deposit paid together with 10% of it as interest or was alternatively entitled to cancel the Deed of Sale and to recover any damages that he may have suffered as a result of the breach by the seller from him.

[20] The Applicant filed a replying affidavit in which as concerned the case of the First to Third Respondents, it was denied that the Applicant's case was founded on hearsay because, it was contended, the parties to the agreements were not the Directors in their personal capacities but the company itself, which had as much information on the company as each of the Directors had. Furtherstill it was contended that hearsay was admissible in urgent matters which this one was provided the source was disclosed. It was denied further that Fincorp had such an interest in the matter as would necessitate it be served with the proceedings. These proceedings it was argued, were merely about whether the second sale between the First and Fourth Respondents was legal which allegedly had no bearing on the judgment in favour of Fincorp. In fact, Fincorp, it was argued, had divested itself of any interest when it did nothing despite

being firstly aware that the attached property was sold and later when it by conduct indicated an inclination to abide the judgment of this court by not intervening in the proceeding despite its awareness such proceedings were on going in court.

[21] It was argued further that the failure by the Applicant to adhere to clause 10 of the agreement did not signal the end of the matter, because over and above, the Applicant had an option to resort to the common law remedy of specific performance, which was submitted, is what it chose to do.

[22] The Applicant maintained that it did issue the cheque which is legal tender in this jurisdiction and paid it to the first Respondent's attorney in-keeping with the agreement between the parties. It was denied that same was a ruse aimed at making Fincorp cancel the sale in execution as alleged. Applicant maintained the cheque was paid to the first Respondent's attorneys in keeping with the agreement. Following the challenge it produced its bank statement to indicate how much it had in there in an apparent attempt to confirm that Applicant had the money to pay the purchase price Applicant produced the said statement and annexed it to the Replying Affidavit. This bank statement indicated that Applicant had a balance of E2, 344, 678.38 which was clearly the above the E500, 000.00 it was argued it could not afford to pay.

[23] The alleged cancellation of the agreement as contended by the first to third Respondents was denied by the Applicant who contended it had not received any such cancellation. In any event, it was argued the purported cancellation was not in accord with clause 9 (or even 10) of the agreement of sale concerned given that it did not or had not given Applicant the 14 days notice it had to be given before a cancellation could take effect, calling upon the Applicant to remedy such a breach and only after such a notice could a cancellation be effected lawfully.

[24] The foregoing summarizes the case of the parties before me. it was agreed at the commencement of the hearing of the matter, that the entire matter as comprising the points in *limine* and the merits be argued in its entirety with this court only being required to decide whether to determine same on the points raised or in the merits. I will start off with the points in *limine* raised.

[25] The starting point is whether the Applicant's case is based on hearsay evidence which means that it has no foundations. If this is correct the matter falls to be dismissed on this point alone. Other than the first Respondent's counsel's submission, I have not been referred to any basis in support of this assertion. The court is merely being asked to construe that since the Respondents dealt with the other Director as opposed to the

one who deposed to the affidavit, then it must be that what the latter attests to is hearsay. I cannot agree. It is the one who alleges who should make out a case for what he alleges. In other words he who alleges must prove. I cannot agree that a Director of a small company who says he is involved in its day to day affairs can ever be said not to know about what goes on in the said company. The thrust of the present matter is a sale of two properties to the Applicant. The sale was accomplished by means of a written deed or agreement, whose copy was annexed to the application. It is common knowledge between the parties that the same properties have since been sold to the fourth respondent, with this latter agreement of sale being also annexed to the papers. I cannot understand why attesting to these facts which are readily available in the company's records can ever be termed to be hearsay if testified to by a Director of a company having access to the its records. It therefore has not been shown how these facts can be said to be hearsay if testified to by the current Director of the Applicant company.

[26] There is further no prejudice occasioned Respondents by the deponent to Applicant's founding affidavit, when considering that all the averments made by the Applicant were responded to in full by the Respondents. I am convinced it has not been shown that there is any hearsay evidence in

what was attested to by the deponent to the founding affidavit. This point in *limine* can therefore not succeed.

[27] On the contention that notwithstanding the Applicant's awareness that the property had already been attached on behalf of a certain party, Fincorp, who had previously advertised it for sale which he had to drop at the instance of the Applicant who has now not cited and served with these court papers, I can only say that it is paramount for all interested parties who are known to be served with court papers. Where that does not happen, it may prompt the court to order that the proceedings be postponed and that the matter be not proceeded with until that party had been served and has indicated its stance in the matter. This however would be more the general rule which of course has exceptions. For instance, whereas in the present matter Fincorp needed to be served, there is no doubt that it did become aware of the matter pending in court between the parties and it chose not to intervene. In any event Fincorp was shown as having at some stage endorsed the sale of the properties in question to the Applicant when they were already under attachment when it abandoned a sale in execution at the instance of the Applicant and the first Respondent in order to give Applicant the chance to pay for the property and eventually to have it transferred to the Applicant.

[28] I have no hesitation that this, coupled with the fact that Fincorps Legal Advisor was in court when the matter was heard while her organization did not intervene therein was an indicator it stood to suffer no prejudice in the determination of the matter, because it appears each one of the disputing parties wants to pay it in terms of the agreement concluded by each such party with the first Respondent. The circumstances of this matter reveal a classic case of a party who would abide the court's decision. I have no hesitation therefore that this point cannot succeed in the context of this matter.

[29] There was also the contention that the Applicant's application could not succeed because the Applicant had allegedly not complied with paragraph 10 of the agreement relied upon if it complained of any breach by the first Respondent. Further to this point, it was argued that the agreement in question had long been cancelled by means of a cancellation notice that had been served on the Applicant through one of its directors. It was contended this was done prior to the sale of the properties to the fourth Respondent.

[30] Paragraph 10 of the Deed of Sale provides as follows:

"Should the seller fail to make good the property provided for herein or otherwise commit a breach of any of the conditions hereof, and remain in default for 14 (fourteen days) after dispatch of a written notice by registered post requiring him to make good such property or remedy any such other breach, the purchaser shall be entitled to, and without prejudice to any rights available (to it) at law:-

10.1. Claim immediate refund of the deposit paid with 10% interest

10.2. Alternatively the purchaser shall be entitled to cancel this Deed of Sale and to recover any damages that he may have suffered as a result of the breach by the seller".

[31] The contention by the first Respondent in reality is that the Applicant had not, upon realizing a breach of the agreement by it, issued a notice to the latter calling upon it to make good such property or to remedy the breach within fourteen days failing which the Applicant would institute proceedings for nothing else than a refund of the deposit plus 10% interest or alternatively to cancel the agreement and recover the damages suffered as a result, which is what the agreement provided for in the event of a breach by the First Respondent.

[32] From the undisputed facts, it would appear that the Applicant was only to discover well after the sale of the same property it awaited transfer of, had been sold to the fourth Respondent. When it discovered this, the property was itself awaiting transfer to the new purchaser which could be

effected anytime as the bank guarantees themselves had already been given to Fincorp in terms of their arrangement. The question is, was this the situation contemplated by paragraph 10 (a) of the agreement? I think not. Upon discovering the problem caused by the First to Third Respondents, the Applicant could not be realistically expected to issue the 14 days Notice required of it, assuming that was the breach contemplated in terms of the paragraph. Furtherstill, the Applicant in my view would hardly be expected to look to the remedy provided for in the agreement when it could, through the use of the principles of interdicts and specific performance as reliefs, obtain a more satisfactory remedy such as a reversal of the sale prejudising it, which in any event was contemplated in terms of the agreement concluded between the parties.

[33] This takes me to the further argument by the Applicant that paragraph 10 of the agreement concerned provides, expressly for its reliance on what it considered an appropriate remedy as it says the remedies referred to above and as cited in the agreement would be resorted to without prejudice to any other rights available to it at law. It was argued by the Applicant's Counsel that the rights contemplated therein are such rights as enforcement of a specific performance which is in law a discretionary remedy. I must say I agree with Applicant's counsel's submission in this regard particularly that it remained opened to Applicant to approach this

court for an order for specific performance in the face of a deliberate breach of the agreement concerned. I agree that this application is one for specific performance which means that the Respondent's point in *limine* in this regard also falls to be dismissed.

[34] In the merits of the matter, it cannot be denied that the Applicant and the First Respondent as represented by the second and third Respondents, concluded an agreement in terms of which the firs Respondent as the seller, sold Applicant the two properties in question, on the terms contained in the said agreement or Deed of Sale. This sale was by conduct sanctioned by the entity that had already attached the property in question as contended by the Applicant above.

[35] On the face of it, the Applicant did not violate the Deed of Sale. Applicant appears to have complied with all its obligations in terms of the Deed of Sale. It for instance paid the agreed deposit of Five Hundred Thousand Emalangeni (E500, 000.00) on signature to the agreement by means of a cheque. That the cheque in question was not deposited into the Bank by the first Respondent and its attorney should not in my view be attributed to the Applicant. Whether or not there was any money in the account would have been determined by the deposit of the cheque and it cannot lie with the First Respondent and its attorney to say Applicant

had no money in its account. Whereas the Respondent also seeks to say that the cheque was a ruse aimed at ensuring that the properties were not sold as advertised for the sale in execution meant to be carried out on behalf of Fincorp, the Deed of Sale signed by and between the parties makes no such mention. Instead it provides that upon payment of the deposit aforesaid, it was encumbent upon the Applicant to avail a bank guarantee within 140 days from the date of signature to the agreement, which was to be followed by a transfer of the property within the same period.

[36] It is an undisputed fact that the same property was thereafter secretly sold to the fourth Respondent. This happened on less than 30 days from the signing of the Deed of Sale. It shall be noted the Deed of Sale was signed on the 18th June 2015 and the property was subsequently sold to the fourth Respondent on the 8th July 2015.

[37] The first Respondent wants to say that it, upon realizing the failure to pay the agreed deposit by the Applicant, wrote a letter annexure JS2 to the answering affidavit, to Applicant and notified it that it was cancelling the agreement concluded between the parties, because of failure by the Applicant to pay the required deposit as well as because Fincorp was not accepting the terms of the agreement signed by and between the parties.

This letter suggests on its face, to have been prepared on the 6th July 2015, two days before the secret sale of the properties in question to the fourth Respondent.

[38] The Applicant denied receipt of any such letter by the Respondent concerned. This presents problems in as much as there is no proof of delivery of the letter, just as there is not even an allegation on how same had been delivered on the Applicant. Be that as it may, this can only suggest the existence of a sharp dispute of fact. For what I say herein below, I am of the view the said dispute is not a material one requiring a decision by this court before the determination of the matter itself. It is the same thing as the other dispute on whether there was or there was no money in the Applicant's account from which the E500, 000.00 deposit could be paid, except that on this latter dispute if there was no money in the account, the said cheque would have been dishonoured.

[39] The point being made herein is that clause 9 of the agreement of sale or the Deed of Sale between Applicant and first Respondent covers situations of breach or defaults by the purchaser, who in this context is the Applicant. The clause provides as follows:

> *"Should the purchaser fail to make any payment provided for herein or otherwise commit a breach of any of the conditions hereof, and remain in*

default for 14 (fourteen) days after dispatch of (a) written notice <u>by registered post</u> requiring her to make such payment or remedy any other breach, the seller shall be entitled to, and without prejudice to any other rights available at law:-

9.1 claim immediate payment of the entire purchase price provided for under this Deed of Sale; or

9.2 Alternatively to the above, the seller shall be entitled to cancel this Deed of Sale and to recover any damages that he may have suffered as a result of the breach by the purchaser from the purchaser".

[40] Viewed against the provisions of this key clause or provision of the agreement there appears to be fundamental problems with the Applicant's letter or notice of cancellation. For starters the written notice to the purchaser or Applicant herein, should have been dispatched by registered post which would help obviate the dispute we are now faced with on whether or not the letter or notice was ever served or delivered on or to the Applicant. Secondly and more fundamentally, the purchaser (Applicant in this context), must have remained in default or must have failed to remedy the default or breach after 14 days of dispatch of the said notice.

[41] It is common cause that the cancellation notice relied upon by the Respondent, besides the questions of whether or not it was served on the other side it had not given Applicant as the purchaser the 14 days

mandatory period to enable it remedy the breach complained of. It was apparently prepared on the 6th July 2015, with the property being sold on the 8th July 2015. Its wording is also strange and not in accord with the agreement as it does not call upon the applicant to remedy the breach. On this ground alone, it is clear that the cancellation relied upon by the first Respondent was no cancellation at all as it is not contemplated by the agreement concluded by the parties which means that it is a nullity and is of no force or effect.

[42] A closer consideration of the cancellation notice or letter, "JS2" primarily basis the cancellation on an alleged refusal by Fincorp to accept the terms of the agreement. This scenario is very difficult to fathom in the context of this matter. This is because at some stage the court was told of an agreement between Fincorp, Applicant and First Respondent which led to Fincorp postponing a scheduled sale in execution after the E500, 000.00 cheque provided for in the agreement was given or delivered with the first Respondent's attorney after the signature to the agreement. It defeats logic how the said Fincorp can say or do two contradictory things at the same time. In other words how it can blow hot and cold or approbate and reprobate. That would not be allowed to happen in law.

[43] More fundamentally, a cancellation of the agreement could only be resorted to where there was a breach by the purchaser or the Applicant in this context. It is difficult to envisage a breach by the applicant or purchaser in a case where Fincorp allegedly does not approve of the agreement terms. This would hardly entitle Respondent to cancel the agreement. It is the one that would have concluded the agreement without Fincorp's approval and it therefore could not lie with it to rely on its own wrong doing to upset the agreement. In other words first the Respondent cannot lift itself with its own bootstraps. It seems to me that such an agreement could be terminated mutually and certainly not on the basis of a breach by Applicant as there was simply none. I am therefore convinced there is no basis for a cancellation which means that the purported one is a nullity and is therefore of no force or effect.

[44] I note that the fourth Respondent seems to be a victim of circumstances in this matter and that it finds itself in a very compromising position as a result. It was pleaded by the fourth Respondent in its papers that since it had already paid all the bank guarantees to Fincorp, when it had not initially known that the property was already sold to the Applicant herein, this court ought to, in the interests of justice and equity, allow it to retain the properties sold to it.

[45] Since the transfer process has not yet been finalized I do not see how the fourth Respondent can be allowed to keep the properties and the Applicant as the party prejudised by the sale be not given redress if entitled to same in law. It seems to me that justice in the matter calls for it to be dealt with according to law, which I am obliged to apply and enforce.

[46] For the foregoing reasons I have come to the conclusion that the Applicant's application succeeds to the extent set out hereunder.

1. The agreement of sale of the properties fully described in the notice of motion concluded between the First Respondent and the Fourth Respondent be and is hereby declared null and void and is set aside.

2. The First, Second and Third Respondents be and are hereby ordered to sign all such documents as may be necessary to enable a transfer of the properties concerned to the Applicant upon the latter complying fully with the agreement of sale concluded between it and the First Respondent.

3. In the event of the First, Second and third Respondents failing to sign and execute such documents as are necessary to give effect to the transfer of the properties to the Applicant after the latter shall have complied fully with the agreement then the Sheriff or her lawful deputy be and is hereby authorized to sign and execute such documents as may be necessary to give effect to the transfer and to this order.

4. The First Respondent be and is hereby ordered to pay the costs of these proceedings.

N. J. HLOPHE
JUDGE - HIGH COURT