IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.: 1927/2016

In the matter between

BONGANI EPHRAEM NTSHALINTSHALI	**Applicant**
And	
MVELI ADAM BRIGHTWELL MTHETHWA	**First Respondent**
THE REGISTRAR OF DEEDS	**Second Respondent**
THE ATTORNEY GENERAL	**Third Respondent**
LINDIWE THULIE MTHETHWA	**Fourth Respondent**

Neutral Citation: *Bongani Ephraem Ntshalintshali Vs Mveli Adam Bhrightwell Mthethwa & 3 Others (1547/2007) [2017] SZHC 111 (09th June 2017)*

Coram: Hlophe J.

For the Applicant: Mr M. Sithole

For the Respondent: Mr N. Mabuza

Date Heard: 28 April 2017

Date Delivered: 9th June 2017

Summary

Contract of sale of land –Failure by First Respondent to effect transfer of land sold by it to applicant –Without First Respondent filling papers in opposition, his wife married to him in terms of civil rites and in community of property, seeks to intervene and oppose the application –She alleges that the agreement of sale was unenforceable for failure to comply with Section 11 of the Deeds Registry Act as amended by Section 16(3) of the Deeds Registry Act (amendment) Act 2/2012, in that her consent had not been sought before same was sold –Whether agreement of sale enforceable in the circumstances –No proof of collusion other than a strong suspicion – Contract cannot be enforced in the circumstances – Application dismissed, the First Respondent is to pay the Applicants costs occasioned by all the proceedings triggered by his sale of the land in question to applicant.

JUDGMENT

[1] The Applicant approached this court for an order inter alia, interdicting and restraining the First Respondent from transferring or alienating the land forming the subject matter of these proceedings described as Portion 59 (A portion of portion 31) of Farm No.987, Hhohho District, Swaziland, to any other person than the Applicant. There was sought as well an order compelling the First Respondent to sign and execute all documents necessary to effect the transfer of the said property to the applicant; failing which the Registrar of the High Court was to be authorized to sign and

execute all such documents as are necessary to pass transfer to the applicant. There was further sought an order for costs.

[2] The factual basis for the reliefs sought was allegedly that the First Respondent sold the property referred to above to the applicant for a sum of E350 000 -00. The terms governing the sale of the land in question were contained in a written Deed of sale, signed by the parties and in particular by the First Respondent as the seller on the 19th February 2016, in Manzini.

[3] The payment of the purchase price was to be secured by means of a guarantee provided by a Financial Institution within some thirty (30) days of the signing of the Deed of Sale. In the event of breach of any of the material terms of the agreement, the defaulting party was to be given a written Notice calling upon such party to remedy the said breach within 7 days; failing which the appropriate legal action would be taken.

[4] It is common cause that although the guarantee was not provided within the 30 days period agreed upon, but much later than that, there had never issued

the envisaged notice calling upon the purchaser to rectify the breach. When the purchaser eventually provided the said guarantee, there is no dispute same was acceptable to the Respondent.

[5] According to the Applicant, the First Respondent failed to honour its obligations by refusing to effect transfer of the property. In this regard, First Respondent allegedly failed to sign the transfer documents as prepared by the conveyancer appointed to carry out the task. A consequence of this was to frustrate the transfer of the property to it as the lawful purchaser. The applicant averred the First Respondent did this in an endeavuor to ensure that the property was transferred to somebody else. I must however clarify that no evidence justifying or confirming this assertion was placed before court.

[6] Although the First Respondent did not oppose the application, his wife, married to him in community of property effectively did so. As she had not been cited and served as a party she filed an application to intervene as the fourth Respondent and went on to disclose what her ground for opposition was. She contended therein that she had not initially known about the sale

of the matrimonial property and that if she had known, she would have objected thereto as she had neither an intention nor a desire to alienate the said property. For these reasons, she contended that the sale of the property to the Applicant was a nullity as it was against Section 16(3) of the Deeds Registry Act as amended by Act No.2 of 2012. This section reads as follows;

> *"16(3) Where immovable property or other real right that is not excluded from the community is transferred or ceded to or registered in the name of a spouse married in community of property neither spouse may, alone deal with the immovable property or other real right unless that spouse has the written consent of the other spouse or has been authorized by an order of the court to so deal with the immovable property or any other real right."*

[7] On the basis of this contention, the fourth Respondent averred that the deed of sale between her husband and the Applicant was a nullity and therefore that it was not enforceable. She thereafter filed a counter application, in

terms of which she sought an order nullifying the Deed of Sale and eventually dismissing the application.

[8] The Applicant argued that the forth Respondent's manner of opposing the application and seeking of an order in terms of her own counter application smacked of collusion between her and her husband the First Respondent. It was argued that in that sense her case was not different from that of **S'mile B. Dlamini Vs Noah Nkambule Civil Case No.613/2012 Neutral Citation [2012] SZHC 148**. It was argued it could not lie with the wife to set aside the agreement concluded between the Applicant and her husband, particularly when taking into account that she had not disclosed when she became aware of the sale of the property and what she had done upon becoming aware of that situation and the eventual filing of the application by the applicant which she now sought to oppose. It was argued further that the section itself should not have availed them in the circumstances of the matter as the first respondent had also sought to support her by claiming he had not consulted her before concluding the agreement which could realistically not lie in his mouth if he now sought to nullify his own act to the detriment of an innocent party like the applicant.

[9] It cannot realistically be disputed that in the normal scheme of things, courts should always uphold the sanctity of contracts which is in any event about putting into effect the wishes of the parties to the contract at least as at the time they signed it which should be binding. I agree as well that these wishes of the parties as expressed in the agreement concerned should not be defeated through fraud and or collusion which is what this court should be weary of. This of course was the rationale in the **Smile B. Dlamini Vs Noah Nkambule Case (Supra)**.

[10] There however seem to be at least three material distinguishing features between that case and the present one. Firstly it was the seller in that case who was coming out to say the agreement was a nullity and had to be set aside because he had not obtained the consent of his wife before he concluded the sale by signing the agreement or Deed of Sale. This court disapproved of the conduct by the seller in that case as he was obviously trying to lift himself with his own bootstraps which the law frowns upon.

[11] The second distinguishing feature was that the applicant in this matter had not set out a case which would enable this court construe on a balance of probabilities and reasonably that there was collusion between the First and Fourth Respondent. He in fact left everything to speculation that this was the case or sought to rely on the strong suspicion that this was the case. Suspicion, no matter how strong a feeling grounds it, does not amount to a proven fact. This is all the moreso where the suspicion relates to a fraud or collusion (which is in my view a species of fraud). The position is now settled in our law that for one to construe that there was fraud), there should be unequivocal facts proving same as it can neither be made nor construed lightly.

[12] To underscore this point in **Chief Officer (Swaziland National Administration) Vs Kunene, In Re: Kunene Vs The Attorney General And Others [2008] SZICA at paragraph 22,** the full bench of the Industrial Court of Appeal had the following to say which is apposite to the case at present;

> "*There is a finding of the court a quo which has greatly exercised our minds. In Paragraph 21 and in the subsequent*

paragraphs of the judgement, the learned judge refers to the allegations which the Respondent had made regarding the alleged irregularities in which he found that ***fraudulent payment of allowances*** *were made to certain committee members. It is clear to us that the court a quo accepted these allegations made by the Respondent, to prove that these payments were made and that they were contrary to some standing regulations which state that members of these committees, and who were in receipt of other income would not be entitled to receive allowances for sitting on those committees.* ***Fraud is a serious allegation to make and it should not lightly be accepted unless there is evidence to support it.*** *No such evidence was produced and we believe that such evidence was necessary before serious allegations of fraud could be imputed to people."*

[13] That a finding of fraud is not to be lightly made but should be preceded by sufficient evidence can be found as well in the High Court case of **Swaziland Electricity Company And Another Vs Malesela Technical Services (PTY) LTD And Two Others, civil case numbers 1183/05**. In

this particular case, a conclusion that there had been fraud and collusion was preceded by the setting out of facts supporting that assertion. For instance this was in showing that the contract forming the subject matter of that case was awarded to the Respondent as a party through fraud and collusion as embodied in wide efforts by the second Respondent there to ensure that the particular contract was awarded to the First Respondent company notwithstanding that it had not independently made a case to be so awarded. In fact it was shown in that matter that the applicant had lied and said that the Respondent Company was not going to charge anything for the first phase of the contract but later turned around to the payment of certain amounts. It was also shown that the Second Respondent in the said matter had gone on to force the panel appointed to assess and score the tender awarding process to change their initial scores awarded the said company. Furthermore it was also placed before court in that matter that a senior employee of the Swaziland Electricity Board, who had given information that the First Respondent company did not qualify for the award of the tender was dismissed from work by the 2nd Respondent. Clearly, in that matter the fraud and collusion was proved, as all the facts establishing it were set out in detail. This satisfied the principle, that allegations of fraud cannot be made lightly nor can evidence of it be accepted lightly.

[14] This is to demonstrate that for the applicant to succeed on its allegations of fraud in this matter it had to place all the material facts establishing fraud and/or collusion before court as it cannot suffice to merely bring about a suspicion that there was a likelyhood of such fraud and or collusion as the averments by the applicant in the present matter seemed to suggest in my view.

[15] The third distinguishing feature between this case and that of **Smile B. Dlamini Vs Noah Nkambule (Supra**) is that the two cases are not affected by the same law in the sense that whereas the amendment to the Deeds Registry Act, prohibiting the alienation or transfer of land without the consent of a spouse in the case of spouses married in community of property, was not in place then. It is in fact interesting to note that as fate would have it the Judgement in the **S'mile B. Dlamini Vs Noah Nkambule (Supra)** case was issued on the 29th June 2012; the same day on which the amendment to the Deeds Registry Act, in question was done. Ofcourse it is also noteworthy that in the **S'mile B.Dlamini Vs Noah Nkambule** case, the objection to the transfer was made by the Husband, who had sold the

property in the first place yet in this one it is made by the wife who claims to be innocent and indeed no evidence in this regard has been provided to show she was not save for the lingering suspicion.

[16] In support of the point on the amendment of the Deed's Registry Act, the Fourth Respondent sought to argue that there was now in existence a specific prohibition against the transfer of matrimonial property without the written consent of the other spouse. In this sense it was contended that the act of purporting to transfer the property was null and void. There was thus cited from the case of **Macfoy Vs UAC (1961) 3 All ER 1169**, the following passage which was said to be apposite:

> *"If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have it declared to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

[17] It is not in dispute that the applicant did not seem to have an answer to these assertions by the Respondent. He seemed to accept that as a matter of fact the agreement was to be construed as being null and void except that he was contending such a point could not even arise in this matter because according to him the attempt to evade the agreement was a result of collusion between the First and Forth Respondents. I have already reached a finding above, in this regard, where I have concluded that a case setting out such a collusion has not been made as no sufficient material setting out such fraud or collusion has been placed before Court.

[18] In this sense I have to proceed from the premise that the agreement as concluded by the Applicant and First Respondent was prohibited. I agree that the fate of such agreements has long been decided by the courts. For, instance in **Schierbout Vs Minister of Justice 1926 AD 99**, Innes CJ held that agreements prohibited by law are void, whether they are expressly or impliedly prohibited.

[19] Supporting this conclusion, our High Court had the following statement to make in **Swaziland Electricity Company Vs The Ministry of Natural Resources and Energy, High Court Case No.1183/2005 at page 16**:

> *"It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect….So that what is done contrary to the prohibition by the law is not only of no effect but must be regarded as never having been done and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act. The maxim quod contra legen fit pro infecto habetur is also recognized in English Law. And the disregard of peremptory provisions in a statute is fatal to the validity of the proceedings affected."*

[20] A point that merits a comment at this stage is that made in **Sutter V Schepers 1932 AD 165**, to the effect that a distinction should be made between those cases in which the provision referred to is peremptory from those in which same is directory. It was said that certain guidelines to

determine this question had been put in place although they are not conclusive. The following was thus stated:

> *"The word "shall" when used in a statute is rather to be constumed peremptory than as directory unless there are other circumstances which negate this construction. If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate. If a provision is couched in a positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory."*

[21] From the foregoing paragraph, it is clear in my view that the provision in question, that is section 2(3) of the Amendment to the Deeds Registry Act 2012 is couched in a negative form, which means that it is peremptory. In other words, the provision concerned prohibits the alienation of marital property (in community of property) without the other spouse's written consent. It has been said that anything done contrary to the prohibition of the law is not only of no force and effect but should be regarded as never having been done. It does not matter whether the law giver has expressly so

decreed or not, as the mere prohibition operates to nullify the act. See the **Schierbout Vs Minister of Justice 1926 AD 99 at 109**.

[22] This principle was affirmed in the following words in **York Estates LTD Vs Warehan (1950) SA 125**;

> *"As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by statute."*

[23] I am convinced that the relevant provision in this matter is not only peremptory in its effect but it prohibits the transfer of the property in these circumstances, which means that the agreement which purported to effect the transfer of the property in these circumstances was a nullity. I therefore must conclude that the purported alienation of the land in question cannot be allowed which means that the applicant's application cannot succeed and should be dismissed.

[24] The question is having dismissed the said application can a relief as contemplated in terms of the counter application be avoided? I think not. Accordingly, and for the reasons set out above, I have to order that the agreement concluded between the Applicant and the First Respondent be and is hereby set aside.

[25] Owing to the reckless manner in which the First Respondent dealt with the Applicant and the property in question, it seems to me that it will be in the interests of justice to order him to bear the costs of these proceedings. Accordingly I order the First Respondent to pay the Applicant's costs on the ordinary scale

N. J. HLOPHE

JUDGE – HIGH COURT