IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Civil Case No. 715/2014

In the matter between:

SAMUEL S. DLAMINI **Applicant**

And

STEVEN SANDLA DLAMINI **1st Respondent**

NELLY DLAMINI **2nd Respondent**

THE SHERIFF OF SWAZILAND **3rd Respondent**
THE REGISTRAR OF DEEDS **4th Respondent**
THE ATTORNEY GENERAL **5th Respondent**

Neutral citation: *Samuel S. Dlamini vs Stephen Sandla Dlamini & 4 Others (715/2014) 2017 SZHC 11 07 February 2017*

Coram:	Hlophe J
For the Applicant:	Miss S. Matsebula
For the 1st and 2nd Respondents:	Mr. M. Ntshangase
For the 3rd, 4th and 5th Respondents:	No appearance
Date Heard:	27th June 2016
Date Handed Down:	07 February 2017

Summary

Application proceedings – Interdict sought to prevent transfer of immovable property to anyone else than to the Applicant – Requirements of an interdict considered – whether such requirements met in the circumstances of this matter – Agreement concluded between Applicant and first and second Respondents on the other concerning the sale of a certain piece of land – Applicant observes all terms of the agreement – Respondents refusing to give effect to the transfer of the property because they allegedly cancelled agreement - No reasons justifying the alleged cancellation put forward – Respondents allegedly trying to transfer property to someone else. Specific performance sought as a remedy by the Applicants – When such a relief competent – Whether applicant entitled to the said relief – Question whether any agreement outside the written one and signed by the parties conceivable – Whether the Respondent can in law avoid the enforcement of such an agreement – Whether Applicant entitled to an order compelling the Respondents to sign the documents meant to effect transfer of title in the property concerned to him.

JUDGMENT

A. Background

[1] On the 28th November 2008, the Applicant and the First Respondent concluded a written agreement of sale in terms of which the latter was sold the property fully described as Portion 107 (a portion of portion 52) of Farm Dalriach No. 308, Hhohho, Swaziland, by the former.

[2] The purchase price was a sum of E330, 000.00 payable by means of a guarantee which was to be secured from Standard Bank within 60 days of signing the agreement. The amount guaranteed was otherwise to be paid to the First Respondent on the day of registration of the transfer of the property in Applicant's name.

[3] It is noteworthy that the agreement makes no reference to the payment of a deposit nor does it make reference to that term. It also says nothing about the circumstances under which either of the parties would be entitled to a cancellation of the agreement. There is however an apparent assumption such would happen upon failure to remedy a breach by either party after 10 days of failure to do so after a notice to that effect would have issued.

[4] It is common cause that after the conclusion of the agreement the Applicant complied with all the terms of the agreement by inter alia providing the guarantee as required to do so in terms of the agreement concerned. It is not in dispute that when the 1st and 2nd Respondents offered to sell the piece of land in question to the Applicant, they desperately needed some money with which to pay their children's school fees in the Republic of South Africa.

The Applicant also arranged for the First Respondent to obtain an overdraft facility in the sum of E70, 000.00. There is a divergence of views on the reasons or purpose for the overdraft facility including in whose name it was supposed to be granted. Whereas the Applicant contends it was supposed to be in the First Respondent's name who it was benefitting, the First Respondent contends otherwise, particularly that it was supposed to be in the applicant's name. It avers that it was supposed to be in the name of the Applicant who was supposed to pay same as a deposit for the purchase of the same property. This requirement, it is contended was a requirement of a verbal agreement over and above the written one which was signed by the parties.

[5] This Latter contention forms a further point of departure between the parties. That is whether or not there was a further oral agreement to the

written one. The question is of course whether this was conceivable from the facts of the matter or from the agreement itself. Whereas the First Respondent contends that there existed such an agreement, the Applicant denies it. Otherwise this oral agreement according to the Respondent provided for the payment of a deposit of E70, 000.00 by the First and second Applicants. First Respondent according to the Second Respondent was called by Standard Bank to come through and sign the overdraft in question without she being made alive to the fact that she was actually binding herself to the concerned facility.

[6] The Applicant gives a contrary version. He says that he made arrangements for the Respondents to obtain the overdraft to quickly access the funds they desperately needed at the time following their request and after it had already been agreed he was being sold the piece of land in question. The overdraft was, according to this party, going to be cleared soonest after the guarantee would have become payable and that not a long time for the payment of the guarantee was foreseeable then.

[7] The parties are agreed that there later ensued a dispute around the overdraft facility between them after the Respondent refused to sign the necessary documents to pass transfer. The Applicant claimed that the

Respondents refused to sign because they were no longer under the pressure they were in before he arranged them the overdraft facility. He argued, that the facility had eased their financial needs when taken together with a further E100,000.00 loan, it transpired the Respondents had obtained from the Swaziland Building Society. It transpired that this had been secured by means of a bond over the same property. On the other hand the First Respondent contends that it refused to sign such documents after realizing that the Applicant had not been candid with them considering that he had without disclosure secured an overdraft facility and made them pay for it, yet they had allegedly not planned for such. In any event, it was the Respondent's case that they had cancelled the agreement of sale concerned and that they had informed the Applicant timeously of the said cancellation. They contended that the applicant had only sought to challenge same after a year of its cancellation and therefore that he had waived his right to challenge same by delaying to challenge the cancellation in the manner he did it.

[8] It was after the Applicant had allegedly gathered some information that the land sold to him in terms of the Deed Of Sale referred to above, was now being sold to a third party unknown to him, that he instituted the current proceedings. In these proceedings the Applicant prayed for inter alia an interdict restraining the transfer of the property to any other person

or entity than him. There was further sought an order directing or compelling the Respondents to sign all the documents as are necessary to pass transfer, failing which the sheriff was to be authorized to sign all such documents. In this application, the applicant contends it has a valid agreement of sale with the First Respondent, whose terms it contended it was continuing to observe fully.

[9] The application by the applicant is opposed by the Respondents who contends that the agreement in question had long been cancelled by them and therefore deny that the applicant is entitled to the reliefs sought because according to them, the Applicant had since waived his right to challenge same. They further claim that they were justified to cancel same when considering that the Applicant had allegedly informed them he was organizing them an overdraft facility in the sum of E70, 000.00 in his name as a deposit only for them to discover the overdraft concerned had been sought in the 1st Respondent's name who had to repay it. This overdraft facility, it was contended, had caused them misery because they had to pay it without having planned to do so.

B. <u>Issues And Question For Determination.</u>

[10] It seems to me that the issues for determination in this matter are whether or not there was cancellation of the Deed of Sale between the Applicant

and the First Respondent, including whether such was fathomable in the manner it was allegedly done. It is contended this did not comply with what would be done by a party who sought to rely on a breach by another one to the agreement. A determination of this question also has to necessarily entail a determination of the question whether or not the overdraft of E70, 000.00 the Applicant allegedly arranged for the First Respondent could be taken to be a deposit paid towards the purchase of the property concerned. This would necessarily also entail a determination whether a deposit was conceivable in terms of the agreement. There would also be a need to determine whether or not the Applicant had waived his right to enforcing the agreement together with the propriety or otherwise of an order for specific performance in the circumstances of the matter.

C. <u>The Cancellation Or Otherwise Of The Agreement</u>

[11] The First Respondent contends that he and the Second respondent cancelled the agreement way back in 2012 May upon realizing that the Applicant had, contrary to their agreement, sought an overdraft in the name of the First Respondent instead of securing one in his own name and for his account as a deposit for the purchase of the property. This contention is concluded by saying that even after they had cancelled the

agreement, the applicant did not do anything about it for over two years which allegedly amounted to a waiver.

[12] It is not in dispute that the agreement did not make mention of any deposit as having to be paid by the purchaser. It instead made it clear what the purchase price was and how it was to be paid.

[13] The purchase price was of course a sum of E330, 000.00 in terms of the Deed of Sale and was payable (all of it) by means of a guarantee provided by the Standard Bank. Nothing is said about a deposit having to be paid. Other than mentioning the E330, 000.00 as the purchase price, the agreement also decrees that it constitutes the entire contract between the parties to it and that no other conditions, stipulations, warranties or representations whatsoever were contemplated or made by either party.

[14] This makes it highly improbable that the parties could have agreed on the payment of a deposit. It further defeats logic why such would have had to be paid by the Applicant by means of an overdraft payable to the First Respondent when it was to have had to be paid by the applicant. Clearly, what the Applicant has said has more credence and is more probable than

that by the Respondent. In my view the contention by the Respondents in this regard is aimed at creating a dispute. Such a dispute would be conjured and would therefore not be genuine. This would therefore necessitate the application of what has come to be known as the **Plascon – Evans V Van Riebeck Paints Rule,** which states that it is not every dispute that would render a matter not determinable on the papers as they stand. See **Plascon – Evans Paints (PTY) LTD 1984(3) SA623(A) at 634L to 635B,** as well as **Nokuthula Dlamini VS Goodwill Tsela Supreme Court Civil Appeal Case No.11/2012.** See also **Early Harvest Farming (PTY) LTD** and **EI Ranch (PTY) LTD 454/2015.**

[15] Clearly if the oral agreement referred to by the Respondents was to be conceivable, it would be so because it was possible to conclude such an agreement in terms of the Deed Of Sale concluded by the parties. Although the agreement does not expressly say anything about its cancellation, one would assume that when it talks of a breach, it was by implication referring to the entitlement of the aggrieved party to a cancellation at Paragraph 6 of the agreement signed by the parties when it provided the following:

> **"Should any of the parties for any reason whatever commit a breach of the terms and conditions of this**

Deed of Sale and remain in such breach for a period of 10(ten) days (Sic) of demand being made to remedy the same, the other party in addition to any other damage (Sic) that such aggrieved party shall have suffered due to such breach…"

[16] Although woefully drafted, I will take it that this clause was intended to read that should the defaulting party remain in such default after the lapse of some 10 days since it was notified about the breach and called upon to remedy it without doing so, then the aggrieved party could without prejudice to any other remedy it has in law, be entitled to cancel the Deed of Sale. Clearly a reliance on such a clause would no doubt require a full compliance with it.

[17] The starting point is that if by supposedly arranging the overdraft in the manner he allegedly had, then the Applicant was committing a breach. If that was the case, there was supposed to issue a notice some 10 days before the alleged cancellation. The cancellation would only happen where there was clearly no compliance with such a notice. There has not

even been an attempt to comply with that aspect of the agreement and there was no allegation such had been complied with.

[18] Consequently therefore, there was no compliance with the agreement in question by the Respondents as they purported to cancel the agreement. The effect of this in my view is that the purported cancellation cannot stand as it would not have been done in the manner agreed upon between the parties. The purported cancellation was therefore an exercise in futility if it was not carried out in terms of the agreement itself.

[19] I agree with applicant's Counsel that in the circumstances of this matter, if indeed a cancellation had been done, it would clearly not be unequivocal and would be contrary to the requirement of law as stated by **R.H. Christie in his book titled, The Law of Contract, 4th Edition, Butterworths at page 626** when he says that **"notice of a cancellation must be clear and unequivocal and it takes effect from the day it is communicated to the other side."** The one alleged in these circumstances is clearly equivocal and therefore does not meet the muster.

D. Whether Applicant Waived His Rights To Enforcement Of The Agreement.

[20] Having determined from the facts that a cancellation was not fathomable on account of the failure by the Respondents to comply with clause 6 of the agreement which required a notice before cancellation, which I have specifically found was not issued, it seems to me that the question whether or not there was a waiver of the applicant's rights does not arise. I agree with the argument by the Applicant's Counsel that a party cannot waive his right merely by delaying to enforce it. R.H.Christie, in his book, **The Law of Contract, 4th Edition, Butterworths,** at page 515 puts the position as follows;

> **"Delay in enforcing a right conferred by the terms of a contract is not necessarily a waiver of the right. One can go further and say that delay, of itself and without more, can never deprive a party of a right conferred by the terms of a contract except by prescription. In North Eastern Districts Association (Pty) Ltd v Surkhey Ltd 1932 WLD 181 186 Krause J said that;**

> **"it is not by mere delay that a man loses his rights, even if he is aware of the fact that another has infringed his rights. Delay or 'standing by', as it is called may be taken into consideration by the Court in arriving at the conclusion as to whether or not the man did or did not lose his rights"**

[21] Although the Respondents rely on what was said in **Mutual Life Insurance Co.of New York V Ingle 1910 TPD 540** to the effect that when a person is entitled to a right which he knows is being infringed and he acquiesces in its infringement, he leads the one infringing it to think he has abandoned it and, he would be debarred from asserting it. The operative words in this statement of the law is the knowledge that the said right was being infringed which is not the case herein. It has herein not been shown that the applicant was aware of the purported cancellation of his right nor could he ever think of such when considering that the alleged cancellation if it did happen was not done in terms of the agreement and I have found it would have been of no force or effect therefore.

[22] Consequently, I am convinced that there is no basis for the Respondents in these circumstances to assert that the Applicant had waived his rights in the circumstances of this matter.

E. <u>Whether Or Not The Applicant Is Entitled To Specific Performance.</u>

[23] The position of our Law has repeatedly been stated to be the following with regards Specific Performance;

> **"Prima facie, every party to a binding agreement who is ready to carry 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."** See in this regard **Farmers Coop. Society (Reg) V. Berry 1912 AD 343 at 350.**

[24] Of course specific performance by the other party will be insisted upon where the defendant is in a position to perform, as was stated in the following words in **Thomson vs Pullinger (1894) 1 OR at Page 301.**

[25] The position is also settled that whether or not to order specific performance is a discretionary remedy by the court and this principle was

enunciated in the following words in the **Thomson Vs Pullinger** case (Supra);

> **"It is true that a court will exercise its discretion in determining whether or not decrees of specific performance will be made. They will not of course, be issued where it is impossible for the Defendant to comply with them."**

[26] These principles with regards specific performance have been stated and restated in several local High Court and Supreme Court Cases, including **Nondlela Susan Nkwanyana Vs Ngwane Park Township (PTY) LTD – Supreme Court Case No.58/09 at page 3 paragraph 3**, and also **Vulindlela Dlamini and another Vs Phumzile Patience Simelane – Supreme Court Case No. 64/2013 at pages 11 – 12**. To sum up on what the courts have said with regards when it would be or would not be competent to grant an order for Specific Performance, the Appellate Division of the Supreme Court off South Africa put the position as follows in **Haynes Vs King Williamstown Municipality 1951(2) SA 371(A) at 378 H-379 A**.

> **"Where it would operate unreasonably hard on the Defendant, or where the agreement giving rise to the claim is unreasonable, or where the decree**

would produce injustice or would be inequitable under all the circumstances."

[27] In the matter at hand the agreement was concluded between the parties where the price of the land being sold to the Applicant was set out. Other than a possibility that the Respondents found it possibly convenient to no longer perform in terms of the agreement, no sound reason has been put forth why it was impossible, difficult, unreasonable or unjust in the circumstances to comply with its obligations in terms of the agreement. I am convinced that granting the order for the specific performance sought would not operate unreasonably hard on the Respondents nor would same result in an injustice or be inequitable in the circumstances. It is also not impossible for the Respondents not to perform. Otherwise the inconvenience that would come with the enforcement of the agreement was self-inflicted by the Respondents who failed to uphold an agreement they had concluded themselves with the Applicant.

[28] Consequently I am convinced that this is a matter where I should, in exercise of the discretionary powers that vest in me, direct that an order for specific performance be issued against the Respondents herein. Accordingly I have come to the conclusion that the applicant's application succeeds with the result that;

1. The rule nisi issued by this court on the 30th day of May 2014 be and is hereby confirmed.

2. Without derogating from order 1 above I also specifically order that:

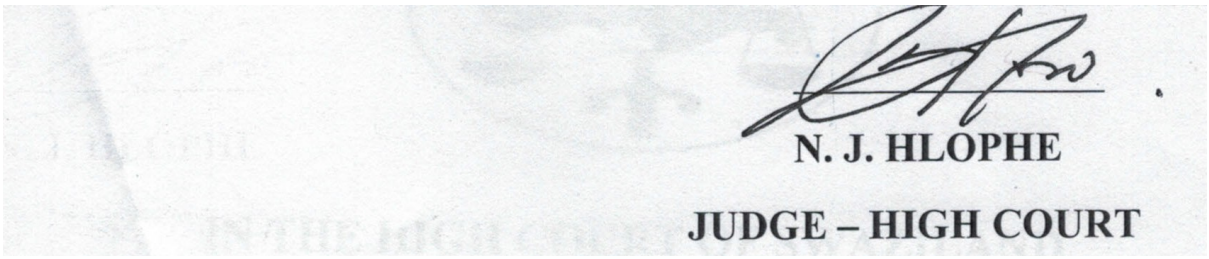
2.1. The First and Second Respondents be and are hereby ordered to take all steps necessary to effect transfer of Portion 107 (a portion of portion 52) of Farm Dalriach No. 308, District of Hhohho, Swaziland to the applicant within 14 court days from service of this order upon the Respondents.

2.2. The Applicant shall pay the full purchase price to the first and Second Respondennts within 14 days of the Registration of the property in his name.

2.3 Should the First and Second Respondents fail to take such steps as are necessary to effect the transfer of the property into the name of the Applicant within the above specified period, the 3rd Respondent be and is hereby directed, authorized and empowered to take all such steps as are necessary to effect the transfer of the property mentioned in order 2.1 above into the name of

the Applicant including the signing of such documents as may be necessary.

3. The First and Second Respondents be and are hereby ordered to pay the costs of these proceedings on the ordinary scale.



N. J. HLOPHE

JUDGE – HIGH COURT