



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 68/2014

In the matter between:

ROSE RAUTEBACH (NEE MASEKO)

Applicant

And

REUBEN BERNARD RAUTENBACH

First Respondent

A.B.C. Ministries

Second Respondent

GERRY RICHTER

Third Respondent

ROBYN RICHTER

Fourth Respondent

REGISTRAR OF DEEDS

Fifth Respondent

THE ATTORNEY GENERAL

Sixth Respondent

Neutral Citation : Rose Rautebach (Nee Maseko) v Reuben Bernard Rautebach & 4 Others (68/2014) [2020] SZHC 69 (28th April 2020)

Coram : MABUZA – PJ

Heard : 7th February 2020
Delivered : 28th April 2020

SUMMARY

Law of Contract: Applicant seeks cancellation of deed of sale over immovable property entered into between the first and third Respondent

Law of Husband and Wife: The cause of action is based on the joint community of property existing between Applicant and first Respondent who are married in community of property.

Law of Husband and Wife: First Respondent disallowed from selling joint property by operation of the law

JUDGMENT

MABUZA –PJ

[1] In this matter the Applicant seeks and order in the following terms:

- a) The Deed of Sale, in relation to Portion 3 (a portion of portion 1) of Farm No. 869, situate at Motshane Hhohho District, concluded between the first-fourth Respondents on or about the 10th September 2014 is hereby cancelled and/or set aside and/or declared a nullity;

- b) The second-fourth Respondents and /or all those holding title on their behalf are hereby ejected forthwith from Portion 3 (a portion of portion 1) of Farm No. 869, situate at Motshane, Hhohho District;
- c) The first, second, third and fourth Respondents are ordered to pay the costs of this application at Attorney and own client scale;
- d) Granting the Applicant further and/or alternative relief.

[2] The application is opposed by the A.B.C Ministries (the Second Respondent).

[3] On the 7th February this matter was before me for arguments but Counsel for the 2nd, 3rd and 4th Respondents did not appear notwithstanding a Notice of Set Down which had been timeously served on their correspondent attorneys. Instead of applying to dismiss the matter Mr. Jele for the Applicant requested the Court to write the judgment using the parties Heads of Argument.

THE PARTIES

- [4] The first Respondent is Reuben Bernard Rautebach, and adult male resident at or near St Marks Primary school Mbabane.
- [5] The second Respondent is A.B.C. Ministries a company registered as a non-profit association of which the third and fourth Respondents are Directors.
- [6] The third Respondent is Jerry Richter, an adult male currently residing at Portion 3 (a portion of portion 1) of Farm No. 869 situate at Motshane in the District of Hhohho.
- [7] The fourth Respondent is Robyn Richter, an adult female currently residing at Portion 3 (a portion of portion 1) of Farm No. 869 situate at Motshane in the District of Hhohho. The third and fourth Respondents are husband and wife.
- [8] The fifth Respondent is, The Registrar of Deeds cited in his nominal capacity as such, carrying on business at 4th Floor, Justice Building, Mbabane. No adverse order is sought against his office.

BACKGROUND

[9] The Applicant and first Respondent were married on the 21st December 1990 in community of property in accordance with civil rights. The parties were divorced on the 14th February 2006. A rescission application was brought on the 12th July 2013 by the first Respondent but was dismissed. He appealed to the Supreme Court. His appeal was successful and the order relating to the divorce and forfeiture of the property was set aside by judgment delivered on the 29th November 2013 (civil appeal No. 38/2013). This effectively means that as of that date the parties' marriage still subsisted and still subsists. There is a new divorce action brought by the Applicant which is pending. In that action the ancillary prayer includes forfeiture of the benefits arising from the parties' marriage in community.

[10] On or about the 30th May 2001, the Applicant and first Respondent purchased immovable property (the property) described as Portion 3 (a portion of portion 1) of Farm No. 869 situate at Motshane in the Hhohho District. Due to the practice that prevailed at the time of registration of transfer, the property was registered in the name of the first Respondent only.

- [11] The parties resided on the property until they encountered marital problems and the first Respondent moved out and went to reside elsewhere. Due to financial constraints the Applicant also moved out and leased the property first to WBHO and later to the second to fourth Respondents. The latter's lease was from the 1st July 2012 and was to run for a period of 24 months with an option for renewal at the end of the lease period.
- [12] The second to fourth Respondents were known to the Applicant and first Respondent prior to the break-up of their marriage. As mentioned earlier the third and fourth Respondents are husband and wife. Together they run the second Respondent which is a non-profit company which provides shelter for homeless and abandoned children and babies.
- [13] When the lease between the Applicant and the second Respondent came to an end, it was renewed by the first Respondent, between him and the second Respondent and rental were remitted to the First Respondent.
- [14] Unbeknown to the Applicant, the first Respondent also entered into a Deed of Sale with the second Respondent to sell the property for E1 350.000.00 (Emalangeneni Three Hundred and Fifty Thousand Emalangeneni).

[15] The Applicant's name is not reflected as a co-seller in the Deed of Sale.

THE APPLICANT'S CASE

[16] The Applicant avers that she is married to the first Respondent in community of property and that the marriage still subsists and they are engaged in divorce proceedings which are part heard. She further alleges that the first Respondent colluded behind her back with the third and fourth Respondents to sell the property to the second Respondent without her consent.

[17] The property, it is stated by the Applicant, falls under the joint estate of the Applicant and the first Respondent. The Applicant further states that the sale was an act of fraud on the part of the first to fourth Respondents and for that reason it stands to be declared null and void. It is further stated that the Deed of Sale was concluded against the provisions of section 16 (3) of the Deed Registry Act of 2012, in that there was no written consent of the Applicant.

[18] The Applicant further states that the third and fourth Respondents knew that she was married to the first Respondent and that such marriage was in

community of property. She further states that legally she is also the registered owner of the property.

[19] The Applicant does not dispute that repairs were effected on the property but asserts that same was instructed by the first Respondent and not herself.

[20] The Applicant asserts that the property was sold under value in that it should have been sold for E2.7 Million as advised by Ngwenya Town Board.

[21] The Applicant states further that the first Respondent had no right in law to alienate the property which is part of the joint estate without her written consent.

THE SECOND RESPONDENT'S CASE

[22] The second Respondent states in its papers before Court that it is not privy to the internal agreements and arrangements between the Applicant and the first Respondent. Further, in the dealings with the first Respondent in relation to the conclusion of the deed of sale the first Respondent presented himself as a husband of the Applicant and being capable of concluding any agreement on behalf of both Applicant and the first Respondent. The deed of sale was entered in good faith on the side of the second Respondent.

[23] It is stated that the Applicant and the first Respondent always knew of the intentions of the second Respondent to purchase the property and have it transferred to it.

[24] It is further stated that when the Applicant initially approached the second Respondent for the leasing of the property, she advised them that she had already divorced the first Respondent and that the property belonged to her alone. As time went on, it was discovered that the first Respondent was still married to the Applicant and that the first Respondent was the registered owner of the property as in accordance with the title deed.

[25] When the lease agreement entered into with the Applicant came to an end a new lease agreement was entered into with the first Respondent and this time around the Applicant was not involved in the conclusion of the lease agreement.

[26] The second Respondent further states that there was never any collusion in the conclusion of the deed of sale and that same was concluded in good faith and all that relates to the deed of sale was conducted in good faith on the

part of the second Respondent. The Applicant knew from the beginning of the intentions to purchase the property by the second Respondent.

[27] With the deed of sale having been entered into between the first and the second Respondent, it came to light that the Applicant had some complaints with same. The second Respondent without any hustling or fighting offered its undertaking on not proceeding with the transfer of the property until the dispute between the Applicant and the first Respondent had been settled.

[28] It is further stated that there was no fraud or collusion on the part of the second to the fourth Respondents in dealing with the Applicant and first Respondent and such dealing were done in good faith. There was no reason to believe that either the Applicant or the first Respondent were acting in isolation and without the permission or knowledge of the other in either conclusion of the first lease agreement and the deed of sale. The only exception being the conclusion of the lease agreement whereupon the Applicant advised the second Respondent that she had already divorced the first Respondent.

[29] It is further submitted that a precedent had been created by the Applicant and the first Respondents that either of them can contract on behalf of both them

in relation to the property, as the lease agreement had been entered into with one of the parties and the other not being present. For that reason it was inferred that the other party had the authority and consent of the other to enter into the contract.

DISCUSSIONS AND CONCLUSIONS

[30] The second Respondent raised a point *in limine* of misjoinder namely, that the Deed of Sale is concluded between the first and second Respondent. And that the second Respondent is a company registered as a non-profit association of which the third and fourth Respondents are Directors and that they have been wrongly cited in their personal capacities.

[31] Having seen the certificate of incorporation and the letter from the Government granting permission to register the company as a non-profit association (**Annexures “ABC1” and “ABC2”**). I am inclined to agree.

[32] Consequently this point of law is upheld with attendant costs if any occasioned by wrong citation.

[33] On the merits, I do not accept that the Directors of the second Respondent were unaware of the marital status of the Applicant and first Respondent. The Directors of the second Respondent were instrumental in securing for adoption one of the minor children for the Applicant and first Respondent from the second Respondent during 2001. The marriage was intact then and they dealt with both the Applicant and first Respondent.

[34] The second Respondent first entered into a lease agreement with the Applicant and when this lease expired entered into a lease with the First Respondent. There is no clear explanation as to how this transition took place. How did it get to know that the first Respondent was the registered owner?

[35] There is an allegation by the second Respondent that the Applicant and the first Respondent always knew that the intention of the second Respondent was to purchase the property as that was the initial plan and proposal from the second Respondent to the Applicant and the first Respondent upon leasing the property. The Applicant has denied this allegation and there is no evidence advanced to support this allegation for example such as an offer to purchase or such document.

[36] The Deed of Sale was signed by the first Respondent on the 23rd July 2014 and by the representatives of the purchaser on the 10th September 2014. The Applicant was not a co-signatory. She is not even listed as a co-seller nor has the first Respondent indicated that he is acting for her as well.

THE LAW

[37] Section 16 (3) of the Deeds Registry Act (Amendment) reads;

“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.”

[38] **In MUSA GOODMAN DLAMINI v PATRICIA DLAMINI AND OTHERS, Supreme Court Case No. 68/2014**, the Supreme Court, in endorsing a High Court decision, in setting aside a Deed of Sale that was

concluded by the husband behind the back of the wife whilst divorce proceedings were on going had this to say’

“21. ...a husband in a civil marriage cannot, on his own exclusive whims and policies, dispose of assets in a joint estate anyway he pleases. The rationale behind this is simple, his wife owns half of the undivided joint estate and she most definitely has an equal say in the matter. An abuse of marital power cannot be tolerated or countenanced to say that the wife in a civil marriage does not have a prima facie right to protection of her half share in their joint estate by an interdict.”

[39] In the case of **BONGANI EPHRAEM NTSHALINTSHAL v MVELI MTHETHWA AND OTHERS Case No. 1927/2016**, the High Court had this to say at paragraphs 18-23 on agreements concluded contrary to a statute:-

“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 **Schierbourt v 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 v 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 legem 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 construed peremptory than a 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 v Minister of Justice 1926 AD 99 at 109.***

22. *This principle was affirmed in the following words in **York Estates LTD v Warenhan (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 is question cannot be allowed which means that the applicant's application cannot succeed and should be dismissed."*

[40] It is clear from the foregoing that the first Respondent had no authority to enter into the Deed of Sale without the Applicants written consent. The sale is therefore a nullity and the Deed of Sale stands to be set aside.

[41] Clause 7 of the Deed of Sale makes provision for occupation, tenancy and rental as follows:

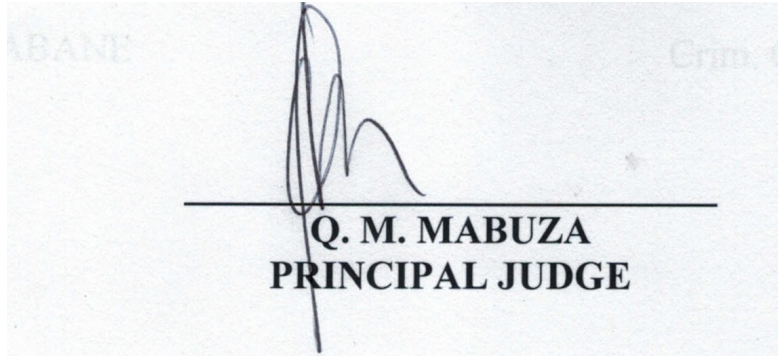
"The purchaser shall be obliged to pay occupational rent of an amount of E8000-00 (Emalangeneni Eight Thousand) in advance to the seller until the date of transfer."

[42] It follows, therefore, that once the Deed of Sale is set aside, the second to fourth Respondents no longer have a legal right to stay or occupy the property and must be evicted.

[43] In my view, the culprit herein is the first Respondent. It is him who should bear the costs albeit on the ordinary scale.

[44] In the event it is hereby ordered:

- (a) That the Deed of Sale, in relation to Portion 3 (a portion of portion 1) of Farm No. 869, situate at Motshane Hhohho District, concluded between the first - fourth Respondents on or about the 10th September 2014 is hereby declared a nullity consequently cancelled and is set aside;
- (b) That the second – fourth Respondents and/or all those holding title on their behalf be hereby ejected forthwith from Portion 3 (a portion of portion 1) of Farm No. 869, situate at Motshane, Hhohho District;
- (c) The first Respondent is ordered to pay the costs of this application on the ordinary scale.



For the Applicant : Mr. N.D. Jele

For the 2nd, 3rd & 4th Respondents : Mr. Dlamini