

**IN THE HIGH COURT OF ESWATINI**

HELD AT MBABANE

CIVIL CASE NO. 2064/2019

In the matter between

Cebsile Cordey Pierce

Applicant

And

Stephen Paul Pierce

1<sup>st</sup> Respondent

Muziwethu Sihle Dlamini

2<sup>nd</sup> Respondent

The Registrar Of Deeds

3<sup>rd</sup> Respondent

Swaziland Building Society

4<sup>th</sup> Respondent

Standard Bank Swaziland

5<sup>th</sup> Respondent

The Attorney General

6<sup>th</sup> Respondent

Neutral citation: *Cebsile Cordey Pierce v Stephen Paul Pierce & 5 Others*  
(2064/19) SZHC-120 [2021] (2021).

Coram : D Tshabalala J

Heard : 16/04/20

Delivered : 20/07/21

*Summary: Civil procedure: Application for rescission I variation of court order in terms of Rule 42 (J) of High Court Rules on the ground that the Applicant was not heard as an interested party married in community of property to the seller of property concerned; that the property, the subject matter of the order was sold unlawfully without Applicant's consent and in violation of Section 16(3) Deeds Registry Act as amended; Declaration of the deed of sale as unlawful, null and void on grounds that it violates the said Section 16(3) of the Deeds registry Act. Held: Application fails because the Applicant not only negotiated the sale for the property alongside her husband, but also signed the deed of sale as a witness to his signature. Therefore, the spirit of the Act has been complied with.*

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## JUDGMENT

### Rescission Application

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[1] This is an application filed under a certificate of urgency, for rescission of Court order granted on the 29 November 2019 under Case No. 1724/19, together with other ancillary prayers, couched in the following terms:

1. *Dispensing with the Rules of Court relating to time limits and manner of service ...*
2. *Condoning Applicants non-compliance with the Rules.*
3. *Granting a Rule Nisi calling upon the Respondents to show cause .... why an order in the following terms should not be made:*
  - 3.1 *Declaring to be unlawfital and therefore null and void ab initio the Deed of Sale entered into by and between the First and Second Respondents purportedly entered into on or about August 2019.*

3.2 *Interdicting and restraining the Respondents and any other persons acting on their behalf pending determination of the dispute between the parties, from effecting the Court order and making the sale agreement take place.*

3.3 *Rescinding the Court order made on November 29, 2019 under High Court Case No. 1729/19.*

*Alternatively;*

4. *That the Second Respondent pays the market value of EI, 943,000.00 (One Million, Nine Hundred and Forty-Three Thousand Emalangi) and or pay the forced sale value of EI, 554,000.00 (One Million, Five Hundred and Fifty Four Thousand Emalangi).*

5. *That paragraph 3.1 and 3.2 above operate as an interim order with immediate interim effect pending the return date.*

6. *Costs of suit in the event the application is opposed.*

7. *Any further and or I alternative relief*

[2] The Applicant and 1<sup>st</sup> Respondent are wife and husband married by civil rites, without an antenuptial contract, since 12 December 2009 to-date. The property consequences of their marriage is governed by common law, as inscribed on the marriage certificate filed. The Applicant submits that she therefore has an equal share in the property the subject matter of this application:

## Background facts

[3] The Application follows judgment of this Court in case no. 1729/19<sup>1</sup> entered in favour of the 2<sup>nd</sup> Respondent against the 1<sup>st</sup> Respondent. The parties in the case under attack will hereinafter be referred as they are cited in *casu*. In the former case the 2<sup>nd</sup> Respondent sought and was granted an order compelling the 1<sup>st</sup> Respondent (the seller) to give to the 2<sup>nd</sup> Respondent (the purchaser) transfer of immovable property purchased by the latter from the former, within 7 days. In the absence of that, authorizing and directing the Registrar of the High Court to sign all necessary court papers and do all deeds necessary to give the purchaser, transfer of the said property. The order also restrained the Registrar of Deeds from effecting transfer of the said property from the name of the 1<sup>st</sup> Respondent, or conducting any transaction in connection therewith. A *rule nisi* was also issued calling upon the 1<sup>st</sup> Respondent to show cause why the orders should not be made final, and costs at attorney and client scale. The property is described as:

*Certain: Portion 41 of the Farm "notcliffe" No 674  
situate Lubombo District Swaziland  
Measuring: 2, 2998 (two comma two nine nine eight) Hectares,*

[4] The interim order was confirmed following that no Answering affidavit was filed but instead a failed attempt by the 1<sup>st</sup> Respondent's then attorney, to introduce unilaterally from the bar, an intervening affidavit deposed to by a non-party<sup>2</sup> to the proceedings.

[5] No reasons were furnished nor was it apparent to this court why the 1<sup>st</sup> Respondent did not file requisite answering affidavit in the first place, and secondly, why an application for joinder of his wife to the proceedings was

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<sup>1</sup> **The present case under attack,**

<sup>2</sup> The present Applicant.

not filed and served in accordance with rules of procedure. A founding affidavit deposed to by the 1<sup>st</sup> Respondent's wife was filed supposedly in support of a counter-application. No counter application had been filed.

The comi in that case properly granted a final order, given that the 1<sup>st</sup> Respondent filed no opposing affidavit, which state of affairs rendered the factual issues raised by the 2<sup>nd</sup> Respondent in his founding affidavit uncontroverted and unchallenged and therefore established. See **Attorney General v Siphon Dlamini & Another**.<sup>3</sup>

[6] The 2<sup>nd</sup> Respondent's case, in Case No. 1724/19 was that he and the pt Respondent had entered into a written Deed of sale for propertiy described at paragraph [3] above, for a purchase price of E740, 000.00 (Emalangeni Seven four zero zero zero zero), that he secured and furnished required bank guarantee, payable upon registration of transfer from 1<sup>st</sup> Respondent's to the 2<sup>nd</sup> Respondent's names.

[7] The 2<sup>nd</sup> Respondent having duly secured and furnished the guarantee was informed that the 1<sup>st</sup> Respondent had changed his mind regarding the sale of the propertiy to the Applicant. The Court found in favour of the 2<sup>nd</sup> Respondent for breach of contract in respect of sale of the said propertiy, in the aforesaid circumstances.

[8] Following the said Cami's judgment the present application for rescission was launched by the Applicant<sup>4</sup> for the aforesaid relief.  
Applicant's case

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<sup>3</sup> SZICA Appeal case no. 4/2013 at para[83].

<sup>4</sup> pt **respondent's wife**.

<sup>5</sup> See paragraph [1].

[9] *Rescission*: The Applicant advances the following grounds for rescission of the judgment:

*"The Court order was granted by mistake in my absence given that the Honourable Court was unaware that I am the co-owner of the property. Had the Honourable Court been aware of my legal rights and interest in this matter it would not have made the order."*<sup>6</sup>

*"...The Honourable Court made the order erroneously without being advised that the Deed of sale did not comply with requirements of the Deeds Registry Act"*<sup>7</sup>

*"...The Honourable Court would never have granted the Court Order if it knew that there was a 3<sup>rd</sup> party in the Swaziland Building Society [4<sup>th</sup> Respondent] which has a legal and financial interest in the matter and did not consent since the property is bonded with it under Mortgage Number 135433."*<sup>8</sup>

[9.1] Although reference is made to mortgage bond as annexure "CP -10 no such copy was filed or furnished to the court. There is no statement filed of outstanding amount or owing against the alleged bond. No papers have been filed or any representation made for the 4<sup>th</sup> Respondent, the alleged bond holder.<sup>9</sup>

[10J] *Declaration of Deed of sale as unlawful*: The Applicant seeks an order declaring the Deed of Sale as unlawful and therefore *null and void ab initio*,

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<sup>6</sup> See para 17 of the founding affidavit.

<sup>7</sup> Para 17.1 of founding affidavit.



<sup>8</sup> see para 17.2 iounding affidavit.

<sup>9</sup> Swaziland Building Society.

asserting that it is in breach of the *Deeds Registry Act* as amended in that, it is undated, and secondly, that the Applicant as co-owner of the property was not party to the purported sale transaction as required by Section 16(3) of the said Act which requires knowledge or notice to, and consent of the other spouse prior to disposal of property belonging to the joint estate of spouses married in community of property.

[11] The Applicant further alleges that the 2<sup>nd</sup> Respondent breached material terms of the Deed of Sale and its addendum in two respects. Firstly, it is alleged that the 2<sup>nd</sup> Respondent delivered the guarantee out of time, beyond the date stipulated by the Deed of Sale. Secondly, that he failed to pay the full amount of E50,000 by the stipulated date of 27<sup>th</sup> August 2019 in terms of the addendum. The Applicant's contention is that in the circumstances, the default clause 4 of the said addendum is applicable.<sup>11</sup> However, the Applicant only alleges breach of the agreement and its addendum and nothing more. Importantly, there is no indication that a notice of the breach was issued to the 2<sup>nd</sup> Respondent per clause seven of the deed of sale, which provides for a 14-days written notice to the buyer within which to remedy the breach, among others. Therefore, there are no requisite additional facts to support the relief sought for the alleged breach.

[12] The Applicant makes significant admission that she was part of the meeting at Riverstone restaurant in Manzini where the 2<sup>nd</sup> Respondent insists terms of sale of the property were settled between the 1<sup>st</sup>

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<sup>st</sup> Respondent and the Applicant on one hand, and the 2<sup>nd</sup> Respondent as the purchaser. However, the Applicant and 2<sup>nd</sup> Respondent's versions on what actually transpired at this meeting are at variance. The Applicant denies that the price was agreed.

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<sup>10</sup> Para 8.4 and 11.2 of founding affidavit.

<sup>11</sup> See founding affidavit at paras 7.2, 9.1.1, 9.2

Her version is that the 2<sup>nd</sup> Respondent made a proposal for purchase price which she believed was not good enough, and that she whispered her reservations to her husband.<sup>12</sup> She further denies that subsequent signing of the deed of sale was done with her knowledge. She denies appending her signature as a witness for her husband's signing of the document as alleged by the 2<sup>nd</sup> Respondent, as it appears to be on the deed of sale. She alleges that her signature was forged.

### **2<sup>nd</sup> Respondent's case**

[13] The 2<sup>nd</sup> Respondent raised points *in limine* under four headings:

1. *Non-compliance with Requirements of Rule 42 of the High Court Rules;*
2. *Non-disclosure;*
3. *Failure to plead with particularity the reasons for urgency; and*
4. *Non-service.*

[14] The assertions made in the first and second points are interrelated in that the 2<sup>nd</sup> Respondent alleges that the Applicant failed to disclose that she made unsuccessful attempts to intervene in the previous application,<sup>13</sup> and that as a result the Applicant has failed to state or point out the patent error committed by the court in granting the order as it did. The 2<sup>nd</sup> Respondent submits that the Application therefore falls short of requirement of Rule 42. This point *in limine* lacks merit as it ignores the fact that the Applicant was never a party to the application in Case No. 1724/2019 as she never sought nor joined those proceedings. Her aborted unprocedural attempts to file papers in the proceedings meant that she was not heard on those issues she

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<sup>12</sup> At para 15 of Applicant's replying affidavit.

<sup>13</sup> The application in which the order was made that she now seeks to be rescinded.

tried to sneak in through the back door. The court never entertained or heard what she had to say including the fact of her stake in the property and her alleged ignorance about the sale. The first point *in limine* therefore fails.

[15] It is alleged under the next point *in limine* that no grounds of urgency exist in the matter, noting that the Applicant has shown in her papers that she had sufficient prior knowledge of the impending sale of the property between 1<sup>st</sup> and 2<sup>nd</sup> Respondent, but sat on her laurels and did nothing to challenge the transaction. Indeed, it appears from the Applicant's papers, the founding affidavit and Reply, that she was aware of and even co-operated in the steps towards sale of the said property, for quite a long time. Nonetheless, given the history and nature of issues involved in this matter, the Court considers that relaxing technical requirements will be in the interests of justice, and that it should hear the matter despite the apparent unmerited claim for urgency.

[16] The 2<sup>nd</sup> Respondent's last point pertains to improper service of the application, alleging that service was made with the property agent Mr Phila Ndlovu with whom the 2<sup>nd</sup> Respondent has no relations. This court is of the view that, even though it is established that service on the 2<sup>nd</sup> Respondent was less than perfect, the court finds it immaterial and that the overriding factor is that the 2<sup>nd</sup> Respondent was able to respond to the application and made appearance before Comi. There was no material prejudice to the 2<sup>nd</sup> Respondent.

[17] The points *in limine* are accordingly dismissed. I now proceed to consider the application on the merits.

[18] The 2<sup>nd</sup> Respondent's case on the merits is that rescission application should fail because the Applicant was fully aware of the sale of the property. That, not only did she partake in the negotiations of the sale alongside her husband but also signed the deed of sale as a witness to her husband's signature.<sup>14</sup> The 2<sup>nd</sup> Respondent avers that the Applicant and 1<sup>st</sup> Respondent sold him the property for E820,000, and because his bank could only finance him up to E740,000.00 it was agreed that he furnished bank guarantee in that amount, which he did. The parties also signed an addendum<sup>15</sup> to the sale agreement in terms of which he was to pay the balance of E80,000.00 by cash instalments, of which E30,000 has been disbursed.

### **Analysis and findings**

[19] *Non-compliance with Section 16 Deeds Registry Act:* The first ground advanced for rescission of the order made in case No. 1724/19 is that it was erroneously granted in that the Court was not aware that sale agreement infringed Section 16 (3) of the Deeds Registry (Amendment) Act of 2012, in so far as the Applicant's written consent had not been obtained, given that she and the 1<sup>st</sup> Respondent were married in community of property.

[20] As earlier stated in this judgment, indeed no facts were placed before court in case No. 1724/19, concerning co-ownership of the Applicant in the property. However, strong indications are that the Applicant is not being candid with the court in her denial of giving consent to the sale of this property. In her founding affidavit the Applicant concedes that she attended a meeting in Manzini at Riverstone Mall where the sale terms were discussed, including the price. The Applicant's denial that she signed the

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<sup>14</sup> Annexure "CP-6" to Applicant's founding affidavit.

<sup>15</sup> Annexure "CP-4" to Applicant's founding affidavit.

deed of sale as a witness to the 1<sup>st</sup> Respondent is unconvincing and lacks credibility. Her bare denial is posted conveniently to support her change of mind regarding the sale. Neither the Applicant who claims that her signature was forged nor the 2<sup>nd</sup> Respondent in his Reply, furnished any handwriting expert evidence to support their positions. However, even a non-expert comparison of the disputed signature with the ones on the Applicant's founding and replying affidavits shows remarkable similarities. It appears to me, and it is clear that she has since changed her mind and is no longer satisfied with the purchase price that she and her husband accepted. It is not the intended purpose of rescission procedure to assist a party to escape a bad deal they may feel they entered into.

- [21] Section 16 (3) of the Deeds Registry Act forbids any of the spouses married in community of property, to "*alone deal with immovable property ...unless that spouse has the written consent of the other spouse ...* " In *casu* the 1<sup>st</sup> Respondent did not *alone deal* with the property concerned. Evidence before this court shows that he did so jointly with the Applicant. This is evident from the fact that the Applicant was party of the discussion leading to signing of the Deed of sale. According to the 2<sup>nd</sup> Respondent, supported by 1<sup>st</sup> Respondent's agent Mr Phila Ndlovu, the Applicant signed the Deed of sale as a witness. Applicant's act of appending her signature as a witness further signified in written form, her consent for the sale of the property. A detailed or express written consent in my view, would be relevant in circumstances where the 1<sup>st</sup> Respondent, acted alone without direct involvement of the Applicant or in her absence, which is not the case in this matter. We have here a case where the spouses together negotiated the sale of their property. It is my considered view that the Applicant's signature as a witness suffices to cement the requisite statutory consent in this particular circumstances.

[22] The facts and circumstances of this case show that the impugned sale agreement was well in compliance with the spirit of Section 16 (3) of the Act. The Applicant has failed to convince this Court on a balance of probabilities that the order of 29 November 2019 under High Court Case No. 1724119 was erroneously sought and erroneously granted. The application for rescission therefore ought to fail.

*Declaration of Deed of sale as unlawful.*

[23] The Applicant also seeks declaration of the deed of sale as null and void on the grounds that it is undated and that it offends against the provisions of Section 16(3) of the Deeds Registry Act in that her written consent was not obtained for the sale of the property. Indeed, legal documents need to be signed and dated in order to support their legality. The Applicant's query related to date is not strong enough to ground annulment of the agreement in that the date is only incomplete as it shows the month and year.

[24] I have already made a finding that the Applicant was fully involved in the sale of the property and also signed the deed of sale as a witness to her husband's signature. In the absence of a prescribed format for a written consent the court is at liberty to treat each case on its peculiar merits. In this case the Applicant's signature as a witness taken together with the surrounding circumstances, including her participation in negotiations for the transaction, strongly favours the finding that the statutory requirement of her written consent for the sale was complied with. For these reasons the deed of sale does not infringe the said Section 16 (3) of DRA.


[25] The Applicant seeks in the alternative that the 2<sup>nd</sup> Respondent must pay the



purchase price equivalent to the market value or the forced market value  
of

the property. Following from the finding above that the applicant is bound by the sale agreement concluded between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, there is no legal basis for the court to intervene to enhance the seller's price agreed in the deal concluded with the purchaser.

[26] The Application therefore fails and is dismissed with costs at ordinary scale. Any interim order that may have been issued is hereby is discharged.

  
-----v  
D Tshabalala  
Judge

For Applicant : TR Maseko  
For P' Respondent : W Maseko  
For 2<sup>nd</sup> Respondent : M Ndlovu  
**For yd\_ 6<sup>th</sup> Respondents: No appearance**