

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.35/2000

In the matter between:

TFOLWAPHI JANE MKHWANAZI Appellant

And

ENOCK LWANE MASEKO 1st Respondent

REGISTRAR OF DEEDS FOR SWAZILAND 2nd Respondent

THE MASTER OF THE HIGH COURT 3rd Respondent

SWAZILAND SAVINGS & DEVELOPMENT BANK 4th Respondent

SARAH VANGILE MKHATSHWA 5th Respondent

CORAM R.N. LEON J.P.

P.H. TEBBUTT J.A.

D.L. SHEARER J.A.

JUDGMENT

Shearer J.A.

The First Respondent as Applicant sought an order for the ejection of the present Appellant from the premises known as Lot 374 Ngwane Park Township, in the district of Manzini. The First Respondent had been married by civil rights to the late NDODELANA SOLOMON MKHATSHWA who died on the 9th February 1993. The Appellant had a common law relationship with the deceased and had two children by him. At the time of his death and at the time of the application she and her family occupied the property and had done so from 1989.

On the 27th October 1997, the 5th Respondent entered into a written agreement selling the property to the first Respondent in which her name appears as "seller". She was, on the 1st March 1999, appointed Executrix Dative to her late husband's estate and Letters of Administration were issued in her favour by the Master of the High Court. In the meantime, on the 27th October 1997, a Deed of Sale was entered into between the 5th Respondent, described as "the Seller" and the 1st Respondent. She did not herself sign as "Seller", but one Ngwenya did. It appears that he was an Estate Agent, A special power of Attorney appears in the papers nominating and appointing "E.M. Ngwenya" as "Attorney and Agent" for the 1st Respondent. It may be added that the 1st Respondent was married to the deceased out of community of property. The requisite consent of the Master to validate such a transaction by the Estate could only have been obtained after the appointment of the Executrix Dative and hence some time after the execution of the

Agreement of Sale.

This succinctly sets out the main facts upon which the 1st Respondent relies in her application, but her locus standi to bring that application is completely lacking. She has, on the papers, no interest in the Estate of the Deceased and consequently the relief which she seeks, which is all concerned with the property asset in the Estate, is of no legal moment to her.

The position on the main application is otherwise. An order was sought against her and she was perfectly entitled to call the status of the Applicant (now 1st Respondent) into question. The question is whether the requisite documents validate the sale by the Estate to the 1st Respondent.

There were a number of unsatisfactory features about the succession of transactions and documents which eventually resulted in the registration of transfer to the First Respondent.

(1) The Deed of Sale does not reflect that the 5th Respondent was acting in any capacity other than her personal capacity. Indeed, she had no power to represent the estate until some 17 months later when she received her appointment as Executrix Dative. She did not, and could not, have the appropriate consent of the Master, until her appointment and therefore

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had no power to sell the property.

(2) The Deed of Sale was signed by Ngwenya describing himself as "The Seller" without indicating any representative capacity. It is true that the 5th Respondent signed a Special Power of Attorney in favour of Ngwenya on the 16th September 1997 but at the best for the 5th Respondent this authorised his acting on her behalf and certainly not on behalf of the Estate. The Respondents sought to rely on this to establish the effective transfer of ownership to the 1st Respondent.

The necessity for the appropriate documents to reflect the representative capacity of the signatory is clear from a number of cases. One of the most important of these is *Hersch v. Nel* 1948(3) S.A. 686 A, and in particular at 703 in which it was held that an agent should clearly state in the deed of alienation that he is acting for a named principal. Parol evidence to prove the identity of an unnamed principal will be inadmissible see *Grossman v. Baruch* 1978/4 S.A. 340(w). See also *Hamdulay v. Smith N.O. & Others* 1984 (3)

S.A. 308 at 316

On that basis the relevant document was defective since the signatory was silent as to his capacity, and the sale is void ab initio. There are other defects in the Deed of Sale. The person signing as seller had in fact no authority to act for the estate when she signed the Deed. The claim of the 1st Respondent could only be derived from the two relevant documents, which were ineffective to create a valid sale by the Estate to the first Respondent.

Even if the signatories had the power to act for the Estate, this deficiency would be fatal to the application since the 1st Respondent could only derive his claim of action from the Deed of Sale.

In the Court below the learned Chief Justice relied upon the proposition that the first respondent was the owner in granting an order for ejectment. That basic premise was ill-founded, and so consequently, was the order for ejectment.

I propose that the appeal be allowed with costs to the extent of refusing the grant of an order for ejection.

The dismissal of the counter application stands.

D.L. SHEARER J.A.

I agree

R.N. LEON J.P.

I agree

P.H. TEBBUTT J.A.

Delivered in open Court on this.. 13th .day of December 2000.