

IN THE COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL NO. 11/2005

In the matter between:

BERESFORD HOUSE (PTY) LIMITED                      APPELLANT

VS

1. ANNE TUNG LI-CHEANG                                      1<sup>st</sup> RESPONDENT

2. ZHEN ENTERPRISES (PTY) LTD                              2<sup>nd</sup> RESPONDENT

CORAM

BROWDE JA

STEYN JA

ZIETSMAN JA

FOR THE APPELLANT: MR. MABILA

FOR THE RESPONDENTS: ADV VAN DER WALT

JUDGMENT

Browde JA:

On 16<sup>th</sup> September 2004 the appellant moved an application before the High Court (Nkambule J) in which it sought a temporary interdict against the 1<sup>st</sup> Respondent in the following terms:-

"(c) That a rule nisi do hereby issue calling upon the Respondent to show cause on a date to be fixed by the above Honourable Court, why an order in the following terms should not be made final:

(i) That the Respondent be and is hereby restrained and interdicted from selling and/or transferring to any other person(s) other than the applicant certain immovable property more fully described as:

Certain Portion 238 of Farm No.2 situate in the Mbabane Urban Area, District of Hhohho, Swaziland, measuring 3897 square metres ("the property") pending an action to be instituted by the Applicant to transfer the aforesaid property to the Applicant.

(d) That order (c)(i) operates with immediate and interim effect.

(e) That the above Honourable Court issues a directive regarding filing of further papers and hearing dates herein...."

There are further prayers including one for costs which need not be set out for present purposes. The second Respondent was joined as a party during the proceedings.

The application was opposed and answering affidavits were filed on behalf of the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent. Thereafter appellant's replying affidavit was filed and the matter was argued.

The application was dismissed with costs. It is against that order that this appeal was brought before this Court. Mr. Mabila, who appeared for the appellant moved for an order condoning the late noting of the appeal by the appellant for reasons set out in an affidavit by one of the directors of the appellant company. Advocate Ms. J.M. van der Walt who appeared before us for the respondents informed us that the application for condonation was opposed and that she intended arguing that aspect of the matter on the grounds set out and attached to her heads of argument. These grounds included submissions on the prospects of success. It is the general approach that if the prospects of success in an appeal are good the court will more readily condone non-compliance with the rule of court than is the case when the prospects of success are poor. With that in mind we decided to hear argument on the merits of the appeal before determining whether condonation should be granted.

In broad outline the case for the appellant made out in the founding affidavit was the following. The appellant maintained that a valid written contract of sale had been entered into by it with the Respondent in terms of which the Appellant purchased the property for the sum of one million Emalangeni. Despite this, so the appellant alleged, the respondent had "begun preparation for having the property sold and transferred to another person." That other person turned out to be the 2<sup>nd</sup> Respondent who was joined at its own instance during the proceedings. The basis for the Appellant's contention that it had purchased the property in terms of a valid deed sale is that:-

(i) On 14<sup>th</sup> July 2004, after the first Respondent had informed the appellant that her property was for sale and the Appellant had expressed an interest therein, the first Respondent's attorneys "Cloete Corporate in association with E.J. Henwood and M.L. Dlamini" sent a draft Deed of Sale to M.J.

Manzini and Associates, the appellant's attorneys, with an accompanying letter. The draft deed described the purchaser as "Stewart Harding" who was said to be a "boyfriend" of the deponent to the Appellant's founding affidavit. The name of the purchaser was subsequently altered to describe the appellant as the purchaser and nothing turns on this substitution.

The letter of the 14<sup>th</sup> July reads as follows:-

RE: DEED OF SALE - ANNE TUNG LI-CHENG/STEWART HARDING

We refer to the above matter and enclose the Deed of Sale in this matter for signature by your client.

Our Mr. Rob Cloete has been given a Power of Attorney to sign on behalf of Mrs. Li-Cheang.

Kindly have your client sign this document together with the enclosed Land Control Board application forms which we request be filled in and returned to us by the 15<sup>th</sup> July 2004 for Land Control Board at the end of this month."

This letter purports to be signed by one Musa L. Dlamini.

The deed of sale referred to the purchase price as E1, 100.00.00. Because of the need to amend the deed by substituting the appellant as purchaser an amended deed was sent by the Respondent's attorneys to the Appellant's attorneys on 15<sup>th</sup> July 2004 with an accompanying letter which reads:-

"RE: DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

We refer to the above matter and enclose the amended Deed of Sale for your client's signature."

This letter, too, was written on behalf of the attorneys by Musa L. Dlamini. Thereafter, due to the fact that the Deed of Sale had not been signed and returned to the Respondent's attorneys, there followed two letters from the latter firm both signed by Musa Dlamini. They were dated 3<sup>rd</sup> August 2004 and 23<sup>rd</sup> August 2004 respectively and read:-

"RE: DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. We refer to the above matter and must at the onset (sic) express our disappointment at the fact that the Deed of Sale has not been returned.
2. Should we not receive the signed Deed of Sale by Thursday the 5<sup>th</sup> August 2004 we shall assume that your client is no longer interested in pursuing the matter and shall accordingly seek further instructions from our client with regard to the way forward. We hope that your client will attend to this matter of signature urgently."

Despite this threat of cancellation it is not disputed by the Respondents that thereafter Harding, acting on behalf of the appellant, continued to negotiate with the 1<sup>st</sup> Respondent for the sale of the property nor indeed is it disputed that Respondent "relented and agreed to proceed with the sale, with certain changes being made." This latter statement was made in the founding affidavit and not denied. It was

also not denied that thereafter discussions took place between the Appellant's attorney M.J. Manzini culminating in the foil owing: -

- (a) A written offer was made on behalf of the appellant to purchase the property for E1 million;
- (b) The Appellant was to pay 10% of the purchase price upon signature of the Deed of Sale and;
- (c) The balance of the purchase price was to be paid on or before the 17<sup>th</sup> September 2004. Apparently before the above was agreed upon the respondent had been in contact with another purchaser. A letter recording this and dated 23<sup>rd</sup> August 2004 was signed by Musa Dlamini and addressed to Attorney Manzini.

It reads as follows:

"RE:DEED OF SALE - ANNE TUNG LI-

CHEANG/STEWART HARDING

1. I refer to the above matter and confirm that my instructions from my client are to advise you that she has now accepted an offer from another party as your Mr. Harding has failed and/or neglected to sign the Deed of Sale and/or communicate effectively with my client with regards to the way forward."

I shall later in this judgment advert to this letter and shall refer to it as "BH6".

In recording the discussions between the 1<sup>st</sup> respondent and himself in a letter dated 26<sup>th</sup> August 2004, Attorney Manzini included what he acknowledged was an improper term, namely that in the proposed written deed the purchase price would be reflected as being E900,000-00 in an effort to keep [at a lower level] the transfer costs payable on the transaction. (The words in the brackets were obviously but unintentionally omitted). The deed was duly re-drafted but the improper suggestion was not accepted

by the respondent and, therefore, the purchase price was recorded as being E1 million. This re-drafted Deed of Sale was then sent to the appellant together with a letter dated 27<sup>th</sup> August 2004 which was also signed by Musa Dlamini, calling upon the Appellant to sign the deed. This letter "BH8" reads as follows:-

"RE: DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. We confirm that we have re-drafted the Deed of Sale to reflect that Beresford House is the purchaser and that it is purchasing the property for E1 million. We have added a further paragraph to state that household furniture is E60,000.00 and it will not form part of the purchase price for the land.
2. Accordingly we enclose the Deed of Sale and confirm that we have inserted an amount of E1 million (one million Emalangeni) and not the E900,000.00 (nine hundred thousand Emalangeni) suggested by your letter as you are aware that this is illegal and we cannot partake in an issue that would defraud the government of its revenue in anyway whatsoever. We have advised our client of this and she accepted that such an undertaking would be illegal and she has further instructed that we must do it the right way as she herself does not want to be held for any illegalities. Kindly advise you clients of this and have them sign the document which is enclosed herewith."

The last-mentioned letter was signed by M.L. Dlamini and the Deed of Sale with the amendments referred to in the letter, coming as they did in response to the offer made in the letter of 26<sup>th</sup> August 2004 from Mr. Manzini, the letter and re-drafted Deed of Sale can reasonably be regarded as a counter-offer. It is contended by the appellant that when the terms thereof were accepted by the appellant and

the redrafted deed signed by it, a sale of the property was concluded in writing as required by Section 31 of the Transfer Duty Act which provides that no contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agent duly authorised in writing.

In the redrafted deed there was included the stipulation that:-

"The purchaser shall upon signature of this document pay E100,000.00 which amount is to be paid into Cloete Corporate Consultants Trust account for the account of the seller."

Before turning to the issues raised by the respondents I refer to the remaining correspondence which is relevant to the factual background of the dispute.

On 2<sup>nd</sup> September 2004 i.e. within a week of receipt by the Appellant's attorneys of the rc-drafted deed, the latter firm acknowledged by letter the receipt of BH8 and the Deed of Sale and advised the Respondent's attorneys that Harding was in the United Kingdom, that he was sending the E100,000.00 to the Appellant and that on receipt thereof the signed agreement of sale and the money would be transmitted. There does not appear to have been any demur to this. Thereafter, and on the 13<sup>th</sup> September Attorney Manzini, by letter addressed to Cloete Corporate Consultants, informed the latter that under cover of the letter they would find the duly signed Deed of Sale and the cheque for E100,000.00. It seems, however that as a result of an oversight the signed deed was not included with the cheque. This elicited the following response in a letter dated 14<sup>th</sup> September 2004 from the



respondents' attorneys signed by "Musa Dlamini." It reads:-

"RE: DEED OF SALE - ANNE TUNG LI-CHEANG/STEWART HARDING

1. I refer to the above matter and confirm receipt of your documentation, unfortunately I am returning same as per the attachments.
2. I have received instructions from client to proceed with another sale where the purchaser has offered an amount higher than the current and they are willing to pay this amount by the end of the day.
3. In any event there was no Deed of Sale attached to your documents and although that might have been an oversight we regret to advise that there is no longer a sale between my client and Beresford House (Pty) Ltd."

It is not clear what documentation is referred to in paragraph 1, but it might have included the cheque. Whether it did or not is in my view not material. On receipt of this last-mentioned letter the appellant immediately launched the urgent application seeking the relief referred to at the outset of this judgment.

I should here point out that in his judgment Nkambule J said "the entire application turns on whether Mr. Dlamini has written authority to sign the agreement of sale in respect of this property." The learned judge, after referring to the requirements of Section 31 of the Transfer Duty Act regarding the sale of fixed property came to the conclusion that "any document signed by M.L. Dlamini cannot stand as authentic in the light of the power of attorney."

This Power of Attorney was annexed to the respondent's answering affidavit and was relied upon by the

Appellant in order to meet the requirement of the statute - it appears from that document that the 1<sup>st</sup> respondent appointed, to "negotiate, sign and instruct conveyancers to transfer [the property] for the sum of E 1.1m-

"Robert John Cloete and/or Earl John Henwood or anyone of the partners or Professional Assistants of Cloete Corporate in Association with E.J. Henwood and M.L. Dlamini with power of substitution."

The respondents' answering affidavit - filed, as is stated on the document, by

"Cloete/Henwood/Dlamini & Associates (1<sup>st</sup> Respondent's attorneys)" - was deposed to by Musa Leon Dlamini. He described himself as an associate of the attorneys firm "Cloete Corporate Consultants" which is somewhat different from the name of the firm on the face of the affidavit and on its stationery. He says, also, that he, M.L. Dlamini, is duly authorised to oppose the proceedings. The position therefore is that M.L. Dlamini handled the matter throughout, that he was the author of all the relevant correspondence on behalf of the Respondent not to mention, of course, his authority to conduct the litigation on behalf of the respondent. Also in BH6 he referred to "My instructions from my client" and, as referred to above, the Power of Attorney included authority to "sign" to any one of the partners or professional assistants of the firm.

Despite all of this the learned Judge accepted Dlamini's denial of authority and found that, therefore, the Appellant had proved no clear right or even "a prima facie right which was open to some doubt," as was referred to by Innes CJ in the celebrated case of SETLOGELO VS SETLOGELO 1914 AD 221 as the requirement to justify the grant of a temporary interdict.

Nkambule J does not appear to have enquired into what Dlamini meant when he deposed to being an "associate" - the Oxford English Dictionary gives as one of the synonyms for "associate" the word "partner" and "one who shares an office or position of authority with another." It is also of interest to note that in his affidavit Dlamini states that the appellant was aware that he, Dlamini, had no authority to sign the agreement because it had been pointed out by Dlamini in a letter written by him to Appellants' attorney on 14<sup>th</sup> July 2004. In that letter, however, all that Dlamini says is "Our (and I stress that) Mr. Rob Cloete has been given a Power of Attorney, to sign on behalf of Ms. Li-Cheang." As already referred to the special Power of Attorney went much wider than that.

The question whether Musa Dlamini had authority in writing to conclude the sale will, if the matter goes to trial, probably be cleared up by full discovery being called for from the respondents in order to ascertain the precise role played by Musa Dlamini in the firm Cloete Corporate in Association with E.L. Henwood and M.L. Dlamini. From the documents filed and which are before us in this matter it appears to be, if not clear, at least prima facie the case that Musa Dlamini is either a partner or a professional assistant of the firm. If he fulfilled neither of those functions it would be difficult to understand why his name and qualifications i.e. B.A. Law LLB (UNISWA) should be printed at the foot of the firms stationery together with R.J. Cloete and E.J. Henwood with the addition of the words "admitted as attorneys of the

High Court of Swaziland, South Africa and Lesotho" and why he should refer to the 1<sup>st</sup> respondent as "my client."

The question whether or not it was shown on the papers that there was a concluded contract in writing was not seriously contested by Advocate van der Walt, who submitted that the case "all turns on the

meaning of the Power of Attorney."

After making submissions on the matters dealt with by her in her heads of argument Advocate van der Walt informed us that her attention had "just been drawn" to the following. Both parties had dealt with the sale in question as pertaining to Portion 238 of Farm No.2 situate in the Mbabane Urban area, District of Hhohho, Swaziland, measuring 3897 square metres. In its founding affidavit, however, in paragraph 9.5 the appellant stated:-

"The person who signed the written offer on behalf of the applicant was duly authorised to do so. A copy of the written authority is annexed hereto marked "BH13."

In answer to that, at paragraph 11.4 of the answering affidavit the first respondent stated :-"This is not disputed."

However BH13, which purports to be the Resolution of the Board of Directors of the appellant resolves that the company purchases:-

"Certain Portion 60 (a portion of Portion 14) of Farm No.1214 situate in the District of Hhohho, Swaziland measuring 29.1403 Hectares."

This would seem to be a property other than that concerned in the dispute between the parties. What exactly the significance is of this apparent contradiction was not raised in the court a quo, nor, as I have pointed out, does it appear to be an issue in the affidavits. Consequently this, too, is a matter which will probably be cleared up in evidence if the matter goes to trial. It may simply be an error arising from the

uncontested fact that the appellant company has, as one of its objects, "to acquire by purchase land, houses and building of any description whatsoever." Was the wrong resolution mistakenly annexed to the founding affidavit? Only viva voce evidence can furnish the answer to that question.

Finally, in regard to the relief sought by the appellant, Advocate van der Walt submitted that it had not been shown that the balance of convenience, were a temporary interdict to be granted, favours the appellant. The respondents adopted the attitude that the sale of the property to a third party would not prejudice the appellant since it could avoid any prejudice by simply purchasing another property. The answer to this submission is that the relief sought by the appellant, namely the enforcement of the Deed of Sale, is of a quasi-vindictory nature and that therefore prejudice is a presumed consequence of non-performance by the respondents. See for example, *NDAUTI VS KGAMI AND OTHERS* 1948(3) SA 27 at page 37.

"And where the action is a vindictory one or in other cases where the damage to the applicant by the refusal of an interim interdict may be irreparable, an interim verdict may be granted though the probabilities of success in the action are against the applicant, and should ordinarily be granted if no damage will thereby be occasioned to the respondent."

With regard to damage to the respondent Advocate van der Walt, in her heads of argument stated that the respondents had "already acted in terms of their agreement" thus suggesting prejudice to them were an interdict now to be granted. There is however no evidence of that in the affidavits and the statement of counsel cannot take the respondent's case any further.

As I stated at the outset of this judgment the question of whether we should condone the appellant's non-compliance with the rules of court was left over until we had heard argument of the prospects of success of the appeal. The non-compliance was the late noting of the appeal and the late filing of the record. According to the affidavit filed by the appellant the facts are briefly as follows:-

On the 10<sup>th</sup> November 2004 argument on the application in the High Court was completed and the late Justice Nkambule reserved judgment. Thereafter on several occasions the directors of the appellant visited their attorneys to ascertain when judgment would be handed down. They were "always informed" that no date had been specified by the learned judge but notice would be given to all parties when the judgment was to be delivered. After waiting for over 3 months the directors of the applicant, namely one Harding and the deponent to the affidavit left on a business trip to the United Kingdom from where they returned at the beginning of April 2005. They then discovered that judgment had been delivered on 24<sup>th</sup> February 2005. The deponent avers that the failure to file the notice of appeal timeously was not deliberate and submitted that in the circumstances the explanation tendered is a reasonable one.

In reply to those averments the respondents pointed out:-

(I) That when they left for abroad the directors were aware that judgment was still to be delivered;

(ii) They should have made arrangements, therefore, for their attorney to inform them as soon as judgment was delivered and not wait to enquire only upon their return to Swaziland.

(iii) The notice of appeal should have been filed by 24<sup>th</sup> March 2005 but was only filed on 22<sup>nd</sup> April 2005 - the notice is,

however dated 11<sup>th</sup> April 2005.

(iv) In the notice of the roll for this session of the Appeal Court practitioners were advised that no appeal records would be accepted for inclusion on the roll after 10<sup>th</sup> May 2005 and that in casu the record was only filed on 12<sup>th</sup> May. There is no application for condonation for that late filing of the record.

The seriousness and effect of non-compliance with the Rules of Court must be viewed objectively and as already alluded to, weighed against due consideration of the prospects of success in the appeal. In my judgment the explanation given by the appellant for the delay in noting the appeal is in the particular circumstances of this case a reasonable one. The late filing of the record was of short duration and there is no evidence that the respondents were prejudiced thereby.

It will have appeared from what is stated above that I am of the view that the prospects of success in the appeal are sufficient to warrant this Court condoning the non-compliance by the appellant of the Rules of Court relating to the filing of the notice of appeal and the filing of the record. Condonation is therefore granted.

In the result the appeal will be upheld on the terms set out below. If the appellant is thereby encouraged to proceed with the action. I think it appropriate to sound a word of warning. The result of the appeal is based largely on a finding that the right to the interdict sought has been shown to exist "prima facie though open to some doubt." That phrase involves a judgment which is not based only on objective

facts - it is influenced to a certain extent by what an individual court regards as falling within the concept of "some doubt."

With that in mind perhaps the parties may find a more satisfactory way of arriving at a conclusion to this litigation than what is entailed in the long and expensive journey of a full-scale trial in the High Court.

The appeal is upheld with costs. The Order of the court a quo is altered to read:

1. An Order is granted in terms of paragraphs c (i) and (d), (f) and (g) of the Notice of Motion.
2. The matter is sent to trial and the appellant is ordered to file its particulars of claim within 30 days of the date of this judgment.

Thereafter the Rules of the High Court shall apply to all further processes in the action.

In the result condonation is granted and, for the above reasons, the appeal is upheld with costs.

J. BROWDE

judge of Appeal

I AGREE

J. H. STEYN

Judge of the Appeal

I AGREE



N.W. ZIETSMAN

Judge of Appeal

Delivered on this day of June 2005