

**SUPREME COURT OF SWAZILAND**

**Appeal Case No.58/09**

**In the matter between:**

**NONDLELA SUZAN KONYANA**

**APPELLANT**

**VS**

**NGWANEPARK  
RESPONDENT**

**TOWNSHIP**

**(PTY)**

**LTD**

**CORAM FOXCROFT JA**

**TWUM JA**

**FARLAM JA**

**FOR THE APPELLANT MR. P.M. SHILUBANE**

**FOR THE RESPONDENT MS. J.M. VAN DER WALT**

**JUDGMENT**

*Appeal against refusal of Motion Court to compel respondent to sign all documents necessary for transfer of land - Deed of sale - specific performance - nature of discretion - Section 32(1) of Deeds Registry Act, 1968 - no reasons for judgment of Court a quo - undesirability thereof.*

**FOXCROFT JA:**

[1] This is an appeal against an order of Mabuza J dated 13<sup>th</sup> October 2009, dismissing the appellant's urgent application to compel the respondent to sign all documents necessary for the transfer of land to her. She alleged that she had in December 1982, entered into a Deed of Sale in respect of the said property and that she had paid the purchase price in full.

[2] Regrettably, no reasons for this order are before us. We are informed from the Bar by Mr. Shilubane, appearing for the appellant, that he had written to the Judge in the High Court who had made the order but had received no response. Upon enquiry by this Court he added that he had appeared in the Court *a quo* and that the matter had been fully argued in respect of the question of urgency, and the merits of the application. On the day appointed for judgment, no oral reasons for judgment were given, only an order being pronounced by the Judge who had heard the matter. We are unable to determine the basis upon which the discretion to refuse the order for specific performance sought, was exercised. Accordingly, we are obliged to form our own view on the facts before us, and to apply the law. Ms. van der Walt, appearing for the respondent, correctly in my view, conceded that this was so.

[3] Ms. van der Walt referred us to the well-known decision in South Africa of *Haynes v. Kingwilliamstown Municipality 1951(2) SA 31 (AD) 371 at 378H*. She submitted, citing a passage from that judgment, that specific performance should not be granted in this matter, as it –

*“would operate unreasonably hardly on the defendant”.*

In the more recent decision of the same court in *Benson v. S.A. Mutual Life Assurance Society, 1986(1) SA 776 (AD) at 783 C-D, Hefer JA*, in an “elucidation” of what De Villiers AJA had said in *Haynes v. Kingwilliamstown Municipality*, said the following:

*“This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle (Ex parte Neethling (supraat 335)). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, e.g, if, in the particular circumstances, the order will operate unduly harshly on the defendant”.*

The learned Judge of Appeal then proceeded to caution against any attempted infusion of English practice into the Roman-Dutch common law.

The effect of the judgment in *Benson v. S.A. Mutual Life Assurance Society* is to make clear that the discretion to be exercised in cases of this kind is not a completely unfettered one. Specific performance, if chosen by a plaintiff in preference to a claim for damages and where the right to relief is established, will be granted unless it will produce an unjust result. The discretion is therefore a discretion not to grant specific performance where it is sought. It is not a wide, unfettered discretion to grant either specific performance or damages.

[4] What are the facts upon which the proper discretion is to be exercised? The appellant, now a widow, entered into a Deed of Sale on the 7<sup>th</sup> December 1982 with the respondent. The Deed, annexure “NK1” to the Notice of Motion, records that the Seller (the respondent) sold to the Purchaser (the appellant) land being Lot No.533 in the Ngwane Park Township in the District of Manzini for the sum of E2500-00. E50 was payable in cash on signature of the

Deed and the balance of E2450-00 was payable by monthly instalments of not less than E30-00, commencing on 1<sup>st</sup> September 1975. It would appear that payments may have commenced before the Deed was signed, and the appellant did indeed allege in paragraph 5 of her founding affidavit that -

*“The Deed of Sale provided for the payment of the purchase price in advance in terms of Clause 2 thereof”.*

The only indication of an “advance” payment in clause 2 of the Deed is the instalment starting date of 1<sup>st</sup> September 1975, seven years before the Seller’s date of signature on the Deed of the 7<sup>th</sup> December 1982. There are indications on the papers that “earlier” payments had in fact been made, the respondent contending these were in respect of a different portion of land.

[5] The appellant averred that she had paid the purchase price of the land and that on 1<sup>st</sup> July 1974 the respondent had advised her attorney that she “could not take transfer of the property” and that she should contact the seller’s conveyancers who were to attend to the conveyancing of the property. A copy of the letter (“NK2”) is annexed to her affidavit. The letter does not bear out the allegation that the appellant could not take transfer, in fact stating that -

*“The Minister for Local Administration in the Swaziland Government had approved transfer of stands in the second zone, in which area the above numbered stand is situated”.*

The letter is headed -

*“Re: Transfer Zone 2 Ngwane Park Township No.533 Mr. A.K. Konyana”.*

(The appellant may have intended to state that transfer was to be made to her husband, Mr. A.K. Konyana, the inference being that she could not take transfer.)

[6] The appellant further averred that in 2001, a director of the respondent, Mr. Alec Taylor, signed the transfer document in respect of a transaction in which the said property had to be transferred to the estate of her deceased husband simultaneously with a transfer to one Khayelitsha Hlatshwayo. The transaction was subsequently cancelled. Certain receipts are annexed to the affidavit, and a letter dated 29<sup>th</sup> May, 2009 tendering the sum of E2500.00 to respondent as payment of the purchase price which the respondent refused to accept.

[7] The respondent's opposing affidavit is deposed to by Mr. Alec Taylor who describes himself as a chartered accountant and director of the respondent, with over forty years experience in the business of property development and property sales. Mr. Taylor who is clearly the same Alec Taylor whom the appellant refers to in her founding affidavit responded with two points of law, and a reply on the merits of the matter.

[8] The first law point taken is that the -

*"Founding Affidavit is fatally defective in terms of Section 93 of the Deeds Registry Act No.37 of 1968, which requires that the Registrar of Deeds shall be given fourteen (14) days' notice before the hearing to enable him to file a report".*

The Section referred to relates to any order sought which involves "the performance of an act in the Deeds Registry" and provides for the submission of a report by the Registrar of Deeds to the court hearing the matter if the Registrar should deem it desirable to make a report. Mr. Shilubane submitted that the Section is not intended to

allow the Registrar of Deeds to report on an application where no relief is sought against his office. It frequently occurs that unwilling transferors of land are ordered to sign whatever documents are necessary for transfer to be effected, and that the Sheriff is authorized to sign such documents on behalf of a respondent who refuses to do so despite the order of the court.

When the Court orders a seller to sign transfer documents, or authorizes the Sheriff to sign on behalf of a recalcitrant seller, the transfer is then able to proceed in the usual way. Section 32(1) of the Deeds Registry Act, 1968, provides for registration of title by other than the ordinary procedure. In this matter, in my view, one is dealing with the ordinary procedure for registration and not with acquisition of ownership by prescription or other extraordinary means.

In my view, Mr. Shilubane's submission that the Registrar of Deeds is in no way involved in the present matter is sound. No order "involving the performance of an act in the Deeds Registry" is sought. Accordingly, there is no merit in the first point of law.

[9] The second point of law raised by the respondent in the Court *a quo* was that the urgency alleged by the appellant was self-created. Since the matter was fully argued and the application does not appear to have been dismissed for want of urgency, there is also no merit in this submission. Ms. van der Walt, wisely in my view, did not pursue the point of lack of urgency either in her written Heads of Argument or in oral argument.

[10] As to the merits, the respondent's director denied that the appellant had paid the full purchase price for the property and claimed that he had no recollection of ever having signed a Power of Attorney to give transfer, adding that the Deed of Transfer does not bear his signature. He averred that since about 2001 the appellant

has been aware that she had failed to produce proof of payment in accordance with the Deed of Sale. Mr. Taylor also denied that payments made by the appellant in 1971 were in any way relevant to the present matter but does admit that the first monthly instalment in respect of the Deed of Sale was to be paid in September 1975. He does not explain how a Deed of Sale signed by one Knowles on behalf of Respondent on 7<sup>th</sup> December 1982 provided for payments to commence in 1975.

[11] Whatever the position of these payments may have been, the appellant's attorney tendered the sum of E2500-00 to the respondent on the 29<sup>th</sup> May 2009, in full and final settlement, that sum being the full purchase price for the property. Mr. Taylor refused the tender since he still required proof of payment, adding that the appellant was "seemingly wanting to enter into a fresh agreement". He then added that clause 2(b) of the Deed of Sale required monthly instalment payments to be made "as from the 7<sup>th</sup> December 1982, failing which the Deed of Sale would be cancelled". This is incorrect since the Deed of Sale before this Court shows the commencement date in clause 2(b) of the Deed of Sale as the 1<sup>st</sup> September 1975. Mr. Taylor states that the Deed of Sale "never effectively came into force and should have been formally cancelled years ago..."

A Deed which did not come into force cannot be cancelled, yet Mr. Taylor appears to accept that it did come into force since he argues that it should have been cancelled and purports to give notice of cancellation in his opposing affidavit.

[12] In an affidavit in reply, Mr. Shilubane, duly authorized to do so, takes a point *in limine* as to the authority of Mr. Taylor, and then deals with the merits. In my view, the point *in limine* is not sound, since the appellant clearly treated Mr. Taylor as authorized to act on

behalf of the defendant. Moreover, the Respondent's Opposing Affidavit was presented for filing by CJ Littler & Company described as Respondent's Attorneys. One must assume that these attorneys were not acting without a mandate from the respondent company. The order of the Court *a quo* also records that both parties (i.e. applicant and respondent) were represented by counsel.

[13] Reference is also made in his Replying Affidavit to receipts for E1500-00 having been paid to a Mr. Knowles. What appears before us is that a Mr. Knowles signed the Deed of Sale on behalf of the Respondent on the 7<sup>th</sup> December 1982. Whether he credited the Respondent with the E1500-00 paid by her to Swaziland Real Estate is not known. This is in reply to the allegation by Mr. Taylor in paragraph 14.1 of his Opposing Affidavit that the receipts annexed as "NK4" and "NK5" to the Founding Affidavit reflect payments relating to a stand No.429 and not Lot No.533, and were made to another entity namely Swaziland Real Estate. It is not possible on the papers to determine the full facts in regard to these early payments. What is clear is that in 1982 when the Deed of Sale was signed, it appeared to take into account earlier payments since instalments were to commence on the 1<sup>st</sup> September, 1975.

[14] The point which Mr. Shilubane stressed before this Court was that the tender of a cheque for E2500-00 in full and final settlement of the dispute between the parties should have been accepted. That after all was the agreed purchase price for Lot 533 in terms of the existing Deed of Sale.

[15] Ms. van der Walt submitted that this Court should exercise its discretion not to grant specific performance in the light of the vast increase in value of the property since 1982. She pointed to the harsh effect which this would have upon the Respondent which would be paid only E2500-00 for a property for which a recent



intending buyer had agreed to pay E129000-00 to the appellant. The simple answer to that submission is that the Respondent has only itself to blame for not insisting upon proper performance of its contract with the appellant over a 27 year period. The remedy of cancellation of the Deed of Sale for non-payment of the purchase price was always available to the respondent seller.

In my view, the appellant is entitled to the order sought against the respondent, there being no reason to exercise our discretion against the grant of specific performance.

[16] One matter remains. It is regrettable that no reasons for judgment were provided in this matter despite a request by Mr. Shilubane in the form of the letter handed to us at the request of this Court. This failure has occasioned additional difficulty for those arguing and deciding this appeal. In a recent decision in the Court of Appeal of Lesotho, *Otubanjo v. Director of Immigration and Another* LAC(2005-2006) 336 at 343, *Gauntlett JA* with *Ramodibedi JA* (as he then was) and *Grosskopf JA* concurring dealt with a delay of 26 months before an interim order was set aside in the High Court and a continuing failure by the Judge *a quo* to give reasons for his ruling. A number of authorities cited deal with delay in delivering judgment, while others concern delay in producing judgment.

[17] Earlier, in South Africa in the matter of *Road Accident Fund v. Marunga* 2003(5) SA 164 (SCA) at 171, paragraph 31, *Navsa JA* said the following:

*“31. Before considering whether the amount awarded by the trial Court should be upset on appeal I return to an aspect touched on briefly earlier in this judgment, namely the lack of a reasoned basis for the determination of general damages. As a general rule a court which delivers a final judgment is obliged to give*

*reasons for its decisions. In an article in 1998 in the South African Law Journal at (Vol.115 - pp 116-128) entitled 'Writing a Judgment' the former Chief Justice, M. M. Corbett, pointed out that this general rule applies to both civil and criminal cases. In civil cases this is not a statutory rule but one of practice. The learned author referred to Botes and Another v. Nedbank 1983(3) SA 27 (A) where this Court held that in an opposed matter where the issues have been argued litigants are entitled to be informed of the reasons for the judge's decision. It was pointed out that a reasoned judgment may well discourage an appeal by the loser and that the failure to supply reasons may have the opposite effect, that is, to encourage an ill-founded appeal. The learned author stated the following at 117-*

*In addition, should the matter be taken on appeal, the Court of Appeal has a similar interest in knowing why the Judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for their decisions. Whether or not members of the general public are interested in a particular case - and quite often they are - a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice".*

Similar sentiments have been expressed in Australia<sup>[1]</sup> and in the Constitutional Court in South Africa<sup>[2]</sup>.

[18] In this matter, the application was heard in June 2009 and an order was given on the 13<sup>th</sup> October 2009. The Notice of Appeal was lodged on the 21<sup>st</sup> October 2009 and the grounds were stated to be that the Court had erred in law and in fact in upholding the respondent's points *in limine*, and that the Court *a quo* had erred in law and in fact in not granting the order sought against payment of the sum of E2500-00 which had been tendered.

[19] Since Mr. Shilubane informed us from the Bar that the learned Judge *a quo* had said nothing more in delivering the order than the words of the order, i.e. that the application was dismissed with costs on a party and party scale, we are unable to deal with the first ground of appeal. As it appears above, however, there is no merit in the points *in limine*. I mention this as an indication of the position in which this Court was placed.

[20] Fortunately for the appellant, the matter has now been resolved in her favour and the appeal has probably not been delayed as a result of the fact that there are still no reasons for the judgment of the High Court. Nevertheless, the failure of the learned Judge *a quo* to provide reasons for her order and failure to respond to the subsequent request for reasons for judgment (if she received notice of the request) is a matter for concern, and a copy of this judgment will be forwarded to the Honourable Chief Justice. A copy of Mr. Shilubane's letter to the Registrar of the High Court is attached to this judgment.

[21] It is ordered as follows:

- (a) The appeal succeeds with costs and an order is granted in terms of prayers 2, and 3 of the Notice of Motion, against

payment of the sum of E2500-00 by the appellant to the respondent.

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**J.G. FOXCROFT**

**JUSTICE OF APPEAL**

**I AGREE** \_\_\_\_\_

**DR. S. TWUM**

**JUSTICE OF APPEAL**

**I AGREE** \_\_\_\_\_

**I.G. FARLAM**

**JUSTICE OF APPEAL**

Delivered in open court on the .....day of May, 2010.

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[1] Australian Law Journal (Vol. 67A 1993) at 494, a passage cited in Road Accident Fund v. Marunga, supra, at 172A-B.

[2] Mphahlele v. First National Bank of South Africa Ltd 1999(2) SA 667 para 12.