



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 64/2013

In the matter between:

**VULINDLELA DLAMINI NO
HAWANE ESTATE PTY) LTD**

**FIRST APPELLANT
SECOND APPELLANT**

AND

PHUMZILE PATIENCE SIMELANE

RESPONDENT

Neutral citation:

Vulindlela Dlamini N.O. & Another vs Phumzile Patience Simelane (64/2013) [2014] SZSC37 (30 May 2014)

Coram:

**A.M. EBRAHIM, JA
DR. S. TWUM, JA
M.C.B. MAPHALALA, J.A**

Heard

19 May 2014

Delivered

30 May 2014

Summary

Civil Appeal – contract for the sale of land – the respondent sued for an order for specific performance directing the appellants to apply to the Natural Resources Board for a subdivision of the property in accordance with the terms of the contract – she further sought an order directing the appellants to transfer twenty hectares of the subdivided property and have it registered in her name, and, in the alternative she sought an order directing the sheriff to transfer the property into her name – the court *a quo* found that there was a discrepancy between the description of the property in the Deed of Sale and the Notice of Motion but held that this was a mere technicality and granted the order – held that the *res vendita* was

identifiable on the basis that the respondent resides on the property with the consent of the deceased – appeal accordingly dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA J.A.

[1] On the 24th April 2001 the deceased Richard Sandlane Dlamini concluded a written contract of sale of an immovable property with the respondent. There is a discrepancy in the description of the property in the Deed of Sale as well as in the Notice of Motion lodged in the court *a quo*. The Deed of Sale describes the property as being the “Remainder of Portion 8; a portion of portion 987, Hhohho District (subdivision still pending approval)”; however, the Notice of Motion describes the property as being the “Remaining Extent of Portion 8 of Farm No. 987 situate in the Hhohho”.

[2] The learned Judge in the court *a quo* acknowledged the discrepancy at para 22 and 23 of his judgment when he stated the following:

“[22] On the face of it, portion 8 of portion 987 is different from portion 8 of farm 987. But, in the circumstances of this case where inter alia, there is no doubt about the exact physical location of the property in question and its attributes, such as the structures thereon, and bearing in mind the true intentions of the applicant and the deceased, is this objection legally sound? I do not think

so. It is a quibble. It is a legal technicality that if allowed would bring the law and the legal profession into disrepute. This court cannot countenance this. It is the sort of technicality that our Court of Appeal frowned upon in Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors, Appeal Case 23/2006, judgment delivered on 1st June 2006. It is a technicality that subverts rather than promotes justice and fairness between litigants. Law and legality are all about that elusive and noble notion or concept called justice. A court of law is there to dispense justice and not to dispense with it in favour of unscrupulous litigants and property dealers.

[23] In the instant case, there was an error in the deed of sale in referring to the property as portion 8 of portion 987 instead of Farm 987. This error was I believe, honestly caused by the deceased as owner of the property and the person who knew its real description. To allow the objection in this circumstance would cause incalculable and unwarranted prejudice to the applicant, who has had to sell her house and refurbish the property in question. On the other hand, to refuse it would cause no prejudice at all to the respondents and would not amount to this court drawing up a new agreement for the parties. (Vide *Regenstein v. Brabo Investments (Pty) Ltd*, 1959 (3) SA 176 (A), to which I was referred by Counsel for the Applicant). I would therefore dismiss this objection too.”

[3] The cause of action between the parties is specific performance in respect of the following orders: firstly, that the directors of the first and second appellants should be directed to appear before the Natural Resources Board within one week of being served with the court order to move the application for the subdivision of Remaining Extent of Portion 8 of Farm No. 987 situate in the

Hhohho Region. Secondly, that the first appellant is ordered to forthwith take all steps and sign all documents necessary to transfer the subdivided twenty hectares of Remaining Extent of Portion 8 of Farm No. 987 situate in the Hhohho Region bought by the respondent in terms of the Deed of Sale within two weeks of being served with the court order. Thirdly, and in the alternative, that in the event the first appellant failing to take such steps within a period of two weeks from date of service of the court order, the sheriff of Swaziland is directed to sign all documents in the name and on behalf of the first respondent to give effect to the second prayer. The respondent further sought an order for costs against the first appellant and any other party who opposes the application.

- [4] It is not in dispute that the Seller of the Property died on the 2nd November 2011 before the Natural Resources Board had granted the application for a subdivision of the property. The material terms of the contract were that the deceased sold to the respondent an undivided twenty hectares of land at a purchase price of E380 000.00 (three hundred and eighty thousand emalangeni), that the respondent would pay a deposit of E60 000.00 (sixty thousand emalangeni) on signature of the agreement and the balance secured by a Bank Guarantee; and, that the deceased would subdivide the property so that it could be transferred into the name of the respondent. It is not in dispute that pursuant to the conclusion of the contract, the respondent paid the requisite deposit of E60 000.00 (sixty thousand emalangeni) to the deceased. What

remained at that stage was for the seller to apply to the Natural Resources Board for the subdivision of the property; the seller only instructed D.M. Thwala Surveyors to lodge the application for subdivision of the property in September 2011.

- [5] The purchase price for the twenty hectares of the unsubdivided property was E380 000.00 (three hundred and eighty thousand emalangeni); and a deposit of E60 000.00 (sixty thousand emalangeni) was payable on conclusion of the contract. The balance of the purchase price was payable by a Bank Guarantee upon registration of transfer. Annexure PS2 is the requisite Bank Guarantee issued by the Central Bank to Robinson Bertram Attorneys in August 2011 during the lifetime of the deceased. The Bank Guarantee was for payment of E320 000.00 (three hundred and twenty thousand emalangeni) being in respect of the balance of the purchase price.

The property in the bank guarantee was described in the same fashion as in the Deed of Sale being Portion 8, a Portion of Portion 987. Annexure PS3 is a letter subsequently written by the respondent's Attorneys on the 22nd August 2011 and addressed to the deceased enclosing a copy of the Bank Guarantee. In that letter the respondent's attorneys were calling upon the deceased to subdivide the portion of the property sold to the respondent in terms of clause 10.1 of the Deed of Sale with a view to transfer the property. The Bank

Guarantee issued in August 2011 lapsed on the 17th October 2011 before the deceased could effect the subdivision of the property.

- [6] Upon the death of the deceased, the first appellant was appointed the Executor Dative in the Estate Late Richard Sandlane Dlamini. An attempt was made by the first appellant to cancel the contract and evict the respondent from the property in terms of a letter addressed to the respondent's attorneys dated 23rd May 2012 on the basis that the respondent had failed to furnish a Bank Guarantee in respect of the balance of the purchase price. However, this was not correct since a Bank Guarantee had been furnished in August 2011 by the Central Bank in respect of the balance of the purchase price.

Similarly, the balance of the purchase price was only payable upon registration of transfer; however, no transfer could be effected when the subdivision of the property had not taken place. It is on that basis that the respondent's attorneys rejected any attempt by the first appellant to cancel the contract; in addition the respondent's attorneys returned the cheque of E60 000.00 (sixty thousand emalangi) which was a refund of the deposit paid by the respondent. In August 2012 the Central Bank further re-issued a Bank Guarantee in respect of the balance of the purchase price.

- [7] In their answering affidavit the appellants contended, *in limine*, that the application does not disclose a cause of action on the basis that the respondent

seeks relief in respect of property described in the Notice of Motion as Remaining Extent of Portion 8 of Farm No. 987 situate in the Hhohho Region whereas the Deed of Sale on which the relief she seeks is founded, the property is described as Remainder Portion 8, a portion of portion 987 Hhohho District. To that extent the appellants argued that the alleged contract is void and unenforceable on the basis that the *res vendita* is not identifiable and does not exist in the Deeds Registry. It is common cause that the property described in the Notice of Motion as being Remaining Extent of portion 8 of Farm 987, Hhohho District, is registered in the name of the second appellant.

[8] It is apparent from the evidence that the appellants do not deny that the deceased and the respondent concluded the contract of sale as alleged. However, they argue that the contract is void and unenforceable on the basis that the *res vendita* is not identifiable and does not exist in the Deeds Registry. It is further apparent from the evidence that the property mentioned in the Notice of Motion is not recorded as the *res vendita* in the agreement of sale between the respondent and the deceased.

[9] It is not denied by the appellants that the property sold is situate at Hawane Park or that it measures twenty hectares with improvements of a three bedroomed house, two sheds, one complete and the other incomplete. It is further not denied that the property was subject to sub-division before it could be transferred to the respondent. However, it is denied that the property in

annexure “PS4” is the *res vendita* being the Remaining Extent of Portion 8 of Farm 987 Hhohho region on the basis that it is not incorporated in the Deed of Sale. The respondent contends that the Deed of Sale was prepared by the deceased with the misdescription of the property and that the first appellant was trying to benefit from their own wrongdoing.

[10] The contention by the respondent that she was given occupation of the property sold to her by the deceased has not been disputed. Similarly, the contention that she sold her property at Checkers Township in 2001 for the sum of E280 000.00 (two hundred and eighty thousand emalangeni) with which she paid off the bond and further paid the deposit in the new house has not been denied. Furthermore, the contention by the respondent that she currently resides on the property purchased and that she has spent about E80 000.00 (eighty thousand emalangeni) renovating the house has not been denied.

It is also not denied that the deceased obtained title to the land mentioned in the Notice of Motion by virtue of purchasing shares in the second appellant at a purchase price of E535 000.00 (five hundred and thirty five thousand emalangeni). In terms of the Memorandum of Agreement of Sale of shares, being Annexure “PS4”, the second appellant is the owner of Remaining Extent of Portion 8 of Farm No. 987 Hhohho Region. On the 23rd May 2012 an attempt was made by the first appellant in terms of Annexure “PS6” to evict the respondent from the property for failure to furnish a Bank Guarantee for the

balance of the purchase price; this evidence supports the respondent's contention that the deceased gave her occupation of the property in 2001 pursuant to the conclusion of the contract of sale between them. It is not in dispute that the property she occupies is the Remaining Extent of Portion 8 of Farm 987 Hhohho Region.

[11] The contract of sale between the deceased and the respondent was in writing as required by section 31 of the Transfer Duty Act 8/1902. This section 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 agents duly authorised in writing".

[12] Clauses 9.2 and 9.3 of the Contract of Sale are intended to uphold the Parol Evidence rule, and, they provide as follows:

"9.2 The agreement constitutes the sole and entire agreement between the parties and no warranties, representations, guarantees or other terms and conditions of whatsoever nature given by either party or his/her agent not contained or recorded herein shall be of any force or effect.

9.3 No variations of the terms and conditions of this agreement or any consensual cancellation thereof shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorised representatives."

[13] In the leading case of the South African Appellate Division in *Union Government v. Vianini Ferro-concrete Pipes (Pty) Ltd* 1941 AD at 43 and 47, *Watermeyer JA* said the following:

“Now this court has accepted the rule that when a contract has been reduced to writing, the writing is in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence.”

[14] The court *a quo* was correct in rejecting any reliance on Annexure PS4, the shares agreement, as a means of identifying the exact property purchased by the respondent from the deceased on the basis that such reliance would offend against the parol evidence rule. The shares agreement as well as the diagram of the twenty hectares in annexure “PS4” are not incorporated as part of the Deed of Sale. In addition the respondent was not a party to the shares agreement.

[15] The description of the property in the Deed of Sale is defective on the basis that no such property exist in the Deeds Registry; furthermore, the property cannot be identified from the mere description in the Deed of Sale. The property has not been subdivided to identify the portion sold. The court *a quo* misdirected itself in holding as it did that portion 8 of portion 987 is the same as portion 8 of Farm 987. His Lordship took the view that this was a mere technicality which if allowed would bring the law into disrepute and subverts the course of

justice. When applying the integration and/or parol evidence rule the two properties cannot be the same. However, this is a far cry from saying that the contract is void and unenforceable because the *res vendita* is not identifiable. The fact that the respondent resides on the property makes the property identifiable. Appellants' counsel properly conceded that rectification of the contract would have been proper in the circumstances to correctly describe the *res vendita*.

[16] In the case of *Mavimbela v Sedcom Swazi Estate late Darrington and Others* Civil Appeal case No. 27/2008 and *Savela Investments (Pty) Ltd v. Sedcom* Civil Appeal case No. 27/2008 and 43/2008, P.A.M. Magid AJA at para 21 said the following:

“But it is trite that the court has a discretion to grant or refuse an order for specific performance which discretion must be exercised judicially and not capriciously nor upon a wrong principle.”

[17] His Lordship then quoted with approval *Herfer JA* in the case of *Benson v. South African Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783 C where His Lordship 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. 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. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy.... Furthermore, the court will not decree specific performance where it has become impossible. Here a distinction must be drawn between the case where impossibility extinguishes the obligation and the case where performance is impossible but the debtor is still contractually bound. It is only the latter type of case that is relevant in the present context, for in the former the creditor clearly has no legal remedy at all.”

- [18] The court *a quo* did not misdirect itself when making its findings at para 22 and 23 of the judgment that the physical location of the property was identifiable particularly because the respondent was residing on the property with the consent of the deceased. His Lordship correctly found that there was an error in the Deed of Sale in referring to the property as portion 8 of portion 987 instead of Farm 987. It is also significant that the error was caused by the deceased as owner of the property when he drafted the Deed of Sale. It is trite that the court has a discretion to determine whether or not specific performance should be granted and that such discretion should be exercised judicially and not capriciously or upon a wrong principle. In the exercise of its discretion the court should promote and advance justice and fairness between the litigants. In the circumstances of this case I am inclined to exercise the court’s discretion in favour of the respondent.

[19] Accordingly the appeal is dismissed with costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

DR. S. TWUM
JUSTICE OF APPEAL

For Appellants
For Respondent

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DELIVERED IN OPEN COURT ON 30 MAY 2014