IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal No. 23/2016

In the matter between:

XOLILE SIHLONGONYANE t/a	
THE PROPERTY SHOP	**1st Appellant**
ZANDILE SIMELANE	**2nd Appellant**
MFANAWENKOSI J. DLAMINI	**3rd Appellant**
NEDBANK (SWAZILAND) LIMITED	**4th Appellant**
And	
JABULANI ELLIOT SIHLONGONYANE	**Respondent**

Neutral citation: ***Xolile Sihlongonyane t/a The Property Shop and 3 Others vs Elliot J. Sihlongonyane (23/2016) [2016] SZSC 36 (30 June 2016)***

Coram: **J. MAGAGULA AJA, K. R. CLOETE AJA AND C. MAPHANGA AJA**

Heard: **10 May, 2016**

Delivered: **30 June, 2016**

For 1st and 2nd Appellants: M.S. Dlamini

For 3rd Appellant: **M. Mabila**

For 4th Appellant: **P. Van der Berg**

Summary: ***Application proceedings – matter referred to trial - status of affidavits already filed – applicant dies before testifying at trial – hearsay evidence of other witnesses - absolution from the instance – agent acting contrary to principal's instructions – rights of innocent third party not affected – validity of contract in circumstances.***

JUDGMENT

J. MAGAGULA AJA

[1] In this matter the respondent approached the High Court through motion proceedings seeking an order in the following terms:

"1. Declaring the contract of sale between the applicant and the third respondent hereto attached and marked JS1 to be void ab initio and of no force or effect;

2. Rescinding, setting aside and/or reversing the transfer of portion 7 of Farm Calaisvaile II No. 693 in the Manzini District, from Applicant's name to third respondent's name under Deed of Transfer No. 153/14;

3. Cancelling the Mortgage bond executed by the third respondent in favour of the 6th respondent on the said Portion 7 of Farm Calaisvaile II No. 693 in the Manzini District.

4. Ordering restitution of the parties to the position they were in before the conclusion of the purported contract;

5. Awarding costs of this application against first respondent at attorney-client scale……"

[2] The application was supported by an affidavit of the respondent herein in which he alleged *inter alia*, the following:

a) That towards the end of December 2013 he was approached by the first appellant who told him that she was in the business of estate agents and requested the respondent to engage her agency to sell his farm (a certain Portion 7 of Farm Calaisvaile II No. 693 in the Manzini District.

b) Respondent took some time to ponder over the request but eventually agreed to engage the first respondent as his agent. He however instructed

the first respondent that she should first subdivide the farm and only sell one portion thereof leaving enough land for the respondent and his livestock on the other portion.

c) On the 14 January 2014 respondent signed and agency agreement between himself and the first respondent's business known as the Property Shop duly represented by the first respondent. (This "Agreement of Mandate" is attached to respondent's founding affidavit and it is marked "EJ2")

d) The essential terms of the agreement of mandate are that first respondent was to first subdivide the farm and sell the first portion thereof at the highest price attainable. The price was estimated at E1, 500.000-00 (One Million Five Hundred Thousand Emalangeni). The agent was to be paid 10% of the purchase price as commission.

e) On the afternoon of the same day respondent was called by first appellant to sign some papers which were part of the transaction he had mandated earlier on that day. The first appellant prevailed upon the respondent to sign some papers without affording him an opportunity to read them as she said she was rushing somewhere. She just showed him where to sign on each of the papers which were many. Despite respondent's request for copies of these papers later on, these were not availed to the respondent by the first appellant. Respondent only got to know after a transfer of the whole farm to the third appellant had been passed that the papers he was

made to sign without being afforded an opportunity to read them was a Deed of Sale for the whole farm and not a portion as he had mandated.

f) Before transfer of the property was effected respondent was called to the offices of C.J. Littler and Company Attorneys to sign a Power of Attorney to pass transfer of a certain Portion 8 of Farm Calaisvaile II No. 693. He believed this to be a subdivision of his Portion 7. He learnt after transfer of the property that Portion 7 had been re-designated as Portion 8 by the Surveyor General's Office. What had therefore been transferred was the whole of his farm which used to be portion 7. There was actually no portion 7 in the Surveyor General's Office anymore.

g) The respondent came to know all this when the third appellant acting through his attorneys started to threaten him with eviction proceedings.

h) Prior to the threatened eviction proceedings he had however been paid the sum of E1, 000 000.00 (One Million Emalangeni) which was deposited into his account. He enquired about the funds from first appellant and she told him that it was the purchase price of the property. He waited for the balance of E500 000.00 (Five Hundred Thousand Emalangeni) but it never came.

i) In paragraph 25 of the founding affidavit the respondent states:

"25. I humbly submit that the agents acted fraudulently in making me hastily and inadvertently sign the Deed of Sale for the whole farm when I had mandated them to subdivide and sell only a portion thereof….."

j) In paragraph 25.3 respondent states:

"To put it beyond doubt that first, second (and perhaps) third defendants fraudulently tricked me into selling my property for "a song," by the time I conferred the agents (first and second defendants) with authority through Annexure "EJ2" on the 14th January 2014, the third defendant ("Buyer") had already signed the Deed of Sale on the 13th January 2014."

(I shall return to these submissions later on in this judgment)

[3] In a nutshell respondent's contention is that he was tricked into signing a Deed of Sale and Power of Attorney to transfer the whole of his farm when he actually intended to sell and transfer only a portion of it. That is why he approached the High Court seeking an order to set aside the sale and transfer of his property, as well as *restitutio in intergrum.*

[4] Respondent's application was opposed by the appellants at the High Court. The first and third appellants filed affidavits opposing the order sought by the respondent whilst the fourth appellant explained in its affidavit that it was neither

opposing nor supporting the relief sought by the respondent. The fourth appellant stated that it was filing an affidavit merely to record how it got involved in the transaction culminating to the registration of the mortgage bond in its favour, and also to seek *restitutio in integrum* from the respondent and/or first and second appellants if the order sought by the respondent at the High Court was granted. The fourth appellant is the bank which financed the third appellant in the purchase of the property.

[5] The first appellant filed her opposing affidavit way out of time and after the third and fourth appellant had filed their affidavits and the respondent having filed his replying affidavit. The result was that the respondent had to file a second replying affidavit just to deal with the allegations contained in the first appellants opposing affidavit.

[6] From the onset in paragraph 3 of her affidavit the first appellant states the following:

> ***"I state that the application before court is based on dishonesty fraud and forgery, on the part of the applicant. The applicant has circumvented facts which are wholly not true in so far as the alleged cause of application is concerned and further went on to create documents which***

are annexed to his application. Such documents are forgery and the original documents have been altered……"

[7] Since there are no other documents that are disputed by the first appellant it would seem that the allegations of fraud and forgery are directed only to annexure "EJ2" to the respondent's founding affidavit which is the agreement of mandate.

[8] In fact first appellant deals with this document in paragraph 11 of her opposing affidavit where she states *inter alia*:

"…….. I deny the entire contents and the said annexure "EJ2".

11.2 ***I mention that the agreement that was signed between myself and the applicant, as agreed, was to sell the entire farm being Portion 7 of farm Calaisvaile II No. 693, Manzini District measuring 47 hectares in total for the price of E1 500 000.00 (One coma Five Million Emalangeni)***

11.3 I state that prior to the signing of the agreement the applicant read through it and noted that he had no issue with the contents thereof and thereafter appended his signature. Kindly see attached hereto and marked "F" a copy of the agreement of mandate referred to herein.

11.4 ***I mention that annexure "EJ2" is not known to me and I respectfully state that same has been created by the applicant to circumvent facts to***

favour him. I state that the original agreement of mandate has been altered on the first page to suit the deposition made by the applicant."

[9] First appellant's annexure "F" is an agreement of mandate signed on the same date as respondent's annexure "EJ2." The material parts of annexure "F"are as follows:

"DESCRIPTION OF PROPERTY AND SIZE

Portion 7 of farm Calaisvale II No. 693 Manzini District. Measuring 47 hectares in total extent.

COST AND COMMISSION

The agreed purchase price of the property is E1.5 million (One Million Five Hundred Thousand Emalangeni only). Commission amount payable to the above mentioned Agents is E500 000.00 (Five Hundred Thousand Emalangeni Only)."

[10] The material parts of annexure "EJ2" on the other hand read as follows:

"DESCRIPTION OF PROPERTY AND SIZE

The agents are hereby mandated and authorised to effect a subdivision of Portion 7 of Farm Calaisvale II No. 693 Manzini District, currently measuring 47 hectares in total extent. After the subdivision the agents are authorized to sell the first portion of the said property and the remaining extent thereof to

continue owned by the "owner" of this property for his dwelling and livestock farming.

COST AND COMMISSION

The purchase price of the portion to be sold is estimated at E1.5 million (One Million five Hundred Thousand Emalangeni), but the agents shall evaluate the property and secure the highest price possible for the sale of the portion of the farm.

PAYABLE

…….The Commission shall be 10% of the purchase price which shall be share by the agents…….."

[11] The major difference between these two mandates are that annexure "F" is for the sale of the whole farm whilst annexure "EJ2" is for a subdivision and sale of only a portion of the property. Secondly for the same purchase price of E1.5 million Emalangeni, the agent's commission is E500 000.00 in terms of annexure "F" and 10% (E150 000.00) in terms of annexure EJ2.

[12] Whilst the respondent maintain that the correct mandate is his annexure "EJ2," the first appellant maintain that the correct mandate given to her is her annexure "F". This is a sharp and very material dispute of fact. It goes to the very root of the dispute which is whether or not the respondent mandated a sale of the whole of

his farm or only a portion of it. In my view oral evidence was necessary to resolve this dispute.

[13] The first appellant also denies in her opposing affidavit that she rushed respondent to sign the Deed of Sale and that respondent signed the same without being afforded an opportunity to read it. In paragraph 22.1 of her affidavit first appellant states:

> ***"……I mention that the applicant was aware of the contents of the Deed of Sale after I explained same to him and above that, the applicant was given opportunity to read through the agreement.***
> ***22.2 I state that the applicant is not being sincere in his contentions, at all material times applicant was aware that the entire farm was being sold, not a portion."***

This is another material dispute of fact arising from the affidavits of respondent and first appellant.

[14] In his founding affidavit respondent also stated that when he signed the Power of Attorney to transfer Portion 8 of Farm Calaisvale II No. 693, he was not aware that this was a transfer of the whole of his property. He alleged that since he knew his farm to be Portion 7, he thought Portion 8 was a portion originating from the subdivision of his portion 7. The first appellant denies this in her opposing affidavit. In paragraph 27 of her opposing affidavit first appellant *inter alia* states:

"…… I state that upon receiving mandate from the applicant to sell the entire farm applicant had informed me that the farm was certain portion 7. However upon signing the Power of Attorney to pass transfer, it transpired that the farm owned by applicant was a certain portion 8 not 7 as mentioned by applicant, hence reference in the Power of Attorney reflecting a certain Portion 8.

…….Further, I submit that the issue of reference to a Portion 8 was explained to applicant by the conveyancer upon execution of the power of attorney to effect transfer."

I view this as another material dispute of fact.

[15] The affidavit of the third appellant raises virtually the same issues raised in the affidavit of the first appellant. He denies that he was buying a portion of the farm and most importantly that he ever perpetuated any fraud upon the respondent.

[16] The affidavit filed on behalf of the fourth appellant (the bank) explained how the bank got an application to finance the transaction and eventually financed it on behalf of the third appellant.

[17] The affidavit of the bank further explains that the application received by it was to finance a certain Portion 7 of Farm Calaisvale II No. 693, Manzini District. However upon receipt of the application by respondent it realized that the mortgage bond executed in its favour was for portion 8 of the same farm. It is then that the bank summoned the conveyancer to explain how this came about.

The conveyancer, Mr. Manzini, explained that after receiving instructions from the respondent, first and second appellants, he conducted a search at the Surveyor General's office. He discovered that there was actually no portion 7 of the said farm but there was portion 8. The description of the property had been changed from portion 7 to portion 8. The confirmatory affidavit of Mr. Manzini is attached to the fourth appellant's affidavit filed in the court *a quo.*

[18] Evidently the matter could not be resolved on the affidavits before court in light of the material disputes of fact. After referring to the Parties' points of contention and the fact that the third appellant had raised a point in *limine* that the matter was fraught with disputes of fact which were foreseeable, the learned judge *a quo* state the following on page 3 of her Judgment:

> ***"Having considered the pleadings, the matter was referred to trial. I however directed that the conveyancer and the Registrar of Deeds should also be called as witnesses in order to explain about the description of the farm."***

[19] Rule 6 (17) and (18) of the High Court Rules provides as follows:

> ***"17 Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision.***
>
> ***(18) Without prejudice to the generality of sub-rule (17) the court may direct that oral evidence be heard on specified issues with a view to***

resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[20] Clearly by referring the matter to trial, the learned judge *a quo* must have come to conclusion that the matter could not be properly determined on affidavits. Secondly the learned judge *a quo* intended that the application proceedings be converted into trial proceedings. She did not just want oral evidence to be heard on specified issues. Had she intended the latter she would have specified the issues on which oral evidence was to be heard and the witnesses to be called. The referral of the matter to trial meant that the matter was now to be decided on oral evidence and the affidavits were therefore of no evidential value. Although the learned judge did not direct this, the affidavits merely constituted pleadings in action proceedings. In a trial viva voce evidence is used, not affidavits. The matter therefore fell to be determined solely on evidence led at the trial and without reference to the affidavits unless same were read into the trial record.

Rule 38 (4) of the High Court Rules provides:

"The witness at the trial of an action shall be examined viva voce, but the court may at any time for sufficient reasons, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing on such terms and conditions as to it may seem fit……"

[21] In *casu*, the court having referred the matter to trial all witnesses had to give oral evidence unless the court ordered some of them to give evidence by affidavit. The court never ordered any witness to give evidence on affidavit. Particularly, the court could not order any of the witnesses who had already given evidence by affidavit since by referring the matter to trial, the learned judge had come to the conclusion that the affidavits were of no assistance to the court since disputes of fact arose therefrom. She could not therefore revert to the same affidavits.

[22] Apart from the three witnesses who were called at the direction of the court, namely the Registrar of Deeds, the conveyancer and the Surveyor General, only two witnesses were called on behalf of the respondent. The respondent himself passed away during the course of the trial and was therefore unable to testify. The three witnesses called at the instance of the court were to explain how the property known as Portion 7 of Farm Calaisdale II No. 693 Manzini District changed to be Portion 8. However the main issue for determination by the court was whether or not the respondent gave a mandate for the subdivision of his farm and sale of a portion thereof or he gave a mandate for sale of the whole of his property.

[23] When the respondent gave the mandate to the first appellant none of the witnesses who testified for him at the trial were present. They testified on what they had heard from the respondent and such evidence is clearly hearsay and inadmissible. The result is therefore that no evidence was adduced to prove the respondent's

allegations which had been denied by the first appellant in the pleadings. In the absence of such evidence an order for absolution from the instance should have been entered and respondent's claim dismissed with costs.

[24] However, even if evidence had been led on behalf of the respondent, it seems to me that such evidence was going to prove that the first appellant, who was an agent of the respondent, intentionally did not carry out the mandate as given to her by her principal. The evidence could probably go on to prove that first appellant fraudulently caused respondent's whole farm to be sold instead of a portion thereof.

In fact the learned judge *a quo* finds at page 31 of her judgment

> ***"……..The first respondent as an agent dismally failed to discharge her duties……. She failed to carry out her principal's instructions as she did not subdivide the farm. She did not revert to her principal to have the deed of mandate and sale amended to read accordingly and neither did she disseminate the information that Portion 7 was renamed Portion 8. ……. She acted far below the standard of good faith by failing to account to her principal when called upon by the applicant. She ignored calls from applicant's daughter to come and discuss the matter."***

The learned judge continues at page 32 whilst dealing with the issue of costs:

> ***"Agents of the first and second respondent's calibre deserve to be mucted with such costs. Not only have their mala fides affected the applicant negatively but also innocent parties such as the third and sixth respondents."***

The third appellant was third respondent and the fourth appellant sixth respondent in the court *a quo*. These parties are the purchaser and the financing bank respectively.

[25] The learned judge then proceeded to grant an order in favour of the respondent herein based on her findings stated above, which are basically the *mala fides* of the first appellant who was the respondent's agent. Particular note should be made of the fact that the learned judge found that the third appellant was an innocent purchaser and only blamed the actions of the seller's agent. Having thus found the learned judge should not have granted an order setting aside the sale and transfer of the property to the third Appellant. If the respondent suffered harm in the hands of his own agent; even if he was defrauded by his own agent, that should not affect the right of a *bona fide* purchaser. According to **G.T.R. Gibson, South African Mercantile and Company Law (4th edition page 254):**

> ***"……. Where an agent has acted within the scope of his authority (express implied or ostensible) …… the principal is liable to any third party with whom the agent has contracted and no contractual liability to the third party attaches to the agent…….. The rule applies even if the agent acts fraudulently and in the furtherance of his own interests and not on the interests if his principal."***

Also in the case of **Akojee Vs Sibanyoni 1976 (3) SA 40 (W) Nicholas J** stated at 442:

"This is therefore another of those cases in which the Court is called upon to decide which of two prima facie innocent parties is to suffer for the fraud of a third person…

On the applicant's own case, he delivered the vehicle to Power, a firm of motor dealers, for the purpose of selling it, and he must have contemplated that Power would exhibit the vehicle for sale at its business premises with its other stock-in-trade. Power therefore dealt with the vehicle with the applicant's consent in such a manner as to proclaim that the dominium or jus disponendi was vested in it. In this circumstances, the applicant is stopped from vindicating the vehicle from the second respondent who is an innocent third party… The applicant clothed Power with the apparent authority to sell the vehicle as if it were part of Power's own stock and he cannot set up his private instructions that Power was not to deliver the vehicle to a purchaser until the applicant had been paid the purchase price…"

[26] In *casu*, if the respondent was let down or even defrauded, he was defrauded by his own agent. Such fraud cannot affect the interests of the appellant whom the judge *a quo* found to be an innocent purchaser. The contract of sale remains valid and there is therefore no justification or basis for an order setting aside the transfer. This would have been the case even if the first appellant had contracted on behalf of the respondent. However, in *casu* the third appellant's case is even strengthened by the fact that it is the respondent himself who contracted and not

his agent. If the respondent was tricked (and there is no valid evidence to prove this) into contracting, he was tricked by his own agent and he personally entered into the contract. Surely there is no way in which the third appellant can be faulted or the validity of the contract challenged. For the foregoing reasons the court has come to the following conclusions:

1. At the close of respondent's case in the court *a quo*, an order for absolution from the instance should have been entered.
2. Since the respondent's complaint was against his own agent and the court *a quo* specifically found that the third appellant was an innocent purchaser, the contract of sale remains unchallengeable and valid. This even particularly so because it is not even the agent but the seller himself who contracted.

For the foregoing reasons the court makes the following order:

1. The appeal is upheld with costs;
2. The decision of the court *a quo* is set aside.

_____

J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

I agree

_____

R. CLOETE

ACTING JUSTICE OF APPEAL

I agree

_____

C.S. MAPHANGA

ACTING JUSTICE OF APPEAL