IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **APPEAL CASE NO. 16/2019**

In the matter between:

ZINHLE MASEKO MDLULI **Appellant**

And

ALDONA LAPIDOS **1st Respondent**

MZAMO MAMBA **2nd Respondent**

REGISTRAR OF DEEDS **3rd Respondent**

Neutral Citation: Zinhle Maseko/Mdluli vs Aldona Lapidos and two Others [16/2019][2019] SZSC 54 (28 November 2019)

Coram: **R.J. Cloete JA, S.J.K Matsebula AJA, and J.M Mavuso AJA**

Heard: **10 September2019**

Delivered: **28 November 2019**

Summary: *Law of contract – law of agency – Principal gives mandate to her agent to sell property – agent delegates such mandate to a sub-agent to sell the property – sub-agent sells the property as consisting of 2*

two bedroom flats – when purchaser assumes ownership is told by seller that the property consists of only 1 two bedroom flat – purchaser alleges misrepresentation and cancels the contract of sale – seller pleads that the non-joinder of the lending bank vitiates the purchaser's claim for restitution hence it should be entitled to cancel contract..

Held: the purchaser was induced by the misrepresentation to enter into the contract of sale;

Held: misrepresentation as to a material fact of the merx of the contract entitles the purchaser to claim restitution.

Held: the acts of an agent binds the principal – the acts of a sub-agent binds both the agent and the agent's principal.

Held: the Respondent was justified in not joining the lender (Bank) in the case as the interest of the lender were not in jeopardy or in danger as they were secured by a mortgage bond entered into between the lender and the Respondent and the Appellant was not representing the interest of the lender in the case but her own interests.

Held: the appeal should be dismissed with costs.

JUDGMENT

SJK Matsebula AJA

Introduction

[1] The Appellant who was Respondent in the Court *a quo* is the owner of an immovable property described as Portion 5 of Lot 2417, Extension 21, Mbangweni Township, Mbabane, District of Hhohho. She will be referred to herein as the Appellant.

[2] The uncontroverted evidence is that:

(a) Appellant being desirous of selling her property, approached Mzamo Mamba, who is the 2nd Respondent herein, to find her interested buyers of her property or put differently to sell the property on her behalf; the 2nd Respondent, as it turned out, works as a freelancer agents for an estate agency called D.S. Properties.

(b) D.S. Properties is managed and directed by Mr. David Magagula. This company is a conduit where freelancing estate agents can sell or collect rentals through it. The 2nd Respondent is one such freelancer agent of this company.

(c) The 2nd Respondent, armed with the mandate to sell Appellant's property, communicated such information to David Magagula, the Director of D.S. Properties and to another agent, Innocent Ngwenya, that there was this property of the Appellant which needed to be sold or was available for sale.

(d) David Magagula solicited an interested buyer who is the 1st Respondent herein, Aldona Lapidos.

(e) David Magagula presented the 1st Respondent with the sale agreement already signed by Appellant as the seller and 1st Respondent was asked to sign the second part as the purchaser, which she did.

(f) David Magagula, on the information given to him by 2nd Respondent who obtained it from the Appellant, pointed out the merx being sold.

(g) Prior to signing the sale agreement, the other agent who was present when the 2nd Respondent communicated the desire of the Appellant to sell the property, Innocent Ngwenya, who also works under D.S. Properties, had also telephoned 1st Respondent and advised her of the sale of the property which he said consisted of 2 units (2 two bedroomed units) at E900 000.00 (Nine Hundred Thousand Emalangeni). Each unit being E450, 000.00 (Four Hundred and Fifty Thousand Emalangeni).

(h) Consequent to the pointing out in paragraph (f), 1st Respondent viewed the property (flats) as identified by 2nd Respondent, Innocent Ngwenya and David Magagula but she was allowed to see one unit and was told the flats were identical hence there was no need to view the other one and in any event it was locked.

(i) The unit or flat that she was denied access to was actually or eventually the one sold and registered in the name of the 1st Respondent and the one she was permitted to view and actually entered was never transferred to her name.

(j) The 1st Respondent secured a bank loan and additional money from other sources and paid Appellant E900 000-00 (Nine Hundred Thousand Emalangeni) including transfer fees.

(k) After completion of the sale transaction, 2nd Respondent contacted the 1st Respondent and offered to be her agent to collect rentals.

(l) 1st Respondent got Appellant's phone number from the 2nd Respondent and communicated her desire to meet and be introduced to the tenants occupying the property she had just acquired. That is when Appellant informed the 1st

Respondent that she only bought one unit and not two units. Appellant told 1st Respondent that the other unit or flat belonged to Appellant.

(m) In light of this development, the 1st Respondent seeks cancellation of the contract of sale, reversal of the purchase price of E900 000.00, and E2 150-00 paid for municipal rates and further for the Registrar of Deeds to expunge or set aside the Deed of Transfer 10/10/016 from the Registers.

(n) The Appellant is resisting such a claim, arguing, among other facts, that the freelancing agents are agents of the 1st Respondent and are responsible for the misrepresentation of the material facts and arguing further that the amount paid servicing the bank loan and the amount paid for the municipal rates should be claimed separately as damages.

[3] The Court *a quo* made a finding that Appellant mandated the 2nd Respondent to secure a purchaser for her property. The 2nd Respondent shared the mandate with other 3rd parties who are all doing their agency work for or through the company D.S Properties. These agents included David Magagula, Innocent Thwala, Sibongile Gama and Colani Mdluli.

[4] It was further a finding of the Court *a quo* that the 1st Respondent herein was induced to enter into the contract of sale of the merx on the representation that the property comprised of 2 two bedroom units or two flats. The 2nd Respondent had accepted that he shared the mandate to sell the property with the other 3rd parties mentioned above but denied having said the property comprised of 2 two bedroom units. Therefore the misrepresentation must have come from the 3rd parties. It should be noted that the 2nd Respondent did not file any affidavit confirming or denying any of the facts attributed to him yet he received the mandate to sell and further shared it among his colleagues in the estate agency business.

[5] At paragraph 26 of the judgment, the Court *a quo* also found that the 3rd parties, in particular D.S. Properties was responsible to the 2nd Respondent as the person who shared the mandate and that D.S. Properties was a sub-agent of the 2nd Respondent as evidenced by the fact that 2nd Respondent and D.S. Properties equally shared the commission which accrued from the sale.

[6] The Court *a quo* also found and concluded that D.S. Properties could not be the agent of the Respondent irrespective of the fact that it was D.S. Properties which showed or pointed out to the Respondent the property as consisting of two units. D.S. Properties was involved in the transaction through an invitation by the 2nd Respondent who was the Agent of the Appellant. D.S. Properties as represented by David Magagula was a sub-agent to the 2nd Respondent who was in turn the agent of the Appellant.

[7] At paragraph 39 of the judgment, the Court *a quo* made the following orders:-

"In the final analysis, I enter the following orders:

[39.1] The applicant's application succeeds;

[29.2] The deed of sale entered into between the applicant and 1st Respondent is hereby declared cancelled forthwith;

[39.3] An order of *restitution in integrum* against the 1st respondent in favour of the applicant is hereby granted in that the 1st Respondent is hereby directed to reimburse the applicant the following sums:

[39.3.1] E900 00.00;

[39.3.2] Mortgage interest accrued from the sum of E900 000.00

commencing from date of mortgage bond to date of final payment of bond as calculated by applicant's financer (First National Bank).

[39.4] The 1st Respondent is ordered to pay the sums under order [39.3] within three months from date of this judgment;

[39.5] The 3rd respondent is ordered to expunge from its records the deed of transfer 1010/2016 in favour of the applicant upon 1st respondent's compliance with order [39.3] herein;

[39.6] 1st respondent is ordered to pay cost of suit".

The Appeal

[8] The Appellant (1st Respondent in the Court *a quo*) being dissatisfied with the judgment of the court *a quo* has approached this court for redress and the appeal is as follows – "

1. *The Court a quo erred in fact and in law in holding that the First National Bank (FNB) has no direct and substantial interest in the proceedings yet the bank has a registered Mortgage Bond over the property in question.*

2. *The Court a quo erred in fact and in law in holding that the averments in the Appellant's Affidavit were hearsay and Appellant was stating as a matter of fact what she had discussed with the 2nd Respondent.*

3. *The Court a quo erred in fact and in law in holding that D.S Properties was the Appellant's Agent (David Magagula and Innocent Ngwenya), yet 1st Respondent's Attorney conceded in argument that D.S. Properties was 1st*

Respondent's Agent. Furthermore, the 1st Respondent did not deny in her replying Affidavit that D.S Properties (David Magagula and Innocent Ngwenya) were her agents yet Appellant has specifically stated this in her Answering Affidavit.

4. *The Court a quo erred in holding that the valuer acted on the Appellant's misrepresentation when the valuer prepared the valuation report stating that the property consisted of 2 units".*

5. *The Court a quo erred in fact and in law to grant 1st Respondent an order for the payment of the sum of E900 000.00 (Nine Hundred Thousand Emalangani), interest that occurred on the Mortgage Loan, when these are damages which the 1st Respondent could only claim through action proceedings.*

6. *The Court a quo erred in fact and in law in granting the order for payment of E2 150.00 (Two Thousand One Hundred and Fifty Emalangeni) which constitutes damages.*

WHEREFORE it may please the above Honorable Court to uphold the appeal with costs."

The judgment

[9] The Appellant, on the issue of non- joinder relies on the case of **Savela Investments v Sedcom and Others – Civil Case No, 48/2008** of this Court wherein the Court quoted with approval **Amalgamated Engineering Union v Minister of Labour 1949 (3) S.A 637** as follows –

> "If a party has a direct and substantial interest in any order the court might make in proceedings or if such order could not be sustained or carried out without prejudicing that other party, he is a necessary party and should be

joined in the proceedings, unless the court is satisfied that he has waived his right to be joined". (my underlining)

[10] The Appellant seems desirous of giving unsolicited legal services to the Bank (First National Bank) who holds mortgage over the property signed between the Bank and the 1st Respondent guaranteeing that the Bank shall not lose its money as the Respondent is the mortgagee.

[11] Clause [39.5] of the judgment of the Court *a quo* cited above reads –

"[39.5] The 3rd Respondent is ordered to expunge from its records the deed of transfer 1010/2016 in favour of the Appellant upon 1st Respondent's compliance with order [39.3] herein"

Clause [39.3] orders the 1st Respondent in the Court *a quo* to refund the applicant the purchase price and further pay ancillary fees and charges.

[12] This is a sufficient guarantee to the Bank that it would not suffer any prejudice. According to the **Savela Investments** case supra, if an order can be carried out without prejudicing the interest of the 3rd party it is not necessary to join that party. The underling words is prejudice to a third party who may not be aware of the proceedings taking place and excludes a party who is aware but is not interested to be a party. In the present case the Bank stands to suffer no prejudice as its interests were secured by the mortgage bond it signed with the 1st Respondent hence its joinder was not necessary.

[13] The second point of appeal is that the Court *a quo* erred in fact and in law in holding that the averments in the Appellant's Affidavit were hearsay and Appellant was stating as a matter of fact what she had discussed with the 2nd Respondent.

If that was the case, the Appellant was simply stating as a matter of fact, what value should a court attach to such utterances. A person relying on such utterances should take steps to give them value for admittance by filing a confirmatory affidavit in motion proceedings in Court. Otherwise they remain worthless and are regarded as hearsay which is not admissible in our Courts.

[14] The case of Member of the Executive Council (MEC) for the **Department of Roads and Transport, Eastern Cape v Ndlazi (815/08) [2019] Z A E M H C 25** better illustrates the rule against admittance of hearsay evidence-

> *"…that the probative value of deponent's evidence depended on the credibility of Mr. Zani who has not testified. No Confirmatory Affidavit has been procured from him either. The evidence can, therefore, as a whole, not be legally admitted. It will be found that it is inadmissible evidence. Having found that the evidence is not admissible, then the Applicant's application becomes sterile, unaccompanied as it is, by evidence that would have been gleaned from an acceptable affidavit or evidence source".*

Only the Appellant knows why the utterances were not confirmed by an affidavit if they were meant to have value and be admitted. This ground of appeal fails.

[15] The 3rd ground of appeal goes to the crux of the matter and on that point alone this matter can be decided. The question to be decided is who was the agent of

whom, whether 2nd Respondent was Appellant's agent or the agent of the 1st Respondent.

[16] It is common knowledge that the Appellant had immovable property to sell which was Portion 5 of Lot 2417, Extension 21 Mbangweni Township Mbabane, District of Hhohho. The property was sold and the Appellant received or pocketed the purchase price. D.S Properties through David Magagula brought the Deed of Sale to the Appellant who signed it and handed it back to David Magagula who in turn took it to the 1st Respondent for acceptance and signature. The Appellant says she gave the mandate to sell the property to Mzamo Mamba (2nd Respondent). It is not Mzamo who gave her the draft of Deed of Sale for signature but David Magagula who owns D.S. Properties where Mzamo is a free lance agent. The Appellant did not question David Magagula's participation in the transaction. It turns out that Mzamo shared the mandate to sell with David Magagula and to Innocent Ngwenya who became sub-agents. The sub-agents carried out the mandate, without evidence to the contrary, as shared by the 2nd Respondent to the letter including the correct price that the Appellant wanted and deducting the promised commission, which turns out was shared among the agent Mr. Mzamo and the sub-agents David Magagula and company.

[17] With these uncontroverted facts, David Magagula and Company could not have been the agents of the purchaser (the 1st Respondent) but worked for the Appellant as sub-agents to Mzamo Mamba (the 2nd Respondent). The 2nd Respondent has not denied that he shared the mandate to sell the property with David Magagula and Company. All the information David Magagula had about the property was given to him by Mzamo Mamba, the Appellant's agent and as a sub-agent he relied on the main agent, including the price of the property and the

pointing out of the property to the sub-agents who in turn passed all such information to the purchaser (1st Respondent).

[18] As the Appellant admits that she gave the mandate to Mzamo Mamba to sell the property, the question that boggles the mind is why Mzamo Mamba never filed an affidavit or a Confirmatory Affidavit to support the story of the Appellant. The answer that he is a man of straw cannot stand because agents have their principals and in this case the Appellant would have taken care of the agent's fees and expenses.

[19] I find no fault with the reasoning of the Court *a quo* that David Magagula and Innocent Ngwenya were sub-agents to Mzamo Mamba the agent given the mandate to sell the property by the Appellant. This ground also fails. Any representation or misrepresentation done by the sub-agents which induced the 1st Respondent to enter into a contract of sale was for the agent and in turn for the principal.

[20] Misrepresentation or representation of incorrect facts which thereby induces the purchaser to buy or enter into a contract vitiates consent and the contract is void *ab nitio.* In **Spenmac (Pty) Ltd v Taitrim CC – (216/2013) 2014 ZASCA 48** at paragraph 31 the effect of misrepresentation was summed up as follows-

> *"[31] In the present matter there can be no question that the plaintiff's representative, Thompson, was misled by Spendly's misrepresentation that the sectional title scheme comprised only two units, and the non-disclosure of the fact that the approval to the subdivision of unit 2 had been granted prior to the conclusions of the agreement of sale between the plaintiff and*

defendant. The misrepresentation resulted in a reasonable and material mistake as to what the merx was. The contract was thus void from the outset. In the circumstances the appeal must fail" (my underlining).

[21] Even in the present case the misrepresentation that there were 2 two bedroom units resulted in a reasonable and material mistake as to what the merx was. There was no meeting of the minds *in casu* therefore the contract was void from the outset necessitating a refund of the purchase price and any incidental and consequential expenses and not as damages because there never was a contract. This is called restitution.

[22] I do not find merit on the fourth ground of appeal. The 2nd Respondent who had the seller's mandate, Appellant, started the whole issue of a 2 two bedroom units when he shared the mandate to sell with David Magagula and Company. The valuer is not a surveyor but a valuer and relied on representation of the property being sold.

[23] The fifth ground of appeal has been covered above. In very simple and basic terms, there never was a contract from the outset, the question is that of restoration; the purchaser returns the property and the seller returns the purchase price and incidental costs and expenses. In that way the status quo before the purported conclusion of the contract is restored.

[24] The six ground of appeal is similarly covered in the above conclusion of the law.

Judgment

[25] Accordingly the Court issues the following order -

(a) the appeal is dismissed;

(b) the judgment of the Court *a quo* is upheld and confirmed; and

(c) the Appellant to pay costs of the appeal**.**

S.J.K. MATSEBULA
ACTING JUSTICE OF APPEAL

I agree

M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

S.B. MAPHALALA
JUSTICE OF APPEAL

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