IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held in Mbabane **Case No. 70/2021**

In the matter between:

BRIAN ARTHUR GOWRAN FITZPATRICK 1ST APPELLANT

BILLEE FITZPATRICK 2ND APPELLANT

And

LUCKY HOWE 1ST RESPONDENT

KIANU KANU JOHNSON-HOWE 2ND RESPONDENT

STEFAN JANSEN VAN VUUREN N.O. 3RD RESPONDENT

(In his capacity as Executor of the Estate of the Late Petrus Jacobus Jansen Van Vuuren)

Neutral citation: *Brian Arthur Gowran FitzPatrick, Bilee FitzPatrick vs Lucky Howe, Kianu Kanu Johnson-Howe, Stefan Jansen Van Vuuren N.O(70/2021)SZSC 33.(..03 August, 2022.)*

Coram: **MJ Dlamini JA, RJ Cloete JA and JP Annandale JA**

Heard: **19 May 2022**

Delivered: **03 August 2022**

***Contract**: Immovable property – Sale of – Seller not adequately identified – Purchaser an infant of about five years – Whether purchaser assisted by natural guardian – Validity of alterations on deed of sale – Whether contract wholly in writing – The parol evidence rule*

***The Deeds Registry Act, 1968**: Whether sec. 16 (3) of the Act applicable where deed of sale was signed by one spouse – Meaning of the subsection considered*

***Held**, Appeal upheld and counter-application dismissed.*

JUDGMENT

MJ Dlamini JA

Introduction

[1] This is an appeal from the judgment of the High Court (per J. Magagula J) delivered on 14 October 2021. The appeal arises from a dispute between the parties dating as far back as soon after the parties purportedly signed the Deed of Sale (BAG 1) in August 2014. For some inexplicable reason the purported sale was fraught with a litany of errors and concomitant controversies. Most of these are not relevant in the judgment reached and where mentioned, will only be in passing.

[2] The Deed of Sale signed in August 2014 was in respect of land described as "Portion 21 (a portion of portion 3) of Farm No 132 situate in Manzini, eSwatini" (the property). The said Portion 21 was in fact community property of the Appellants who are husband and wife. The sale transaction was handled by the 1st Appellant, husband to 2nd Appellant, virtually to the exclusion of the 2nd Appellant. For instance, in paragraph 8 of his founding affidavit, 1st Appellant speaks of the title deed to the Portion 21 as "my property to the

exclusion of all others". No doubt entertaining that notion in mind, 1st Appellant dealt with the property without much regard to 2nd Appellant.

[3] In his answering affidavit, 1st Respondent concluded by stating that the Appellants *"refuse to pass transfer to the 2nd and 3rd Respondents as set out in clause 3 of the Deed of Sale"* and that *"the [Appellants] have no legal basis for refusing to pass transfer"* and prayed for the order set out in the counter-application. In the counter-application 1st Respondent sought an order directing the Appellants to *"sign all documents that may be necessary to effect the transfer"* of the property. The court *a quo* dismissed the main application and granted the counter-application with corrections on the Deed of the name of the Seller and the description of the property. It appears that the court *a quo* did not order the Appellants to sign all the documents as required by 1st Respondent. Central to the application, Appellants had two or three prayers set out in the judgment *a quo* as follows –

> "2. Declaring that the purported Deed of Sale Agreement between the Applicant and 1st and 2nd Respondents for the sale of Portion 21 . . . is null and void and of no legal force and effect; alternatively.
>
> 2.1 Cancelling, rescinding and or setting aside the Deed of Sale between the Applicant and 1st and 2nd Respondents.
>
> 3. Directing the Applicant to return the tendered purchase price to the 1st and 2nd Respondents and 1st and 2nd Respondents are to accept the tendered purchase price from the Applicants."

Interestingly, 1st Appellant speaks of the contract as being between himself and 1st and 2nd Respondents. No mention is made of 3rd Respondent as party to the contract.

Background

[4] In about 2014, the subdivision having occurred about March 2011, 1st Appellant says that he was approached by the late Petrus Jacobus Jansen Van Vuuren to sell him the subdivided property for a beekeeping venture. 1st Appellant says he reluctantly obliged and prepared the dummy or inchoate deed of sale "BAG 4"and sent it to said Late Van Vuuren. Apparently, "BAG 4" was altered without the participation or awareness of 1st Appellant. 1st Appellant says he signed the Deed of Sale without being aware at the time of the alteration. The original title deed of the property was then sent to 1st Respondent for the purpose of effecting transfer. It was at that stage that 1st Appellant says he realized the sale could not go on for a variety of reasons, some of which are not relevant in this judgment save for historical reasons. From the foregoing account 1st Respondent appears on the scene, after the Deed of Sale was signed. But 1st Respondent has a somewhat different version.

[5] On 11 December 2015, 1st Appellant e-mailed 1st Respondent and advised him that he could not go on with the sale transaction for a variety of reasons of which he, 1st Appellant, had not been aware of when he agreed to the sale and signed the Deed of Sale. Those reasons according to 1st Appellant rendered the "purported Deed of Sale null and void and accordingly unenforceable". The stated reasons for wanting out of the transaction were later set out in paragraph 12 of Appellants' founding affidavit, summarized as follows-

- The Deed of Sale was void because *"the 2nd Respondent is a minor and does not have the capacity to contract. I was unaware that the 2nd Respondent [was] a minor until the 1st Respondent stated so. At that time the purported Agreement had already been signed by all parties."*

- The property as subdivided was for the purpose of being incorporated to a neighbouring property. This imperative condition makes the sale impossible to perform as the subdivision was approved on that condition;

- The performance of the purported Deed of Sale is objected to by 2nd Appellant who has refused to grant her written consent to the transaction as required by section 16 (3) of the Deeds Registry Act, 1968;

- The alteration in clause 1 of the Deed of Sale from Portion '17' to Portion '21' was not countersigned by both (all) parties. The alteration thus unlawful the *merx* is not identifiable;

- The Deed of Sale wrongly reflects 'Fitzpatrick Gerald' as the 'Seller' instead of 'Brian Arthur Gowran FitzPatrick'.

[6] 1st Appellant says that he agreed to the sale and signed the Deed of Sale on 22 August 2014, but was not aware that 2nd Respondent was a minor who should not have been party to the agreement as reflected in the Deed of Sale. 1st Appellant has accordingly averred: *"The 2nd Respondent is a minor and does not have the capacity to contract. I was unaware that the 2nd Respondent (was) a minor until the 1st Respondent stated so. At that time, the purported Agreement had already been signed by all parties"*. Indeed, a year later, in December 2015, when the Respondents sought transfer, the move was resisted by 1st Appellant. But 1st Respondent 'on behalf of 2nd Respondent' insisted that the Respondents including Mr. van Vuuren, would press for the property being transferred as there was no legal impediment to such transfer and there were no encumbrances on the title prohibiting the transfer. Looking back, it seemed obvious that 1st Respondent was oblivious

of the need for 2nd Appellant's written consent, if not to the sale which had already purportedly occurred, then to the transfer which was still pending.

[7] 3rd Respondent's affidavit is unfortunately somewhat confused and confusing. He gives the impression that 1st and 2nd Appellants had been in discussions not only with his (3rd Respondent's) father but also with him, apparently to persuade his (3rd Respondent's) father to purchase the property. That, indeed, the sale happened and 2nd Appellant got some money she needed to renovate a chalet on her property which was later rented to 3rd Respondent. 3rd Respondent continues:

> *"10. Thereafter there were many occasions where 1st and 2nd Respondents mentioned the property in small talk with me in the context of the fact that the property now belonged to the deceased, my father, and discussing various possibilities with the property. The 1st and 2nd Respondents being elderly ... whenever we were in each other's company the property would be mentioned".*

[8] I take it that by "1st and 2nd Respondents" in the foregoing paragraph, the 3rd Respondent meant 1st and 2nd Appellants. But the reference to the property then belonging to his father the deceased is unclear. 3rd Respondent seem to mean that the property in issue in these proceedings was in fact (initially) purchased by the deceased without the involvement of the 1st and 2nd Respondents. That would then seem to support what 1st Appellant avers in that he had sent a dummy deed of sale to 3rd Respondent anticipating a single 'purchaser'. If the property was indeed initially sold to 3rd Respondent's father, it is even more confusing that 1st Respondent says he negotiated the purchase price and got a reduction. At what point exactly 1st and or 1st and 2nd Respondents came into the sale proceedings is not clear. Be that as it may, it may also be true that 1st Appellant never anticipated an infant becoming a party to the sale transaction in a Deed of Sale which should have been signed by 3rd Respondent only.

[9] In paragraph 5.1 of his answering affidavit 1st Respondent said that "at all material times" he was acting for 2nd Respondent "who was purchasing the property together with the late Mr. Jansen van Vuuren Petrus Jacobus (sic) who acted for himself". But 3rd Respondent, who is son of the deceased van Vuuren, does not mention 1st and 2nd Respondents during the acquisition of the property. The clear impression 3rd Respondent makes is that the property was sold to his father, the deceased. 3rd Respondent narrates that *"through the course of 2013/2014, well before the sale occurred, the [Appellants].....discussed with [the 3rd Respondent] the possibility or prospect of [the deceased] purchasing the property which is the subject matter of this application"*.

[10] 3rd Respondent also has nothing to say about what preceded the signing of the Deed of Sale and how 2nd Respondent and 3rd Respondent's late father became the purchasers. 3rd Respondent states that *"the agreement was signed on behalf of the 2nd Respondent by the 1st Respondent who is the [2nd] Respondent's father and legal guardian"*, and that *"2nd Respondent was duly assisted by his guardian within the requirements of law, which assistance took the form of the 1st Respondent being present at the execution of the contract, assenting to and signing the contract on behalf of the 2nd Respondent"*. The narrative does not answer how 1st and 2nd Respondents came into the picture or why 1st Appellant sent to 3rd Respondent the dummy deed of sale reflecting one purchaser. The impression created is that 1st Appellant had as purchaser, the deceased or his son, the 3rd Respondent. As for the 1st Respondent signing the Deed on behalf of 2nd Respondent and or 1st Respondent assisting the 2nd Respondent in the execution of the contract, the less said the better. The long and short of the story told is that it is extrinsic and irrelevant.

[11] To the foregoing, 1st Appellant states: *"28. At all material times of the signing of the Deed of Sale, I believed that I was entering into a contact of sale with Mr. Van Vuuren. He had mentioned Lucky Howe who would assist him in the beekeeping venture. I had prepared a Deed of Sale which was just between myself and Mr. Van Vuuren. So when I signed the last page as presented to me, I believed this to be the agreement I had prepared"*.

1st Appellant further states that he only realized after signing the Deed of Sale that 2nd Respondent was an *infans*. It may be noted that 1st Appellant's signature as 'Seller' does not appear on the last page of the Deed of Sale where the names of 2nd and 3rd Respondents appear. And so when signing 1st Appellant could easily have missed the very last page.

[12] In paragraph 52, 3rd Respondent says by signing 'BAG 1' it was the common intention of the parties that *"the 2nd Respondent and the deceased should become the owners of the property....."* But it is nowhere shown or told where the deceased and 2nd and or 1st Respondent first met in connection with 2nd Respondent and deceased partnering in the purchase of the property; or who introduced 1st and or 2nd Respondents to 1st and or 2nd Appellants as partners in the purchase of the property. These questions may appear inconsequential, but in a matter full of controversies one wonders who may or may not be telling the truth. In the result, the three main affidavits of 1st Appellant, 1st Respondent and 3rd Respondent do not meet happily.

[13] From the information contained in the Record it appears that 2nd Respondent who is the son of 1st Respondent was at the time of conclusion of the contract an *infans*, that is, a minor below the age of seven years. It is then said that 1st Respondent acted for the 2nd Respondent in the run-up to the sale agreement culminating in the Deed of Sale. Mr. Rodrigues, counsel for the 1st and 2nd Respondents, emphasized the fact that 1st Respondent was known by 1st Appellant and that was never an issue. The written consent of the 2nd Appellant was not necessary for the validity of the Deed of Sale. Counsel for the 3rd Respondent aligned himself with 1st and 2nd Respondents' contentions. The Respondents' proposition is that since 1st Respondent 'at all material times' acted for the 2nd Respondent, the infancy of the 2nd Respondent is of no consequence. It is then impliedly argued that the sale agreement was concluded by 1st Appellant with 1st Respondent who also signed the Deed of Sale. It was further argued for 1st Respondent that since he was the party who ostensibly contracted with 1st Appellant, then 2nd Respondent was at all times assisted by 1st Respondent and accordingly the Deed of Sale cannot be void.

[14] On the ground that the Deed of Sale was invalid in as far as it reflected 2nd Respondent, then an *infans*, as the 'Purchaser' together with 3rd Respondent, the learned Judge *a quo* stated as follows:

> *"[9] ... In casu, the 2nd respondent did not do anything. He did not sign the Deed of Sale nor did he insert his name thereon. The truth of the matter is that it is the 1st respondent who contracted with the 1st applicant and indeed he is the one who signed the contract .... The fact therefore that the Deed of Sale reflects the 2nd respondent as the purchaser when in fact he never contracted with the 1st applicant does not render the agreement which was entered into by the 1st applicant and 1st respondent invalid or void. It just means that the Deed of Sale has to be corrected to reflect the correct parties to the agreement"*

[15] With respect, it is hard to understand which Deed of Sale the learned Judge *a quo* had before him. The Record reflects one signed Deed of Sale identified as 'BAG 1', showing 1st Appellant as the 'Seller' and 2nd Respondent and 3rd Respondent as the 'Purchaser' or 'Purchasers'. 1st Respondent does not appear as a party to the agreement of sale except for the inexplicable signature he appended above the name of 2nd Respondent. Inexplicable because, as it is, it purports to be that of 2nd Respondent which, in fact, it is not. There is no indication in what capacity 1st Respondent signed the Deed of Sale. The learned Judge *a quo* says that the sale agreement was entered into between 1st Appellant and 1st Respondent. With respect, that is not what the Deed of Sale reflects. It is the Deed of Sale that we must look to as the recorded memorial of the contract between the parties. By our law, the Deed of Sale cannot ordinarily be trumped by whatever prior or preliminary discussions prospective contractors may have had before signing the Deed. It is the Deed not what preceded it that defines the terms of the agreement between the parties.

Sale of immovable property

[16] Hoffmann and Zeffertt[1] acknowledge that a contract is a product of negotiations, offers and counter-offers, which evidence is ordinarily admissible in correctly understanding the terms of the contract. But, the learned authors caution:

> *"If . . . . the parties decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the parties' previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible. 'The rule' remarks Botha JA in* ***National Board (Pretoria) (Pty) Ltd v Estate Swanepoel*** *(1975 (3) SA 16 (A) at 26, 'is well summarized by Wigmore (para 2425) as follows:*
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> > *'This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, ie its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: When a jural act is embodied in a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act.'"*

[17] Gibson [2] defines 'sale' as *"a contract in which one person (the seller or 'vendor') promises to deliver a thing to another (the buyer or 'emptor'), the latter agreeing to pay a certain price* (**Treasurer General v. Lippert** (1883) 2 SC 172). *It is, then, the agreement alone that constitutes the sale – neither delivery nor payment is necessary before the sale is concluded. And legal rights and duties flow immediately upon agreement"*. And Schulze

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[1] LH Hoffmann and DT Zeffertt **The South African Law of Evidence** 4th edition (Butterworths) pp 294 - 295

[2] **South African Mercantile and Company Law**, 8th edition (Juta) (2003) by Visser *et al*, at p 110.

et al [3] confirm: *"A contract of sale may be defined as a contract in which one party (the seller) undertakes to deliver the* merx *to another party (the buyer or purchaser), and the purchaser in exchange for this, agrees to pay the seller a certain sum of money (the purchase price)."* Schulze *et al* further write (at p 159): *"When a contract of sale is executed in full and without hitches, the purchaser acquires ownership of the* merx. *The transfer of ownership is usually the primary purpose of the parties to a contract of sale, yet it is not an automatic consequence of the execution of a contract of sale"*. (My emphasis). Accordingly, a contract of sale necessarily bears on its back or in its belly an element of transfer or disposal or delivery of the *merx* to the buyer – a change of ownership. *In casu*, if it is the written agreement that we must look to, then, that the contract was negotiated by the 1st Respondent is irrelevant or at most only incidental: that does not make 1st Respondent a party to the contract save as appears on the Deed of Sale. And the Deed of Sale may not be lightly manipulated to achieve extra-consensual agreements materially different from the written contract.

[18] The general rule is that the entire contract for the sale of immovable property must be in writing, although not necessarily in one document, save that if there are more than one document *"these documents, read together, must fully record the contract,"* says Corbett JA in **Johnson v Leal** 1980 (3) SA 927 (AD) at 937H. Naturally, the concern in the written contract must be with the important terms of the agreement. And the learned Justice Corbett continues:

> *" . . . The material terms of the contract are not confined to those prescribing the* essentialia *of a contract of sale, viz. the parties to the contract, the* merx *and the* pretium, *but include, in addition, all other material terms (see* ***King v Potgieter,*** *1950 (3) SA 7 (T) at p 14 C;* ***Meyer v Kirner,*** *1974 (4) SA at pp 97-9). It is not easy to define what constitutes a material term. Nor is it necessary in the present*

[3] Heinrich Schulze *et al* **General Principles of Commercial Law** (Juta) 8th edition (2015) p 71

case to do so ... Generally speaking these terms - and especially the essentialia – *must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject-matter of the contract, as also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral consensus_between the parties (.....). This denial of recourse to evidence of an oral consensus applies to earlier, contemporaneous or subsequent oral agreements. In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by the so-called 'parol evidence rule', (....) or, more correctly, that branch of the 'rule' which prescribes that, subject to certain qualifications (....), when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract (see* ***National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel*** *1975 (3) SA 16 (A) at 26 A-D and the cases there cited). The extrinsic evidence is excluded because it relates to matters which by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant (**National Board** case, supra at 26C)".*

[19] And Jansen JA in **Venter v Birchholtz,** 1972 (1) SA 276 (AD) at p 282G concurs: "*From* Neethling v Klopper and Others *1967 (4) SA 459 (AD) at 464G it is clear that as a general rule the requirement of writing does not allow subsequent verbal amendments to the essential provisions of the written contract of sale*". In casu, the Court a quo misdirected itself in thinking that the Deed of Sale could be altered by rectification to reflect a supposed prior oral consensus between the parties. The authorities do not support that view.

Section 16 (3) of the Deeds Registry Act, 1968

[20] With regard to the sale or alienation of the property in the present matter it may be instructive to take a leaf from our neighbouring jurisdiction. Section 15 of the Matrimonial Property Act 1984 of South Africa requires a spouse married in community of property to obtain the consent of the other spouse to perform certain acts. *"These are acts which the spouses would generally regard as important and which are potentially prejudicial to the joint estate"*, says Sharrock[4]. The consent required is written (or formal) consent. Sharrock continues: *"In terms of section 15 (2) (read with sec. 15(5)) of the Act a spouse cannot without the formal consent of the other spouse: (1) alienate, mortgage, burden with a servitude..... immovable property forming part of the joint estate; (2) enter into a contract for the alienation, mortgaging, burdening with a servitude ... immovable property forming part of the joint estate"*. It seems to me that the deed of sale is essentially a document for alienating immovable property. On that account, the deed of sale would also require the written consent of the other spouse for its execution. For what would be the value of the deed of sale if the property sold cannot be transferred and registered in the name of the buyer for lack of written consent? The seller *"must also undertake to transfer ownership to the buyer. He cannot . . . purport to sell the* res *and yet reserve permanently his right of ownership in it,"* says Sharrock (at p 271). That is why it is proper to see the deed of sale as an act connected to the transfer, cession or registration of the property sold regardless of the different processes involved. That is, from sale to registration, is a single unbroken act or movement of the *merx* from seller. The gap that may exist between sale and registration is only a temporary, halfway stop that cannot be permanent unless the sale was fictitious. Ownership must inevitably change even where the seller continues to hold or occupy the thing sold.

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[4] Robert Sharrock, **Business Transactions Law (Juta)** 8th edition (2011) p 47.

[21] *In casu* the agreement was also challenged on the basis of contravening section 16 (3) of the Deeds Registry Act in that 2nd Appellant never consented to the sale of the subdivision. The Court *a quo* rejected the challenge holding that the subsection did not apply because, according to that court's interpretation, the sub-section applied only when the immovable property was "transferred or ceded or registered". According to that court: "None of these is taking place at this point". In other words the court *a quo* did not see the Deed of Sale as in effect an alienation of the property from the Appellants to the Respondents. To that extent, in my new, the court *a quo* erred by failing to see that in a sale there is a transfer of the thing sold as signified in the change of ownership. When a thing is sold it is disposed of, it moves from one ownership to another. The pace of the movement is not material.

[22] In my view, section 16 of the Deeds Registry Act 1968 must bear a similar import as the South African section 15(2). Section 16 (3) reads as follows:

> *"Where immovable property or real right that is not excluded from the community is transferred, ceded to or registered in the name of a spouse married in community of property neither spouse may alone deal with the immovable property or other real right unless that spouse has the written consent of the other spouse or has been authorized by an order of court to so deal with the property or other real right."*

Clearly, from the subsection, the spouse dealing with joint estate property must have at hand the written consent of the other spouse. Otherwise the *dealing with* avails to naught. It was not brought to the attention of the Court how the Deeds Registry Office understands the provision. Nor did the Respondents sufficiently address the point.

[23] The section deals with immovable property or real right that is or meant to be part of the joint estate. In that case the property is coming into the community such as following a purchase. The property at issue is property not excluded from community; the property

is (a) transferred to the name of a spouse . . . , (b) ceded to the name of a spouse . . . , or (c) registered in the name of a spouse . . . The property is in-coming and not out-going as after a sale. This then is the property or real right that neither spouse may alone deal with without the written consent of the other spouse. To be sure, the property or real right is being or sought to be transferred to or ceded to or registered in the name of one of the spouses. In other words, the property is being acquired and not alienated. If the foregoing be the correct understanding of the section, the question arising is why the need for the written consent. The Respondents did not explain their understanding of the section other than that consent is required where the property is "transferred, ceded to or registered." In that case, the purpose of the consent is not clear. The consent would be more purposeful where the property was being alienated as the South African approach shows.

[24 If the above be the correct meaning of the subsection, then with respect I do not understand the necessity for the written consent. In my opinion, the correct meaning and understanding of the provision must be in the opposite direction, that is, property exiting the community. It is in this respect that there is potential prejudice if only one spouse is allowed to deal with community property to the exclusion of the other. The provision seems to require that the written consent precede the dealing with: otherwise the dealing is a nullity. Where the written consent is otherwise unavailable the spouse wanting to deal with joint estate property must first obtain a court order authorizing that spouse to so deal with. In the present case, neither of the two alternatives has occurred. The provision does not seem to allow for retrospective approval. Rightly so in my view to avoid inconvenience and expense to parties going all the way from sale/purchase to signing the transfer documents just to be told that the anticipated consent will not be forthcoming.

[25] The consequences of a spouse entering into a sale agreement of community property but unable to give effect to it by transfer or registration or cession because of absence of the written consent of the other spouse must be dire for the purchaser. We have seen that it is *"essential to the concept in our law that the seller should undertake to deliver the*

subject matter of the sale to the buyer. He does not undertake to make the buyer the owner of the article but undertakes to give him vacant possession". (Gibson, supra, p 119). If the provision in issue refers to incoming property then obviously it does not apply in present case as the sale in question is alienating community property. If acquisition is the correct understanding of the subsection then its usefulness is doubtful. That is why in my opinion the provision is mainly if not exclusively concerned with out-going property not excluded from the community. In such a case, the concern is that a spouse should not unilaterally dispose of joint estate property without the written consent of the other spouse. In that way, serious prejudice to the other spouse is controlled and averted.

[26] It was argued, and indeed held, in the court *a quo* that section 16 (3) does not apply to a deed of sale so that the Deed of Sale *in casu* was valid without necessity for written consent of 2nd Appellant. The Respondents contended that consent is for purposes of effecting registration at the Deeds Office and is accordingly not required for the validity of a sale agreement. The Respondents argued: *"The provisions clearly come into play where the property or real right is 'transferred or ceded or registered'. None of these processes took place or was taking place. It is a requirement to be met at the Deeds Office during registration of the property".* In my view, this approach is not long-sighted. If the property was acquired for registration in the name of a spouse, and as such the property was not excluded from the community, there would be unavoidable dealing with that property by the one spouse which requires consent of the other spouse. Likewise, where the property is sold and the property is not excluded from the community, there is a dealing with the property which implicates consent from the other spouse. In that case the person who requires the consent is the purchaser indirectly from the 'other spouse'. There would be no point buying property that cannot be registered or transferred into the name of the purchaser. The requirement for written consent in my opinion necessarily covers sale of community property. Sale involves a dealing with the property sold. If the argument is that since the property will not be transferred into or ceded to or registered in the name of a spouse then written consent is not necessary for the sale of the community property that

would be most unfortunate. The manifest objective of the statute in maintaining spousal equality for instance in dealing with community property would be defeated. In that regard the *long title* to the Amendment Act of 2012 refers.[5] One notes in passing that the long title and the subsection are by no means an epitome of elegant drafting. The provision must either refer to incoming or outgoing community property: not to both. Whatever the subsection means, it must be redone.

[27] To recap: The provision reads in its essence relevant here: *"Where immovable property or other real right [that is not excluded from the community] is transferred, ceded to or registered in the name of a spouse [married in community of property] neither spouse may alone deal with the immovable property or real right unless that spouse has the written consent of the other spouse or has been authorized ... to so deal with the immovable property or other real right."* Clearly, *in casu,* the property sought to be sold in terms of the Deed of Sale *"is registered in the name of a spouse married in community of property"*. It is property so registered that the one spouse is prohibited from dealing with without the written consent of the other spouse. *In casu* the Appellants argued that section 16(3) *"excludes either spouse from dealing with immovable matrimonial property without the written consent of the other spouse"* and that: *"The purported contract amounted to dealing with immovable matrimonial property....which means that the 1st Appellant required the 2nd Appellant's written consent to conclude the Deed of Sale Agreement"*.

[28] In their heads of argument the Appellants submitted that the Deed of Sale was invalid and the understanding of the section by the Court *a quo* did not give effect to the purpose implicit in the 2012 Amendment. They submitted as follows-

> *"The legislature's intention and purpose of the Amendment can be gleaned from the situation it sought to change. Under the Deeds Registry Act 37 of 1968, the husband*

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[5] **"AN ACT to amend the Deeds Registry Act, 1968 to provide for the equality of natural persons to own property, execute deeds and other instruments and to witness registrable documents in their own right".**

had the sole discretion in dealing with the immovable matrimonial property. The Amendment sought to address the unequal situation by providing that where a spouse deals with immovable matrimonial property, the said spouse would require the other spouse's written consent. *Also, the formality of the other spouse's written consent was no doubt informed by the consideration that sale of land contracts are transactions of considerable value and importance for contracting parties, more so for spouses married in community of property. The court a quo's finding and interpretation contradict the reading and purpose of the Amendment, perpetuate the very harm the Amendment sought to address, undermine progress aimed at ensuring equity amongst spouses and aligning the statute with the prevailing morals of the community".*

[29] The above submission makes eminent sense. Excluding sale from the controlled transactions does not make much sense. The Respondents have only argued that for validity of a sale agreement section 16 (3) does not apply: *"The consent required is for purposes of effecting registration at the Deeds Office. So, no registration would be passed until the consent of the spouse is produced. The provisions clearly come into play where the property or real right is 'transferred or ceded or registered'. None of these processes took place or was taking place."* I partly agree. But the Respondents do not address even one of the alternative situations, namely, *"immovable property or other real right . . . registered in the name of a spouse married in community of property . . ."* The provision says that dealing with such property requires the written consent of the other spouse. And, at any rate, there is no guarantee that the Court would order the consent to be given or that the transfer, etc, proceed without the consent. The South African approach seems to make better sense and I do not understand what might have motivated our purported different response to the similar concern as described by Sharrock *et al* above, that is, if the Respondents are correct. It is in the case of alienation that the joint estate is greatly prejudiced and in need for spousal protection. At registration, or cession or transfer the

need for the written consent may be too late and attended with a great deal of inconvenience in having to reverse the sale.

[30 The catch in the subsection in my opinion is not so much in that the transaction involved a transfer, cession or registration of property not excluded from community but rather in whether the one spouse in dealing with the property had the written consent of the other. *In casu,* 1st Appellant purportedly signed the Deed of Sale without the written consent of 2nd Appellant. This is extant on the face of the Deed. The interpretation given by the court *a quo* to the sub-section is not reasonable, that is, that one spouse can alone sign the deed of sale but later require a written consent of the other spouse as seemingly happened *in casu*. What if this written consent is not given? Surely, the sensible thing is to have the written consent upfront, before the deed of sale is signed. Also the allegation by 3rd Respondent that prior to the sale both Appellants had been involved in discussing the sale of the property at the Malkerns Club does not assist the Respondents in the face of the Deed of Sale that was signed by one spouse without the written consent of the other spouse. The point is not whether the other spouse consented: the point is whether her consent is manifested in writing. Also, it is not a matter of one spouse informing the other spouse regarding the proposed sale or transfer, etc. The law requires not just a consent but a written consent. Accordingly, the court *a quo* erred when it held that the necessity for a written consent was irrelevant or that the consent where needed may be unwritten.

The parties to the contract

[31] The Deed of Sale bears the name of the 2nd Respondent, the infant son of the 1st Respondent. 2nd Respondent is reflected as one of two purchasers, that is 2nd and 3rd Respondents. In short, 2nd Respondent is a co-purchaser. It is said that 2nd and 3rd Respondents were in a partnership. It is to the Deed of Sale we must look to see who were parties to the contract. The parties as shown in the Deed of Sale are 1st Appellant as Seller on the one hand and 2nd and 3rd Respondents as purchasers on the other hand. The 2nd Appellant and 1st Respondent are parties in the proceedings but not to the contract. The

question that arises is the capacity of 2nd Respondent to be party to the contract. 1st and 3rd Respondents contend that 1st Respondent was party to the contract and not 2nd Respondent who was purportedly assisted by 1st Respondent. The argument is not very rational: that is not what the Deed of Sale reveals.

[32] Apparently born in 2009, it is common cause that 2nd Respondent was an *infans* in 2014 when the Deed of Sale was signed, and as such 2nd Respondent personally had no contractual capacity so as to appear (by name) in a contract document, as the Deed of Sale shows. On the face of the Deed, it appears that 2nd Respondent did himself append his signature above his name. It has however been admitted that that signature is of the 1st Respondent who is otherwise a witness to the contract. On the copy of the Deed of Sale in my file, it does not appear in what capacity 1st Respondent signed over the name of 2nd Respondent. But for the admission, it would normally mean that the signature was that of 2nd Respondent. That still does not quite solve the problem of who between the father and son is the 'party'. In this regard Schulze *et al* [6] say, that a distinction must be drawn between 'minors' and 'children':

> *"In terms of our law a minor under the age of seven has an insufficient level of development to enable him or her to form a sound judgment of contractual obligations. Such a minor has no capacity to act and can therefore not conclude any contract whatsoever. The minor under the age of seven years is not even capable of concluding a contract in terms of which he or she acquires rights without incurring any concomitant obligations and may, for example, not even accept an offer of a donation".* [My underlining]

[6] **General Principles of Commercial Law**, 8th edition (2015) p 71

[33] It would follow then that 2nd Respondent cannot be party to the contract by virtue of his age. A contract entered into by a minor under the age of seven years would be void *ab initio*. Sharrock [7] writes:

> *"An* infans *(a child who has not reached the age of seven) has no contractual capacity whatsoever. In the eyes of the law, he has neither understanding* (intellectus) *nor discretion or judgment* (iudicium). *For him to acquire rights and duties under a contract, his guardian must enter into it on his behalf".*

[34] The law is that an *infans* cannot contract or even be assisted to acquire rights. Instead the guardian must enter the contract on behalf of the child. This means that the guardian must appear on the face of the contract as a party. In the case at hand, 1st Respondent signed above the name of 2nd Respondent. This is perfectly ambiguous as to whether 1st Respondent or 2nd Respondent was the party. Now if we accept that 2nd Respondent could not contract, then, maybe, 1st Respondent was the contracting party. But, however, 1st Respondent is not reflected in the first place as the 'purchaser'. Instead it is 2nd Respondent who is so shown. Accordingly, 1st Respondent could not sign as or for the purchaser (2nd Respondent). In the result, the Deed of Sale cannot be salvaged from nullity. Cloete JA in **Brink v Humphries and Jewell (Pty) Ltd**[8] says: *"The three clauses at the end of the first page are preceded by a phrase which would convey to any person who saw it that the signatory was signing in a representative capacity ('I, THE UNDERSIGNED . . . IN MY CAPACITY AS . . . OF THE DEBTOR'); and the place for signature which follows those clauses has the obvious and unmistakable express qualification 'FOR THE "DEBTOR"'. I attach considerable importance to this latter aspect. . . ."* As already intimated, the problem in the present matter is that the signature of the 1st Respondent is silent, it does not speak for itself or for 2nd Respondent. In the result, even if 2nd Respondent could be signed for in the process of being assisted by 1st Respondent that is not shown by

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[7] **Business Transactions Law** 8th edition (2011) p 42.
[8] 2005 (2) SA 419 (SCA) at para [10] (2)

the manner the signature was executed. Any person looking at the Deed of Sale would assume that the signature was that of 2nd Respondent.

[35] Briefly, looking at the Deed of Sale as signed and as such representing the written contract between the parties, we realize the following possible shortcomings –

1. The Seller's name wrongly written and address in clause 9 is not given. There is thus a gap in this regard giving the impression that the contract has not been fully written, that is, that it is partly written and partly oral. The Seller is accordingly not clearly identified beyond his date of birth. Yet clause 10 declares that the Deed of Sale "constitutes the entire contract between the parties".

2. The 2nd Respondent is reflected as the Purchaser, and it is nowhere indicated that he is in any way assisted by the 1st Respondent.

3. 1st Respondent has signed above the name of 2nd Respondent. There is no indication at all that the signature belongs to 1st Respondent in a representative capacity or other capacity in which the signature was effected.

4. The alteration from 17 to 21 in clause 1 was not countersigned by all parties.

[36] Faced with such a predicament, the court *a quo* decided to rewrite the agreement by a process of rectification in terms of which 1st Respondent replaced 2nd Respondent as 'purchaser'. I very much doubt the propriety of the purported rectification, the more-so because the Appellants clearly no longer want to sell the property at all or to the Respondents. If there ever was a contract between the parties then it has been repudiated by the Appellants. I can see no compelling reason for imposing the contract in the manner the court *a quo* sought to do. Counsel for Appellants argued that rectification should not

have been granted without reference to oral evidence. From the attempts undertaken by 2nd Appellant to have the sale rescinded, it is clear how strongly she, at least, felt against the sale, even if she might have been in favour of it at some earlier time.

[37] The Appellants' basis for wanting the Deed of Sale set aside as void or unenforceable were that (a) name of the Seller is not correct, (b) 2nd Respondent was an *infans* incapable of contracting even with assistance; (c) 2nd Appellant had not consented to the sale as required by law and (d) that the Deed of Sale had been signed in clause 1 by only one person (who was only a witness to the contract). The result was that the *merx* was not identifiable. On the point of 2nd Respondent being an infant without legal capacity to contract, the learned Judge *a quo* seems to have accepted that that was the correct legal position. But counsel for 2nd Respondent argued that the 'purchaser' was in reality not 2nd Respondent as appeared on the Deed but 1st Respondent who had allegedly concluded the contract together with 3rd Respondent. That was a misdirection.

[38] Instead of dwelling on the Deed, argument seem to have shifted from the Deed to what preceded the signing of the Deed. The court *a quo* capitalized on what it considered to be *"unquestionable evidence that at all times the 1st Applicant was dealing with the 1st Respondent and he knew very well that the 1st Respondent was acting on behalf of his son, the 2nd respondent"*. That may have been so, but who did the Deed of Sale reflect as seller and purchaser(s)? The learned Judge *a quo* also observed that *the* 2nd Respondent did nothing, did not even sign the Deed of Sale nor insert his name thereon: *"The truth of the matter is that it is the 1st Respondent who contracted with the 1st Applicant and indeed he is the one who signed the contract"*, said the learned Judge. I have already dealt with this line of thinking by the court *a quo* and that it is the Deed alone that tells the true story. Whatever may have gone before or was understood by the parties was of no value unless stated in the Deed. I think the learned Judge *a quo* underestimated the real situation before him: That is, the Deed of Sale as signed and the evidence the Deed presented. The Judge *a quo* even blamed the Deed for the supposed errors it carried: ". . . *this however*

cannot be a ground for rescinding the contract since it is the Deed of Sale that does not properly describe the parties. The Deed of Sale can be rectified to reflect the true intentions of the parties . . . " In the order that the court *a quo* finally made, it does not appear that 1st Respondent was substituted for 2nd Respondent as 'purchaser' on the Deed of Sale.

[39] Counsel for the Appellants reacted to the position taken by the court *a quo* in above regard by pointing out that *"in law the Deed of Sale agreement constitutes the sole testimonial of the transaction, and its contents may not be contradicted or altered by any evidence. The Respondents in this case seek to do [that] by introducing extrinsic evidence. This is contrary to the parol evidence rule"*. This Court stated it as 'trite' that *"when a contract has been reduced to writing, no extrinsic evidence may be given of its terms except the document itself, nor may any contents of such document be contradicted or varied by oral evidence as to what passed between the parties during negotiations leading to the conclusion of the contract; and, the written contract becomes the exclusive memorial of the transaction"*. See **Fathoos Investments** [9]. In paragraph 10, the Deed of Sale itself excluded other evidence.

Conclusion

[40] When the sale has been completed, the deed of sale becomes history, matter for the archive. If the Deed of Sale in this case were to be held valid, a person who will come across the Deed would wonder how a five year old entered into a contract of sale as 'purchaser' of immovable property, and personally signed the Deed of Sale: for that is position the Deed appears in its present form. If the Deed of Sale should pass, it would have to be redone. Even granting that 1st Respondent, as natural guardian, could sign for 2nd Respondent, that would also have to be redone properly to reflect the capacity of the signatory. That would be so because the fact that it was 1st Respondent who signed above the name of 2nd Respondent is a matter falling outside the Deed of Sale as it is nowhere

[9] **Fathoos Investments (Pty) Ltd and Others v Misi Adam Ali**, [2012] SZSC 70 (30 November 2012) para [29]

recorded in the Deed itself. The ambiguity in the identity of the purchaser implicates the *contra proferentem* rule.

[41] As already stated, the Seller has not been set forth sufficiently clearly in the Deed as his address was left out. The name and date of birth may meet the requirement but without the address the identity is not complete. The uncompleted space on the Deed only exacerbates the situation resulting in the Deed not being complete. Add to these short-comings the alteration in clause 1 which was not initialed by the parties. Corbett JA in **Johnson v Leal,** supra, at 936B says: "*. . . Where the printed terms of the contract contain blanks, these have, for the most part, been filled in. In addition there are deletions and amendments of printed provisions . . . All such alterations to the printed form have been initialed, presumably by the parties and the witnesses to their signatures.*" The alteration made on Clause 1 not having been initialed by all the parties is invalid and of no force. The cumulative effect of these defects renders the Deed of Sale ambiguous and unenforceable. Whist the Court may authorize the registration of the property without the written consent of one spouse, I am not convinced that the Court *a quo* could render valid an otherwise invalid deed of sale which amounts to re-writing the sale agreement.

[42] In the result and for the foregoing, it is my considered opinion that the court *a quo* misdirected itself in the conclusion it reached. I make the following order -

1. The appeal is upheld and the judgment of the Court a quo is set aside.
2. The Deed of Sale dated 22 August 2014 is defective, null and void for one or more of the following –
   (a) Being contrary to section 16 (3) of the Deeds Registry Act, 1968;
   (b) 2nd Respondent, being purportedly a party to the Agreement;
   (c) The property sold (merx) not identifiable.
   (d) Seller not identifiable.

3. The tendered purchase price must forthwith be returned by 1st Appellant to 1st Respondent and or to any other person entitled to it in whole or in part.
4. The Title Deed, in this matter, held by 1st Respondent be forthwith returned to 1st Appellant.
5. Costs to follow the result.

MJ Dlamini JA

I Agree

RJ Cloete JA

I Agree

JP Annandale JA

For **Appellants** MM Magagula
For **1st and 2nd Respondents** J. Rodrigues
For **3rd Respondent** S. Dlamini