IN THE HIGH COURT OF SWAZILAND

Gertrude Mavuso

Plaintiff

V

Dora Lichfield

First Defendant

Timothy Guy Bertram N.O.

Second Defendant

Case No 567/87

Coram	S.W. SAPIRE, CJ
For Plaintiff	Mr. Magagula
For Second Defendant	Mr. PR. Dunseith

JUDGMENT

(15/10/98)

This action commenced as a claim for ejectment of the First Defendant from Lot No 183 Msunduza Township Extension No.3. (" the property "). The Plaintiff issued summons claiming this relief in 1981. Since then the First Defendant has long vacated the property.

Second Defendant, the executor dative in the estate of the late Thornton Msindazwe Sukati has joined as a co-defendant and has in turn made a counterclaim. The only question now in issue is whether the Plaintiff, who is the registered owner of the

property as reflected in Crown Grant No 33/67, is under an enforceable obligation to transfer the property to the second defendant. This is the relief claimed by the second Defendant in its counterclaim

The Plaintiff, who I gather from the documents which have been produced in evidence is presently ninety-one years old, was a sister of the deceased, Thornton Sukati. The Plaintiff acquired the property in 1967. The circumstances of such acquisition are a matter of dispute. The case for the Second Defendant is that when stands in the township were originally on sale, the deceased wished to acquire the property for himself The policy of the Mbabane City Council, which controlled the sale of the lots of which the property is one, was that no civil servant would be allowed to purchase more than one property in the township. The deceased, a civil servant, and already the owner of a property in the township was in terms of the policy not eligible to purchase a second property. This policy was probably one adopted to avoid speculation in land and to promote an equitable distribution of the residential plots then made available.

Second Defendant adduced evidence of a former official of the council, who claimed clear recollection of the events of this transaction even after the passage of more than thirty years. He says that the deceased consulted him and explained his problem. He in turn advised the deceased that the policy of the Council

could be circumvented or evaded by the deceased purchasing the property in the name of a nominee and thereafter having the property transferred to himself. This he explained was a stratagem often resorted to with his connivance at that time. Why this particular incident should be so well remembered was not investigated or explained. He maintained that what happened is that the property was purchased in the name of the Plaintiff and that it was to her that transfer was passed in accordance with the advice he gave to the deceased. He unabashedly admitted that the plan was conceived and carried out to deceive his employers. The evidence of such a witness, who has made dishonesty his habit, must be viewed with suspicion

There is no written contract between the Plaintiff and the deceased recording their agreement that the plaintiff would at some stage transfer the property to the deceased.

Plaintiff maintains that she bought the property as principal and only received financial assistance from her brother, the deceased, so to do. She claims that there was never any intention or agreement that she should retransfer the property.

Section 29 of the Transfer Duty Act reads

"Private sales and leases to undisclosed Principals declared null and void.

29. Every sale of fixed property made otherwise than by auction,.....in regard to which the purchaser.....does not profess to purchase.... for himself in his individual capacity, shall be wholly null and void unless at the time of making and completion thereof the name of the principal for whom the purchase .... is made is disclosed and inserted in the contract which may be made in regard to such sale....."

(I have excised the words, which refer to leases)

In the absence of any evidence that the name of the deceased was mentioned in the deed of sale it must be inferred that the Plaintiff purchased the property as principal in her individual capacity. This excludes her being a nominee. This being so the Second Defendant has to rely on some collateral contract between the Plaintiff and the Deceased as the basis for the claim for transfer. Any other interpretation, more particularly that for which the Second Defendant contends in the counterclaim would, mean that the original purchase by the Plaintiff was, in terms of the section quoted, null and void.

There are other circumstances, which support the Plaintiff's contentions, namely

1. The length of time that elapsed from the original transaction to the making of the present claim.

2. The Deed of Crown Grant No 33 of 1967, a copy of which is an exhibit, recites that the plaintiff, then a widow and born in 1907 had purchased the property and records the transfer of ownership therein to her.

3. The fact that when money was borrowed on security of a mortgage hypothecating the property in order to finance improvements thereon, it was the plaintiff who personally incurred liability to the lender. In fact two such bonds were registered at differing times. In both cases it was the Plaintiff who was the mortgagor. Of course this is only to be expected if she was a registered owner of the property but there is no explanation as to why at the time that the bond was registered the deceased did not then claim transfer of the property to himself.

4. The claim for transfer is not mentioned in the first and final liquidation and distribution account framed by the Second Defendant. Although he testified that it was not his intention by omitting the claim

from the account to indicate abandonment thereof. He said that the parties interested in the estate were reluctant to involve themselves in the expence in claiming transfer from the plaintiff. One can understand that during the lifetime of the deceased, a more relaxed attitude prevailed in which the necessity to enforce any rights the deceased may have had to claim transfer of the property may have been overlooked. There is evidence that the sharply differing contentions emerged at the time of the deceased's funeral. The property was mentioned in the inventory made by the deceased's surviving spouse, yet despite knowing the Plaintiffs attitude it is strange that action was not taken on behalf of the estate before the liquidation account was prepared to recover the property. It is even more strange in the circumstances that the property is not mentioned in the account.

There are on the other hand factors, which may render the second Defendant's version more probable. The Second Defendant claims to have been in continuous possession of the property over much of the time since it was transferred to the Plaintiff. This evidence is challenged by the plaintiff and it is difficult to put an interpretation on the facts which conclusively were in the second defendant's favour. On balance however I must come to the conclusion that the second defendant has not proved the

5

existence of an agreement in the terms for which it contends. That is not the only reason why Second Defendant must fail in its claim

I also questioned whether the agreement for which the Second Defendant contends is one, which the court would enforce. The dictates of public policy seem to weigh heavily against recognising and giving effect to such an agreement. There is a parallel between the facts in this case and those in COUZYN v LAFORCE 1955 (2) SA 289 (T) which strongly suggests that, as in that case, the court should refuse to enforce and give effect to an agreement concluded to deceive a third party.

The head note reads

"Contract - Legality -Agreement contrary to good morals and to public policy - What amounts to - Agreement for reward falsely to pretend to be interested in the purchase of certain property - Object to deceive lessee into buying -Action against seller for the agreed reward -Agreement unenforceable.

To a declaration claiming the sum of oe5,000 defendant pleaded that a company was the lessee of certain premises belonging to defendant which he was desirous of selling to the company for oe90.000; that the lessee would probably not want the premises sold to a third party and that, if the lessee got the idea that a third party was considering the purchase of the property, the lessee would probably itself negotiate for its purchase; that the parties had therefore agreed that the plaintiff should give the lessee the impression that another firm was considering the purchase of the property; that in order to do so plaintiff would give out that he had been instructed by a firm which was interested in purchasing the property to ask for permission to inspect the property and that he would forthwith carry out such an inspection. For this service he was to receive ce25 and, if the lessee as a result of the performance of such service bought the property for not less than oe95,000, then plaintiff was to receive the sum of oe5,000, inclusive of the oe25. Defendant accordingly pleaded that the agreement was contrary to public policy and unenforceable. In an exception to the plea as disclosing no defense.

Held, that the representation which constituted a complete falsehood made with the object of spurring a buyer on to buy a valuable property was contrary to good morals and accordingly contrary to public policy and unenforceable."

In the instant case the object of the agreement between the plaintiff and the deceased on which the Second Defendant relies, would have been to deceive the

6

original seller into selling the property to the Plaintiff not knowing that in reality it was the deceased who

did not qualify as a purchaser, who bought the property.

It is not in the interests of public policy that such agreements should be enforced. Furthermore this is a point which the court will raise even if the parties do not. There is a long line of cases starting with Cape Dairy and General Livestock Auctioneers v Sim 1924 AD 167; Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture' 1990 (2) SA 548 (A) at 556 A - E and Courtney-Clarke v Bassingthwaighte 1991 (1) SA 684 (Nm) at 690 D all hold that a Court should refuse to enforce or uphold an illegal contract and that it will mero motu refuse relief, even if the illegality is not pleaded.

Of course this is not a case of illegality, it is merely a case of deception in order to avoid the policy which had been adopted by the seller for reasons of public policy. This also is not a case where the par delictum rule should be applied. The deceased, if the version contended for by the Second Defendant is to be accepted, was at fault to a far greater extent than the plaintiff was. To relax the rule would be to allow the very mischief, which the policy applied in allocating stands in the township, sought to avoid.

See JAJBHAY V CASSIM 1939 AD 537as applied most recently in HENRY v BRANFIELD 1996 (1) SA 244 (D)

The Second Defendant cannot succeed on the basis of a collateral agreement to transfer the property as such an agreement to be valid would have to be in writing in terms of Section 31 of The Transfer Duty Act 8/1902 read with the definition of Sale in Section 2.

It was argued that the transaction is not one which falls within the ambit of the provisions of the Act. It is said that the transaction was not one of sale and that the word "sale" which is defined to include a session is not applicable in the present instance. The word "session" has a wide meaning and broadly speaking it means the transference of any rights of property however such transference takes place. In the

present instance we have seen that because of Section 29 the plaintiff was not a nominee holder and the second defendant has to rely on a collateral agreement to transfer the property for no consideration of course on demand. I cannot see why such an obligation

is not a session as referred to in the Act.

I would refer to the case of DADABHAY VS DADABHAY AND ANOTHER 1981 (3) SA 1039. Superficially this case has similarities and parallels with the case which we are now concerned but there are distinguishing differences which make it inapplicable. In the first place the legislation dealt with in the South African case is not in the same terms as that applicable in Swaziland. Secondly, the word "Nominee" it was held could in some circumstances include a trustee. But the legislation in Swaziland

as I have demonstrated makes it clear that one cannot be a nominee unless such relationship is revealed in the deed of sale and in the deed of transfer. This is in accordance with Section 29 The decision in DADABHAY VS DADABHAY was not a decision on the merits. It was a decision on an objection to a proposed amendment to a

plea and the Court did not decide whether in fact the one party was a nominee in terms

of evidence before it. The decision is authority for no more than that in relation to the relevant legislation applicable in that jurisdiction there was a possibility that the word "nominee" may include "trustee". Different considerations apply in construing the Swaziland Legislation.
For these reasons the second defendant's claim for transfer of the property will fail and there will be judgment for the plaintiff with costs.

S.W. SAPIRE

CHIEF JUSTICE