



IN THE

HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.376/2012

In the matter between:

PATRICIA NOMPUMELELO DLAMINI

Applicant

and

MUSA GOODMAN DLAMINI

1st Respondent

REGISTRAR OF DEEDS

2nd Respondent

MINISTRY OF AGRICULTURE AND CO-OPERATIVES

3rd Respondent

ATTORNEY GENERAL FOR THE KINGDOM OF SWAZILAND

4th Respondent

SWAZILAND DEVELOPMENT AND SAVINGS BANK (SWAZIBANK)

5th Respondent

MANGUE INVESTMENTS (PTY) LTD

6th Respondent

FIRST NATIONAL BANK SWAZILAND

7th Respondent

Neutral citation: *Patricia Nompumelelo Dlamini vs Musa Goodman Dlamini & 5 Others (376/2012) [2014] SZHC 342(01st October 2014)*

Coram:

Hlophe J

For Applicant:

Mr. S. Simelane

For the 1st Respondent:

Mr. S. Gumedze

For the 2nd – 5th Respondents:

No Appearance

For the 6th Respondent: M. L. Mzizi
For the 7th Respondent: No Appearance
Dates Heard: 16/03/12, 08/06/12, 07/12/12, 12/12/12, 14/12/12, 14/02/13,
11/04/13, 24/05/13, 11/07/13, 11/02/14, 15/04/14, 16/04/14
Dates Judgment Handed Down: 01st October 2014

Summary

Application – Mandatory and Prohibitory interdicts sought against Respondents – Applicant and first Respondent married to each other by civil rites and in community of property – These parties currently undergoing divorce proceedings – During subsistence of the marriage, first Respondent secretly selling and transferring matrimonial property (immovable) to 6th Respondent – Order sought reversing the sale and transfer of the property concerned as well as interdicting First respondent from alienating and or transferring any further matrimonial property – Whether Applicant entitled to orders prayed for particularly reversal of sale of the joint estate’s immovable property to the 6th Respondent – Legal position applicable in such situations.

JUDGMENT

[1] It is not in dispute that Applicant and first Respondent herein are husband and wife, married to each other in terms of Civil Rites and in Community of property. There is further no dispute that the marriage between the two is still subsisting,

even though they are currently undergoing a divorce, in which proceedings are currently pending before the Manzini Magistrate's Court.

- [2] It suffices to mention that the cause of the divorce is a subject of a heated dispute between the two with Applicant accusing the first Respondent of adultery while the latter levels the same accusations against the Applicant.
- [3] It appears from the papers filed of record, particularly those by Applicant, that with the divorce proceedings so pending, it finally dawned to the parties that they had to agree on the divorce with the assets of the joint estate being shared equitably between them. The Applicant avers that she drew a list of all the matrimonial assets and sent same to the first Respondent asking him to suggest a way forward on how best the said assets could be equitably divided or shared between them.
- [4] It would appear that the concerned list contained several motor vehicles, cattle, furniture, a home situate at Malindza area on Swazi National Land and most significantly, the developed Plot No. 397, Ngwane Park Township, Manzini. Although there is a dispute as regards the number and nature of the vehicles forming part of the matrimonial assets as well as the cattle in that regard, there is no dispute that Plot 397, Ngwane Park Manzini, did form part of the joint estate.

[5] I say “did form part of the joint estate” because according to the Applicant, she was to learn after having reached an agreement in principle that the divorce sought be granted on the terms to be contained in a Deed of Settlement which would have included a division of all the assets of the joint estate, that the said property Plot 397, Ngwane Park, Manzini, had already been secretly sold to the 6th Respondent herein without her knowledge.

[6] She further claims to have discovered at about the same time that the cattle allegedly forming part of the joint estate and registered at the Dip Tank in First Respondent’s name had some of them transferred into the name of the Applicant’s mother, with only about 15 such herd remaining in the latter’s name. She said she further discovered that a certain motor vehicle had allegedly been purchased for the benefit of first Respondent’s girlfriend’s mother. Obviously these alleged discoveries prompted her to conclude that the said Respondent, her husband, was engaged in a long intricate and secret scheme to alienate assets of the joint estate.

[7] As a result the Applicant claims to have been compelled to institute the current proceedings in terms of which she sought an order of this court inter alia directing the second Respondent to reverse the sale and transfer of the Ngwane Park Plot or property described herein above which is now registered in the name of the 6th Respondent; restraining and interdicting the Respondents concerned

from transferring properties registered in first Respondent's name pending finalization of the divorce proceedings; restraining the first respondent from disposing off or alienating assets of the joint estate pending finalization of the application; staying the divorce proceedings between the two of them pending the finalization of these proceedings and an order for costs.

[8] As regards the prayer for the reversal of the sale and transfer of Plot 397 Ngwane Park, Manzini as the matrimonial property, it was contended that the first respondent, with the fixed or settled intention of alienating the property concerned had secretly sold and transferred the said property to the sixth Respondent.

[9] The Applicant contends that she was not informed that the property concerned was being sold just as she further contends that there was no reason to sell the property concerned when taking into account the fact that the said property was occupied by a tenant who was paying rentals for the property at an amount more than the bond's monthly instalment. To this extent it was contended that the property was, as had always been the case, and through the rentals, taking care of itself and the bond and therefore there was no need to sell it, for the alleged reason namely a failure to pay the bond with the bank thus allegedly threatening to foreclose.

[10] The Applicant alleges that she first got to know about the sale of the said property from a family friend who however could not give details of the sale including who the purchaser was and the amount it allegedly sold for. She alleged that she proceeded to the bank concerned, Swazi Bank, and enquired from an officer she was directed to, who only confirmed that the property was sold and a transfer was underway but refused to reveal details of the sale, contending that the transaction was a confidential matter. This was allegedly despite her pleas that she had an interest in the matter as the property concerned was matrimonial property. She had however been advised to engage the services of an attorney.

[11] The attorneys she engaged allegedly wrote a letter to the first Respondent's attorneys seeking confirmation or otherwise of the sale of the property as well as placing on record its illegality. The attorneys in question allegedly responded by saying that they would consult their client and come back with a response. It was not very long thereafter that the Applicant was allegedly called by the bank official she had recently talked to who now confirmed to her that indeed the property was being sold including advice that she informs her attorney to obtain an interdict in her favour so as to protect her interests in the property.

[12] She says that an application was eventually instituted before the Manzini Magistrates Court; being the court where the divorce proceedings were pending,

seeking an order interdicting the Respondent from alienating the said property. Although admitting by means of an answering affidavit to the said matter that the property had been sold, no clarity was made on whether same had been transferred or not, even though all indicators are that it had not yet been transferred. The matter was allegedly not heard and finalized because the file allegedly disappeared from court on the day on which it was to be heard, which coincided with the first Respondent's attorney's failure to attend court as well. The said file disappeared without a trace thereafter. This led to Applicant failing to obtain the order sought. The result of this was allegedly the first Respondent going ahead with the sale and transfer of the property into the name of the sixth Respondent. The Applicant's contention in this regard is that the first Respondent consummated the sale and/or transfer of the property well knowing that it was being contested as being fraudulent, by the Applicant who was a co-owner of same.

[13] Applicant contends that she discovered that the property was sold for E200, 000.00. This amount she contends was far less than its true value which had been determined much earlier in 2009 and fixed at E790, 000.00 as can be seen from a valuation report annexed to the papers. This she said bolstered her belief that the sale was not a genuine one. She was further bolstered in this conclusion by the fact that the person shown as having purchased the said property for such a low sum, was a former tenant of theirs who had occupied it as a lessee or a tenant.

This tenant had himself allegedly been warned about the fraudulent nature of the sale. The details on this aspect are set out herein below.

[14] On the basis of the foregoing, the Applicant asked that the reliefs sought by her be granted particularly that the sale and transfer of Plot 397 Ngwane Park, Manzini be reversed.

[15] Responding to these allegations the first Respondent in a nutshell, denied having embarked on a scheme to alienate the assets of the joint estate. On the alleged alienation of a number of cattle belonging to the joint estate, he contended that not all the cattle in his name were all belonging to the joint estate as there were those belonging to his mother as they had been paid as lobola beasts for his two sisters, Sizakele and Linda. These he said were respectively herds of twenty five and eighteen. Without explaining why it had become necessary to change these cattle from being registered in his name into that of his mother at this time, he maintained they were not his nor did they form part of matrimonial property. He also did not explain why this change was effected behind the Applicant's back, in other words, why such were transferred secretly.

[16] On the motor vehicle, he tried to explain which cars were owned by the joint estate from the list and which ones were not. One of them was allegedly leased to the company owned by the parties whilst another one was allegedly owned by

the mother to the first respondent which was however denied by the Applicant. Whilst a Toyota Avensis was admitted as an asset of the joint estate, a certain Toyota Vitz existence was denied by first Respondent despite an insistence by Applicant it was there.

[17] While not disputing the existence of a property called Plot 397, Ngwane Park, the first respondent confirmed that he had sold same for a sum of E200, 000.00 to the sixth Respondent. He explained that the sale in question was necessitated by the fact that their business, under the style M&N Sure Foundation (PTY) LTD, a stationery business which used to supply schools with stationery and books, was struggling those days as a result of government's having introduced Free Education but failing to pay timeously for services rendered by their company or business. He says this led to the supplier of the books to their company or business – MacMillan - threatening to take legal action for an outstanding amount, which he says was beyond a Million Emalangi. This financial strain he alleges extended as well to his ability in servicing the bond held by Swazi Bank over the said property.

[18] Whereas he claims to have asked Applicant to take over that particular debt and service it from the proceeds of Kusekhaya Restaurant which was their other business allegedly run by the Applicant, the latter allegedly refused to take over the debt and was allegedly not cooperative. He says the bank was about to

foreclose on the bond for non payment when he decided to sell the property for the sum of E200, 000.00. It otherwise was allegedly owing about E112, 864.91 at the time on the bond. He alleges he was more concerned with saving the property.

[19] These were in a nutshell the facts as pleaded in the papers before court when the matter was allocated to me for hearing. A perusal of the papers confirmed to me that the major relief sought in the matter, was a reversal of the sale and transfer of Plot 397, Ngwane Park, Manzini, to the 6th Respondent. This is because as opposed to all the other reliefs sought which were in the form of prohibitory interdicts, it was the only mandatory interdict sought. I noted from the file that despite having apparently been served with a copy of the application, the Registrar of Deeds, the Ministry of Agriculture and Cooperatives, (in connection with the registration of cattle at a Dip Tank) the Attorney General and the Swaziland Development and Savings Bank, had not filed opposing papers, which can only mean they were signaling that they were going to abide the order of court. Having considered closely the reliefs sought, they did not appear to have any peculiar interest on the reliefs, something that cannot be said of the 6th Respondent, Mangu Investments (PTY) LTD, the purchaser of the property whose sale was sought to be reversed. A closer look at the service address section provided for on the Notice of Motion the applicant was allegedly served on an unidentified person on a certain unclear date of February 2012. When I

enquired if there was proper service upon this particular Respondent, I was shown a Return of Service which now indicated that the application had been served on Siphon Gumedze, the first Respondent's Attorney. I found it strange and puzzling that papers meant for the sixth Respondent which had the potential of drastic consequences for the said Respondent were served on the attorney of another Litigant, who because of the inherent conflict in their cases could not even represent him because his client had sold the 6th Respondent the disputed property.

[20] Having observed this controversy to which there has remained no answer to this day, I ordered that the sixth respondent be served with a full set of the papers serving before court, to enable it file an answering affidavit if so advised as none had been filed amidst the controversial service. I postponed the matter for over a week to enable an exchange of the papers should that become necessary. As I did so I gave specific time limits.

[21] Surprisingly this time around the service of these papers elicited a specific response from the sixth Respondent vi-a-viz the sale of the property in question to him. He in a nutshell, through the 6th Respondent's Director, dissociated himself or his company from any collusion with the first respondent in the sale and subsequent transfer of Plot 397, Ngwane Park. He further denied being party to any fraudulent activity in that regard to prejudice the Applicant. He in fact

claimed not to know the Applicant nor anything about her relationship with the first Respondent. This is despite his having rented their property for sometime before he was sold same by first Respondent. He painted a picture of one having genuinely purchased the property for E200, 000.00 from the first Respondent. He did not deny having been a lessee or tenant of or in the same property at the time of the sale. He went on to reveal that after purchasing the property he obtained a loan from the First National Bank (FNB), for renovating or improving it. The loan in question was however referred to as a Home Loan in the bank documents annexed to the papers and was for a sum of E612, 000.00. It was covered by a First Surety Bond over the property concerned.

[22] The other parties, namely the Applicant and first Respondent filed their subsequent papers as well, stating their individual cases on the aspect raised by the sixth Respondent. Of particular note were the assertions by the Applicant who stated that it was not true that the sixth Respondent's Director, Victor Mingana, did not know her or that he had no discussions with her at any point. She disclosed that upon learning from a friend of hers that the property in question was being secretly sold, her personal investigations from Swazi Bank revealed that the alleged purchaser was the Director of the 6th Respondent Mr. Mingana. She says she went to him at his place of residence and advised him not to purchase the property as it was being secretly sold to prejudice her by the first Respondent with whom they were married according to Civil Rites and they were

then involved in divorce. She said she went on to enquire from him what the purchase price had been fixed at and that the sixth Respondent had refused to divulge same telling her to enquire about that from the first Respondent. When she insisted he told her he was going to answer that question when he came back from Johannesburg as he also asked her what the first Respondent had said to her.

[23] Even before this encounter, sometime around April 2011, she said she was driving around Ngwane Park area when she saw Mr. Mingana, their tenant at the house concerned. During her discussion with him, he had asked her the whereabouts of her husband the first Respondent, prompting her to disclose to him that they were no longer staying together as they were having marital problems. This was revealed to indicate that the said Victor Mingana did not only know her, but also knew she was married to the first Respondent.

[24] Further to their discussion, when she advised him not to purchase the property and when he had refused to disclose how much he was buying it for, the said Victor Mingana, had stated that she herself knew that he wanted the property for himself or for his company. This he said as she told him in front of her family members and one Gugu Zulu not to buy the property. In fact she contended that at the time they leased him the property, before they left for Malindza, the sixth Respondent, through Mr. Mingana had expressed a desire to buy the said property, only to find that they were not selling.

[25] The first Respondent had presented a story which in a nutshell sought to suggest that the property in question was sold to the Respondent on a willing buyer and willing seller basis and that there was no collusion between them to prejudice Applicant.

[26] When the date for hearing the matter as fixed by this court arrived, that is after I had issued the order that the sixth Respondent be properly served with the papers, a further interested party, the First National Bank (FNB), was revealed by the recent papers exchanged between the parties. There was therefore a need for this party to be served as well. This became necessary when considering the ramifications of the order sought. First National Bank (FNB) had a bond over the property whose sale and transfer to the sixth Respondent was sought to be reversed. I was of the view a reversal of the sale and transfer of the property could be prejudicial to the said Respondent, hence the need to hear it.

[27] In view of this observation, I ordered that the matter be postponed to a fixed date, meanwhile FNB, was to be served with papers in the interim to enable her file hers in response to the reliefs sought if she had any or was so advised. I also directed that pending finalization of the matter, the parties were interdicted from alienating matrimonial property in their possession. The 6th Respondent was also

given leave to deal specifically with any new issues that could arise from FNB's papers or from the Applicant's reaction to FNB's papers.

[28] The service entry on the Filing Notice covering the order of court indicated that same was served on FNB's internal Legal Advisor, one Lomantjolo Mnisi, on the 31st January 2013. There was also filed an affidavit of service by the messenger of Applicant's Attorneys' Firm confirming service of the Court Order on FNB on the same date as that reflected on the Filing Notice. Of significance is that FNB did not file any papers nor did it make any representations in court despite its having received an unequivocal order on what was to happen and what was required of it if it had any interest in any of the reliefs sought. The clear inference in this regard was that FNB was going to abide the order of court like the other Respondents who did not oppose or file opposing papers to the application.

[29] When the matter was mentioned for hearing on the date fixed for that purpose it became clear that there were certain disputes of fact on the basis of which the matter could not be decided on the papers. In a nutshell these were on what comprised matrimonial property between Applicant and first respondent; whether Applicant was aware of the sale of Plot No. 397 Ngwane Park, as well as whether the purchaser of the said property, Mr. Mingana on behalf of the sixth Respondent, was aware at the time of the sale of the property or even prior to its

transfer to his company, that it was property belonging to a married couple who were having matrimonial problems including whether he was aware that the Applicant had not consented to the sale of the property; as well as whether he had any reason to doubt the authenticity of the sale including whether not the price was normal and lastly whether anything to put him on notice at the time he purchased same, was there.

[30] Bearing these in mind, it was agreed that the matter be referred to oral evidence for purposes of clarifying these issues. It was clear that whereas the Applicant claimed that the first respondent was alienating matrimonial property to prejudice her including his having sold the Ngwane Park plot secretly for far below its value, the first Respondent disputed these assertions and claimed that no property had been alienated or disposed off to prejudice Applicant and further that the sale of the plot was in the interests of the joint estate. While the Applicant was of the view that the 6th respondent was involved in a collusion with the first Respondent when he purported to purchase the property in question, the 6th Respondent contended otherwise claiming not to have known about the marital relationship between the first Respondent and Applicant and that he never had any notice that the sale of the property to his company was irregular.

[31] During the oral evidence led the Applicant's case had two witnesses namely the Applicant herself and one Gugu Zulu while the first Respondent gave evidence on behalf of his case. The sixth Respondent did the same on his and his company's behalf.

[32] The Applicant maintained that the first Respondent, her husband, was involved in a nefarious scheme to deliberately and secretly alienate or dispose off matrimonial property to her prejudice. She referred to the herd of cattle which were now said to be 15 when the joint estate should be having over 60 such. The first Respondent had allegedly transferred the said cattle from their estate to the name of his biological mother supposedly in an attempt to defraud her. The same thing applied to the other matrimonial properties such as the motor vehicles. For these items she emphasized she was praying for an order asking that the Respondents be interdicted from alienating such properties.

[33] Concerning Plot 397, Ngwane Park, Manzini she contended that completely behind her back, her husband had disposed off the said property by selling it to the 6th Respondent. The property was deliberately sold to the 6th Respondent for far less than its value. While it had a value of E790, 000.00 in terms of a valuation report conducted in November 2009, it was sold for E200, 000.00 in July 2011. This she said was indicative of a fraudulent act or transaction particularly when considering that fixed property is expected to escalate or

appreciate every year in value rather than depreciate, particularly at so high a rate as to plunge from E790, 000.00 to E200, 000.00 in three years. Furthermore, there was no reason why the property could have been sold in the first place when considering that it was capable of paying off its bond through its monthly rentals paid by the tenant in occupation of same. The first Respondent allegedly continued with the sale and transfer of the property despite her having filed an application in court challenging his transfer of the property which was indicative of malice and fraud in the entire sale and transfer of the property to the 6th Respondent.

[34] As concerns the 6th Respondent's Director, Mr., Mingana, she testified that they knew each other very well with him as she had met him on several occasions prior to the sale and transfer of the property to him as well as meeting him in court. In fact when she met him after the news of the sale of the joint estate property were broken to her, it was for the fifth or so time when considering the instances she enumerated. She otherwise claimed to have first met him at their Ngwane Park Plot in question when he came there in the company of his wife. The two of them had gone there to inspect the house in question as it had been advertised in the Newspapers, as available for letting. She herself claimed to have been in the company of her husband the first Respondent at the time.

- [35] After conclusion of the lease agreement allowing her tenancy to the property, she was asked by her husband, to collect a cheque comprising the first rental instalment and deposit from Mr. Mingana. The said cheque was for a sum of E7600.00 which meant that the monthly rental and deposit was a sum of E3800.00 each. This cheque she testified to have had personally collected from Mr. Mingana, thereby meeting him for the second or so time.
- [36] A few days later from her having allegedly collected the cheque and having given it to her husband, she was informed by the latter to take it back to Mr. Mingana because there were certain missing or erroneous endorsements he needed to attend to. This she did and once again met Mr. Mingana.
- [37] The fourth time she allegedly met him was when, whilst driving around Ngwane Park area, she had decided to go by the house in question to ascertain the cause of complaint or issue about a gate to the property. Even on this occasion she met Mr. Mingana who went on to ask her about the first Respondent's whereabouts, as he was aware they were husband and wife. She had informed him in response that they were no longer staying together as husband and wife following marital problems that had cropped up between them. To this the said Mr. Mingana had allegedly expressed surprise.

[38] It was therefore the fifth time she saw him when she confronted him after having learnt from the bank that the property belonging to the joint estate had been sold to the 6th Respondent, a tenant to their house, which she knew to be owned or directed by Mr. Mingana. When she confronted him at this point, she notified him not to purchase the property concerned because it was part of their joint estate and she had not consented to, its alienation or sale and that it was in fact sold behind her back. She had also asked him how much he was buying the property for. Instead of responding to him and telling him the answer Mr. Mingana asked her what the first Respondent had told her and had referred her to the first Respondent. He also undertook to answer her questions on his return from Johannesburg or the Republic of South Africa, which on the overall was a refusal to cooperate with her on this aspect of the matter. She thereby created a strong suspicion that she had something to hide in that regard.

[39] Even after she had learnt of the sale of her property to Mr. Mingana, and as there was a challenge of same before the Manzini Magistrates Court, she testified having on a certain date, seen Mr. Mingana as he drove past her parked car where she was seated with her sister. He was in his Nissan Navara car. As she had, whilst discussing some matter with her sister in her parked car pointed at Mr. Mingana, as he drove past them, he had sent her a Short Message Service (SMS) on her cellphone, expressing his disgust at being pointed out to strangers. The point in this piece of evidence is the emphasis that Mr. Mingana knew her very

well to the extent he had her cellphone number which had been given to him at the time the lease was still being negotiated particularly when a cheque had to be collected from him by her as stated above.

[40] It is imperative to note that although there were these specific encounters, indicating firstly that the Applicant and Mr. Mingana knew each other and that the latter also knew that the Applicant and first Respondent were married to each other no serious challenge to these incidents was mounted during her cross examination to dispel the case made against him and by extension the 6th Respondent. A general position to the effect that he had never seen her was put to her. The other encounter specifically denied beyond the other general contention that Mr. Mingana was meeting her for the first time in court, was that she had approached him and warned him not to purchase the property in question given that its sale was fraudulently engineered to prejudice her as well as well as when she enquired from him what the purchase price of the property was.

[41] It seems to me that of the two versions that is that of the Applicant and that of Mr. Mingana, the most probable one is that of the Applicant. It is improbable that the Applicant, a co-owner of the disputed house in at Ngwane Park with her husband the first Respondent would not know the occupant and tenant to her house. It shall be recalled that same had been occupied by her for a considerable time as at the time she had heard for the first time that same was being sold.

Secondly, it is a fact that having learnt that the house was being secretly sold and transferred to the 6th Respondent, she instituted urgent proceedings at the Manzini Magistrate's Court to interdict both the sale (whose details she did not have) and the then intended transfer, which proceedings were mysteriously stifled through the alleged unexplained disappearance of the court file. Even then it is a fact that the first Respondent and possibly the 6th Respondent, still went on to consummate the transfer concerned. There is no way in my view the Applicant would have failed to confront the occupant of her house who she knew was now secretly buying same. Furthermore the incidents enumerated by the Applicant on their dealings with Mr. Mingana for 6th Respondent are informed by clarity and detail of how they came about and why they were necessary as opposed to Mr. Mingana's somewhat bare denials of them.

[42] Some of these encounters are supported by the evidence of independent witnesses for example, the incident of where and when Mr. Mingana was warned not to buy the property including a disclosure that same was being done to prejudice her. This is supported by the evidence of Gugu Zulu, who I found to be a credible witness, as she explained how she accompanied the Applicant to Ngwane Park when she had gone there to inter alia warn him and enquire about the amount of the purchase price.

[43] I must say that even during her cross examination the Applicant was more composed, answered questions with clarity and with ease, which same thing cannot be said of Mr. Mingana who was content with giving bare denials and avoided going into the detail of matters placed in issue. In short when comparing the two I found Mr. Mingana to be a poor witness. In fact his case did not flow. For instance it is unclear when the sale between him and the first Respondent was concluded. Whilst the two wanted to suggest the 18th May 2011 in Mbabane, the Title Deed, which I directed both parties be produced before me, says something else as it says same was concluded on the 11th day of July 2011. It is not difficult to figure out why there is this disparity. It is aimed at portraying a picture that when the property was sold the 6th Respondent was unaware of any fraudulent activities by the first Respondent and that when she eventually jumped up the property had already long been sold to his company.

[44] Although I refused to accept the Deed of Sale during the oral evidence, it is important I say something about it. The Deed of Sale was never referred to in the application and was therefore not annexed thereto. Clearly its subsequent production was more an afterthought. It only magnified the problem that the date it alleged as the one for concluding the sale conflicted with the one reflected on the Title Deed of the property. I cannot help but conclude that the obvious reasonable inference is that the one belatedly produced in court was “created” after the transfer of the property to make it look like it had long been concluded

as at the time Applicant confronted 6th Respondent and eventually instituted proceedings before the Magistrate's Court. I am supported in this view I take of the matter by a hand written inscription, written on the back of the copy that was handed into court which reads as follows:-

“You should specifically deny the collusion friend”

[45] The meaning of this except is very clear. Mr. Mingana was apparently being instructed to specifically deny the collusion. I do not think that if he was correct in what he was testifying to in court he needed an instruction to deny collusion. This inscription can only prove the opposite of what it said. That is to say, that there was a collusion between the two friends.

[46] There is still a more fundamental problem herein. The 6th Respondent allegedly bought property evaluated three years earlier at E790, 000.00 as amount value and at E850, 000.00 as insurance value for a meagre E200, 000.00. This does not make sense and is unreasonable when viewed against the totality of the circumstances. This is because despite the property having allegedly been sold to 6th Respondent and allegedly duly paid for in July 2011, there was obtained a home loan of E612, 000.00 for its apparent purchase, which was secured by a mortgage bond against it in the sum of E950, 000.00. Whilst Mr. Mingana wants to suggest that this was a mere loan for repairs and improvements of the property, the falsity of this is easily exposed when one considers the terms of the letter of

the loan offer which refers to a “transfer and bond registration costs,” which is expressed as follows in its entirety:-

“Special Conditions

- (i) *Transfer and Bond registration costs to be paid from proceeds of this advance and any excess to be borne directly by Applicant”*

At paragraph three of the same letter the following is captioned:-

“...the loan will be subject to the terms of the banks’ standard house loan mortgage bond, which will provide, amongst other things, that...”

[47] I believe I am correct in saying that if it was a loan for repairs, it would not have been defined or described as a house or home loan by the bank, and there would not have been a referral to a transfer and bond costs.

[48] The question obviously is, why would there be transfer costs if the house loan concerned was not for the purchase of a house or immovable property which in law required to be transferred. For the foregoing reasons I have to reject the version of the 6th Respondent expressed through Mr. Mingana.

[49] Having rejected the 6th Respondent's version does it mean that I must conclude that it colluded with the first respondent in fraudulently transferring the property situate at Ngwane park to the 6th Respondent. The answer to this question lies in determining from the facts what the purpose of the sale and transfer of the property in the manner it was done was aimed at.

[50] According to the first Respondent the property in question was sold in the manner it was because he was overburdened with debt without receiving cooperation from the Applicant whom he had informed time and again to take over the said property and pay for it utilizing the proceeds from the Restaurant business he purchased for her. Because of the Applicants alleged failure to cooperate with him, in this regard, he says he was forced to sell the property to the 6th Respondent at a very cheap price; most likely a price even lower than that of building or improving it. This contention, does not make sense with respect. If the property was sold because of failure by Applicant to cooperate and relieve him of some of the debts in particular that of the property in issue, why did it have to be sold secretly? Furtherstill, in view of his admission that the property in question was being leased out to the 6th Respondent and that its monthly rental was obviously more than the bond instalment why did he have to be relieved of a debt relating to the house given, that it was obviously taking good care of itself? Furthermore on the debt supposedly owed by M& N Sure foundation (PTY) LTD

from McMillan, why did that have to be a concern of the house concerned as that was a debt belonging to a limited company, which there is no doubt was limited to the company itself and was in any event a usual operational debt in view of the company being involved in the sale of books and stationery sold to it on credit, which would be paid off once the debts are collected? Indeed to this date we are not told it then went under owing to the said debt. In fact it is unclear how the sale of the property concerned helped alleviate first Respondent's indebtedness regard being had to the purchase price. This situation is further complicated by the fact that the house or property in question was supposedly sold for a meagre amount instead of claiming the maximum amount possible from its sale to extinguish the alleged debt of over a Million Emalangeni from MacMillan on behalf of M&N Sure Foundation (PTY) LTD

[51] There exists a strong suspicion that the loan sought and granted the 6th Respondent by FNB was to complete the full purchase price as the amount reflected thereon taken together with that reflected on the Title deed, come very close to the value attached to the property in terms of the report filed of record. I have otherwise rejected the 6th Respondent's version that the loan concerned was for improvements.

[52] On the sale of the said property I am left with only one conclusion to draw, being that the first Respondent secretly sold the property and secretly caused it to be transferred in order to prejudice the Applicant, whose share in the property concerned was deliberately depleted.

[53] The conduct of the first Respondent as concerns not only the sale and transfer of Plot 397, Ngwane Park in the disposal of some cattle under the guise they belonged to his mother as well as the alleged disposal of some motor vehicle (s) confirms that his whole desire was to prejudice the Applicant by ensuring that she came out of the divorce with nothing. Can the same thing be said of the 6th Respondent?

[54] Considering his failure to confirm to the Applicant the sale of the property to his company as well as his failure to disclose the amount involved in the sale despite being warned against taking part in it as well as his apparent failure to ask the obvious and pertinent questions during the sale, such as whether or not the first Respondent was married or as I found he was aware, whether his wife was consenting to the sale particularly if the marriage was in community of property, I am left with only one conclusion which is that the 6th Respondent colluded with

the 1st Respondent to prejudice the Applicant by fraudulently transferring the matrimonial property in the form of Plot 397, Ngwane Park, Manzini.

[55] The question is what is the effect of this finding on the property concerned particularly in light of the relief sought, that is should the sale and transfer of it be reversed as prayed for by the Applicant? The answer to this question lies in what the law provides in such situations.

[56] The position of our law is now settled that where spouses marry each other in community of property, there ensues between them a joint estate which results from the pooling together of all their assets existing as at that time and those to be acquired in the future. Once this happens, the assets of the joint estate are owned in equal shares by the said spouses. This position is settled law in this jurisdiction and I was referred to the following excerpt from **Jourbert's the Law of South Africa (LAWSA)** on marriage, **First Reissue, Volume 16 at page 82:-**

“When parties marry in community of property, all Ante Nuptial assets and all assets acquired post – nuptially are legally united in one Estate which is divided equally between the spouses and/or their assets upon dissolution of the marriage.”

[57] A further reference was made to an excerpt from HR Hahlo's, *The South African Law of Husband And Wife – 5th Edition* at pages 157 – 158, which states as follows:-

“Community of property is a Universal Economic Partnership of the spouses... the spouses own the assets of the joint estate in equal undivided shares”

[58] Although at common law the husband exercises what is known as marital power, which gives him wide powers to deal with the assets of the joint estate under his administration, he is not allowed to exercise such power unreasonably and to the detriment of his wife. Should he do so the court may intervene at the instance of an aggrieved party. In *Fawkes v Fawkes 1969 (1) SA 83 at 87*, the position was captured in the following words:-

“Although it is quite clear that where parties are married in community of property, the husband as the administrator of the joint estate has very wide powers in dealing with the property of the said estate. There is authority for the proposition that, where the husband exercises his marital power in an unreasonable manner, the court is entitled to intervene”.

[59] In *Visser v Hull and Others 2010(1) SA 521*, the Western Cape High Court, ordered the reversal of a sale and transfer of an immovable property, in circumstances where same was found to have been sold and/or transferred to a

third party in a manner fraudulent and prejudicial to the other party to the marriage. Although the case also dealt with the enforcement of a South African Statute which has no equivalent in Swaziland, I have no hesitation, that the position was also similar to that covered under the Common Law, the fundamental principle is what the effect of a fraudulent alienation of an immovable property to an equally fraudulent purchaser is. This principle was put as follows at page 531J-532G of the *Visser vs Hall and Others Case (Supra)*:-

“If a husband, married in community of property, made a donation out of the joint estate to a third party in deliberate fraud of his wife, then the wife or her estate had a right of recourse against him or his estate on dissolution of the marriage and where necessary, she or her estate could proceed with the Actio Paulino directly against the third party for the gift or its value. The same principles applied equally to a fraudulent transaction in some form other than a donation, such as a fraudulent transaction for the sale of land. The wife in the latter instance would have to show (1) fraud on the part of her husband, (2) that the sale was unreasonable, and (3) that the third party colluded with her husband’s fraud”.

[60] From the summary of the facts set out above I have already found that the first Respondent was fraudulent in his sale of the property in question considering the secrecy under which it was shrouded as well as that the sale was unreasonable

when one considers the fanciful reasons suggested by the first respondent as justifying it. For the reasons set out above, I also found that the 6th Respondent, as the purchaser of the said property, colluded with the first Respondent in the fraudulent act of its sale. This I found to be so inter alia, because of my having found as a fact that he refused to divulge the price at which he was buying the property taken together with his ignoring the advice by the Applicant he must not purchase the said property as was it being sold to prejudice her or words to that effect. The price at which the 6th Respondent purported to have purchased it is another testimony to his collusion, just as does his denying the obvious as manifested in his denying having met the Applicant despite that such contention was fanciful. Otherwise the first Respondent's sale of the property was fraudulent when considering his selling it secretly and going ahead with its transfer despite a letter addressed to his attorneys enquiring about same and warning against it, including proceeding with the transfer despite a Magistrate's Court challenge to it.

[61] *In Pretorious v Pretorious 1948 (1) SA 250 (A)*, a case that enforced the common law as applicable in this jurisdiction, the sale of property that had already been transferred to a third party was reversed where the above requirements were met. Although there is no doubt that the salutary rule is to reverse the sale in such circumstances, it cannot in my view be treated as a rule of thumb given that in law, each matter turns on its own peculiar circumstances so

as to ensure that in the end of the day complications are not created but orders that serve the interests of justice be granted.

[62] *In Sithole (nee Mpofu) v Sithole (HC 8187/02) [2005] ZWHHC 83*; the court came to the conclusion that in an appropriate case the sale of property alienated fraudulently to the prejudice of the wife should be reversed and an appropriate order to the effect that the prejudiced wife be paid an equivalent to her interest in the said property was still an effective remedy. This I have no hesitation could be ordered with the necessary safe guards being put in place.

[63] I have come to the conclusion that even though she has an interest in the other assets of the joint estate, her interest in the specific property concerned is 50% of its value. In my view, the sale of the property can only be reversed if it becomes clear that the Respondents concerned cannot pay her, her 50% share of the value of the property set out on the valuation report. I note that on the face of the valuation report, two valuation amounts were put on the property in 2009. One was referred to as a Current Insurance Value while the other one was called a Current Fair Market Value. It was common cause during the hearing of the matter that the value of such a property appreciates yearly. In order to meet this consideration, and acting equitably I would say that in 2011 it was fair to sell the property at its Current Insurance Value of 2009 which was fixed at E890, 000.00. It seems to me that in connection with this immovable property, Applicant

deserves to be paid 50% of the value of the property fixed at the said sum of E890, 000.00. Consequently, the reversal of the sale and transfer shall be resorted to should the concerned Respondents fail to pay Applicant 50% of the value determined above.

[64] Although the Applicant went to great lengths indicating how some movable assets of the estate had been secretly and fraudulently disposed off; it is clear that the relief sought in connection therewith, is an interdict restraining the first Respondent from transferring the remaining such assets or disposing them off. In view of these reliefs, I can only grant them as prayed which may not say much about those assets already disposed off even if I am convinced their disposal was fraudulent and calculated to prejudice the Applicant. It does however merit mention to state herein that for his own good, the first Respondent needs to do an introspection and recall back to the joint estate all the assets of the joint estate which he purported to dispose off such as the cattle and some motor vehicles, so that a fair process of determining what belongs to the estate can be embarked upon. He would do well to engage the Applicant on the fair division of these assets as would be found to belong to the estate. Otherwise this aspect of the matter remains open to the Applicant to take forward before an appropriate court for a befitting order.

[65] I have decided not to comment on the offer of the Division of the joint estate as proposed by the first Respondent in his papers before this court. The parties and their counsel are best placed to come up with a sound solution to their matter. It suffices for me to say that a solution is often not impossible to reach in a matter where transparency and genuineness thrives.

[66] Having said all that I have, I come to the conclusion that Applicant's application succeeds and I make the following specific orders:-

1. In view of the findings of collusion between the first and sixth Respondents, with regards to the sale of Plot 397, Ngwane Park, Manzini, the said Respondents be and are hereby ordered to, within 30 days from today's date, jointly and severally pay Applicant the sum of E445, 000.00 being her 50% share of the alienated asset of the joint estate.
2. Failing order 1 above, the sale and transfer of Plot 397, Ngwane Park, Manzini, to the 6th Respondent, be and is hereby reversed with the said property being reverted to the joint estate of the Applicant and the first Respondent to be dealt with according to law in their divorce.

3. Further, in the event of failure to comply with order 1 above, and in Order to give effect to Order 2 hereinabove, the 2nd Respondent be and is hereby directed to cancel the registration of the property concerned from the 6th Respondent's name and thereafter cause it to be registered in the name of the first Respondent who is to hold it on behalf of the joint estate for it to be dealt with according to law in their pending divorce.

4. The first Respondent be and is hereby interdicted and restrained from transferring or disposing off any further assets of the joint estate pending finalization of the divorce proceedings between them.

5. The Applicant is at liberty, shot of an agreement between the parties, to pursue before an appropriate court the issue of any assets unlawfully alienated from the joint estate so that the ownership of such assets can be properly determined including how those genuinely found to belong to the joint estate are to be lawfully dealt with.

6. The 1st and 6th Respondents be and are hereby ordered to pay the costs of these proceedings at an attorney/client scale, jointly and severally, one paying the other to be absolved.

Delivered in open Court on this the..... day of..... 2014.

**N. J. HLOPHE
JUDGE – HIGH COURT**