IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C. OF A (CIV) NO 67/2018**

LC/APN/99/14

In the Matter between

TEBOHO MOHAPI **APPELLANT**

And

MOTŠELISI LUCY MABATHOANA **1ST RESPONDENT**

HABOFANOE MABATHOANA **2ND RESPONDENT**

CORAM: DR. K.E MOSITO, P
DR. P MUSONDA, AJA
N. T MTSHIYA, AJA

HEARD: 23rd OCTOBER 2019

DELIVERED: 1st NOVEMBER 2019

SUMMARY

Land law – widow of deceased who was married in the community of property seeking invalidation of sale and conveyance of site forming part of the joint estate to appellant – sale in violation of section 7 (1) (2) (3) and section 8(1) (a) of the legal capacity of married persons Act 2006 – Appellant establishing that he did not know and could reasonably have known that the contract which he entered into was without spousal consent as required by section 7 (1) (2) (3) – validity of the contract.

JUDGMENT

DR P MUSONDA AJA

BACKGROUND

[1] This is an appeal against the High Court Judgment (Moahloli AJ). The 1st respondent Motšelisi Lucy Mabathoana is the widow of the late Thabo Jeremiah Tsabeba Mabathoana. The 2nd respondent Habofanoe Mabathoana is the eldest son of the 1st respondent. They approached the court *a quo* seeking the nullification of the purported sale and transfer of a residential site belonging to the joint estate to the appellant without the consent of the 1st respondent in contravention of the ***Legal Capacity of Married Persons Act, 2006***.

[2] The appellant resisted the application in the court *a quo* on the basis that the transaction complied with all legal requirements. The deceased had told him that the sale had the blessings of the family.

FACTS

[3] The undisputed facts in the court *a quo* were that, the 1st respondent and the deceased got married by civil rites in community of property in 1997. In the late 70s or early 80s the couple acquired the disputed residential site (Plot No. 12282 – 114, site number 423) at Sea Point, Maseru. On 15th July 1993 the property was registered and on 4th September 2007, the deceased sold the property to the appellant for M20,000.00

[4] The Minister on 22nd April 2010 pursuant to Section 36 of the ***Land Act 1979***, consented to the transfer of the leasehold property to the appellant for M20,000.00 consideration. The transfer was to be effected on or before 31st March, 2011. For purpose of stamp duty the value was pegged at M36,000.00. The property was transferred to the appellant by the Registrar of Deeds under Deed number 29930 dated 30th March, 2011.

[5] The learned judge in the court *a quo* heard evidence from the 1st and 2nd respondents and from Fako Mabathoana who was caretaking the site in support of the 1st respondent, while the appellant testified in his defence.

[6] Briefly the testimony of the 1st respondent in the court *a quo* was that, the marriage between her and the deceased had subsisted until his demise in July 2012. They had lived apart since 1997, but had not divorced.

[7] She had heard that the appellant was claiming that the plot belonged to him from the caretaker Fako. She referred Falko to her lawyer son the 2nd respondent. The 2nd respondent reported to her that his father had sold the plot, which evidence was corroborated by the 2nd respondent.

[8] The 2nd respondent had offered to refund the appellant once he verified that the plot had been sold by the deceased father.

[9] Fako the caretaker restated what the 1st and 2nd respondents told the court *a quo* save and except that he added that on all the occasions the appellant visited the plot he never showed him any proof of ownership.

[10] The appellant had conceded in the court *a quo* that the deceased did not give him any formal documents to prove family consent. Although the appellant had engaged a lawyer to handle the transfer, no formal inquiries to verify

whether there was family consent were made, but denied the suggestion that him and his lawyer were negligent.

[11] The learned Judge quoted Section 7(1) (a) 7(2) and 7 (3) (a) which enacts that:

> *"A spouse married in community of property shall not, without the consent of the other spouse alienate…any immovable property forming part of the joint estate. The aforesaid consent…may be given orally or in writing*[1]*. But, very significantly, the consent required for any act which entails the registration, execution or attestation of a deed….shall be given in writing."*

[12] According to Section 8(1) (a), so the court went on.

> *"If a spouse married in community of property enters into a contract with another person without the consent required under Section 7*[2] *and that other person does not know or could not have reasonably known that the contract he has entered into is without such consent….the contract shall be deemed to have been entered into with the required consent and [if] the joint estate suffers a loss as a result of that contract, an adjustment shall be effected in favour of the other spouse –*
>
> *(i) Upon division of the joint estate; or*
>
> *(ii) Upon demand of the other spouse at any time during the subsistence of the marriage.*

[1] Ibid, Section 7(2)
[2] Ibid, Section 7(a)

[13] The learned Judge read the above provision with Section 18 of the same Act, which amends the ***Deeds of Registry Act 1967***, in Section 14 by among other things deleting subsection (1) (2) and (3) and substituting the following –

> "Special provisions relating to women –
>
> *14(1) all deeds executed or attested by the registrar, or a notary public and required to be registered in the Deeds Registry shall disclose the full name and status of the person, whether unmarried, married, widowed or divorced;*
>
> *(2) Where a person is married the full name of the other spouse shall be disclosed, and it shall be stated whether the marriage was contracted in or out of community of property.*
>
> *(3) ……*

And by deleting subsection (6) and substituting it with –

> *(6) The registrar shall refuse, except under an order of court to attest, execute or register all deeds and documents in respect of immovable property in favour of any spouse if such registration is in conflict with the rights of others in respect of that property"*

[14] The court found as a fact that the sale and transfer of the property was in September, 2007 and March 2011 respectively, which was after the Legal Capacity of Married Persons Act, had come into operation on 6th December, 2006. The Act was therefore applicable.

[15] The court went on to interrogate the test applicable to Section 8(1) (a). The decision in ***Distillers Corporation Ltd V Modise***[2], where it was held that, the

[2] 2001 (4) SA 383 (T)

use of the word "reasonably" implies that an objective test must be used. Thus the matter must be considered from the point of view of the reasonable person in the third party's position. In a recent case of ***Visser v Hull***[3].

The court adopted a different approach to determine whether a third party is *bona fide*. It held that a third party must do more than rely upon a bold assurance by another party and must undertake an adequate inquiry to verify the real factual situation.

[16] In ***Sishuba v S Kweyiya & Another***[4] the court cited with approval the decision in [5]***Distillers Supra***. However the court went further to hold that:

> *"the onus of establishing the requirements of Section 15 (19) (a) of the MPA, equivalent to Section 8(1) (a) of our Act, rests with the party seeking to rely on it, and that the enquiry was objective in nature, Section 15(9) (a) places an obligation on a third party wishing to rely on it to make enquiries and take reasonable steps to ascertain whether the person with whom he or she is dealing with is married and if so, whether they have obtained whatever consent may be required and necessary."*

Para (111) Where the property in question is subject to a deed of sale concluded without the apparent consent of the other spouse *prima facie* the deed of sale is therefore invalid and the evidentiary burden of establishing that the deed of sale on which he relies is valid is on the purchaser. To do so such purchaser would have to establish that he did not know or could not

[3] 2001 (4) SA 384 (T)
[4] 2010 (1) SA 521 (WCC)
[3] 2001 (4) SA 384 (T)
[4] 2010 (1) SA 521 (WCC)

reasonably have known that the seller was married in community of property and did not have the consent of his spouse to enter into contract of sale.

[17] What the legislature had in mind when using the words "could not have reasonably known" in Section 8(1) is known as constructive knowledge. Constructive knowledge refers to what in the circumstances following a reasonable inquiry for the particular transaction. It is incumbent on the third party to discharge the onus resting on it to prove that it could not reasonably have known that the spouse it was dealing with did well have the necessary consent.

[18] The court *a quo* further relied on our decision, to which the learned Judge was bound, in ***Kobeli v Moseneke & Others***[6] where we held that:

(i) Where the purchaser does not know or could not reasonably have known that the consent of the other spouse was lacking the contract stands and the property rights of the spouses are adjusted as provided for in Section 8(1).

(ii) Where the purchaser does know or could reasonably have known that the contract was entered into by one spouse without the consent of the other, it follows by necessary implication that in the light of the

[5] 842/2007 [2008] ZAECHI 25 6th March 2008
[6] C of A CIV No. 28/2014

prohibition expressed in peremptory terms in Section 7(1) the contract must be invalid.

FINDINGS OF FACT IN THE COURT A QUO:

[19] The learned Judge after hearing the evidence from both parties, analyzing facts and the law came to the conclusion that the appellant only relied on the bold statement of the deceased. The appellant did not make any investigations to verify whether family consent had been obtained. He went on that in his view the appellant did not have sufficient facts to conclude that the 1st respondent had consented to the sale. A reasonable person in his circumstances would not have relied on the deceased's bold statement that he was selling pursuant to a decision of the family.

[20] Section 8(1)(a) of the Act place a duty upon the appellant to make enquiries about the deceased's marital status and matrimonial property regime and/or to enquire whether the deceased had obtained the requisite written consent from his wife. Appellant was negligent in failing to carry out his duty and was consequently not entitled to the protection granted in Section 8(1) (a). The sale and transfer were therefore invalid.

[21] The learned Judge was of the opinion that the Registrar of Deeds was also grossly negligent to register the deed of transfer without ensuring that the provisions of the amended section 14 of the ***Deeds Registry Act***, were complied with.

Aggrieved by the decision of the lower court the appellant noted an appeal to this court.

THE APPELLANTS CASE:

The appellant filed four grounds of appeal:

[22] The first ground, is that the learned trial Judge failed to give sufficient weight to the evidence that the first respondent knew and consented to the sale and transfer agreement. Second ground, the reception of evidence of the second respondent as corroborative of the first respondent on the issue of consent was a misdirection, as the evidence was irrelevant in that respect as second respondent's consent was not required. In the third ground, the appellant contend that failure to characterise the appellant as a *bona fide* purchaser was a misdirection. In the fourth ground, the appellant contest the invalidation of the contract of sale. The court should have instead ordered *restitution in integrum.*

[23] In the first ground the appellant valiantly argues that there were contradictions between first and second respondents' evidence. The first respondent testified that she first knew about the sale when Fako Mahathoana told her that the appellant went and claimed the site. The second respondent said the 1st respondent was surprised when the 2nd respondent asked him about the transaction.

[24] The 1st respondent knew of the transaction during the lifetime of the deceased and the court ought to have inferred that the first respondent was told about the transaction.

[25] In light of the contradictions this court was asked to reverse the findings of fact. This ground was restating the law that the giver of consent should be the spouse and not the children where the marriage is in the community of property.

[26] In the third ground the appellant canvassed that since there was no fraud or malice the appellant was a *bona fide* purchaser. The appellant relied wholly on what the deceased had told him and he saw that the lease was in the deceased's name. There was a suggestion that even if the consent was sought from the 1st respondent, she would have refused that she ever gave it. The appellant submitted that he ought to have been given the benefit of section 8(1) (a) and further relied on the ***Kobeli case*** supra.

[27] When the contract of sale is cancelled, the buyer is entitled to the return of any purchase price he has paid, so it was argued. No one party should benefit unfairly at the expense of the other where the contract is cancelled. The cases of ***Nthako v Motlamelle***[7], and ***Shipping v Abubaker***,[8] were cited in support of that proposition.

[28] Adv. Lefikanyana augumented his filed submissions with an oral address. He conceded that there was no written consent. It was not necessary as the Land Act 2010 was inoperative. Under the legal capacity of Married Persons Act 2006, the Act does not require written consent, while the respondents say it must be in writing.

[29] There was evidence of lease in favour of the appellant, which indicated that the land belonged to the deceased. The land was subsequently transferred to the appellant.

RESPONDENTS CASE

[7] (1985-89) LAC 186
[4](1981) (1) UR 130 HC
(1985 – 89) LAC 186

[31] It was strenuously argued by the respondents that the requisite consent to transact over the disputed land was neither sought nor obtained from the 1st respondent as her testimony in the court a quo demonstrated.

[30] The appellant in answer to the originating application pleaded that he was informed by the deceased that the decision to sell the site had been consented to by the 1st respondent. He however conceded during cross-examination that he could not know as a matter of fact that the 1st respondent had in fact granted her consent to the transfer of the site in dispute. In light of that evidence the respondents valiantly argued that the finding by the court a quo that 1st respondent had not consented cannot be faulted.

[31] The alleged circumstantial evidence arising from 1st respondent communicating with 2nd respondent subsequent to the appellant visit to the site to claim it should be construed that she knew about the transaction and did not enforce her rights. This according to the appellant happened during the lifetime of the deceased. There was no such evidence, so the respondents argued.

[32] The law mandates that consent regarding registration, execution or attestation of a deed shall be in writing[9]. It is common cause that there was no written consent by the 1st respondent in respect of the transaction in issue. The evidence was short of proof of oral consent so to speak. There was no direct or circumstantial evidence to prove the alleged consent.

[5] Section 7(3) (a) of Legal Capacity of Married Persons Act No. 9 of 2006
Section 7(3) (a) of Legal Capacity of Married Persons Act No. 9 of 2006
Land Act No. 17 of 1979, Deed of Registry Act No. 12 of 1967, and Legal Capacity of Married Persons Act
Tsola v Tsola LAC (2011) Page 236 of 239 para 3
Kefumane Taka v Nkhati Pheko No. C of A. (CIV) 59/2015

[33] It was not respondent's case that the consent of 2nd respondent was desirable, it was only the 1st respondent consent which[10] was necessary.

[34] The ground of appellant being a ***bona fide*** purchaser was raised on appeal. It was not pleaded. Even the evidence before the court a quo did not canvass that point.

[35] The dispute was dealing with a matter statutorily regulated and not common law. The court found the agreement was not compliant with statute and therefore illegal.

[36] Assuming but not conceding that the appellant was a *bona fide* purchaser, the underlying contract is invalid.[10] It could not be left alive. The remedy for the *bona fide* purchaser is that compensation for developments effected on the plot, not to allow him to retain title that he was not entitled to be granted in the first place[12]. The respondents are ready and willing to refund the appellant the M20,000.00 plus interest, which he has unreasonably rejected.

[37] The respondents vehemently rejected an order of *Restitutio in Integrum* as respondents never benefited from the transaction. That could only be made against the deceased estate Tsabel Mabathoana.

[38] Mr. Rasekoai argumenting his filed Heads by oral argument conceded that, it was the Registrar to comply with section 14 (1) (2) (3). The power of attorney should be read with section 14. In his view the appellant cannot plead ignorance because he had engaged an advocate. He therefore can be assumed to have had vicarious knowledge. It was his submission that the third party

10

being a *bona fide* purchaser and the annulling of the transaction by section 14 were not pleaded.

[39] He graciously conceded that the case in the court a quo not having been anchored on section 14 of the Deeds and Registry Act, and the Land Act 22010 not having been operational, the case stands and falls on the legal capacity of Married Persons Act, 2006.

[40] The respondents prayed for dismissal of the appeal and punitive costs as the appeal had no merit. Having offered to refund appellant, the litigation was frivolous and vexatious.

ISSUES

(i) The issues this appeal raises is whether this court as an appellate court can interfere with the findings of fact of the trial judge. If the judge is reversed on findings of fact, then it inevitably follows that the protection of Section 8(1) (a) should have been available to the appellant;

(ii) Was there written consent from the 1st respondent pursuant to section 7(3);

(iii) Is there a difference between a contract which is illegal by statute and a frustrated contract;

(iv) Is *restitution in integrum* against the respondents possible; and

(v) Is this an appropriate case for punitive costs.

CONSIDERATION OF THE APPEAL

[41] The philosophy underlying sections 7 (1) (2) and (3) to me appear to be those of the time-honoured English legislation, the statute of frauds 1677. The Act is believed to have been primarily drafted by Lord Nottingham assisted by Sir Mathew Tale, Sir Francis North and Sir Leolue Jenkins. He required that certain types of contracts, wills and grants and assignments or surrender of leases or interest in real property must be in writing and signed to avoid fraud on the court by perjury and subornation of perjury. It also required that documents of the courts be signed and dated.

[42] Section 4, of the Statute of Frauds provided that an action may not be brought on the following types of contracts unless there is a written note or memorandum signed by the party being charged or a person authorised by them.

1. …….
2. …….
3. …….
4. Contracts for the transfer of the interest in land
5. …….

The Statute of Frauds, so is our land legislation in this country, performs an evidentiary function. It was a response to the difficulties posed by perjured testimony, which has arisen in this case where the appellant alleges inconsistencies in the 1st and 2nd respondents' testimony in the court below. Fuller, introduced a cautionary function of legal form by stating that a formal requirement "may also perform a cautionary or deterrent function by acting as

a check against inconsiderate action[11.] Writing itself bespeaks caution. Thirdly, the channeling function Fuller, say a seal for example on conveyancing documents provides a simple and external test of enforceability. An outside observer, such as a court, can readily see that the parties, by signing a document under seal, have decisively passed through a gateway of legal undertaking[14].

The above passage rationalizes the necessity of contracts dealing with the sale of land to be in writing.

[43] The view that we take is to quote section 7 in extension to paint a picture with broad strokes. Section (7) (i) Act requiring other spouse's consent.

> 7(1) notwithstanding subsections (4) and (5) and subject to sections 11 and 12, a spouse married in the community or property shall not, without the consent of the other spouse –
>
> (a) Alienate, mortgage, burden with a servitude or confer any real right in any immovable property.
> (b) Enter into any contract for the alienation, mortgaging, burdening with servitude or conferring of any other real right in immovable property forming part of the joint estate.
> (c) ……..…
> (d) ……..
> (e) ……..

[6]LL Fuller, consideration and form (1941), 41 Col L. Rev 799
unsid

(f) ……..

(g)…….

(h)…….

(i) …….

(j) …….

7(2) The consent required under subsection (1) may be given orally or in writing

7 (3) Notwithstanding subsection (1) the consent required for

(a) Any act which entails the registration, execution or attestation of a deed, or other document;

(b) An act contemplated under subsection (9) (h) shall be given in writing.

[44] The disposition of land required registration under section 14 of the Deeds Registry Act. It required the execution of a deed of sale. The deed was executed on 4th Day of September 2007. The legal capacity of married Persons Act No.9 of 2006, had already come into operation. Section 7 (3) (9) which required the consent of the 1st respondent to be in writing was in operation. The 1st respondent having not consented in writing the transaction is null and void ab initio (our emphasis).

[45] The appellant's appeal is anchored on the findings of fact by the learned trial Judge. We therefore have to deal with this issue extensively. In a seminal case dealing with when the appellate court can disturb findings of fact by the trial Judge sitting without a jury, the Zambia Court of Appeal in ***Nkhata and 4 Others v Attorney General*** said:

"A trial judge sitting alone without a jury can only be reversed on questions of fact if:

(i) The Judge erred in accepting the evidence, or

(ii) The judge erred in assessing and evaluating the evidence by taking into account some matter which he should have ignored or failing to take into account something which he should have considered; or

(iii) The judge did not take proper advantage of having seen and heard the witnesses; and

(iv) External evidence demonstrates that the judge erred in assessing manner and demeanor of witnesses"

[46] This court has anxiously examined the learned Judge's analysis of the evidence on record and the reasons for believing and disbelieving the appellant. In para [19] of his judgment, the judge said:

> *"Under cross-examination Mohapi conceded that Jerry did not give him any formal document to prove that the decision to sell was a family decision. He said that even though he engaged a lawyer to handle the transfer, he (Mohapi) did not make any formal inquiries to verify Jerry's story. Mohapi said that he believed that Lucy knew about the sale and that this was based on his speculative opinion".*

[47] The appellant's response during cross-examination in the lower court buttresses the Judge's finding, that he made no reasonable effort to verify whether there was consent in order to draw him into the protective net of section 8(1). We are of the view that the findings are not perverse to the evidence on record.

[48] There was an illegality and legality cannot flow from an illegality nor can a court come to the aid of a contract anchored on illegality or immorality. It must be appreciated that there is a significant statutory inroad in contracts for the sale of land, because the land belongs to the Basotho nation held in Trust by His Majesty.

[49] The appellant canvassed for *Restitutio in integrum*, which Blacks Law Dictionary defines as:

> *"Restoration to the previous condition or the status quo. In Roman law, a praetor could accomplish this by annulling a contract or transaction that was strictly legally valid but inequitable and by restoring the parties to other previous legal relationship"*

[50] We said in recently in ***Pius Leseteli Melafane v. Madoda Ramajoane and 14 others***, which case is analogous to the present case:

> *"The sale and transfer of rights in land by the wife was unbeknown to the husband. The purported power of attorney given by the husband was fraudulent and illegal. The subsequent transfer was invalid," per Mosito P.*

This court has to yield to the provision of the statute, section 7 (3) (a) (b). this transaction consequently suffers the same fate.

[51] It is clear from this definition that such a submission is a tangential assertion as the contract was illegal and there is no previous legal relationship to restore the parties to.

[52] This court finds no merit in this appeal. However, given the circumstances of the birth of the illegal contract will make no punitive costs order.

CONCLUSION

(i) Appeal dismissed

(ii) Costs will follow the event.

_____

DR. P. MUSONDA
ACTING JUSTICE OF APPEAL

I agree**:**

_____

DR. K.E. MOSITO
PRESIDENT OF COURT OF APPEAL

I agree

_____

N.T. MTSHIYA
ACTING JUSTICE OF APPEAL

For the Appellant: Adv. L. Lefikanyana

For the Respondent: Mr. M.S. Rasekoai