



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**REPORTABLE**

Case No. 1424/2012

In the matter between

**PHUMZILE PATIENCE SIMELANE**

**Applicant**

and

**VULINDLELA DLAMINI N.O.  
HAWANE ESTATE (PTY) LTD  
SHERIFF OF SWAZILAND  
MASTER OF THE HIGH COURT  
ATTORNEY GENERAL**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent  
5<sup>th</sup> Respondent**

**Neutral citation:** *Phumzile Patience Simelane v Vulindlela Dlamini N.O. and Others* (1424/12) [2013] SZHC 201(17<sup>th</sup> September 2013)

**Coram:** Mamba J

**Heard:** 1<sup>st</sup> March, 2013

**Delivered:** 17 September, 2013

[1] Civil law – Law of Contract – Sale of immovable (land) – Section 31 of Transfer Duty Act 8 of 1902 requires that agreement be in writing and signed by parties or their duly authorised agents, failing which agreement of no force or effect.

- [2] Civil law – Sale of Land – Written agreement – land unsurveyed or not subdivided – objection that such land does not exist as not registered in deeds office. Objection bad in law.
- [3] Civil law – sale of unsubdivided land – land merely described in Deed of sale and no attachments thereto – court not entitled to have recourse to any other document for the description of the property not included or forming part of the deed of sale as to do so would violate the intergration rule or rule on parol evidence.
- [4] Civil Procedure and Practice – land erroneously described as portion 987 instead of Farm 987 whilst physical identity thereof certain between the buyer and seller. Seller objects that land described in deed of sale does not exist – buyer cannot be unsuited on this technicality that does not address the substance or real issues between seller and purchaser. Objection refused.

- [1] By a written deed of sale dated 24 April 2001, the applicant bought from Richard Sandlane Dlamini a certain fixed or immovable property  
‘described as Hawane Park

CERTAIN: Remainder of Portion 8; a portion

of portion 987, Hhohho District

(subdivision still pending approval);

MEASURING: 20 (twenty) hectares.

IMPROVEMENTS: One 3 bedroom house, and two sheds, one complete  
and the other incomplete.

- [2] The property was sold for a sum of E380,000.00 and a deposit of E60,000.00 was to be paid and was paid upon signature of the agreement. The balance of the purchase price was “to be paid by Bank guarantee upon

registration and transfer of the property into the name of the Applicant. Such transfer, it was agreed, was going to be done by the seller's conveyancers. The Applicant, it was agreed, was going to be given occupation of the property again, upon transfer of same into her name.

[3] The deed of sale also records that 'the purchaser has acquainted herself with the nature, conditions, beacons, pegs and locality of the property.'

[4] Under general terms and conditions of the sale, the parties recorded that:  
'9.1 The parties undertake to do all such things as may be necessary, incidental or conducive to the implementation of the terms, conditions and import of this agreement.

9.2 The agreement constitutes the sole and entire agreement between the parties and no warranties, representations, guarantees or other terms and conditions of whatsoever nature given by either party or his/her agent not contained or recorded herein shall be of any force or effect [and]

9.3 No variations of the terms and conditions of this agreement or any consensual cancellation thereof shall be of any force or effect unless reduced to writing and signed by the parties or their duly authorized representatives.'

- [5] There was no design, diagram, map, drawing or such like depiction of the property attached and or incorporated, to the Deed of Sale made by the parties thereto. I make this observation because of the nature and tenor of the defence or defences raised in this application to which I shall revert presently.
- [6] The Seller, Richard Sandlane Dlamini, died last year on 2<sup>nd</sup> November 2012, before he could apply and obtain the necessary subdivision of the property and pass transfer thereof to the applicant. However, it appears that the deceased did instruct certain surveyors to file the application but he did not appear before the responsible government Board to move the application and it was thus not heard or decided upon by that office or board. This was despite the fact that the seller had furnished him with the required guarantee for the balance of the purchase price. (see also PS9 at 62 of the Book of Pleadings.) His estate is herein represented by the first respondent in his capacity as the executor thereof.
- [7] The second respondent is Hawane Estate (Pty) Ltd, a limited liability company duly incorporated in terms of the company laws of Swaziland and having its principal place of business at Hawane. The rest of the

respondents having been cited herein as a legal formality and no order is being sought against them and indeed they have not filed any papers in these proceedings.

- [8] It would appear that notwithstanding clause 5 of the deed of sale, stipulating that occupation of the property shall be given to the Applicant upon Registration and transfer of the property into her name, occupation was granted or given to her by the deceased before he died and the applicant is already in occupation of the property. I say so in view of the applicant's assertion that she has '...invested a lot of money in renovating the current house where I stay at Hawane which amounts close to E80,000.00.'
- [9] According to the applicant, the deceased owns or had title to the land in question by virtue of a deed of sale of shares in Hawane Estate (Proprietary) Limited, 2<sup>nd</sup> Respondent, entered into by and between Wendy Allison Reed and Margaret Patricia Reed of the one part and Samuel Frances Dlamini and Bessie Khanyisile Dlamini on the other part. She states that in terms of clause 6 (iv) of that agreement 'the deceased had title to 20 hectares of remaining extent of Portion 8 of farm 987. (This document has been filed by her as PS4 of her founding affidavit.)

[10] Clause 6 (iv) of the said agreement of sale of shares provides that

‘(iv) The Purchasers agree that Richard Sandlane Dlamini ...has the right to use of a portion of the property, approximately 20 hectares in extent, that is at this date outside of the fenced area of the property. The Purchasers shall transfer this portion of land to R.S. Dlamini free of any payment to the Purchasers by R.S. Dlamini, and at no cost to the Purchasers, as and when subdivision is permitted. Alternatively, and in any event prior to any further sale of the property the purchasers shall enter into a 99 year lease with R. S. Dlamini, free of any rental payments, which lease shall be renewable.’

I also mention herein that the copy of this agreement filed herein is incomplete and there is no indication when such agreement was concluded. Also to be noted is the fact that at page 50 of the Book of Pleadings, which is immediately after the last page of the said agreement, there is a diagram apparently drawn by a Land Surveyor showing what appears to be a proposed subdivision of 20 hectares of land on remainder 8 of farm Number 987. This was apparently done in February 1997.

[11] In paragraph 12.1 of her founding affidavit, the applicant says the deceased sold to me an undivided 20 hectares of Remaining Extent of Portion 8 of farm 987, situate at Hawane, Mbabane, Hhohho District.’ This description of the property is clearly not the same as that given in the Deed of Sale. There, Remainder of portion 8, a portion of portion 987 is mentioned.

[12] Based on the above facts and allegations, the applicant has filed this application wherein she seeks inter alia, the following orders:

‘1. The first respondent and the second respondent’s directors to appear before the Natural Resources Board within one week of being served with the court order in order to move the application for the subdivision of remaining extent of Portion 8 of farm No. 987 situate in the Hhohho Region as per the deed of sale between the applicant and the [deceased];

2. The first respondent is ordered to forthwith take all steps and sign all documents necessary to transfer the subdivided 20 hectares of remaining Extent of Portion 8 of farm No. 987 situate in the Hhohho Region bought by the applicant in terms of the deed of sale within two weeks of being served with the court order:

3. Alternatively, in the event the 1<sup>st</sup> respondent failing to take such steps within a period of two weeks from date of service of the order, the third respondent be directed to take all such steps and sign all documents in the name and on behalf of the first respondent to give effect to prayer 2 of this order.’

[13] The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Their grounds of opposition are substantially the same. First, they argue that the property that is the subject matter of the sale and reflected in the deed of sale does not exist. Secondly, that since it has not been subdivided, it cannot be identifiable and this is contrary to the legal requirement that it should be certain and identifiable and thirdly, it is argued that the sale of shares agreement that has been filed by the applicant is inadmissible in evidence in that it is a privileged document that was given to the applicant’s attorneys by the 2<sup>nd</sup> respondent for a different matter altogether and the said respondent has not given permission to the said attorneys to use it in these proceedings.

[14] There have been rather unsavoury accusations of unethical and underhand practices leveled in the main by the second respondent against Mr Nxumalo, attorney for the applicant regarding the use of the agreement of sale of



shares document. I do not think that these accusations advance the respondents cause in any significant way and, having had the benefit of Mr Nxumalo's measured response thereto, I do not think that these accusations are just or fair on him.

[15] Of importance though regarding that document is that it is not part of the deed of sale entered into by and between the applicant and the deceased. That being the case, the applicant may not rely on it to establish or prove to the court the identity of the property that she bought from the deceased. This document, together with the plan or diagram of the 20 hectares of unsubdivided land attached thereto, would have been relevant and therefore admissible or receivable in evidence if the first respondent had raised the defence that the relevant estate does not own the property allegedly sold by the deceased to the applicant. That is not the case in the instant matter.

[16] I have stated above that there were no annexures of any sort referred to in the deed of sale between the applicant and the deceased. There were no plans, diagrams or depictions of any sort referred to therein. Indeed the parties recorded that the agreement constitutes the sole and entire agreement between the parties and no warranties, representations, guarantees or other

terms and conditions of whatever nature given by either party or his/her agent not contained or recorded herein shall be of any force or effect.’ (clause 9.2). Therefore any reference to the sale of shares agreement as a means of identifying the exact property purchased by the applicant from the deceased would sin or offend against the parol or intergration rule.

[17] In *Johnston v Leal*, 1980 (3) SA 927 (A), Corbett JA at 937-9 said:

‘It is not necessary that the terms of the contract be all contained in one document, but, if there are more than one document, these documents, read together, must fully record the contract (see *Coronel v Kaufman* (supra) at 209; *Meyer v Kirner* (supra) at 97E-F). 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* (supra) at 14C; *Meyer v Kirner* (supra) at 97-9). It is not easy to define what constitutes a material term. Nor is it necessary in the present case to do so since clause 11, upon which the dispute turns and which has the effect (if operative) of suspending the whole contract pending fulfillment of a condition as to the procurement of a loan on the security of a first mortgage bond to be

passed over the property sold and also of causing the contract to be automatically cancelled in the event of such a loan not being obtained would clearly constitute a material term of the contract. It is also not necessary in this case to consider at any length the degree of precision with which the writing must set forth the terms of the contract, particularly the essentialia, in order to comply with s1 (1), since this is not an issue which arises here. 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 materials terms of the contract, to be ascertained without recourse to evidence of an oral consensus between the parties (see *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 989-90, 995-6; *King v Potgieter* (supra) at 14D-E; *Magwaza v Heenan* 1979 (2) SA 1019 (A) at 1023C-G and the authorities therein cited).

The 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 (see *Van Wyk v Rottcher's Saw Mill (Pty) Ltd* (supra) at 996 or, more correctly that branch of the rule which prescribed that, subject to certain qualifications (to which some reference would be made later), 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 & Another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26A-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). This parol evidence rule or integration rule (as it was termed in the *National Board* case (supra)...does not preclude evidence of a subsequent oral agreement contradicting, altering, adding to or varying a written contract (see *Venter v Birchholtz* (supra) at 282E-G), but in the case of contracts governed by s1 (1) such a subsequent oral agreement could be of no force or effect if it sorts to contradict, etc a material term of the written

contract....Similarly, a prior or contemporaneous oral agreement, evidence of which was not precluded by the integration rule, as, for example, a contemporaneous oral agreement that the written contract be subject to a suspensive condition (see *Stiglingy v Theron* 1907 TS 998 at 1003), would be rendered of no force or effect by s1 (1) if it purported to contradict, etc a material term of the written contract (cf *Du Plessis v Neil* 1952 (1) SA 513 (A).’

- [18] The applicable legislation in our law is s31 of the Transfer Duty Act 8 of 1902 which decrees that ‘No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorized in writing.’

It is noted that the deceased and the applicant were not parties to the sale of shares agreement, but of course it would have been legally possible for them to refer to that agreement or incorporate the relevant clauses thereof to their deed of sale if the property being sold was that referred to in the sale of shares agreement. That they did not do so of course does not mean that the subject matter of the sale was some other property altogether. The bottom line though in this discourse, is that the sale of shares agreement may not be read as one with or as part and parcel of the deed of sale between the

Applicant and the deceased. This document is, for purposes of this application irrelevant.

[19] The other point raised by the respondents is that the property sold is not identifiable from the description given in the deed of sale and it does not exist since it has not been subdivided and registered in the Deeds office. From the outset, I am unable to say that the mere lack of subdivision of the property in my judgment, make it unidentifiable. If its pegs, beacons and coordinates or location have been described with the required clarity and exactness or precision, though not yet subdivided, the property may be said to be identifiable or capable of being identified for purposes of the relevant law.

[20] I have already referred to the description of the property as set out in the deed of sale and I need not repeat that description herein. It is also not insignificant that the applicant resides or lives on the property in question, having been given occupation thereof by the deceased. Apart from the admitted error that reflects the property as a portion of portion 987 Hhohho region instead of farm 987 Hhohho region, I am of the firm judgment that the property is capable of being clearly identified. One has to bear in mind

that no description of land may be absolutely flawless or accurate. Its almost like the finite mind defining the infinite Being that may not be seen by the naked eye. As stated by Watermeyer CJ in *Van Wyk* (supra) at 989;

‘Meticulous accuracy of description is however not necessary because the maximum certum est quod certum reddi potest applies, subject to the same certum as that mentioned above. ...The provision that the contract of sale must be in writing cannot mean that the only evidence by which the property can be identified must be contained in writing because that...is impossible.

A contract of sale of land in writing is itself a mere abstraction, it consist of ideas expressed in words, but the relationship of those ideas to the concrete things which the ideas represent cannot be understood without evidence. For a skilled person the evidence of a mere inspection, coupled with his own local knowledge may be sufficient to identify the property described but, even for him, that much evidence at least and his own knowledge are necessary. In a court of law, of course, in every case evidence is essential in order to identify the thing which corresponds to the idea expressed in the words of the written contract. The abstract mental conception produced by the words has to be translated into the concrete reality on the ground by

evidence. It has been suggested that a written contract does not satisfy the provisions of the statute unless the mere reading of the document is sufficient to identify the land sold without invoking the aid of any evidence dehors the document, but a moment's reflection and an appreciation of the fact that a written contract is merely an abstraction until it is related, by evidence, to the concrete things in the material world will show at once that suggestion makes s30 demand performance of an impossibility.'

These views were echoed by Schreiner JA in the same case when he said

'It will be convenient to consider some of the ways in which identification may be achieved or attempted. In addition to, or sometimes without, a reference to a town or district in which the property is situated, it may be identified by the name of the house or farm as the case maybe, by a street number or by a number on some general plan or survey or it may identified by reference to specified adjoining property. Then there may be identification by reference to the relationship of some person to the property. So it may be described as "my property or the house leased or occupied by X" or the house mortgaged to Y or the title deeds of which are in the possession of Z. Again, the description may refer not to the present



state of things but to the history of property, as “the house owned in 1940 by P or the house built by Q. In cases of identification by events connected with the property a distinction must be drawn between events that form part of the negotiations leading up to the sale and events that are unconnected with those negotiations. Events of the latter class will ordinarily provide a major of objectivity and to that extent furnish some protection against the kind of dispute that the requirement of writing is designed to minimize. But I do not think that a written agreement which describes the property only as “the farm we discussed (or looked at) yesterday” (The discussion or examination having been in cause of the negotiations) could, consistently with the Coronation Syndicate Case be held to satisfy s30 ... Another important way of identifying property is by stating its boundaries. This may be done by reference to a plan, which can be applied to the land through the correlation of marks on the plan with marks on the land or by surveying and fixing on the land the boundaries shown on the plan. The statement of boundaries in the contract may, instead of, or in addition to, a plan, mention features on the land, which may be natural or artificial, such as fences, buildings and beacons. A beacon is simply a boundary mark; it often consists of

an iron peg driven into the ground, and to make it easier to locate it from a distance and cairn of stones or a concrete cone is often erected over or next to it. It must not be assumed that because a mark is called a beacon it therefore identifies itself. When it is a surveyors beacon and represents an angle on a surveyors plan its identification is simple and ordinarily, certain. But where this is not the case a beacon as such, only proclaims itself as, in all probability, a boundary mark of some property or other. It does not explain which corner of which property it is marking.'

With due respect, I endorse these views and find them apposite in this case.

- [21] In *Van der Merwe v Cloete and Another, 1950 (3) SA 228 (T)*, the plaintiff sold to the defendant a portion measuring 12 morgen of his farm Honingklip Number 179 in the District of Carolina, measuring 1,312 morgen 520 square roods. The 1<sup>st</sup> defendant was entitled to select or choose the required portion anywhere on the farm and cause it to be surveyed or subdivided. An exception was raised or taken that the contract was unenforceable as the land which was the subject matter of the sale was not adequately defined or identified as it had been left to the selection of the 1<sup>st</sup> defendant. Dismissing this exception Murray J at 231-32

‘The only question therefore is whether any different result flows from the formalities for the sale of fixed property prescribed by the statute in question. The general effect of the statute and the decision thereon is of course (as summarized by Tindall JA in *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 996 that all the essential terms of the contract must be in writing, and as the contract must be in writing, the so called parol evidence rule applies to it and evidence of so much of what passed between the parties has formed part of their prior oral agreement is inadmissible... The provision that the contract must be in writing cannot mean that the only evidence by which the property is sold can be identified must be contained in writing, for that is impossible. What the section means, and what according to Watermeyer CJ and Tindall JA what meant by the well known judgment... in *Coronation Syndicate*... was that testimony to prove agreement to prove agreement of the parties as to the identity of the land sold is inadmissible if not embodied in the writing. The object of the legislature...was to provide certainty of what was being bought and sold, thereby preventing litigation and removing the temptation to fraud and perjury. The evidence which is excluded is

not evidence of the parties which merely identifies the fixed property they have bought and sold, but evidence constituting “an attempt to supplement a written description of the property by testimony as to some negotiation or consensus between the parties which is not embodied in the written agreement.”

If that is the effect of the judgment of the Appellant Division in *Estate Du Toit v Coronation Syndicate Ltd* and *Van Wyk v Rottcher’s Saw Mill (Pty) Ltd*, it seems to me that the present exception must fail. For the property sold has been definitely fixed by the agreement of parties expressed in the written document of sale. No further consensus is required from them in that matter to supplement the written description. There can be no dispute, no fraud or perjury in an endeavour to produce certainty as to what was sold. All that remains is a purely unilateral act on the purchaser’s part, which act has no effect in creating certainty as to the subject matter of the sale and showing what the concluded contract covered; his act is concerned solely with the performance of that concluded contract, as finally fixing not what the parties agreed by the written document, but the precise piece of fixed property, transfer of which, in the purchasers

election, is to constitute the sellers due performance of his obligation under the contract...’

In the instant case the applicant having performed his part of the contract, what remains to be done is the application for the subdivision of the property by the 1<sup>st</sup> respondent. He is contractually obliged to do so.

[22] Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have raised the point that the property sold and referred to in the deed of sale is “remainder of Portion 8, a portion of portion 987 whereas the applicant in essence wants performance by respondents in respect of remaining extent of portion 8 of farm 987. These, it is argued, are two different properties. On the face of it, portion 8 of portion 987 is different from portion 8 of farm 987. But, in the circumstances of this case where inter alia, there is no doubt about the exact physical location of the property in question and what its attributes, such as the structures thereon are, and bearing in mind the true intentions of the applicant and the deceased, is this objection legally sound? I do not think so. It is a quibble. It is a legal technicality that if allowed would bring the law and the legal profession into disrepute. This court cannot countenance this. It is the sort of technicality that our Court of Appeal frowned upon in *Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors*,

Appeal Case 23/2006, judgment delivered on 1<sup>st</sup> June 2006. It is a technicality that subverts rather than promotes justice and fairness between litigants. Law and legality are all about that elusive and noble notion or concept called justice. A court of law is there to dispense justice and not to dispense with it in favour of unscrupulous litigants and property dealers.

[23] In the instant case, there was an error in the deed of sale in referring to the property as portion 8 of portion 987 instead of Farm 987. This error was I believe, honestly caused by the deceased as owner of the property and the person who knew its real description. To allow the objection in this circumstances would cause incalculable and unwarranted prejudice to the applicant, who has had to sell her house and refurbish the property in question. On the other hand, to refuse it would cause no prejudice at all to the respondents and would not amount to this court drawing up a new agreement for the parties. (Vide *Regenstein v Brabo Investments (Pty) Ltd*, 1959 (3) SA 176 (A), to which I was referred by Counsel for the Applicant). I would therefore dismiss this objection too. On specific performance in general, [vide *Nonhlanhla Tsabedze v University of Swaziland*, civil case 3432/10 and case cited therein].

[24] For the foregoing reasons, the application succeeds with costs.

**MAMBA J**

For the Applicant : Mr. N.D. Jele

For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents : Mr. S. Dlamini