IN THE COURT OF APPEAL FOR SWAZILAND HELD AT MBABANE

APPEAL CASE NO. 9/93

In the matter between:

THANDIE ELIZABETH MALAZA Appellant

(born NKOSI)

And

MARGARET LONDUMO MALAZA Respondent

(born DLAMINI)

CORAM : MELAMET JP

:KOTZE JA

: BROWDE JA

JUDGMENT BROWDE JA:

This case commenced in the High Court before Dunn J. The notice of motion asked for an order declaring that a partnership existed between the Applicant (the present Respondent) and the late Henry Bhutana Malaza, in equal shares, in respect of a farm in the Hhohho district, and directing the Respondent as the Executrix Dative of Mr

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Malaza's estate to transfer her half share of the farm to her.

The facts briefly stated were as follows:

1. The deceased was married to the Respondent (the present Appellant) , to whom I shall henceforth refer to as "the Appellant", by civil rights in community of property in 1956. One son and three daughters were born of the marriage.

2. In 1972 the deceased began to live with the Applicant (who I shall henceforth refer to as "the Respondent") . The Respondent alleges that she was married to the deceased in 1975, in accordance with Swazi law and custom. In 1986 the farm (Portion 2 of Farm No. 950) was bought in the deceased's name. He and the Respondent moved to live on it, and remained there until his death in 1991. The Respondent still lives there. She contends that although the transaction was undertaken in the deceased's name only, there was a tacit partnership agreement between her and the deceased in regard to the farm, and that in various ways they each contributed equally to the acquisition of the farm, its development and maintenance.

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The Respondent's case as set out in her affidavits (and later confirmed during her evidence viva voce) is that in July of 1990 or thereabouts, because of the deteriorating state of the deceased's health, he and she agreed to subdivide the farm in order to enable him to leave his half share to his four sons, two of whom he had by a third relationship. The Respondent

contends that the remaining portion on which the dwelling house stands, was to be retained by her as her half share interest in the property. To this end, a plan of subdivision was prepared and an application was made during 1990 to the Natural Resources Board for approval of the subdivision. The letter of application dated 1 August 1990 and the plan were annexed to the Respondent's founding affidavit. The letter referred to four sub-divisions each of four hectares. The given reason for the sub-division was that the owner wished to distribute land to his sons. The plan, the significance of which I will return to later in this judgment, shows that the effect of the sub-division was to produce not four smaller lots but five, the latter being referred to as the remaining portion of the farm, and the extent thereof being 5.5830 hectares. This latter portion is the part of the farm claimed by the Respondent as her half share and is also, as I have said, the portion on which the dwelling house stands.

The application was refused by the Board on 7 December 1990 but after the deceased's death, at the instance of both the

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Appellant and the Respondent, an appeal was lodged, which was successful.

The main point in issue before Dunn J, was whether or not there was a tacit partnership between the deceased and the Respondent as the latter contended for. Dunn J was of the view that viva voce evidence was necessary and the matter was accordingly referred to oral evidence on the question of:

1. The Respondent's marriage to the deceased (in the affidavits this is denied).
2. The alleged partnership agreement between the Respondent and the deceased.

In due course, the matter came before the learned Chief Justice, who after hearing the evidence of, inter alia, the Appellant and the Respondent allowed the claim of the Respondent and ordered the Appellant to pay the costs. The order made by Hull CJ was that:

1. A partnership existed between the Respondent and the deceased in equal shares in respect of Portion 2 of Farm No. 950 situate in the Hhohho district, measuring 21.5880 hectares.

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2. Directing the Appellant in her capacity as the Executrix Dative in the estate of the deceased, to take all such steps as may be necessary to give to the Respondent her half share of the aforementioned farm.

Because the matter was sent to evidence by Dunn J, the Appellant waited until the decision of Hull CJ, before noting her appeal against the rulings of Dunn J and Hull CJ. In the circumstances this seems to me to have been a reasonable approach, and therefore, without deciding that this was permissible, and indeed without deciding that Dunn J's order was appealable at all, I think we should consider counsel's argument on the merits of the matter.

The points raised by Mr Shilubane on behalf of the Appellant, may conveniently be summarised as follows:

1. That for the Respondent's claim to half of the farm to be valid she had to have been a signatory to the Deed of Sale, or at least, if it is alleged that the deceased was her agent, he had to have been authorised by her in writing to enter into the agreement on her behalf.

This is because of the provisions of section 31 of Act No. 8 of 1902 (the Transfer Duty Act) which reads:

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"No contract of sale of fixed property shall be of any force or effect unless it is signed by the parties thereto or by their agents duly authorised thereto in writing".

If the question of the validity of the Deed of Sale was in issue, the above would be a relevant consideration. However, in this case, there is no question regarding the validity of the sale. All that is in issue is whether, at the time that he purchased the farm, the deceased had agreed that he and the Respondent would be partners in the farm and the business they intended to carry on in exploiting the farm - and did carry on albeit on a very small scale.

Such an agreement of partnership does not have to be in writing and provided she proved the tacit agreement alleged the Respondent would be entitled to her due share in the assets of the partnership, namely the farm which was admittedly registered in the name of the deceased.

As far as the onus of proof is concerned, Mr Shilubane has conceded, rightly in my view, that all that is required and the true enquiry is simply whether it is more probable than not that a tacit agreement had been reached. In this regard see Muhlmann v Muhlmann 1984 (3) SA 102 (A) at 124C and Charles Velkes Mail Order 1973 (Pty) Ltd v Commissioner for Inland Revenue 1987 (3) SA 345 (A) at 357H. In the latter case the learned judge in talking about the question of

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inferences to be drawn from the facts in relation to a tacit agreement says the following:

"It would be apparent that the main thrust of the argument was that a tacit agreement (in respect of each catalogue) was concluded. This, on one of the recognised tests, is established where, by a process of inference, it is found that the most plausible conclusion from all the relevant proved facts and circumstances is that a contract came into existence ... ".

Thereafter the learned judge refers to several authorities including that of Muhlmann v Muhlmann to which I have already referred. I will return to the evidence regarding the partnership later in this judgment.

The next point raised by Mr Shilubane is that the deceased and the Respondent's relationship was bigamous having regard to the fact that the Appellant was married according to the Civil Law in 1956 and while that marriage still subsisted, and to their knowledge the deceased and the Respondent entered into a customary union.

Accordingly, so the submission went, the second marriage was bigamous and contra bonos mores and no action could be entertained which arose from that relationship. In this regard Mr Shilubane relied on the judgment in Khoza v Sedibe 1963-1969 SLR 413 and submitted that that case decided, on similar facts, that ex turpi causa non oritur actio. There

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seems to me to be a simple answer to this submission. In Khoza's case the Plaintiff's cause of action that the alleged partnership arose because of a putative marriage (see p. 416) and that the parties knew their union was a bigamous one, the Plaintiff could not rely on it to give rise to the cause of action, namely the alleged partnership.

In the High Court Elyon J in dismissing the appeal said that since the alleged partnership was founded on an immoral agreement (namely the illicit union) no redress could be granted (pp. 421-422).

This immediately points to the essential difference between the two cases. In the instant case the partnership is alleged to have come about as a result of an agreement dehors the

allegedly bigamous union - it was an agreement between two people (who happened to be living together) to buy the farm in partnership. The Respondent paid the deposit (for which she received a receipt made out to her) and thereafter the deceased and the Respondent shared the outlay involved in improving the property.

The Respondent said in evidence that she paid "a higher percent" than the deceased. No reliance was placed on their so called union, only a tacit agreement to share the farm in partnership. In view of this I do not believe it is necessary to decide whether or not the "marriage" between the

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deceased and the Respondent was a putative marriage or a bigamous one. It just plays no part in the issues as I see them.

The next point raised by Mr Shilubane was that absolution from the instance should have been ordered by Hull CJ since the Respondent did not prove the value of the property. He relied on a footnote at page 103 of Bamford' s work on The Law of Partnership and Voluntary Association in South Africa (3rd Ed.) . Apart from the fact that this appears to be contrary to the judgment in Fink v Fink & Another 1945 WLD 226. I see no relevance in this submission to the facts of this case. The Respondent's evidence was to the general effect that the shares in the farm, (that is the portions to which each of the partners would be entitled) was decided between them and that the deceased' s share consisted of the four portions for his sons and the Respondent's the remaining one portion on which she lived with the deceased during the latter's lifetime. That this was the arrangement appears to have been acknowledged by the Appellant who collaborated with the Respondent in the appeal to the Natural Resources Board. In the circumstances, I am of the opinion that the value of the farm or for that matter that of the portion claimed by the Respondent is not relevant to the issues between the parties.

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Mr Shilubane also submitted that because the deceased was married to her in community of property she was entitled to half of the farm irrespective of whether or not there was a partnership between the Respondent and the deceased. I believe this submission to be fallacious. All that the Appellant is entitled to is half of the deceased's share in the farm. If the deceased agreed to take as his share the four portions intended for his sons then those are the portions in which the Appellant may be entitled to share. There was nothing in my view in the circumstances of this case which in law would have prevented the deceased as the administrator of the joint estate between him and the Appellant from agreeing to the division of the farm in the manner deposed to by the Respondent.

There remains only the question of whether the tacit agreement contended for by the Respondent was proved. There is no doubt substance in Mr Shilubane's submission that the evidence tendered was not in all respects consistent with the claims made by the Respondent. Approaching the matter, however, in accordance with the enquiry referred to in Muhlmann' s case it seems to me that the following can be fairly said and was submitted by Mr Flynn who appeared for the Respondent:

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"There is clear evidence establishing a pattern of contribution and involvement by the Respondent right from the outset in the enterprise"

i.e. the proposal by the Respondent and the deceased to purchase the property.

The Respondent was involved in the negotiations in the selection of the property. She was also closely involved in the financial arrangements for the payment for and development of

the property - that she raised loans for the project could not be and was not denied; also that rentals she received from what was referred to as her Golf Course property were employed in developing the farm.

In my judgment Hull CJ was fully justified in arriving at the conclusion he did on the evidence namely that on a balance of probabilities the agreement of partnership - the tacit agreement contended for by the Respondent - was proved by the Respondent.

In the circumstances I do not think it is necessary to deal with exactly what happened at the family meeting - suffice it to say that it seems to me that the probable intention of the

deceased was to divide up the farm so as to avoid a family dispute by taking as his share the four portions designated in the plan for his sons and by agreeing that the remaining portion would represent the Respondent's share arising from the partnership.

In the result I am of the view that the appeal should be dismissed with costs.

BROWDE A

I agree

MELAMET JP

I agree

KOTZE JA