



**IN THE SUPREME COURT OF SWAZILAND**

**CIVIL APPEAL NO.31/05**

**In the matter**

**MONICA MATTHEWS N.O.**

**1<sup>ST</sup> APPELLANT**

**PIUS CLARENCE HENWOOD N.O.**

**2<sup>ND</sup> APPELLANT**

**AND**

**AMOS VELEM KUNENE DAVID**

**1<sup>ST</sup> RESPONDENT**

**MASAKENI KUNENE**

**2<sup>ND</sup> RESPONDENT**

**CORAM : STEYN JA**

**ZIETSMAN JA**

**RAMODIBEDI JA**

**HEARD : 4 MAY 2007**

**DELIVERED: 8 MAY 2007**

## SUMMARY

*Administration of deceased's estate - Administration of Estates Act No. 28 1902 - Section 51 thereof obliges the Master to examine and approve every Executor's account - The fact that the Executor may not have passed on payment of the purchase price to the beneficiaries (the appellants) cannot affect the validity of the sale) - Appeal dismissed with costs.*

## **JUDGMENT**

### **RAMODIBEDI JA**

[1] In essence the point of dispute in this appeal revolves principally around the question whether or not payment was effected in the sale of a certain property described as Farm 382 situated in Shiselweni District, Swaziland, measuring 422,3346 hectares. The deed of sale dated 22 February 1987 (annexure "AVK1") reflects that the sale was between the Estate Late Richard Clarence Henwood (represented by Eric Martin

one hand and the respondents as "the purchaser" on the other hand.

These proceedings commenced in the High Court on notice of motion in terms of which the respondents sought the following relief against

*"1. Directing the First and Second Respondents jointly, and/or the Third and/or Fourth Respondents to comply with all requirements necessary to pass transfer of the property the description whereof is **FARM 382 SITUATE IN SHISELWENI DISTRICT, SWAZILAND; MEASURING: 422,2346 (FOUR TWO TWO COMMA TWO THREE FOUR SIX) Hectares; hereafter referred to as the property from Estate Late RICHARD CLARENCE HENWOOD Number E2707/7S into Applicants' ownership title.***

*2. Directing and/or authorising the Third Respondent to sign all documents necessary to give effect to the transfer of the property into Applicants' joint ownership title.*

3. *Directing and authorising the Fourth Respondent to i and/or remove the caveat lodged with his office preven transfer of the property.*
  
4. *Directing and authorising the Sheriff of this Honourabe Court to take such steps on behalf of the Respondents and i sign all necessary documents including a Power of Attorney should the Respondents for any reason fail to comply with an Order in terms of the preceding prayers hereto.*
  
5. *Directing that the First and Second Respondents to pay the costs of this application, jointly and severally, and the Third, Fourth and Fifth Respondents to pay only in the event of unsuccessful opposition hereto.*
  
6. *Granting Applicant such further and/or alternative relief as to this Court may seem meet. "*

After hearing submissions, the High Court granted the orders sought in terms of prayers 1 to 5 of the notice of motion. The appellants are aggrieved by these orders and have thus

[4] At the outset, it is pertinent to observe that the appel made no attempt to reply factually and issuably to material allegations contained in the founding affidavit Amos Veleni Kunene (the first respondent) as ful highlighted in the course of this judgment. In such i situation the inference is inescapable in my view that they did not challenge the factual allegations because they could not do so.

[5] Briefly stated, the respondents' case as foreshadowed in the first respondent's founding affidavit is the following. As indicated above, on 22 February 1987, the respondents entered into a written agreement ("the agreement") of sale of

[6] In terms of the agreement, the Executor sold the proper the respondents. The price was fixed at E16 500.00 pay; as follows:-

7. A sum of E7 000.00 in cash.
8. Two equal instalments of E4 750.00 each making up the balance.

[7] It was specifically agreed that payment would be effected at the Executor's offices and that thereafter transfer of the property would be passed by the Executor's conveyancers.

[8] It is the respondents' version that they fulfilled their obligations in terms of the agreement by paying the full purchase price to the Executor "through his legal practice." They allege, however, that they have only been able to locate

search for the receipts which "may have been lost or m over passage of time".

[9] Pausing there for a moment, I observe that the responded allegation that the Executor passed away while he was in th process of effecting transfer of the property to them has not been denied in the papers. And so is their allegation that the Executor had been removed from the roll of attorneys. The respondents submit, therefore, that they could not have anticipated that the Executor would meet these misfortunes before effecting transfer. Suffice it to say that after the Executor's death, the Law Society of Swaziland duly appointed Mr. Welile Mabuza as curator in the winding up of the Executor's legal practice.

respondent by attorneys acting on behalf of one or more of the beneficiaries to the estate.

The main bedrock of the respondents' case is, in my view, contained in paragraph 9 of the first respondent's founding affidavit. Therein he makes the following crucial averments :-

*"9.1 It is my respectful submission that in fulfillment of our obligations in terms of the Agreement, we (myself and the Second Applicant) made full payment of the purchase price to the said **ERIC MARTIN CARLSTON** through his legal practice. I wish to refer this Honourable Court to copies of receipts in proof of such payment which I have managed to locate, annexed hereto and marked "AVK2".*

*9.2 I have not managed to locate the rest of the receipts as they may have been lost or mislaid over passage of time notwithstanding my conduct of a diligent search therefor.*



*/ could not have anticipated at the time that Carlston's practice would cease prior to fulfillment c transaction nor that he would himself thereafter j away. Hence I pray for condonation for my failure to annex h Confirmatory affidavit.*

*3 I nonetheless hereby refer this Honourable Court to annexure "AVK3" in proof of our compliance with Clause 2 of "A VK1" in payment of the purchase price. In the annexure referred to, the said person in his capacity as the Executor Dative had acknowledged his receipt of and accounted for the said purchase price to the Third Respondent in his Liquidation and Distribution account.*

*t It is my respectful submission that the Third Respondent only approves all accounts lodged therewith upon his satisfaction, **inter alia**, that all monies received over sale of estate assets have been fully accounted for. And that accordingly, he could only have authorised the Fourth Respondent (in accordance with "AVK4) to effect transfer of the property upon ascertaining that the sale had been transacted in full. "*

As indicated previously, these allegations are not disputed and must therefore be accepted as correct on the authority **PLASCON-EVANS PAINTS LTD V VAN RIEBEC1 PAINTS (PTY) LTD 1984(3) SA 623 (A)** at 634E - 635C.

[12] The liquidation account, annexure "AVK3", admittedly prepared by the Executor shows that the property was indeed sold to the respondents for the sum of E16 500.00. The distribution account in turn shows that the appellants and the other beneficiaries were awarded their respective shares of the sum of E8 503.22 each. It is not disputed for that matter that the liquidation and distribution account in question was open for inspection prior to its approval by the Master of

[13] It is equally significant to note that the Master of the 1 Court duly made written confirmation, annexure "AVK that the property was indeed sold with his consent. In tl regard the

*"66. If the Master, after due enquiry is of opinion that it would be to the advantage of persons interested in an estate to sell any property belonging to such estate out of hand instead of by public auction he may grant the necessary authority to the executor to do so if no provision has been made in the deceased's will to the contrary. "* (Emphasis added.)

[14] In terms of section 51 of the Act, the Master is obliged to examine and approve every executor's account lodged with him. Now, following the presumption of regularity, *omnia praesumuntur rite esse acta*, the Master could only have approved the liquidation and distribution account as well as confirming the sale in question after he had

Factually, this proposition has not been challenge highlighted in paragraph [11] above.

[15] In these circumstances it is no wonder, therefore, that t appellants have not seriously disputed payment in the. answering affidavits. They have merely contended themselves with the fact that the respondents were unable to produce all the receipts in the matter. Such failure on the respondents' part, however, was in my view reasonably explained as fully set out in paragraph [8] above. Moreover, there are other factors which would seem to make it highly unlikely, on the probabilities, that the respondents did not make payment in full. These are:-

(1) The respondents have been in

- (2) During all that long period of time the appellants have never sued the respondents for , outstanding balance of the purchase price.

[16] As indicated previously, the issue of payment is central to this case. As such it disposes of the matter. The fact that the Executor might not have passed on payment to the appellants and the other beneficiaries cannot affect the validity of the sale in question. It is as such irrelevant for the purposes of this case. And so is the appellants' contention that the property was undervalued. In any event there was a sworn appraisal, annexure "AVK6", which confirmed that the property was valued at E16,500.00. In these circumstances the respondents discharged their obligation in terms of the deed of sale,

[17] It follows from the foregoing that, as a matter of overwhelming probability, the respondents duly made payment in full. For these reasons the appeal cannot succeed. It is accordingly dismissed with costs including the costs of counsel. These are to be paid jointly and severally, the one paying the other to be

  
M.M. RAMODIBEDI  
JUDGE OF APPEAL

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J.H. STEYN  
JUDGE OF APPEAL

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N.W. ZIETSMAN  
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