IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

CASE NO: A716/2012

DATE: 23/5/2014

IN THE MATTER BETWEEN

YONDA INVESTMENTS CC (Registration number: 2001/070192/23)	APPELLANT
AND	
FRIEDRICH ROHR	1ST RESPONDENT
ANNA ELIZABETH ROHR	2ND RESPONDENT

JUDGMENT

MAKGOBA, J

[1] This is an appeal against the whole of the judgment and order of a single judge (Baqwa J), which judgment was delivered on 25 June 2012, dismissing the appellant's claim with costs.

[2] The appellant (plaintiff **a quo**) instituted action against the first and second respondents wherein it claimed specific performance in terms of a Deed of Sale concluded between the appellant and the first respondent dated 25 June 2006. The property that was sold in terms of the Deed of Sale was known as Residential Unit number 11 in the sectional title scheme known as Wild Fig ("the property"). The purchase price amounted to R475 000,00 of which the purchasers were to pay a deposit of R5 000,00.

After summons was issued the appellant accepted the respondent's repudiation of the Deed of Sale and sold the property to a third party for an amount of R425 000,00. The appellant then amended its cause of action to claim payment of R45 000,00 in damages calculated as the lesser purchase price obtained for the property, R39 900,00 in damages calculated as occupational rent for the months of December 2008 to November 2009 and R4 258,80 in damages calculated as levies for the months December 2008 to November 2009. The total claim is therefore one for payment of an amount of R89 158,80.

[3] The court **a quo** in dismissing the appellant's claim found that the appellant failed to prove that a binding and enforceable agreement was entered into and also failed to prove the **quantum** of the alleged damages.

[4] The parties to this appeal are **ad idem** that for the appellant to succeed in the appeal and for the judgment of the trial court to be reversed, all of the following aspects need determination in favour of the appellant:

4.1 Could the appellant sell the immovable property at the time the Deed of Sale was entered into on 25 June 2006?

4.2 Did the appellant prove that Ms Tania Erasmus who signed the purported Deed of Sale on behalf of appellant as seller, did have written authority to sell the immovable property at the time the Deed of Sale was signed on 25 June 2006?

4.3 Was the purported Deed of Sale signed on 25 June 2006 invalid by virtue of the provisions of section 15(1) and (2) of the Matrimonial Property Act 88 of 1984?

4.4 Did the appellant prove the **quantum** of its damages?

[5] The following facts are common cause or have not been disputed at the trial:

(a) On 25 June 2006 the appellant, a close corporation and represented by its employee, one Tania Erasmus, entered into a written agreement of sale of the property with the first respondent for the sum of R475 000,00.

(b) At the time of signing the Deed of Sale on 25 June 2006 the appellant was not yet the registered owner of the land or the property to be sold. The appellant became the registered owner of the property on 25 July 2006.

(c) Ms Tania Erasmus who signed the Deed of Sale on behalf of the appellant did not have and could not produce any written authority by the appellant to sell the property on its behalf or sign the Deed of Sale on its behalf.

(d) The first respondent was married in community of property to the second respondent. At the time of signing the Deed of Sale on 25 June 2006 the first respondent did not have the consent of the second respondent to purchase the property. The second respondent also did not sign the Deed of Sale.

(e) Tania Erasmus was a friend of the respondents and knew for the last four years that the parties were married in community of property.

[6] I proceed to deal, **ad seriatim,** with the issues raised in the determination of this appeal.

Could the appellant sell the immovable property at the time the Deed of Sale was entered into on 25 June 2006?

[7] The appellant contends that there was a valid contract of sale despite the appellant not being the owner of the property. In this regard counsel for the appellant relied on **Wessels: The Law of Contract in South Africa**, **par 3400 at page 977:**

"*According to our law, a person can sell the property of another, whether it be land or movables, and if the vendor fails to carry out his contract, he*

is liable in damages as if the property which he offered to sell were his own."

[8] On the other hand the respondents contend that there is no valid agreement of sale. Reference was made to the case of **Kleynhans Bros v Wessels Trustee 1927 AD 271 at 290** where the following was said:

"*No doubt one person may sell the property of another but, as the contract of sale is a* **contractus bona fide**, *the seller warrants the absence of* **dolus** *in every case. And where a person knowingly sells the property of another as his own without the owner's consent, he commits a fraud upon the buyer and cannot found on his own fraudulent conduct.*"

In this case fraud is defined in a narrower sense as "*a false statement made with knowledge of its falsehood for the purpose of inducing the other party to enter into a contract*". It gives as one of the examples of fraud the case of a seller holding himself out as the owner of the property when it is not his. **In casu** the appellant no doubt knew that it was not yet the owner of the property but purported to sell the property to the first respondent.

[9] In the case of **Peter Flaman & Co v Kokstad Municipality 1919 AD 427 at 434** Solomon ACJ said:

"*By civil law a contract is void if at the time of its inception its performance is impossible:* **impossibilium nulla obligatio**. *So also where*

a contract has become impossible of performance after it had been entered into the general rule was that the position is then the same as if it had been impossible from the beginning."

In casu the appellant only became the owner of the property upon registration of Deed of Transfer no T91415/2006 on 25 July 2006 a month after the Deed of Sale was entered into on 25 June 2006. It is trite that ownership of land may only be transferred from one owner to another by a deed of transfer executed and attested by the Registrar of Deeds.

[10] No evidence was produced at the trial to the effect that the erstwhile owner of the immovable property gave authority to the appellant or Ms Tania Erasmus to proceed with the sale of a part of the immovable property prior to the transfer or ownership thereof to the appellant on 25 July 2006.

The learned judge **a quo** therefore correctly found that prior to 25 July 2006 the plaintiff close corporation could simply not sell the property referred to in the Deed of Sale as it was not the owner thereof. Any attempted representation that the appellant was the owner of the property was simply incorrect and consisted of a misrepresentation as shown in the case of **Kleynhans Bros, supra**.

Did the appellant prove that Ms Tania Erasmus who signed the purported Deed of Sale on behalf of the appellant as seller, did have written authority to sell the immovable property at the time the Deed of Sale was signed on 25 June 2006?

[11] Section 2 of the Alienation of Land Act 68 of 1981 provides that no alienation of land (including a unit in a sectional title scheme) shall be of any force and effect if not contained in a written deed of alienation signed by the parties thereto or by their agents acting on their written authority.

In casu the Deed of Sale was clearly not signed by the appellant's sole member and only authorised representative to sign a contract of sale of land on behalf of the close corporation, Mr Den Dunnen. It is common cause that the Deed of Sale was signed by Ms Tania Erasmus on behalf of the appellant.

[12] A member of a close corporation need not have written authority to enter into a contract for the sale of land. But when a member authorises a third person to enter into a contract for the sale of land, the authorisation must be in writing. See: **Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and another 2010 3 SA 630 (SCA) par [25] at 640E**.

[13] It is common cause that Ms Tania Erasmus is not a member of the appellant. Therefore she required express written authority of the appellant to sign the Deed of Sale. On the facts of this case she did not have such express written authority. The appellant contends that the written authority need not appear from a separate document but can be read or gleaned from the written agreement itself. In the written agreement **in casu** the name of Tania Erasmus was added by herself in

handwritten form in the blank space purporting to show that she was duly authorised.

[14] In my view such purported authorisation cannot be sufficient to constitute a written authority emanating from a principal. The reason being that the objective of the requirement of written authority is to minimise risk of subsequent disputes concerning the authority of the agent who signed having the extra degree of certainty which a written document affords. If the parties to the agreement did not themselves sign the agreement, there should be no doubt as to the authority of the agent who signed on their behalf.

[15] The requirement of the phrase in the Alienation of Land Act "*their written authority*" is that the grant of the authority must be in writing and the writing must be authenticated as that of the authorising principal, even when concise phrases like the contents of a telegram or even an sms is used because the identity of the sender is determinable. See: **Hugo v Gross 1989 1 SA 154 (C)**.

[16] Counsel for the appellant put much reliance on the case of **Van der Merwe v DSSM Boerdery Bk 1991 2 SA 320 (T)** to drive home the point that the written authority need not be contained in a separate document but can be gleaned from the Deed of Sale itself. In this case an estate agent who was present when the contract of sale of a farm was signed filled in the particulars of the parties on the printed offer to purchase. Above the words "*the seller*" the estate agent had filled

in the applicant's (Van der Merwe's) name followed by the words "*acting on behalf of T K van der Merwe (applicant's wife) in the sale of the undermentioned property*". The applicant's wife was present. The question that arose was whether the inclusion of these words in the Deed of Sale constituted written authority for purposes of section 2(1) of the Alienation of Land Act. The court (Schabort J) was of the opinion that the evidence showed that the abovementioned words were intended to be the seller's authorisation to her husband and that, although it was an unconventional place and manner in which the estate agent had documented such written authority, the courts had to bear in mind that formalism and comprehensiveness were often to be sacrificed in the heat of business transactions. The court accordingly held that the authorisation complied with the formal requirements of section 2 of the Act and that the contract was valid.

[17] With respect, the judgment in the abovementioned case cannot be sound. It is a judgment of a single judge and we, sitting as a Full Bench, are not necessarily bound by such judgment more so when we are of the view that the judgment is clearly wrong. The judgment does not take into consideration the fact that the statute specifically requires "*written*" authority and clearly states this as a requirement. The court compromised the strict requirement of the Act on the ground that "*formalism and comprehensiveness were often sacrificed in the heat of business transactions*". This is clearly wrong.

[18] In any event the facts of this judgment are clearly distinguishable for the following reasons:

18.1 The applicant in the case (Van der Merwe) and his wife who provided him with authorisation were both present when the agreement was signed;

18.2 The applicant's wife was present sitting next to the applicant when he, the applicant, explained verbally in the presence of his wife that she gave him authorisation and she did not interrupt to deny this statement;

18.3 The action of the applicant's wife of not disputing the explanation by the applicant that he was authorised by his wife clearly left the impression that she confirms the authority.

[19] **In casu** there exists no evidence whatsoever that the appellant's sole member, Mr Den Dunnen, provided any authority, let alone in writing, to Ms Tania Erasmus to act on behalf of the appellant in the sale of the property. The evidence of Tania Erasmus confirms that she did not receive any instruction in this regard.

[20] In the absence of written authority given by the appellant's sole member, Mr Den Dunnen, which is common cause, the Deed of Sale signed by the third party, Ms Erasmus, is thus invalid. The court **a quo**'s finding in this regard cannot be faulted.

Was the purported Deed of Sale signed on 25 June 2006 invalid by virtue of the provisions of section 15(1) and (2) of the Matrimonial Property Act 88 of 1984?

[21] The relevant provisions of section 15 of the Matrimonial Property Act read as follows:

"*(1) Subject to the provisions of subsections (2), (3) and (7) a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.*

(2) Such spouse shall not without the written consent of the other spouse –

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act 68 of 1981), and to which the provisions of that Act apply;

(h) bind himself as surety.

(3) ...

(4) ...

(5) ...

(6) The provisions of paragraphs (b), (c), (f), (g) and (h) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.

(7) ...

(8) ...

(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16(2), and –

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be."

[22] It is common cause that the first respondent and second respondent were married in community of property, a fact which Ms Tania Erasmus as a friend was aware of. On the evidence before the court **a quo** the first respondent did not obtain the consent of the second respondent when he signed the Deed of Sale. The appellant specifically stated in its amended particulars of claim that the second respondent consented in writing to the conclusion of the agreement. This is incorrect in the light of the evidence on record.

[23] Furthermore the appellant specifically stated in the alternative in its amended particulars of claim that in the event that it is found that the second respondent did not consent in writing to the conclusion of the agreement (as is common cause) at the time of the signature of the agreement, the appellant did not know and could not reasonably have known that the agreement was being entered into by the first respondent without the written consent of the second respondent – section 15(9)(a) of the Matrimonial Property Act. This averment is denied by the respondents in their plea and the appellant was put to the proof thereof.

[24] It is clear from the evidence produced at the trial that the appellant's employee, Ms Tania Erasmus, in completing the Deed of Sale was well aware that the respondents were married and had been aware of this fact for about four years by 25 June 2006 as a result of the existing friendship. It was incumbent upon Ms Erasmus to have made an inquiry as to the marital regime of the respondents especially when it relates to the contract of the purchase of immovable property. In **Visser v Hull and Others 2010 1 SA 521 (WCC)** it was held that a third party was required to take steps to establish whether the contracting spouse had obtained the consent of the non-contracting spouse. See also **Bopape and another v Moloto 2000 1 SA 383 (T); [1999] 4 All SA 277**.

[25] The appellant contends further that the written permission of the second respondent was not required as contemplated in section 15(2) of the Act in that

when concluding the Deed of Sale the first respondent did so in the ordinary course of his profession, trade or business - section 15(6) of the Act. In this regard appellant's counsel referred to the case of **Strydom v Engen Petroleum Ltd 2013 2 SA 187 (SCA) par [13]**.

[26] The appellant's contention or argument is misplaced. It is clear from the evidence on record that the first respondent is a salaried employee of the National Parks Board. He wanted to acquire the property for residential purposes upon his retirement. It cannot be said that the property would have been acquired in the ordinary course of his profession, trade or business.

[27] The court **a quo** correctly found that the purported Deed of Sale signed on 25 June 2006 was invalid by virtue of the provisions of section 15(1) and (2) of the Matrimonial Property Act 88 of 1984.

[28] Having decided and/or answered the first three questions in this appeal against the appellant, I do not deem it necessary to decide or answer the fourth and last question relating to proof of the **quantum** of damages. Once it has been found that the Deed of Sale is invalid and unenforceable the question of damages does not arise.

[29] The appeal is accordingly dismissed with costs.

E M MAKGOBA
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A716-2012

I agree

W HUGHES
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

S STRAUSS
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 14 MAY 2014
DELIVERED ON: MAY 2014

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