THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 518/2019

In the matter between:

MAFEMANI COLLET VUKEYA **APPELLANT**

and

SHALATE NELLY NTSHANE **FIRST RESPONDENT**

REGISTRAR OF DEEDS, JOHANNESBURG **SECOND RESPONDENT**

MARINGA ATTORNEYS & CONVEYANCERS **THIRD RESPONDENT**

Neutral citation: *Vukeya v Ntshane and Others* (Case no. 518/2019) [2020] ZASCA 167 (11 December 2020)

Coram: MAYA P, DAMBUZA, MOCUMIE and PLASKET JJA and GOOSEN AJA

Heard: 20 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 11 December 2020.

Summary: Matrimonial Property Act 88 of 1984 – ss 15(2)*(a)* and 15(9)*(a)* – spouses married in community of property – sale and registration of immovable property sold by one spouse without the consent of the other spouse – the non-contracting spouse deemed to have consented to the sale because the third party did not know and could

not reasonably have known that the first respondent's consent was lacking – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Rome AJ sitting as a court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs.'

JUDGMENT

Mocumie JA (Maya P, Dambuza and Plasket JJA and Goosen AJA concurring)

[1] This is an appeal against the judgment of Rome AJ of the Gauteng Division of the High Court, Johannesburg (high court) which granted the following order against the appellant:

'1 That the deed of transfer dated 19 May 2009 and having registration number 015157/09 in respect of the property described therein as Erf 12103 Diepkloof Township Registration Division IQ be and is hereby cancelled.

2 The second respondent is directed to give effect to the cancellation of the above deed of transfer in records of the Deeds Registry Office, Johannesburg.

3 The first respondent is to pay the costs of the application.'

The appeal is with the leave of the high court.

[2] The appellant also filed an application to adduce new evidence. The application was not opposed. At the hearing of the appeal counsel for the appellant, correctly so, abandoned the application because it was not necessary as the evidence sought to be adduced was not new but a clarification and expansion of the answering affidavit.

[3] The factual background is as gleaned from the admitted or undenied facts in the founding affidavit of the first respondent, Mrs Shalate Nelly Ntshane. The first respondent and Mr Wilson Mkhatshane Ntshane (the deceased) were married in community of property on 13 May 1980. They lived together with their children in a residential property situated at Erf 12103 Diepkloof, Soweto (the property) until the children became majors and left their home. Due to old age, the first respondent moved to Potgietersrus in Limpopo. The deceased remained behind on the property with one of the children who later left the deceased to reside alone. In July 2013 the deceased became gravely sick and passed away on 27 July 2013. On 8 September 2013, the first respondent was appointed by the Master of the High Court as the executrix of the deceased estate. Then, she became aware of the sale of the property by the deceased to the appellant on 5 April 2009 without her knowledge or consent as required by s 15(2)(*a*) of the Matrimonial Property Act 88 of 1984 (the MPA).

[4] Consequent to that, and some four years after her appointment as executrix, the first respondent instituted proceedings against the appellant in the high court seeking the relief set out in para 1 of this judgment. In his answering affidavit, the appellant stated in para 4 thereof:

'At the time I purchased the property from the deceased/seller, he was staying alone in the said property and he also confirmed to me that he was not married. He signed the deed of sale and also the transfer documents alone as unmarried.'

The appellant also annexed to his answering affidavit, a copy of the deed of transfer/ title deed no: T66466/2000 describing the deceased as unmarried and as the sole registered owner of the property, as well as a copy of the power of attorney to effect the transfer to him describing the deceased as unmarried. He furthermore, averred that he purchased the property bona fide as he had no knowledge that the deceased was married to the first respondent at the time of the sale and transfer of the property to him by the deceased.

[5] Before the high court, the first respondent contended that until her appointment as executrix of the deceased's estate she was not aware that the property had been sold to the appellant. She asserted that the appellant was duty bound to have reasonably made enquiries as provided in s 15 of the MPA to establish whether the deceased was married, if so, in terms of which marital regime, and if it was in

community of property, whether she had consented to the sale and transfer of the property.

[6] Despite the appellant's assertion that he did not know that the deceased was married and that the deceased had not sought the first respondent's consent to sell the property, the high court found in favour of the first respondent. It found that the mere registration of a deed of transfer did not itself pass dominion unless there was a real agreement, that is, an intention on the part of the transferor to divest himself of ownership and an intention on the part of the transferee to acquire ownership. With regard to the meaning of 'owner', the high court had regard to s 102 of the Deeds Registries Act 47 of 1937, which states that in relation to immovable property 'owner' means the person registered as the owner or holder thereof. The high court found that 'owner' does not necessarily mean that the person who was registered as the owner in the Deeds Office was in fact the legal owner and that such interpretation of 'owner' was consistent with the abstract theory of property.

[7] The high court concluded that, in the circumstances, the real agreement was defective as in the absence of the consent of the first respondent, as co-owner, the deceased could not have formed the requisite intention in the real agreement to transfer the property to the appellant. On that basis, the transfer of property was null and void. Two observations are apposite at this stage. First, the application of s 15(9)*(a)* of the MPA was not considered at all by the high court. Secondly, if the approach taken by the high court is correct, s 15(9)*(a)* would be rendered purposeless.

[8] Section 15 of the MPA, in particular s 15(9)*(a),* is at the centre of the determination of this appeal. The relevant parts of the section provide:

'(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 a spouse shall not without the written consent of the other spouse–

(a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;

(b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;

(3) A spouse shall not without the consent of the other spouse –

(a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;

. . .

(c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection.

. . .

(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;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.'

[9] The issue for determination in this appeal is straightforward. Because it is not in dispute that the first respondent never gave her consent to the sale, the issue is whether the appellant has brought himself within the protection afforded to third party purchasers by s 15(9)*(a)*. If he has not, the sale is a nullity for want of the first respondent's consent. If he has, the first respondent is deemed to have consented to the sale and is valid.

[10] Recently, this Court in *Marais NO and Another v Maposa and Others*,[1] was seized with deciding on the consequences of the failure to acquire consent in terms of s 15(3) of the MPA. In this regard this Court stated as follows:

'[26] The effect of s 15 may be summarized as follows. First, as a general rule, a spouse married in community of property "may perform any juristic act in connection with the joint estate without the consent of the other spouse". Secondly, there are exceptions to the general rule. In terms of ss 15(2) and (3), a spouse "shall not" enter into any of the transactions listed in these subsections without the consent of the other spouse. Subject to what is said about the effect of s 15(9)(a), if a spouse does so, the transaction is unlawful, and is void and unenforceable. This, it seems to me, flows from what Innes CJ, in *Schierhout v Minister of Justice*, called a "fundamental principle of our law", namely, that "a thing done contrary to the direct prohibition of the law is void and of no effect". Thirdly, if a listed transaction is entered into without the consent of the non-contracting spouse, that transaction will nonetheless be valid and enforceable if the third party did not know and could not reasonably have known of the lack of consent. While the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, the "deemed consent" provision in s 15(9)*(a)* is intended to protect the interests of a bona fide third party who contracts with that spouse.

[27] Section 15 thus seeks to strike a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other. Whether the legislature has struck an appropriate balance has been fiercely debated by academic writers, but is an issue that does not have to be engaged with in this judgment. In *Sishuba v Skweyiya and Another* the context in which s 15 and s 15 (9)*(a)* in particular, is to be interpreted was set out as follows:

"These provisions seek to regulate marriages in community of property after the abolition of marital power. They must be interpreted and applied within this context – one in which "the restrictions which the marital power places on the capacity of a wife to contract and to litigate" have been abolished; in which "a wife in a marriage in community of property has the same powers with regard to the disposal of the assets of the joint estate, the contracting of debts that lie against the joint estate, and the management of the joint estate as those which a husband in such a marriage had immediately before the commencement of this Act"; and in which proper effect must be given to the fundamental right of everyone to equality before the law and the equal protection and benefit of the law."

[28] A third party to a transaction contemplated by ss 15(2) or (3) that is entered into without the consent of the non-contracting spouse is required, in order for consent to be deemed and for the transaction to be enforceable, to establish two things: first, that he or she did not know

[1] *Marais NO and Another v Maposa and Others* [2020] ZASCA 23; 2020 (5) SA 111 (SCA).

that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given. In terms of the general principle that the party who asserts a particular state of affairs is generally required to prove it, the burden of bringing s 15(9)*(a)* into play rests on the party seeking to rely on the validity of the transaction.

[29] The reference to reasonableness in the phrase "cannot reasonably know" imports an objective standard into the proof of this element: it must be established with reference to the standard of the reasonable person, in terms of what the reasonable person would do in the circumstances and the conclusion that the reasonable person would draw.

[30] In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries. Van Heerden, Cockrell and Keightley say:

"Lack of actual knowledge on the part of the third party is a straightforward enough stipulation and capable of determination. But "cannot reasonably know" is more problematic. It must imply that the third party is under some sort of obligation to enquire about the status of the person with whom he or she is contracting. The third party is called upon, it is submitted, to take reasonable steps to ascertain whether the person with whom he or she is dealing is married and, if so, whether they have obtained whatever consent may be necessary for the particular transaction."

The authors make the point that the third party may not do nothing, because then s 15(9)*(a)* would be meaningless. To put it at its lowest, the third party is "put on enquiry".

[31] The views of the academic writers are in harmony with the views expressed in various high court judgments. For instance, in *Visser v Hull and Others*, Dlodlo J, after referring to the views of Steyn, held:

"I agree with Professor Steyn that a third party is expected to do more than rely upon a bold assurance by another party regarding his or her marital status. An adequate inquiry by the third party is required. If this proposition and interpretation of the liability of third parties is accepted, then it could be argued that the third parties in the case under consideration should have made the necessary inquiries into the current state of the applicant and the deceased's marital status."

The same conclusion was reached in *Sishuba v Skweyiya and Another*, with reference to the views of Van Heerden, Cockrell and Keightley replicated in para [30] above.

[32] I endorse the views expressed in the cases to which I have referred, as well as the views of the academic writers upon which they are based: a duty is cast on a party seeking to rely on the deemed consent provision of s 15(9)*(a)* to make the enquiries that a reasonable person would make in the circumstances as to whether the other contracting party is married, if so, in terms of which marriage regime, whether the consent of the non-contracting spouse is required and, if so, whether it has been given. Anything less than this duty of enquiry, carried out to the standard of the reasonable person, would render s 15(9)*(a)* a dead letter. It would

not protect innocent spouses from the maladministration of the joint estate and would undermine the Matrimonial Property Act's purpose of promoting equality in marriages in community of property.'

This approach and the test to apply in these circumstances, which I approve, was most recently endorsed by this Court in *Mulaudzi v Mudau and Others.*[2]

[11] Reverting to the facts, as alluded to already, it is common cause that it was only in September 2013, upon her appointment as executrix of the deceased estate, that the first respondent became aware that, without her knowledge or consent, the deceased had sold the property to the appellant on 5 April 2009 for R50 000. As a result of her not having consented, she contended, the sale was invalid. In her replying affidavit, she stated in response to para 4 of the answering affidavit quoted above, 'I note the contents of this paragraph.' In the absence of an explanation or response to para 4 of the answering affidavit, applying the *Plascon-Evans* rule[3] the version presented by the appellant must be accepted.

[12] The first respondent was legally represented at all times. Despite this, however, her founding affidavit lacked particularity in important respects. Although it is stated that she moved back to Limpopo, she did not say when exactly she did so. One must infer that it was before the sale in 2009. It is not stated when the last of the children moved out of the house. No averments are made of relevant details pertaining to the period when the deceased fell sick and died, such as where he was staying at the time of his death. No reference is made as to who was staying on the property when it was sold and from the time it was sold.

[13] It is not in dispute that the appellant was staying alone and presented himself as unmarried when he and the appellant concluded the sale agreement. This is different from the facts in *Visser v Hull,*[4] one of the cases relied upon by the first respondent, where the third party was well-known to the contracting spouse, was a relative of his and knew from visiting his home that he lived with and had children by a woman with whom he lived as man and wife. In addition, in this case, there are two

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[2] *Mulaudzi v Mudau and Others* [2020] ZASCA 148.
[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA (A); 1984 (3) SA 623 (A) at 634E-635C.
[4] *Visser v Hull and Others* [2009] ZAWCHC 77; 2010 (1) SA 521 (WCC).

official documents that supported the appellant's version that he was unaware that the deceased was married to the first respondent. First, the deed of transfer dated 19 May 2009 referred to the appellant as unmarried. Second, the power of attorney to pass transfer with the deceased's signature appended to it described the deceased as unmarried. This all lends credence to what the appellant stated from the outset, namely that he was not aware that the deceased was married and could not reasonably have known that he was. In these circumstances, he could not reasonably have been expected to make further enquiries as suggested by the first respondent.

[14] This appeal falls squarely within the realm of *Mulaudzi*, the facts of which are briefly as follows. The first and second respondents were married to each other in community of property. Sometime before they divorced, the first respondent, the husband, and the appellant entered into a sale agreement in respect of the property which was duly registered in the name of the appellant. It was common cause that at the time of the sale, the second respondent, the wife, had not consented to the sale of the property as required by s 15(2)*(a)* of the MPA.

[15] The first respondent filed an application in the high court against the second respondent, the appellant and the Registrar of Deeds where she sought an order, inter alia, '[r]eviewing and/or setting aside the sale agreement' between the appellant and the second respondent in respect of the property, alternatively, declaring that the sale agreement was null and void.' The high court found in her favour. On appeal, the full court declared the sale to be null and void on the basis that the second respondent's statement on oath that he was unmarried 'was clearly false and amounted . . . to a fraudulent misrepresentation that vitiates the contract'. It also said that it was this misrepresentation 'and not so much whether or not the [appellant] knew or could not have known about the true marital status of the seller . . . that goes to the root of the deed of sale'.

[16] This Court found this approach to be incorrect and not in line with several judgments, in particular, that of this Court in *Marais*. It confirmed the order of the court of first instance which held that 'the first respondent was deemed to have consented

to the sale because the appellant did not know and could not reasonably have known that the first respondent's consent was required.'[5]

[17] The only difference between the facts in *Mulaudzi* and this case is that, in *Mulaudzi*, one of the representations that the seller was unmarried was made under oath. That, in my view, is not a material distinguishing factor: in this case, the representation that the deceased was unmarried was made in formal legal documents, one of which was signed by the deceased. The appellant was entitled to rely on those representations and nothing would have given him pause for thought, and required him to enquire further. In any event, counsel for the first respondent was hard-pressed to suggest any feasible and reasonably practical enquiries that could be made in ascertaining the deceased's marital status.

[18] My conclusion is that, as in *Mulaudzi*, the appellant did not know that the deceased was married and could not reasonably have known this. That being so, the standard of the 'deemed consent' provision kicked in. That should have been the end of the matter.

[19] Messrs Mr Paul Zietsman and Rico Van der Merwe of the Free State Society of Advocates assisted this Court as *amici curiae* because the first respondent belatedly opposed the appeal, and the second and the third respondents opted to abide the decision of this Court. We are indebted to them for their assistance at such short notice. They principally raised issues concerning the duties of conveyancers. It is not necessary to consider those arguments, given the conclusion to which I have arrived.

[20] The high court erred by not considering s 15(9)*(a)* in its enquiry. Despite the fact that the appellant did not refer expressly to s 15(9)*(a)* in his answering affidavit, as counsel for the first respondent contended, as a trier of facts, the high court was bound to consider s 15 in its entirety and not cherry pick certain sections. The interpretation of any document including legislation must be approached, as this Court has indicated in numerous judgments, contextually and holistically, taking into account

[5] *Mulaudzi v Mudau and Others* fn 9 above para 9.

the purpose of the legislation under discussion.[6] In this case, the purpose of the provision was to strike a balance between the interests of a non-consenting spouse, on the one hand, and a third-party purchaser, on the other. As aptly noted in *Marais*, '[w]hile the consent requirement is designed to provide protection to the non-contracting spouse against maladministration of the joint estate by the contracting spouse, the "deemed consent" provision in s 15(9)*(a)* is intended to protect the interests of a bona fide third party who contracts with that spouse.'

[21] In the result, the following order is granted.

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs.'

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B C MOCUMIE

JUDGE OF APPEAL

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18. *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 10.

Appearances:

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Instructed by:	T F Mathebula Attorneys Inc, Johannesburg
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For first respondent:	N Raji
Instructed by:	Matojane Malungana Incorporated, Johannesburg
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As *amici curiae*:	P Zietsman and R Van der Merwe.