

LESOTHO / JUDGMENT

Thabiso Tsehla & Ano. V Rethabile Jonathan (CCT/0568/2021) [2025] LSHC 87 (10 April 2025)

[2025] LSHC 87

COURT

High Court

CASE / FILE NUMBER

CCT/0568/2021

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IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0568/2021

In the matter between:

THABISO TŠEHLA

‘MABAFOKENG TŠEHLA

1ST PLAINTIFF

2ND PLAINTIFF

AND

RETHABILE ROBERT JONATHAN

DEFENDANT

Neutral Citation: Thabiso Tšehla & Another v Rethabile Robert Jonathan [2025]

LSHC 87 Comm. (10 APRIL 2025)

CORAM:

MOKHESI J

HEARD: 27 MARCH 2025

DELIVERED: 10 APRIL 2025

SUMMARY

Law of Property: A spouse who concluded an agreement with an innocent third party for alienation of the immovable property of the joint estate without first obtaining the other spouse's consent, seeks to resist its enforcement even though the agreement is deemed valid and the non-contracting spouse not interested in protecting her proprietary rights- Held, the agreement is enforceable and cannot be cancelled on the score that spousal consent was not obtained as it is deemed to be valid, and further that because the other spouse is not interested in protecting her rights that is another basis on which the defendant should not be allowed to resist its enforcement or to seek to cancel it.

ANNOTATIONS

Legislation

Legal Capacity of Married Persons Act, 2006

Cases

Kobeli v Moseneke and Others (C of A (CIV) 28/2014 LSCA 35 (24 October 2014)

Marais N. O and Another v Maposa and Others 2020 (5) SA 111 (SCA)

JUDGMENT

- [1] In this matter there are two actions, the main action and the counterclaim. In the main action the plaintiffs who are husband and wife are seeking an order against the defendant, for specific performance alternatively cancellation of the agreement and the return of the purchase price. In the counterclaim the defendant claims that the agreement between the parties be declared null and void and that the defendants be ordered to return the lease document to him, and further, that he be directed to refund the purchase price he was paid for the immovable property in question.
- [2] The plaintiffs' case in the main action is based only on their oral testimony, while the defendant's case as well as in the counterclaim was based only on his evidence. PW1, was Mr Thabiso Tšehla. He testified that on 11 January 2014 he concluded a written agreement of sale and transfer of rights in a site situated at Ha-Tsetsane registered under lease no. 12293-419. The purchase price was M45,000.00. The amount of M42,000.00 was paid on 11 January 2014 while the remaining balance was paid on 28 February 2014. After payment of this last instalment the defendant handed over to the plaintiffs the original lease document alluded to in the preceding sentences.
- [3] However, problems began to surface when the defendant was due to cause the transfer of the site to the plaintiffs. He approached the plaintiffs and informed them that he concluded the transaction without consent of his ex-wife, and therefore, the latter was withholding her consent for the transfer of the site. The defendant's ex-wife met PW2 where she indicated that she was not opposed to the transfer. [4] In the aftermath of concluding this agreement – in 2015- the defendant went through a divorce with his ex-wife. On 16 May 2018 a decree of divorce was granted, and the defendant was awarded the site now in dispute in this matter and was ordered to compensate his ex-wife for having sold the site to the plaintiffs. Even following this decree of divorce the defendant would not transfer the site as he came up with an excuse that he under-priced it.
- [5] Under cross-examination by the defendant's counsel, Advocate Sepiriti, the witness indicated that he entered into this agreement unaware that the defendant was still married. When asked whether he made an attempt to find out when she was married, he told the court that, when he asked him, the defendant said he was unmarried. It was put to the witness that the defendant told him that the agreement was subject to the approval of his wife. PW1 said the defendant came back after two weeks when they had paid the last instalment saying his wife was disapproving of the sale.

- [6] The witness told the court that he became aware that the defendant was married when he was expected to make a transfer of the site. PW1 was asked why the defendant's ex-wife did not assist them if she did not have a problem with the transaction, whether there was any documentary prove of the same. PW1 said he did not have proof. It was put to PW1 that the defendant did not transfer the site because his wife was withholding consent. PW1 disagreed. It was put to the witness that the defendant wants to refund the purchase price. PW1 said he does not want money but the site he bought from the defendant. It was further put to the witness that when he bought the site it was undervalued. PW1 said it is the defendant who determined the purchase price.
- [7] The decree of divorce was marked as EXH. "D" and handed in as evidence and the copy of the lease document was also handed in as Exhibit and marked "EXH. "C". [8] PW2 was Mrs 'Mabafokeng Tšehla who is the PW1's wife. She confirms everything which PW1 told the court until when the defendant handed over the original lease document to the site to them. PW2 told the court that when they heard that the defendant could not transfer the site to them because his wife was withholding consent, they asked him for her phone numbers, but he refused saying his ex-wife was a difficult person. She told the court that after a lapse of some months she got a visitor at her workplace who introduced herself as Ntsimane Mahase. She said she was the defendant's wife. She said she was from the offices of the Land Administration Authority (LAA) and that is where she got information about her in the site's file. She said she did not have a problem with the site being transferred to them. PW2 told the court that they did not know that the defendant was married as even before they bought the site, they perused through the site file at LAA and found that he was the sole owner of the site.
- [9] Under cross-examination when PW2 was asked whether she was aware that the agreement could only be concluded with consent of both spouses, she said she was aware but that the defendant said he was unmarried. It was put to the witness that it was impossible to effect the transfer because of the absence of consent of the defendant's wife.
- [10] As already stated, the defence case was anchored only on the evidence of the defendant. DW1 testified that indeed he concluded an agreement for the sale of the site in question to the plaintiffs. He states that he was at the time still married to his ex-wife. It was impossible for him to transfer the site as he sold it without her consent and that she refused to ratify the sale. Her reason for refusing to ratify it was that she felt cheated as it was sold below its market value. Within a month of the sale, he told the plaintiffs that he was cancelling the contract and offered to refund the purchase price in full, but the plaintiffs refused to accept cancellation and tender of restitution. He says the agreement is invalid for lacking his ex-wife's consent.
- [11] Under cross-examination Mr Lebakeng for the plaintiffs asked him to confirm whether the property which he was awarded in terms of the decree of divorce is the property in issue in this case. His response was in the affirmative. He confirmed further that he was ordered to compensate his-ex-wife with M45,000.00 for this site he sold. His answer was in the

affirmative. He however told the court that he has not yet compensated his ex-wife as ordered. He was asked whether he realised that the purpose of the order of compensation was so that his wife cannot have any claim over the site. DW1 said he realised that that is the case.

- [12] A question was put to him whether if the ex-wife had agreed to the agreement he would cause for the transfer of the site. His response was that “No, not for M45,000.00.” Then followed another question whether the problem is the lack of the ex-wife’s consent or the value of the site. His response was that money is not the problem. It was put to him that in the year 2021 when he was served with summons commencing action in this matter his ex-wife had no interest in the site. His answer was that she has interests because she wants compensation. A question was put to DW1 that if he was genuine about transferring the site to the plaintiffs, he would have done so in 2021 because he was now its sole owner. His was in the negative. DW1 confirmed in re-examination that in terms of the decree of divorce he was awarded the site in issue and ordered to compensate his ex-wife for having sold it.
- [13] Evaluation and discussion From the evidence adduced in these two matters the facts are largely common cause: The plaintiffs bought an immovable property from the defendant without consent of his wife in January 2014, and the purchase price was paid within two months, following which the defendant handed over the original lease document for the site. The site is registered only in his name. He did not transfer the site to the plaintiffs because he said his wife did not consent to its sale. During the period of the stalemate the defendant instituted divorce proceedings against his ex-wife. It is therefore clear why consent was not sought. The relationship between the defendant and his ex-wife had probably reached its lowest ebb. The original lease document is only in the names of the defendant.
- [14] It is uncontroverted that the plaintiff had always thought that the defendant was unmarried as when he showed signs of reluctance to transfer the site to them further enquiries which they made in the records at LAA in relation to the site showed that he stated that he was unmarried. Following the conclusion of the divorce case the defendant was awarded the site in issue and was further ordered to compensate his ex-wife in the amount he sold it. When the summons was sued out against him in 2021 the site solely belonged to him.
- [15] PW1 came across as a reliable and credible witness. He conceded that he knew that in order to conclude this type of agreement the defendant needed his wife’s consent. I am also prepared to make same observations with regards to PW2. Her assertion that she met with the defendant’s ex-wife and that the latter said she did not have a problem with the site being transferred to the plaintiffs is corroborated by her inaction despite being aware that the defendant had sold one of the assets of the community without her consent. She was even further prepared to wait until an adjustment upon division of the joint estate on divorce.
- [16] It will be observed when the defendant instituted a divorce case, he had already sold the site to the plaintiffs and the proprietary ancillary reliefs he sought included being awarded the site and for his ex-wife to be compensated for the site having been sold, ostensibly without her consent. This goes to confirm PW2’s testimony that the defendant’s wife did not have a

problem with the site being transferred to the plaintiffs. In fact, it became apparent during DW1's cross-examination that the main issue is not that his wife did not consent to the alienation of the property, but rather what he felt to be the under-pricing of the site due to its market value. This was evident during cross-examination when he showed reluctance to indicate that he would have transferred the site to the plaintiffs if his wife had consented to the site being sold for M45,000.00. After much evasiveness, he conceded reluctantly that he would have effected its transfer had his ex-wife consented to the transaction.

- [17] DW1 came across as not being a credible witness. I find it improbable that he would have handed over the original lease document to the plaintiffs pending consent of his ex-wife. No reasonable person would have received the full purchase price and handed over the lease document subject to consent of the wife. Logic dictates that he would have, as the plaintiffs told this court, assured them that he was unmarried. The fact that he returned few weeks later after receiving the last payment showed that he was having second thoughts about having sold the site. It only dawned on him at the stage that he should have sold it at the higher price given its market value. Lack of his ex-wife's consent or ratification was merely a ruse or stratagem to renege from the contract. It is clear to me that he gave the plaintiffs the impression that he was unmarried, only to raise the issue of his marital status conveniently to renege from the contract.
- [18] It was Mr Lebakeng's submission, for the plaintiffs and defendants in reconvention, that they are covered by the provisions of Section 8(1)(a) of the Legal Capacity of Married Persons Act 2006 as they did not know or could reasonably have known that the defendant was married at the time of concluding the contract as even the lease document lists him as its sole owner. He further argued that once the parties got divorced, the defendant was awarded the site in issue and was ordered to compensate his ex-wife for the alienation of this property. This was an adjustment as contemplated under Section 8(1)(b)(1) of the Act, and therefore once this was done his ex-wife was non-suited to lay a claim to the site. The defendant was obliged therefore to cause the transfer of the site to the plaintiffs.
- [19] On the other hand, Advocate Sepiriti, for the defendant and plaintiff in reconvention, submitted that the sale agreement in question concluded without his ex-wife's consent is null and void and therefore unenforceable. This is the defendant's contention in its simplest form.
- [20] Germane to the determination of this dispute are Sections 7(1) and 8 of the Legal Capacity of Married Persons Act, 2006 ('the Act'). Sections 7(1) provides that: "(1) Notwithstanding Subsections (4) and (5) and subject to Sections 11 and 12, a spouse married in community of property shall not, without consent of the other spouse –
- (a) alienate, mortgage, burden with a servitude or confer other real right in any immovable property forming part of the joint estate;

- (b) enter into any contract for the alienation, mortgaging, burdening with servitude or conferring of any other real right in immovable property forming part of the joint estate;”
- [21] And Section 8 provides that: “(1) If a spouse married in community of property enters into a contract with another person without the consent required under Section 7, or without leave granted by court under Section 11, or contrary to an order of court under Section 12, and –
- (a) that other person does not know or could not have reasonably known that the contract entered into without much consent or leave or in contravention of the court order, the contract shall be deemed to have been entered into with the required consent or leave or while the power of the concerned spouse has not been suspended:
- (b) that spouse knows or ought reasonably to have known that he or she will not obtain such consent or leave or that the power concerned has been suspended. And the joined estate suffers a loss as a result of that contract, an adjustment shall be effected in favour of the other spouse –
- (i) upon division of the joint estate; or (ii) upon demand of the other spouse at any time during the subsistence of the marriage.”
- [22] Section 11 deals with the power of the court to dispense with spouse’s consent in certain circumstances if the court is satisfied that the other spouse is unreasonably withholding consent or upon good reason being shown. Section 12 deals with the power of the court to suspend powers of a spouse on application by the other, in order to protect the interests of the applicant spouse in the joint estate.
- [23] In terms of Section 6 of the Act, a spouse married in community of property “may perform any act which arises by virtue of operation of law with regard to the joint estate without consent of the other spouse.” Section 7 provides exceptions to this rule by listing prohibited acts requiring spousal consent, and one of those matters is the subject matter of this litigation- alienation of the asset of the joint estate. A deeming provision in Section 8(1)(a) saves an otherwise invalid contract which was concluded without another spouse’s consent where two of any of the two circumstances may be found to exist as a matter of fact; where the third party contractant does not know or could not have reasonably known that the contract was concluded without consent of the other spouse.
- [24] Section 8(1) of the Act was interpreted in the case of *Kobeli v Moseneke and Others* (C of A (CIV) 28/2014 LSCA 35 (24 October 2014) at para. 11: “It will be observed that the section deals with the situation where the “other person” to the contract does not know or could not reasonably have known that the consent of the other spouse was lacking. In that event the contract stands and the property rights of the spouses are adjusted as provided for in the section. The section does not deal with the converse situation where the other person does know or could reasonably have known that the contract was entered into by one spouse without the consent of the other. However, it follows, I think, by necessary implication that in the light of the prohibition expressed in peremptory terms in Section 7(1) the contract

must be regarded as invalid.”

- [25] In that case it was stated that the party asserting the validity of the contract bears the evidential burden of proving the same (ibid at para. 12). The reasonableness standard in Section 8(1)(a) is an objective one which calls upon a third party to do what a reasonable person would normally do in the circumstances. A third party should undertake an enquiry to ascertain the marital status of the spouse he/she is contracting with to determine whether he/she obtained consent for concluding the agreement (See *Marais N. O and Another v Maposa and Others* 2020 (5) SA 111 (SCA) at paras. 29-31 where the court was interpreting similar provisions in the South African Act).
- [26] An important issue was raised by Mr Lebakeng, for the plaintiffs, with regard to the question whether where an adjustment in favour of the defendant’s ex- wife during the division of the joint estate, serves to disentitle the defendant to resist the enforcement of the contract? This is a pertinent issue in this case because, firstly, the defendant’s ex-wife was well aware that he alienated the matrimonial property without her consent. Having been aware of this state of affairs she did not seek to challenge the transaction. In fact, at the instance of the defendant as he is the one who successfully instituted divorce proceedings, among the reliefs he was granted was an adjustment in the joint estate in favour of his ex-wife. This is evidence enough that his ex-wife treated the transaction as water under the bridge. The person who was prejudiced by the alienation did nothing to challenge it. In my considered view, the answer to the question is that in the absence of the ex-wife’s challenge, the defendant is not entitled to raise the issue of her non-consent against enforcement of the contract he concluded with the plaintiffs.
- [27] Prohibition against one spouse engaging in certain transactions without consent of the other as provided under Section 7 of the Act should be understood in its proper context. It provides protection to the innocent spouse whose consent was not obtained by the other before entering into transactions which require his or her consent. The Act was brought about by the harshness of the husband’s common law marital power on the women to engage in contracts, to litigate and with regard to administration of joint estate, among others. With the abolition of this marital power by this Act, it simultaneously sought to give the same powers to the wife who is married in community of property with regard to the disposal of the assets of the joint estate and other related matters while at the same providing protection to third parties who may contract with a spouse who does not have the other spouse’s consent. This is the context within which this law is located.
- [28] In a situation where a spouse who did not obtain the other’s consent and that other spouse is not interested in challenging the transaction, the contracting spouse cannot impugn the contract on the basis of lack of consent of the other spouse especially in the present case where a deemed consent of the other spouse has been established by the innocent third party. The odds are further stacked against the defendant in the sense that his ex-wife was never interested in challenging the transaction in the first place, and upon division of the joint estate an adjustment was made in her favour with regard to the property in question.

- [29] It was clear during cross-examination that the defendant's reason for seeking to cancel the contract is due to his discomfort that he under-priced the property. His ex-wife's lack of consent is being used as a ruse to renege from the contract. Lack of consent is a protection which is provided to a non- contracting spouse, and where he/she is not interested in making use of it a contracting spouse cannot conveniently use it to walk away from the contract. Metaphorically, to a non-contracting spouse lack of consent is both a shield and a spear while an errant contracting spouse has no benefit of these weapons. In terms of his defence and the counterclaim the defendant is trying to use the weapons which are not open to him to make use of. Under a prayer for "further and/or alternative relief" the court will make an addition to the main relief in the main action to avoid the necessity of brining contempt application to force the defendant to comply with the order.
- [30] In the result the following order is made: (i) The main action succeeds with costs in terms of Prayer 1, which should read: "The Defendant is ordered to perform in terms of the agreement signed by the parties on the 11 January 2014 by causing, facilitating and or effecting the transfer of site under lease No. 12293-419 to the Plaintiffs by signing consent application and deed of transfer and to perform all other requirements under the law within a month from the date of this judgment, failing which the Deputy Sheriff of this court is given powers and authority to effect transfer of the said site in terms of the requirements of the law as if he/she is the Defendant." (ii) The counterclaim is dismissed with costs.

MOKHESI J For the Plaintiff in the main and Defendant in the counterclaim: Mr Lebakeng from Rasekoai, Rampai and Lebakeng Attorneys For the Defendant in the main action and Plaintiff in the counterclaim: Adv. R. Sepiriti instructed by Messrs T. Maieane & Co Attorneys 17

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