

“BALANCE” DOES NOT ALWAYS SEEM FAIR

Vukeya v Ntshane and Others (518/2019) [2020] ZASCA 167 (11 December 2020)

Where a husband who is married in community of property sells land without the consent or knowledge of his spouse to an unsuspecting purchaser, is the law on the side of the wife or the purchaser?

Insofar as the spouse sought relief against the purchaser, the Matrimonial Property Act provides that a balance between the interests of the non-consenting spouse, on the one hand, and the bona fide third party, on the other, must be achieved. If the purchaser made a reasonable effort to ascertain what the seller's marital status was, he is entitled to rely thereon and the court will not order cancellation of the sale and transfer. The outcome in this judgment is an illustration on point.

The Judgment can be viewed [here](#).

FACTS

Mrs Shalate Ntshane and Mr Ntshane ('the deceased') were married in community of property and owned a residential property in Soweto ('the property'). Due to old age, Mrs Ntshane moved to Potgietersrus whilst the deceased remained behind on the property. In July 2013 the deceased became gravely sick and passed away later that month.

In September that year, Mrs Ntshane was appointed by the Master of the High Court as the executrix of the deceased estate. It was then that she became aware of the sale of the property by the deceased to Vukeya during April 2009. This occurred without her knowledge or consent (as is required by the of the Matrimonial Property Act 88 of 1984 (the MPA)).

Consequent thereto, and some four years after her appointment as executrix, she instituted proceedings against Vukeya, the purchaser, seeking cancellation of the transfer. Vukeya however explained that at the time he purchased the property from the deceased/seller, the latter "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." Vukeya further stated that he purchased the property in good faith as he had no knowledge that the deceased was married to Mrs Ntshane at the time of the sale and transfer of the property.

The deed of transfer issued in favour of Mr Ntshane in fact describes the deceased as unmarried and as the sole registered owner of the property.

Before the High Court, Mrs Ntshane contended that Vukeya was duty bound to have reasonably made enquiries as provided for in section 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.

The High Court found in favour of Mrs Ntshane and Vukeya appealed.

HELD

- 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

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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.'*

- The effect of section 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. 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.
- 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.
- Because it is not in dispute that Mrs Ntshane never gave her consent to the sale, the issue for determination was whether Vukeya had brought himself within the protection afforded to third party purchasers by s 15(9)(a).

- A third party to a transaction contemplated by subsections 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 that consent was lacking; and secondly, that he or she could not reasonably have known that consent had not been given.
- 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. In other words, a duty is placed on the party seeking to rely on deemed consent to make reasonable enquiries. The words “cannot reasonably know” 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.
- Reverting to the facts, it was not in dispute that the deceased was staying alone and presented himself as unmarried when he and Vukeya concluded the sale agreement. In addition, in this case, there are two official documents that supported Vukeya’s version that he was unaware that the deceased was married. First, the deed of transfer in the name of the deceased referred to him (as transferor) 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 Vukeya 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 Mrs Ntshane.

CONCLUSION

Thus, as it was shown that Vukeya did not know that the deceased was married and could not reasonably have known this. The standard of the ‘deemed consent’ provision kicked in and the appeal succeeded.