THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1034/2019

In the matter between:

ROTONDWA MULAUDZI **APPELLANT**

and

MATODZI PETRONELLA MUDAU **FIRST RESPONDENT**

AVASHONI THOMAS MUDAU **SECOND RESPONDENT**

THE REGISTRAR OF DEEDS,
POLOKWANE **THIRD RESPONDENT**

Neutral citation: *Mulaudzi v Mudau and Others* (1034/2019) [2020] ZASCA 148 (18 November 2020)

Coram: VAN DER MERWE, MAKGOKA and PLASKET JJA and LEDWABA and MABINDLA-BOQWANA AJJA

Heard: 11 September 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 18 November 2020.

Summary: Matrimonial Property Act 88 of 1984 – ss 15(2)*(a)* and 15(9)*(a)* – spouses married in community of property – sale of fixed property by one spouse without the consent of the other spouse – whether in terms of s 15(9)*(a)* consent deemed to have been given.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP, Phatudi ADJP and Muller J, sitting as the full court):

(a) The appeal is upheld with costs.

(b) The order of the court below is set aside and replaced with the following order: 'The appeal is dismissed with costs.'

JUDGMENT

Ledwaba AJA (Van der Merwe, Makgoka and Plasket JJA and Mabindla-Boqwana AJA concurring)

[1] The issue in this appeal concerns the application of s 15 of the Matrimonial Property Act 88 of 1984 (the Act) and the validity or otherwise of the sale of an immovable property by the second respondent, Mr Avashoni Thomas Mudau, who was married in community of property to the first respondent, Ms Matodzi Petronella Mudau, to the appellant, Ms Rotondwa Mulaudzi, without the consent of his spouse. In the court of first instance, the Limpopo Division of the High Court, Thohoyandou, Semenya AJ dismissed the application brought by the first respondent to set aside the sale. Her order was, however, set aside by a full court of the Limpopo Division of the High Court, Polokwane, and an order was made setting aside the sale. Special leave to appeal was granted by this court. Only the first respondent opposes the appeal. Consistent with their approach to the litigation in the courts below the second

respondent and the third respondent, the Registrar of Deeds, Polokwane (the Registrar), do not oppose the appeal.

[2] Section 15 of the Act reads as follows in relevant part:

(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…

…

(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 s 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…'

[3] The first and second respondents were married to each other in community of property on 6 June 2003. They resided at erf 571 Makwarela-A township, in the district of Thohoyandou, Limpopo (the property). The property was transferred and registered in the name of the second respondent in January 2002, before the marriage.

[4] On 7 August 2012 the first respondent instituted divorce proceedings by issuing summons against the second respondent. The action was defended. The Limpopo Division of the High Court, Thohoyandou, granted a final order of divorce

on 13 February 2014. The court further ordered the second respondent to forfeit the matrimonial benefits of the marriage in community of property.

[5] On 5 July 2012, some time before the divorce was finalised, the second respondent and the appellant entered into a sale agreement in respect of the property. It is not in dispute that the first respondent never consented to the sale, as required by s 15(2)*(a)* of the Act. The property was duly registered in the name of the appellant on 28 August 2012.

[6] It was against this background that, in August 2013, the first respondent filed her application in the court of first instance against the second respondent, the appellant and the Registrar. 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.

[7] The first respondent's case was that, because she was married to the second respondent in community of property when the sale agreement was concluded, in terms of s 15(2)(*a*) of the Act her consent was required for the valid conclusion of the sale agreement. She had not provided the requisite consent. Accordingly, so the argument went, the sale agreement was invalid and should either be set aside or declared null and void.

[8] The appellant opposed the application. The basis of her opposition was that the second respondent had represented to her that he was unmarried. She said she did not know the second respondent, and pointed out that at the time of the

conclusion of the sale agreement, the records of the Registrar reflected the second respondent as the sole owner of the property; the second respondent recorded in the sale agreement that he was unmarried; and, in an affidavit entitled 'Declaration Proving Status' deposed to on the same date and at the same place, the second respondent declared that he was unmarried. On a proper reading of the appellant's evidence, this affidavit was signed on the same occasion as the deed of sale. Therefore, the appellant's case was that she did not know and could not reasonably have known that the second respondent was married and required the consent of his wife for the sale.

[9] Semenya AJ decided the matter on the basis of these facts. She held that, in terms of s 15(9)*(a)* of the Act, 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. The full court took a different approach. It held that s 15(9)*(a)* of the Act had no application at all and that the appellant's reliance on it was 'misconstrued'. Its finding in this respect stemmed from a misreading of s 15(9). The full court substituted the word 'person' in the first line of subsection 15(9)*(a)* with the word 'spouse'. As a result, it quite erroneously held that the subsection was inapplicable.

[10] Instead, 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'. This finding was quite clearly wrong.

Only the appellant could have elected to avoid the sale agreement on the ground that it had been induced by a misrepresentation and she elected to do the converse.

[11] The interpretation and application of the consent requirements of s 15(2)*(a)* and the deemed consent provision in s 15(9)*(a)* of the Act was recently dealt with comprehensively by this court in *Marais and Another NNO v Maposa and Others*.[1] As correctly noted by Plasket JA, s 15 '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'.[2] The learned Judge continued:

'The effect of s 15 may be summarised 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.

…

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 that consent was

[1] *Marais and Another NNO v Maposa and Others* [2020] ZASCA 23; 2020 (5) SA 111 (SCA).
[2] Ibid para 27.

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.'[3]

[12] Contrary to the finding of the full court, s 15 – and s 15(9)*(a)* in particular – is central to this case. The appellant's version that she did not know that consent was lacking has, in my view, been established by her. As stated, the deed of sale described the second respondent as unmarried and that was confirmed by him under oath in the affidavit headed 'Declaration Proving Status'. On this basis, the appellant could also not reasonably have known that consent had not been given.

[13] Counsel for the first respondent submitted that the appellant should have contacted the Department of Home Affairs to enquire into the marital status of the second respondent. There is no merit in the submission for the reasons that follow. First, I doubt whether the Department of Home Affairs would have given personal information about the second respondent to the appellant. Secondly, in the light of the description of the second respondent as unmarried in the deed of sale and his express representation on oath that he was unmarried, it was not reasonably required of the appellant to make further enquiries. The appellant did not know the second respondent and nothing indicated to her that he may not be telling the truth. In other words, the appellant's reliance on the second respondent's representations was reasonable.

[3] Ibid paras 26 and 28. (Footnotes omitted.)

[14] Even though, factually, the first respondent did not give consent, in my view, s 15(9)*(a)* of the Act protects the appellant. The result is that, contrary to the finding of the full court, the first respondent's consent is deemed to have been given, with the result that the transaction is valid and enforceable.

[15] The remedy for any loss suffered by the non-contracting spouse, in terms of s 15(9)*(b)*, is an adjustment in her favour when the joint estate is divided. That is academic in this case because, in the divorce proceedings, an order of forfeiture of the benefits of the marriage was made against the second respondent.

[16] This case was straightforward and uncomplicated. It did not justify the costs of two counsel, and counsel for the appellant rightly did not press for such an order.

[17] In the result, I make the following order:

(a) The appeal is upheld with costs.

(b) The order of the full court is set aside and replaced with the following order:
'The appeal is dismissed with costs.'

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A P LEDWABA
ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant:	J Vorster (with him M Khomola)
Instructed by:	MacRobert Attorneys, Pretoria
	Claude Reid Inc, Bloemfontein
For First Respondent:	A D Ramagalela
Instructed by:	TR Ligege Attorneys, Thohoyandou
	Matsepes Attorneys, Bloemfontein