



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Appeal Case No.: **A93/2024**

Court *a quo* Case No: **552/2022**

In the matter between:

AYANDA MALUNGA

First Appellant
(First Respondent *a quo*)

NTSHONALANGA FISHING (PTY) LTD

(Registration No.: 1997/004602/07)

Second Appellant
(Second Respondent *a quo*)

and

THULILE QUEEN SANQELA

Respondent
(Applicant *a quo*)

Date of Hearing: 24 January 2025

Date of Judgment: 24 March 2025

Coram: Allie J, Da Silva-Salie J et Holderness J

JUDGMENT

HOLDERNESS J

Introduction

[1] In this appeal the first appellant, Ms Ayanda Malunga (Ms Malunga) and the second appellant, Ntshonalanga Fishing (Pty) Ltd (the Company) seek to set aside the judgment and order of the Court *a quo* (*per* Dolamo J).

[2] In the proceedings before the court *a quo*, the respondent in this appeal, Ms Thulile Queen Sanqela (Ms Sanqela), the applicant in the court *a quo*, sought an order declaring a Shareholders Agreement and Resolution (the agreement) in respect of the sale of 50% of the shares in the Company, to the second respondent before the court *a quo*, to be valid and enforceable.

[3] The agreement was entered into between Ms Sanqela and Mr Mtunzi Malunga (Mr Malunga), the late husband of Ms Malunga, on 29 March 2018. The Company is the holder of several fishing rights, including a deep sea hake trawling licence. The former shareholders in the Company were Mr Malunga and Mr Balindi Sanqela (Mr Sanqela), the late husband of Ms. Sanqela.

[4] After Mr Sanqela's passing, Mr Malunga became the sole director of the Company, until his death in 2020. Ms Sanqela and Ms Malunga were appointed as directors of the Company on 28 September 2020.

[5] In terms of the agreement Mr Malunga granted an option to Ms Sanqela to purchase his full shareholding in the company. The option was exercised by Ms Sanqela. At the time of the conclusion of the agreement Mr Malunga was married in community of property to Ms Malunga.

[6] The appellants contend that the agreement is void, and therefore unenforceable, on the following grounds:

6.1 Ms Malunga had not consented to the conclusion of the agreement, which she contends was required in terms of section 15 of the Matrimonial Property Act 88 of 1984 ('the MPA').

6.2 The transfer of shares is subject to the Marine Living Resources Act, 18 of 1998 ('the MLRA') which precludes the transfer of fishing rights without the consent of the Minister; and

6.3 The agreement is inchoate.

[7] The court *a quo* held that the agreement was self-standing and choate. It further held that as Ms Malunga sought a declarator and not a transfer of shares or rights, section 21(2) of the MLRA would only find application when she exercised the option.

[8] The court *a quo* found that as Ms Sangela was legally represented at the time she entered into the agreement, she could not reasonably have been expected to know that Ms Malunga had not consented thereto and is therefore protected by the provision set forth in s 15(9)(a) of the MPA. The applicant *a quo* (respondent on appeal) was accordingly successful, and the agreement was declared by the court *a quo* to be valid and enforceable.

Factual Background

[9] The former directors of the company, Mr Sangela and Mr Malunga, each held 50% of the issued share capital of the company. Mr. Sangela passed away on 15 December 2015. Mr. Malunga passed away on 27 September 2020.

[10] Ms Sangela inherited her husband's 50% shareholding in the Company and was duly registered as a shareholder and member on 27 June 2016.

[11] After Ms Sangela became a shareholder in the Company, certain issues arose between her and Mr Malunga regarding the conduct of the business of the Company.

[12] Negotiations ensued, during which Mr and Ms Malunga were represented by an attorney, Mr Klerck of Herold Gie Inc ('Mr Klerck'), and Ms Sangela was represented by Ms Makan of Webber Wentzel Attorneys ('Ms Makan'). The negotiations culminated in the agreement, drafted by Mr. Klerck, and presented to Ms Sangela for signature.

The agreement

[13] The salient terms of the agreement are as follows:

13.1 Mr Malunga extended an option to Ms Sangela to purchase his shares in the Company at a future date (the shares), subject to him being afforded sufficient time, in his capacity as the sole director of the Company, to use and apply his knowledge and experience to grow the business and secure long-term fishing rights (the option).

13.2 The value of the shares was to be determined by an independent auditor, subject to Ms Sangela agreeing to the provisions set out in the agreement.

13.3 The option was extended subject to certain conditions, including *inter alia* that Mr Malunga was to remain the sole director and manage the business and Ms Sangela would remain in the employment of the Company, and would agree to a fair and market related increase in remuneration for Mr Malunga. Lastly, Ms Sangela would not be involved in the operations side of the business.

13.4 Should Ms Sangela breach any of the conditions, the option would lapse, and Mr. Malunga would be entitled to purchase her shares in the Company.

[14] Ms Sangela's evidence was that, at all material times prior to and after the conclusion of the agreement, she and Mr Malunga were legally represented.

[15] According to Ms Sanqela, at the time of negotiating and signing the agreement, she accepted that all formal and legal requirements had been complied with.

[16] Ms Sanqela stated that, by presenting her with the agreement for signature, Mr and Ms Malunga through their attorney represented to her that her acceptance of the terms thereof and signature of the agreement would result in a valid and binding agreement between herself and Mr Malunga.

[17] It is common cause that Mr Malunga and Ms Sanqela gave effect to the agreement, and that Ms Sanqela complied with the conditions set out therein pertaining to the exercise of the option.

[18] An issue which was in contention before the court *a quo* is whether Ms Sanqela was aware, at the time of the conclusion of the agreement, that Mr Malunga was married to Ms Malunga in community of property and therefore required his wife's consent to alienate his shares in the company.

[19] Ms Sanqela denied that she was aware that the Malungas were married in community of property and that Ms Malunga had not consented to the alienation of shares at the time. According to her version, she believed that Ms Malunga was in any event aware of the agreement and had consented to its conclusion.

[20] Ms Malunga's evidence was that the first time she became aware of the agreement was on 20 October 2020, when Ms Sanqela's attorney addressed an email to her attorney stating that the proposed option agreement would merely reaffirm Ms Sanqela's and Ms Malunga's rights in terms of the agreement.

[21] Ms Sanqela further contended that the agreement 'unequivocally set out that it contemplated the conclusion of further substantive agreements.'

[22] Mr Klerck deposed to an affidavit in which he stated that it was unnecessary and premature for the parties to finalise compliance issues at the commencement of negotiations. He stated further that it was common commercial practice to conclude

draft agreements before calling for and procuring the necessary 'compliance documentation.'

[23] According to Mr Klerck, as the parties had not reached consensus on the shareholder agreement, which was still to be negotiated and concluded, the issue of whether the spousal consent was required for the agreement was not addressed at that stage.

[24] Lastly, Ms Sanqela contends that as an experienced businessman and director of 25 companies at the time of his death, Mr. Malunga in any event concluded the agreement in the ordinary course of business.

Section 15 of the MPA

[25] In terms of s 15(2)(c) of the MPA a spouse married in community of property:

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

...

(c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate.'

[26] Mr. Randall, who appeared on behalf of Ms Sanqela, argued that the agreement does not fall within the ambit of the categories of assets or agreements prescribed in s 15(2)(c) of the MPA, as it did no more than extend a right to the respondent to exercise an option to purchase the shares at a future date.

[27] The court *a quo* found that whilst it was satisfied that there was a self-standing agreement of an enforceable option, on its own, this agreement would not amount to an alienation, cession, or pledge of these shares themselves. It would only be on the conclusion of the main contract of sale of the shares that the operation of section 15(2)(c) will be triggered. The court therefore found that section 15(2)(c) of the MPA does not avail Ms Malunga, nor the Company.

[28] It is apparent that there existed an agreement in principle between Ms Sanqela and the late Mr Malunga, to grant an option to sell the shares in the future. Following upon the successful exercise of the option by Ms Sanqela, a valid and binding agreement of sale of shares and transfer of shares would have to occur.

[29] To find that a separate eventual transfer of shares would take place upon the happening of certain events and fulfilment of certain conditions, as distinct from the agreement to sell shares, in our view places an artificial construction on the intention of the parties as expressed in their agreement.

[30] The court *a quo*, accepting that it may be wrong in this regard, turned to consider whether if section 15(2)(c) found application, the agreement could be saved by the provisions of s 15(9)(a), which provides as follows:

‘(9) when a spouse enters into a transaction with a person contrary to the provisions of subsection two or three of the 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 two or three, or while the power concerned of the spouse has not been suspended, as the case may be.’

[31] The last section of the MPA which finds application is section 15(6), which reads in relevant part as follows:

‘(6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) 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.’

The issues

[32] The legal questions which the court *a quo* was called upon to determine were the following:

32.1 whether the agreement is one that is rendered invalid by the provisions of section 15(2)(c) of the MPA for want of spousal consent;

32.2 If the agreement is invalid in terms of section 15(2)(c) of the MPA, is it saved from invalidity by section 15(6) as it was concluded in the ordinary course of business?

32.3 Alternatively, is the agreement saved by section 15(9)(a), and deemed to have been entered into with the consent required as, on the facts before the court *a quo*, can Ms Sanqela be said to have not reasonably known that the transaction was entered into contrary to the provisions of section 15 (2)(c) in circumstances where the authorities place a duty on her or in this case, her legal representative to have made reasonable inquiries?

32.4 If the agreement is found to be valid, is it still enforceable in light of the provisions of section 21 of the MLRA, for want of approval of the minister for the transfer of shares?

32.5 Lastly, whether the transaction embodied in the document signed by Mr Malunga and Ms Sanqela, is inchoate and therefore does not constitute an alienation of property forming part of the joint estate of Mr Malunga.

Is an option to purchase shares at a future date an alienation of shares as envisaged in section 15(2) of the MPA?

[33] It was argued on behalf of Ms Sanqela before the court *a quo* that an option is merely an offer which would upon acceptance give rise to a valid contract. In dealing with the submission, the court cited Christies *Law of Contract*:¹

¹ 7th edition at p 66.

‘To understand the true nature of an option it is best to analyse it into two parts – an offer to enter into the main contract together with a concluded subsidiary contract (the contract of option) finding the offer or to keep that offer open for a certain period. On this analysis it is easy to see that the offeror is contractually bound to keep this offer open, and if he breaks this contract of option by disabling from performing it or by expressly or impliedly repudiating it, he will be liable for damages for breach of contract.’

[34] Based on the foregoing the court *a quo* held that the agreement, as being a choate and self-standing option capable of enforcement, that does not amount to an alienation, cession or pledging of the shares themselves.

[35] We agree that it is a self-standing and choate agreement, however, the option in this case was exercised by Ms Sanqela, therefore, it is no longer a question of *if* the shares will be transferred and alienated but a question of whether the underlying agreement or *causa* that gives rise to the later transfer of shares was validly concluded without spousal consent. Section 15(2)(c) is therefore triggered because the option is a binding agreement to sell the shares in the future (the future having arrived after the death of Mr Malunga) and therefore it is in substance and effect, an agreement to alienate.

Is the agreement enforceable?

[36] It is trite that before an agreement becomes enforceable, the contracting parties must reach agreement on all material terms.²

[37] In the preamble to the agreement, it is recorded that the parties agree to the option to purchase shares being extended to Ms Sanqela, subject to her agreement to the provisions set out therein. She agreed to the provisions of the agreement, and they were given effect to. An argument that there was no agreement on the material terms in respect of the option agreement accordingly lacks merit.

² *Pitout v North Cape Livestock* 1977(4) SA at 851F-G; *Kenilworth Palace Investments (Pty) Ltd v Ingala & Others* 1984 (2) SA 1 (C) at 12A.

[38] As pointed out by Mr Randall, the company was capable of being run without Ms Sanqela and Mr Malunga entering into a shareholders' agreement. This in fact came to pass from the date on which the agreement was concluded in March 2018, until the passing of Mr Malunga in September 2020.

[39] The agreement expressly provided that the option was to be exercised by Ms Sanqela by service of a notice on Mr Malunga, and that the consideration to be paid for the shares was a fair market value to be determined by an independent auditor within 30 days of a valuation being determined. The agreement provided that the option was subject to the conditions stipulated in clause 6 thereof and set out the consequences of a breach of the agreement by Ms Sanqela. All the material terms were agreed between the parties.

Was the agreement entered into in the ordinary course of business?

[40] If the agreement was entered into by Mr. Malunga in the ordinary course of business, it will be enforceable in terms of section 15(6) of the MPA.

[41] In *Strydom v Engen Petroleum*³ the SCA held that the determination of whether a transaction was one which fell within the ordinary course of business of that person was a question of fact to be determined objectively with reference to what is to be expected of a businessman.

[42] Whilst it is apparent from the evidence before the court *a quo* that Mr Malunga held interests in and was at various times a director of numerous companies, the business of these companies was not trading in shares. It is therefore clear that the agreement was not in the ordinary course of Mr. Malunga's business. Mr. Randall did not place much emphasis on this argument at the hearing of the appeal.

[43] The court *a quo*, correctly in our view, found that more was required in the way of evidence to show that the most probable inference to draw from the proven

³ 2013 (2) SA 187 (SCA) at para [10].

facts is that the disposition of Mr. Malunga's shares when he exited, in the entities in which he had an interest, and in terms of the agreement, was in the course of his business.

If the agreement constituted an alienation, is it rendered void by the provisions of section 15(2)(c)?

[44] If the option constitutes an alienation for the purposes of section 15(2)(a) of the MPA, then the central issue which arises for determination in this appeal is whether Ms. Sanqela is entitled to the protection afforded to third party purchasers by section 15(9)(a). If she is not, the sale is void for want of the consent of Ms. Malunga. If she has brought herself within the protection of the deeming provision in section 15(9)(a), Ms. Malunga is deemed to have consented to the agreement and the option is enforceable.

[45] In *Marais NO and Another v Maposa and Others*⁴ (*Maposa*) the SCA stated as follows:

‘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”.

⁴ *Marais NO and Another v Maposa and Others* [2020] ZASCA 23; 2020 (5) SA 111 (SCA) at para 26.

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.

....

[46] In *Maposa* the court clearly set out the requirements for an agreement to be validated in terms of section 15(9)(a), as follows⁵:

‘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 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.

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. Van Heerden, Cockrell and Keightley say:

⁵ *Ibid* at paras 28 to 32

“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.”

[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*.⁶

[47] The Court *a quo* observed that the nature and form of the inquiry which the third party is required to undertake depends on the circumstances of each case, and that such an enquiry may also be by the third party's agent, for example an attorney.

[48] Ms Malunga does not dispute that the Ms Sanqela was not aware of the fact that Mr Malunga was married in community of property and Ms Malunga had not consented to the conclusion of the option agreement. The first leg of the test in terms of section 15(9)(a) is accordingly met. The only question that remains is whether Ms Sanqela could reasonably have known that consent was required and that it had not been given.

[49] In terms of the general principle that she who asserts must prove, the party who invokes the protection of s 15(9)(a) must prove that the requirements in terms thereof have been met.⁷

[50] After considering the findings in *Maposa*, the court *a quo* found that the enquiry required of Ms Sanqela as the third party was not prescribed, and that whether that enquiry was sufficient must be viewed in the context of the facts of each case.

[51] In the present matter, unlike in *Maposa*, both parties were represented by attorneys when the agreement was concluded.

[52] The court *a quo* held that as Ms. Sanqela was represented, it could not be expected of her to go over her legal representatives and directly inquire from Mr.

⁶ *Mulaudzi v Mudau and Others* (1034/2019) [2020] ZASCA 148 (18 November 2020).

⁷ *Maposa* at para 28.

Malunga regarding the marital regime governing his marriage, and, if it was one in community of property, to ascertain whether he had the written consent of his spouse.

[53] The court *a quo* found that this was the responsibility of the legal representatives who assisted the parties, and that in the circumstances as a reasonable person she cannot have known or have been expected to know that their marriage was one in community of property, or that Ms Malunga longer had not given her written consent.

[54] It is necessary for us to now determine whether this finding is correct, and more specifically if Ms. Sanqela is protected under section 15(9)(a) where she did not make any enquiries and relied solely on her attorney as her agent to do so. The question which arises is whether this was this an objectively reasonable stance for her to adopt.

[55] In essence, the court *a quo* put Mr Malunga's attorney on enquiry, and did not consider that the duty to make reasonable enquiries, as contemplated in section 15(9)(a), of the Act, in fact rested on the attorney of the third party, Ms Sanqela.

[56] In our view, as the party seeking to avail herself of the protection afforded in terms of section 15(9)(a), Ms Sanqela or her attorney, acting as her agent, was obliged, if she wished to invoke the deeming provision, to make the necessary and reasonable enquiries to ascertain whether Mr Malunga was married in community of property, and if so, whether his spouse had consented to the transaction.

[57] By accepting the client's instruction and undertaking to provide them with the legal services necessitated by such instruction in exchange for a fee, a contract is formed between the client and the legal practitioner. It is implied in such contract that the legal practitioner represents to the client that they have the necessary skill,

knowledge and diligence to perform their duties as would be expected of a legal practitioner with ordinary skill.⁸

[58] Ms Sanqela's attorney, Ms Makan's failure to make the necessary enquiries was unreasonable in the circumstances of this matter. Her omission in this regard must be imputed to Ms Sanqela, because as her attorney and agent, he was ethically and statutorily duty bound to represent her client's interests to the best of her ability, and to act in accordance with her mandate to represent her on all legal matters pertaining to the transaction given her legal expertise.

[59] The failure of Ms Sanqela's attorney to inquire about the matrimonial property regime applicable to Mr Malunga and consequently and to inquire about Mr Malunga having spousal consent, means that Ms Sanqela did not discharge the duty to take all reasonable steps to make that inquiry. In the circumstances she cannot avail herself of the protection of section 15(9)(a).

[60] In applying the authority set out in paragraph 46 above, it is our view that it was Ms Sanqela and her attorney who were required to make reasonable enquiries in this regard. It is clear that he failed to do and on this basis Ms Sanqela failed to discharge the burden necessary to invoke the deeming provision in section 15(9)(a).

Conclusion

[61] In the result, the Respondent's failure to make the necessary and reasonable inquiry, vitiates the agreement due to lack of spousal consent and the appeal must succeed.

Costs

⁸ see *Honey and Blanckenberg v Law* 1966 (2) SA 43 (R) at 46E-F. <https://www.derebus.org.za/the-legal-basis-of-a-legal-practitioners-liability-for-negligence-in-execution-of-mandate/>

[62] Costs must follow the result. The appellants have been completely successful, therefore they are entitled to the costs of the appeal.

Order

[63] It is ordered that:

63.1.1 The appeal is upheld.

63.1.2 The order of the court *a quo* is set aside and replaced with an order that the Respondent's application is dismissed.

63.1.3 Respondent is ordered to pay the costs.

HOLDERNESS J

ALLIE J

I agree and it is so ordered.

DA-SILVA SALIE J

I agree.

APPEARANCES

For the Appellants: Adv A Oosthuizen SC

Instructed by: Herold Gie Attorneys
Mr HC Stubbings

For the Respondent: Adv R Randall

Instructed by: Schreuder Incorporated Attorneys