IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, MTHATHA)

APPEAL NO. CA13/2012

CASE NO. 1393/2011

Reportable	**yes**

In the matter between:

NOMKHITHA VUYOKAZI GUGU	**1st Appellant**
PHUMELELE GUGU	**2nd Appellant**

And

ANDILE LIVINGSTONE ZONGWANA	**1st Respondent**
NOMHLE LUCY ZONGWANA	**2nd Respondent**
MKHANYISELI PANGWA	**3rd Respondent**
THE REGISTRAR OF DEEDS, MTHATHA	**4th Respondent**
LINDA PRECIOUS-PEARL PANGWA	**5th Respondent**

FULL BENCH APPEAL JUDGMENT

D VAN ZYL ADJP:

[1] This appeal concerns the successive sale of a residential property situated in Southridge Park, Mthatha **("the property").** According to the appellants the first respondent sold the property to them on 16 March 2011 for a purchase price of R740 000,00. In terms of clauses 3 and 6 of the written deed of sale ("**the sale agreement**") the first respondent undertook to transfer ownership of the property to the appellants upon the furnishing of a guarantee, and to place the appellants in occupation of the property. In June 2011 the appellants made application to the court *a quo* as a matter of urgency for an order, the purpose of which was to prevent the first respondent from acting in breach of the sale agreement. The reason for the application was the fact that a certain Mr Dukada, an estate agent who was instrumental in the sale of the property, told the appellants that the first respondent had cancelled the sale in writing and that the property was sold to the third respondent. From the documentation put up in answer to the application it transpired that it was in fact the first respondent and his wife, the second respondent who sold the property to the third respondent and his wife, who was then as a consequence subsequently joined as the fifth respondent.

[2] Save for the registrar of deeds, who was cited as the fourth respondent, the application was opposed by the respondents. As they not only placed the validity of the sale agreement in dispute, but also its very existence and cancellation, it is necessary in order to effectively deal with the issues raised thereby to investigate the factual background to the signing of the said agreement. According to the said Dukada, who deposed to an affidavit in support of the appellants' application, he was phoned sometime in December 2010 by the second respondent. She informed him that she is the former wife of the first respondent and that she **"wanted to have the property owned under the name of the first respondent sold so that her part of the proceeds could be paid to her attorneys based in Port Elizabeth in line with a proper distribution between herself and the first respondent."** Dukada requested the second respondent to confirm her instructions to him in writing. He thereafter received a letter from a firm of attorneys in Port Elizabeth. He also telephonically discussed his mandate with the said attorneys, which was **"to cause the property sold and that offers be referred to Miss Zongwana."**

[3] In the aforementioned letter addressed to Dukada he was informed that the first and second respondents' marriage was dissolved in October 2010 and that in terms of the court order a division of the joint estate was ordered. Further, that the property which is registered in the name of the first

respondent, formed part of the joint estate, and that **"in terms of the division order, our client wants this property to be sold and our client's instructions to you are to place the property on the market with or without Mr Zongwana's consent. All offers must be referred to our client and to Mrs Zongwana."** The reference to the last sentence to **"Mrs"** Zongwana in its context seems to be incorrect and was meant to refer to the first respondent.

[4] According to Dukada he thereafter on occasion met the first respondent and informed him of the instructions he had received from his former wife. He arranged with the first respondent, who was co-operative, to view the property so as to assess the market value thereof. Dukada also performed a deeds office search and found that the first respondent was registered as the owner of the property. He received an offer for the purchase of the property from the appellants. He informed both the first and second respondents of the offer who expressed their satisfaction therewith. The first respondent then signed the sale agreement as the seller of the property as it **"was agreed between the applicant and his ex-wife that it should be under the name of the first respondent as the property is so registered at the Deeds Registrar."** Reference to the **"applicant"** in this sentence is presumably meant to refer to the first respondent.

[5] In his answering affidavit the first respondent confirmed the fact that he was informed by Dukada that his former wife, the second respondent, had instructed him to place the property on the market. Dukada introduced him to two potential buyers. Nothing however materialised. He was also phoned by the second appellant who informed him that she was employed at the financial institution where one of the potential buyers apparently applied for a loan, and that she was in a position to obtain finance for the purchase of the property in the amount of R740 000,00. The first respondent informed her that the purchase price of the property was R800 000,00. In March 2011 the first respondent then instructed a certain Mr Xwayi to find potential buyers for the property. As a consequence he was introduced to a husband and wife, namely the third and fifth respondents, who offered to purchase the property for R800 000,00. The offer was conveyed to the second respondent who accepted it. On 16 March the first respondent signed a deed of sale **("the second agreement")** in terms whereof the property was sold to the third and fifth respondents for the sum of R800 000,00. By reason of the fact that the second respondent was residing in Port Elizabeth, she could only sign the agreement two days later on the 18th. The first and second respondents are described in the second agreement as the **"sellers"** of the property.

[6] The first respondent further denied having sold the property to the appellants. According to him he was approached by Dukada on 16 March 2011 **"with a prepared deed of sale"** and he was requested to sign it. After he had signed it he handed it back to Dukada. With regard to the cancellation of the sale agreement, the first respondent's version is that he was again approached by Dukada in June 2011 who informed him that the purpose of his visit was **"so that I might cancel a deed of sale which I had signed with the applicants** (the appellants) **and he then showed me the said sale agreement, I informed him that the sale agreement was never signed by my ex-wife as a result whereof it was null and void and have no force and effect. He told me that I should write a letter for its cancellation even if it was null and void so as to convince the applicants, and I did that."**

[7] The second respondent's response to the application was to the effect that she had telephonically instructed Dukada to market the property. This was followed by the letter from her attorneys referred to by Dukada in his affidavit. According to the second respondent she told Dukada that she was a joint owner of the property. He was instructed to place the property on the market and to refer all offers to her and the first respondent. The second respondent denied having agreed to sell the property to the appellants. The

only time she spoke to Dukada about the sale of the property to the appellants was some time after the conclusion of the sale of the property to the third and fifth respondents. Dukada informed her on that occasion that he had an offer for R740 000,00 for the property. She told him that the property had already been sold and that she was in any event not interested in an offer of R740 000,00. The sale agreement on which the appellants place reliance is, according to the second respondent, invalid as she is not a party thereto and it does not comply with the statutory requirements applicable to the sale of land.

[8] The third and fifth respondents also filed affidavits in opposition to the application, essentially on the basis that the sale agreement is invalid by reason of the fact that it had not been signed by both the first and second respondents as the joint owners of the property. The remainder of the matters raised in the third and fifth respondents' affidavits are not relevant to a decision of the issues in this appeal. The relief claimed by the appellants in the application is of a very limited nature and related to two matters: The first was the cancellation of the sale agreement by the first respondent in June 2011. The appellants asked that it be declared unlawful and be set aside. The second prayer dealt with the second agreement which the first

respondent entered into jointly with the second respondent for the sale of the property to the third and fifth respondents. The appellants asked that this agreement be declared unlawful and that it be set aside. The remainder of the relief claimed was of an interim nature aimed at preventing the first respondent from giving transfer of the property to the third and fifth respondents in terms of the second agreement pending the finalisation of the application.

[9] At the initial hearing of the application the court *a quo* issued a *rule nisi* in the terms of the relief claimed in the notice of motion. When the matter was finally argued before Dunjwa AJ on an extended return day he refused to confirm the *rule nisi*. He ordered the dismissal of the application with costs and subsequently refused the appellants leave to appeal. This appeal, with the leave of the Supreme Court of Appeal, is against the aforesaid order.

[10] In its judgment the court *a quo* agreed with the respondents that the sale agreement on which the appellants placed reliance for the relief sought was invalid. It gave two reasons for arriving at this conclusion: Firstly, the sale agreement did not comply with the provisions of section 2(1) of the

Alienation of Land Act 68 of 1981 **("the Alienation of Land Act").** This sub-sections provides that **"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect, unless it is contained in a deed of alienation signed by the parties or their agents acting on their written authority."** The court found that the first and second respondents were co-owners of the property, and in the absence of the first respondent having had the authority in writing to act as an agent on behalf of the second respondent, they both had to be parties and signatories to the agreement.

[11] Secondly, by reason of the fact that the property formed part of the joint estate of the first and second respondents, the court *a quo* held that the first respondent was not entitled to sell the property without first having obtained the written consent of the second respondent as required by section 15(2) of the Matrimonial Property Act 88 of 1984 **("the Matrimonial Property Act")**. Sub-section 15(1) and 15(2)(a) and (b) reads as follows:

"(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."**

Accordingly, having failed to show that the second respondent consented to the sale of the property to the appellants in writing, and in the absence of the appellants having taken reasonable steps to ascertain whether such consent was obtained, the sale agreement was invalid.

[12] The court *a quo* finally held that even if the sale agreement was to be found to be valid, the appellants were seeking a final interdict and had to establish a clear right for such relief. This they had failed to do. This finding appears to be based on the proposition that whilst the third and fifth respondents were parties to a valid agreement of sale and they had complied with their obligations therein, the appellants by contrast had failed to provide a **"proper"** bankers guarantee for the full purchase price and to pay the purchase price within the thirty days required by the sale agreement. This finding is clearly not supported by the documentary evidence placed before the court *a quo* in this regard, or by the terms of the sale agreement, and unsurprisingly none of the parties at the hearing of this appeal sought to

place any reliance thereon. It is accordingly not necessary to make any further reference to this finding.

[13] As stated earlier, the first respondent denied that he entered into the agreement on which the appellants placed reliance on. His contention was that although he signed the written document recording the terms of the sale agreement, he did not know who the purchaser was. From the judgment of the court *a quo* it would appear that the respondents did not seek to rely on the first respondent's allegations in this regard and instead elected to direct their attack at the validity of the sale agreement. The respondents quite rightly in my view did not at the hearing of this appeal attempt to argue with any conviction that the appellants have failed to show the existence of the agreement on which they place reliance for the relief sought. The reason is that the first respondent's contentions with regard to the signing of the sale agreement are not worthy of any credit, are implausible and clearly untenable to the extent that they may justifiably be rejected merely on the papers. (See *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 E – I and *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) at 290E – F.)

[14] The explanation tendered by the first respondent for his signing of the sale agreement is vague and non-committal. It fails to explain why he would, on his version, and on the same day after he had already signed another agreement for the sale of the property at the instance of another property agent, sign a further agreement with a different agent without enquiring what the purpose of its signing was. He further failed to explain why and in what circumstances he also signed an addendum to the sale agreement. Similarly, the first respondent's explanation for having written a letter to the appellants cancelling the sale agreement which according to him was non-existent, is not worthy of belief. The unsatisfactory explanation of the first respondent rather suggests that he signed the second agreement because he received a higher offer for the property.

[15] It must accordingly be concluded that the first respondent did enter into the sale agreement. The appellants' case in argument was simply put that the first respondent as its registered owner was entitled to sell the property to the appellants, and that any claim which the second respondent may have by virtue of the order for a division of the joint estate, was limited to a half share of the proceeds of the sale. It was accordingly contended that the first respondent is bound to the sale agreement, and as the appellants' rights arose

in time before that of the third and fifth respondents (*qui prior est tempore potior est jure*), the second agreement is unenforceable. This argument is based on the fact that the sale agreement was concluded two days before the second agreement, a fact which is not in dispute. As stated earlier, the second respondent only appended her signature to the latter agreement on 18 March 2011. The respondents in turn supported the findings of the court *a quo* that in the absence of the second respondent having been a party to the sale agreement, and failing compliance with the provisions of the Alienation of Land Act and the Matrimonial Property Act, the sale agreement was invalid.

[16] The questions to be decided is therefore whether the fact that the second respondent was not a party to the sale agreement in any way affected the validity thereof, and if not, whether the second agreement should be declared invalid. The answer to these questions does not lie in the legislation relied upon, but rather in the application of, and interaction between a few fundamental principles and rules of our common law. A point of departure is to investigate more closely the legal relationship between the first and second respondents and their respective rights to the property. It is common cause that prior to the dissolution thereof the first and second respondents

marriage was one in community of property. The effect of a marriage in community of property is that it produces a universal community of property which entails that the husband and wife become tied or bound co-owners in undivided and indivisible half-shares of all the assets and liabilities they have at the time of their marriage. The community comprises all the assets of the spouses, moveable and immovable, wherever situated. (Hahlo **The South African Law of Husband and Wife** 5th ed at page 157 to 158 and 161 to 162.) The community persists during the continuance of the marriage. Upon dissolution of the marriage it comes to an end. Unless the court granting the divorce makes an order for forfeiture of benefits, the divorce order automatically also operates as an order for a division of the joint estate. (Hahlo *op cit* at page 376 *et seq).*

[17] The legal effect of the dissolution of the community of property is that the joint estate is divided *ipso jure* into two equal shares. (*Geard v Geard* 1943 EDL 322 at 326). Where the spouses were previously tied owners in undivided and indivisible half-shares of all the assets and liabilities forming part of the joint estate, their shares become determinate and divisible. They now become **". . .in effect free co-owners *entitled* to a division of the estate. Their shares become divisible. Given the circumstances of divorce, it can rarely arise in**

practice that they would elect to continue co-ownership in this new form, and thus possibly the rule has grown up that the granting of a divorce carried with it an automatic order for division. It is open to the divorcing spouses (see section 7(1) of the Divorce Act 70 of 1979) to arrive at a settlement in terms of which they could, for example, continue as co-owners of particular assets." (Per King J in *Ex Parte Menzies and Uxor* 1993(3) SA 799(C) at 815 F – G. Referred to with approval in a decision of the full court in *Corporate Liquidators (Pty) Ltd v Wiggill* 2007 (2) SA 520 (T) at 526 D-E). In practice the parties more often than not agree upon a division of the property comprising the estate. If the spouses are unable to agree on a division **"...the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf. Under the general powers which the Court has to appoint curators it may nominate and empower some one ... to collect, realise, and divide the estate. And that that has been the practice in South African courts is clear"**. (Innes CJ in *Gillingham v Gillingham* 1904 TS 609 at 613. Also *Van Onselen NO v Kgengwenyane* 1997 (2) SA 423 (BSC)).

[18] It is evident from this exposition of the legal position that the finding of the court *a quo* that the provisions of section 15(2) of the Matrimonial Property Act found application to the sale agreement despite the dissolution of the first and second respondents' marriage, because **"the property to be alienated**

formed part of the joint estate", is misplaced. The said section, from a reading thereof, clearly regulates the relationship between the spouses during the course of the marriage in community of property. The word "**spouse**" in its ordinary meaning indicates a person who is, not was married. Further, the words "**joint estate**" is defined in section 1 of the Matrimonial Property Act as meaning the joint estate of a husband and wife married in community of property. The finding of the court *a quo* further loses sight of the fact that post divorce the community of property comes to an end and that the legal relationship between the spouses changed, which in turn effected their rights and duties as co-owners of the property. Where, as it appears to be the position in the present matter, the former spouses choose not to continue as co-owners but to divide the assets by liquidating some or all of it without invoking the general power of the court to appoint a liquidator for that purpose, the division is jointly administered by them. The reason lies in the fact that following their divorce they are co-owners of the assets of the joint estate and any juristic act with regard to the common property can only be effected with the co-operation of both of them. Generally, a co-owner is not an agent for the others (*Oblowitz v Oblowitz* 1953(4) SA 426 (C) at 433G). This means that the one spouse cannot without the consent of the other alienate the assets of the joint estate. (*Van der Merwe v Van Wyk* 1921 EDC 298 at 303; Van der Merwe **Sakereg** 2nd ed at page 260 and Joubert (ed) The

Law of South Africa (**LAWSA**) first reissue vol 27 at para 410). This requirement post divorce accordingly arises from their relationship as co-owners, and not by virtue of the provisions of section 15(2) of the Matrimonial Property Act.

[19] The position is therefore that the first respondent could not, without the consent of the second respondent, sell to the appellants anything more than his half share in the property. This is so despite the fact that the property was registered in the deeds office in the name of the first respondent. The reason is twofold: Firstly, upon the dissolution of a marriage in community of property by an order of the court the rights of the former spouses in the property of the joint estate vest in them *ipso jure* without the need for delivery in the case of movable property or, in the case of immovable property, registration of transfer. Although, **"... formal conveyance and transfer *coram lege loci* became established in our law as the only valid mode of *traditio* in relation to ownership of immovable property... where ownership passed by operation of law, no *traditio* and therefore no transfer was required to vest it**." (See *Ex Parte Menzies et Uxor* supra at 816A-B). Secondly, although our system of land registration generally proves ownership, it is not necessarily conclusive. "**We have a negative system of registration where the deeds registry**

does not necessarily reflect the true state of affairs" (*Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001(3) SA 569 (SCA) at 579F. Also *Corporate Liquidators (Pty) Ltd v Wiggill* supra at 527 E-F and *Ex Parte Menzies et Uxor* supra at 816 A-B). There are a number of exceptions to the rule that the acquisition of a real right of ownership in immovable property must be by registration. Besides prescription, an example of acquisition of ownership not requiring an act of registration is by marriage in community of property. **"Nor does the fact that the land in question is registered in the name of the board militate against this conclusion, for registration is not necessarily conclusive on the question of ownership of land. It is not so, for example, in the case of marriage in community of property, or of partnership, or of bequests by will."** (*Union Government (Minister of Justice) v Bolam* 1927 AD 467 at 472 see further *Rosenberg v Dry's Executors and Others* 1911 AD 679 at 689; Badenhorst *et al* **Silberberg and Schoeman's The Law of Property** 5th ed at page 236; Mostert *et al* **The Principles of the Law of Property in South Africa** at page 212 and Van der Merwe *op cit* at 342 to 343.)

[20] On a reading of the sale agreement it is evident that the first respondent did not intend to sell, and the appellants did not intend to purchase, the first respondent's undivided share in the property. The intention of the parties

thereto as it appears *ex facie* the written record of their agreement is the sale of the actual property itself. Leaving aside the formal requirements for the sale of land in section 2(1) of the Act, the question is then whether the second respondent consented to the sale of the property to the appellants. As stated earlier, the second respondent in her answering affidavit denied that she was consulted by Dukada or the first respondent with regard to the sale of the property to the appellants. The first appellant's reliance in her replying affidavit on the fact that the second respondent agreed that the property be sold on the open market as constituting the required consent is misplaced. The question is rather whether she consented to the sale of the property to the appellants on the terms as contained in the sale agreement. On an application of the principles in *Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd supra* it must accordingly be accepted that the first respondent acted without the consent and authority of the second respondent.

[21] The result of this is firstly, that on an application of the doctrine of privity of contract the second respondent is not bound by the terms of the sale agreement. As a principle, a contract is a matter between the parties thereto, and no one who is not a contracting party will incur any liability or derive any benefit from the terms thereof. (See generally Christie **The Law of**

Contract in South Africa 5th ed at page 260 to 261). It must accordingly be accepted that in the absence of her being a party to the sale agreement, the second respondent cannot be compelled to comply with any of the terms thereof. Secondly, without the second respondent ratifying the sale agreement the first respondent is unable to give effect to the terms thereof by giving transfer of the ownership of the property to the appellants and place them in occupation thereof. He is not the owner of the property and cannot transfer ownership of the property to the appellants. Any attempt to do so would entitle the second respondent to an interdict. Simply put, not being the owner of the property the first respondent is unable to give any better or greater right or title thereto than what he had at the time of the sale ("*Nemo plus juris ad alium transferre potest, quam ipse haberet*" Digest 50.17.54. See *Bles v Botha* 1910 EDC 15 at 18 and *Ex Parte Van der Watt* 1924 OPD 9 at 14. Also Kahn *et al* **Principles of the Law of Sale and Lease** 2nd ed at page 5.)

[22] The question is then whether this means that the sale agreement as a contract binding the applicants and the first respondent is invalid because the first respondent is not the owner of the property but simply owns an undivided half-share therein, and acted without the authority of the second respondent.

The answer is that it is not invalid. Provided the sale agreement is valid for compliance with the requirements for a valid sale (*emptio venditio*) and / or any other statutory formalities which may find application, the position in our law is that the seller need not be the owner of the thing sold. The seller may in other words sell the property of another. Wessels in his work on **Contract** (volume 1 at para 413 and 414) explains it as follows: **"The Roman-Dutch Law, however, has followed implicitly the Roman Law and has adopted the principle that if I promise to give or to sell or to let or to pledge to you something which belongs to another, I undertake to procure the object of my promise from the real owner or to pay to you whatever damage you have suffered on account of my inability to carry out the agreement (D.41.3.15.3; D.18.1.28.; D.19.2.9; D39.5.18.3; D13.7.9.4; D19.4.1.3; Voet, 18.1.14)."**

and

"The contract with regard to a thing belonging to another is a contract with regard to a thing *in commercio*, and its delivery is not a matter of physical impossibility. It is as a rule immaterial whether the promisor knows or does not know that he will not be able to obtain the object promised. There may be a difficulty, but there is no impossibility. "*Et generaliter causa difficultatis ad incommodum promissoris non ad impedimentum stipulatoris pertinent; ne incipiat dici eum quoque dare non posse qui alienum servum quem dominus non vendat, dare promiserit*" (D.45.1.137.4). A vendor, therefore, can validly sell the property of a third party (Huber, *Hed. Recht.*, bk. 3, c. 3, n. 3; Pothier, *Vente,* n. 7; *Oblig.*, n 133; *Theron and Du Plessis* v.

***Schoombie*, 1897, 14 S.C. 193). The sale is, however, subject to the buyer's right to be indemnified against eviction, for the third party can always claim his property from the purchaser unless he has ratified the seller's action (C.3.32.3).**

[23] The principle that the sale of a *res aliena* does not render the contract void has consistently been applied in our case law (See *Kleynhans Bros. v Wessels' Trustee* 1927 AD 271 at 290, *Ensor v Kader* 1960(3) SA 458 (D) at 459 and *Alpha Trust (Edms) Bpk v Van der Watt* 1975(3) SA 734 (A) at 743H), and applies equally to the sale of land. (See *Frye's (Pty) Ltd v Ries* 1957(3) SA 575 (A) at 581A and Wulfsohn **Formalities in respect of Contracts of Sale of Land Act** at page 89). **"There can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased."** (Per Hoexter JA in *Frye's (Pty) Ltd v Ries supra* at 581A.) In *Ensor v Kader supra* at 459H to 460A it is said that **"It seems to be axiomatic that a sale is not 'null and void and of no force and effect' solely because the thing sold is not at the time of the sale the property of the seller"** It is not necessary to consider the implied rights and obligations of the seller and purchaser at common law where the seller knowingly or unknowingly sells a *res aliena.* (See in this regard Grotius **Inleidinge** at 3.14.6; Voet **Commentarius** 18.1.14; *Van der Westhuizen v Yskor Werknemers se Onderlinge Bystandsvereniging* 1960(4) SA 803 (T) at 811D – F and the

discussion in Kerr **The Law of Sale and Lease** 2nd ed at page 162 to 163; Hackwill **MacKeurtan's Sale of Goods in South Africa** 5th ed at page 12 and Zulman and Kairinos **Norman's Law of Purchase and Sale in South Africa** 5th ed at page 3 to 4.) In the present matter the first respondent expressly undertook to place the appellants in occupation of the property and to give them transfer of ownership thereof. If the first respondent is unable to comply with his obligations in terms of the sale agreement he may be liable for damages for breach of his promise, or for his false representation if fraudulent or negligent. It accordingly follows that the mere fact that the second respondent was not a party to the sale agreement, and that she did not authorise the first respondent to sell the property, did not affect the validity of the sale agreement as a contract regulating the relationship between the appellants and the first respondent.

[24] It is further evident from a reading of the sale agreement that the first respondent signed it as the seller of the property in his personal capacity and that he did not intend to also bind the second respondent by acting as an agent for and on her behalf. The requirement of written authority in section 2(1) of the Alienation of Land Act did therefore not arise at all and the court *a quo* misconceived the provisions of this section by finding that in the

absence of the second respondent having been a party to the sale agreement, or the first respondent having acted as her agent, the sale agreement was invalid for want of compliance with section 2(1). As a general rule a contract can be made informally, no writing or other form is required. Where parties who have the required intention agree that one will make something (the *merx*) available to the other in return for the payment of a price (*pretium*), the contract is a sale. All that is therefore required for a valid sale is that there be agreement, which does not need to be in writing, on the thing sold and the price to be paid (*Dharumpal Transport (Pty) Ltd v Dharumpal* 1956(1) SA 700 (A) at 707 C-D). In section 2(1) of the Alienation of Land Act the legislature has deemed it appropriate to prescribe formalities (vormvoorskrifte) in respect of the alienation of land. The definition of **"alienation"** in section 1 of this Act includes the sale, donation and exchange of land. In order to be of **"any force and effect"** any contract for the sale of land must be in writing and contained in a document or documents, the so-called deed of alienation, and signed by each party or his agent acting on his written authority. What this means in effect is that where the contract is one for the sale of land the following must appear *ex facie* the deed of alienation: the identity of the seller and the purchaser; the essential terms of the sale, ie the price, and the subject matter of the sale; the other material terms of the agreement which the parties have agreed upon; and the

signature of each of the parties to the agreement, or that of their agents (*Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and Another* 2008(1) SA 654 (SCA) at para [7]). Compliance with the formalities of s(2)(1) is accordingly determined with reference to the written instrument itself.

[25] The purpose of the formal requirements in section 2(1) of the Alienation of Land Act is to prevent uncertainty, disputes and malpractices in transactions relating to land (*Wilker v Kohler* 1913 AD 135; *Clements v Simpson* 1971(3) SA 1 (A) at 7A-B). The relevant portion of section 2(1) on which the court *a quo* placed reliance for its finding that the sale agreement is invalid, deals with the formality relating to the situation where a party or parties to a deed of alienation are represented by an agent who signs the document, in the case of a sale, on behalf of the person or entity identified in the document as the seller or the purchaser **("... signed by the parties thereto or by their agents...")**. Where a person signs the document as an agent he must not only disclose that he is acting in a representative capacity, but he must be authorised in writing to do so. The formality requiring written proof of the agent's authority to act in that capacity is clearly aimed at avoiding a dispute over whether the person, who purported to sign the contract in a representative capacity on behalf of the seller or purchaser, indeed had the authority to do

so. Section 2(1) is not intended to determine or prescribe who may lawfully sell or purchase immovable property. It is also not intended to give effect to those legal principles or rules which may regulate the relationship between persons who may have a legal right to the property which forms the subject matter of a sale. The legal relationship between the parties to the agreement *inter se*, and between the parties and third persons, are determined and regulated by the terms of the agreement, the substantive law applicable to the contract of sale, the principle of contractual privity, and the principle aimed at the protection of property, namely that no-one can give a better title than he himself possess.

[26] In support of the submission that the court *a quo*'s reliance on section 2(1) for its finding that the sale agreement was invalid is correct, counsel for the third and fifth respondents referred this court in argument to the decision in *Booysen v Booysen and Others* 2012(2) SA 38 (GSJ). The facts of that case were that the surviving spouse of a couple married in community of property, who was the sole heir to his deceased wife's estate, sold an immovable property which formed part of their joint estate before the finalisation of the estate. The court was asked to declare the sale invalid. It found that the surviving spouse did not have authority to conclude the

agreement for the sale of the property without the consent of the executor and that it was as a result invalid. This finding is based on the premise that, otherwise than what the position is where a marriage in community of property is dissolved by divorce, and by reason of an application of the rules applicable to our system of administration of a deceased estate, neither the surviving spouse nor the heirs of the deceased spouse automatically acquire co-ownership in individual assets of the joint estate. They merely acquire the right to claim from the executor of the estate half of the net balance of the joint estate after winding up. (See *Corporate Liquidators (Pty) Ltd v Wiggill* supra at 526 D and Hahlo *op cit* at page 174 to 175, page 376 and 382). As the surviving spouse did not "**...gain ownership of the whole joint estate upon the death of his wife ...**" he **". . . therefore had no legal capacity to enter into the disputed sale agreement . . ."** as it "... **was the prerogative of the executor ... to do so"** (Moshidi J in *Booysen v Booysen supra* at para [12]). In the alternative it was found that in the absence of authority to conclude the agreement, the sale of the property did not comply with section 2(1) of the Alienation of Land Act. With reliance on the decision *Tabethe and Others v Mtetwa NO and Others* 1978(1) SA 80 (D), the court further found that in order to avoid invalidity, a deed of sale dealing with property in a deceased estate has to be signed by the duly appointed executor, or an agent on behalf of the executor acting on his written authority as required by section 2(1).

[27] I find myself in respectful disagreement with these findings. It loses sight in the first place of the fact that in our law the sale of a *res aliena* does not render a contract of sale invalid. The surviving spouse as the sole heir was not precluded from contracting to alienate what he hoped to receive after the winding up of the estate. Secondly, the finding that without the authority of the executor the sale is invalid for non-compliance with section 2(1) of the Alienation of Land Act is based on a misreading of that section. The written authority required by section 2(1) is that of the agent. It does not require the person or entity who is identified *ex facie* the deed of alienation as the seller and the purchaser respectively, to have the authority to sell or to buy the property forming the subject matter of the sale. What it says is that if the deed of alienation is not signed by the seller or by the purchaser, but by another person on their behalf and in a representative capacity, that person must to have the written authority of the seller or the purchaser to do so.

[28] The decision in the *Tabethe* case (*supra*) also does not provide authority for the finding of the court in Booysen (*supra*). In *Tabethe* (*supra*) the court was called upon to give meaning to the terms of an agreement for the sale of a property which formed part of a deceased estate. The question to be

decided was whether on a construction of the document recording the terms of the agreement, the signatory thereto who was a co-executrix of the deceased estate, sold the property in her personal capacity, or in her capacity as representative of the estate. The court held quite correctly that if it was to be found that contract was intended to record a sale of the property by the two executrices of the estate, both their signatures had to appear on the deed of sale. Once the executrices were identified as being the seller of the property, in order to comply with the requirement in section 2(1) of the Alienation of Land Act, namely that the deed of sale must be signed by the parties thereto, they both had to append their signatures to the deed of sale, or in the absence thereof, the signature of an agent with written authority to represent the co-executor who did not sign the agreement.

[29] The reason for this finding lies in the legal nature of the office of an executor. Like tutors or curators the executor derives his authority to represent the estate *ex lege*, and by signing a deed of alienation he does so as a principal and not as an agent. In *Potchefstroom Dairies and Industries Co. Ltd v Standard Fresh Milk Supply Co.* 1913 TPD 506 at 513, adopted in *Muller en 'n Ander v Pienaar* 1968 (3) SA 195 (A) at 200H to 201C, the court, in dealing with a provision similar to section 2(1), said the following:

"Moreover the use of the word 'authorised' points I think to an express authorisation as distinct from one arising by implication of law. So that it seems to me that the agency contemplated by the section is one expressly created by a person who could himself have exercised the delegated power had he chosen to do so. In this view tutors, curators, corporations and partnerships are all excluded. Tutors and curators are excluded because the acts which they are appointed to perform are *ex hypothesi* acts which their wards cannot perform. Corporations are excluded because having neither minds nor hands of their own they cannot themselves do what their agents do for them. And partnerships are excluded because the agency of a partner for his co-partner is not expressly created but arises by implication of law as soon as the partnership relation is constituted. Not only is this in my opinion the effect of the section properly construed, but it seems to me to be a reasonable interpretation and one which accords with the true facts of the case. Tutors and curators are really not agents at all. They are principals, though with limited powers. And if they enter into a contract of sale they do so by virtue of a faculty incidental to their office and not of any power derived from the ward."

(See further *SA Sentrale Koöperatiewe Graanmaatskappy Bpk v Thanasaris* 1953(2) SA 314 (W) and Van Rensburg and Treisman **The Practitioner's Guide to the Alienation of Land Act** 2nd ed at page 58 to 59.)

[30] The finding in *Tabethe* (*supra*) therefore goes no further than that the signatories to a deed of sale as contemplated in section 2(1), must be the

person or entity identified therein as being the seller and the purchaser. In other words, whether the parties have signed the deed of sale as required by section 2(1) is determined with reference to the deed of sale itself. (*Grossman v Baruch and Another* 1978(4) SA 340 (W)). If it is signed by someone other than the parties described therein, there must be written proof of the authority of the signatory to have acted on behalf of the seller or the purchaser as the case may be. As stated earlier, in the present matter the first respondent *ex facie* the agreement acted in his personal capacity in binding himself to the appellants for the sale of the property. Whether he could, without the co-operation of the second respondent comply with his obligations to give the appellants transfer of the property and place them in undisturbed possession thereof, is dependent upon the principles applicable to the law of sale and of property, and has nothing to do with the question whether the sale agreement complied with the formality requirements of section 2(1) of the Alienation of Land Act.

[31] It must therefore be concluded that the appellants are entitled to enforce their rights in terms of the sale agreement viz-a-viz the first respondent. The next question is whether this finding would entitle the appellants to the relief claimed in these proceedings. The purported cancellation of the sale

agreement was clearly invalid and in breach thereof. Clause 12 thereof deals with cancellation and provides that the seller must give the purchaser 14 days written notice by pre-paid registered post requiring the purchaser to remedy any breach. In the absence of having complied with this provision, the first respondent was not entitled to cancel the sale agreement. It is not in dispute that the first respondent failed to comply with clause 12. On the contrary, his contention was in effect that he had no intention to cancel any agreement as none existed in the first place. The appellants are accordingly entitled to an order declaring the first respondent's cancellation of the sale agreement to have been invalid and of no force and effect.

[32] As stated earlier, the further relief sought by the appellants is limited to an order declaring the second agreement invalid ("**unlawful**"). This is quite clearly on the basis, as submitted during argument, that the second agreement constituted an infringement of the appellants' prior right arising from the terms of the sale agreement. The position is however that the existence of a contract for the sale of a specific property does not effect the validity of a subsequent sale of the same property by the same seller to a different purchaser. In other words, the existence of an agreement for the sale of a specific thing does not prevent the creation of a competing personal

right *ex-contractu* for the delivery or the transfer of the same moveable or immoveable thing. Consequently, ownership is generally not acquired by the purchaser whose contract was the earlier one, but by the purchaser who was the first to obtain delivery or transfer without knowledge of the existence of the prior right of another. (Scholtens **"Double Sales"** (1953) 70 SALJ at page 22; *Cussons en Andere v Kroon* 2001(4) SA 833 (SCA) at 839 C-E and generally Kerr **The Principles of the Law of Contract** 6th ed at page 673 and the authorities referred to. Whether knowledge has to exist at the time of the sale or at transfer is an open question. See *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) at 787 E-H). Where, as in the present matter, ownership has not yet passed to any of the competing purchasers, the personal right of the purchaser who is first in time is given preference by application of the *maxim qui prior ext tempore potior est jure*. (See *Krauze v Van Wyk en Andere* 1986(1) SA 158 (A) at 171G – I and 173J). The result of this is that the first purchaser has the right to claim specific performance of his contract and to restrain the seller from committing a breach of his contract by interdicting the seller from passing ownership to the second purchaser, whose only remedy in turn is an action for damages against the seller. (See generally Kerr *op cit* at page 671 to 672.)

[33] Counsel for the appellants urged this court in argument, if its found that the second agreement is not invalid, to instead interdict the first and second respondents from giving transfer of the property to the third and fifth respondents in terms of the second agreement pending the finalisation of an action for an order enforcing the terms of the sale agreement. The difficulty with this request is that this was not relief which the appellants sought in the court *a quo* and the issue raised by it goes beyond the validity of the cancellation of the sale agreement and the validity of the second agreement. It raises the question in the context of an application for an interlocutory interdict, whether the appellants would be entitled to seek enforcement of the terms of the sale agreement, which was not the case the respondents were called upon to answer. However, accepting in favour of the appellants that this issue has been properly raised and is capable of determination on the papers as they stand, I am not convinced that they are entitled to the relief sought during argument. The accepted approach to successive sales and competing rights is that as a point of departure the possessor of the earlier right, in this case the appellants, is entitled to specific performance, unless the second purchaser can show that the balance of fairness is in his favour. "**... the priority of the competing claims had to be decided in favour of the appellants according to the *qui prior est tempore potior est iure* principle unless the respondent had raised special circumstances that would tilt the balance of fairness**

in his favour…" (Per Brand JA in *Wahloo Sand Bk v Trustees, Hambly Parker Trust* supra at 779A-B and 784F–G).

[34] There are two considerations which are in my view important in assessing fairness in this case. The first is that it is not alleged, and there is nothing to show that the third and fifth respondents, and more importantly the second respondent as joint owner, had knowledge of the prior rights of the appellants, or that they were not *bona fide*. A second and more important consideration on the facts of the present matter is the court's view of the prospects of a claim for specific performance succeeding in the anticipated proceedings. This requires an assessment of whether the appellants would be able to effectively enforce their rights in terms of the sale agreement. It is evident that the answer to this question is dependant on whether the first respondent would be in a position to comply with the terms of the sale agreement. As stated earlier, the first respondent, being a co-owner of the property, cannot deal with the property without the co-operation of the second respondent. He would accordingly only be in a position to comply with his obligations in terms of clauses 3 and 6 of the sale agreement, namely to give transfer of the property to the appellants and to place them in undisturbed occupation thereof, if he is able to either obtain the consent of

the second respondent thereto, or to acquire her undivided half share in the property. The difficulty with this proposition is that the second respondent, who it must be accepted on the evidence acted *bona fide*, would not be able to do either without her being in breach of her agreement with the third and fifth respondents to sell the property to them. By opposing the relief sought by the appellants in these proceedings the third and fifth respondents have made it clear that they are intent on enforcing their rights in terms of their agreement with the first and second respondents. The second respondent in turn had similarly expressed her commitment to comply with the terms of the second agreement which is financially more beneficial to her, and she had made it clear that she has no intention of ratifying the first respondent's sale of the property to the appellants.

[35] If the first respondent is not in a position to either obtain ownership of the property by purchasing the second respondent's undivided share therein, or obtain her consent to the sale of the property and to give free and undisturbed occupation to the appellants, it would clearly serve no purpose to grant the appellants interdictory relief. This appears to be an appropriate case where the court should in the exercise of its discretion, decline to grant the interdict sought. (Van Loggerenberg & Farlam **Erasmus Superior**

Court Practice at E8-13 *et seq*). The result is that the appellants may have to be satisfied with a right to claim damages from the first respondent, a right which remains open to them to pursue in subsequent proceedings. For these reasons the appellants are in my view only entitled to an order in terms of paragraph 1(a) of the *rule nisi*.

[36] With regard to costs, as the appellants have achieved substantial success they are entitled to the costs of both the appeal and of the application in the court *a quo*. The question was raised with the parties during argument whether the first respondent should not solely be responsible for such costs. The application was necessitated by the fact that he entered into a second agreement in respect of the same property and there is, as stated, nothing to show that the second, third and fifth respondents were not *bona fide*, or that they were aware, or for that matter should have been aware of the existence of the sale agreement which the first respondent entered into with the two appellants. There is similarly no evidence that the appellants had knowledge of the limitation to the first respondent's title in the property, or that they were not *bona fide* in entering into the sale agreement. A further consideration relevant to costs relates to the first respondent's conduct in choosing to advance an unacceptable and plainly misleading explanation not

worthy of any belief for having entered into the second agreement. This merits censure. It would accordingly in my view not do justice to the other respondents to also make them responsible for the payment of the appellants' costs. They were entitled to defend their rights and I consider it a proper exercise of the court's discretion to order the first respondent to pay the costs.

[37] I accordingly propose that the appeal be upheld with the first respondent to pay the costs thereof. The order of the court *a quo* is set aside and is substituted with the following order:

"(1) Paragraph 1(a) of the *rule nisi* issued on 14 June 2011 is confirmed. The remainder thereof is discharged.

(2) The first respondent is ordered to pay the costs of the application."

D VAN ZYL

JUDGE OF THE HIGH COURT

I agree

_____

F DAWOOD
JUDGE OF THE HIGH COURT

I agree

_____

Z NHLANGULELA
JUDGE OF THE HIGH COURT

Counsel for the Appellant:	Adv. V Kunju
Instructed by:	S. Booi & Son Attorneys Suit 3 Clublink Building 28 Madeira Street **MTHATHA**
Counsel for 1st and 2nd Respondent:	Adv. Z Z Matebese
Instructed by:	Caps Pangwa & Associates Suite 302, Office 318 City Centre Complex

York Road
MTHATHA

Counsel for 3rd and 5th Respondent: Adv. Benningfield

Instructed by: A. S Zono & Associates
Suite 319 - 3rd Floor
ECDC Building
York Road
MTHATHA

Date Heard: 30 August 2013

Judgment Delivered: 10 October 2013