



**IN THE SUPREME COURT OF SWAZILAND**

Civil Appeal No: 47/2013

In the matter between:

**SIKHUMBUZO R. MABILA NO  
THE SIKHUMBUZO REGINALD MABILA  
TRUST**

**FIRST APPELLANT  
SECOND APPELLANT**

**AND**

**SYZO INVESTMENT (PTY) LTD  
SYDNEY SIBONGINKOSI DLAMINI  
REGISTRAR OF DEEDS  
THE ATTORNEY GENERAL**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT  
FOURTH RESPONDENT**

Neutral citation: *Sikhumbuso R. Mabila NO and Another v. SYZO Investment (Pty) Ltd and Three Others (47/2013) [2013] SZSC 70 (2013)*

**Coram: M.M. RAMODIBEDI, CJ  
S.A. MOORE, JA  
M.C.B. MAPHALALA, JA**

Heard: 19 November 2013  
Delivered: 29 November 2013

**Summary**

Civil Appeal – Transfer of ownership in respect of immovable property to a Trust – held that section 15 of the Deeds Registry Act prohibits the transfer to a non-legal person – held further that the practice obtaining at the Deeds Registry office of allowing such transfers cannot override the provisions of the section 15 of the Deeds Registry Act – appeal dismissed – no order as to costs

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**JUDGMENT**

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**M.C.B. MAPHALALA, JA**

- [1] On the 18<sup>th</sup> July 2013 the Court *a quo* dismissed an application brought by the appellants seeking an order directing the first and second respondents to transfer certain immovable property into the name of the second appellant, a trust established by the first appellant. The basis of the judgment is that such a transfer is prohibited by section 15 of the Deeds Registry Act No. 13 of 1968.
- [2] The appellants lodged a Notice of Appeal timeously on the 16<sup>th</sup> August, 2013. Rule 8 (1) of the Rules of Court stipulates that a notice of appeal shall be filed within four weeks of the date of the judgment appealed against. The grounds of appeal were as follows: firstly, that the Court *a quo* erred in finding that the second respondent or in the alternative, the first respondent cannot transfer ownership of immovable property to the second appellant. Secondly, that the learned judge *a quo* failed to take into account the full provisions of section 15 of the Deeds Registry Act and interpreted the Statute erroneously, thus barring any further considerations pertaining to the transfer of immovable property even on the basis of such legislation. Thirdly, that the Court *a quo* failed to take into consideration the ramifications to the general practice in Swaziland of registering immovable property into the name of a trust; and, that further inquiry would have revealed that usage had developed to a point where judicial recognition of custom and practice is warranted.

[3] The fourth ground of appeal is that the Court *a quo* erred in finding that the prevailing practice in Swaziland of registering property in the name of a trust is therefore not correct and does not find support in law; and, that the appellants are appealing against the finding on the basis that the contrary is the legal position in Swaziland. The fifth ground of appeal is that the Court *a quo* should have taken into consideration the merits of the matter in order that a complete analysis of the prevailing jurisprudence be applied in order to expose the justiciability of the decision which is premised on a technicality. It is contended that it is not a desirable practice for the Courts to reach decisions based on technicalities; and, that the decision of the Court *a quo* must be set aside and an order premised on the merits be pronounced by this Court.

[4] The facts of this matter are common cause. The first respondent, duly represented by the second respondent, concluded a contract of sale with the first appellant in his capacity as the Founder and Trustee in the cause of formation. The trust was subsequently formed and registered as protocol No. 06/2012 on the 10<sup>th</sup> December 2012. In terms of the contract, the first respondent was duly represented by the second respondent, in his capacity as the Managing Director of the first appellant. The first respondent sold to the second appellant property, to wit, certain property described as Lot No. 464, Matsapha Industrial site, Manzini District, and measuring 8542 square metres.

[5] The purchase price was the sum of E1 250 000.00(one million two hundred and fifty thousand emalangeni), and this amount had to be secured by a covering letter of guarantee issued by a registered financial institution securing the amount of E1 250 000.00 (one million two hundred and fifty thousand emalangeni) and made payable to the seller upon registration of the property in the name of the purchaser, being the trust in the cause of formation. Transfer of the property to the purchaser would only be effected upon the furnishing of the bank guarantee, transfer duty as well as transfer costs. Possession and occupation of the property would be given to the purchaser upon registration of transfer of the property into the name of the purchaser. Clause 8 emphasised that the parties had agreed that the written agreement would constitute the entire contract between the parties. Clause 9 is equally important, and it provides, that “if either party breaches the contract and remains so in breach for a period of 14 days after written notice to rectify the breach or if either party repudiates the agreement, the other party may sue for specific performance of the defaulting party’s obligations”.

[6] On the 28<sup>th</sup> February 2013 the appellants filed an urgent application directing the first and second respondents, and failing which, the Registrar of the High Court be authorised and directed to effect transfer of the property from the name of the first respondent into the name of the second appellant. They further sought an order interdicting and restraining the third and fourth respondents

from dealing in any manner with the property pending the transfer or from dealing in any manner with the shares of the first respondent.

[7] The appellants also sought an order interdicting the third respondent from transferring the property to any third party other than the second appellant. A rule *nisi* with interim relief was subsequently granted by the Court *a quo* on the 28<sup>th</sup> February 2013 on an ex parte application. The *rule nisi* was returnable on the 15<sup>th</sup> March 2015. The appellants further sought an order for costs against the first and second respondents.

[8] On the 21<sup>st</sup> December 2012 the Swaziland Building Society issued a bank guarantee No. 184/2013 in terms of Clause One of the agreement for the full amount of the purchase price. It is common cause that the first appellant is a businessman leasing property Lot No. 463 in Matsapha, where he conducts his business. The property that is a subject-matter of the contract is Lot No. 464 in Matsapha, which is adjacent to where the first appellant conducts his business.

[9] It is not in dispute that upon the conclusion of the contract, the first appellant lent and advanced to the second respondent a sum of E150 000.00 (one hundred and fifty thousand emalangeneni) at his own instance in order to alleviate the financial problems of the first respondent. In turn the second respondent pledged Lot 379 Tubungu Estate to the appellants. The loan transaction was

independent from the contract of sale of the property concluded between the parties. The loan amount has since been repaid.

[10] The appointed Conveyancer, Attorney Nkosinathi Manzini, duly prepared the transfer documents soon after receiving the bank guarantee; and, he invited the second respondent and first appellant to sign the documents. The first appellant signed the transfer documents in January 2013; however, the second respondent refused to sign the transfer documents allegedly on the basis of an advice received from his financial advisors that he should not sell the property. It is not in dispute that it is the second respondent who initially offered to sell the property to the first appellant citing financial meltdown of his company, and that the first appellant expressed interest in the property leading ultimately to the conclusion of the contract of sale.

[11] It is common cause that the first appellant paid a deposit of E312 500.00 (three hundred and twelve thousand five hundred emalangen) to the Swaziland Building Society prior to the release of the bank guarantee by the bank. In addition the first appellant had paid transfer costs to the appointed conveyancer in anticipation of the transfer of the ownership of the property from the first respondent to the second appellant.

[12] The application was opposed by the first and second respondents. In their Opposing affidavit they raised three points of law; firstly, that the application

does not disclose a cause of action in so far as the relief sought would result in a contravention of section 15 of the Deeds Registry Act. Secondly, that the application does not disclose a cause of action in so far as it seeks to enforce the provisions of an agreement that is null and void *ab initio*. Thirdly, that the agreement being null and void *ab initio* in so far as it purports to pass ownership to a non-existent legal persona, alternatively, the deed of sale is null and void *ab initio* in so far as it purports to pass ownership in immovable property to a person in a representative capacity, it is prohibited by law.

[13] On the merits the respondents contend that they have since been advised that the sale is null and void *ab initio* on the basis that it is not legally enforceable. They further contend that immovable property may not be sold nor may it be transferred to a trust. Similarly, they contend that ownership may not pass to a person in a representative capacity.

[14] The respondents concede that in June 2012 and preceding months, the first respondent was experiencing severe cash flow problems and could not meet its financial obligations; hence, it resolved to sell the property to raise the much needed capital. At the same time, the first respondent's trust had been attached in execution of a judgment in South Africa; and, an amount of E150 000.00 (one hundred and fifty thousand emalangen) was required to salvage the truck from being sold by public auction. It is against this background that the first respondent sought and obtained a loan of E150 000.00 (one hundred and fifty

thousand emalangen) from the first appellant to alleviate its financial problems. Lot 379, Tubungu Estate, was used as a pledge; the loan agreement was executed in the name of the trust, being Sibonginkhosi Trust.

[15] The first and second respondents contend that in November 2012, they needed further funds; and, they approached the first appellant seeking further financial assistance by virtue of the purchase price still outstanding. The first respondent contends, that it was forced to cancel the contract orally after realising that the first appellant did not have the money; this allegation is denied by the appellants. Furthermore, the written contract in so far as it relates to land could not be cancelled orally. Similarly, the bank guarantee was issued in December 2013 paving the way for registration of transfer as well as the release of the purchase price. Incidentally, payment by cash was not provided for in the contract; payment was by means of a bank guarantee. It is mischievous for the respondents to contend that the appellants had to bail them financially from the balance of the purchase price.

[16] The respondents allege that on the 29<sup>th</sup> November 2012, they obtained a credit facility from the Standard Bank in Manzini against the mortgage of the property on the basis that the bank guarantee was taking too long to arrive. This contention overlooks the fact that Clause One of the contract does not stipulate the period within which the bank guarantee had to be furnished; this proviso only states that “the purchase price shall be the sum of E1 250 000.00



(one million two hundred and fifty thousand emalangeni) which amount will be secured by a covering letter of guarantee issued by a registered financial institution securing the amount of E1 250 000.00 (one million two hundred and fifty thousand emalangeni) and made payable to the Seller upon registration of transfer of the property into the name of the purchaser, being the trust in the cause of formation.

[17] Similarly, the contract does not provide for the oral cancellation of the contract as alleged by the respondents. Clause 8 provides that “the parties hereto agree that the aforewritten agreement constitutes the entire contract between them and that neither party or his/her agents have made no other conditions, warranties or representations whatsoever”.

[18] In the case of *Motsa v. Carmichael Investments (Pty) Ltd* 1979-1981 SLR 166 at 171 (HC), Nathan CJ had this to say:

**“Apart from this, no time for delivery of the bank guarantee was laid down in the deed of sale. Consequently, the law as laid down in the case of *Hammer v. Klein and Another* 1951 (2) SA 101 (AD) applies, namely that the Seller is not entitled to demand that the buyer should provide a guarantee on a date earlier than that on which the Seller proposes to lodge with the Registrar of Deeds the documents required for transfer. If he makes such a demand, the buyer is entitled to ignore it without any risk of being placed in *mora*. The buyer duly performs his obligation if he tenders the guarantee at any time before the Seller actually lodges the documents required for transfer with the Registrar of Deeds.”**

[19] Section 31 of the Transfer Duty Act No. 8 of 1902 provides the following:

**“31. No contract of Sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorised in writing.”**

[20] Similarly, a contract for the sale of land cannot be varied or terminated orally.

His Lordship Nathan CJ in the case of *Soar v. Mabuza* 1982-1986 SLR 1 at 2-3 had this to say:

**“... this was a contract for the sale of immovable property which has by Statute to be in writing. It is well-settled law that extrinsic evidence, whether oral or contained in writings such as preliminary drafts or correspondence instruments or the like is inadmissible to add to, vary, modify or contradict a written instrument ... To permit the leading of evidence in support of the representation pleaded by the defendant would be to contradict the very terms of the written agreement which includes the *voetstoots* clause. It would also adding to and varying the written agreement .... Where the transaction is affected by mistake, fraud, illegality or duress it may be added to, varied, contradicted or vitiated in whole or in part. But it is to be noted that that the exception does not extend to the case where the transaction has been induced by an innocent, as distinct from a fraudulent misrepresentation.”**

[21] The appellants in their replying affidavit argued that section 15 of the Deeds Registry Act does not preclude the registration of immovable property into the name of a trust on the basis that real ownership of the property vests in the trustees. They further argued that this has been a long standing practice in the

registration of immovable property into a trust. It is not in dispute that, in this country, a practice has developed where immovable property is registered in the name of a trust with ownership of the property vesting in the trustees. However, section 15 of the Deeds Registry Act provides the following:

**“Save as otherwise provided for in this Act or any other law, the Ownership of land may be conveyed from one person to another by means of a deed of transfer executed or attested by the registrar.”**

[22] It is apparent from section 15 of the Deeds Registry Act that ownership of land can only be transferred from one person to another. A trust is not a legal person, and this explains why property in a trust vests in the trustees. The long standing practice prevailing in this country of registering immovable property in the name of a trust cannot supercede the clear and unambiguous provisions of section 15 of the Deeds Registry Act.

[23] Section 15 of the Deeds Registry Act is synonymous with section 16 of the South African Deeds Registries Act 47 of 1937. Both articulate the Common law position. The Supreme Court of Appeal of South Africa in the case of Commissioner of *Inland Revenue v. Friedman and Others* NNO 1993 (1) SA 353 (A) at 370 emphasises the Common law position that a trust is not a legal person; and, that for this reason assets and liabilities in a trust vest in the trustees. In the case of *Jourbert and Others v. Van Rensburg and Others* 2001 (1) SA (W) 753, the Court emphasised that the effect of section 16 of the Deeds

Registries Act is to prohibit transfer of immovable property to a trust on the basis that it is not a legal person, and, that trust property is owned by the trustees. The Court further emphasised the prevailing practice of registering immovable property in the name of a trust; the Court held that such a practice cannot override the provisions of section 16 of the Deeds Registry Act.

[24] Labuschagne J in the case of *Mariola and Others v. Kaye – Eddie NO and Others* 1995 (2) SA 728 (W) at 731 stated the Common law position of trusts in the following:

**“In our law a trust is not a legal person but a legal institution, *sui generis*. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration of trust, but qua trustee he has no beneficial interest therein.**

....

**Unless one of the trustees is authorised by the remaining trustee or trustees, all the trustees must be joined in suing and all must be joined when action is instituted against a trust....**

**In legal proceedings trustees must act *nomine officii* and cannot act in their private capacities.”**

See *Rosner v. Lydia Swanepoel Trust*, 1998 (2) SA 123 (WLD) at 126-127; *Siboniso Clement Dlamini NO v. Deputy Sheriff Hhohho Region and Swaziland Building Society* Civil Case No. 30/2008 (HC); *Elphas Mabhawodi Dlamini v. Thabsile Mbali Nkosi and Eight Others* Civil case No. 1582/2012 (HC).

[25] Flemming DJP in *Jourbert and Others v. Van Rensburg and Others* (supra) at para 9.3 to 9.5 states the following:

**“9.3 Transfer cannot be passed to a trust. This is the consequence of s 16 of the Deeds Registries Act 47 of 1937, which caters only for the conveying of title to another person. In any event it is at Common law notionally unacceptable to transfer to something which does not exist. There is no legal person alongside the contracting parties. Even in respect of a trust which was not created by contract, despite the result being *sui generis*, it was held in Commissioner for *Inland Revenue v. Friedman and Others* NNO 1993 (1) SA 353 (AD) at 370 that a trust is not a legal person and that the owner of trust property is the trustee.**

**9.4 A person continues to exist even if he happens to become a trustee. He can take transfer and be owner. When that happens he is the only party vested with the dominium. Subject to amending legislation (see s 12 of the Trust Property Control Act, 1988), the property is part of his estate when he dies or his estate is sequestrated....**

**9.5 It follows that a trustee does not hold in a capacity. He becomes owner as an individual because he is a trustee and as an office-bearer (of a legal institution which does not exist). He operates as a principal in a contract and not as a functionary or agent ...”**

25.1 Section 12 of the South African Statute, The Trust Property Control Act, 1998, provides that “Trust property shall not form part of the personal estate of the trustee except in so far as he as trust beneficiary is entitled to the trust property”.

[26] The judge *a quo* did not misdirect herself in coming to the conclusion that ownership in respect of immovable property cannot be transferred to a trust. Such a conclusion is in accord with section 15 of the Deeds Registry Act. It is open, however, for Parliament to amend section 15 of the Deed Registry Act to allow for the transfer of immovable property to a trust. Accordingly, I agree with the conclusion reached by the judge *a quo* at para 28 and 29 of her judgment as follows:

**“28. The more prudent course to accord with legal doctrines and the principles of legal concept of trust, is to talk in terms of the trustees whenever that particular relationship is being referred to. Therefore, the registration of the property subject to that relationship; should not be in the names of the trustees as trustees or registered trustees as the case may be.**

**29. The prevailing practice in Swaziland of registering property in the name of trusts is therefore, in the light of the foregoing, not correct and does not find support in law.”**

[27] In view of the conduct of the respondents in trying to avoid the consequences of the contract which they freely and voluntarily concluded by hiding behind legal technicalities, it can only be fair and just that each party bears its own costs.

[28] Accordingly, I make the following order:

- (i) The appeal is dismissed.
- (ii) Each party to bear its own costs.

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M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I agree

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M.M. RAMODIBEDI  
CHIEF JUSTICE

I agree

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S.A. MOORE, JA  
JUSTICE OF APPEAL

For appellants

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Instructed by  
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For 1<sup>st</sup> and 2<sup>nd</sup> Respondents

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