HIGH COURT OF SWAZILAND

CIVIL CASE NO. 3466/02

In the matter between:

MICAH PASCHAL MKHONZA	APPLICANT
AND	
BELARMINO BARROCA GIL	1st RESPONDENT
REGISTRAR OF DEEDS	2nd RESPONDENT
ATTORNEY GENERAL	3rd RESPONDENT
CORAM	SHABANGU A J
FOR THE APPLICANT	MR. M. NKAMBULE
FOR RESPONDENTS	MR. B. MAGAGULA

JUDGMENT

23 rd SEPTEMBER 2003

The applicant one Micah Paschal Mkhonza commenced proceedings before this Court by way of application in which he sought the following relief:

1. That the first respondent be and is hereby interdicted and restrained from, any way whatsoever, occupying, utilizing and/or dealing with: certain Farm No.1019 situate in the Shiselweni District, Swaziland, measuring 68 5226 (six eight comma five two two six) hectares.

2. That the purported transfer of the property described under paragraph two above from the applicant to the first respondent be and is hereby declared null and void ab initio.

3. That the second respondent be and is hereby directed, authorised and empowered to re-register the property described under paragraph 2 above in the name of the applicant and to cancel and remove all documents indicating the first respondent as the registered owner of the aforesaid property.

4. That the first respondent be and is hereby ordered to pay costs of this application at attorney and client scale.

5. Granting the applicant further and/or alternative relief.

As a basis of the application and claim for the relief contained in the notice of motion the applicant alleges the following in paragraph five of its founding affidavit:

"In 1982 I took transfer of certain farm 1019 situate in the Shiselweni District measuring 68,5226 (sixty eight comma five two two six) hectares which property was sold to me on the 24th July 1979 by one Selina Nene - annexed hereto is a copy of the deed of transfer No. 139/1982 in my favour marked "A"."

The first respondent who is the only respondent opposing the application admits the contents of the abovequoted paragraph five of the applicant's founding affidavit.

Then the applicant proceeds to state in paragraph six that -
"... the aforesaid property has been mine since then and I have never sold or in any way disposed of same in as much as 1 have never signed any power of attorney to have same transferred from me to someone else."

The applicant goes on to state how he came to know that the property was no longer registered in his name in paragraphs seven to eight wherein he states:-

"7 Around March 2000 I had occasion to meet with a Mr. Derrick Dlamini of the Ministry of Public Works and Transport to discuss compensation for part of my aforesaid property expopriated by Government for the construciton of the Luyengo/Sicunusa public road (MR4) whereat he advised that I was not the only one claiming ownership of the aforesaid property as there was a certain Belarmino Barroca Gil represented by the offices of Bheki G. Simelane &. Company who was also claiming that he be compensated as the registered owner of the aforesaid property - annexed hereto marked "B" is a copy of a letter dated 14th December 1999 to that effect from Bheki G. Simelane & Company to the Principal Secretary in the Ministry of Public Works.

8 Subsequently 1 went to the deeds registry offices to establish the true position regarding the registered owner of the aforesaid property and to my shock and disbelief I discovered that indeed my aforesaid property had been transferred to the first respondent on 1st February, 2000 under Deed of Transfer No.22/2000 and the transaction was handled by Thembela Simelane of Bheki G. Simelane & Company. On further perusal of the deeds registry file to ascertain who gave Mr. Thembela Simelane the power of attorney to tranfer my said property I discovered that there was a power of attorney dated 14th December, 1999 purported to have been given by myself but on checking the signature thereof 1 further discovered that it was not mine but that of the first respondent. 1 annex hereto a copy of the fraudulent power of attorney
and mark Same "C"." my underlining

Then in paragraph 10 again the applicant states:

"10 As already indicated under paragraph six herein above I have never in anyway disposed of my aforesaid property nor have I during 1999 signed a power of attorney authorising Thembela Simelane or any other person to be my agent and representative for purposes of transfer of my aforesaid property to the first respondent or any other person. To assist the honourable court to establish that the signature on annexure "C" is not mine but that of the first respondent I annex hereto a copy of a document upon which both our signatures appear under our respective names and mark same "D".

Paragraph 9 of the founding affidavit is merely a conclusion which is stated as follows:

"In light of the aforegoing, I am advised by my attorneys and very believe that the purported transfer of my aforesaid property to the first respondent was fraudulently procured in as much as it is contrary to the provisions of the Deeds Registry Act. Furthermore 1 submit that first respondent's conduct amounts to criminal fraud and as such he should not be allowed to benefit from his criminal activities. "

The summary of the first respondent's answer to the aforementioned allegations by the applicant is contained in paragraph ten of the first respondent's answering affidavit wherein the following is stated as a direct response to paragraph ten of the applicant's founding affidavit.

"The contents of this paragraph are denied in so far as it is alleged that attorney Thembela Simelane had no authority to effect transfer. I aver that the power of attorney which 1 signed effecting transfer was signed by virtue of the special power of attorney granted to me by the applicant himself which he now conveniently chooses not to disclose to the above Honourable Court. "

Paragraph eight and nine of the first respondent's answering affidavit is to similar effect as paragraph ten aforementioned. The first respondent denies that its actions were fraudulent because as the respondents says he, "... was acting by virtue of the special power

of attorney granted me [him] by the applicant on the 28th August, 1997 annexure " 1". " The first respondent goes on to state in paragraph nine that -

"In any event, I am advised and verily believe that even assuming that the transfer was cotnrary to the provisions of the Act, which is in any event denied, I submit that the applicant is not entitled to the relief which he seeks without a report of the Registrar of Deeds issued in terms of Regulation 93 of the Deeds Registry Act. "

Paragraph six of the first respondent's answering affidavit is a long paragraph commencing from page twenty three to page twenty eight of the book of pleadings. This paragraph is meant to be a response to paragraph six of the applicant's founding affidavit which is answered in summary form in paragraph ten of the first respondent's answering affidavit. Paragraph six gives a long histroy and background of the relationship between the parties which history can be summarised as follows. The first respondent was a tenant in a house owned by the applicant at Trelawney Park in Manzini. The first respondent used the house for purposes other than residential as a result of which he did certain alterations on the house. In March, 1988 the applicant was arrested, convicted and imprisoned for what the first respondent terms customs fraud. During the period of imprisonment of the applicant the first respondent presented to the applicant whilst the latter was still in prison a number of documents including acknowledgements of debt, for the applicant to sign. In all the acknowledgements of debt the applicant was to acknowledge his indebtedness to the first respondent. In most cases the debt was said to arise from some alleged repairs and renovations, which the first respondent claimed to have done on the applicant's Trelawney Park house and vehicles. The applicant who possibly could have relied only on the word of the first respondent on these alleged repairs and renovations because he was in prison and therefore probably not in a position to know the truth and authenticity of the applicant's claims, now denies in the replying affidavit that any such repairs were done. The applicant states the following in paragraphs 3.4 and 3.6 of the replying affidavit.

"3.4. I always mistakenly believed that he was a true friend whilst on the otherhand he was planning to deprive me of all my remaining livelihood after the long sentence I served in prison. Therefore the litany of debts mentioned in annexure "B" of his document are far fetched and grossly exaggerated. I do not agree with such -

3.5. I do not admit that expensive repairs were effected to my car whilst I was in prison at the cost of E4,394-80. In 1982 I bought the Ford LDV van through a government advance at E8,800-00. It would be ridiculous to effect repairs of E4,394-80 on such a vehicle which I personally drove to the High Court for my judgment and final sentencing on the 5th February, 1988. Each time respondent lent me some money to service the Mazda 626 car I was using, he would deduct it from the rental payment immediately."

3.6. Our property at Trelawney Park is in the same state and condition since my incarceration save for very minor improvements and changes to suit the respondent's business transactions i.e. mechanic, building construction, earth moving equipment all done on our residential property and at profits accruing direct to respondent. Therefore the sum of E145,624-36 appearing on paragraph 6.5 cannot be acceptable to me since it cannot be substantiated. "

The first respondent raised certain points in limine during argument which are that -

1. The applicant who had not made out a case in his founding affidavit had introduced new matter in the replying affidavit which he ought not be able to rely on.

2. That there was a real and bona fide dispute of fact which cannot satisfactory be determined without the aid of oral evidence and that because the applicant ought to have realised when launching his application that such serious dispute of fact was bound to develop, the application should be dismissed.

Regarding the first point it is important to note that the respondnet does not say what the new matter is which is introduced in the replying affidavit. There is in my view no such new matter in the replying affidavit which "amounts to an abandonment of the existing claim and the substitution thereof of a fresh and completely different claim based on a different cause of action" as contended for by the first respondent in paragraph 1.1.1.2 of the heads of argument filed on his behalf. The new matter contained in the applicant's replying affidavit was a natural and ordinary response to the new allegations relied upon by the first respondent in its answering affidavit. The

new matter relates to the allegation of repairs, renovations and the various agreements alleged by the first respondent which according to the latter entitled or justified the respondent to sign a power of attorney purporting to be given by the applicant, authorising attorney and conveyancer Thembela Simelane to appear before the Registrar of Deeds for execution of the deed of transfer as required by Section 18 of the Deeds Registry Act 37/1968. This new matter is not necessarily essential to the cause of action relied upon by the applicant in respect of the relief claimed. The cause of action relied upon by the applicant for the relief claimed is his ownership of the property which is the subject matter of this litigation. The applicant will be entitled to the relief claimed in the notice of motion once he has established that he is the owner of the property notwithstanding that in the Deeds Registry the first respondent is the registered title holder. The question that might arise is whether it is possible for one to establish that he is the owner of immovable property inspite of the fact that the said property is registered in the name of another person in the deeds register. That this is so, clearly follows from the fact that our system of deeds registration is a so-called negative system of deeds of registration. In this regard I refer to D. Carey Miller, THE ACQUISITION AND PROTECTION OF OWNERSHIP, 1986 at page 169, wherein the following is stated:

"An accepted distinction in the classification of systems of registration is between registration of deeds and registration of title, sometimes reflected in the respectively corresponding descriptions of negative and positive systems. Put at its simplest generality, the registration of deeds label is applied to systems which are primarily concerned with the recording of rights in land -negative systems - whereas registration of title refer to positive systems in which registration carries with it a guarantee of unimpeachability. A system of registration - as opposed to one of private conveyancing - requires registration before a right in land can be fully efficacious, but this does not necessarily mean that the registered title is warranted by the state. The South African system illustrates this difference; although a real right in land can be acquired only through registration the law does not guarantee unimpeachability of a registered deed. That an absolute guarantee of the position as per registered deed could not be made follows from the nature of the system based, as it is, upon the general principles of the passing of ownership, with delivery in the form of registration pursuant to a real agreement rejecting the parties intentions to give and receive ownership. The derivative acquisition of ownership according to these principles is incompatible with any system of absolute registered title because there can be no warranty of the validity of title in a system which takes account of the transferor's actual intention... A consequence of this is that '...though the

land registrar generally proves ownership, this is not necessary conclusive.'"
(my underlining)

Similarly SILBERBERG & SCHOEMAN'S THE LAW OF PROPERTY 3rd EDITION by Kleyn and Boraine make the following observation -

"Though a high standard of accuracy is maintained by our Deeds Offices the data contained in the Deeds Registry records cannot be said to be correct or complete under all circumstances. Mistake or fraud does

occur, real rights to land can in appropriate circumstances be acquired by means other than registration... Consequently the question whether we have a positive or negative system of registration is of more than mere academic interest. It is highly relevant as far as the protection of third parties, relying in good faith on the correctness of such data, is concerned. If a third party, acting in good faith, accepts incorrect data in the Deeds Office as correct and acts upon this information, he will normally enjoy no protection under a negative system of land registration (apart from the possible application of the doctrine of estoppel and apart from any delictual remedies he may have). This may be illustrated as follows: A fraudulently obtained registration of B's land in his name and subsequently sells it to C who is acting in good faith. Transfer to C is effected on payment of the purchase price. A had no right of ownership which he could transfer to C (nemo dat qui non habet) and if A happens to be a man of straw, C would have no remedy. It would not avail C to claim as against B that he acted in good faith in relying on the accuracy of the facts recorded in the deeds office. In contrast to this, a positive system of registration warrants as against bona fide third parties, that the data contained in the deeds office records is correct. In the example we have first referred to, C would enjoy full protection under a positive system. The accuracy of the registered information, including A's registration as "owner", is, as far as C (a bona fide third party) is concerned, guaranteed. Unless B, the original owner is compensated for his loss, he will come of second best. "

The two passages by the two authors clearly illustrate why on the basis of the principles of derivate acquisition of property (including immovable property) it is possible in our law for a person, such as the applicant in these proceedings to remain the owner of the immovable property, even though some other person is registered as the owner in the deeds registry. There are also in any event a number of situations as observed by the learned authors whereby notwithstanding the fact that the registers do in general provide a fairly complete picture of the rights in respect of any particular unit of land, the registers are incomplete and inaccurate. Examples usually given of such instances are those instances where real rights to land are acquired by prescription and by marriage in community of property. See SILBERBERG AND SCHOEMAN supra page 105 and D. Carey Miller supra at page 170.

The high efficiency of the system of our deeds registration means that there is a dearth of case law authority on the subject of defective titles or deeds office error. However the little case law that there is supports the view that registration is not necessarily conclusive with regard to real rights in land. For example in the case of BARCLAYS NASIONALE BANK BPK v REGISTRATEUR VAN AKTES, TVL, 1975(4) SA 936 (T) a registered bond was overlooked when the mortgaged property was transferred to a bona fide party who obtained as it were ex facie the deed of transfer "clean" registered title on the property. However the court held that this did not mean that the mortgagee had lost his right against the property concerned. This decision was followed in STANDARD BANK VAN S.A. V BREITENBACH 1977(1) SA 151(T). See also TOFFEE V PRODENTIAL BUILDING SOCIETY & OTHERS 1944 WLD 186 at 189. It follows therefore that once the applicant establishes that he is still the owner of the property inspite of the registration, which registration would not have had the effect of conveying any real right over the property from the applicant to the respondent, the applicant would be entitled to the relief claimed in prayer one, two and three of the notice of motion. The applicant has sufficiently in his founding affidavit in paragraph five, established that he owned the property since 1982 when the property was transferred to him by deed of Transfer No. 139/1982 from one Selina Nene, following a deed of sale concluded on 24th July, 1979. The first respondent admits this in his answering affidavit. The applicant further states that he never sold or in anyway disposed of the property to anyone in as much as he never signed a power of attorney to have same transferred to someone else. This is clearly contained in paragraph ten of the founding affidavit. The applicant has therefore made sufficient allegations and provided sufficient evidence in its affidavit, which if not controverted sufficiently in the answering affidavit, would entitle the applicant to the relief claimed. Any new evidential material in the replying affidavit does not amount to an abandonement of the existing claim and substitution thereof of a fresh and completely different claim based on a different cause of action. On this basis the point in limine cannot succeed.

The second point which like the first one was argued in the course of the main argument on the merits, is that there is a real dispute of fact which cannot be satisfactorily determined on the papers without the aid of oral evidence, and that

because the applicant ought to have foreseen that such dispute of fact was bound to develop, the application has to be dismissed. This point can only be considered in light of what the real issues are in the case. The primary question which arises for decision on the facts pleaded in this matter is whether the act of registration of the property into the name of the first respondent did have the effect of conveying the real right of ownership from the applicant to the first respondent. Now as already observed above our Deeds Registry Act like the South African one does not contain any form of warranty of the correctness of the position as reflected by a registered deed. As indicated it would appear that any form of warranty of the position as per the registered deed would be incompatible with the fundamental requirements that the transferor -

1. must be in a position to pass ownership - nemo dot quod non habet.

2. and the parties must intend that ownership should pass.

There are a number of other requirements for the conveyance of ownership from one person to another in our law, which requirements are applicable to the conveyance of real rights in both movable and immovable property. For a list of these requirements (see D. Carey Miller supra at 118 and SILBERBERG AND SCHOEMAN'S LAW OF PROPERTY supra at page 75-77. In our law the conveyance of real rights in movables is by traditio and by registration in the case of immovables. A distinction is drawn for this purpose between the underlying agreement, such as a sale and what is called the real agreement. The underlying agreement which is the basis or cause of the real agreement is treated separately and its invalidity or non-existence for some other reason will not affect the validity of the real agreement, which latter agreement is the only agreement relevant to the question whether there was a conveyance of the dominium or other lesser real right from one person to the other. It is because of this distinction that our law is said to follow the abstract theory as opposed to the causal theory in the transfer or conveyance of real rights to property, both movable or immovable. All that our law requires for the real agreement to be valid is justa causa traditionis which is no more than a serious and deliberate intention on the part of the transferor to pass ownership and on the part of the transferee to receive the said ownership. See COMMISSIONER OF CUSTOMS & EXCISE V RANDLES, BROTHERS & HUDSON LTD 1941 AD 369 at 398-99, WEEKS V AMALGAMATED AGENCIES LTD 1920 AD 218 at 230, PRELLER &

OTHERS v JORDAAN 1956(1) SA 483 A at 496. This is the correct position from the point of view of substantive law inspite of conveyancing and deeds office practice which requires an identifiable underlying causa, for instance, a sale, succession etc, as a prerequisite to the registration of transfer. Such information regarding the underlying causa is important to the Registrar of Deeds not for the reason that it has any relevance to the validity of the transfer or conveyance of the ownership from one person to another, but because the Registrar of Deeds needs to know this in order to ascertain what other legal requirements, such as liability for transfer duty, have been complied with. (see D. Carey Miller supra page 167 on the causa requirement.)

D. Carey Miller supra summarises the position regarding the above as follows:

"The essentials of derivative acquisition applying to movables are equally applicable to immovable property with the difference that the element of delivery takes the form of a requirement of registration. It is also true that in respect of the transfer of ownership in land the critical requirement is that of intention.... A mere deed of transfer of land does not of itself pass the dominium unless there is an intention on the part of the transferor to divest himself of the ownership and an intention on the part of the transferee to acquire it. Accordingly, although the act of registration - like traditio in respect of movables - is the dominant, active element it will be effective only if the necessary preconditions for the passing of ownership are present and, importantly, if the parties intend ownership should pass. However, this said, one must acknowledge that, in practice, the system of registration tends to ensure that the essential

requirements of the passing of ownership are present; consequently registration de facto amounts to the consummate act which effectively passes ownership. Only in exceptional cases -for example, involving Deeds Office error or where the necessary intention to transfer is absent - is registration likely to be ineffective. " My emphasis

The act does not seek to replace the common law as D. Casey Miller supra observes at page 166 with regard to Section 16 of the South African Act. Section 16 of the South African Act is the equivalent of Section 15 of our Deeds Registry Act 37/1968. Further in Section 18 of our Deeds Registry Act which is the equivalent of Section 20 of the south African Deeds Registry Act it is provided:

"Deeds of Transfer shall be prepared in the forms prescribed by law or by regulation or in such other form as the Registrar may in special cases approve and, save as in this Act or any other law provided or as ordered by the court in respect of Deeds of Transfer executed by the Registrar, shall be executed in the presence of the Registrar by the owner of the land described therein or by

a conveyancer authorised by power of attorney to act on behalf of the owner and shall be attested by the Registrar."

As D. Carey Miller supra at page 181 observes "two fundamental requirements of the process of registration of transfer are referred to in this section," namely the deed of transfer prepared for registration and the power of attorney to pass transfer which is the transferor's authority to a conveyancer to appear before the Registrar of Deeds and execute the transfer. From the section it is also clear that the transferor has the option to execute the transfer himself even though in practice this is hardly known to happen. "In most cases the conveyancer's authority to pass transfer is provided in a special power of attorney - one granted by the registered owner for the specific purpose concerned. A conveyancer can be appointed in a general power of attorney - one giving the agent general authority to act on the grantor's behalf over a range of affairs - but the scope for this is limited because the appointee to pass transfer can only be a conveyancer practising in a Deeds Office centre." It is possible that the grantor's special power of attorney to transfer may himself be an agent holding the registered owner's general power of attorney. The power of attorney granted by the owner authorising ther conveyancer to appear before the Registrar of Deeds and execute the transfer is not only evidence which satisfies the requirement of competence of the transferor (conveyancer) but it also satisfies the requirement that the transferor must intend to transfer his ownership or such other real right as may be the subject of the transfer to the transferee. The absence of a power of attorney duly executed by the transferor or title holder of the land or his duly authorised agent will not only offend against the requirements of Section 18 but will also mean the requirements mentioned above of the competence or capacity of the transferor and his intention to transfer and convey the property to the "transferee" are not satisfied and may be completely lacking. The result in such a situation will be that despite the change in deeds records as to who the registered owner is, it would be possible that such registration may have failed to convey the dominium or ownership to the person who becomes registered as the "owner" of the property. D. Carey Miller supra at 184 puts it thus -

"The power of attorney giving authority to a conveyancer to register transfer must link up with the holding title deed which, of course, has to be lodged. This fundamental requirement is easy to explain: the holding deed is the

transferor's title proving that he is in a position to dispose of the property; the power is his authority to a conveyancer to effect transfer. Clearly, the title and the power must correspond in respect of the property and the identify of the owner/transferor. If the property owner as reflected in the holding title and the grantor of the power of attorney to transfer are not the same person then the grantor's authority to represent the owner must be established. In this situation the agency is proved by lodging the general power of attorney, or, if it has been registered, by reference, to the registration number. "

Therefore whereas it is possible for a person who is authorised to do so by power of attorney signed by the owner of the property (the registered title holder) to grant the authority to or appoint the conveyancer who is to appear before the Registrar of Deeds on behalf of the owner (as evidenced by the current deed of transfer), only a conveyancer can be appointed or authorised to give transfer to the transferee on behalf of the owner. A distinction therefore ought to be drawn between, on the one hand, the authority to give transfer which the owner of the property can only give to a conveyancer and other authority to otherwise deal with the property (including the authority to appoint on behalf of the owner the conveyancer for purposes of effecting transfer of the property.

The power of attorney relied upon by the first respondent referred to inter alia in paragraph ten of the answering affidavit does not seem to me to authorise the first respondent to appoint a conveyancer to effect transfer of the property on behalf of the owner. At best the said special power of attorney appearing at page fifty eight of the book pleadings and is annexure I of the first respondent's answering affidavit purports to authorise the first respondent to "give transfer" relating to the 'above immovable property...."' Indeed at paragraph ten of the answering affidavit this is the interpretation that the first respondent is contending for, when he states -

"The contents of this paragraph are denied in so far as it is alleged that attorney Thembela Simelane had no authority to effect transfer. I aver that the power of attorney which I signed effecting transfer was signed by virtue of the special power of attorney granted to me by the applicant himself.

And similarly in paragraph eight of the answering affidavit the first respondent states:

"... In particular I deny that the power of attorney which I signed to effect transfer was fraudulent..."

It is clear from this statement of the first respondent contained in the answering affidavit that he thinks that the power of attorney which is annexure I of his affidavit gave him authority to effect transfer and that he believes he did this (that is, he effected the transfer), when he signed the power of attorney which is annexure "C" of the applicant's founding affidavit, purporting to appoint Mr. Thembela Simelane to appear before the Registrar of Deeds to execute (or effect transfer of the property), the deed of transfer. Annexure I of the first respondent's answering affidavit as a power of attorney authorising the said first respondent to give transfer could not validly be given to the first respondent who was not a conveyancer, regard being had to the provisions of Section 18 of the Deeds Registry Act, 37/68. This is one reason upon which the first respondent's reliance on this power of attorney must fail. The power of attorney itself relied upon by the first respondent is headed "Special Power of Attorney" and continues to provide -

"I the undersigned, Micah Paschal Dinabantu Mkhonza do hereby grant, nominate, constitute and appoint to (sic) Belarmino Barroca Gil with full power of attorney to act on my behalf and in my place to:

1. To sell immovable property registered in my name herein mentioned namely; Farm 1019, situate in the Shiselweni District, Mankayane measuring (68,5226) six eight, comma five two two six hectares. To obtain a purchaser for the property herein mentioned and to make all the necessary declarations as to the truth of the amount of the selling price, to receive or to make and give, as the case may be, to sign the necessary documents and deeds of sale, transfer relating to the above immovable property.

2. To receive and deposit the proceeds of the sale of the said immovable property in his name.

3. To receive and to pay to agent(s) the required commissions as arranged between the appointee herein and/or agents arising from the sale of the said immovable property.

And to do all things lawfully necessary in connection with the aforegoing.
Signed at Manzini (Swaziland) on this 28th day of August, 1997...."
It is clear from all the paragraphs of the special power of attorney that the object of the power of attorney is the sale of the grantor's (applicant's) immovable property as described therein. There is only one word

in the whole document which might possible suggest the scope of the mandate given to first respondent is wider to the extent that something else other than a sale is contemplated and that is the word

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'transfer' in the paragraph numbered 1 of the "special power of attorney." The presence of that word produces a degree of vagueness and ambiguity on the reading of the second sentence of paragraph one.

The one possibility which does not advance the first respondent's case any better is that the first respondent is given authority "... to make and give, to sign the necessary documents and deeds of sale and transfer relating to the immovable property." Now, as already seen the first respondent is not competent to sign a deed of transfer because the only people with such competence according to Section 18 are the owner of the property or his duly authorised conveyancer. The first respondent who is neither of this people could not be given such power by the special power of attorney. Similarly, the power of attorney could not vest him (that is, first respondent) with the authority to give transfer in respect of the property because again as we have observed above both in terms of the common law and Section 18 of the Deeds Registry Act, 37/1968 it is either the owner himself or a conveyancer who can do this. All that the special power of attorney could have authorised the first respondent to do would be to appoint the conveyancer on behalf of the applicant, which as we have already observed, the special power of attorney does not attempt to do.

Secondly, and in any event, even assuming that the special power of attorney granted to the first respondent on 28th August 1997 did authorise him to appoint a conveyancer to appear on behalf of the Registrar of Deeds for the purpose of executing the deed of transfer (that is, effecting the transfer) the power of attorney which is annexure "C" of the applicant's founding affidavit appointing Thembela Simelane to appear before the Registrar to execute does not on the face of it appear to be given by the first respondent, but purports to be given by the applicant when in fact it is not the applicant who gave it. The said power of attorney states after the heading "Power of Attorney to Transfer" -

"I the undersigned Micah Paschal Dinabantu Mkhonza (born on the 7th July, 1939 ID No.4320-01-50164797) do hereby appoint THEMBELA ANDREW SIMELANE and/or LINDIFA RONALD MAMBA with power of substitution to be my/our true and lawful attorney and Agent to appear before the Registrar of Deeds for Swaziland at Mbabane and there to declare that I did on the 5th day of August, 1999 sell to Belarmino Barroca Gil (born on the 19th January, 1947...."

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At the end thereof the power of attorney to pass transfer is not signed by Micah Paschal Dinabantu Mkhonza but by the first respondent. As the Registrar of Deeds would not know the signature of Micah Paschal Dinabantu Mkhonza who was the holder of the then current title deed and therefore being the person whose name had to appear in both the title deed and the power of attorney, by wording the power of attorney in this manner as one purporting to be given by the applicant whereas the signature would be that of the first respondent, which signature was not known to the Registrar of Deeds, the first respondent must have realised that the power of attorney to pass transfer which he signed was calculated to deceive the Registrar of Deeds. In the result the conveyancer, that is Mr. Thembela Simelane who executed the deed of transfer before and in the presence of the Registrar of Deeds was not authorised to do so by either the owner or a duly authorised agent of the owner, to appoint a conveyancer. The power of attorney to pass transfer was not an act of either the owner (the applicant herein) nor does it purport on the face of it to be an act of the first respondent. Further support for the view that in signing the power of attorney to pass transfer, the first respondent did not purport to act on the basis that he had the competence to so act, by the special power of attorney granted to him by the applicant on 28th August, 1997 is that this latter power of attorney was not filed by the frist respondent as proof of his authority to represent the applicant registered owner in appointing a conveyancer to appear before the Registrar of Deeds to execute the deed of transfer. Indeed if the power of attorney to pass transfer had appeared to be given by the first respondent the Registrar of Deeds would have been alerted to require proof of the first respondent's authority to represent the applicant in this conveyancing transaction i.e. authority to appoint

a conveyancer to act on behalf of the applicant and as already shown above such authority would clearly have been shown to be lacking. The failure to properly describe the parties in the power of attorney purporting to appoint Mr. Thembela Simelane vitiates the whole transaction. In this regard I refer again to D. Carey Miller supra at 185 where he observes:

"An accurate description of the parties to a conveyancing transaction is clearly important."
and then in the footnote on the same page he states in relation to the same matter:

"An obvious objective of any system of land registration will be to avoid errors. Ensuring that the correct unit of land is conveyed, by a willing owner - or party entitled to convey on the registered owner's behalf— to the intended and intending transferee should avoid fundamental error and the possible problems of duplicated titles. "

It is therefore clear that the defects in the transaction meant that not only was there no compliance with the requirements of the Deeds Registry Act, 37/1968 because of the absence of a proper power of attorney appointing the conveyancer to appear on behalf of the owner before the Registrar for the purpose of executing the deed of transfer, but also that there was non-compliance with the requirements of the common law relating, to the competence of the conveyancer to pass the ownership from the applicant to the first respondent and the absence of proof of an intention expressed by the applicant, that it was his will, that ownership should pass from him to the first respondent. This intention and will of the transferor is usually expressed by the power of attorney which he signs authorising the conveyancer to appear on his behalf before the Registrar of Deeds, to execute the deed of transfer. It may also be expressed by the involvement of the owner of the property who appears in person before the Registrar, which practice as we have seen is unheard of in reality.

Lastly, the existence of the deed of sale of 28th August, 1997, together with the reference in the power of attorney to pass transfer to a non-existent sale supposedly concluded on 5th August, 1999, does not affect the matter. This is because as we have already observed above inspite of the fact that deeds office practice requires that the underlying causa or agreement giving rise to the transfer be identified, the actual existence or validity of such an underlying causa has no bearing on the real agreement which is the only transaction which has the effect of conveying the dominium or whatever real right is the subject of the transaction from the transferor to the transferee. The real agreement is a separate agreement which must conform to all the requirements of an agreement including, as we already stated, in case of land the justa causa traditionis. In the case of land (immovable property) registration takes the place of traditio. Similarly, the fact that the special power of attorney granted by first respondent to the conveyancer had referred to an non-existent sale would not have affected the validity and effect of the transaction if the purported transfer had

complied with all other requirements of the common law and the Deeds Registry Act, as already shown. I may mention in passing however, that having regard to the surrounding circumstances of the signing of the deed of sale, the other agreements the parties had concluded and some provisions in the deed of sale itself it is probable that the so called deed of sale may have been a 'simulated' transaction where the parties entered into an agreement taking the form of a sale whereas the object of the parties in concluding such apparent sale were not, that the consequences which normally flow to the parties to a sale, would follow in their case. In other words, even though the parties entered into the 'sale agreement' they did so without intending to be bound inter se by its terms. This is clear from the following:

1. The deed of sale was signed on the same day, that is, 28th August, 1997 as the power of the attorney granted by the applicant to the first respondent to find another purchaser for the same property on behalf of the applicant.

2. In accordance with clause 2.1.3 of a deed of sale settlement signed by the parties on 18th

August, 1997 in which deed of settlement the applicant's wife was also a party it was agreed as follows: "Belarmino Gil be given a power of attorney to secure a purchaser of the said farm mentioned above and in terms thereof be given rights to accept payment in respect thereof in the event it is sold by him and who shall account to the Defendant (Micah Pascal Mkhonza) in the event there is a balance remaining. "

3. Similarly, in clause 7.5 of the Deed of Sale, it is provided as follows: "Furthermore, in the event of the purchaser selling the said property herein mentioned in excess of the amount owed to him by the seller.(sic) He shall deduct an amount of E145,000-00 less 5% commission from the sale of property together with any other monies due and payable by the seller to the purchaser at the time and account to the seller herein in respect of whatever balance remaining from such sale."

4. It is also clear that it was contemplated that the applicant could still sell the same property to another person.

5. The purchaser, first respondent was given neither vacuo possessio nor a right to be given transfer of the property. In this regard refer also to clause 7.7 of the deed sale.

6. The parties expressly agreed in the "deed of sale" that as soon as the applicant paid the first respondent the amount of the 'acknowledged debt' from any source including a sale of the same propety, by either party, the sale would be of no force and effect.

7. Inspite of the 'deed of sale' the first respondent continued in his efforts to look for a purchaser of this property without bothering to demand transfer until the possibility of compensation arose as a result of expropriation of a portion of the property by government in connection with the construction of the Luyengo - Sicunusa Road.

8. In terms of 2.1.2 of the deed of settlement signed on 18th August, 1997 the right that the first respondent was to obtain in respect of the property was simple to register a mortage over same. Actually it is clear that the drawing of the power of attorney and all the documents signed by the parties thereafter were meant to implement the provisions of the deed of settlement signed ten days earlier. Further it is against this background that the special power of attorney granted by the applicant to the first respondent has to be interepreted. Once the special power of attorney is view against the other agreements which were also in writing it becomes clear that it cannot be contended that the power of attorney dated 28th August, 1997 gave the first respondent the authority to transfer the property either to himself or third parties. At best for the first respondent the power of attorney, (assuming it could do this) only gave him power to transfer real rights which normally go with the registration of a mortgage bond. Similarly the sale was not intended to give him a right to receive transfer of the ownership over the property.

On the basis of the aforegoing apart from the fact that the sale is irrelevant to the issues arising, the further problem in the first respondent's way is that it may well be that it was a void sale for lack of justa causa, in the sense of a serious and deliberate

intention to create the relationship, rights and duties which normally arise from a contract of sale.

On the basis of the aforegoing I find that the ownership of the property described as Farm 1019 situate in Shiselweni District, measuring 68,5226 (six eight comma five two two six) hectares did not pass from the applicant to the first respondent. In the circumstances, the applicant is clearly entitled to the order sought in the notice of motion. I therefore make the following Order:

1. The first respondent is hereby interdicted and restrained from, any way whatsoever, occupying, utilising and/or dealing with: certain farm No.1019 situate in the Shiselweni District, Swaziland, measuring: -68,5226 (six eight comma five two two six) hectares.

2. The purported transfer and registration of the property described under paragraph one above from the applicant's name to that of the first respondent is declared null and void and is set aside.

3. The second respondent, that is, the Registrar of Deeds, is hereby directed, authorised and empowered to re-register the property described under paragraph one above in the name of the applicant and to cancel and remove all documents indicating the first respondent as the registered owner of the aforesaid property.

4. The first respondent is ordered to pay the costs of this application.

A.S. SHABANGU

Acting Judge