



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 304/13

In the matter between

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

1ST APPLICANT

2ND APPLICANT

And

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

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

Neutral citation: *Sikhumbuzo R. Mabila (NO) v Syzo Investment
(Pty) Ltd and 3 Others (304/13) 2013*
[SZHC] 143 (18 July 2013)

Coram: OTA J

Heard: 25 June 2013

Delivered: 18 July 2013

Summary: **Civil procedure: Trusts; non-legal persona; order sought to register immovable property in the name of a trust; order incompetent; prohibited by Section 15 of Deeds Registry Act No. 37 of 1968, as a trust is not a legal person; application dismissed *in limine*.**

Judgment

[1] The Applicant contends for the following substantive reliefs:-

3. Ordering the 1st and 2nd Respondents to forthwith transfer immovable property being Certain Lot 464, Matsapha Town, situate in the Manzini District into the name of the 2nd Applicant failing which; The Registrar of this Honourable Court be and is hereby authorized and directed to effect transfer of the said Lot No 464, Matsapha, Town situate in the Manzini District from the name of the 1st Respondent into the name of the 2nd Applicant.

4. Interdicting and restraining the 1st and 2nd Respondents from dealing in any manner with the said Lot 464 Matsapha Town pending the said transfer or from dealing in any manner with the shares of the 1st Respondent.
5. Interdicting the 3rd Respondent from permitting the transfer to any third party other than the 2nd Respondent, Certain Lot No 464, situate in Matsapha Town, District of Manzini, Swaziland, measuring, as such 8524 square metres held by 1st Respondent under Deed of Transfer No 463/2008 dated 18th June 2008.
6. Costs against the 1st and 2nd Respondents on the scale as between attorney and his own client.

[2] The Applicant obtained a rule nisi in terms of the reliefs sought in paragraphs [3] and [4] above, which was granted on the 28th of February 2013.

[3] The common cause facts of this case are that on the 20th of June 2012, the 1st Respondent and the 1st Applicant who was representing the 2nd

Applicant (which was then a trust in the course of formation) entered into a written agreement of sale, wherein the 1st Respondent sold to the trust Certain Lot No. 464, situate in Matsapha Town, District of Manzini Swaziland (the property).

[4] It is common cause that the agreed purchase price of the property was E1,250 000-00 (One Million Two Hundred and Fifty Thousand Emalangeni) which amount it was agreed the purchaser was to secure by a covering letter of guarantee made payable by the seller upon registration of the property into the name of the purchaser. The sale agreement between the parties is evidenced by annexure A,

[5] It is common cause that subsequent to the agreement in annexure 'A' on the 13th day of July 2012, and in recognition of the 1st Respondent's fledging financial situation, the 1st Applicant and 2nd Respondent entered into a subsequent loan agreement evidenced by annexure D, wherein the 1st Applicant lent to the 2nd Respondent the sum of E150,000-00 (One Hundred and Fifty Thousand Emalangeni), meant to hive off the 1st Respondent's general debt thus alleviating its financial woes. The 2nd Respondent pledged Certain Lot 379,

Tubungu Estate belonging to one Sibonginkosi Trust, named in annexure D as the borrower, to the 1st Applicant as security for the transaction. This subsequent transaction is not a part of the original transaction evidenced by annexure A.

[6] It is common cause that after the signing of annexure A, the trust i.e 2nd Applicant was duly executed on the 10th of December 2012. On the 21st of December 2012, the Swaziland Building Society issued Certain guarantee No. 184/2013 for the full purchase price of the property.

[7] In the wake of this development, 1st Applicant's conveyancer, Attorney Nkosinathi Manzini prepared the documents of transfer of the property to the trust.

[8] It is common cause that the 1st Applicant duly signed the transfer documents, but the 2nd Respondent has up till date refused to sign the transfer documents.

[9] What is apparent from the papers filed of record is that on the 29th of November 2012, prior to execution of 2nd Applicant and provision of the bank guarantee, the 1st Respondent obtained a loan facility from its bankers, Standard Bank Swaziland Limited, in the total amount of E1,464,000-00 (One Million Four Hundred and Sixty Four Thousand Emalangeni). The loan was secured by a First and Second continuing covering mortgage bond over the property (i.e. lot 464) see paragraph 6.1.2 of loan agreement. The second Respondent alleges that though the first mortgage bond has been cancelled as evidenced by annexure SMI, the 2nd mortgage bond however still subsists.

[10] It was against a background of the foregoing facts, that the Applicants commenced this application praying for the reliefs enumerated in paragraph [1] above.

[11] In their opposing papers the 1st and 2nd Respondents raised the following points of law, seeking to defeat the entire application *in limine*.

- 1) The application does not disclose a cause of action as the relief sought would result in contravention of Section 15 of Deeds Registry Act No. 37 of 1968.
- 2) The sale agreement is null and void in so far as it purports to pass dominion/ownership to a non-existent legal persona.
- 3) 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 which is prohibited by law.

[12] In support of these points of law, Mr S.C Simelane who appeared for the 1st and 2nd Respondents, contended, that the order sought to transfer ownership of the property to the 2nd Applicant, which is a trust, is incompetent, as it contravenes Section 15 of the Deeds Registry Act, which provides that ownership of immovable property can only be transferred to a legal person. A trust is not a legal person. The practice of transferring ownership of immovable property to a trust finds no sanction in the Deeds Registry Act.

[13] Counsel further contended that the trust has not been registered at the Deeds office, therefore, the Applicants have not satisfied the

requirement for such an order. It is also Counsel's contention that the order sought calls for transfer of immovable property to be made to a person in a representative capacity and there can be no vesting of real right in land in a person in a representative capacity. The agreement of sale was entered into by the 1st Applicant in a representative capacity.

[14] It was contended *replicando* for the Applicants by learned counsel Mr S Nkosi, that the consequences of a trust said not to be a legal persona does not mean that the trust cannot hold property. Counsel further submitted that by the nature of trusts, even though immovable property may *de facto* be registered in the name of the trust itself, real ownership of the property vests in the trustee or trustees. Counsel submitted that this is accepted practice both in Swaziland and in South Africa. He further submitted that the question of registration of the trust in the Deeds office will occur simultaneously with registration of the transfer of the property. He called for a dismissal of the points *in limine*.

[15] Now, the starting point of this decision to my mind is with the wording of Section 15 of the Deeds Registry Act, which lies at the subtractum of this issue. This is in honour of the cardinal rule of interpretation that the first port of call in interpreting a statute is the wording of the statute itself.

[16] Section 15 of the Deeds Registry Act provides as follows:

“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”. (emphasis added)

[17] The parties are *ad idem* that by the above legislation ownership of land can only be transferred to a legal person. It is also the overwhelming consensus *in casu* that a trust is not a legal persona. It is this state of affairs that gives impetus to Mr Simelane’s contention.

[18] I agree with the parties that a trust is a non-legal person. It has no existence known to law. That is why the property in a trust is vested in the trustees. This shows that the trust does not have an independent legal existence as a legal persona. This is because one of the ideal

features of a legal personality is the capacity to own property; others include the capacity to sue or be sued *eo nomine* (by its owner name); its investment with the power, the duty and function whose exercise affect or can affect the interest of other persons. If a body does not have any of these qualities or characteristics, it cannot be regarded as a legal personality. The trust is devoid of all these characteristics. Therefore, it is not a legal person. Since it is not , it cannot by virtue of Section 15 of the Deeds Registry Act, be the transferor or transferee of property.

[19] Mr Nkosi has drawn my attention to the prevailing practice in this jurisdiction where property is registered either in the name of the trustees or directly in the name of the trust, notwithstanding the provision of Section 15 of the Deeds Registry Act. Mr Nkosi therefore contends, that the order sought transferring the property into the name of the 2nd Applicant i.e. the trust, is competent. Mr Simelane, as I have hereinbefore demonstrated, holds to the contrary.

[20] There is no case law authority on this point in Swaziland. One can however be guided by the manner this issue has been approached

under the Common Law and in the neighboring Republic of South Africa, whose jurisprudence is of high persuasion in the Kingdom.

[21] In South Africa, the issue is polarized on two points. One part of the South African legal system holds the view that immovable property can be transferred either into the name of the trustee(s) or directly into the name of the trust. The opinion is that even though immovable property may *de facto* be registered in the name of the trust itself, real ownership of the property vests in the trustee or trustees. This position was succinctly stated by the learned editor **P.A. Oliver** in the text **“Trust Law and Practice” 1990 HAUM Tertiary at pp 65-66**, as follows:-

“No uniform procedure is adopted when immovable property is transferred to such a trust. Transfer is usually registered in most Deeds offices in South Africa as ‘the trustees of the ABC Trust and their successors subject to the conditions hereafter set forth’. However from time to time property is simply registered in the name of the ABC Trust”. See CIR V Macneille’s Estate 1961 (3) S.A 833 (AD) at 840 and Braun V Blana & Botha 1964 (2) S.A 850 (A).

[22] On the other hand, the South Africa Common Law position is that a trust is not a legal persona and therefore does not take transfer of immovable property as the trust qua trust. This Common Law position was re-stated in clear and unambiguous terms in the case of **Joubert and Others V Van Rensburg and Others 2001 (1) SA 753 W at 768 F-1 when considering Section 16 of Deeds Registry Act 47 of 1937 of South Africa**, which is in pari materia with our Section 15. The court stated as follows:-

“Transfer cannot be passed to a ‘trust’. That is a consequence of s16 of Deeds Registry 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 generic. It was held in Commissioner for Inland Revenue v Friedman and Others NNO 1993 (1) SA 353 (A) at 370 that a trust is not a legal person and that the owner of ‘trust property’ is the trustee”

[23] The take home message from the jurisprudence paraded above, is that in South Africa, the unanimous opinion is that a trust is not a legal person. To this extent it shares similarity with the Common Law position.

[24] The confusion that the South African position generates is that a trust though not a legal person can have property registered in its name, however the property will not vest in it and will rather vest in the trustees.

[25] This position is clearly confusing because it is difficult to conceive:

- (1) how a non-legal person can have property registered in its name.
- (2) how a person in whose name property is registered can be said not to be vested with the property.

[26] The exact nature of the trust is very clear and is defined by the fact that it is a non-legal person. The trust is not an entity. It is a legal concept defining a relationship or what we may call a fiduciary

relationship, to which the primary parties are the trustees and the beneficiaries.

[27] So when we talk of the trust, it will be more proper legally speaking to talk of it in terms of a concept defining such a relationship and not as an entity that is capable of having property registered in its name. This suggests the existence of a separate legal personality. It will be contrary to established legal doctrine and unrealistic to do so.

[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 personal names of the trustees whenever that particular relationship is being referred to. Therefore, the registration of the property subject to that relationship, should 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.

[30] The prayer sought for the registration of the property in the name of the trust is contrary to law and therefore incompetent. All the interdicts sought which are also predicated on this relief are also rendered incompetent. I will not concern myself with the other points taken *in limine* as they have become academic.

[31] The result is that the point taken *in limine* on the incompetence of the reliefs sought is upheld. This application fails and is accordingly dismissed with costs.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS
.....DAY OF2013**

**OTA J
JUDGE OF THE HIGH COURT**

For the Applicant: S. Nkosi

For the Respondent: S. C. Simelane