



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 1028/2012

In the matter between:

**VMB INVESTMENTS**

**Applicant**

And

**BOY BOY NYEMBE t/a MR TRAILER  
AND ONE STOP TYRE SERVICES**

**First Respondent**

**FIHLIWE NYEMBE**

**Second Respondent**

**SWAZILAND ELECTRICITY COMPANY**

**Third Respondent**

**SWAZILAND WATER SERVICES CORPORATION**

**Fourth Respondent**

**THE COMMISSIONER OF POLICE**

**Fifth Respondent**

**THE ATTORNEY GENERAL**

**Sixth Respondent**

**Neutral citation: *VMB Investments (Pty) Ltd v Boy Boy Nyembe and 5 Others*  
(1028/2012) [2014] SZHC 109 (13<sup>th</sup> June 2014)**

**Coram: M. Dlamini J.**

**Heard: 25<sup>th</sup> March, 2014**

**Delivered: 13<sup>th</sup> June, 2014**

*A buyer to a contract of sale acquires a personal right to be enforced not beyond the person who was a party to the contract of sale. As per section 15 of the Deeds Registry Act No. 37 of 1968, the personal right over immovable is converted to a real right upon registration to the name of the purchaser to be enforced against the whole world. This position of the law is irrespective of whether the purchaser who has subsequently complied with the terms of section 15 is aware of other purchasers of the same immovable. The right of other purchasers who have not registered remains personal and is enforceable only against the seller.*

**Summary:** The applicant seeks for an eviction order against first and second respondents on the basis that it is a title deed holder of the land occupied by first and second respondents. First and second respondents are opposed to the orders on the grounds that they purchased the said property and are awaiting subdivision and registration.

### **Background**

[1] It appears from the pleadings as common cause that one **Mr. Richard Dlamini** (now deceased) sold immovable property *wit.* Portion 908 (a portion of portion 569) of Farm No.2 situate in the district of Hhohho to **Electro Limited**. **Electro Limited** later sold the said property to the applicant. This property as a result was registered in the name of applicant under Deed of Transfer No.15/2012. It turned out that first and second respondents are trading on the said property and have erected a structure.

### **Issue**

[2] The applicant claims that as a title deed holder, it has a clear right over the property. The first and second respondents on the other hand insist that they too hold ownership over the said property by virtue of a sale

agreement between **Mr. Richard Dlamini** and themselves. It is the duty of this court to protect innocent buyers, respondents contend.

[3] The question therefore is, who holds ownership of the north part of Portion 908 (a portion of portion 569) of Farm No.2, Hhohho region.

**Applicant's contentions:**

[4] In support of its case applicant avers:

“19. *The applicant is the registered owner of the immovable property to wit Portion 908 (a portion of portion 569 of Farm No.2 situate in the district of Hhohho along Sozisa Road measuring 5102 (five one zero two) square meters by virtue of Deed of Transfer No.15/2012.*

20. *It will appear clearly that there is no notarial lease agreement registered against the property. In fact prior to the applicant buying his property I, on behalf of the applicant, verified from the previous owner Mr Cetin Olmez on behalf of Electro Limited if he had any lease agreement with anyone on the property and he advised me that he had no lease agreement with anyone.*

21. *Immediately after the property was registered in the name of the applicant I noticed that there were certain structures on the north east side of the property which according to me were within the property owned by the applicant. I immediately contacted a land surveyor Mr Martin De Beer to verify my observations. The pegs were positioned by Mr Martin De Beer and he confirmed that the structures constructed by the first and second respondent were within the property owned by the applicant. I refer the court to the confirmatory affidavit of Mr Martin De Beer herein.*

22. *I then approached the first respondent and told him that the property where he is conducting his business was within the applicant's property and wanted to find out on what basis he has erected those structures within the premises. The first respondent told me that his mother (the second respondent) was allocated the land by the previous owner. I requested a copy of a deed of transfer or lease agreement and he failed to produce same. I then told the first respondent that he must remove the*

*structures otherwise the applicant will approach the relevant authorities to assist. The first respondent did not comply with the applicant's request."*

Applicant proceeded:

*"27. The applicant has been advised that ownership and/or right to an immovable property has to be registered at the Deeds Office against the title deed of the property so that it can be enforced by the owner against third parties or at worst against the whole world. There are no endorsements on the title deed that is in favour of the applicant that the first and second respondents have a right to use a part of the applicant's property. The applicant therefore submits that the first and second respondents have no legal right to occupy the applicant's property and their illegal structures have to be demolished as the applicant wants to develop the place."*

### **Respondents' depositions**

[5] In rebuttal, the respondents contend:

#### **In limine**

*"3.1 It is averred that there are material disputes of facts which should have been foreseen by applicant when instituting these proceedings and which disputes are incapable of resolution on papers.*

*There are real dispute of facts regarding whether the first and second respondent's occupation of the land in question is lawful or not. Particularly, because 1<sup>st</sup> respondent is in possession of all requisite documents corroborating its claim to the land in question. Such information was brought to the attention of the applicant when it initially sought to evict the 1<sup>st</sup> and 2<sup>nd</sup> respondents from the property in question and the applicant before initiating these proceedings was well aware that the 1<sup>st</sup> and 2<sup>nd</sup> respondent would vigorously defend the matter.*

*Full and further arguments will be advanced by council for and on behalf of the respondent during the hearing of this matter.”*

On merits they state:

- “6.1 *I aver that I am in lawful occupation of the land in question and it therefore follows that all structures erected by me are lawfully constructed. I refer the court to a copy of an agreement of sale marked “SN1” and three confirmatory affidavits of Vulindlela V. Dlamini, Mrs Witness S. Dlamini and Mrs Constance Dlamini, marked “SN2” “SN3” and “SN4” respectively.*
- 6.2 *I further submit that I do not need to get the applicant’s approval because I occupied the land in question in the year 2007, long before the applicant bought its portion of land. I obtained a building permit from Mbabane municipal council on or about 14<sup>th</sup> August 2007. Furthermore **Mr Richard Masihambisane Dlamini**, in my presence, advised **Cetin Olmez** the buyers of portion 1047 and portion 1048, of the marked, but yet to be registered portion sold to me. I reiterate the fact that the applicant was advised that I had bought the portion upon which I have erected my structures before it bought its portion of land. I am therefore perturbed by the applicant’s incipient allegations that I am encroaching upon its land. The above manifests peaceful occupation.*
- 6.3 *The position of the law is that when property is bought, it is inherited with all its encumbrances. The applicant took ownership of the property in 2011 as morefully appears in annexure marked “A” hereto. At that time I was already the lawful owner and occupier over the property which is the subject of this application. By operation of law therefore, the applicant is precluded from denying knowledge of an encumbrance he found to have existed on the property years before he took ownership. Full legal argument in support of this position will be advanced during the hearing of this matter.*
- 8.1 *I further submit that **Mr Cetin Olmez** was advised by **Mr Masihambisane Dlamini** that I had bought a portion of land, which portion was clearly demarcated but was yet to be registered. Upon being advised of my real right to the land, **Mr Cetin Olmez** never incommoded me with claims of ownership over my portion. I was in peaceful ownership of the land, until applicant assumed ownership of the property. **Mr Masihambisane Dlamini** went further and engaged the services of a land surveyor **Mr Dumisa Thwala**, with the view to drawing and registering of my portion of land. I humbly refer the court to a letter from Dumisa Dlamini marked “SN8”.*

8.2 *I have been advised that a notorial lease is a limited real right. It is therefore overt that no registered lease agreement in my name will be found, chiefly because I have a real right to the land on which I have built my structures.*

*I wish to confirm that **Mr. Barreiro** has approached me on more than one occasion to determine the basis of my occupation of the property he alleges to be his. In all such occasions I have explained to him that the property was procured by myself and my mother from **Masihambisane Dlamini** and that our occupation therefore was legal. I have gone as far as to show him the deed of sale that was signed by my mother and **Mr Masihambisane Dlamini**. I have further advised him that my occupancy of the property over such a lengthy period should be enough demonstration to him of my legal right to be in occupation. I reiterate therefore that I have on countless occasion advised **Mr. Barreiro** of my ownership of the property in question.”*

[6] The applicant replied as follows:

- “5. *I wish to point out at this outset that the answering affidavits, confirmatory affidavits as well as the annexures thereto have no substance in their totality and do not disclose any defence to the claim for eviction by the applicant. I say this because the applicant has a deed of transfer that proves that it is the owner of the property in question. I am advised that the ownership to land is proved by registration of the land in the name of the owner. The court is drawn to annexure “A” in the founding affidavit which is the deed of transfer in favour of the applicant.*
6. *It will fully appear on the deed of transfer that the transfer to the applicant had no reservation of any right of occupation nor possession of any part of the property to the first and / or second respondent.*
7. *The first respondent is contending that he took occupation of the property in 2007 as per sub-paragraph 6.3 of the answering affidavit. I am advised that occupation of an immovable property does not give that person title to the land in question. He may be occupying that land illegally like the present first and/or second respondent are doing. I am advised that ownership can only be limited by a valid lease agreement and a valid servitude and that has not been pleaded by the first respondent. The second respondent is merely contending that he owns the land because it was sold to him but fails to appreciate that proof of*

ownership to an immovable property is only proved only by registration into your name.

8. *I have had occasion to go through the old deed of transfer that the applicant took title from. That deed of transfer was in favour of Electro Limited having been sold to it by the Richard Sandlane Dlamini on the 18<sup>th</sup> day of June 2008 for an amount of E1 000 000.00 (One Million Emalangeni). A true copy of the deed of transfer is annexed hereto marked "F". The conditions of the transfer are on page 2 of the deed of transfer and there is nowhere on the deed where the ownership of the property is limited in favour of the first respondent through occupation and/or possession. The late Richard Dlamini having signed the alleged invalid deed of sale with the second respondent on the 2<sup>nd</sup> day of January 2008 proceeded on the 18<sup>th</sup> day of June 2008 to sell the whole property to Electro Limited and the latter obtained ownership and became entitled to free and undisturbed occupation and possession of the property.*
9. *The reality of the situation is that, even if Richard Dlamini had given the right of occupation to the first respondent in 2007 but in 2008 he proceeded to ignore and override that and sold the whole property to Electro Limited and in such circumstances the first and / or second respondent have only a claim against the estate of Richard Dlamini for damages and not the applicant. Whatever right the first respondent had then was terminated by the sale to Electro Limited in terms of the law.*
10. *The applicant, on the other hand, took ownership from Electro Limited on the 6<sup>th</sup> day of January, 2012 and without any reservation of occupation and / or possession to the first respondent as per the deed of transfer marked "A" on the founding affidavit. The applicant therefore is entitled to free and undisturbed occupation and possession thereof hence the present application."*

### **Adjudication**

#### **Point in limine**

[7] The respondents contend that prior to applicant instituting the present legal proceedings, it approached them. They indicated that the matter would be

defended. In that view, applicant ought to have foreseen therefore that the matter was fraught with dispute of facts.

[8] My duty at this juncture, is to ascertain whether there are any real dispute of facts in the present matter to warrant a dismissal of applicant's application.

Rule 6 (17) and (18)

“(17) *Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision*

(18) *Without prejudice to the generality of sub-rule (17), the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”*

[9] In **Garment Workers Union v De Uries and Another 1949 (1) SA 1110 (W)** at 1133 **Price J** stated:

*“Applications for hearing of viva voce evidence in motion proceedings should be granted only where it is essential in the interest of justice.*

[10] In ascertaining whether it is in the “*interest of justice*” to refer the matter for *viva voce* evidence the court is guided by the *classicus* case of **Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd 1949 SA 1155** where the *ratio* partly reads:



*“where no real dispute of fact exist, there is no reason for the incurring of the delay and expense involved in a trial action and motion proceedings are generally recognized as permissible.”*

[11] His Lordship **Murray AJP** at 1163 neatly summed it up as follows:

*“In every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.”*(my emphasis)

[12] The corresponding question therefore is, whether there is a *bona fide* dispute of fact *in casu* as I have cited the parties’ contention in the preceding paragraphs herein. Or should I put it differently, will the calling of *viva voce* evidence disturb the probabilities as so stated in **Hilleke v Levy 1946 AD 214** at 219 as follows:

*“... in any particular case, however, the attitude taken up by one of the parties in regard to whether viva voce evidence should be heard, may be an element to be taken into consideration on the question whether such evidence might disturb the balance of probabilities as appearing from the affidavits.”*(my emphasis)

One must then swift for common matters between the parties.

### **Common cause**

[13] It is not in issue, as correctly pointed out by learned Counsel for applicant that the applicant is a holder of the title deed for the property in issue. Further, from the totality of applicant’s averments in reply, applicant does not dispute any sale agreement between respondents and Mr. Masihambisane Dlamini. All that applicant does is to maintain in the face of the sale agreement that by virtue of a title deed in its name, it has a better title over the land.

[14] In view of the foregoing, it is my considered view that the question for determination borders on the question of law and not fact. Therefore, it is untenable that there can be a dispute of fact at all let alone *bona fide* in the circumstance of the present case. The *point in limine* therefore stands to be dismissed.

### **Determination on merit**

[15] Discussing real rights over a thing, **Silberberg, law of property (1975) (Durban – Butterworths)** at page 39-40 point as follows:

*“Possessions, mortgages and servitude were real rights in Roman law and introduced into the law of Holland. A lessee, however, did not have a real right in Roman law but only a personal right against the particular owner of the thing with whom he had entered into a contract of lease. If that owner transferred his right of ownership in the thing, his successor was, as a general rule (and even if he acquired the property with knowledge of the lease) entitled to evict the lessee as he was not bound by the latter’s contract with the previous owner.”* (my emphasis)

[16] The learned author proceeds to clarify the above position at page 41 by hitting the nail on the head as follows:

*“In other words, a contract imposes on one of the parties an obligation to transfer a real right in a thing, but the other party does not acquire a real right in it by virtue of his contractual right.”* (my emphasis)

[17] I understand the learned author to be saying a contract of sale for instance, as *in casu*, is not sufficient to prove ownership (real right). In other words where parties conclude a contract of sale in respect of immovable, the purchaser does not by mere conclusion of the contract acquire a real right. His right over the thing remains for all intent and purpose personal. For the

personal right to be transformed into a real right, the purchaser must do something further. What is this something further? In our jurisdiction, the answer lies in **section 15** of the **Deeds Registry Act No. 37 of 1968** (the Act):

*How real rights shall be transferred.*

“15 *Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the Registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the Registrar.* (my emphasis)

*Provided that notarial attestation shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond.”*

[18] In other words, having entered into a contract of sale, the purchaser acquired a personal right over the thing viz. land. The purchaser must approach the Registrar of Deeds office to register the said property into its name. It is upon registration that the personal right is converted into real right that can be enforced against the whole world by virtue of *sui generis* and this includes other purchasers who were there before. The purchaser, who for one reason or the other had not complied with section 15 of the Act, remains with a personal right over the immovable. That personal right, as it is trite, cannot be enforced beyond the party who was part of the contract of sale, being the seller. This position of the law does not change irrespective of whether the latter purchaser and transferor was aware of the presence of other prior buyers as per **Silberberg** *supra*.

[19] Applying this position of the law in the present case, applicant having entered into a sale contract with **Electro Limited** then complied with the

provisions of section 15 of the Act as evidenced by the title deed in its name. However, it cannot be so said of first and second respondents.

[20] In the final analysis, the applicant has a clear right over the property. Respondents' cause of action lies not against applicant but the **estate late Richard Dlamini**, if the contentions on the contract of sale are anything to go by.

[21] In the foregoing, I enter the following orders:

1. Applicant's application succeeds;
2. The structures constructed by the first and/or second respondents on the north east of the applicant's property being Portion 908 (a portion of portion 569) of Farm No.2 situate in the district of Hhohho along Sozisa Road in Mbabane are declared unlawful;
3. The first and/or second respondents and/or all other persons occupying the illegal structures constructed by the first and/or the second respondents on the north east of the applicant's property are ejected;
4. The third and fourth respondents are ordered to disconnect the water and electricity supply to the structures constructed unlawfully by the first and the second respondents on the north east of the applicant's property being Portion 908 (a portion of portion 569) of Farm No.2 situate in the district of Hhohho along Sozisa Road in Mbabane;
5. The applicant is authorised to demolish illegal structures on the north east of its property being Portion 908 (a portion of portion 569) of

Farm No.2 situate in the district of Hhohho and the costs thereto be borne by the first and the second respondents;

6. The Deputy Sheriff, Hhohho region, is ordered to assist the applicant in carrying out the demolition referred to in prayer 5 above so as to maintain law and order;
7. Costs of the application to be borne by the first and the second respondents only.

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**M. DLAMINI**  
**JUDGE**

**For Applicant** : **N. D. Jele**  
**For Respondents** : **S. Dlamini**