



**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No: 1768/15

In the matter between:

**HENRY SIBUSISO SHONGWE N.O.** : **1<sup>ST</sup> APPLICANT**  
**MDUDUZI SHONGWE** : **2<sup>ND</sup> APPLICANT**

and

**MICHAEL MASOTJA SHONGWE** : **1<sup>ST</sup> RESPONDENT**  
**REGISTRAR OF DEEDS** : **2<sup>ND</sup> RESPONDENT**  
**ATTORNEY GENERAL** : **3<sup>RD</sup> RESPONDENT**

**Neutral Citation** : Henry Sibusiso Shongwe N.O. and Another vs Michael Masotja Shongwe and 2 Others (1768/15) [2016] SZHC 133 (29 JULY 2016)

**Coram** : JUDGE Q.M. MABUZA

**Heard** : 29/04/2016

**Delivered** : 29/07/16

**Summary** : **Administration of Estates – Co-executors reclaiming estate immovable property – Cancellation of transfer to 1<sup>st</sup> Respondent – For the benefit of heirs to estate.**

## JUDGMENT

### MABUZA J

[1] In this matter the Applicants seek the following orders:

1. That the sale and transfer of the undermentioned property to the First Respondent be and is hereby set aside namely:

CERTAIN : Lot No. 943 situate in Ngwane Park Extension No. 1 Township, District of Manzini, Swaziland

MEASURING : 1182 (One One Eight two) square metres

HELD : Under Deed of Transfer No. 564/2013

2. That the Registrar of Deeds be and is hereby ordered to cancel the registration of transfer in the name of the First Respondent.
3. That the First Respondent pays the costs of suit.
4. Further and/or alternative relief.

[2] The 1<sup>st</sup> Applicant has described himself as an adult male of Boyane in the Manzini district and co-executor dative in the estate of the late Nelson Mavukela Shongwe. The 2<sup>nd</sup> Applicant is a co-executor.

- [3] The First Respondent is Michael Msotja Shongwe an adult male of Vusweni area in Manzini currently employed by the Central Bank of Swaziland, Mbabane in the Hhohho District.
- [4] The Second Respondent is the Registrar of Deeds cited herein in her capacity as the custodian of all deeds of transfer or officer responsible for registration of transfers and hypothecation of immovable property of the Deeds Office Mbabane in the Hhohho District.
- [5] The Third Respondent is the Attorney General cited herein in his capacity as the nominal Respondent in proceedings against the government or government departments including the Second Respondent of Fourth Floor, Ministry of Justice Building, Mhlambanyatsi Link Road in the Hhohho District.
- [6] On the 1<sup>st</sup> December 2014 at Manzini the late Nelson Mavukela Shongwe died intestate leaving behind seventeen (17) children, including the First Respondent, most of whom were born by the deceased's three (3) wives whom he had married in terms of Swazi law and custom.

- [7] At the time of his demise, the late Nelson Mavukela Shongwe resided at Ngwane Park Township on the property described at prayer 1 of the Notice of Motion.
- [8] The 1<sup>st</sup> Respondent does not deny the contents of the above paragraphs.
- [9] The background to this matter is that when the deceased died he was the registered owner of Lot No. 943 situate at Ngwane Park Extension 1, in Manzini.
- [10] After his demise and burial the 1<sup>st</sup> Respondent advised the 1st Applicant that he was now the registered owner of the Ngwane Park Property. After their appointment as co-executors dative in the estate of the deceased, the executors discovered that indeed the 1<sup>st</sup> Respondent was the registered owner.
- [11] Upon enquiries at the Deeds office the co-executors discovered the following information:

- (a) That the said property was transferred to the 1<sup>st</sup> Respondent on the 12 August 2013;
- (b) That the 1<sup>st</sup> Respondent had allegedly paid E100,000.00 for its purchase
- (c) That the deceased had executed a Power of Attorney to pass Transfer of the aforesaid property.

[12] Indeed a copy of the Power of Attorney which was annexed to the application indicates that the purchase price was the sum of E100,000.00 as well as the Deed of Transfer.

[13] However, the deceased's bank statement which was also filed off record does not disclose any deposit amounting to this amount.

[14] By letter dated 22 May 2015 the co-executors called upon the 1<sup>st</sup> Respondent to furnish proof of the payment of the purchase price for the property, and the Deed of Sale, the 1<sup>st</sup> Respondent was not able to do so.

[15] Equally by letter dated 7 October 2015 the conveyancers were called upon to furnish a copy of the Deed of Sale and proof of payment for the property, they were unable to do.

[16] The 1<sup>st</sup> Respondent's general response is as follows:

- “4.1 I wish to state that before my father died, he had been sick for a long time and had been neglected by all his children and his surviving spouse and I took him to stay with me in my home where I took care of him until he became better. After he became better he then moved back to his property at Ngwane Park.**
- 4.2 I arranged for and hired a helper to look after my father at his Ngwane Park residence and the costs of the helper were paid for by myself’**
- 6.2 I wish to state that during my late father’s sickness and his subsequent recovery, he called myself, Dumisa Shongwe, and Make LaNkambule and he told us that since I have been taking care of him using my own resources he wanted to show his appreciation and say thank you by giving me his immovable property.**
- 6.3 The late Nelson Mavukela Shongwe further stated that he was giving me the responsibility to raise his minor children, namely Nhlakanipho Shongwe, Somandla Shongwe and Vukani Shongwe. He said I should be responsible for their education and all their other needs. He then said as a way to repay me for this task the immovable property would be the payment.**
- 6.4 We then discussed the method of having the property transferred to me and it was then agreed that since he has given me financial responsibilities relating to his minor children then we estimate that the responsibilities, past and future, would be in the region of E100,000.00 (One hundred thousand Emalangen) and we then agreed that this should be the selling price.**

**6.5 I then drafted the deed of sale and we both signed it. I then took it to my conveyancers, who prepared all relevant documents to effect the transfer. I took the documents to my father and he signed them. I then returned them to my lawyers who then effected the transfer.**

[17] Further to the above admissions the 1<sup>st</sup> Respondent says that he looked for the deed of sale but could not find it. He never responded to the letter dated 22 May 2015 because he did not know what the Applicants wanted to achieve because they also knew that the deceased had given the property to him during his lifetime. With regard to the letter dated 7 October 2015 his lawyers advised him about it but since he had a fallout with them about fees it was not responded to.

[18] The contents of the affidavit of the 1<sup>st</sup> Respondent are confirmed by Dumisa Shongwe, LaNkambule and attorney Nkosinathi Manzini. Dumisa Shongwe and LaNkambule attest to the allegation by the 1<sup>st</sup> Respondent that the deceased told them that since the 1<sup>st</sup> Respondent had taken care of him using his own resources he wanted to show his appreciation by giving the 1<sup>st</sup> Respondent the Ngwane Park property. They also attest to the allegation by the 1<sup>st</sup> Respondent that the deceased was giving him the responsibility of

raising the deceased's minor children namely Nhlakanipho, Somandla and Vukani.

[19] The contents of the affidavit of the 1<sup>st</sup> Applicant are confirmed by the affidavit of the Co-executor Mduduzi Shongwe.

[20] It is clear to me that Ngwane Park property is a valuable asset of the estate of the deceased. That being the case the Co-executors want it recovered and returned to the estate.

[21] However, nobody has thought to apprise the Court about the deceased's state of mind during his "long sickness" no medical history has been filed to enable me to ascertain whether or not he was *compos mentis* when he signed over his property to the 1<sup>st</sup> Respondent.

[22] I have been told that the deceased had 17 children and three wives, Thoba Veronicah Lukhele being the only survivor. I have not been told what the adult children do for a living. I have been told that in addition to the minor children Nhlakanipho, Somandla and Vukani are Busisiwe and Mbongeni from LaLukhele.



[23] The following observations tend to make me agree with the applicants:

[24] In terms of section 31 of the Transfer Duty Act 1902, a contract of sale of fixed property shall be of no force or effect unless it is in writing and signed by the parties to it or by their agents duly authorized thereto in writing. There is no deed of sale. The 1<sup>st</sup> Respondent says that he drew it up but is unable to state its contents, the date it was signed or even state the witnesses who attested to it. He has not even attached an affidavit by the witnesses who attested to it.

[25] The 1<sup>st</sup> Respondent says that the purchase price was E100,000.00 (One hundred thousand Emalangi). There was no exchange of cash instead this amount was agreed upon in respect of financial responsibilities relating to his minor children. The deceased and the 1<sup>st</sup> Respondent estimated that the responsibilities past and future would be in the region of E100,000.00 and it was agreed that this would be the selling price. The property was a gift for having looked after the deceased with his own resources.

[26] The amount spent on the deceased by the 1<sup>st</sup> Respondent is not stated. The 1<sup>st</sup> Respondent always had a claim against the estate and if the 1<sup>st</sup> Respondent was indigent the Constitution obligates the 1<sup>st</sup> Respondent to look after his parent.

[27] It is peculiar that the deceased would exclude the two other minor children from those to be looked after by the 1<sup>st</sup> Respondent.

[28] It is even more stranger than fiction that the property would be undersold for a paltry E100,000.00. A valuation may not have been filed but having resided in Manzini for many years, the land itself in Ngwane Park would in my view be worth E100,000.00 excluding the improvements thereon.

[29] In the event that the property was a gift to the 1<sup>st</sup> Respondent the most logical step to have done would have been to lawfully donate the property to the 1<sup>st</sup> Respondent. As correctly pointed out by the Applicants; section 87 of the Deeds Registry Act 37/1968 states:

**“no transfer of land and no cession of a registered lease or sub-lease or other real right in land, except a mortgage, made as security for a debt or other obligation, shall be attested by the Registrar or registered in the Deeds Registry.**

[30] Even assuming that there was a deed of sale, the fact that the 1<sup>st</sup> Respondent now seeks to contradict the contents of the Deed of Transfer and Power of Attorney, in so far as they relate to the causa or reason for the transfer and the fact that the property was sold for the sum of E100.000.00 (One hundred thousand Emalangeni) makes placing reliance on his allegations regarding the terms of the alleged Deed of Sale difficult and imprudent.

[31] The reason now given for the sale is an afterthought because once the Applicants confronted him with the bank statements of the deceased which reflected no deposit of E100,000.00 (One hundred thousand Emalangeni) he had to manufacture a story to explain the failure to pay the purchase price.

[32] For the foregoing I find for the Applicants and make the following order:

- (a) That the sale and transfer of the undermentioned property to the First Respondent be and is hereby set aside namely:

CERTAIN : Lot No. 943 situate in Ngwane Park  
Extension No. 1 Township, District of  
Manzini, Swaziland.

MEASURING : 1182 (One One Eight two) square

Metres.

HELD : Under Deed of Transfer No. 564/2013

(b) That the Registrar of Deeds be and is hereby ordered to cancel the registration of transfer in the name of the First Respondent.

(c) That the First Respondent pays the costs of suit.

(d) Further and/or alternative relief.

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JUDGE Q.M. MABUZA  
JUDGE OF THE HIGH COURT

For the Applicant : Mr. Mthethwa

For the Respondent : Mr. N. Manzini