



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

In the matter between:

case No. 712/2014

RICHARD KHANYILE

1st plaintiff

And

THANDI MOTSA

1st defendant

ALPHEUS LANGWENYA N.O.

2nd defendant

BOY SIHLONGONYANE

3rd defendant

LINDIWE NHLEKO N. O.

4th defendant

MASTER OF THE HIGH COURT

5th defendant

Neutral citation: ***Richard Khanyile v Thandi Motsa & Others (712/2014)[2018] SZHC 164 (19th July, 2018)***

Coram: **M. Dlamini J**

Heard: **16th July, 2018**

Delivered: **20th July, 2018**

Trial

Civil procedure – Rule 22 – failure to plead defence – failure to plead material facts supporting defence - it would not be

*improper for the defendant to plead such facts even if this amounted to pleading evidence; **and in cases where it is necessary to plead them if the plaintiff is not to be taken by surprise, the Court may in a proper case, if evidence of such facts is objected to on the ground of surprise, grant appropriate relief, probably by a postponement, and possibly by an order for costs against the defendant.***”

Witness’s credibility to deny obvious facts amounts to being an incredible witness in law – evidence must be approached with great caution

Written contract in respect of land – section 31 of Stamp Duty Act – Boyboy Nyembe’s case – “...a typical piece of **consumer protection legislation.**” In other words, the duty was upon the defendants to ensure that the agreement complied with the provisions of section 31 and not vis-versa for the reason that they were the sellers and the plaintiff the purchaser (consumer). To shift the blame to the plaintiff who was the purchaser would defeat the purpose behind the legislation.

Executor’s co-duty to administrate the estate of the deceased by collation of the property and effects of the deceased, value them and pay all creditors of the estate, including maintenance for minor children of the deceased. He demonstrates his discharge of such duty by periodically filling with the office of the Master liquidation and distribution accounts. He further demonstrates that he has finalized his work by filling a final liquidation and distribution account

Summary: The bone of contention were two immovable properties under the name of the estate late Leon Sihlongonyane. The plaintiff claimed that he purchased

the two pieces of land while the defendants denied any knowledge and capacity to transact in that regard.

The Parties

- [1] The plaintiff is an adult male residing at Motshane, the region of Hhohho. During the hearing, he was reported to be unable to give evidence due to ill health. By consent of the parties, he was substituted by his wife, Them bani Khanyile.
- [2] The 2nd and 4th defendant are described as *executors dative* for the late estate Leon Sihlongonyane (the estate). The 1st respondent is also a beneficiary in the estate.
- [3] The 3rd defendant is a beneficiary to the estate. The 5th defendant is the Master of the High Court who is cited by virtue of his office being in charge of deceased estate in the Kingdom.

Contentions

- [4] The plaintiff prayed as follows:
- a. *Rectification of annexure “A” to record the **res vendita** as Portion 51 measuring 5 hectares (a portion of portion 9) of Farm Droxford situated in the District of hhohho instead of Lot 38/1007 Droxford Farm as the **res vendita**.*
 - b. *The Deed of Sale being annexures “A” and “B” are rectified by substituting the name of the Late Mimi Sihlongonyane, the first, third and*

fourth defendants with that of the first and second defendants and /or any other executor for the time being of the Estate Late Leon Sihlongonyane as sellers.

- c. Directing the first and second defendants to do all that is necessary to give full effect to the agreement entered into with the plaintiff, including signing all statutory instruments failing which the Deputy Sheriff for District of Hhohho be authorised to sign where necessary.*
- d. Alternatively, to prayer (b) above and as against the first and second defendants in their capacity as executors in the estate of the late Leon and Mimi Sihlongonyane, Compensation in the current market value of the 5 hectares of land sold to the plaintiff by the late Mimi Sihlongonyane;*
- e. As against the first, second and fourth defendants, compensation in damages in current market value of the property that the said defendants purported to sell to the plaintiff;*
- f. Alternatively, to compensation in damages as set out in prayers (d) and (e) above, reimbursements of all monies paid to the said defendants with compound interest at 9% per annum on each sum so paid to the defendants effective from the date of disbursement of date of final payment.*

[5] The defendants refuted any sale transaction. Alternatively, if there was any sale, it was null and void on the basis that the parties thereof lacked the necessary capacity to contract on behalf of the deceased's estate.

Oral Evidence

- [6] Mrs. Thembani Khanyile (Thembani) testified under oath that in 1992 she purchased from Leon Sihlongonyane (deceased) Portion 38 of farm No. 1007. The land was transferred into the plaintiff's name. She referred the court to the title deed in this regard.
- [7] After the demise of the deceased, Mimi Sihlongonyane (Mimi), a wife to the deceased offered to sell them a piece of land in the name of the deceased. They appeared before the land management board who after interviewing Mimi advised that she could not sell anything below 5 hectares. Following that she was selling only 2.1 hectares, the land board gave them time to redraw the sale agreement to reflect an additional 2.9 hectares. They duly complied. She referred the court to a deed of sale and pointed out that she signed as a witness while her husband as the purchaser. In this deed of sale, 1st defendant was also involved as she signed as a witness for Mimi and that was evident by 1st defendant's signature next to Mimi's.
- [8] The sale agreement was concluded on 25th July 1999 and it pertained to portion 51 of farm 1007. However on the agreement of sale, the property was described incorrectly. It was referred to as lot No. 38/1007. Lot No. 38/1007 had already been transferred to plaintiff under the 1997 sale agreement. They paid a deposit of E30 000 and Mimi allowed them to erect fence around portion 51/1007.
- [9] WBHO requested to store its containers of explosives. They ploughed in Portion 51/1007 and later constructed immovable structures. In November

1999 Mimi passed on. 3rd defendant was Mimi's driver during her lifetime. He would call the plaintiff to go and strip burn the grass around the boundaries on Portion 51/1007. The full purchase price was paid.

[10] It was only in 2014 that plaintiff became aware that 2nd defendant was the executor of the estate. They learnt this from a correspondence written by the executor's attorney demanding them to vacate the premises. After the demise of Mimi, 1st, 3rd, and 4th defendants offered to sell them another seven hectares of land which was adjacent to the five hectares sold to them by Mimi. They accepted the offer.

[11] The agreed purchase price for the seven hectares was E105 000. They agreed that the purchase price would be paid in monthly instalment. They also granted them permission to fence the area. She referred the court to documents and testified that they reflect 1st, 3rd and 4th defendants' signatures indicating receipt of the purchase price.

[12] The defendants subsequently received an offer from an investor to purchase the same seven hectares land for E2.7 million. They demand that plaintiff vacate the property. They went to defendant's lawyer Mr. A. Lukhele who arranged several meetings for them. However every time they turned up for the meeting, defendants would not. Plaintiff is praying for a transfer of the 5 and 7 hectares into his name. He also prays that the names of Mimi be substituted with the 2nd and 4th defendants in the sale agreement.

[13] Thembani was cross examined at length on the first agreement drawn with Mimi for the sale of 2.1 and 2.9 hectares. It was put to her that the agreement on 2.9 hectares was a duplicate copy of the 2.1 hectares agreement. She, together with her husband, forged the second agreement. There was never any sale of five hectares of land by Mimi to plaintiff.

[14] In response, she pointed out that it was her intention to secure the minute of the land management board in order to verify her version that the sale of a further 2.9 hectares was as a result of advice by the board. In fact the defendants disputed any sale agreement between plaintiff and Mimi.

[15] She testified that the two agreements were given to her by 1st and 4th defendants. In this regard she referred to exhibit 24B. Plaintiff was subjected to a lengthy cross-examination. I shall refer to it under adjudication.

[16] The plaintiff closed his case. The defence opened their case by first calling Alpheous Sehlukano Sihlongonyane, 2nd defendant in this matter.

[17] Mr Sihlongonyane testified that he did not know the plaintiffs witness Thembani. He was related to the 1st, 3rd and 4th defendants as they were the children of his brother Leon Mshopane Sihlongonyane who died in 1995. He was the executor of his brother's estate. He did not know of any sale transaction between Mimi whom he identified as his brother's wife. When referred to the deed of sale between Mimi and plaintiff, he testified that he did not know such agreement and that he never saw it before.

[18] Mr. Sihlongonyane asserted that he knew nothing of the second agreement of sale between plaintiff and 1st, 3rd and 4th defendants. Similarly, he never received any monies for the estate in regard to the purported second agreement of sale. He testified further that he was appointed by the deceased family to administer the estate. He has not yet distributed any immovable to any of the children of the deceased.

[19] He acknowledged that there was a sale agreement between the deceased and plaintiff. He pointed out that deceased had two wives. Mimi was the first wife. I shall refer to his cross examination later.

[20] The next witness on behalf of the defence was Lindiwe Joyce Nhleko, 4th defendant. She testified on oath that she knew plaintiff by sight. She was sired by the deceased from Mimi. She informed the court that she knew nothing about the sale of the two pieces of land viz, 5 and 7 hectares. She disputed any sale agreement by her and her siblings i.e. 1st and 4th defendant.

[21] She acknowledged receiving monies from plaintiff and asserted that such monies were received as gifts from plaintiff. She too was crossed examined. I shall address her cross-examination under adjudication in order not to burden this judgment.

Issues

[22] The questions for determination are:

- i. Were there any sale agreements between the deceased beneficiaries and the plaintiff? If the answer is to the positive, the next question is:
- ii. Were the sale agreements valid?

Adjudication

Forgery

[23] Mrs. Khanyile was cross-examined partly as follows:

Mr. Nzima : Look at pages A55 and B33. Do you agree with me that these are two different documents, one referring to 2.1 and the other to 5 hectares?

Mrs. Khanyile: Yes

Mr. Nzima : Do you see that both agreements at pages A55 and B33 is the same. It appears that one is the duplication of the other?

Mrs Khanyile: Yes.

.....

*Mr. Nzima : **I put it to you that both documents were forged by you and your husband. These are not authentic.***

Mrs. Khanyile: We never did so.

Mr. Nzima : There was never any sale in relation to your husband, yourself and Mimi.

Mrs. Khanyile: I tried to get the minutes from Natural Resources board but they said I could get it by court order.

[24] The defence on forgery of Mimi’s signature was raised for the first time in cross-examination by the defendant. This was contrary to Rule 22 of the High Court Rules. The Rule 22 (2) provides:

*“The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of those facts are not admitted and to what extent, and **shall clearly and concisely state all material facts upon which he relies.**”* (My emphasis)

[25] Adjudicating on the same Rule **Greenberg JP and Barry J** postulated:

*“Where a plaintiff claiming damages in this declaration alleges negligence by the defendant the natural result of which would be the injury complained of, if he relies on the intervention of a new cause which breaks the chain, must specifically plead such intervention and should not be permitted to lead evidence in support of **nova cause** under cover of a plea merely denying that the defendant’s negligence was the proximate cause of the damage.¹*

[26] On this ground alone, i.e., failure to plead forgery defence, the defendant’s defence in this regard ought to fall. I note however, the *ratio decidendi* by their Lordships as they proceeded:

¹ **Murdt N.O. v Union Government 1938 TDP 589**

*“Where there is no natural connection between the negligence and the injury. In the latter case, however, though there may be no obligation on the defendant to plead the fact which are to be relied on in evidence merely in reinforcement of the denial that defendant’s negligence is the proximate cause, it would not be improper for the defendant to plead such facts even if this amounted to pleading evidence; **and in cases where it is necessary to plead them if the plaintiff is not to be taken by surprise, the Court may in a proper case, if evidence of such facts is objected to on the ground of surprise, grant appropriate relief, probably by a postponement, and possibly by an order for costs against the defendant.**” (My emphasis)*

[27] On the basis of the above principle and following that this court was interested in the factual circumstance of the case thereby serving justice, it ordered that the Secretary of the Land Management Board, falling under the Ministry of Natural Resources appear in court with the minutes. She obliged.

[28] The minutes reveals:

“Estate Late Lion Sihlongonyane – proposed Subdivision of portion 9 of Farm No. 1007 Hhohho.

Miss Lindiwe Joyce Sihlongonyane appeared before the Board with Richard Khanyile and stated under Oath that the Subdivision should have been made on the same that the application for Subdividing portion 51 was made.

It was delayed because the Sihlongonyane family needed to harvest the maize ploughed on the fields.

Khanyile confirmed that he needed the property because he wanted to put his livestock which had been despatched by the Oshoek Highway.

The Sihlongonyane's would like to retain portion 2 where there is a Pre-School and hope to develop it into a Lower Primary School.

DECISION: *The Board approved this application."*

[29] The minutes, according to the heading, were recorded on 15th June, 2000. Glaring from the minutes is that the person who appeared for the subdivision of the Farm was 1st defendant together with the plaintiff. The 1st defendant moved the application for the subdivision. Over and above, the 1st defendant pointed out that the subdivision so sought ought to have happened prior. Now the question is when is prior. It can safely be inferred that the subdivision ought to have happened during the lifetime of Mimi who was then deceased during the appearance of 1st defendant and plaintiff before the land management board.

[30] 4th defendant gave evidence. She attested in relation to the plaintiff, "*I know the plaintiff by sight.*" She was led in chief by her Counsel, "*Before court is an issue of two pieces of land. One first piece was sold to plaintiff by your mother while the second piece by you, Boy and Thandi. What can you say?*" She responded, "*I know nothing pertaining to that.*"

[31] The 4th defendant was also led, “*What can you say pertaining to the two agreements at A53 and B31 i.e. both agreements were signed by your mother.*” She replied, “*What I can say is that I was not available as I was absent when my mother did this.*” From the line of examination where the 4th defendant was specifically led to concentrate on the signature and the evidence adduced on behalf of the plaintiff that the signatures were said to be that of Mimi, one would expect that the answer by the 4th defendant would be that her mother did not sign such documents but her signature was forged. She did not say so. The reason is not far. Her response was in line with her plea. In fact throughout her evidence in chief, she did not allude to any forged signature of her mother. For this reason again, the defence on forgery must fall. The rationale is that although put to the plaintiff’s witness, no evidence was adduced in chief by the defendants. It was therefore an afterthought which could not even find any support in the defendants’ evidence in chief. This was despite that her attention was specifically drawn to that alleged circumstance by learned Counsel, **Mr. O Nzima**.

[32] 4th defendant was cross-examined on the minutes:

Mr. Jele : Let us turn to the minutes tendered by the Secretary to the Natural Resources board. You were responsible for the subdivision?

1st defendant: I don’t know. I didn’t have the powers since I was not the executor and the Master was not there.

Mr. Jele : What this document says is that you appeared before the land board and with plaintiff where you said that

you agree that it should be subdivided and you said that under oath.

1st defendant: I don't recall doing that. I agree my name appears in this document.

Mr. Jele : This document speaks for itself. The government has no interest in this matter.

1st defendant: I repeat. I never went there on my own. I don't know where the offices of Natural Resources are.

Mr. Jele : I put it to you that there is no reason why the government would make up this document against you and you are not telling the court the truth.

1st defendant : What I'm saying is the truth. I've never visited the offices of Natural Resources and I don't know where they are.

[33]

The above responses by 4th defendant to the effect that not only has she not set her foot in the offices of the land management board, but she did not know its whereabouts, called for this court to ascertain the 4th defendant's demeanor as a witness. The following cross-examination revealed her demeanor:

Mr. Jele : Last year you sold the property under issue to Tinsimbi Property Ltd for millions.

1st defendant : I am unaware of that.

Mr. Jele : *In 2017 the estate sold this property to Tinsimbi for millions.*

1st defendant : *I'm unaware of it.*

Mr. Jele : *That happened as plaintiff moved an application to interdict the sale of the property pending finalization of this matter.*

1st defendant : *I know nothing.*

Mr. Jele : *Your attorney, Mr. Nzima was involved in that application, representing the estate.*

1st defendant : *I don't know when that was*

Mr. Jele : *Tinsimbini was the purchaser which involved part of this.*

1st defendant : *I know nothing. It was purchasing from who?*

[34] Of note is that when the 4th defendant was cross-examined on the application by the plaintiff to interdict the executors from disposing of the properties under issue, the said application had been given to her to peruse. To ascertain more responses on the application, with a view to determining her demeanor, the court asked her to turn to the pages 157 and 158 of the answering affidavit under case number 736/2017. She confirmed that it was her name and her signature. She pointed out that she did not know where her signature was coming from. This response clearly revealed the demeanor of the 4th defendant. Firstly she disputed that she ever attended to the land management board at the Ministry of Natural Resources despite

that the minutes reads that she appeared and moved an application for a subdivision in favour of the plaintiff. Not only did she end there, she submitted before the board that the subdivision had delayed. Indeed this was consistent with the evidence adduced and supported by documents on behalf of plaintiff that the transaction was between the plaintiff and Mimi, 4th defendant's mother. The subdivision had delayed as Mimi died before a subdivision and transfer of the five hectares of land.

[35] Secondly, the 4th defendant's act of denying her own signature under application 736/2017 demonstrated clearly that she was economical with the truth. To deny obvious facts amounts to being an incredible witness in law. Her evidence must be approached with great caution. It follows that the evidence on behalf of plaintiff that the documents at A53 and B32 emanated from Mimi must be accepted. It further follows that the evidence that Mimi entered into a sale of immovable property of five hectares with the plaintiff must be accepted. Nothing turned on the 2nd defendant's evidence as he repeatedly stated that he knew nothing of the transaction and that he was never involved. He was correct in that regard. I shall highlight later in this judgment why he could not be involved.

[36] This application for the subdivision at the instance of the 4th defendant in favour of the plaintiff was supported by a correspondence addressed to the board and authored by the Land Surveyor, Mr. Haw. He authored that he was doing so on behalf of the Estate. It reads:

“On behalf of the Estate of the Late Lion Sihlongonyane application is hereby make to subdivide the above property in the manner shown on the enclosed Plan No H18/100.

Subdivision 1 is to be sold to Mr. M R Khanyile who needs to extend his farming activities. Mr. Khanyile owns the adjacent Portion 51 and will consolidate this Portion with the new subdivision

Subdivision 2 is to be transferred to a family member.

[37] The contents of the above correspondence were similar to the minutes of the board whose information was provided by the 4th defendant. It was not clear why 4th defendant was disowning the minutes except that she was all intent to ensure that the plaintiff was deprived of the property purchased by him with her full knowledge and assistance from Mimi, her mother. It was with her full knowledge as she later assisted the plaintiff to subdivide the portion of land in accordance with the deed of sale witnessed by her elder sister, 1st defendant, as evident under A55.

[38] Exhibits B28 fortifies the plaintiff’s case and justifies this court to reject the evidence by 4th defendant that she knew nothing of the transaction between the plaintiff and Mimi. Exhibit B28 reveals that on the 15th June, 2000, barely a year after the demise of Mimi, 3rd and 4th defendants authored a letter addressed to the Minister for Natural Resources and Energy as follows:

**“RE: APPLICATION OF SUBDIVISION ON PORTION 9 OF FARM
1007**

I wish to confirm to the board that the Subdivision was provisionally approved by Mr. and Mrs Sihlongonyane in the presence of myself – Mr. Boy Sihlongonyane (elder son of Mr And Mrs. Sihlongonyane) and my sister Mrs. Lindiwe Nhleko (nee Sihlongonyane).

We hereby humbly request your board to approve the proposed subdivision.

Thank you for your kind co-operation.

Yours Faithfully

Boy Sihlongonyane Lindiwe Nhleko (nee Sihlongonyane)

[39] The above correspondence bears both signatures of 3rd and 4th defendants respectively. It is clear from the above correspondence that when the defendants conducted themselves towards the estate, they gave the impression that it was their father and mother who approved of their conduct. On the evidence demonstrated above, it was clear that in the year 2000, the piece of land sold by the deceased to the plaintiff had long been subdivided and transferred as evident by exhibit B1 and D. The only property that had not undergone subdivision and transfer in June, 2000 was in respect of the piece of land sold by Mimi (1st, 3rd and 4th defendants' mother) to the plaintiff. Now the correspondence highlighted above, shows that the 4th defendant was aware of that transaction as she did not only support but also motivated an application for its subdivision. In this regard, her evidence that she did not know anything must be rejected.

Piece of land alleged to have been sold by 1st 3rd and 4th respondents:

[40] The plaintiff's witness testified further that after the demise of Mimi, 1st, 3rd and 4th respondents approached her together with plaintiff and offered to

sell them another portion of land. This was in February 2000 and the land was seven hectares. Following that they had just completed paying off the sum of E70 000 for the five hectares by Mimi, it was agreed among them that they pay in monthly instalments. The agreed purchase price was E105 000. She then referred to a number of documents reflecting sums of money and signatures adjacent therein. She identified them as belonging to the 1st, 3rd and 4th defendants and as evidence of receipt of the amounts reflected therein.

[41] Thembani further testified that later, upon realizing that the defendants were singing a different tune, she pleaded with the 1st and 3rd defendants to produce a receipt verifying that they paid the sum of E70 000 and E105 000. Although 3rd defendant would hear none of it at the time she made the request, 1st defendant produced a receipt reflecting that plaintiff had paid the sum of E175 000 as final payment. 1st defendant affixed the stamp of the estate's bus named "*Tintsaki Bus Service*" which had at that time been dispossessed for non-payment. She referred the court to exhibit B23 in this regard. When 1st defendant gave her the receipt, she was in the company of 3rd defendant.

[42] 3rd defendant in chief, disputed any sale of land by her and her siblings to the plaintiff. She pointed out that they could not sell anything as they did not have the capacity to do so. She however accepted that she received the various amounts reflected in the exhibits B10-B21, although some were duplicated. She then clarified, "*I do remember these monies i.e. E1000.00 consecutively. Mr. Khanyile would give us these monies as gifts. Each time we met with him, he would give us these monies.*" He was led in chief,

“All these monies you signed for were gifts? She responded to her attorney’s question, “That is the position. But I can see documents pertaining to monies we did not sign for. We don’t know anything about that.”

[43] Learned Counsel on behalf of defendants persisted with the question on what the monies were for. He stated in this regard. *“According to plaintiff he says that they were for sale of seven hectares that you sold him.”* 1st defendant replied, *“From the money we signed for from pages 16 onward, were monies received from Khanyile who was acquainted to us. He was saying he was giving us from the balance from the certain monies owed to my late father.*

[44] Two answers were proffered on the reason the defendants accepted various sums of money from the plaintiff. The first was that the plaintiff who was described by 4th defendant when she first gave her evidence that she knew him by sight only gave them the various amounts of money as gifts. This answer was repeated over and over by the 4th defendant. This answer must be taken in light of the evidence adduced by 4th defendant that she only knew plaintiff by *“sight”*. It is highly implausible that a person known only by sight would give another such high amounts of money as gifts. It is similarly highly implausible that they too would accept such amounts from a person who was only known by sight. The 4th defendant testified further that the plaintiff would give them the monies whenever they met even on the streets. Now the question that boggles the mind is a) when did they then append their signatures following that their meetings were not by arrangements? They met by coincidence, so to speak. b) Why sign thereby

acknowledging receipt of such different amounts all ranging above E1000.00, if they were gifts? The answer is obvious. It is because these amounts received from the plaintiff by the 1st, 3rd and 4th defendants were not gifts but payment of the land claimed.

[45] The second answer proffered for the receipt of the monies reflected in the exhibits is that the plaintiff advised them that it was in respect of balances for the piece of land sold to him by their father, the deceased. In her evidence in chief, Them bani testified that in 1992 the plaintiff purchased 2 hectares of land from the deceased for the sum of E51 000. She referred to exhibit B1 in this regard. She pointed out that the purchase price was paid by the bank after having applied for a loan. She produced exhibit D in support of her version which was a correspondence by the Swazi Bank attaching proof of payment and transfer under deed 551/92. The deed number correlated to the deed number in exhibit B1 (documents from the bank of the mortgage bond in respect of the land). The assertion on behalf of the plaintiff under cross –examination of 4th defendant that plaintiff could not have paid for the land purchased from their father after his demise in 2000-2004 following that the bank had paid the deceased the full purchase price was therefore correct and stands to be accepted. The evidence that the plaintiff was paying for the land purchased from the deceased is therefore without basis and must be rejected.

[46] There is another reason why the evidence by the 4th defendant on the reason they accepted the monies reflected in the exhibits stands to be rejected. Under cross-examination when asked why he accepted the monies and signed for them, 4th defendant stated that the plaintiff said that he was

thanking them for allowing “*his cattle to graze in their farm.*” This evidence again stands to be rejected by reason that the 4th defendant was asked by her Counsel several times on why they accepted the monies from plaintiff and she insisted on giving the same answer that it was a gift until at the end she changed to say plaintiff was paying the balance due from a sale transaction with their father. In other words she had ample opportunity to advance all the reasons for accepting the plaintiff’s money in chief. To give a totally different reason under cross-examination was an indication that the reasons advance both in chief and under cross examination were an afterthought. If the grounds for receiving money from plaintiff were true, defendants would have maintained their version. They changed as the case progressed. This court was however faced with a reason for paying the various sums to the defendant which was not changed both in chief and under cross-examination. It was testified upon by Thembani that plaintiff was paying for the 7 hectares of land purchased by him from the 1st, 3rd and 4th defendants.

Sale of 7 hectares of land not reduced into writing

[47] It was submitted on behalf of the defendants that the court should hold that the sale agreement in respect of the seven hectares of land was null and void by reason that it did not comply with section 31 of the Transfer Duty Act No. 8 of 1902 which stipulates that a contract of sale whose *merx* is an immovable should be reduced into writing with the property correctly described and the purchase price defined. The plaintiff’s defence argued that the court is bound by the decision in **Boyboy Nyembe t/a Trailer and One Stop Tyre Service and Another v VMB Investments (Pty) Ltd (22/20140 [2014] SZSC 73 (3 December 2014).**

[48] In that case, the court accepted a document reflecting the names of parties and their signatures. The document did not mention the property sold and its price. Nor were the terms of payment defined. *In casu*, there are various pieces of documents, some signed by both parties while others by either the plaintiff or the 1st, 3rd and 4th defendants. The headings in such pieces of documents do indicate that it is in respect of payment for land. In some also in their bodies, it indicates that it is in regard to payment for a specific piece of land. I must state that a comparison of the document accepted by the Supreme Court in **Boyboy** matter and the present shows that the present pieces of documents are much detailed than the **Boyboy** document. In other words, the **Boyboy** document contains much shallow information as compared to the documents herein. There is therefore no reason why I should reject the various pieces of documents demonstrating the intention of the parties to the sale agreement.

[49] There is another aspect from which section 31 of the Transfer Duty Act should be looked at. **Brand JA**² interpreting a similar provision pointed out that such a piece of enactment, “*can be described as a typical piece of consumer protection legislation.*” In other words, the duty was upon the defendants to ensure that the agreement complied with the provisions of section 31 and not vis-versa for the reason that they were the sellers and the plaintiff the purchaser (consumer). To shift the blame to the plaintiff who was the purchaser would defeat the purpose behind the legislation. **N V Hurt AJA**³ clarifies the position of consumers on the rationale why they qualify to be protected by stating that, “*Apart from being ‘vulnerable’ and possibly ‘uninformed’, I think that he should be considered unlikely to be acquainted with the law, or to have an attorney at his beck and call. He*

² See *Adriaan Adam van Niekerk and Another v Max Edward Favel and Another* Case No. 627/2006 SCZA at para 10

³ At para 12 n²

would presumably also be reluctant to incur the expense of retaining an attorney for the purpose of obtaining advice concerning the contract, except perhaps at a later stage.” The learned judge also proceed, “On this basis, there is plainly no room, in interpreting the subsection, for the application of the general presumption that ‘the purchaser must know the law’ when it comes to deciding precisely what the Legislature intended in the Act,” as it was so intended to be demonstrated under cross-examination of Thembani on behalf of the defendants.

Mandate to sell

[50] It is apposite to mention the co-duty of an executor. It is highlighted under section 51 (1) of the Administration of Estate Act NO. 28 of 1902 as follows:

“Administration and distribution accounts

(1) Every executor shall administer and **distributes** the estate to which he is appointed executor according to law, and the provisions of any valid will, codicil or other testamentary instrument relating to such estate.”

[51] Section 51(3) and (4) then stipulates:

“(3) If any such account be **not final account**, it shall set forth all debts due to the estate and still outstanding, and all property and effects still unsold and unrealized, and the reasons why the same have not been collected or realized, as the case may be.

(4) *The executor shall, from time to time, as the Master may direct, render periodical accounts of his administration and distribution **until the estate be finally liquidated**, and should he fail to do so, he shall be liable to be summoned in terms of section 52.*” (My emphasis)

[52] From the reading of the three sub-sections under section 51, it is clear that the co-function of an executor is to administrate the estate of the deceased by collation of the property and effects of the deceased, value them and pay all creditors of the estate, including maintenance for minor children of the deceased. He demonstrates his discharge of such duty by periodically filling with the office of the Master liquidation and distribution accounts. He further demonstrates that he has finalized his work by filling a final liquidation and distribution account.

[53] Turning to the case at hand, the 2nd defendant testified that he was the executor of the estate and was appointed in 1996 following the demise of the deceased on 10th January, 1996. He was neither consulted nor aware of the transaction for the sale of land by Mimi and her children. 4th defendant also testified both in chief and under cross-examination that she never had any mandate to sell the seven hectares of land following that the executor and the Master were not roped in during the sale transaction. Should this evidence render the two agreements for sale of the properties *void ab initio* as it was so contended on behalf of the defendants?

[54] 2nd defendant was cross-examined as follows:

Mr. Jele : Do you know Johannes S. Nkambule?

2nd defendant : *Yes.*

Mr. Jele : *How do you know Johannes?*

2nd defendant : *When we were before Churchill the Master, I enquired from Churchill whether Johannes could represent me as an executor.*

Mr. Jele : *The Master consented to him as the executor?*

2nd defendant : *Yes.*

Mr. Jele : *Look at exhibit B36-B40. Are you aware of any liquidation and distribution account prepared by Johannes Nkambule?*

2nd defendant : *None.*

Mr. Jele : *B36-B40 is a liquidation and distribution account and it was signed by Johannes Nkambule and approved by the Master.*

1st defendant : *I don't know about it as my children got nothing. I started distributing now.*

[55] Exhibit B36-B40 is a liquidation and distribution account in respect of the deceased's estate. It is reflected as the first and final liquidation and distribution account (account). It bears the Masters stamp as 3rd July, 1997. An executor's certificate appears at B40 as signed by Johannes S. Nkambule on the 3rd July, 1997. It reads:

“DISTRIBUTION ACCOUNT

<i>Mimi Sihlongonyane (nee Maseko)</i>	
<i>(wife by civil rites) ½ share</i>	554 304.50
<i>Child’s share</i>	42 638.90

CHILDREN

1. <i>Thandi Sihlongonyane</i>	42 638.80
2. <i>Boy Jabulane Sihlongonyane</i>	42 638.80
3. <i>Thembi Popany Sihlongonyane</i>	42 638.80
4. <i>Mercy Bhusmane Sihlongonyane</i>	42 638.80
5. <i>Lindiwe Joyce Sihlongonyane</i>	42 638.80
6. <i>Sibongile Vigi Sihlongonyane</i>	42 638.80
7. <i>Thulisile Rejoice Sihlongonyane</i>	42 638.80
8. <i>Mandla John Sihlongonyane</i>	42 638.80
9. <i>Phumzile Ntombi Sihlongonyane</i>	42 638.80
10. <i>Zanele Silwane Sihlongonyane</i>	42 638.80
11. <i>Audrey Makhosazane Sihlongonyane</i>	42 638.80
12. <i>Dion Sihlongonyane</i>	<u>42 638.80</u>
	<u>1108609.00</u>

(See waiver of inheritance)

WIFE BY CUSTOM

(Child’s share)

Thulisile Sihlongonyane (Sibandze)

[56] Before the sub-heading “Distribution”, the executor had authored:

“ACTUAL BALANCE CASH AVAILABLE FOR

DISTRIBUTION

232 704.27

Distribution value of unsold items

1, 108 609.00

[57] A comparison of the sum distributed equals the sum of distribution value of unsold items. In brief, 2nd defendant, having requested the Master as per his evidence under cross-examination, for a substitution and the Master having consented, Mr. Johannes S. Nkambule was appointed the executor. The executor, Mr. Nkambule completed his task as evidenced by his certificate filed under B40. Each beneficiary received his or her share of the estate in terms of the distribution account. From this evidence therefore, it can reasonably be inferred that when Mimi, having been given her share in terms of the final liquidation and distribution account, had all the rights to dispose of her share. Similarly, the 1st, 3rd and 4th defendants who were also given their share as evident by the account, had the right to dispose of them. The certificate by the executor is testimony that there was nothing further to be done in the estate. The evidence by the 2nd defendant that he knows nothing about the sale agreements by Mimi and the 1st, 3rd and 4th defendant is not surprising in the circumstance therefore as he nominated Mr. Johannes S Nkambule to discharge his duties under the said estate.

[58] From the evidence of 2nd defendant, Mr. Johannes Nkambule was not co-executor with him. He was for all intent and purposes the only executor of the estate. His mandate to do so emanated from the application made by the 2nd defendant before the then Master Churchill Dlamini. Mr. Johannes Nkambule’s certificate is testimony that once the assets of the estate were finally liquidated and distributed as borne by the account (B36-40), the

work of the executor ended on approval of the account by the Master. This was duly done on the 3rd of July, 1997 as the Master's approval stamp and signature reflect at B36. All that remained thereafter was for the beneficiaries to enjoy their inheritances as reflected in the first and final liquidation and distribution account filed by the duly appointed executor at the instance of the 2nd defendant. They duly did by Mimi selling five hectares of her share to the plaintiff thereafter, on 25th July, 1999. The 1st, 3rd and 4th defendants followed suit in the latter part of 1999 by selling seven hectares of their share to the plaintiff. The five and seven hectares of land summed up to E175 000.00 as exhibit B23 which bears the stamp of defendants' transport business so reflects.

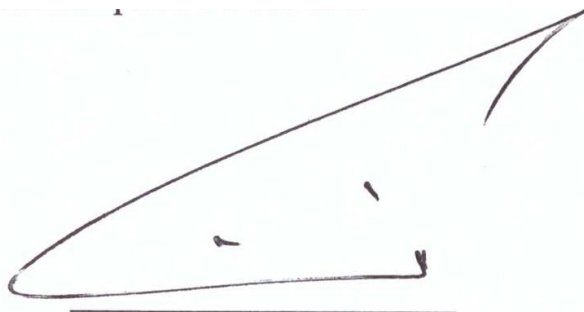
[59] I note that B23 was refuted by defendants as unknown by them. However, a bare denial in the face of a stamp emanating from their business cannot hold. I note that B23 was backdated to 25th August, 1998. The reason is not far as it had to be in line with the contents of the correspondence authored by 3rd and 4th defendants highlighted in para 38 above (exhibit B28).

[60] In the analysis, no mandate was needed by the beneficiaries of the estate following that the appointed executor had completed his task by, in the words of the enabling Act, finally liquidating the estate as he paid off its creditors and distributed the balance assets and effects as reflected in B36-40 and the Master had approved the same. The work of an executor cannot be perpetual. It must end upon approval by the Master of the final liquidation and distribution account supported by the executor's certificate.

[61]

In the final result, I enter the following orders:

1. The plaintiff's cause of action succeeds;
2. Annexure "A" is hereby rectified to read as Portion 51 measuring 5 hectares (a Portion of Portion 9) of Farm Droxford situate in the District of Hhohho instead of Lot 38/1007 Droxford Farm;
3. The Deputy Sheriff for the District of Hhohho is authorised to sign all necessary processes including statutory instruments in order to give effect to this judgment. That is namely,
 - (a) all applications and documents necessary for the transfer to the plaintiff of the property under order no. 2 herein;
 - (b) all applications and documents necessary for the subdivision of 7 hectares of the remaining Portion of Portion 9 of Farm Droxford situate in the District of Hhohho and its subsequent registration and transfer to the plaintiff;
4. Costs to follow the event.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left side that curves upwards and then downwards to the right, ending in a small hook. There are a few small, dark marks scattered within the loop and to the right of the main stroke.

M. DLAMINI J

For the plaintiff : **N.D. JELE OF ROBINSON BERTRAM**

For the defendants : **O. NZIMA OF NZIMA AND ASSOCIATES**