



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1123/2017

In the matter between:

MKHULULI DLAMINI

APPLICANT

and

**DARYALI INVESTMENTS (PTY) LTD
PHESHEYA ZWANE
STANDARD BANK SWAZLAND LIMITED
REGISTRAR OF DEEDS N.O.
THE ATTORNEY GENERAL N.O.
REGISTRAR OF THE HIGH COURT N.O.
BARAKA INVESTMENTS (PTY) LTD**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT**

Neutral Citation : Mkhululi Dlamini vs Daryali Investments (Pty) Ltd and 6 Others (1123/2017) [2018] SZHC 173 (31 JULY 2018)

Coram : MABUZA – PJ

Heard : 18^T SEPTEMBER 2017

Delivered : 17 AUGUST 2018

SUMMARY

Civil Law – *Civil Procedure - Applicant seeks declaratory order that deed of sale of immovable property between the parties is null and void.*

Civil Law – *Immovable Property – That such be re-transferred to the Applicant – Application fails with costs.*

JUDGMENT

MABUZA -PJ

[1] The Applicant has made an application for an order as follows:

(a) **Interdicting the Respondents from alienating, selling, transferring, encumbering or dealing with the land subject herein, in any way, manner or form, pending finalization hereof.**

3.1 **That prayer 3 hereof operates forthwith as an interim order pending finalization of this application.**

(b) **Declaring the Memorandum of Understanding signed by the Applicant and the 1st Respondent as cancelled and of no force and effect, by virtue of the 1st Respondent's material breach thereof;**

(c) **Declaring that the land subject-matter herein still belongs to the Applicant unconditionally and free of any encumbrances and/or claims by the Respondents;**

- (d) Directing the 4th Respondent to do all that is necessary to have the immovable property registered under the Applicant;**
- (e) Alternatively that the 6th Respondent sign the necessary documents to give effect to the order of this Honourable Court;**
- (f) That the 4th Respondent expunge all records of the purported transfer of the land from the Applicant to the 1st Respondent;**
- (g) Costs of suit.**

[2] The application is opposed by the 1st Respondent.

[3] The Applicant is an adult Swazi businessman of Manzini and the Director and Shareholder of the 7th Respondent herein.

[4] The 1st Respondent is Daryali Investment (Pty) Ltd a company with limited liability duly registered in terms of the Companies Act of Swaziland and having its principal office in Manzini, in the Manzini District.

[5] The 2nd Respondent is Phesheya Zwane an employee of the 3rd Respondent cited herein in his capacity as the agent and employee of the 3rd Respondent.

- [6] The 3rd Respondent is Standard Bank Swaziland Limited (Mbabane Branch), a financial institution registered as such, having its palace of business in Mbabane.
- [7] The 4th Respondent is the Registrar of Deeds N.O. having its offices in Mbabane, in the District of Hhohho.
- [8] The 5th Respondent is the Attorney General, cited herein as attorney for the 4th Respondent, carrying on business as such at 1st Floor, Justice Building, Mbabane, in the District of Hhohho, Swaziland.
- [9] The 6th Respondent is the Registrar of the High Court N.O. cited herein in his/her official capacity as such and whose principal place of business is in the High court, Swaziland, Hospital Hill, Mbabane, in the District of Hhohho.
- [10] The 7th Respondent is Baraka Investments (Pty) Ltd, a limited liability company duly registered in terms of the Companies Act of Swaziland and having its principal place of business at Sidvokodvo, Manzini, in the Manzini District.

[11] Many facts were pleaded by the parties herein. I have tried to glean from those facts what appears to be the problem. The Applicant was initially the owner of Portion 48 (a Portion of Portion 26) of farm Nkonyeni III No. 523, situate in the District of Manzini Swaziland. (hereinafter referred to as the property). From the 20th December 2016 the aforesaid property was transferred and registered into the name of the 1st Respondent under Deed of Transfer No. 1050/2016.

[12] The said property was registered into the 1st Respondent's name subsequent to a memorandum of agreement entered into between the Applicant and the 1st Respondent on the 13th July 2016.

[13] The Applicant now wants all records of the purported transfer of the land from the Applicant to the 1st Respondent expunged and to have the immovable property re-registered to the Applicant. The 4th Respondent (Registrar of Deeds) has been cited in order to fulfill this purpose.

[14] Alternatively, that the 6th Respondent (the Registrar of the High Court) sign the necessary documents to effect the order of this Court.

- [15] The reason given for this application is that the 1st Respondent breached the Memorandum of Understanding that was signed by the parties on the 13th July 2016.
- [16] Furthermore, it was argued on behalf of the Applicant that the Applicant had only agreed to sell to the 1st Respondent a subdivided portion of the immovable property described in paragraph 11 supra.
- [17] On the property is a refueling business (filling station) at Tri-Cash at Nkonyeni area along the Manzini/Nhlangano Yithi Abantu Highway.
- [18] The 7th Respondent of which the Applicant is a Director and shareholder and the 1st Respondent entered into a Management Agreement for the 1st Respondent to manage the filling station which was previously managed by the Applicant. The management agreement was signed on the 25th February 2016 and was for a period of 72 months (6 years).
- [19] The monthly rental was fixed at E30,000.00 (Thirty thousand Emalangeni) for the initial 36 months (3 years) and was to be negotiated for the remaining 36 months (3 years) based on fuel volume sale increases.

[20] The Applicant had loaned money from Fincorp in order to finance his businesses. He defaulted on repayment and was under pressure because Fincorp wanted to foreclose on the mortgage bond it had with Applicant over these moneys.

[21] The Applicant sold the business owned on by the 7th Respondent to the 1st Respondent. They entered into an agreement of sale on the 13th July 2016.

[22] The material terms of the Deed of Sale were *inter alia* as follows:

- (a) **The 7th Respondent wishes to sell its business a fuel station, business situate at Portion 48 (a Portion of Portion 26) of farm Nkonyeni III No. 523, situate in the District of Manzini, Swaziland to Daryali Investments (Pty) Ltd.**
- (b) **The aforementioned business is trading as Tri-Cash Filling Station and Daryali Investments (Pty) Ltd wishes to purchase the business and its assets.**
- (c) **The full purchase price payable by the purchasers to the seller for the business and the assets would be E4,000,000.00 (Four Million Emalangeneni).**
- (d) **The purchasers would pay the full sum of E4,000,000.00 (Four Million Emalangeneni) not later than close of business on Friday 15 July 2016.**

[23] The Deed of Sale for the business and the Memorandum of Understanding were signed on the same day, that is on the 13th July 2016. The Deed of Sale for the business failed and never went through.

[24] It is not denied that the Applicant and the 1st Respondent concluded a Memorandum of Understanding. The 1st Respondent argues that after being advised that Fincorp was going foreclose on its bond, the Applicant in fear of Fincorp appealed to 1st Respondent to purchase the entire property for the sum of E4,000.000.00 (Four Million Emalangeneni).

[25] The Applicant denies that he sold the entire property to the 1st Respondent. He states that he sold a portion which was to be subdivided later. At paragraph 14 of the founding affidavit the Applicant states as follows:

“14.1 In fact the land was never sold to the 1st Respondent it was only aimed,

at obtaining finances from the 3rd Respondent in favour of the 2nd Respondent. This is common cause between myself, 1st Respondent, 2nd Respondent, 3rd and 7th Respondents.

14.2 Therefore no ownership of the land would pass on to the 1st Respondent but a transfer of land would only be effected to facilitate the finance.

14.3 It was a material term that the 1st Respondent was purchasing from myself, the business, which is the Galp Filling Station and the shops within the same structure, not the land. It would only be upon future contracts that the land would be sold to the 1st Respondent.

14.4 As alluded to hereinabove, the contract of sale was undertaken in phases as follows:

- i) The 1st Respondent shall purchase the business for E4,000,000.00 (Four Million Emalangeni) to be paid by the 15th July 2016.**
- ii) That on this payment being effected, at the offices of S.V. Mdladla & Associates, the business only would be considered sold to the 1st Respondent.**
- iii) After the conclusion of the sale of the business, then I would proceed to sub-divide the whole piece of land and then sell a maximum of 7245 square metres (Seven thousand two hundred and forty five square metres) to the 1st Respondent for a further 4 Million Emalangeni, and I keep the remaining extent of the land.**

[26] And the response of the 1st Respondent is that it is not true that the transfer of land was aimed at obtaining finances, and that the 2nd and 3rd Respondents made it clear from the onset that they will not finance the purchase of the business because the asking price was unjustifiable.

Furthermore, it was not provided for in the MOU that the transfer of the property was for purposes of finance.

[27] The Applicant is adamant that even the 2nd Respondent who is employed by the 3rd Respondent was aware that the sale was for the business and that the transfer of the land was a means to meet the security requirements required by the 3rd Respondent and not meant to pass ownership of the land to the 1st Respondent. Alas, neither party caused the 2nd Respondent to file an affidavit detailing his part in the transaction and in particular confirming the Applicant's allegations.

[28] The Applicant further states that the understanding was that in order to finance the transaction the 3rd Respondent agreed to pay off the money owing to Fincorp, advance the money needed to the 1st Respondent and register a bond over the property once the property was registered to the 1st Respondent. The Applicant now tenders re-payment of the amount of E4 Million to the 3rd Respondent together with any associated costs for the immovable property to be returned to him.

[29] Ultimately the 3rd Respondent declined to finance both transactions. It agreed to finance the purchase of the land because it could readily register a mortgage bond over the land and not the business. To that end the 3rd Respondent issued a Guarantee (DAI) on the 1st November 2016.

[30] The Guarantee is addressed to Messrs Mdladla and Associates Trust Account. The contents of the Guarantee are as follows:

“Dear Sirs,

Acting under instructions received from DARYALL INVESTMENTS (PROPRIETARY) LIMITED, we advice that we are holding the sum of SZL 1,012,754.19 (EMALANGENI ONE MILLION AND TWELVE THOUSAND SEVEN HUNDRED AND FIFTY FOUR, NINETEEN CENTS) at your disposal IN FAVOUR OF DLAMINI MKHULULI SIBUSISO.

This amount will be paid to you at our MANZINI Branch free of commission presentation of the Original Guarantee (Endorsed for Payment) to the Bank of advice in writing from S.V. MDLADLA AND ASSOCIATES their signatures having been duly confirmed by their bankers, or other sufficient evidence that:

- 1. TRANSFER OF PORTION 48 (A PORTION OF PORTION 26) OF FARM NNKONYENI 3 NO. 523 MANZINI DISTRICT INT O THE NAME OF DARYALI INVESTMENTS (PROPRIETARY) LIMITED HAS BEEN EFFECTED.**
- 2. REGISTRATION OF A FIRST CONTINUING COVERING MORTGAGE BOND FOR SZL4,000,000.00 (EMALANGENI FOUR**

**MILLION) OVER THE ABOVE PROPERTY IN FAVOUR OF
STANDARD BANK SWAZILAND LIMITED HAS BEEN EFFECTED.**

**3. SIMULTANEOUS CANCELLATION OF ANY EXISTING BONDS
OVER THE ABOVE PROPERTY HAS BEEN EFFECTED.”**

[31] On the 1st December 2016, the Applicant executed a Power of Attorney to pass transfer of title from himself to the 1st Respondent. It is reproduced hereunder:

“POWER OF ATTORNEY TO TRANSFER

I the undersigned,

**MKHULULI SIBUSISO DLAMINI
(BORN ON THE 1ST DAY JUNE, 1981).
I.D. NO. 8106016100452**

**MARRIED ACCORDING TO SWAZI LAW AND CUSTOM TO
KATHRYN MBULI**

Do hereby nominate, constitute and appoint

JUBA SAMUEL DLAMINI

AND/OR

HLOMENDLINI NKANYEZI MDLADLA

**With power of substitution to be my/our true and lawful Attorney and
Agent in our name, place and stead to appear before the**

REGISTRAR OF DEEDS FOR SWAZILAND AT MBABANE

And then and there to declare that I

Did on the 13th day of July, 2016 sell to

**DARYALI INVESTMENTS (PROPRIETARY) LIMITED
CERTIFICATE OF INCORPORATION NO. 847/2011**

For the sum of E4,000,000.00 (Four Million Emalangeni).
The following property, namely:

CERTAIN:	Portion 48 (A Portion of Portion 26) of Farm Nkonyeni III No. 523, situate in the District of Manzini, Swaziland;
MEASURING:	7517 (Seven Five One Seven) square metres;
HELD:	Under Deed of Transfer No. 614A/2014 dated the 29 th day of July, 2014 made in favour of Mkhululi Sibusiso Dlamini.

And to transfer the said property in full and free property to the said,

DARYALI INVESTMENTS (PROPRIETARY) LIMITED.”

[32] The guarantee referred to in paragraph 30 supra clearly states that transfer of portion 48 (a Portion of Portion 26) of Farm Nkonyeni 3 No. 523 Manzini District was to be effected into the name of the 1st Respondent.

[33] The Power of Attorney referred to in paragraph 31 supra, clearly refers to the transfer of Portion 48 (a Portion of Portion 26) of Farm Nkonyeni 3 No. 523 situate in the District of Manzini measuring 7517 (seven five one seven) square metres to the 1st Respondent.

[34] Mr. Mdladla argued that the property be transferred back to the Applicant and that there was no formal Deed of Sale of the immovable property in terms of section 31 of the Transfer Duty Act which provides as follows:

“No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorized in writing”

[35] Arif Umarji (deponent) for the 1st Respondent disagrees and argues that:

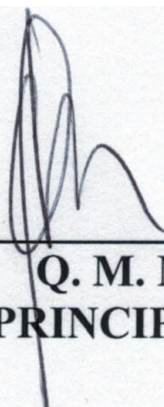
“32.5 Mr. Dlamini was paid in full for the said sale of the property in the amount of E4,000.000.00 which amount he accepted and benefitted from. In this regard I draw the Court’s attention to the Guarantees showing that an amount of E2,772,288.00 was paid to Fincorp to extinguish his bond, and an amount of E1,227,712.00 was paid to Mr. Dlamini’s Attorneys. These payments were accepted by Mr. Dlamini; and

32.6 Upon having passed transfer of the property to Daryali and received the payment in respect of the purchase price, Mr. Dlamini has not done anything pertaining to the said transaction and has now, eight months after, rushed to court and complains that his property has been “stolen”.

[36] The Power of Attorney to Give Transfer and the Deed of Transfer (Title Deed) provide proof that the 1st Respondent is the owner of the disputed immovable property. I have no doubt that even the declarations of purchase

and sale reflect similar details as appear on the Power of Attorney to Give Transfer.

[37] For the foregoing I am unable to grant the application and it is hereby dismissed with costs.



TMBABANE
Crim. Cas

Q. M. MABUZA
PRINCIPAL JUDGE

For the Applicant : Mr. S.V. Mdladla
For the 1st Respondent : Mr. M. Nkomondze