IN THE SUPREME COURT OF SWAZILAND

Held at Mbabane Civil Appeal Case No. 22/2014

In the matter between:

VMB INVESTMENTS (PTY) LTD **Appellant**

AND

BOY BOY NYEMBE **1st Respondent**

FIHLIWE NYEMBE **2nd Respondent**

Neutral citation: *VMB Investments (Pty) Ltd vs Boy Boy Nyembe and Another (22/2014) [2016] SZSC 60 (30 June 2016)*

Coram: **S.P. DLAMINI JA, J. MAGAGULA AJA, Z. MAGAGULA AJA, M. LANGWENYA AJA AND M.J. MANZINI AJA**

Heard: 04 May 2016

Delivered: 30 June 2016

Summary: *Civil Procedure – review proceedings under section 148 of the Constitution of the Kingdom of Swaziland – Supreme Court alleged to have committed patent error(s) of law – what constitutes reviewable patent error of law – application disclosing no reviewable error(s) of law – application for review dismissed.*

JUDGMENT

MANZINI AJA

[1] The Applicant ["VMB"] launched an application in terms of section 148 and 149 of the Constitution of the Kingdom of Swaziland of 2005 seeking the following relief:

1. Reviewing and setting aside the decision of the Supreme Court handed down on 3 December 2014.
2. Confirming the decision of the High Court handed down on 13 June 2014 in terms of which the first and second respondents were ejected from the applicant's property to wit Portion 908 (a portion of portion 569) of Farm No. 2 situated in the Hhohho urban area.
3. The first and second respondents are ordered to pay the applicant's cost including the certified costs of Counsel in terms of Rules 68 (2) of the High Court Rules.
4. The applicant is granted such further and/or alternative relief as the above Honourable Court deems just in the circumstances.

[2] The application is opposed by the 1st and 2nd Respondents ["NYEMBES"].

[3] The review application follows upon a judgment of this Court upholding an appeal in favour of the 1st and 2nd Respondents with costs, against orders of the High Court (per Dlamini J) which were in the following terms:

1. Applicant's application (for eviction) 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 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.

[5] Before dealing with the grounds of review and merits of the application it is necessary to set forth a brief historical background to the matter:

5.1 The Applicant is the registered owner of Portion 908 (a portion of portion 569) of Farm No. 2 situate in the district of Hhohho along Sozisa Road;

5.2 The property is held under Deed of Transfer No. 15/2012 dated 16th January, 2012;

5.3 The Applicant purchased the property (and took transfer) from Elektro Limited, who in turn had purchased (and taken transfer) from the late Richard Sandlane Dlamini by virtue of Deed of Transfer No. 682/2008 dated the 22nd August, 2008;

5.4 The 1st and 2nd Respondents are in occupation of a portion of the property registered in the name of the Applicant (the "disputed portion");

5.6 The 1st and 2nd Respondents claim to have purchased the disputed portion from the late Richard Sandlane Dlamini around 2007 and have been in occupation eversince;

5.7 The 1st and 2nd Respondents erected structures on the disputed portion and run a commercial enterprise thereon since about the time of their occupation;

5.8 The 1st and 2nd Respondents have never taken transfer of the disputed portion;

5.9 In 2008 the late Richard Sandlane Dlamini, despite having sold the disputed portion to the 1st and 2nd Respondents, sold and transferred the entire property to Elektro;

5.10 The Deed of Transfer in favour of Elektro has no condition(s) relating to the1st and 2nd Respondents' occupation of the disputed portion;

5.11 Notwithstanding, that the entire property was transferred to Elektro without reservation of any conditions, they were informed about the 1st and 2nd Respondents' occupation of the disputed portion;

5.12 The 1st and 2nd Respondents were in peaceful possession of the disputed portion, and co-existed with Elektro, until trouble began when the Applicant purchased the property; and

5.13 The Applicant confronted the 1st and 2nd Respondents' about their occupation of the disputed portion, resulting in the High Court

application, mainly for their eviction and the demolition of the structures they had erected thereon.

[6] The Applicant seeks to review the judgment of this Court on several grounds, namely:

6.1 Firstly, that the court committed a fundamental error of law in failing to draw a proper distinction between real and personal rights as well as the consequences flowing from it. It is argued that the former is concerned with the relationship between a person and his or her property (movable, immovable or incorporeal) while the latter only concerns the relationship between two persons without giving rise to any rights against property. Thus, it was argued that the High Court's conclusions on the law and findings were correct, and this Court's findings were "troubling, incorrect and poorly reasoned".

6.2 Secondly, that inasmuch as it may be argued that the deceased concluded a deed of sale with the 1st and 2nd Respondents, which fact was denied, no real rights were created in their favour. It is argued that the property, that is, the disputed portion, was not registered with the Deeds Office registry, and the entire property was subsequently sold by the deceased and registered in the name

of Elektro with no reservation of a right to occupy or possess the property by the 1st and 2nd Respondents.

6.3 Thirdly, that at best the1st and 2nd Respondents have a claim against the estate of the deceased for damages, and were precluded from asserting any title over the property on a proper application of section 15 of the Deeds Registry Act 1968.

6.4 Fourthly, that this Court's reliance on the case of **Jeke (Pty) Ltd v Samuel Solomon Nkabinde [2013] SZSC 53** was "misplaced" in that no challenge was mounted as to the validity of the Applicant's Deed of Transfer, which can only be set aside by a court of law. It is argued that the Deed of Transfer is presumed valid until set aside.

6.5 Fifthly, that this Court's reliance on the doctrine of notice was "misplaced". It is argued that this Court cited a passage in a judgment **(MC Gregor v Jordaan)** which finds no application in this case given the provisions of section 15 of the Deeds Registry Act. It is argued that even if the Applicant was aware of the interest the 1st and 2nd Respondents had in the property, that interest was not registrable and therefore of no concern to the Applicant since it had real rights acquired from Elektro which "trumped" any personal rights of the 1st and 2nd Respondents to acquire registrable rights to the portion of the property in dispute.

6.6 Lastly, even though this does not appear to be a stand-alone ground of review, it is argued that there was no basis for this court to conclude that the Applicant perpetrated fraud against the 1st and 2nd Respondents as this was not alleged in their founding papers serving before the High Court.

[7] The Appellant's case is concluded by a claim that this Court made a number of patent errors of law which constitute reviewable irregularities, and that to leave such a judgment undisturbed will give rise to manifest injustice to the Applicant and other property owners. I assume that all the review grounds listed above constitute the claimed patent errors of law and reviewable irregularities.

[8] The Respondents, on the other hand, raised a preliminary point arguing, with no serious conviction, that the application for review was delayed, and that there was no explanation for the delay. I say that there was no serious conviction regarding the preliminary point because it was not seriously pursued by the Respondent's Counsel, and it seems to have been raised routinely. I do not intend to determine this point for the above reason.

[9] The Respondent's resistance to the application for review was mainly premised on the argument that in law not all errors of law are reviewable, even assuming that this court had committed an error of law. It is argued that this court was fully aware of the distinction between real and personal rights, hence its comments that the 1st and 2nd Respondents' personal rights were registrable.

[10] The Respondents further argued that as regards the second and third grounds of review, this court did not lay a general proposition that personal rights in land are enforceable against third parties. The Respondents contend that their case falls within the permissible exceptions to the rule. Further, the Respondents argue that the Applicant has a cause of action against Elektro who sold them the entire property well knowing that they did not own the portion in dispute.

[11] The Respondents further argued that the application for review is in fact a further appeal disguised as a review.

ANALYSIS OF THE RELEVANT ARGUMENTS AND THE APPLICABLE LAW

[12] The view I take of this matter is that the central issue is whether the Applicants have established that there is/are patent error(s) of law which is/are reviewable. This involves a determination of what constitutes a patent error of law for review purposes. There are several decisions of this Court which are relevant for this exercise.

[13] Once the general principles have been outlined, I will then deal with the question whether the Applicant's grounds of review pass the muster, that is, whether a case for review has been made out.

[14] In the context of section 148, and concerning errors of law, this court in **President Street Properties (Pty) Ltd v Maxwell Uchechukwu and 4 Others (11/2014) [2015] SZSC 11 (29th July, 2015)** per Dlamini AJA stated the following:

> **"From the above authorities some of the situations already identified as calling for supra judicial intervention are an exceptional circumstance, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice or absence of alternative effective remedy".**

(my own underlining)

[15] However, in my view the above statement must not be viewed in isolation, the peculiar facts of that case must also be considered. Thus, what the court stated in paragraphs [49, 52, 66, 67 and 68] is pertinent:

> **"[49] The Applicant says that the judgment obtained by Respondent in terms of which Applicant is now obliged to pay over half a million Emalangeni is grossly unfair. <u>It was unfairly obtained by default</u>. Applicant says when it thought the fight had its battle ground at the Magistrate's Court, Manzini, the Respondent then went behind Applicant's back to the High Court where Respondent obtained judgment <u>without Applicant being afforded a chance to present its case</u>.**
>
> **[52] I agree with the learned justice Ota JA where she says that the "issue of service of the company" has become the "axis upon which this whole [review] revolves" para [35] of the Supreme Court Judgment. To a large extent, in my opinion, this application for review must also bear on the strength and propriety of that "service".**
>
> **[66] The difference between the case at hand and the Malawona case (supra) is that in the latter case service on a responsible person had not been denied and had in fact been independently verifiable by the steps taken by**

the company to challenge the regularity of the service. This is not the case here ….

[67] **<u>Had there been independent evidence of the irregular service, independent evidence that Applicant had sight or knowledge of that service, I would have been inclined to condone that irregularity</u>. But since there is no such evidence and Applicant has unequivocally and consistently denied having ever been served, there is nothing to condone and this Court (on appeal) ought not to have dismissed the appeal. Otherwise applicant stands to suffer real prejudice. Respondent would have to serve correctly.**

[68] **It is my considered view that in all the circumstances of the case, Applicant has satisfied cumulatively that there are exceptional circumstances for it to be allowed to defend the case brought against it by the Respondent. The Applicant must therefore have its day in court."**

(my own underlining)

[16] In my analysis the central issue in the **<u>President Street Properties</u>** case (supra) concerned an irregularity which had the effect of depriving a litigant the right to have its case (defence) heard in court. In issue was

essentially a procedural defect or irregularity emanating from the High Court up to the appeal court, that is, this Court exercising its appellate jurisdiction.

[17] In **Swaziland Revenue Authority vs Impunzi Wholesalers (Pty) Ltd (06/2015) [2015] SZSC 06 (9th December 2015)** per DR. B.J. Odoki JA, this Court stated the following:

> **"[45] The critical issue in cases of this nature is whether the Applicant has established grounds to bring the Applicant within Section 148 (2) of the Constitution, having regard to the emerging jurisprudence on the review jurisdiction in this country and other similar jurisdictions. Regard must always be had to the need to respect the principles of finality in litigation on one hand, and the need to do justice where serious irregularities have occurred resulting in a gross miscarriage of justice, on the other. This is why in most cases the court will look for exceptional circumstances as recognised from time to time. Indeed this process requires a delicate balance.**

[46] In the present case, the main ground for review is that the Supreme Court erred in entertaining the Application when the Respondent had not exhausted internal remedies by appealing to the Minister under Section 65 (4) (a) of the Customs and Excise Act. The Supreme Court rejected the argument that the Respondent had to exhaust internal remedies because the appeal to the Minister arises only where the price of goods was actually paid or payable could not be ascertained and not as in the present case where the price was ascertainable. Secondly the Act did not seek to oust the jurisdiction of the court."

[18] In dismissing this ground for review this Court rightly stated and re-affirmed the general position as follows:

"[50] <u>However I find that even if the Supreme Court misdirected itself in interpreting the Act, it would not constitute a proper ground to review as it would merely amount to another appeal.</u> The court did not decide the appeal *per incuriam,* as it was aware of the provisions of

the Act, it interpreted. This did not amount to an exceptional circumstance justifying review."

(my own underlining)

[19] As regards the second ground for review, namely, that the Supreme Court misdirected itself when it ordered the Applicant to pay for expenses occasioned to the Respondent by seizure of its goods when no basis for such claim had been made or established the court said –

"[52] <u>This ground raises a serious issue whether the Supreme Court was entitled to determine the merits of the application on appeal and award damages when the trial court had dismissed the application on points *in limine*, without determining the merit</u>s....

[53] Even the issue of the assessment of the chargeable tax for the quilts was not addressed by the trial judge, but dealt with on appeal.

[54] In my view, <u>the determination of the merits on appeal was a serious irregularity which caused a gross miscarriage of justice for an appellate court to arrogate itself the role of a trial court, thus depriving the parties</u>

<u>of a right to appeal against the decision made in the first instance.</u> Instead of castigating the trial judge for dismissing the application on technicalities and determining the merits itself, the Supreme Court should have sent back the application to the High Court to be determined on the merits."

(my own underlining)

[20] In my view the **Swaziland Revenue Authority** case clearly draws a distinction between a misdirection (error) of law which is not reviewable, and a misdirection (error) of law which is capable of review. As regards the latter, the Supreme Court's determination of the merits of a dispute for the first time on appeal (where the trial court had not done so) constituted a serious procedural defect or irregularity. The authorities referred to by Dlamini AJA in the **<u>President Street Properties</u>** case (supra) also emphasise that a distinction must be drawn. I will not go on to discuss the other decisions of this Court as the two cases referred to above clearly set out the view or approach that it has authoritatively taken on reviews in terms of section 148.

[21] Further, in my view the decisions in the **Swaziland Revenue Authority** and **President Street Properties** cases are consistent with the common law position on review. This court in the case of **Takhona Dlamini vs President of the Industrial Court and Another Civil Appeal Case No. 23/1997** approved as persuasive and adopted as the position in this jurisdiction the principles laid down in **Hira and Another vs Booysen and Another 1992 (4) SA 69; Local Road Transportation Board and Another v Durban City Council and Another 1965(1)SA 586 (AD)** and **Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551,** namely –

> **"As would appear from a number of the cases to which I have referred, the courts have often relied upon a distinction between**
>
> **(a) an error of law on the 'merits' and**
>
> **(b) one which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or to refuse to do so. A category (a) error …has been held not to be reviewable, whereas a category (b) error… has been held to be a good ground for review at common law."** (per Corbett CJ in **Hira and Another**)

[22] Looked at in the context of the test laid down in the **Hira and Another** case, the errors of law concerned with in the **President Street Properties and Swaziland Revenue Authority** cases are category (b) errors of law.

[23] What I have stated above is what I consider to be the correct principles governing this Court's powers of review in terms of section 148 of the Constitution (or the common law), as regards errors of law.

[24] Next is an analysis of the merits of the application.

[25] The central theme of the application for review is this Court's alleged failure to draw a proper distinction between real and personal rights as well as the consequences flowing from it. This argument is based on the narrow view that the 1st Respondent, having entered into an agreement of sale of the disputed portion, at best had a right of action against the seller (the estate of the late Richard Sandlane Dlamini) to compel registration of the transfer of the disputed portion. It is argued that this right was personal, and would be converted into a real right only upon registration of the transfer of the disputed portion into the name of the 1st Respondent

with the Deeds Office registry. On the other hand, it is contended that since the Applicant, by virtue of the Deed of Transfer in its favour, has a real right which "trumps" the personal rights of the 1st and 2nd Respondents, it is immaterial that the Respondents had taken occupation and erected conspicuous structures and running a business on the disputed portion.

[26] Taking into account the doctrine of good faith or notice this argument could not be further from the true legal position. This doctrine is well entrenched in our law (Roman Dutch Law), and largely owes its existence as a mechanism to resolve competition between real and personal rights. The application of this doctrine in case demonstrates an awareness of the distinction between real and personal rights and the consequences that flow from it.

[27] At paragraphs 62, 66, 67, 68, 71, 72 and 74 of the judgment the court analysed the principles of the doctrine of good faith or notice, and applied it to the facts, hence its decision that the Applicant is not entitled to obtain a transfer in respect of the disputed portion, and, most importantly, that it was not entitled to evict the Respondents from the disputed portion.

This result is consistent with a proper application of the doctrine, in my view.

[28] In **Silberberg and Schoeman's The Law of Property (5th Edition) 2006** at page 83, the learned authors state the following:

> **"In resolving the conflict between a competing real right and a prior personal right granted by the predecessor in title of the real right, the knowledge of the acquirer of a real right of the prior personal right terminates the validity of the real right."**

[29] The learned authors go on to state that (at page 84)

> **"The instances of the application of the doctrine do not purport to be an exhaustive list …**
>
> **Application of the doctrine of notice takes place by forcing the acquirer of the real right to give effect to the earlier personal rights."**

(my own underlining)

[30] The exposition by the learned authors is supported by case law: **Wahloo Samuel BK v Trustees, Hambley Parker Trust 2002 (2) SA 776 (SCA); Mvusi v Mvusi 1995 (4) SA 994 (TK SC)**; **Cohen v Shires, McHattie** and **King (1882) 1 SAR; Mc Gregor v Jordaan 1921 CPD; Cussons v Kroon 2001 (4) SA 833 (SCA); Grant v Stonestreet 1968 (4) SA 1 (A)**; and numerous other cases.

[31] Counsel for the Applicant also argued that this court relied on constructive notice, which is not part of our law, since there was no proof that the Applicant had actual knowledge of the 1st and 2nd Respondent's rights. This argument loses sight of what was stated by the Appellate Division in the case of **Grant and Another v Stonestreet and Others** (supra) per Ogilvie Thompson JA at page 20:

> **"Although, unlike the English Law, the doctrine of constructive knowledge has, in our law, little or no application in enquries of this kind … the statement made by BRISTOWE, J in *Erasmus's* case, supra at p1049, that, if a person wilfully shuts his eyes and declines to see what is perfectly obvious, he must be held to have had actual notice, appears to me to be sound in principle and to merit the approval of this court"**.

(my own underlining)

[32] In discussing the requirements for the application of the doctrine of notice **Silberberg and Schoeman**, at page 88, state that:

> **"The acquirer of the real right has to have actual knowledge of the prior personal right (or, possibly act with dolus eventualis in respect of the existence of the prior personal real right)".**
>
> (my own underlining)

[33] Thus, the doctrine of notice finds application in the context of competing personal and real rights. This Court's application of the doctrine is a clear indication that it was not only alive to the distinction between real and personal rights, but it was also alive to and applied the relevant principles engaged by the courts in the resolution of such conflicts. The issue of constructive notice was also given adequate consideration. Thus, the Court's noting that **"The structures of the Appellants on the property were conspicuous".** On this score I cannot fault the judgment. I cannot find any reviewable error of law. There simply is no substance in the Applicants' first, second, third and fifth grounds for review.

[34] The Applicants' argument that this Court's reliance on the case of **Jeke (Pty) Ltd v Samuel Solomon Nkabinde** (supra) was "misplaced" discloses no reviewable patent error of law as well. This argument does not fit in with any of the decisions made by this Court exercising its review powers in terms of section 148 that is, no decision of this Court has been reviewed simply because it was "misplaced". In the context of this case, reference to the above case was made to underscore the legal principle that a Deed of Transfer, in this jurisdiction, is not indefeasible. Moreover, in a case where a litigant relies on a wrong notion that a Deed of Transfer is immutable, then the principle in the **Jeke (Pty) Ltd** case finds application.

[35] Lastly, in my view the argument that the Court's finding that the Applicant acted fraudulently, when no fraud was pleaded, although correct to some degree, does not tip the scales in its favour. For this reason I find it unnecessary to burden this judgment with an analysis thereof.

[36] In the circumstances I am of the view that the Applicant has failed to make out a case for review under section 148 of the Constitution.

[37] The Court hereby issues the following Order:

"The application for review is dismissed with costs."

M.J. MANZINI AJA

I agree.

S.P. DLAMINI JA

I also agree.

J. MAGAGULA AJA

I also agree.

Z. MAGAGULA AJA

I also agree.

M. LANGWENYA AJA

For Applicant:	**Advocate C. Bester (instructed by Robinson Bertram – Mr. N.D. Jele)**
For Respondents:	**M. Simelane (M.P. Simelane Attorneys)**