



**IN THE SUPREME COURT OF SWAZILAND**  
**JUDGMENT**

Civil Appeal Case No. 22/2016

In the matter between:

**FRED LEIBRANDT**

**1<sup>st</sup> Appellant**

**DORICA LEIBRANDT**

**2<sup>nd</sup> Appellant**

And

**STEVEN PHILLIP LEIBRANDT**

**1<sup>st</sup> Respondent**

**REGISTRAR OF DEEDS**

**2<sup>nd</sup> Respondent**

**ATTORNEY GENERAL**

**3<sup>rd</sup> Respondent**

**LITSAFA PROPRIETARY LIMITED**

**4<sup>th</sup> Respondent**

**SAGANGA PROPRIETARY LIMITED**

**5<sup>th</sup> Respondent**

**Neutral citation:** *Fred Leibbrandt and Another vs Steven Philip Leibbrandt and Four Others (27/2016) [SZSC ] 57 [2017] (10 November, 2017).*

**Coram:** M.J. DLAMINI JA  
R. J. CLOETE JA  
S.B. MAPHALALA JA

**Heard:** 1 August, 2017

**Delivered:** 10 November, 2017

Summary: *Civil Procedure – the questions for determination – including whether a sale and transfer of property tainted by fraudulent activities warrants to be set aside - secondly, whether a judgment which was erroneous pursuant to procedural irregularity in respect of service of process can be rescinded – and other legal questions –this court finds in favour of the Appellants in respect of the questions for decision being rescission and fraud - the other questions need not to be decided because of the court’s views on the question of rescission and fraud.*

**Held:** *in the result, the Appeal is upheld together with ancillary orders being 2 to 5 thereof.*

## JUDGMENT

### S.B. MAPHALALA JA

#### **Introduction**

- [1] This is an appeal against the decision of the High Court per **S.A. Nkosi J.** dismissing the Appellant’s Notice of Motion dated the 21<sup>st</sup> January, 2015 with costs in paragraph [30] (c) of judgment in the court **a quo**.
- [2] In paragraph (b) thereof ordering that the funds which were ordered by the court to be held in the account of one Mendoza Joachim Marguis be distributed as between the Applicant and the 1<sup>st</sup> Respondent in terms of the 1<sup>st</sup> share to Applicant and the 3<sup>rd</sup> share to 1<sup>st</sup> Respondent minus the amount the 1<sup>st</sup> Respondent has already disposed of which amount must be deducted from his share of the proceeds.
- [3] In paragraph (c) thereof that the 1<sup>st</sup> Respondent pays the costs of the interlocutory application dated the 6<sup>th</sup> October 2015 and finally in paragraph (d) that no order as to costs was made against the 6<sup>th</sup> Respondent.

## **The appeal**

[4] The 1<sup>st</sup> and 2<sup>nd</sup> Appellants are aggrieved by the above mentioned orders of the court **a quo** in two provisional Notices of Appeal in cases No. 27/2016 and case No. 30/2016 culminating in the amended Notice of Appeal in respect of both the Applications being Case No. 27/2016 and 30/2016. Such a notice is filed in terms of Rule 12 of the Court of Appeal Rules of 1971 outlining 13 grounds for the following relief:

1. **By withdrawing the second and third grounds of appeal as they appear in the Notice dated 4<sup>th</sup> April 2016, and substituting them with the following;**
2. **The Learned Judge a quo erred in law and in fact when he failed to make a finding on whether the *factum* of occupation by the Appellant since 1962 of the farm hereunder described conferred any legally protected entitlement on the Appellant to wit:  
Certain: Farm No. 945 situate in the Shiselweni District, Swaziland.**
3. **The Learned Judge a quo erred in law and in fact when he failed to make a determination that the application for intervention of the Appellant read with its answering papers in the court below raised a question of a constitutional nature.**
4. **The Learned Judge a quo erred both in law and in fact when he failed to refer the said constitutional question to a full bench of the High Court, and staying the proceedings pending the outcome of such determination.**
5. **The Learned Judge a quo erred in law and in fact when he held the sale and subsequent transfer of the Farm at Nhlangano, was**

valid and good in law notwithstanding the constitutional transgression it occasioned the Appellant.

6. The Learned Judge a quo erred in law when he held that there was no allegation in the pleadings of the Appellant (6<sup>th</sup> Respondent in the court below) pertaining to her deprivation of land contrary to section 19 of the Constitution of Swaziland Act 2001/2005, whereas the answering affidavit as well as the arguments of Appellant were premised on same.
7. The Learned Judge a quo erred both in law and in fact when he held that Appellant did not allege that she had title to the land whereas Appellant clearly and unambiguously pleaded that she had taken in continuous and undisturbed occupation (possession) of the land since 1962.
8. The Learned Judge a quo erred in law and in fact when he held that there was no element of fraud in the sale of the property concerned as well as its transfer. The conduct of the 1<sup>st</sup> Respondent and the 5<sup>th</sup> Respondent was such that there was a collusion and fraud and as such the sale was *void ab initio*.
9. The Honourable Judge erred in law in finding that, the Appellant failed to establish a cause of action to warrant the High Court to reverse the sale and transfer of the properties on the basis of fraud and procedural irregularity.
10. The learned Judge erred in law in finding that, the 1<sup>st</sup> Respondent's sole discretionary authority is absolute, unlimited and that the 1<sup>st</sup> Respondent did not owe a fiduciary duty to the Appellant and other co-owners of the properties when dealing with the affairs of the properties in question.

11. **The Learned Judge misdirected himself in allowing the matter to proceed to its finality without the availability of the E5,000,000.00 (Five Million Emalangi), to serve as security that could equitably protect the interest of all the parties involved in the matter despite any possible outcome as the court may have arrived at.**
  
12. **The Learned Judge misdirected himself in ordering that the amount of E1,600,000.00 (One Million Six Hundred Thousand Emalangi), be kept in the bank account of one Mr. Mandoza pending the outcome of the matter. In making this order, the Learned Judge ignored and /or overruled an order of the High Court as per Acting Justice Mdladla of the 25<sup>th</sup> of September 2015 wherein it was ordered that the 1<sup>st</sup> Respondent is to deposit the total amount of E5,000,000.00 (Five Million Emalangi) into a joint trust account to be administered by all the attorneys involved in the matter pending its outcome. Furthermore, there was no application presented before the Honourable Judge of the High Court requesting him to order that the money be kept in the account of the said Mr. Mandoza.**

[5] The above grounds of appeal raise a host of legal questions for determination by this court. Firstly whether a sale and transfer of property tainted with fraudulent activities warrants to be set aside by this court. Secondly, whether a judgment which was **erroneous** pursuant to the procedural irregularity in respect of service of process can be rescinded. Thirdly, whether the discretionary powers to administer and dispose immovable property by the 1<sup>st</sup> Respondent is absolute and unfettered; despite the existence of other co-owners of the property (s) which also enjoy the constitutional right to a home and that of occupation, in relation to the properties in question. These are questions for determination by this court.

### **The background**

[6] Before dealing with the grounds of appeal and the merits it is necessary to outline brief background facts of the dispute between the parties. Such is captured in paragraph 1 of the Heads of Arguments of 1<sup>st</sup> Respondent's to be the following:

- 1.1 **By way of Notice of Motion dated 21<sup>st</sup> January 2015, the 1<sup>st</sup> Appellant sought the relief set out at pages 6 – 9 of the Record of Appeal.**
- 1.2 **In essence, the crux of that application sought to challenge the 1<sup>st</sup> Respondent's interpretation of two Deeds of Donation which are at pages 55 – 6 (Deeds of Transfer 37/1979) and pages 61 – 70 (Deed of Transfer 38/1979) respectively.**
- 1.3 **The 1<sup>st</sup> Appellant's focus in those two Deeds of Donations were at clauses H sub-clauses 1, 2, 3, 4, 5 and 6. (See pages 58, 59 and 68, 69 of the Record of Appeal).**
- 1.4 **The 2<sup>nd</sup> Appellant's challenge of the same Deeds of Donation is in respect of clauses H, sub-clause 7 at pages 59 and 69 of the Deeds of Donations respectively.**
- 1.5 **The 2<sup>nd</sup> Appellant's claim was that since she is the surviving spouse of the late Victor Sydney Leibbrandt who had a life usufruct in both immovable properties, she therefore has a right to use and enjoy the properties, such right having been inherited from her late husband Victor Sydney Leibbrandt. (see pages 59 and 69 of the Record of Appeal).**
- 1.6 **The 1<sup>st</sup> Appellant also sought an order in the court *a quo* to determine and interpret the sharing formulae as per clause H of the Deeds of Donation.**

17. **Determination of the aspects or questions of law set out in 1.6.1.1, 1.6.1.2 and 1.6.1.3 above would automatically determine whether or not the Appellants (at that time Applicant had 6<sup>th</sup> Respondents) were to be entitled to the ancillary relief set out in the Notice of Motion dated 21 January 2015.**

1.8 **It is common cause that the court *a quo* made a determination of all the three (3) legal questions set out in 1.6.1.1, 1.6.1.2 and 1.6.1.3 as set out in the judgment at pages 371 – 388 of the Record of Appeal.**

[7] The attorneys of the parties canvassed their arguments before this court on 1<sup>st</sup> August, 2017 filing Heads of Arguments. I shall in brief outline the salient features of each attorney's arguments for one to understand the issues for decision by this court.

**(i) The 1<sup>st</sup> Appellant's arguments**

[8] The attorney for the 1<sup>st</sup> Appellant in his Heads of Arguments first gave an introduction to the case and outlined the facts of the dispute in paragraph 2 of such Heads. In paragraph 3 thereof he dealt with the applicable law in rescission applications in terms of Rule 42(1) of the High Court Rules. In paragraph 7 thereof he dealt with the **ratio** in the local case of **Nedbank Limited vs Mendelow NO. (686 12) 2A SCA** where it was held that, it is trite law that where a registration of transfer of movable property is effected pursuant to fraud or forged documents, ownership of the property does not pass to the name of the person whose name the property is registered after the purported transfer. The attorney for the 1<sup>st</sup> Appellant cited a number of cases in support of this legal proposition.

[9] The next topic the attorney for the 1<sup>st</sup> Appellant dealt with was the fiduciary duty in paragraph 5 of the said Heads of Arguments.

[10] The attorney proceeded to deal with the issue of abuse of discretion in paragraph 6 thereof and the final topic is that of the doctrine of the “clean hands principle” in paragraph 7 thereof.

[11] In paragraph 12 of the said Heads of Arguments the attorney for the 1<sup>st</sup> Appellant advanced arguments on the interpretation of the Deeds of Donation in paragraphs 12.1 to 12.2. In this regard at paragraph 12.2 it is contended for the 1<sup>st</sup> Appellant as follows:

**12.2 We humbly submit that the court a quo erred in this regard. It will be submitted that the purpose of the donation was to confer a benefit to the transferees in the form of either securing a home for the said beneficiaries or financial benefit equivalent to the economic value of the properties. In our respectful view, the authority which was given to the eldest transferee cannot be viewed as the ultimate purpose of the donation at the exclusion of the rights of the other beneficiaries; which we submit are the primary reason the donation was effected in the 1<sup>st</sup> place. There is overwhelming support of this proposition throughout the record of appeal, in that not only do the family, but also that the properties were to a greater part utilized as the Leibbrandt family home.**

[12] Finally in paragraph 12.3 of the said Arguments, that in light of these arguments 1<sup>st</sup> Appellant has advanced good reasons why the judgment of the court **a quo** should be overturned and such that an order reversing the sale and transfer of the property be granted in favour of the 1<sup>st</sup> Appellant.

[13] Furthermore, that 1<sup>st</sup> Appellant prays that he be awarded costs at a punitive scale.



**(ii) 2<sup>nd</sup> Applicant's arguments**

[14] The 2<sup>nd</sup> Appellant's case in the court below was premised on the fact that she was spouse to the late **Gcogca Leibbrandt**, who was a Director of the donor company. That 2<sup>nd</sup> Applicant has been in continuous occupation of the property since 1962 when she settled there with her husband. That she has already considered the property as her marital home. That the occupation aforesaid, did confer upon her an entitlement to the piece of land or an interest therein which falls under the ambit of section 19 of the Constitution of Swaziland. That section 19 thereof entitled 2<sup>nd</sup> Applicant prompt payment of a fair and reasonable compensation prior to the acquisition of the property concerned.

[15] The attorney for the 2<sup>nd</sup> Appellant then framed the legal question to be decided to be the following as outlined at paragraphs 8 to 9 of his Heads of Arguments:

**8. Does the *factum* of occupation by the 6<sup>th</sup> Respondent and (Appellant) herein, afford her with a legally recognizable interest or entitlement to the land concerned?**

**9. If such occupation did confer upon her such legal interest or entitlement, was such of the kind protected under section 19 of the Act 001/2005 (Constitution of the Kingdom of Swaziland) (was the sale and subsequent transfer of the land in compliance with the Constitution of Swaziland?)**

**10. Did the opposing papers of the Appellant in the court *a quo*, raise a constitutional question, which ought to have been referred to the full bench of the High Court for determination?**

[16] Further arguments are canvassed from paragraph 10 to 34 of 2<sup>nd</sup> Appellant's Heads of Arguments and at paragraph 33 thereof that the court **a quo** also had to determine whether or not the deprivation of the land was constitutional. That in a democratic and constitutional society, it is not desirable that a person

be deprived of any legal interest without proper knowledge and due process. That as it stands 2<sup>nd</sup> Appellant was subjected to a humiliating and indignifying position of not only rendered homeless, but destitute. Thus as alleged in its prayers, is a violation of her right to a home and earns a living.

[17] Finally, at paragraph 34 thereof it is contended for the 2<sup>nd</sup> Appellant that the learned Judge in the court **a quo** erred when he held that the sale was valid notwithstanding the precarious, unconstitutional and inhumane circumstances that such pronouncement brought about.

**(iii) 1<sup>st</sup> Respondent's arguments**

[18] The essence of the 1<sup>st</sup> Respondent's argument is that the court **a quo** correctly found that clause 11, sub clause 1-2 of both Deeds of Donation were significant to the determination of the matter that was placed before it referring to pages 376 – 377 of the record. Further, it is contended for the 1<sup>st</sup> Respondent that the court **a quo** also correctly found that both 1<sup>st</sup> Appellant and 1<sup>st</sup> Respondent therein did not challenge the legal validity of the donation. In short, both Fred and Steven Leibbrandt were at common cause, that the donations were validly made by Kellina Kunene to the listed donees therein. In this respect he cited page 377 paragraph 7 of the record.

[19] It is further contended for the 1<sup>st</sup> Respondent that the court **a quo** correctly outlined the issues which it was called upon to decide in order to fully and finally settle the entire dispute between the parties.

[20] Further arguments are canvassed from paragraphs 2.1.6 to 2.1.11 to the contention in paragraph 2.1.10 that the sharing formula was also correctly determined in page 384 – 35 paragraphs 23, 24, 25, 26 and 27 of the record of appeal. That the determination is absolutely correct both in law and in fact. 1<sup>st</sup>

Respondent requests this court of appeal not to interfere with the judgment of the court **a quo**.

[21] Furthermore, that other prayers relating to alleged fraud and rescission of prayers under the claim of 2<sup>nd</sup> Appellant were correctly dealt with and decided by the court **a quo**. As it more fully appears at page 386 – 387 paragraph 28 – 30 of the record.

[22] The attorney for the 1<sup>st</sup> Respondent then cited the South African case of **Natal Joint Municipal Pension Fund vs Endumeni Municipality Supreme Court of Appeal of South Africa 920/2012** on the modern approach to statutory and principles of interpretation of contracts.

[23] He then went on at some length to apply the **ratio** in the above case in paragraphs 3.1 to 3.2 thereof. Finally in paragraph 3.3.1.3 it is contended for the 1<sup>st</sup> Respondent that the court **a quo** applied the correct modern principles of interpretation of the Deed of Donation where the 1<sup>st</sup> Respondents prays that this Court of Appeal must refuse to interfere with the decision of the court **a quo**.

**(iv) 4<sup>th</sup> and 5<sup>th</sup> Respondents' arguments**

[24] The essence of the 4<sup>th</sup> and 5<sup>th</sup> Respondents' arguments is that they were simply innocent and **bona fide** purchasers of the property having been lawfully sold to them and duly registered in their respective names in the year 2014.

[25] That the court **a quo** furnished an immaculately considered and reasonable judgment both on the facts and the law and that, in so far as Counsel for the Respondents is concerned, the judgment cannot be faulted in any material respect and must be upheld. That the court **a quo** correctly found in favour of the 4<sup>th</sup> and 5<sup>th</sup> Respondents as far as the relief sought against them by both

Appellants was concerned and that the appeal of both Appellants should be dismissed.

- [26] That this matter is, and has always been essentially a family dispute between the two survivors in the Leibbrandt family, namely the 1<sup>st</sup> Appellant and the 1<sup>st</sup> Respondent.
- [27] That the total purchase price of the two properties together was E5 Million (3 Million and 2 Million) respectively. That the only real issue in this family dispute at this stage is how the proceeds for the sales fall to be divided between the two family members, and this long outstanding issue is entirely irrelevant as far as 4<sup>th</sup> and 5<sup>th</sup> Respondents are concerned and has nothing to do with them.
- [28] It is contended for the 4<sup>th</sup> and 5<sup>th</sup> Respondents that there is no dispute about the fact that the donation by Victor Leibbrandt via his companies in 1979 in favour of various members of his family (the relevant terms in which were embodied in the Title Deeds of the respective properties) upon transfer to the 4<sup>th</sup> and 5<sup>th</sup> Respondent, entitled to 1<sup>st</sup> Respondent to sell the properties to them in his sole and absolute discretion and to give effect to the transfer thereof as he did in the year 2014.
- [29] It is contended for the 4<sup>th</sup> and 5<sup>th</sup> Respondents that the court **a quo** correctly found that the transactions for sale and transfer of the properties were not tainted by fraud as alleged, either between 1<sup>st</sup> Respondent and 1<sup>st</sup> Appellant, nor in any way whatsoever as far as the 4<sup>th</sup> and 5<sup>th</sup> Respondent were concerned in purchasing the two properties at the instance of the 1<sup>st</sup> Respondent.
- [30] Further arguments are canvassed at paragraphs 3.1 to 3.7 of the supplementary Heads of Arguments of the 4<sup>th</sup> and 5<sup>th</sup> Respondents regarding the contentions of the 2<sup>nd</sup> Appellant.

- [31] That her cause of action was based upon the allegation that she had been the wife of the deceased Victor Leibbrandt (**The Donor**) and that she had been living permanently on the said property since 1962. She had conducted farming activities on the properties for many years and existed on the proceeds of these activities that she contended that she had a constitutional right to be allowed to remain in occupation and as such right to be recognised and given effect to by the new owners. And that she is entitled to resist her eviction from the premises and was entitled to continue to live and conduct her farming occupation there.
- [32] It is contended for the 4<sup>th</sup> and 5<sup>th</sup> Respondent that the resort by the 2<sup>nd</sup> Appellant to the Constitution in this regard is misdirected and that her rights in these circumstance are governed entirely by the common law. That it is significant that her late husband Victor Leibbrandt, had made no provision for 2<sup>nd</sup> Appellant in the original donation, as embodied in the transfer in 1979. She was not included as one of the specified Donors, nor was any provision made to her by way of **usufruct** or a **servitude**.
- [33] That what she seeks now from the 4<sup>th</sup> and 5<sup>th</sup> Respondent, is in effect a life **usufruct** which her late husband had not seen fit to grant her in the said **donation** notwithstanding that it would appear that he had allowed her **de facto** to live on the properties and utilise them for the purposes of earning a living.
- [34] That the fact Victor Leibbrandt specifically retained a **usufruct** for himself as a term of **donation** to his family, but made no such provision for the 2<sup>nd</sup> Applicant is a clear indication that it was never his intention to do so. That a **usufruct** is a personal right which cannot be ceded or transferred but, had Victor Leibbrandt intended to make her a **usufructuary** of the properties he could easily and lawfully have executed a separate Deed which he never did at anytime during the period of approximately 35 years which he lived thereafter.

[35] Accordingly, as much as the present owners might sympathize with the 2<sup>nd</sup> Appellant for her plight, they are not responsible for it nor are they in law obliged, constitutionally or otherwise, to recognise that she has any right to remain on the properties.

[36] Finally, that her appeal ought to fail.

### **The Court's analysis and conclusions thereon**

[37] Having considered the affidavits filed by the parties and the arguments advanced and summarised above, this appeal indeed raises a host of legal questions, as I have earlier indicated in paragraph [5] of this judgment. These being first whether a sale and transfer of property tainted by fraudulent activities warrants to be set aside; secondly whether a judgment which was erroneous pursuant to procedural irregularity in respect of service of process can be rescinded; the third legal question, whether the discretionary power to administer and dispose immovable property by the 1<sup>st</sup> Respondent is absolute and unfettered, despite the existence of other co-owners of the property who also enjoy the constitutional right to a home and that of occupation in relation to the properties in question.

[38] Further legal questions flowing from the appeal are outlined in the 1<sup>st</sup> Applicant's Heads of Arguments at paragraph 1.2 thereof to the following:

- **Whether or not, in light of the Plascons Evans rule, an equitable court of law should find in favour of a litigant who has made explicit allegations of fraud on affidavit, which stands uncontroverted by any of the concerned parties and such alleged fraud is ex facie apparent on the record.**

- **Whether or not, a fiduciary duty exists between parties; where some power or discretion is vested on one party such that it is capable of being used to affect the legal or practical interest(s) of the other.**
  
- **Where a finding of contempt of court has been made against a party to proceedings; whether that litigant should be allowed the opportunity to assert its rights and interest before the very same court it has defied, without purging the contempt.**
  
- **Whether or not, a court in the same level as the court which issued an order; has the authority to over-rule the order of that other court, sitting not as an appeal court nor in rescission proceedings and replacing such order.**
  
- **Whether a court of law, has the requisite competency to direct that, funds which are subject to the outcome of a litigation, to be kept in the bank account of a person who does not occupy any office of trust and where no application to such effect has been made.**

[39] The essence of the legal questions as outlined above are to a greater extent synonymous to the 1<sup>st</sup> Appellant's grounds of appeal as contained in its Notice of Appeal in pages 389 – 393 thereof.

[40] The points for decision by this court distilled from above grounds of appeal can be outlined as follows:

- (i) Rescission**
- (ii) Fraud**
- (iii) Breach of fiduciary duty**
- (iv) Contempt of court's dirty hands**
- (v) Interpretation of Deed of Donation**

[41] I shall address such points **ad seriatim** canvassing the Appellants' contentions first and then the defence by the Respondents to each and then my analysis and conclusions in each case.

**(i) Rescission**

[42] According to the 1<sup>st</sup> Appellant, in the judgment of the court **a quo** the question of rescission is briefly addressed at paragraph 29 (at page 326 of the Record of Appeal). It is contended for the 1<sup>st</sup> Appellant the court below did not adequately address the issue of rescission. That the court **a quo** should have at the very least canvassed the question of rescission since it was placed before it had direct bearing on the outcome of the case.

[43] It is contended on behalf of the 1<sup>st</sup> Appellant that on the facts of the matter 4<sup>th</sup> and 5<sup>th</sup> Respondents in the court **a quo** moved two identical applications under High Court case no. 1117/2014 and 118/2014 in around September, 2014. The incumbent 4<sup>th</sup> and 5<sup>th</sup> Respondents sought to compel the incumbent 1<sup>st</sup> Respondent to sign the requisite transfer documents in respect of both the Matsapha and Nhlanguano Farm. It is common fact that the 1<sup>st</sup> Appellant was cited as a Respondent in both proceedings and that he was never personally served with the Notice of Application and dispute it being a new application. That it is also common fact that the orders were granted on the 3<sup>rd</sup> October, 2014 in the absence of the incumbent 1<sup>st</sup> Appellant on the basis of default of appearance.

[44] It is contended for the 1<sup>st</sup> Appellant that on these facts, it is manifest that the orders were erroneously granted in the absence of the 1<sup>st</sup> Appellant.

[45] On the other hand it is contended for the 1<sup>st</sup> Respondent on the point that the 1<sup>st</sup> Appellant is not entitled to the rescission because no relief was being sought



against him in the application under cases 1117/14 and 1118/14 thereby lacks the required **locus standi**. Further, the 1<sup>st</sup> Appellant's interest in the said proceedings were merely financial, thereby he had no direct and substantial interest in the outcome thereof (in cases 1117/14 and 1118/14).

[46] In my assessment of these arguments on this point it would appear to me that 1<sup>st</sup> Appellant had a direct and substantial interest in the outcome of the proceedings under cases 1117/14/ 1118/14 in that:

1. He is a co-owner of the properties to which the order to compel transfer was sought.
2. He is a legal occupant in the property in question and enjoys a right to a home in relation to the said property.
3. He would be entitled to share in the proceeds of the sale of the properties and such benefit is linked to the co-ownership interest in relation to the property (thus not merely financial).

[47] On the facts of the matter court orders 1117/14 and 1118/14 were erroneously granted in the absence of the 1<sup>st</sup> Appellant, as a co-owner, the 2<sup>nd</sup> Appellant as legal occupant and one whose rights are protected by section 19 of the Constitution, had a direct and substantial interest in the outcome of the case(s). That the court orders were granted in the absence of 1<sup>st</sup> and 2<sup>nd</sup> Appellants, as interested parties in the outcome of the proceedings. The transfer of the property to the 4<sup>th</sup> and 5<sup>th</sup> Respondents was occasioned by the said court orders, and the eviction notice served on the 1<sup>st</sup> Appellant was based on the effect of such court orders and subsequent Deed(s) of transfer.

[48] The court **a quo** on these facts erred by not finding in favour of the 1<sup>st</sup> Appellant with regard to the questions of rescission.

**(ii) Fraud**

[49] 1<sup>st</sup> Appellant contends under this Heads of Argument that the court **a quo** addressed the question of fraud at page 28 of its judgment (at page 326 of the record of appeal) but that the court **a quo** according to the 1<sup>st</sup> Appellant did not adequately address the question of fraud in its judgment, and as such it erred in arriving at the decision it did. That all the Court makes reference to in respect of this legal question in the passiveness of the representative for government in this regard. In this regard the 1<sup>st</sup> Appellant advanced a two pronged argument. First in the fraud perpetrated against (government), the court **a quo** focussed on the latter and conclusively decided on the basis of the passiveness of the government's legal representative.

[50] Secondly, on the fraud committed against the 1<sup>st</sup> Appellant, contends that this court ought to import, as a benchmark for determining the alleged fraud, the requirements as set out in case of **Kellerman vs Kellerman 1957 (3) SA. 764(0)**.

[51] 1<sup>st</sup> Appellant contends that in line with **Kellerman case (supra)**, even in the instant case, the circumstances render it probable that the husband had her rights in mind when he entered into the impugned transaction and that will prejudice her right.

[52] 1<sup>st</sup> Appellant argued firstly that 1<sup>st</sup> Respondent did not advise the 1<sup>st</sup> Appellant about the sale, before and when it was concluded. Secondly, the 1<sup>st</sup> Appellant was not informed about the purchase price. Thirdly, the registered purchase price at the Deeds Registry was of significant importance because according to the apportionment in the event of sale, 1<sup>st</sup> Appellant would be entitled to share in the proceeds. As such, the Deed(s) of transfer serve as the primary source of

information about the property. In particular the price for which it was transferred. This, is obvious that the 1<sup>st</sup> Respondent's intention was to prejudice the 1<sup>st</sup> Appellant.

[53] Fourthly, and lastly it contended for the 1<sup>st</sup> Appellant that it probable that the 3<sup>rd</sup> party (being 4<sup>th</sup> and 5<sup>th</sup> Respondent) to whom the disposition was made was aware that the transaction was entered into fraudulently by under-declaring the value by signing a simulated agreement whose purpose was deceptive. He also avers that, 1<sup>st</sup> Respondent colluded with the 4<sup>th</sup> and 5<sup>th</sup> Respondent. Furthermore, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents do not dispute these allegations in their Answering affidavit.

[54] I think it is important at this stage to outline what is stated at page 153 of the Appeal Record for one to understand the 1<sup>st</sup> Appellant's argument on the fraud perpetrated by the 1<sup>st</sup> Respondent in tandem with the 4<sup>th</sup> Respondent and 5<sup>th</sup> Respondent.

[55] In the Answering affidavit of the 1<sup>st</sup> Respondent at paragraph 47.2 at page 153 he deposed as follows:

**47.2 I may add that the fourth and fifth Respondents represented by Mr Peter Ngwenya requested me through the agent Mr Koert Van Vuuren to sign another deed of sales for the lesser amounts so that they could cut on transfer costs. I reluctantly agreed on condition that I was to get the agreed purchase price of E5.000.000.00 (Five Million Emalangi). The Applicant and Timothy are aware of the purchase price as I advised them about it before and after the sale. The Court is referred to paragraph 17.1 of the Applicant's founding affidavit. I state further that the issue of the payment of the balance of the transfer costs is now being attended to by me, the fourth and fifth Respondent and by the time the matter is finally heard it will be long sorted.**

- [56] It would appear to me that the above averments of the 1<sup>st</sup> Respondent prove without any doubt that that the 1<sup>st</sup> Respondent acted in concert with the 4<sup>th</sup> and 5<sup>th</sup> Respondents to defraud the fiscus and therefore whatever agreements subsequently entered into by the parties were tainted with illegality.
- [57] Therefor the finding by this court at this stage will put paid to any determination on the other topics I have outlined earlier in the judgment.
- [58] The paper trail used to effect transfer of the property is fatally flawed and the process of transferring the property to the 4<sup>th</sup> and 5<sup>th</sup> Respondents was fraught with inconsistencies, clear fraud and illegalities. These are found in pages 79, 85, 108, 121 and 152 of the Record. This is where the inconsistency in respect of the purchase price and the registered purchase price in the Deed(s) of transfer is evident. In this regard I agree **in toto** with the contentions of the 1<sup>st</sup> Appellant that it is very strange that the court **a quo** failed to pick up such 'evidence' of blatant fraud.
- [59] It is my considered view that the above stated factors, the court **a quo** had a good reason to make a finding that the transaction effecting transfer of ownership was marred by fraudulent activities. I agree with the 1<sup>st</sup> Appellant's contentions in this regard that the court **a quo** should have set aside the whole transaction, thereby ordering for a reversal of the registration of ownership of the farms to the 4<sup>th</sup> and 5<sup>th</sup> Respondents. It is also not clear in the judgment of the court **a quo** if any consideration was made on these fraudulent activities of the 1<sup>st</sup> Respondent together with the 4<sup>th</sup> and 5<sup>th</sup> Respondent. The court **a quo** appears to have countenanced or condoned the fraud.
- [60] In this regard I find that the **dictum** in the High Court case of **Nedbank Limited vs Mendelow N.O (686 12) ZASCA** opposite where it was held that, it is trite law that where a registration of transfer of immovable property is effected pursuant to fraud or forged agreement, ownership of the property does

not pass to the name of the person in whose name the property is registered after the purported transfer.

[61] In this regard the South African cases of **Quatermark Investments (Pty) Ltd vs Mkhwanazi And Another** and that of **Anna Visser vs Frans Hermanus case no 4375/2008 S.A.H.C. Western Cape Division** on the principles of the **Nedbank Limited case** apply to the facts of this case.

[62] As I have stated earlier on that it would be pointless to consider the other topics as outlined in paragraph [40] of this judgment and these being (iii) breach of fiduciary duty, (iv) contempt of court's dirty hands and (v) interpretation of the deed of donation. The reason being that the fraud that has been established taints the transactions concerning the transfer of the properties by the 1<sup>st</sup> Respondent together with the purchasers being 4<sup>th</sup> and 5<sup>th</sup> Respondent. That whatever happen thereafter is founded on an illegality.

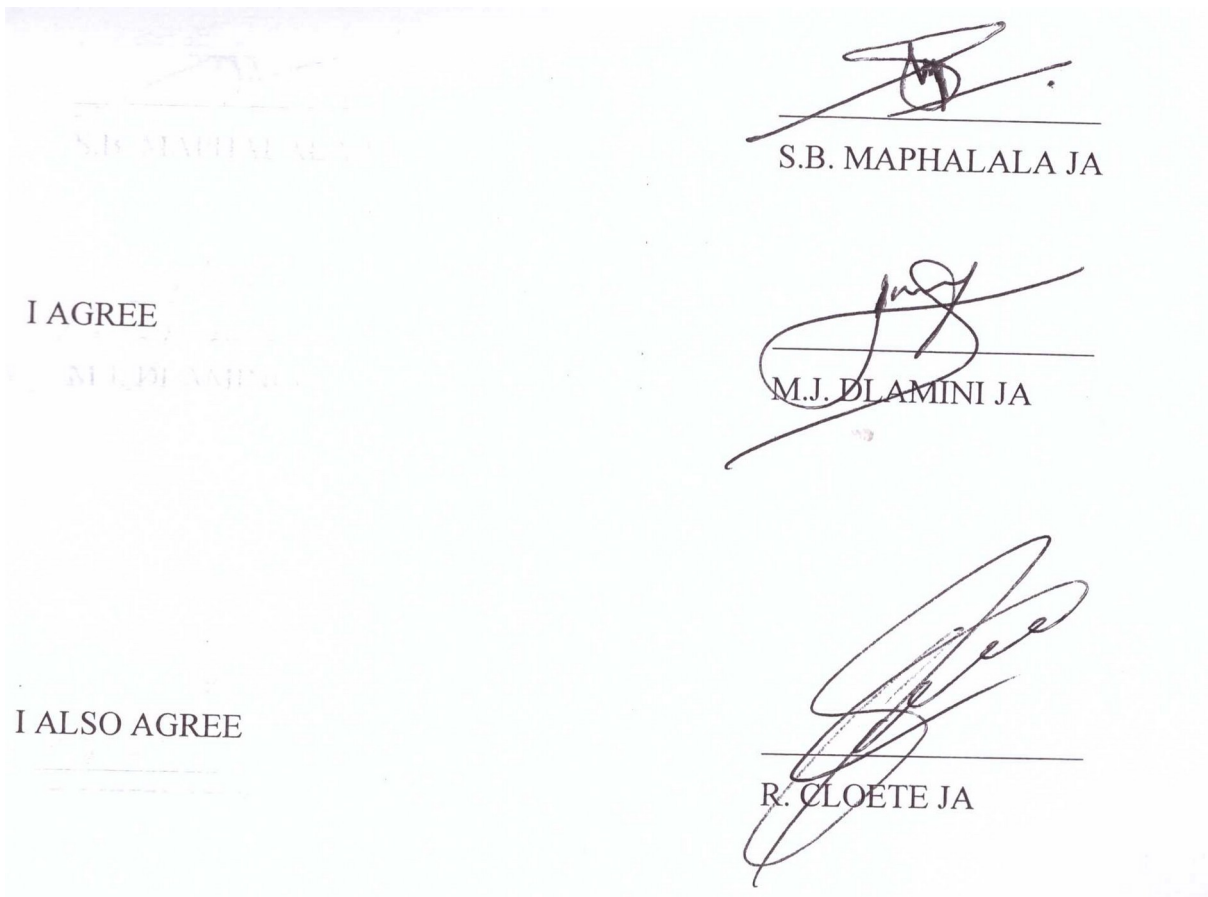
[63] I now come to the issue of costs. The 1<sup>st</sup> Appellant sought an award of costs at a punitive scale, particularly because of the lack of honesty in the conduct of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. The learned Authors **Herbstein et al** in their textbook **Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition at page 718** state the following:

**The grounds upon which the court may order a party to pay his opponent's attorney-and-client costs include the following: that he been guilty of dishonestly or fraud or that his motives have been vexatious, reckless and malicious, or frivolous; or that he has misconducted himself gravely either, in the transaction under inquiry or in the conduct of the case. The court's discretion to order the payment of attorney-and-client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct: it includes all cases in which special circumstances or consideration justify the granting of such an order. No exhaustive list exists.**

[64] In my assessment of the facts of the case as I have stated above **in casu** it is without question that a fraud has been perpetrated by the 1<sup>st</sup> Respondent acting jointly with the 4<sup>th</sup> and 5<sup>th</sup> Respondents and I am obliged to issue an order of costs to be on the punitive scale.

[65] In the result, for the foregoing reasons the following orders are entered:

1. The Appeal of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants is upheld.
2. An order is granted reversing the sale and transfer of the properties from the 1<sup>st</sup> Respondent to the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
3. In the event of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents failing to sign the required documents to give effect to the Order in 2 above within a period of 14 days of date hereof, the Deputy Sheriff for the District of Manzini is hereby authorized to sign any such documents on behalf of the parties.
4. 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents shall bear all the costs of implementing the Orders in 2 and 3 above.
5. 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents shall bear the costs of 1<sup>st</sup> and 2<sup>nd</sup> Appellants in the appeal on the scale as between attorney and client.



For the 1<sup>st</sup> Appellant:

Mr. B. Magagula  
Magagula Attorneys

For the 2<sup>nd</sup> Appellant:

Mr. Z. Magagula  
Zonke Magagula & Company

For the 1<sup>st</sup> Respondent:

Mr. S. Simelane  
Simelane Mtshali Attorneys

For the 4<sup>th</sup> and 5<sup>th</sup> Respondents:

Mr Denis Kuny S.C.  
Instructed by Ben J. Simelane Attorneys

