



IN THE SUPREME COURT OF SWAZILAND
JUDGMENT

Case No. 58/2016

In the matter between:

MICHAEL MASOTJA SHONGWE

Appellant

and

HENRY SIBUSISO SHONGWE N.O

1st Respondent

MDUDUZI SHONGWE N.O

2nd Respondent

REGISTRAR OF DEEDS

3rd Respondent

ATTORNEY GENERAL

4th Respondent

Neutral citation: Michael Masotja Shongwe v Henry Sibusiso Shongwe and 3
Others (58/2016) [2018] SZSC 6 (3rd May 2018)

Coram: **M.J. DLAMINI JA,**
 RJ CLOETE JA,
 SB MAPHALALA JA

Heard **:** **12th APRIL 2018**

Delivered : 3rd May 2018

Summary: Appellant purported to enter into a Deed of Sale for the sale of immovable property with late father – no such Deed of Sale produced to the Court and no evidence put before the Court relating to the contents of the purported Deed of Sale nor its compliance with the provisions of Section 31 of the Transfer Duty Act of 1902 - in addition purported sale to the detriment of the other heirs of the deceased – provisions of Section 34 of the Constitution breached – judgment of the Court a quo confirmed and appeal dismissed.

JUDGMENT

RJ CLOETE JA

FACTS

- [1] The Appellant is Michael Masotja Shongwe who is a son of the late Nelson Mavukela Shongwe, whose Estate is the subject of this matter and who for the purposes of this judgment will be referred to as “Nelson”.
- [2] The 1st and 2nd Respondents are the Executors Dative of Nelson’s Estate and will be referred to as the “Respondents”. The 3rd and 4th Respondents have not entered into the proceedings.
- [3] On 6th May 2013 the Appellant and Nelson purportedly entered into a Deed of Sale in terms of which Nelson purportedly “sold” to the Appellant, for a consideration of E100 000.00, the following Property:

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

MEASURING: 1182 (One One Eight Two) square metres.

HELD: Under Deed of Transfer No. 864/2013.

(For the purposes of this judgment, hereinafter referred to as the “Property”)

- [4] Nelson passed away on 1 December 2014 while residing at the Property and subsequently the Respondents were appointed as Executors Dative by the Master of the High Court.
- [5] The Respondents conducted an investigation into the assets of the late Nelson and were advised by the Appellant that he was the owner of the Property and on further investigation the Respondents found that the Property had been transferred from Nelson to the Appellant on 8 August 2013.
- [6] Respondents filed bank statements of the late Nelson which they had obtained from Swazibank and on investigation found that the purported purchase price for the Property in the sum of E100 000.00 had never been paid into the account of the late Nelson.
- [7] On 22 May 2015 the Respondent’s Attorney wrote to the Appellant requesting proof of the payment of the purchase price and a copy of the purported Deed of Sale. This request was simply ignored by the Appellant.

- [8] On 7 October 2015 the Respondent's Attorney addressed a letter to the Conveyancers requesting a copy of the purported Deed of Sale. Again there was no response.
- [9] Accordingly the Respondents had no option but to bring the proceedings before the Court *a quo* in terms of which they sought an Order that the sale and transfer of the Property be set aside, that the Registrar of Deeds be ordered to cancel the registration of transfer into the name of the Appellant together with an order for costs against the Appellant.
- [10] The Respondents set out all the facts in detail in the founding Affidavits including further information to the effect that the late Nelson was infact illiterate and that the application had been necessitated since neither the Appellant nor the Conveyancers had responded to the request for a copy of the purported Deed of Sale and that the Appellant failed to furnish proof of payment of the purported purchase price.
- [11] The Appellant filed an answering Affidavit and maintained that there was indeed a valid Deed of Sale but it was not required to pay the purchase price in cash but that he had to fulfil certain obligations which included looking after Nelson and to raise 3 of his minor children namely; Nhlakanipho Shongwe, Somandla Shongwe and Vukani Shongwe. This arrangement was apparently confirmed before two remote family members.

[12] At para 6.5 on page 46 of the Record the Appellant states **“I then drafted the Deed of Sale and we both signed it. I then took it to my Conveyancers who prepared all relevant documents to effect the transfer. I took the documents to my father and he signed them, I then returned them to my lawyers who then effected the transfer.”**

[13] The purported Deed of Sale was thereafter mysteriously or more probably conveniently, misplaced or lost after he had taken the file from the Conveyancer. There is evidence of allegations of the withdrawal of the Conveyancer as Attorney of record in some Magistrates Court action between the parties, but in my view nothing turns on those issues.

[14] In a fully reasoned judgment the Court *a quo* found in favour of the Respondents and issued an Order in the terms in which the Respondents had prayed for.

[15] The Appellant then filed a Notice of Appeal on the following grounds;

1. The Court *a quo* erred in fact and in law in holding that when the deceased (Wilson Mavukela Shongwe) died he was the registered owner of Lot No. 943 Ngwane Park Extension 1 in Manzini.
2. The Court *a quo* erred in holding that the executors of the estate (1st and 2nd Respondents herein) discovered that the Appellant had allegedly paid

E100 000.00 (One Hundred Thousand Emalangeni) for the purchase of the property, Lot 943 Ngwane Park Extension No. 1.

3. The Court *a quo* erred in holding that there was no Deed of Sale for the immovable property.
4. The Court *a quo* erred in holding that the Appellant had a claim against the estate for the amount of money spent by Appellant on his father.
5. The Court *a quo* erred in holding that the property was undersold for a paltry sum of E100 000.00 (One Hundred Thousand Emalangeni).
6. The Court *a quo* erred in holding that the most logical step was to have the property lawfully donated to the Appellant whereas the parties to the transaction had deliberately chosen a sale.
7. The Court *a quo* erred in holding that the Appellant contradicted the contents of the Deed of transfer and Power of Attorney in so far as they relate to the cause of reason for the transfer.
8. The Court *a quo* erred in holding that the reasons given or explanation by the Appellant were an afterthought and that the Appellant had to manufacture a story to explain the failure to pay the purchase price.

APPELLANTS' CASE

[16] Counsel for the Appellant filed Heads of Argument but did not refer the Court to a single authority to bolster his arguments or the case of the Appellant.

[17] It was simply alleged that there was indeed a Deed of Sale because the Power of Attorney to transfer and the Deed of Transfer said so. I will deal with this hereunder.

[18] It was further alleged that the purchase price of E100 00.00 was not relevant because the purchase price could in any event be settled in any manner agreed upon between the parties.

[19] That the transfer was valid and not in breach of the provisions of the Transfer Duty Act.

RESPONDENTS' CASE

[20] That there was no valid Deed of Sale and that the Appellant and the Conveyancer were extremely evasive on the issue.

[21] The allegations of the Appellant relating to the purported agreement to deal with the purchase price in the manner suggested was nothing more than an afterthought.

[22] That the Court was urged to adopt a robust approach as the Court *a quo* had done and that the judgment of the Court *a quo* could not be faltered in anyway.

FINDINGS OF THIS COURT

[23] I have analysed the evidence presented by both of the parties in all respects and, like the Court *a quo*, believe that the case of the Applicant is fatally flawed in many respects and in that regard;

1. The Appellant opposed the application on the basis that there was a purported valid sale agreement between the parties reduced to writing and signed by them.
2. However, at paragraph 9.1 on page 47 of the record the Appellant makes the following statement which I believe gives the true picture: **However, I could not respond to this letter because I did not understand what the Applicants wanted to achieve because they also know that my late father had given the property to me during his life time.** (My underlining).
3. Similarly at paragraph 22 on page 51 of the record the Appellant stated **“This also shows that the Applicants are being vindictive towards me for the fact that my father preferred me over his other children by giving me his property”** This in my view further proves that the purported sale of the property was a sham. (My underlining).

4. There is no denial that the late Nelson was illiterate and as such there is no convincing evidence that Nelson fully understood what he was signing or that the contents were fully explained to him. This is borne out by the fact that the Power of Attorney to transfer contained an error relating to his purported wife and more significantly it bore both a thumb print and a purported signature.
5. There is no evidence before us that the late Nelson advised his other close family members of his intention to sell or donate the Property to the Appellant.
6. As stipulated above, Appellant stated that he personally drew the Deed of Sale which was purportedly signed by the late Nelson. There is no evidence that a document drawn by a complete layman complied with the provisions of the Transfer Duty Act of 1902 and our common law.
7. In preparing the answering Affidavit the Appellant and the Conveyancer had the perfect opportunity to verify under oath that there was indeed a compliant and valid and binding Deed of Sale and what the contents were relating to the purchase price and the alleged obligations of the Appellant that he had to fulfil, but both of those parties failed dismally to do so.
8. There is no proof that the purchase price or infact any part thereof was paid by the Appellant. Interestingly at paragraph 7 on page 47 of the record he states; **“However, as stated above, I never paid the E100 000.00 to my father’s bank account as the purchase price was not only in cash but to be repaid to the obligations which he bestowed upon me.”** That clearly implies that some unknown part of the purchase price was indeed to be paid in cash.(My underlining).

9. There is undisputed evidence that the late Nelson earned interest and pension monies and received rentals from the houses which he had constructed on the Property and which he had let out and as such did not need the Appellant to maintain him as alleged.
10. It is a complete mystery why neither the Appellant nor the Conveyancers answered the letters of the Respondent's Attorney and only upon the application being served responded, albeit unsatisfactory.

[24] In addition to the above the purported sale clearly sought to deprive the other beneficiaries in the late Nelson's estate of a share of at least maintenance. By giving by far the most valuable asset to one beneficiary (even if it was indeed sold for E100 000.00 that was a paltry sum in relation to the actual value). The provisions of Section 34 of the Constitution provides that a surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by Civil or Customary Rights. It is trite that the late Nelson was at the time married to Thobana Veronicah Lukhele. For that reason alone the purported sale appears to have been an attempt to deprive the now widow of her rightful share. It further bears to be mentioned that there is evidence before us that in the instructions given by the late Nelson relating to his pension proceeds, that all of his spouses and children were to be the beneficiaries and as such his intentions were clearly that no one should be deprived and for that reason it is highly unlikely that he would have been partly to a sale with the Appellant which would deprive certain beneficiaries of their rightful share.

[25] Clearly the value of the property is some way in excess of E100 000.00 as there were houses built on it which were let out.

[26] The Respondents, in their well-prepared Head of Argument referred the Court to applicable law. By reference to **Nokuthula N. Dlamini v. Goodwill Tsela (unreported) Case No. 11/2012 at paragraph [28] pages 17-18. “It is for the Court to decide whether an application can properly be decided on the Affidavits.”** I agree with this view and believe that this matter was

dealt with fairly and adequately on the evidence by Affidavit before the Court *a quo*. The Appellant did not raise any issues relating to this concept in its Heads nor was it argued that the Court *a quo* had erred in deciding the issue on the Affidavits before it. Accordingly the Court *a quo* acted entirely correctly in dealing with the matter on the papers.

[27] Section 31 of the Transfer Deed Act of 1902 provides that **“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 the agents duly authorised in writing.”** As stated previously, the Appellant and the Conveyancer had every opportunity of taking the Court *a quo* into their confidence by giving itemised details of the purported Deed of Sale and its contents but failed to do so. On that basis I cannot fault the Court *a quo* who found, at paragraph 24 of its judgment at page 105 of the record that **“In terms of section 31 of the Transfer Duty Act 1902, a contract of sale of fixed property shall be of no force or effect unless it is in writing and signed by the parties to it or by their agents duly authorized thereto in writing. There is no deed of sale. The 1st Respondent says that he drew**

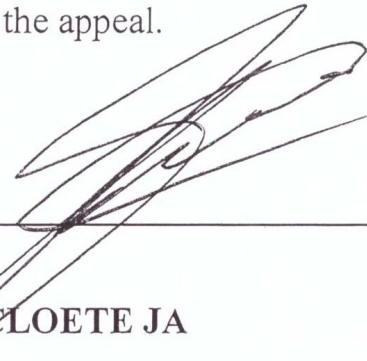
it up but is unable to state its contents, the date it was signed or even state the witnesses who attested to it. He has not even attached an affidavit by the witnesses who attested to it.” (My underlining).

[28] Accordingly I find that the purported sale was invalid and that I cannot fault the judgment of the Court *a quo* in any way. The Appellant, if he has any proof of claims for improvement of the property or any other lawful claims, these can be proved against the estate of the late Nelson and dealt with by the Respondents and the Master of the High Court in the winding up of the Estate of the late Nelson.

ORDER

It is ordered as follows;


1. The Appeal of the Appellant is hereby dismissed.
2. The judgment of the Court *a quo* stands in all respects.
3. The Appellant shall bear the costs of the appeal.



R.J. CLOETE JA

I agree _____

M.J. DLAMINI JA

I agree _____

S.B. MAPHALALA JA

Counsel for the Appellant : N.S Manzini
Counsel for the 1st and 2nd Respondents : X. Mthethwa