IN THE HIGH COURT OF SWAZILAND

JUDGMENT

CASE NO: 1038/15

In the matter between:

SKHUMBUZO DLAMINI	**APPLICANT**

And

THE QUADRO TRUST	**1ST RESPONDENT**
THOMAS MOORE CARL KIRK	**2ND RESPONDENT**
ROBERT RICHARD JAMES KIRK	**3RD RESPONDENT**
ADREAS MFANISENI LUKHELE N.O.	**4TH RESPONDENT**
MANDY MENDZI DLAMINI N.O.	**5TH RESPONDENT**
NONTOKOZO DLAMINI	**6TH RESPONDENT**
REGISTRAR OF DEEDS	**7TH RESPONDENT**
MASTER OF THE HIGH COURT	**8TH RESPONDENT**
ATTORNEY GENERAL	**9TH RESPONDENT**

Neutral Citation: *Skhumbuzo Dlamini vs. The Quadro Trust and 8 Others Case No. (1038/15) [2017] SZHC 277*

Coram: **MLANGENI J.**

Heard: **9/10/17**

Delivered: **15/12/17**

Summary: *Law of succession – administration of estates- two estates owning immovable property in equal undivided shares- disagreements among beneficiaries.*

Executors obtaining court order to dispose of one estate's interest in the property by public auction – executors later selling the interest by private treaty, claiming to rely on the authority of s66 of Administration of Estates Act 1902 – the Master consenting to such sale

One beneficiary challenging the sale and transfer on grounds that manner of sale was in breach of the express terms of the court order, that executors were enjoined to sell by public auction, that for various reasons the sale was not an arm's length transaction vis-à-vis the purchaser and was overall not in the interest of beneficiaries

Applicant also seeking removal of executors and that he be appointed executor.

Law of trusts – whether a trust has legal persona.

Held: *The executors were bound by the terms of the court order to sell the interest by public auction:*

In view of the express terms of the court order, the executors could not rely on s66 of the Administration of Estates Act 1902 to justify sale by private treaty;

In the absence of proof of fraud and/or collusion, a case was not made out for the removal of the executors.

JUDGMENT

[1] The Applicant is a beneficiary in the estate of the Late Eunice Mumsy Inskip. The estate is co-owner in undivided shares of two immovable properties which are fully described at pages 1 and 2 of the Notice of Motion dated 7th July 2015. The other co-owner in undivided shares is the estate of the late Mary Queeneth Inskip. The two deceased were sisters. They died within one year of each other – one on the 30th January 1998 and the other one on the 31st December 1998. It is phenomenal that almost twenty years later, the estates of the two deceased sisters have not been finalized and are, infact, the subject of a raging dispute in this court.

[2] The fourth and Fifth Respondents are executors of Estate Late Eunice Mumsy Inskip – EM 9/99. Acting on behalf of the said estate, on or about May 2013 the executors sold and transferred to the First Respondent the one half undivided share in both immovable properties, for the price of E1, 000,000.00. According to the Applicant he was not aware of the sale of the estate's interest in the properties until the 3rd November 2014. He got to know of the sale quite fortuitously. On this date he went to Malkerns Town Board offices to furnish a post office address for purposes of communication. To his surprise he found that the two properties were now co-owned by the late Mary Queeneth Inskip and the Quadro Trust. The latter is cited in these proceedings as First Respondent.

[3] The position adopted by the Applicant is that the sale of the undivided share of the estate of the Late Eunice Mumsy Inskip in the two

immovable properties is unlawful. In this application he seeks the following prayers:-

"1. Declaring that the sale and transfer of the one half (½) undivided shares in the properties described hereunder of the Estate of the late Eunice Mumsy Inskip to and in favour of the First Respondent is unlawful and is hereby set aside *viz*:

1.1. Certain: Portion 2 of Farm No. 1270 situate in the District of Manzini, Swaziland MEASURING: 1,7606 ……..hectares

HELD: Under certificate of Registered Title No. 210/1990 dated 20th April 1990.

1.2. CERTAIN: Portion 3 of Farm No. 1270, situate in the District of Manzini, Swaziland MEASURING: 11, 1283 ……hectares

HELD: Under certificate of Registered Title No. 210/1990 dated 20th April 1990.

2. The Registrar of Deeds be and is hereby ordered to cancel the registration of transfer into the name of the First Respondent.

3. The Fourth and Fifth Respondents be and are hereby removed as co-executors dative in the Estate of the Late Eunice Mumsy Inskip.

4. The Applicant be and in hereby appointed the executor in the estate of the late Eunice Mumsy Inskip.

5. Cost of this application."

[4] The Application is opposed. In support of the application the Applicant has deposed to an affidavit. From this affidavit as well as the opposing affidavits of Thomas Moore Carl Kirk and Andreas Mfaniseni Lukhele it is clear that dealing with the two estates presented enormous difficulties for all concerned, more particularly the executors. Co-ownership by the deceased sisters in undivided shares is one aspect of the difficulty, but the major difficulty, it appears, was inability to get the beneficiaries to agree. These difficulties are captured in the opposing affidavit of the Fourth Respondent at pages 118 – 120 of the Book of pleadings.

[5] As a legal basis for this application the Applicant makes the following material allegations:-

5.1 The executors of the Estate of the Late Eunice Mumsy Inskip (the Executors) moved an *ex-parte* application which was granted by this court on the 20th February 2004. The application sought authority of the court to dispose of the estate's undivided ½ share in both immovable properties by public auction. The court order is at page 18 of the Book and I quote the relevant portion of it below:-

"1. The Executors of the Estate of the Late Eunice Inskip are authorized and directed to sell and/or dispose by public auction the properties known as: .....

.....

....."

Key words in the order are **"authorized and directed".** It is common cause that the sale of the ½ share to the First Respondent was not by public auction, it was by private treaty. The Applicant submits that this was in breach of the court order that the executors sought and obtained, and that for this reason alone the sale and transfer of the interest stand to be set aside. The order to sell by public action was preceded by a special power of attorney which is part of the pleadings[1]and is marked **"B".** This document appears to be incomplete, but what is available of it is to the effect that four beneficiaries in the estate gave authority to the executors to sell the immovable property **"by public auction…."[2]**

5.2 As a beneficiary in the estate, the Applicant did not consent to the sale[3].

5.3 The alleged value of both properties as at the year 2015 was about E6.4 million, one half of which would be about E3.2 million. The argument being made here is that at E1, 000,000.00 the asset was grossly under – valued when sold.

5.4 The manner in which the interest was disposed of was not in the interest of the heirs or beneficiaries and various averments in the affidavits suggest that the sale to the First Respondent was not an arms-length transaction[4], this in part being supported by the deeds of cession that were purportedly entered into by the First Respondent with some of the beneficiaries in the estate in order

[1] Page 20-22 of the Book.
[2] Page 21 of the Book.
[3] Para 35 at page 14 of the Book.
[4] As Trustee of the Purchaser, Thomas Moore Carl Kirk had an active interest in the affairs of the estate, to the extent of attending some meetings of beneficiaries as well as advancing large sums of money to some beneficiaries without any form of security.

to secure re-payment of loans which had been advanced to the beneficiaries.

5.5 In support of the prayer for removal of the executors the Applicant says:-

> **"I aver that the conduct of the executors in failing to ensure that there was a public auction …..and that there were valuations of the properties to operate as a benchmark or reserve price for the undivided shares in the properties was imprudent and not in the interest of the heirs or beneficiaries."[5]**

5.6 He further makes reference to the executors' failure to disclose to the heirs that the interest had been sold and transferred, and the price in respect thereof, as a basis for mistrust, and that they have failed to administer the estate in that some years after the sale of the interest a liquidation and distribution account has not been filed.

[6] Below I summarise the legal basis of opposition by the substantive respondents – i.e. First to Sixth Respondents. I will deal with their submissions collectively.

6.1 Respondents argue that the court order in respect of disposal of the interest did not enjoin the executors to sell by public auction. The Respondents split the operational part of the order into two parts *viz*:-

- "sell and/or

[5] Para 40 at p15 of the Book.

- dispose by public auction."

According to this submission the executors were within their rights to sell by private treaty. Extrapolating from the above, it might be added that it is only **"disposal"** that was to be by public auction and not sale. This argument is highly casuistic, but I will get to that in due course.

6.2 As an alternative to 6.1 above, Respondents argue that the manner of sale or disposal was a mere formality, and failure to comply with a formality cannot render the transaction illegal. This submission appears to be an extension of the argument that the court order did nothing to restrict the executors' common law authority, and that indeed the court order might not have been necessary in the first place.

6.3 If the agreement of sale is set aside, it does not follow that the transfer must also be set aside, because the two are not inextricably intertwined – i.e. the sale is one stand-alone transaction and the transfer is another, goes the argument.

6.4 Because there is no suggestion of fraud or collusion between the executors and the purchaser, the sale to the third party cannot be impugned.

6.5 The court order is impractical and unenforceable. Compliance with it was frustrated by various factors, hence the executors exercised their common law and statutory powers in selling the ½ undivided share. The 4th and 5th Respondents have submitted as follows:-

> **"…..the executors were not bound by an impractical, unenforceable and disadvantageous court order in**

the face of an effective, advantageous and quick route provided by s66 of the Act ….[6]"

[7] I now turn to consider the legal arguments that determine the outcome of the application.

7.1 COURT ORDER NOT PEREMPTORY BUT DIRECTIVE

A court order is valid and binding until set aside on review, on appeal or through rescission or variation[7]. Even if an order of court is manifestly open to challenge, e.g. obtained fraudulently, it is to be observed until set aside through appropriate process. Faced with an order to do something or abstain from doing something, it is well established that you comply and complain later. It is of significance that the order in question was sought by the executors *ex parte* and was granted in the terms as sought[8]. It has been argued for the Respondents that there was no need for the court order, that the executors had a common law power to deal with the interest regardless of the court order[9]. I do not agree with this submission.

The effect of an order of court transcends common law and statutory provisions, for both are authoritatively defined or interpreted by the courts. It is therefore folly to argue that in spite of the court order which was sought and obtained by the executors, they could simply wish it away or pretend that it does not exist. But somewhat interestingly, the Respondents understand the effect of the court order differently. The relevant portion of the order is in these terms.

[6] 4th Respondent's answering affidavit at para 9, page 119-120 of the Book; 4th and 5th Respondents' heads of arguments, para 5.3.6 at page 36 of the Book.
[7] Clement Nhleko v M.H. Mdluli & Co. and Another H/C Case No. 1393/09.
[8] Page 99, para 11.2 of the Book.
[9] Page 132, para 30 of the Book.

"The Executors of the Estate of the late Eunice Inskip are authorized and directed to sell and/or dispose by public auction the properties….."

The 4th and 5th Respondent, in their heads of argument, make the following submission:-

"The executors genuinely believed that a sale, <u>through public auction</u>, would assist the estate to be speedily wound up,"[10] (my underlining).

In my view the matter of the import of the court order could well end here. The executors believed that a solution was in a sale by public auction. In line with their belief, they obtained an order in the terms that they sought. They cannot now be heard to argue that the order was inconsequential.

The First, Second and Third Respondents have ventured to break the operative part of the order into two parts, *viz*:-

"- sell and/or

"-dispose by public auction, the interest in question."[11]

This creative analysis overlooks the fact that the order is actually in one simple sentence. In the context of this matter **"dispose"** can only mean one and the same thing as **"sell".** Dispose is defined to mean **"get rid of[12]"**. The executors could not possibly donate or bequeath, they were to realise the interest and could only do so by selling it; by disposing it of. In terms of the order that they sought and obtained they were enjoined to sell by public action. In the view that I take on this aspect of the matter, and on this basis alone, the sale is

[10] Para 4.3, page 23 of their heads of arguments.
[11] Head No. 12
[12] Concise Oxford English Dictionary

liable to be set aside. A contrary conclusion would do violence to orders of court which, it is agreed, are sacrosanct.

The argument that the court order was impractical, unenforceable and disadvantageous has no merit whatsoever. Assuming that these problems were there, the door of the court was wide open for the executors to present the difficulties and seek appropriate guidance. They did not do so. One major advantage that I see in a public auction, and which the executors saw in a public auction, is maximization of returns through the competitive process of bidding.

Other than the issue of the removal of the executors and the appointment of the Applicant as executor, there is no need for me to deal with the host of other legal issues that arise in this matter. I do nonetheless, deal with some of them briefly herein below.

7.2 MANNER OF SALE A MERE FORMALITY

I have stated above that the order of court supersedes the common law and/or statute. The executors and/ or the Master of the High Court were not, for instance, at liberty to fall back to Section 66 of the Administration of Estates Act No. 28 of 1902 as amended, which authorises the sanctioning of the sale out of hand as opposed to public auction, if in the opinion of the Master this would be advantageous to beneficiaries and creditors. In any event the facts of the matter hardly show that the private sale was advantageous. If anything, the contrary is possibly indubitable.

7.3 IF SALE IS SET ASIDE IT DOES NOT FOLLOW THAT TRANSFER IS TO BE SET ASIDE

This argument is unsustainable. Transfer of property is the necessary consequence of a valid and good sale. If the sale is set aside, there is no basis upon which the transfer can survive the knock. A similar issue arose in the case of Tshabalala & Others v the Municipal Council of Manzini & Others[13] where Mabuza J. had this to say:-

> **"……..the registration of the property in the name of the 2nd and 3rd Respondents which is based on the void sale is also invalid and ought to be set aside……."**

Quoting with approval from Lord Denning M.R. in the famous case of MacFoy v Vac (1961) 3 AER, the judge proceeded to demonstrate that if the sale is set aside, the transfer cannot survive.

[8] One significant legal issue that cannot be overlooked is the role of the First Respondent, the Quadro Trust, in this whole thing. The **"trust"** purports to be the purchaser of the interest in the estate of the late Eunice Inskip. See Deed of Transfer No. 462/2013[14]. On or about the 25th September 2007 the trust purported to enter into deeds of cession with several beneficiaries in respect of their interests in the estate[15].

[9] The frenetic activities of the trust as referred to above, defy a well-established position of our law, that a trust has no legal personality, has no capacity to contract and has no *locus standi in judicio*[16]. It follows, therefore, that the transactions that were purportedly entered into by the trust are inconsequential. And the claim by Thomas Moore Kirk that he represents the trust in the deed of sale[17]is fallacious.

[13] Thembekile Cecilia Tshabalala & Two Others v the Municipal Council of Manzini and Seven Others (1978/12) [2014] SZHC 137.
[14] At page 27 of the Book.
[15] At pages 106-108, 146-148 , 150-150 and 156-158 of the Book.
[16] Sikhumbuzo R. Mabila and Another v Syzo Investments (Pty) Ltd and Three Others, Case No. 304/2013 at para 18 of the judgment.
[17] Deed of Sale between the Quadro Trust and Estate Late Eunice Mumsy Inskip, page 39 of the Book.

Representation is based on agency – a representative must *ipso jure* have a principal, and the trust being a non- entity in law cannot be a principal.

[10] Lastly, should the executors be removed and the Applicant appointed? The Applicant has said a lot about the ineptitude and imprudence of the executors. Some of the allegations, looked at objectively, are cause for concern. I accept, for instance, that in the totality of the circumstances the **"purchaser"** through its trustee the Second Respondent, did a lot of preliminary work that had the effect of placing it in a favourable position to acquire the interest. This included advancing large sums of money to most of the heirs. I also accept that the purchase price of E1, 000,000.00 is on the low side, taking into account the professional valuation which is part of the pleadings[18].

[11] It is undeniable that the estates of the late sisters are by no means ordinary. They are difficult to deal with. One aspect of the difficulty is the undivided shares in two immovable properties which have vastly different market values. Another – and more potent one – Is the well documented discord among the heirs. In the 4th Respondent's words:-

> **"The bad blood between the beneficiaries of the two estates and the differences of the beneficiaries of the late Eunice Mumsy Inskip did not make it easy to speedily and fairly wind up the estate[19]".**

[12] These difficulties are capable of causing uncertainty and diffidence even to the most experienced of administrators of estates. I have no doubt, for instance, that seeking an order of court was a genuine attempt by the executors to find a way forward. I think that they could have put the court order to better use, but in a situation that is

[18] Pages 41-85 of the Book.
[19] Para 8.2 of Answering Affidavit at page 118 of the Book.

admittedly difficult I must not adopt the approach of an arm-chair critic. I must eschew a decision that is likely to take this long-suffering estate[20]a step backward, for this would not be in the interest of beneficiaries and creditors[21], in view of the nineteen years that has already been lost.

[13] I also take into account that the Applicant has not given the court his credentials upon which I could determine the advantages or lack thereof in ordering his appointment. Appointing him would be like throwing a fishing net into the deep seas. The present executors have obviously learnt a lot from this litigation and other factors, and this could be an advantage going forward. The situation would obviously be otherwise if there were proven acts of fraud or collusion between the executors and a third party. These two may not be a matter of mere inference.

[14] The ideal situation would be for the two late sisters' estates to be wound up together, by the same executor or team of executors. This however, is not an issue before me.

[15] Taking all relevant considerations into account, I make the following orders:-

i) Prayers 1 and 2 of the Notice of Motion dated 7th July 2015 is hereby granted.

ii) Prayers 3 and 4 are dismissed.

iii) Applicant's costs to be paid by the estate.

[20] The deceased died in the year 1998.
[21] Ex Parte Willis 1959 (4) SA 644 (E).

iv) Under further and/or alternative relief the following orders are made:-

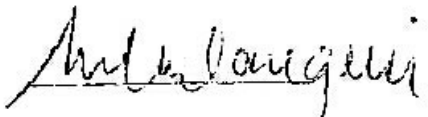
a) The 4th and 5th Respondents are ordered to present to the Master of the High Court, within a period of fourteen (14) days from date of this court order, a written proposal in respect of the sale of the ½ share by public auction, inclusive of a draft advertisement, proposed reserve price and any other relevant matter;

b) Upon receipt of the written proposal the Master of the High Court shall consider it and revert to the executors within a period of fourteen (14) days from date of receipt.

c) The Master of the High Court shall on or before the 31st March 2018, file in this court a progress report on the matter of the estate.

d) The matter is postponed to the 19th April 2018 at 9:30 am

e) This order is to be served on the Master of the High Court, the Attorney General and The Registrar of Deeds.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Applicant: **Mr. S. Bhembe**

For 1st Respondent: **Mr. L.R. Mamba**

For 4th and 5th Respondent: **Mr. A.M. Lukhele**