



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 22/2014

In the matter between:

**BOYBOY NYEMBE t/a MR TRAILER AND
ONE STOP TYRE SERVICE**

1st Appellant

FIHLIWE NYEMBE

2nd Appellant

And

VMB INVESTMENTS (PTY) LTD

Respondent

Neutral Citation: *BoyBoy Nyembe t/a Mr. Trailer And One Stop Tyre Service & Another vs VMB Investments (PTY) LTD (22/2014) [2014] SZSC 73 (3 December 2014)*

Coram: RAMODIBEDI CJ, M. C. B. MAPHALALA JA
and DR ODOKI JA

Heard: 12 November 2014

Delivered: 03 December 2014

Summary

Civil Appeal – Application for condonation of late delivery of Heads of Arguments – Complexity of the matter and impecunuity of the Appellants – No prejudice to the Respondent – Application not opposed by Respondent – Application granted – Registered land – Application for ejection by the Respondent as registered owner against the Appellants who purchased their unregistered portion of land from previous owner before the Respondent – Application of Section 15 of the Deeds Registry Act No. 37/68 and Section 31 of the Transfer duty Act – Respondent had notice of the Appellants’ prior occupation of land – Appellants entitled to cancellation of transfer to the Respondent – Order of ejection set aside – Appeal allowed with costs.

JUDGMENT

DR B. J. ODOKI, JA

- [1] The Appellants appeal against the decision of the High Court (Dlamini J), granting the Respondent an order of eviction against the Appellants, from the property in Portion 908 (a portion of Portion 569) of Farm No. 2, situated in the district of Hhohho, along Lozitha Road, Mbabane, of which the respondent was registered owner, and the Appellants were in occupation thereof.

[2] The Respondent brought an application in the court *a quo* against the Appellants, Swaziland Electricity Company, Swaziland Water Services Corporation, the Commissioner of Police and the Attorney General, seeking various orders, which can be summoned as follows:

- (a) The structures constructed by the Appellants on the said Respondents property, be declared unlawful.
- (b) The Appellants occupying the said structures be ejected from the property.
- (c) Swaziland Electricity Company and Swaziland Water and Services Corporation, be ordered to disconnect electricity and water respectively, from the property occupied by the Appellants.
- (d) The Respondent be authorized to demolish the illegal structures on the said property and costs of demolition be borne by the Appellants.
- (e) The Commissioner of Police, through the Station Commander of the Mbabane Police Station, be ordered to assist the Respondent in carrying out the demolition.
- (f) Costs of the application be borne by the Appellants.

[3] The application was accompanied by an affidavit sworn by Victor Barrerio the Managing Director of the Respondent.

The Appellants swore affidavits which were supported by affidavits

sworn by Mrs Witness Dlamini (Nee Mkhonta) and Mrs Constance P. Dlamini, both widows of the late Richard Dlamini, and Vulindlela V Dlamini, son of Richard Dlamini.

[4] The background to the appeal is as follows: It was common cause that the late Richard Dlamini, who was the registered owner of the property the subject matter of the application, sold the said property to Electro Limited in December 2011. Electro Limited later sold the said property to the Respondent, in January 2012, and the property was registered in the name of the Respondent, under Deed of Transfer No. 15/2012.

[5] It turned out that the Appellants were trading on the said property where they had erected structures. The Appellants claimed that they brought their portion of the said property from Richard Dlamini and occupied it in 2007, but signed an agreement of sale in 2008, before the property was transferred to the Respondent.

[6] The respondent contended in the court *a quo* that there was no notarial lease agreement registered against the property. It stated that before buying the property, it contacted the previous owner through Mr. Cetin Olmez, who confirmed that he had no lease agreement with anyone on the property.

[7] The Respondent further stated that immediately after the property was registered in its name, it noticed that there were certain structures on the North East of the property, which were in its opinion, within the property it owned. A Land Surveyor Mr. Martin De Beer, was engaged, who confirmed that the structures constructed by the Appellants were within the property owned by the Respondent.

[8] The Respondent then approached the first Appellant and told him that the property where he was conducting his business was within the Respondent's property and wanted to know on what basis he had erected those structures within the property. The first Appellant informed the Respondent that his mother (the 2nd Appellant) was allocated the land by the previous owner. The Respondent requested for a copy of a deed of transfer or a lease agreement but the 1st Appellant failed to produce any. The first Appellant was told to remove the structures otherwise the Respondent will approach the relevant authorities for assistance. According to the Respondent the first Appellant did not comply with the Respondent's request.

[9] The Respondent stated that it had been advised that ownership and or a right to an immovable property had to be registered at the Deeds Office to obtain a Title Deed of the property, so that it can be enforced by the

owner against third parties or against the whole world. The Respondent further stated that there were no endorsements on the title deed that were in favour of the Appellants, giving them a right to use a part of the Respondent's property. The Respondent, therefore, submitted that the Appellants had no legal right to occupy its property and that their illegal structures had to be demolished, as the Respondent wanted to develop the property.

[10] On the other hand the Appellants averred in the court a quo that there were material disputes of facts which should have been foreseen by the Respondent when instituting proceedings and which disputes were incapable of resolution on papers.

[11] The Appellants contended that there were real disputes of facts regarding whether their occupation of the land in question was lawful or not. This was so particularly because the 1st Appellant was in possession of all the requisite documents corroborating his claim to the land in dispute. The Appellants claimed that such information had been brought to the attention of the Respondent when it initially sought to evict the Appellants from the property in question and that before initiating the proceeding the Respondent was aware that the Appellants would vigorously defend the matter.

[12] On the merits of the application the 1st Appellant maintained in his affidavit that he was in lawful occupation of the land and, therefore all the structures he erected were lawfully constructed. He referred the court to a copy of an agreement of sale marked “SN1” and three Confirmatory Affidavits of Vulindlela V. Dlamini, Mrs. Witness S. Dlamini and Mrs. Constance Dlamini, marked “SN2”, “SN3” and “SN4” respectively.

[13] The 1st Appellant further submitted that he did not need to get the Respondent’s approval because he occupied the land in question in the year 2007, long before the Respondent bought its portion of land. The 1st Appellant stated that he obtained a building permit from Mbabane Municipal Council on 14 August 2007. He also stated that Mr. Richard Dlamini in his presence advised Cetin Olmez, the buyers of Portion 107 and portion 108 of the marked but yet to be registered portion sold to the Appellants. He reiterated the fact that the Respondent was advised that the Appellant had brought the portion upon which he erected his structures, before it bought its portion of land. The 1st Appellant stated that he was perturbed by the Respondent’s incipient allegations that he was encroaching upon its land; whereas he was occupying his own land peacefully.

[14] The 1st Appellant submitted that the position of the law was that when property was bought, it was inherited with all its encumbrances. He stated that the Respondent took ownership of the property in 2011 when the Appellant was already the lawful owner and occupier of the property which was the subject matter of the application. Appellant submitted that by operation of law, the Respondent was precluded from denying knowledge of an encumbrance it found existing on the property, years before it took ownership.

[15] The 1st Appellant argued that Mr. Cetin Olmez was advised by Mr. Richard Dlamini that he had bought a portion of land which portion was clearly demarcated but was not registered. Upon being advised of the 1st Appellant's right to the land, Mr. Olmez never flooded him with claims of ownership over his portion. Appellant was in peaceful occupation until the Respondent assumed ownership of the property. Furthermore, Mr. Dlamini engaged the services of a Land Surveyor Mr. Dumisa Thwala with a view to surveying and registering the Appellant's portion of land. He produced a letter from Dumisa Thwala marked "SN8".

[16] The 1st Appellant contended that a notarial lease was a limited real right but conceded that he did not have such a lease. He argued, however, that he had a real right to the land on which he had built his structures.

[17] Lastly, the 1st Appellant confirmed that Mr. Barreiro had approached him on several occasions to determine the basis of his occupation of the property he claimed to be his. The 1st Appellant stated that he had explained to him that the property was purchased by himself and his mother from Richard Dlamini and that their occupation was therefore lawful. He showed Mr. Barreiro a copy of the Sale Agreement.

[18] The learned judge in the court *a quo* allowed the application and granted all the orders sought by the Respondent.

[19] The Appellants have appealed to this court on seven grounds of appeal. The first ground is that the learned judge erred in law by upholding the application to eject the Appellants from the property, Portion 908 (a portion of portion 569) of Farm No.2. The second ground is that having found proven that there was a sale between the Appellants and the late Richard Dlamini, the learned judge should have given effect to that sale agreement as it complied with Section 31 of Act No. 8 of 1902.

[20] The Appellants' complaint on the third ground of appeal is that the learned judge erred and misdirected herself by determining the matter purely by focusing on a question of law and ignoring the following relevant factors:

- (a) That the Appellants concluded a sale of the property on 2nd January 2008, and
- (b) That the Respondent's predecessor, Electro Ltd, had bought the plot in August 2008 at, which time the Appellants were already in occupation of their portion, having erected a structure thereon in May 2007.

[21] The fourth ground of appeal states that the learned judge should have held that the sale to Electro Ltd was unlawful in so far as it sought to include the portion or remainder sold to and paid for by the Appellants.

[22] In the fifth ground, the Appellants argue that the judgment of the court *a quo* is erroneous in so far as it seeks to allow for contractual interferences by placing more emphasis on the provisions of Section 15 of the Deeds Registry Act, over section 31 of the Transfer Duty Act.

[23] The sixth ground of appeal states that the court *a quo* erred by not affording the Appellants an equitable remedy to allow for the subdivision to be carried out as intended by the late Richard Dlamini, so that the Appellants continue to keep their portion.

[24] The seventh ground of appeal states that the court *a quo* erred by enforcing the provision of Section 15 of the Deeds Registry Act in isolation of the existing factual background, instead of finding that the sale to Electro Limited and its successors in title was subject to the existing sale concluded between the Appellants and the late Dlamini.

[25] The Appellants filed an application for condonation of the late filing of the Heads of Arguments. The grounds upon which the application was based were that the matter was complex, that an attempt was made to engage Advocate Patrick Flyn from Johannesburg which failed due to financial constraints, that there was no prejudice caused to the Respondent who was in the same predicament, since he also filed his Heads of Argument late.

[26] At the hearing of the appeal, counsel for the Respondent did not oppose the application. He also sought the indulgence of the court to condone his late filing of the Heads of Arguments. The court allowed the application for condonation.

[27] On the first ground of appeal, counsel for the Appellants submitted that the learned judge *a quo* gave too much reliance on the fact that the Respondent was a holder of a Title Deed for the property in dispute. He

contended that the learned judge was misguided in that respect as there is no magic power contained in a Title Deed as it is open to challenge as to its validity. Counsel cited the case of ***Jeke (Pty) vs Solomon Nkabinde Civil Appeal Case No. 54/2013***, where Ramodibedi CJ stated;

“There is no magic power contained in a Deed of Transfer. Like any other document it is open to challenge as to its validity”.

[28] The Appellants submitted further that they entered into a valid contract of sale with the late Dlamini for a piece of land which falls between portion 908 and 1048, which was confirmed by the said Dlamini’s son and windows. They contended that it was, therefore, not within the Respondent’s rights to claim ownership of the whole portion disregarding the adjacent piece of land.

[29] With respect to the second ground of appeal. The Appellants argued that, having found that there was a sale between the Appellants and the late Mr. Dlamini, the learned judge should have given effect to the Sale Agreement as it complied with Section 31 of Act No. 8 of 1902, and not ordered the ejection of the Appellants from the property. They contended that the learned judge should have ordered compliance with the Transfer Duty Act as there was a valid Sale Agreement in place.

[30] In the third ground of appeal the Appellants submitted that the learned judge erred and misdirected herself by determining the matter purely by focusing on a question law and ignoring the relevant factors. Such factors include the fact the Appellants concluded a sale of the property on the 2nd January 2008 and the Respondent's predecessor, Electro Limited, had bought the plot in August 2008, at which time the Appellants were already in occupation of their portion having erected a structure thereon in May 2007.

[31] The Appellants further submitted that the learned judge *a quo* should have also considered that the Appellants took possession of the piece of land during the lifetime of the original owner Richard Dlamini who did not eject them from the piece of land, but advised the later purchasers of the adjacent portions of the Appellants piece of land.

[32] With regard to the fifth ground of appeal, the Appellants argued that the learned judge should have held that the sale to Electro Limited was unlawful in so far as it sought to include the portion or remainder sold to the Appellants. The Appellants submitted that where a sale is held unlawful, it should be set aside. They also submitted that Richard Dlamini did not have power to alienate the portion belonging to the Appellants as he no longer owned it because it was owned by the

Appellants. It was the Appellants' contention that the Respondent was now precluded from seeking to vindicate what it did not own. The Appellants relied on the decision of Mamba J in *Takudzwa Reck vs Thembayena Anastacia Dlamini (410/14) [2014] SZHC 177* when he stated;

“That the respondent was the registered owner of the property was certainly not conclusive or decisive of the issue”.

[33] The Appellants argued further that the judgment of the court a quo was erroneous in so far as it sought to allow interference with contracts by placing more emphasis on the provisions of Section 15 of the Deeds Registry Act over Section 31 of the Transfer Duty Act. It was the Appellants' submission that both provisions should be read together in order to arrive at a just and equitable decision. The Appellants pointed out that the Sale Agreement satisfied the requirements of Section 31 of the Transfer Duty Act, as it was in writing.

[34] On ground six, the Appellants contended that the court *a quo* erred by not affording the Appellant an equitable remedy to allow for the subdivision to be carried out as intended by the late Richard Dlamini, so that the Appellants continue to keep their portion. They submitted that the

interest of justice favoured that such subdivision be ordered to allow each party to continue to keep what it purchased and paid for.

[35] With regard to ground seven, the Appellants submitted that the court *a quo* erred in enforcing the provisioning Section 15 of the Deeds of Registry Act in isolation of the factual ground. It was the Appellants' contention that the court *a quo* should have found that the sale to Electro Limited and its successors in title was subject to existing sale concluded between the Appellants and the late Richard Dlamini which amounted to an encumbrance on the property.

[36] The Appellants further argued that if there is any defect in a sale agreement that affects the intention to transfer ownership of a thing, then ownership will not pass. They relied on the case of ***Legator Mckenna Inc. vs Shea 2010 (1) SA 35***, and ***The Commissioner of Customs and excise vs Randles brothers and Hudson Ltd 1941 AD 369***.

[37] The Appellants concluded their submissions by explaining how the doctrine of notice applied to this case. According to this doctrine, no one will be permitted to defeat for his own benefit another person's personal right envisaging the creation of real right by delivery or registration, if he knows of its existence.

[38] In the present case, the Appellants argued, the Respondent bought the property in 2012 yet the structure on the property had been there from 2007. They argued further that when a person buys a property he does not seek to register it first without ascertaining the boundaries, and that there was no way the Respondent's director could not have noticed the structures before registration.

[39] The Appellants submitted that a reasonable purchaser in the position of the Respondent would have enquired about the full extent of the measurements of the property, the existence of any structures within the property and an explanation for their existence, and whether the purchase price included the said structure. It was also submitted that the normal practice was that before purchase of immovable property, an evaluation would be undertaken, which would have included the Appellants' structure.

[40] It was the Appellants' contention that the Respondent, therefore, had the necessary notice about the existence of the structure and the previous owner, Electro was also aware, and that is why it never sought to assert a better title to the property than the Appellants.

[41] The Appellants pointed out that the allegations made about Mr. Cetin Olmez of Electro Limited, were not substantiated by affidavit to dispute the Appellants' assertion that Electro Limited had knowledge of the existence of the earlier sale to the Appellants, and therefore could not have sold what was not part of the property they purchased from Richard Dlamini. The sale to Electro Limited should have been subject to exclusion of the portion of the Appellants. Reference was made to the case of *McGregor V Jordan 1922 CPD page 308*.

[42] In conclusion, the Appellants submitted that the justice of the matter required that the sale to the Respondent or their predecessors be cancelled to the extent that such sale included the portion already sold to the Appellants. Reliance was placed on the case of *Cohen V Shires, McHattie and King 1882 SAR 41*.

[43] The Respondent submitted that as the validity of the Respondent's Deed of Transfer had not been challenged since the year 2012 when they became aware of it, the validity of the Deed of Transfer was not, therefore, in dispute. Furthermore, there were no conditions on the Deed limiting the right of the Respondents as required by Regulation 18 (a) of the Deeds Registry Regulations 1973.

[44] The Respondent contended that the Appellants did not have a lease agreement with either Electro (Pty) Ltd or the Respondent or even the late Richard Dlamini, to entitle them to stay on the Respondent's property.

[45] It was the submission of the Respondent that whatever rights Richard Dlamini had granted to the Appellants in 2007 and 2008, those rights were ignored and overridden by him when he sold the whole property to Electro Ltd. The Respondent argued that the property was sold and transferred to the Respondent without any reservations of any right of occupation or possession of any part of the property.

[46] The Respondent argued that a party is always entitled to claim an eviction of another only if he can prove that he is the owner of an immovable property, and that the Defendant was in possession of the property when the action was instituted. In support of this argument, the Respondent cited the following authorities: *Goridie Chrono (Pty) Ltd V MCC Contracts (Pty) Ltd 1993 (1) SA 77A*, *Concor Construction Cape (Pty) Ltd V Santam Bank 1993 (3) SA 930 (A)*, *Umbane (Pty) Limited V Sofi Dlamini and Three Others, Supreme Court Civil Case No. 13/2013*, *Joel Mavimbela & Others V Fohloza Zwane and Another, High Court Case No. 3028/2006*, *Chetty V Naido 1974 (3) SA 13 (A)* and *Silberg and Schoeman, the Law of Property 3rd Edition, page 274.*

[47] It was the contention of the Respondent that the Appellants had encroached on the north side of the Respondent's property without any lease agreement with the previous owner or the Respondent and had no right to occupy the property and therefore the Respondent was entitled to the eviction order.

[48] The Respondent submitted that the Appellants were not challenging the ownership of the Respondent and therefore the case is distinguishable from the case of *Jeke (Pty) v Solomon Nkabinde, Supreme Court Case (Supra)* where an application for ejection was refused on the basis that the defendant was challenging the transfer of the Applicant. In the present case, the Respondent contended, the Appellants did nothing to challenge the sale and transfer to the Respondent.

[49] The Respondent submitted further that the alleged sale agreement between the Appellants and Richard Dlamini, "SN1" was a nullity and a fraud as it did not disclose the exact property sold and the purchase price paid and in any case it did not confer a right of ownership to immovable property.

[50] The Respondent maintained that the Appellants have only a claim against the estate of late Richard Dlamini as some litigants have successfully

done. In this connection reference was made to the case of ***Vulindlela Dlamini N. O. and Others V Phumzile Simelane, Supreme Court Case No. 64/2013.***

[51] The Respondent submitted that since there was no application to set aside the transfer, nor was there a counter application to enforce the sale, the judge in the court *a quo* could not grant an order not sought by the Appellants. Reference was made to the case of ***The Commissioner of Correctional Services v Ntsetselelo Hlatshwako, Supreme Court Case No. 67/2009.***

[52] Lastly, the Respondent argued that the submission of the Appellants regarding the doctrine of notice was a new ground not raised in the court *a quo*. As no application for addition of a new ground had been made and filed, the court could not entertain this new ground of appeal.

[53] The main issue in this appeal is whether the Respondent as the registered owner of the property in dispute has the right to evict the Appellants from the said property which they purchased and occupied before the Respondent purchased and registered the same property. The Respondent argues that it has a superior title to the property without any incumbrances against the third parties and the whole world. On the other hand the

Appellants contend that they bought and occupied the portion of the property four years before the Respondent became the registered owner who had prior notice of their possession of the property.

[54] In the court *a quo* the learned judge determined the issue on the basis of the historical distinction between real rights and personal rights. The learned judge relied on the authority of **Silberberg, Law of Property (1975) Durban – Butterworths at page 39-40**, where the author states:

“Possessions, mortgages and servitude were real rights in Roman Law and introduced in the law of Holland. A lessee, however did not have a real right in Roman Law but only a personal right against the particular owner of the thing with whom he had entered into a contract of lease. If that owner transferred his right of ownership in the thing, his successor was, as a general rule (and even if he acquired the property with knowledge of the lease) entitled to evict the lessee as he was not bound by the latter’s contract with the previous owner” (my emphasis).

[55] The learned judge further quotes the author where he explains,

“In other words a contract imposes on one of the parties an obligation to transfer a real right in a thing, but the other party does not acquire a real right in it by virtue of his contractual right” (my emphasis).

[56] Commenting on the above statements by the author, the learned judge said:

“I understand the learned author to be saying a contract of sale for instance, as in casu, is not sufficient to prove ownership (real right). In other words where parties conclude a contract of sale in respect of immovable, the purchaser does not by mere conclusion of the contract acquire a real right. His right over the thing remains for all intent and purpose personal. For the personal right to be transformed into a real right the purchaser must do something further. What is this something further? In our jurisdiction, the answer lies in section 15 of the Deeds Registry Act No. 37 of 1968 (the Act).

“How real rights should be transferred

15. Save as otherwise provided in this Act or any other law the ownership of land may be conveyed from one person to another only by means of a Deed of Transfer executed or

attested by the Registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the Registrar” (my emphasis).

[57] The learned judge then went on to observe that having entered into a contract of sale, the purchaser acquired a personal right over the thing. The purchaser must approach the Registrar of Deeds office to register the said property into its name. It is upon registration that the personal right is converted into real right that can be enforced against the whole world by virtue of sui generis and this includes other purchasers who were there before. The learned judge went on to hold that a personal right could not be enforced beyond the party who was part of the contract of sale, being the seller, and the position does not change irrespective of whether the latter purchaser and transferor was aware of the presence of other prior buyers.

[58] The learned judge held that applying the above position of the law to the present case, the Respondent having entered into a contract of sale with Electro Limited, it complied with the provisions of Section 15 of the Act as evidenced by the title deed in its name, but the same could not be said of the Appellants.

[59] The learned judge concluded that the Respondent had a clear right over the property and the Appellants' cause of action lay not against the Respondent, but the estate of the late Richard Dlamini.

[60] The main complaint by the Appellants is that the learned judge put too much reliance on the rights of a registered owner and did not give due consideration to the rights of a person who had a prior contract on the property with the knowledge of the subsequent purchaser or registered owner. The Appellants produced evidence of the sale agreement which was not challenged by the Respondent by any affidavit evidence. They built a structure on the property in 2007 in which they have been operating a commercial business. The structures were conspicuous for anyone to notice them, Electro Limited to whom Richard Dlamini first sold the property was aware of the Appellant's contract of sale with Richard Dlamini, and did not disturb the Appellants' occupation.

[61] The Respondent claimed that it came to know of the Appellants' occupation of their portion of the property after it bought the property from Electro Limited and registered the property in its name. The Respondent stated that after discovering that the Appellants were in possession of part of the property it bought, it asked the Appellants

whether they had a lease on the property but they replied that they had purchased the property in dispute from Richard Dlamini. The Respondent advised them to vacate the property or else they would be evicted.

[62] The Appellants relied on the doctrine of notice for the proposition that the Respondent was aware of their interest and is therefore not justified in evicting them from the land. This argument raises the question whether a title of a registered owner can be impeached on any grounds, or it is unimpeachable or indefeasible.

[63] It is well settled that there is no magic power in a deed of transfer. This was stated in the case of *Jeke (Pty) Ltd vs Samuel Solomon Nkabinde (54/2013) [20/2013] SZSC 53* by Ramodibedi CJ as follows:

“Finally I should mention that Mr. L. R. Mamba for the Applicant spent considerable time in his argument in this court advancing the submission that simply because the Applicant was the registered owner of the property in terms of the Deed of Transfer following the sale in question as stated above, then on that basis alone the Applicant’s title is unassailable. This submission is in my view completely untenable. There is no magic power contained in a Deed of

*Transfer. Like any document it is open to challenge as to its validity. In casu, it is specifically challenged on various grounds set out above. The defence raised is that it is in fact a “nullity” due to the fact, **inter alia**, that the deceased’s property was sold contrary to the Administration of Estates Act” (emphasis mine).*

[64] It seems to me, therefore, that a transfer deed can be challenged on a number of grounds including illegality and fraud, which would vitiate any contract or deed.

[65] In the present case, the Appellants have challenged the transfer deed in favour of the Respondent on the ground that the respondent had notice of their prior occupation or possession of the property in question, and therefore intended to deprive them of their right to occupy the property. The Respondent is not correct to argue that the Appellants have not challenged its transfer or ownership of the property they occupy when in fact they challenged its ownership of the property in the application in the court *a quo* and in this appeal.

[66] According to the doctrine of notice, a party is not allowed to defeat another person's potential right for his own benefit, if he knows of its existence. This doctrine is well explained in Silberberg and Schoeman, The 2nd Edition (1983) by J. Schoeman, (Durban, Butterworth) the Law of Property (Supra) at page 65 as follows:

*“The general principle nemo ex suo delicto meliorem suam condilorem facere protest operates in the law of property to the extent to which it generous every sphere of the law. This means **inter alia** that nobody will be permitted to defeat another person's potential real right for his own individual benefit if he knows of its existence”.*

[67] The learned authors in the same book go on to give an illustration based on successive sales, at page 66, quoting the case of **McGregor V Jordaan 1921 CPD 301 at page 308**, where Kotze JP, remarked, that it is:

“a clear rule of the law that where a vendor sells a thing to A and then subsequently sell to B, and gives him delivery or transfer thereof, B having knowledge of the previous sale to A, the latter is entitled to claim a cancellation of the delivery or transfer to B, upon the ground that the vendor and the second purchaser with

notice are considered to have acted in fraud of the rights of the first purchaser”.

[68] In *Colien v Shires McHattie and King 1882 TS 41* the transfer to the second purchaser who had knowledge of the first purchaser was cancelled on the ground that their actions amounted to a species of fraud.

[69] Fraud is defined in Blacks Law Dictionary, 6th Edition, at page 660 as:

“An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right”.

It is also defined as:

“A false representation of a matter of fact whether by words or by conduct, by false misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act to his injury”.

[70] In my view, therefore fraud implies some act of dishonesty, double dealing or sharp practice. In land cases fraud means actual fraud or dishonesty which must be traced to in the transferee.

[71] In the present case, the Respondent knew or had notice of the unregistered interest of the Appellants. The interest was registrable.

It is inconceivable that the Respondent did not inspect or survey the property before it purchased and registered it in its name. The structures of the Appellants on the property were conspicuous. It is not in dispute that the previous registered owners of the property were aware of the Appellants' lawful occupation and did not disturb their peaceful occupation. In these circumstances, the Respondent cannot claim to be innocent or *bona fide* purchasers without notice. The Respondent cannot hide behind its registered deed to deprive the Appellants of their unregistered interest which is capable of being registered as a real interest. The conduct of the Respondent amounted to fraud.

[72] Therefore the Respondent had no right to evict the Appellants and the learned judge in the court a quo erred in ordering their eviction. It was not correct in my view, to hold that the Appellants only have a cause of action against the estate of the late Richard Dlamini. The Respondent should have taken precautions to ensure that the property it was purchasing and transferring in its name was free from adverse claims or incumbrances, like the one held by the Appellants.

[73] It is pertinent at this point to re-emphasise the point that the Appellants have been in peaceful possession of the property since 2007. They should not be lightly deprived of the property they have been lawfully

occupying. In the Law of Property (Supra) at page 135, the learned authors caution;

“In final analysis the protection of possession is part of protection of peace in a community which could not be maintained if every person who asserts that he has a real right to a particular thing which is in another person’s possession would be entitled to resort to self-help. Therefore a possessor who has been deprived or “despoiled” of his possession by unlawful means (whether by force, fraud, stealth or other means) may apply to court by mandement van spoilie, for an order directing the spoliator to return the thing immediately. In such proceedings the court will refuse to consider any claim by the spoliator that he has a better title to the possession of the thing in question”.

[74] In the present case, the Respondent was not entitled to obtain a transfer deed in respect of the property occupied by the Appellants as it had notice of their prior unregistered interest. The Appellants are entitled to have the transfer deed in respect of their portion of the property cancelled and to have the property registered in their names, after complying with the law.

[75] In the result, this appeal is allowed with costs. The orders of the court *a quo* are set aside and replaced with the following order:-

“The application is dismissed with costs”.

DR B. J. ODOKI
JUSTICE OF APPEAL

I Agree

M. M. RAMODIBEDI
CHIEF JUSTICE

I Agree

M. C. B. MAPHALALA
JUSTICE OF APPEAL

For the Appellant: Mr. M. P. Simelane

For the Respondent: Mr. N. D. Jele