IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No. 17/2015

In the matter between:

EFFIE SONYA HENWOOD N. O	**1st Appellant**
ESTATE LATE ISRAEL CLARENCE HENWOOD	**2nd Appellant**

And

MONICA MATHEWS N. O	**1st Respondent**
PIUS HENWOOD N. O	**2nd Respondent**

Neutral citation: Effie Sonya Henwood N.O Estate Late Israel Clarence v Monica Matthews N.O and Pius Henwood *N.O (17/2015)* [2015] *SZSC 05 (29 July 2015)*

Coram: **S.B. MAPHALALA AJA, M.D.MAMBA AJA and R.CLOETE AJA**

Heard: **10 July 2015**

Delivered: **29 July 2015**

Summary: *Sale Agreement – Requirements of Section 31 of the Transfer Duty Act of 8 of 1902 not met – Estates – Appointment of Executor takes effect on the dates on which he receives the letters of Administration from the Master.*

JUDGMENT

CLOETE AJA

PRELIMINARY

[1] Motion proceedings were instituted by the Respondents in High Court Case No. 3167/01 and either by agreement or by Order of the High Court, which is not relevant here, the matter was instituted *de novo* in High Court Case No. 786/2013 and it is the Judgement in the latter matter which is being appealed against.

FACTS

[2] The Plaintiffs (Respondents herein) instituted proceedings in Case No. 786/2013 and prayed for an Order in the following terms:

a) Setting aside the Deed of Sale purported to have been entered into between the Estate of the late Richard Clarence Henwood and the 2nd Appellant on the grounds that it was invalid at Law;

b) Alternatively, cancelling and setting aside the Deed of Sale between the Estate of the late Richard Clarence Henwood and the 2nd Appellant for reasons that the purchase price was not paid in full;

c) Setting aside the Power of Attorney and Substitution purported to have been signed by Eric Martin Carlston to pass transfer of the property;

d) Setting aside the sale and possible transfer of the property between the Estate of the late Richard Clarence Henwood and the 2nd Appellant as *null and void ab initio* with no force and effect;

e) Costs of suit.

[3] The matter proceeded to trial and oral evidence was led by both parties.

[4] A brief summary of the allegations made by or on behalf of the Respondents in the pleadings and in the oral evidence is as follows;

a) The Executor Dative in the Estate Late Richard Clarence Henwood (hereafter Estate Richard) was Eric Martin Carlston appointed on 10 November 1975 in terms of the Certificate set out at Page 15 of Bundle 3 and that it was disputed that the document purporting to be a Deed of Sale between Carlston in his representative capacity for Estate Richard and the 2nd Appellant was valid and was not a complete Deed of Sale.

b) That for a number of reasons which need not be fully canvassed here, but mostly on the basis that Carlston was no longer resident in Swaziland, the Master of the High Court declared the position of Executive Dative vacant in terms of a letter to various parties dated 20 December 2000 and referred to on page 23 of Bundle 1.

c) That at a meeting of various heirs in the Estate Richard held at the office of the Master on 18 January 2000 referred to at page 24 of Bundle 1, the Respondents were nominated and according to them appointed as joint Executors from that date.

d) That the purported sale of the property belonging to the Estate Richard which was set out at paragraph 15 of the Particulars of Claim in Case No. 786/2013 was invalid (the actual description of the property is not in dispute and nothing turns on that for these purposes) because the solitary one page document produced in all the proceedings in various places but especially at page 4 of the Bundle of Documents filed by the Respondents Attorneys (Purported Deed of Sale) was incomplete and did not comply with the provisions of the Section 31 of the Transfer Duty Act 8 of 1902 which clearly 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 their agents duly authorised in writing"*.

e) That the purchase price had in any event not been paid in full.

f) Carlston had not been given a lawful mandate by the heirs in Estate Richard to sell the property concerned.

g) That in any event Carlston had no lawful authority to sign any documentation to give effect to the disputed transaction as he had already been replaced as Executor by the Respondents by the Master on 18 January 2001.

[5] A brief summary of the allegations made by or on behalf of the Appellants in the pleadings and in the oral evidence is as follows;

a) That there was a valid and binding Agreement of sale between Carlston on behalf of Estate Richard and the 2nd Appellant and that the Purported Deed of Sale represented the Agreement.

b) That Carlston was at all relevant times the Executor Dative of Estate Richard and was never legally removed from that position.

c) That the Respondents were unlawfully appointed as Executors by the Master of the High Court.

d) That Carlston was accordingly entitled to sign the Power of Attorney to pass transfer on 27 September 2001 being the document referred to at page 5 of Bundle 1 of the documents filed.

e) That before the purported sale most of the beneficiaries in Estate Richard consented to the sale.

FINDINGS OF THE COURT A QUO

[6] The Learned Judge in the Court *a quo* heard the evidence and dealt in some detail with the evidence in the Judgment handed down dated 20 March 2015. *Inter alia* and the Court found that;

a) The Purported Deed of Sale was void *ab initio*.

b) That the Respondents were appointed as Executors by the Master on 20 December 2000 despite the date of the Letters of Administration being dated 10 September 2002 on the basis that the Letters of

Administration purportedly contained words which supported that view which we will deal with below.

c) That it was not necessary for the Master (or the Court) to remove Carlston from his position as he had left Swaziland and as such was disqualified from holding such office any longer.

d) That there was doubt as to whether the purchase price was in any event paid even if, which it was not, it was found that the Purported Deed of Sale was valid.

[7] Accordingly the Court *a quo* granted the following;

a) The purported Deed of Sale between Israel Clarence Henwood and Estate late Richard Clarence Henwood is hereby set aside;

b) The Power of Attorney and Substitution purportedly signed by Mr. Eric Carlston to pass transfer of Portion 2 Farm 929 to Estate late Israel Clarence Henwood is hereby set aside;

c) The sale and possible transfer of Portion 2 Farm 929 between Estate late Israel Clarence Henwood and Estate late Richard Clarence Henwood is hereby declared *null and void ab initio*;

d) 1st and 2nd Defendants are ordered to pay costs of suit including costs under Case No. 3167/2001.

THE APPOINTMENT OF THE RESPONDENTS BY THE MASTER

[8] The Court *a quo* held that the Respondents were lawfully appointed by the Master of the High Court with effect from 18 January 2001 (being the date of the meeting of some of the heirs) the minutes of which appear at Annexure 'G' in Bundle 1, despite the fact that the Letters of Administration were dated 10 September 2002.

[9] The Court *a quo* clearly erred in that regard in that in the matter of **Klempman, N.O. v. Law Union and Rock Insurance Co. Ltd, SALR 1957 (1) at page 506 where the Judge stated that** *"An Executor … has no locus standi as a representative of an Estate unless and until he or she actually receives letters of administration in terms of … the Act …"*. Incidentally the Appellants also referred the Court to this decision.

[10] Also refer to **LAWSA Volume 31 at paragraph 412 on page 268** where it is stated that *"An Executor's authority to act commences on the date he receives letters of Executorship from the Master"* and refers to the **Klempman** matter referred to *supra*.

[11] Accordingly, insofar as it has any relevance to this action, that finding of the Court *a quo* is corrected.

THE REMOVAL OF CARLSTON

[12] The Court *a quo* found that Carlston has been lawfully removed from his position as Executor Dative in the Estate Richard by the Master of the High Court on the grounds that Carlston had *inter alia* left Swaziland and found

on the evidence (without having heard any evidence on behalf of Carlston) that he was no longer fit to hold office and in any event that Carlston became *functus officio* as he had filed his first and final Liquidation and Distribution account.

[13] With respect, firstly, the Master has no right at law to remove a person as an Executor and this right extends only to a Court in terms of the provisions of Sections 28 and 84 of the Administration of Estates Act 28 of 1902 which provisions are clear and unequivocal.

[14] In addition the Court *a quo* erred in finding that Carlston was *functus officio* as an Executor is only entitled to obtain his discharge from the Master of the High Court upon completion to the satisfaction of the Master of the Liquidation and Distribution of a deceased Estate. See **Collie v. The Master 1973 (3) SA 623 – A**.

PAYMENT OF THE PURCHASE PRICE

[15] This issue was dealt with at some length by the Court *a quo* but given what follows hereunder, this in the end result has no relevance save and except

that the Appellants would have the right to prosecute a claim for restitution given the circumstances.

THE PURPORTED DEED OF SALE

[16] This document appears in the various Bundles on various occasions and specially as Exhibit D1 in Bundle 1. The document has appeared in this form throughout and it remains a mystery where the remainder of the document is.

[17] It is not necessary to once again reproduce the document in its entirety suffice it to say that it is clearly a copy of the first page of a document which clearly consisted of two or more pages.

[18] The document is undated and reflects what appears to be initials of various parties. In the evidence before the Court *a quo* there was an attempt to identify the various initials specially that of Carlston, which with respect was not convincing or conclusive and not corroborated by any other evidence.

[19] At the foot of the bottom of the document there is what is known as a "catchword" denoting **3. / Transfer …..** which is common practice in the Deeds Registry which denotes the first words appearing at the next page of any document lodged in the Registry and such catchwords accordingly appear at the bottom of each and every page of any such agreement used in the Deeds Registry relating to immovable property. Mr Lukhele on behalf of the Appellant conceded that this was normal practice. On that basis alone it is clear to this Court that the document is incomplete and consisted of at least another page and at best the document can be described as a copy of the first page of a purported agreement.

[20] Section 31 of the Transfer Duty Act 8 of 1902 states 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 their agents duly authorised in writing"*.

[21] Mr Lukhele for the Appellant urged the Court to accept that the Purported Deed of Sale contained all the necessary requirements set out in Section 31 of the Transfer Duty Act 8 of 1902 above and added that Carlston had in addition lawfully signed a Power of Attorney to pass transfer being Exhibit

'H' on page 5 of Bundle 1 and Carlston had attested to an Affidavit in the form of the Declaration by Seller found at page 108 of Bundle 2 which indicated that there was a valid transaction and that the additional documentation proved it.

[22] **R. H. Christie The Law of Contract 4th Edition** deals with the similar provision in South African law from page 130 onwards. With reference to **Jackson v. Weilbach's Executrix 1907 TS 212** he states that *"But the Declarations of Purchaser and Seller made for transfer duty purposes not being intended to contain a contract, will not suffice, nor for the same reason … a sworn Declaration by the Seller …".*

[23] In the case of **Soar v. Mabuza 1982-1986 (1) SLR 1** the Chief Justice Nathan had this to say *"… this was a contract for the sale of immovable property which has by Statute to be in writing. It is well-settled law that extrinsic evidence whether oral or contained in writings such as preliminary drafts or correspondence instruments or the like is inadmissible to add to, vary, modify or contradict a written instrument … To permit the leading of evidence in support of the representation pleaded by the Defendant would be to contradict the very terms of the written agreement*

which includes the voetstoots clause. It would also adding to and varying the written agreement…".

[24] In **Johnston v. Leal, 1980 (3) SA 927 (A)** (referred to in the High Court of Swaziland Judgment in Case No. 1424/2012 between Phumzile Patience Simelane v. Vulindlela Dlamini N. O. and Others, Corbett JA at 937-9 said *"It is not necessary that the terms of the contract be all contained in one document, but, if there are more than one document, these documents, read together, must fully record the contract (see Coronel v. Kaufman (supra) at 209; Meyer v. Kirner (supra) at 97E-F). The material terms of the contract are not confined to those prescribing the essentialia of a contract of sale, viz the parties to the contract, the merx, and the pretium, but include in addition, all other material terms (see King v. Potgieter (supra) at 14C, Meyer v. Kirner (supra) at 97-9)……. Generally speaking these terms – and especially the essentialia – must be set forth with sufficient accuracy and particularity to enable the identity of the parties, the amount of the purchase price and the identity of the subject matter of the contract, as also the force and effect of other material terms of the contract, to be ascertained without recourse to evidence of an oral consensus between the parties (see Van Wyk v. Rottcher's Saw Mills (Pty) Limited 1948 (1) SA 983 A.*

[25] Mr Lukhele referred the Court to the Judgment of Hannah in the matter between **Landage Investment (Pty) Limited v. Reed Barry SLR 1987 – 1995 (1) SLR 297.** With respect that Judgment merely confirms that the provisions of Section 31 of the Transfer Duty Act 8 of 1902 have to be abided by but found as in other Judgments referred to by **Christie** that a valid Deed of Sale could be contained in two documents which when read together must constitute the contract, must state what the terms are and must contain the signatures of the parties and accordingly that does not take the matter any further.

[26] The Court can only speculate as to what the second and possible further pages of the Purported Deed of Sale contained but as pointed out by Mr Masuku in his argument, it did not contain normal and usual provisions which appear in documents of this nature.

[27] Under those circumstances we find that the undated one page document referred to as the Purported Deed of Sale cannot and does not comply with the provisions of Section 31 of the Transfer Duty Act 8 of 1902 in that it is clearly incomplete and cannot be said to be a full and binding agreement for the sale of immovable property.

[28] Accordingly, the Appeal of the Appellants must fail.

[29] As regards costs, the Court *a quo* ordered the Appellants to pay costs in both Case No. 3167/2001 and 786/2013. Mr Masuku conceded that the Respondents had not asked for costs in Case No. 3167/2001 and as such those costs were awarded in error by the Court *a quo*.

[30] At the hearing of this matter the Attorneys for both parties agreed that it would be equitable for the costs of this Appeal to be borne by the Estate Richard Clarence Henwood.

[31] Accordingly, the Order made by this Court is that;

a) The Appeal of the Appellants is dismissed;

b) The costs of the Appeal are to be borne by Estate late Richard Clarence Henwood.

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CLOETE AJA

I agree _____

MAPHALALA AJA

I agree _____

MAMBA AJA

For the Appellants **:** A. Lukhele

For the Respondents **:** S. Masuku