**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE** **CASE NO 10/2018**

In the matter between:

**Effie Sonya Henwood N.O.** **1st Applicant**

**Estate Late Israel Clarence Henwood** **2nd Applicant**

AND

**Pius Henwood N.O.** **Respondent**

| | |
|---|---|
| **Neutral Citation:** | Effie Sonya Henwood N.O. and Another v Pius Henwood N.O. and (10/2018) [2018] SZSC 64 (30 November, 2018) |
| **Coram:** | MCB MAPHALALA CJ, B J ODOKI JA, J CURRIE AJA, S J K MATSEBULA AJA AND M J MANZINI AJA |
| **Heard:** | 18 August 2018 |
| **Delivered:** | 30th November, 2018 |

***SUMMARY***

***Civil procedure – review application in terms of section 148 (2) of the Constitution – Supreme Court alleged to have committed patent error – requirements of section 31 of the Transfer Duty Act 1902 – whether document (contract) with missing pages satisfies section 31 – proper approach in determining whether requirements of section 31 are satisfied – whether approach adopted by the court in dealing with appeal constituted patent error- Supreme Court dismissing appeal without proper analysis of document (contract) – application for review upheld.***

## JUDGMENT

**JUSTICE MJ MANZINI AJA**

**Introduction**

[1] This is an application brought in terms of Section 148 (2) of the Constitution of the Kingdom of Eswatini for the review of a decision of this Court handed down on the 29th July, 2015.

[2] The first Applicant is the Executrix in the estate of the late Israel Clarence Henwood. She is a widow to the deceased. The estate itself has been cited as the second Applicant.

[3] The Respondent is the Executor in the estate of the late Richard Henwood.

[4] The late Israel Clarence Henwood was a son to the late Richard Henwood.

[5] In terms of the Notice of Motion the Applicants prayed for the following relief:

1. **Condoning the late filing of this application.**
2. **Granting an Order reviewing and setting aside of the judgment of this Honourable Court in Appeal Case No. 17/2015 granted by this Honourable Court on the 29th July 2015.**
3. **Granting an Order that the property known as:**

   **CERTAIN: Portion 2 of Farm 926 situate in the Lubombo District, Swaziland**

   **MEASURING: 774, 7774 Hectares**

   **Which was purchased by the Estate of the Late Israel Clarence Henwood and that such property transferred into the name of the Estate Late Clarence Henwood.**
4. **Granting cost of suit.**
5. **Granting any further and/or alternative relief that this Honourable Court may deem fit.**

[6] The application is opposed on a number of grounds, which will be dealt with in later paragraphs of this judgment.

[7] The grounds for the review have not been elaborately stated, and can only be gleaned from paragraph 8 of the affidavit filed in support of the application where the Applicant deposed as follows:

*"I state that I have good and valid prospects of success in the review for the following reasons;*

7.1 *The Supreme Court erred in finding that the Provisions of Section 31 of the Transfer duty Act had not been satisfied by virtue of the fact that the Deed of Sale was contained in one page document;*

7.2 *The Supreme Court erred in finding that the one page document did not constitute a valid Deed of Sale;*

7.3 *The Supreme Court erred in dismissing the appeal solely on the reasons stated in its judgment.*

[8] The intervening period between the date of delivery of the judgment on the 29th July 2015, and the launch of the review proceedings is approximately thirty two (32) months. The reasons for the delay, coupled with a prayer for condonation, are set out in the founding affidavit.

[9] The Respondent initially took issue with the delay in launching the review proceedings, but this point was not pursued, as it was agreed between counsel for the parties and the court that condonation of all pleadings filed out of time would be granted, enabling the determination of the application on the merits as it were.

**Summary of the facts relevant to review proceedings**

[10] This is a summary of the facts as are relevant to the review proceedings:

10.1 By way of Combined Summons the Respondent instituted legal proceedings before the High Court seeking the following relief:

10.1.1 Setting aside the deed of sale purported to have been signed between the estate of the late Richard Clarence Henwood and the 2nd Defendant, (as meaning the late Israel Clarence Henwood);

10.1.2 Alternatively, cancelling and setting aside the deed of sale between the estate of the late Richard Clarence Henwood and the 2nd Defendant for reasons that the purchase price was not paid in full;

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

10.1.4 Setting aside the sale and possible transfer of the property between the estate of the late Richard Clarence Henwood and the 2nd Defendant as *null and void ab initio* with no force and effect.

10.2 The Respondent (as Plaintiff) averred in its Particulars of Claim that:-

10.2.1 That there is no lawful and valid sale of the above mentioned property, between the estate of the late Richard Clarence Henwood and the 2nd Defendant (Israel Clarence Henwood) for reasons that there is no valid and complete deed of sale between the two parties;

10.2.2 That there is no lawful and valid sale of the above mentioned property between the estate of the late Richard Clarence Henwood and 2nd Defendant for reasons that the purchase price was not paid in full.

10.2.3 That there was no lawful and valid mandate purported to have been given by the heirs to Eric Martin Carlston to sell and transfer the property to the 2nd Defendant;

10.2.4 That there was no lawful and valid authority purported to have been granted to Eric Martin Carlson to give or sign the Power of Attorney and Substitution to Pass Transfer of the property to the 2nd Defendant.

10.2.5 Alternative to the above, the Respondent prayed that in the event of the Court finding that there was a valid and complete deed of sale, the Defendants were in breach of the deed of sale for the reasons that they had failed to pay the full purchase price in that E10 000 (ten thousand emalangeni) remained outstanding despite demand, this entitling cancellation of the same.

10.3 In their Plea, the Applicants (as Defendants) pleaded that an agreement of sale was concluded between the estate of the late Richard Clarence Henwood and the late Israel Clarence Henwood, and annexed thereto a document, (annexure

"D1"and/or "D2"). They alleged that this document was proof of compliance with section 31 of the Transfer Duty Act. The contents of this document will be dealt with in detail in forthcoming paragraphs of this judgment. The Applicant further pleaded that:

10.3.1 The written consent of all and/or most of the beneficiaries of the estate of the late Richard Clarence Henwood was obtained;

10.3.2 The same was valid, binding and of full force and effect, with the purchase price having been fully paid and/or secured;

10.3.3 The said Eric Martin Carlston had a valid mandate to effect the sale and was a competent and valid authority to do so;

10.4 The Applicants prayed that the claim be dismissed with costs, coupled with an order directing that the Respondents honour the sale agreement and transfer the property to the estate of the late Israel Clarence Henwood.

10.5 The High Court heard the full evidence of the parties, and, in its judgment handed down on the 20th March, 2015 made the following Order:

10.5.1 The purported deed of sale between Israel Clarence Henwood and estate late Richard Clarence Henwood is hereby set aside;

10.5.2 The Power of Attorney and Substitution purportedly signed by Mr Eric Carlston to pass

transfer of Portion 2 of Farm 929 to estate late Israel Clarence Henwood is hereby set aside;

10.5.3 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;* and

10.5.4 That 2st and 2nd Defendants are ordered to pay costs of suit including cost under Case No 3167/2001;

10.6 Dissatisfied with the judgment of the High Court, the Applicant filed an appeal to this Court on the following grounds:

10.6.1 The Court *a quo* erred in fact and in law in finding that the deed of sale between Israel Henwood and Richard Clarence Henwood was void and was liable to be set aside;

10.6.2 The Court *a quo* erred in fact and in law in finding that the sale and possible transfer of Portion 2 Farm 929 between the estate of the late Israel Clarence Henwood was void *ab initio*;

10.6.3 The Court *a quo* erred in fact and in law in finding that Eric Martin Carlston was not entitled to sign all documents to pass transfer of Portion 2, Farm 929 to the Estate of the late Richard Clarence Henwood.

10.6.4 The Court *a quo* erred in fact and in law in finding for the Appellant's in Court No. 3167/2001 and 786/2013; and

10.6.5 The Court *a quo* erred in fact and in law in finding that the Appellant's incur the costs of suit in cases no. 786/2013 and 2167/2001.

10.7 This Court, per Cloete AJA, as he then was, found that the High Court erred in finding that Eric Martin Carlston was *functus officio* when he signed the transfer documents, as at that point in time he had not been removed by that Court in terms of the Administration of Estates Act, 1902. The Learned Judge, however, dismissed the appeal with respect to the first and second grounds, and ordered that the costs of the appeal be borne by the estate of the Late Richard Clarence Henwood. This is the Order which is the subject matter of the present review proceedings.

**Grounds for the review and submissions by the parties**

[11] The Applicant alleged in its Replying Affidavit that *"an patent (sic) error and unusual element"* manifested itself in that the court *"erred in finding that provisions of section 31 of the Transfer Duty Act have not been satisfied by virtue of the fact that the Deed of Sale was contained in a one page document and further held that one page document did not constitute a valid Deed of Sale."* Although inelegantly stated, the Applicant's case is that the Court committed a patent error.

[12] In the Heads of Argument the Applicant directed its focus at paragraph 27 of the judgment under review, where this Court held:

"*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 full and binding agreement for the sale of immovable property."*

[13] The Applicant submitted that although it is common cause that only one page of the deed of sale served as an exhibit before the High Court, that one page contained all the essentials necessary to constitute a contract for the sale of immovable property, namely:

14.1 The name of the seller and the name of the purchaser;

14.2 A full description of the property in question;

14.3 The selling price of the property in question; and

14.4 How payment of selling price was to be effected.

[14] It was further contended that the deed of sale was in writing and had been signed by the parties thereto, and that no evidence had been led to the effect that the signatures placed on the deed of sale were not what they purported to be, that is, the signatures of the seller and the purchaser or of their duly authorised representatives. It was submitted that Eric Martin Carlston was duly authorised to sell the property as executor in the estate of the late Richard Clarence Henwood, as he had been already appointed on the 14th February 1975.

[15] The first and second Applicants submitted further that none of the parties to the litigation placed any reliance on a clause not found on that one page of the deed of sale. Put differently, that the fact that there were missing pages was not fatal to the Applicant's cause.

[16] On the other hand, the Respondent submitted that a review application in terms of section 148 of the Constitution cannot lie merely because a litigant is dissatisfied with the result of an appeal. The Respondent alleged that the Founding Affidavit in support of the application for review did not set out the grounds on which it is premised, and that these were merely brought up in the Heads of Argument. It was further submitted that the Applicants failed to set out any facts warranting a re-consideration of the matter, nor were there any exceptional circumstances which warranted the Court's intervention.

[17] The Respondent contended that the Court's finding that the deed of sale was not valid because it was incomplete for lack of compliance with Section 31 of the Transfer Duty Act was perfect. The Respondent submitted that there was no evidence supporting that the deed of sale was ever signed in its complete form, and that it being a one page document, it did not comply with the requirements of the Act. The argument went further to say that it was never established on a balance of probabilities at the trial that there was either a complete deed of sale for the purported sale transaction. It is contended that only a complete deed of sale brought to the fore would warrant or persuade the Court otherwise.

[18] In his oral address counsel for the Respondent submitted that the property description in the one page document was insufficient, and that this on its own constituted a ground for declaring that there was non-compliance with Section 31.

**Relevant applicable legal principles**

[19] The requirements of Section 148 (2) of the Constitution have been judicially determined in a number of cases that have come before this Court, notably ***President Street Properties (Pty) Ltd vs Maxwell Uchechukwu and 4 Others (11/2014) [2015] SZSC 11 (29th July, 2015; Swaziland Revenue Authority vs Impunzi Wholesalers (Pty) Ltd (06/2015) [2015] SZSC 06 (9th December 2015); African Echo (Pty) Ltd t/a Times of Swaziland and Others vs Inkhosatana Gelane Simelane (77/2013) [2016] SZSC 20 (30th June 2016); VMB Investments (Pty) Ltd vs Boy Nyembe and Another (22/2014) [2016] SZSC 60 (30th June 2016)***.

[20] In the ***President Street Properties (Pty) Ltd*** case this Court stated the following:

> *"In its appellate jurisdiction the role of this Supreme Court is to prevent injustice arising from the normal operation of the adjudicative system; and in its newly endowed review jurisdiction, this court has the purpose of preventing or ameliorating injustice arising from the operation of the rules regulating finality in litigation whether or not attributable to its own adjudication as a Supreme Court. Either way, the ultimate purpose and role of this court is to avoid in practical situations gross injustice to litigants*

*in exceptional circumstances beyond ordinary adjudicative contemplation. The exceptional jurisdiction must be properly employed, be conductive to and productive of higher sense and degree or quality of justice. Thus, faced with a situation of manifest injustice irremediable by normal court processes, this court cannot sit back or rest on its laurels and disclaim all responsibility on the argument that it is functus officio or the matter is res judicata, or that finality in litigation stops it from further intervention. Surely the quest for superior justice among fallible beings is a never ending pursuit for our courts or justice, in particular, the apex court with the advantage of being the court of last resort."*

[21] After citing authorities from various jurisdictions, Dlamini AJA, as he then was, identified some of the conditions which might justify review as follows:

*"From the above authorities some of the situations already identified as calling for judicial intervention are exceptional circumstances, fraud, patent error, bias, presence of some most unusual element, new facts, significant injustice, or absence of effective remedy."*

[22] Thus, it is open to a litigant to approach this Court and apply for the review of its own decision on any of the grounds listed above. I understand the judgment to say that *"exceptional circumstances"* is but one *"of the grounds upon which a review can be sought and granted where the facts warrant"*.

[23] In *casu*, the Applicant relies on a patent error, at least as far as the affidavits filed of record are concerned. During oral argument counsel for the Applicant made reference to other "facts" which do not appear in the affidavits, and are only set out in the Heads of Argument, and which he submitted constituted "exceptional circumstances." Counsel for the Respondent correctly pointed out that a litigant cannot raise new facts in his/her Heads of Argument which have not been canvassed in the founding affidavit, or at least in reply. Where a litigant relies on "exceptional circumstances" as a ground for review, these must be clearly set out in the founding papers to enable the other party to put up facts in opposition or counter argument. Raising new facts in the Heads of Argument is clearly unfair to the opposing party, as it may not have had an opportunity to challenge or rebut the new facts. As a result, the Court will ignore the new "facts" and confine itself to the grounds canvassed in the affidavits.

[24] Now turning to deal with the argument that there is a patent error in the judgment of this Court. The thrust of the Applicant's argument, as I understand it, is that the Court dismissed the appeal simply on the basis that the document serving before it was "clearly incomplete" and could not be said to "be a full and binding agreement for the sale of immovable property," without first analysing whether the contents thereof were sufficient evidence of a contract in writing, as per the requirements of Section 31 of the Transfer Duty Act.

[25] The approach adopted by this Court in dealing with the appeal raises a fundamental question: Is a contract, which is required by law to be in

writing, unenforceable (or of no force or effect) simply on the basis that it is incomplete in the sense that there is a page or two missing? If the answer to this question is in the affirmative, the enquiry ends there, and there is no basis on which this Court can set aside the judgment which is sought to be impugned.

[26] However, if the fact of the missing page or two is, in and of itself not decisive, and the contents of the document (s) serving before a Court are decisive in determining whether the requirements of the underlying statutory provisions have been met, it must then be determined if this Court committed a patent error by dealing with the appeal in the manner that it did.

[27] The view that I take is that the contents of the document(s) should be decisive, rather than the fact of the missing page or two. Furthermore, that the failure to analyse the contents of the document(s) constituted a reviewable error of law. The basis of my reasoning, as far as the allegation of a patent error is concerned, is the principle set out in the headnote in the case of ***Goldfields Investments Ltd and Another v. City Council of Johannesburg and Another 1938 TPD 551***, which reads as follows:

> *"A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well intentioned and bona fide does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined".*

[28] The principle set out in the ***Goldfield's*** case has been applied in numerous cases, including by this Court in the case of ***Takhona Dlamini v. President of the Industrial Court and Another Court of Appeal case No. 23/1997***. In the present case the Court's failure to analyse the contents of the document(s) amounted to a failure to apply the Court's mind to the true issue for determination. The Court should have dealt with the contents of the document in order to establish whether the requirements of Section 31 were met, instead of dismissing it out of hand.

[29] Having said this, I now turn to deal with the requirements of Section 31 of the Transfer Duty Act 8 of 1902. The Section reads as follows:

> *"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"*.

[30] Brief as it may be, this provision has been the subject of judicial interpretation from local, and South African courts, whose judgments are deemed to be persuasive in our jurisdiction. Perhaps the starting point would be the words of Innes JA in ***Wilken Kohler 1913 A.D 135 p.142*** where he stated the following:

> *"Recognising that contracts for sale of fixed property were, as a rule, transactions of consideration value and importance, and that the conditions attached were often intricate, the legislature, in order to prevent litigation and remove a temptation to perjury and fraud, insisted upon their being reduced to writing. Whether, all things considered, such a provision is desirable, whether it does not create as great hardships as it prevents, is a matter upon which opinions may well differ; but I am satisfied that the provision was*

*adopted not for the advantage of any particular class of persons, but on grounds of public policy."*

[31] In ***Estate du Toit v Coronation Syndicate Ltd and Others 1929 AD 291*** Stratford, J.A. stated that:

"*Thus the object of formality of the written contract, as also of a notarial contract in matters of this kind, it to have such certainty as a written document affords as will avoid subsequent disputes as to what was really agreed upon."*

[My own underlining]

[32] Although there are differences of opinion in some respects, the authorities are unanimous that the document(s) which will at any point in time be examined for the purposes of determining formal validity must contain the following:

32.1 The identity of the parties;

32.2 The description of the property which is the subject matter of the sale;

32.3 The price, and;

32.4 The signature of the parties or their duly authorised agents.

[33] The first three requirements are considered to be the essential terms (*essentialia*) of a contract of sale for fixed property. The fourth requirement is statutory. The contract is of no force of effect, that is, void, unless it is in writing and it contains all the four requirements set out above. Briefly, each requirement entails what is set out hereunder.

33.1 Identification of the parties

33.1.1 It is essential that the identities of the parties appear with reasonable certainty or clarity *ex facie* the document to avoid nullity. In this regard see: ***Baker v Crowie 1962 (2) SA 48 (NPD) at 52 E – G; Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd 1982 (1) SA 7 (A) at 18 D – E***

33.2 The property

33.2.1 The property sold in terms of the deed of sale should be described in such a manner as to enable identification thereof without falling foul of the rules of parole evidence.

33.2.2 In ***Clements v Simpson 1971 (3) SA 1 (A)*** Holmes JA summarised the principles applicable with respect to this requirement as follows:

*"2. Meticulous accuracy in the description of the res vendita is not required. Certum est quod reddi potest ….…*

*4. The test for compliance with the statute, in regard to the res vendita, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and consensus.*

*5. In the foregoing regard there are, broadly, two categories of contract. The first is where the document itself sufficiently describes the property to*

*enable identification on the ground. There is no fixed rule about this. For example, a house may be identifiable if the contract gives its address, such as its number, street and city; or a farm may be identifiable if the document mentions its name".*

33.3 The price

33.3.1 The document or deed of sale should clearly disclose the price to be paid. In ***Patel v Adam 1977 (2) SA 653 (A) at 665H Rabie***, J.A. stated the following:

*"A written agreement which purports to be a contract of sale but which fails to record a price, either definitely or in such a way as to render it possible to apply the maxim certum ert quod certum reddi potest, would, therefore, not be a valid sale in terms of see. 1(1) of Act 71 of 1969."*

33.4 Signature

33.4.1 The document or deed of sale should be signed by the parties or their duly authorised agents. Signature, according to the authorities,

*"..does not necessarily mean writing a person's Christian and surname, but any mark which identifies it as the act of the other party…To sign, as distinguished from writing one's mark in full is to make such a mark as will represent the name of the person signing. Pencil signatures, signature by initials or by means of a stamp, or by mark, or by a party's writing below a printed heading are all*

*sufficient under the Statute of Frauds (vide Halsbury, Laws of England, Vol 7 para 179, Hailsham Ed).”* Per Murray J, in ***Van Niekerk v Smit and Others 1952 (3) SA17 (TPD) at 25 D – E***.

**Analysis of the one page document**

[34] The one page document which the Applicant relies upon is entitled *“Deed of Sale”* and it records that it is a *“Memorandum of Agreement made and entered into by and between:*

*Estate Late Richard Clarence Henwood*

*(hereafter referred to as the Seller” ……*

*And*

*Israel Henwood*

*(Hereafter referred to as the Purchaser ……”.*

[35] In my view, this clearly defines the parties to the sale agreement. The Seller is clearly defined, and so is the Purchaser. The document further records that:

*“The Seller hereby sells to the Purchaser who hereby buys the under mentioned property (hereinafter called the Property).*

*CERTAIN: Portion 2 of Farm No. 526 Lubombo District”*

[36] Bearing in mind the authorities referred to earlier, my view is that the document clearly identifies the property which was the subject matter of the sale.

[37] The document further records that *"The purchase price is the sum of E46 000.00 (Forty Six Thousand Emalangeni) of which E7 000.00 shall be deemed to have been paid by way of improvements. The remainder shall be payable as to a deposit of E30 000.00 on signing hereof and the balance on registration of transfer. Such amount to be secured by Bond Guarantee to be delivered to the Sellers Conveyancers upon request as and when they in a portion to effectively lodge the transfer documents for registration."*

[38] Thus, the purchase price is clearly stated, likewise is the manner in which payment was to be made.

[39] Both annexures "D1" and "D2" contain a similar number of initials and one full signature. During the trial in the Court *a quo* the Applicant positively identified one of the initials as belonging to her late husband. During cross examination the Respondent conceded that his late brother's initials appeared on the document. The Respondent further conceded that the full signature appearing on the document below the handwritten words *"The sale is still effective"*, was that of Eric Martin Carlston, the Executor in the estate of the late Richard Clarence Henwood.

[40] In my assessment, the one page document contains all the essential elements of a contract of sale of fixed property required in terms of Section 31 of the Transfer Duty Act. Standing alone, this document has all the substance necessary to acquire contractual force. The handwritten words *"The sale is still effective"*, coupled with the signature, puts

matters beyond doubt that the parties entered into a valid contract of sale, and it was affirmation by the seller that the sale was still effective.

[41] In my view, the format or length of a deed of sale is not the decisive factor. A clear example is afforded by the case of ***Dold v. Bester 1984 (1) SA 365 (D & CLD)*** where the following excerpt is to be found:

> *"The document relied upon by the applicant appears to have been written out on the front and back of a small sheet of notepaper. It is written in a somewhat cramped manuscript and it is highly probable that the parties felt that it should be replaced at a later stage by a more presentable and acceptable memorial of their transaction. Non constant, however, that they did not intend their original agreement to be of any force or effect until this was done. The terms of the agreement militate against such a conclusion. It is headed "Agreement of Sale of vacant land." The parties are described as the "purchaser" and "seller" respectively, and the seller indicates that she has accepted the purchaser's offer above her signature. In my view, the document prima facie evinces an intention immediately to bring into existence a binding contract."*

[42] The court made the above statement after having found that the contract relied upon by the applicant, in interdict proceedings, was not void *ab initio*, and that the applicant could legally enforce it. The Respondent had argued, amongst other things, that the document signed by the parties did not constitute a valid contract and did not comply with the formalities prescribed for a valid deed of alienation by section 2 (1) of the alienation

of Land Act 68 of 1981, which is similar to our section 31 of the Transfer Duty Act.

[43] In my view, to conclude that the written document before us does not constitute a contract, or a partial record of the record of the written contract, and therefore void *ab initio* would be to deny the plain obvious, and to subvert the objectives of Section 31 of the Transfer Duty Act. There can be no doubt in my mind that the entire written contract existed at some point. Does the fact that at this point in time there is a page or pages missing there from mean that the contract becomes "unwritten" or "non-existent" for the purposes of Section 31 of the Act? If it were to be so it would be tantamount to permitting the very mischief which the legislature sought to address. It would amount to permitting one party to take unfair advantage of the other. In the case of ***Van Wyk v Rottchers Saw Mills (Pty) Ltd 1948 (1) SA 983 (A)*** Watermeyer C.J. warned against "technicalities" in dealing questions such as the one under consideration, where he stated the following:

> *"In the case of Weinerlein v Goch Buildings Ltd (1925 A.D. 282) this Court went very far to give the section an elastic interpretation because a restrictive interpretation would have permitted one of the parties who based his case upon a strict adherence to the letter of the provisions of sec 30 to escape unfairly from a bargain which he had made …. Clearly, if Sec 30 be construed so as to require a written contract of sale to contain, under pain of nullity, a faultless description of the property sold couched in meticulously accurate terms, then such a construction would merely be an encouragement to an dishonest purchaser to escape from his bargain on a technical defect in the description of the property, even in cases*

*where there was really no dispute at all between the parties. Such a construction would be an encouragement to dishonesty… and it should be avoided if possible."*

[My own underlining]

[44] Having concluded that the judgment of this Court dismissing the appeal on the ground stated therein constituted a patent error which entitles this Court to set it aside in terms of section 148 (2) of the Constitution, I now turn to deal with the High Court Order setting aside "the purported deed of sale" between Israel Clarence Henwood and estate late Richard Clarence Henwood.

[45] All the reasons given by the High Court for setting aside the deed of sale cannot be sustained. The first of these centres around payments which were made to the office of Eric Martin Carlston after the demise of Israel Clarence Henwood. Receipts were produced as evidence of various payments amounting to E29 000.00. At the trial the Applicant (as 1st Defendant) testified that an amount of E10 000 was paid to Eric Martin Carlston before the demise of Israel Clarence Henwood. After analysing the clause relating to payment of the purchase price the Court had this to say:

*"[35] From the evidence of 1st Defendant as corroborated by the receipts presented before Court, there was no such payments of the sum of E30 000.00 as deposit as per Exhibit D1 or D2 upon signature thereof. Further, the balance thereof was never secured by bond guarantee as per the dictates of Exhibit D1 or D2. If therefore the sum of E10 000.00 was ever paid, it was not in compliance with exhibit D1 or D2 following the evidence that the*

*initials at the bottom of each page is indicative of signatures. This alone is a ground for having Exhibit D1 and D2 set aside."*

[46] The Learned Judge went on the say that:

*"[36] It is therefore unnecessary to determine whether the sum of E10 000.00 was paid or not. The reason is that even if it was paid, it could not form a deposit under Exhibit D1 or D2 as it is fell far short of the terms of D1 and D2 which called for signature upon payment of E30 000.00. It is common cause that there was no such payment of and therefore Exhibit D1 and D2 ought not to have been signed. There was no further no bond guarantee of the balance.*

[47] With due respect, this reasoning is misdirected. Generally, the nature of performance which discharges an obligation is that which is due under the contract. However, as Kerr AJ, in his work ***"The Principles of the Law of Contract" 6th edition***, puts it:

*"Performance other than that due, called substituted performance, may be rendered if the creditor consents: if he does consent and it if is so rendered the obligation is discharged."*

[My own underlining]

[48] Christie, RH in his work entitled ***"The Law of Contract in South Africa" 3rd Edition (1996) at page 460***, in discussing the legal position with respect to discharge of a purchaser's obligation to furnish a guarantee for payment of the purchase price of immovable property states the following:

*"The standard device is the furnishing by the buyer, when called upon to do so by the seller's conveyancers who are ready to lodge, of a bank guarantee payable on completion of the transfer, but the provision of any other guarantee to which the seller could raise no reasonable objection, or payment of the money to an agreed stakeholder or (if the buyer is prepared to take the risk) payment to the seller in advance of lodging would all serve to discharge the buyer's obligation in the absence of an agreement to the contrary."*

[My own underlining]

[49] It is a matter of record in this case that various payments were made to the office of Eric Martin Carlston. The payments were accepted by the seller (Eric Martin Carlston acting in his capacity as Executor), who did not insist on strict adherence to the terms of the deed of sale. Thus, substituted performance having been accepted by the seller (the Executor), deviation from terms of the deed of sale cannot be a basis of setting it aside.

[50] The High Court also reasoned that in the light of the evidence that there were two concurrent files in the office of Eric Martin Carlston in respect of which payments were being made by the estate of Israel Clarence Henwood, it could not be concluded whether these related to the purchase for the property in dispute. This reasoning, however, fails to draw a distinction between declaring a contract void *ab initio* for want of compliance with the prescribed statutory formalities, on the one hand, and the cancellation of an otherwise valid contract on the basis of a failure to perform, that is, payment (where payment is due). The fact that there were two concurrent files, and that it is not clear how payments were

appropriated by the office Eric Martin Carlston, cannot be basis for declaring the deed of sale as void *ab initio*.

[51] In its third reason the Court *a quo* seems to have preoccupied itself with the absence of "a full complement of the deed of sale", and the failure of the Applicant to request a copy of the deed of sale from Eric Martin Carlston. As earlier indicated in this judgment this approach fails to deal with the real issue for determination, that is, whether exhibit "D1 and/or D2" satisfy the requirements of section 31.

[52] In conclusion, I am of the view that the Applicant has been successful in establishing that this Court committed a patent error in dismissing the appeal on the ground that it did. Furthermore, the judgment of the Court *a quo* was misdirected as indicated above.

[53] In the circumstances the Court hereby issues the following Order:

1. The decision of this Court handed down on the 29th July, 2015 dismissing the appeal noted by the Applicant against the judgment of the High Court is set aside and replaced with the following:

    1.1 The appeal is upheld with costs.

    1.2 The Respondent is directed to take all steps and sign all documents necessary to transfer Portion 2 of Farm No. 29 situate in the Lubombo District, Eswatini to the estate of the late Israel Clarence Henwood.

2. Costs of the review shall be borne by the estate of the late Richard Clarence Henwood.

_____

**MJ MANZINI**

Acting Justice of Appeal

I agree

_____

**MCB MAPHALALA**

Chief Justice

I agree

_____

**DR. BJ ODOKI**

Justice of Appeal

I agree

_____

**SJK MATSEBULA**

Acting Justice of Appeal

I agree

_____

**JM CURRIE**

Acting Justice of Appeal

For the Applicants: Advocate D. Smith (instructed by Sibusiso B. Shongwe and Associates)

For the Respondent: S Masuku