THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 417/11

In the matter between:

Robert Mandlakayise Du Plooy	First Appellant
Victor Nkosinathi Zikole	Second Appellant

and

Ntombi Christophora Du Plooy	First Respondent
Mfanukhona Du Plooy	Second Respondent
Malezi Du Plooy	Third Respondent
Thulisile Du Plooy	Fourth Respondent
Delsie Du Plooy	Fifth Respondent
Tobhi Du Plooy	Sixth Respondent
Tandiwe Du Plooy	Seventh Respondent
Maria Du Plooy	Eighth Respondent

Neutral citation: *Robert Du Plooy v Ntombi Du Plooy* (417/11) [2012] ZASCA 135 (27 September 2012)

Coram: MTHIYANE DP, HEHER, BOSIELO, PETSE JJA AND PLASKET AJA

Heard: **4 September 2012**

Delivered: **27 September 2012**

Summary: **Ownership of immovable property – whether first appellant owning property in personal capacity or as nominee of siblings (the respondents) – nomination of first appellant established – transfer of property – whether second appellant had knowledge of challenge to first appellant's right to alienate property prior to transfer**

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Ngwenya AJ sitting as court of first instance):

(a) The appeal succeeds to the extent that paragraphs 2 and 4 of the order of the court below are set aside.

(b) The appellants are directed, jointly and severally, to pay the costs of the respondents.

JUDGMENT

PLASKET AJA (MTHIYANE DP, HEHER, BOSIELO and PETSE JJA concurring)

[1] This appeal concerns a dispute between members of a family about the ownership of two houses. It has spawned, according to the papers, great enmity and even violence and, whether or not the respondents are able to establish co-ownership of the properties with the first appellant, the maxim *communio est mater rixarum* – co-ownership is the mother of disputes – has, in this case, proved to be pertinent.[1] The case also illustrates the difficulties and uncertainties that can be created by a failure to formalise and define legal relationships with precision and care, especially where they are intended to endure over generations.

[2] The respondents (the applicants in the court below) applied to the KwaZulu-Natal High Court, Durban (Ngwenya AJ) for orders interdicting the first appellant, (the first respondent in the court below) from 'alienating, selling, disposing of or in any way encumbering' two properties in Emmaus, Pinetown upon which two four-roomed houses had been built; in the event that the transfer of one of the properties

[1] Francois du Bois, Graham Bradfield, Chuma Himonga, Dale Hutchison, Karin Lehmann, Rochelle le Roux, Mohamed Paleker, Anne Pope, C G van der Merwe and Daniel Visser *Wille's Principles of South African Law* 9 ed (2007) at 558.

to the second appellant (the second respondent in the court below) had already taken place, setting that transfer aside; declaring that the respondents and the first appellant were co-owners of the properties; and authorising and directing the Registrar of Deeds to register the properties in the names of the respondents and the first appellant. Orders in these terms plus a costs order against the first and second appellants were granted by Ngwenya AJ. This appeal against those orders is before this court with his leave.

The facts

[3] The first appellant and the respondents are siblings, born of George and Irene Du Plooy. A tenth sibling, Raymond Du Plooy, who played a part in the events that I shall outline below, died in 1995. The family lived in a home in Emmaus, Pinetown that was owned by the Marianhill Mission Institute – the MMI. The precise nature of their tenure is unclear, but nothing turns on this. George and Irene Du Plooy died during the 1970s and their children continued to occupy the house. I think that it would be fair to describe the house as a family home in the sense that even if some of the siblings had homes elsewhere, they returned to the house from time to time and regarded it as the hub of their family.

[4] During the late 1980s or early 1990s MMI decided to sell the land upon which the houses of the Du Plooys and other families stood. The area was rezoned for industrial use and it proposed to sell the land for that purpose. MMI wanted to relocate the families to Umhlathuzana. Some families agreed to be relocated but others, numbering 27 families, did not want to move. They elected a committee, chaired by one Fidelius Phewa, to negotiate with MMI.

[5] The committee met with representatives of MMI and the Pinetown municipality on five occasions during the period 19 March 1990 to 3 May 1990. It was agreed that plots in another part of Emmaus would be allocated to the 27 families, that MMI would build houses on those plots and that the beneficiaries would pay between R2 800.00 and R3 800.00 for a house, not as a purchase price but as a ‘token of appreciation’.

[6] The Du Plooy family was initially allocated two four-roomed houses some distance apart. They were allocated two houses of this size because their old house was an eight-roomed house, and there were no houses of this size available. The late Raymond Du Plooy and one of his sisters, Ntombi Du Plooy (the first respondent) spoke to a representative of MMI, one Father Dieter, who then allocated two adjacent erven to the Du Plooy family. These are the erven at the heart of the dispute in this matter, erf 17874 and erf 17875. In due course, the committee under the chairmanship of Mr Phewa handed over the keys of the houses to Raymond Du Plooy, on behalf of the Du Plooy family.

[7] During at least part of this period, Robert Du Plooy, the first appellant, was not present or involved. According to the respondents, he had been 'chased away' by their mother. If that is so, that would have been in the 1970s, because she died in 1977. According to Robert Du Plooy, he left the area for a much shorter period. He went to Umkomaas to be treated by an isangoma and then he trained and qualified as an isangoma himself. According to Ntombi Du Plooy, he only returned to Emmaus in 1994, while he stated in his affidavit that he left for treatment in 1991 and returned in 1992. In his answering affidavit he denies the averments made by his sister concerning the allocation of the houses and the handing over of the keys by stating that they are 'highly improbable' and that he dealt personally with Father Dieter who allocated the houses to him. This, however, if it happened at all, must have occurred much later, even on Robert Du Plooy's version. For reasons that will be dealt with below, these disputes of fact are resolved against him.

[8] In 1995 Raymond Du Plooy died. It was decided, said Ntombi Du Plooy, that Robert Du Plooy would be the family representative and would hold the houses in trust on their behalf. He denied that this was so and stated that when he acquired title to the properties in 1996, he did so in his personal capacity and was hence entitled to sell one of the properties, as he did, to the second appellant. After he had decided to sell erf 17874 to the second appellant, matters took a turn for the worse. He and the second appellant claim that they were subjected to threats, harassment and assaults by some of the respondents. He was forced to flee from the home at one stage.

[9] As a result of the disputes of fact on the papers, the matter was referred to oral evidence. While the order making the referral was not part of the record, counsel appearing for both the appellants and the respondents were prepared to accept the formulation of the issue to be determined by the oral evidence as being correctly encapsulated by the first paragraph of Ngwenya AJ's judgment. He had stated:

'The crisp question for consideration in this matter is to determine whether the first respondent is the true owner of two immovable properties, erf number 17874 and erf number 17875, Township Pinetown Extension 113, KwaZulu-Natal.'

While this formulation of the issues is rather cryptic, essentially the dispute that the court was required to resolve was whether, when Robert Du Plooy acquired title to the properties, he acquired ownership in his personal capacity or on behalf of his siblings.

[10] Two witnesses testified on behalf of the respondents. They were Fidelius Phewa and Beatrice Malezi Mkhize (neé Du Plooy), the third respondent. The case of the first and second appellants was closed without any evidence being led by them.

[11] Phewa testified about the proposed relocation of the 27 families by MMI from one part of Emmaus to another and the negotiations between the committee he chaired, MMI and the Pinetown municipality. He confirmed that the Du Plooy family was one of the 27 families that his committee represented.

[12] He stated that the negotiations resulted in an agreement that the 27 families would be given new homes in Emmaus to occupy – an area described elsewhere in the record as New Emmaus – and that they would be built in phases. He emphasised that those houses 'would not be constructed for an individual, but they were going to be constructed for all the 27 families'.

[13] During the planning of the project, Father Bohmer of MMI had asked whether the homes could be sold after they had been allocated. Phewa said that the committee's response was in the negative and that 'we wanted those homes to belong to us for generations to come'.

[14] When the houses were built, the committee allocated them. Phewa's evidence in this regard was as follows:

'We as the committee handed the keys to the people, and this is how we did it: we would look at a family and determine who in the family was going to serve as the head of that family. But, most importantly, we would determine the head of the family, not based on the gender of whether it was a male or a female. Our allocation of these houses was based on the fact whether the person concerned was originally occupying a four-roomed house or an eight-roomed house, and if the person concerned was occupying a four-roomed house, we would allocate a four-roomed house. Similarly, when the person had been occupying an eight-roomed house, we would allocate an eight-roomed house. The way in which we conducted these allocations were based on families, not individuals. If a family had been occupying a four-roomed house, we would allocate a four-roomed house to that family. Similarly, if that family had been occupying an eight-roomed house, we would allocate an eight-roomed house. And in instances where an eight-roomed house was not available, we would allocate two four-roomed houses to make up for the eight-roomed house. And the Du Plooy family had previously occupied an eight-roomed house, so they were allocated an eight-roomed house.'

[15] As to the allocation of the houses to the Du Plooy family, he stated:

'When the Du Plooys then were given the accommodation, Robert was not there. The Du Plooy family itself sent a young man who was working for them, who was their breadwinner; with agreement with them, we then gave the key to Raymond Du Plooy. It was not up to us to suggest that we were not going to give Raymond the key because he was not the eldest, this was based on the agreement with the family. It was in 1991. Robert returned in 1994 and he went to occupy the two four-roomed houses, that is the eight-roomed that had been allocated to the family. When Robert returned, the Du Plooys were already living in the two four-roomed houses. At the time when these homes were being erected and the people were being allocated, the registration of bonds was not applicable yet at that time. That only came about in the year 1996 and at the time Robert was already there. And at that time Madoda Raymond had passed away. Then it was up to the Du Plooy family to nominate one amongst themselves as the person who was going to act on their behalf, not as the owner, but merely as the nominee in the family.'

[16] He confirmed that MMI required a nominal amount to be paid for each house; that the amounts were R2 600.00 for a four-roomed house and R3 800.00 for a bigger house; and that this was not regarded as a purchase price but a 'token of

appreciation'. In order to facilitate the payments of these amounts, families were allowed five years grace in which no interest would run. Phewa testified that it was then up to the individual families to decide for themselves 'who had the money and was able to buy the property on behalf of the families'.

[17] Provision was, however, made for the ownership of the houses to pass. Phewa testified in cross-examination that at the stage when title deeds were applied for the committee had fallen out of the picture. The questions and answers that follow this read as follows:

'So, each person who purchased a property dealt directly with MMI? – No, the family.

No, I'm saying, because when it came to the purchase an agreement was signed by one person with MMI, of purchase and sale? – Yes, the person who had been nominated by the family to represent them.'

[18] The upshot of the evidence of Beatrice Malezi Mkhize, little of which was challenged in cross-examination, was this. After the committee had allocated the two houses to the Du Plooy family, Phewa handed over the keys of both to Raymond Du Plooy. This was in 1991, at a time when Robert Du Plooy was not in Emmaus but was, she thought, at Umgababa. The family took occupation of the houses. Raymond Du Plooy died in 1994, the year in which Robert Du Plooy returned. Following the death of Raymond Du Plooy, at the washing of the hands ceremony (ukugezwa kwezandla), a decision was taken to nominate Robert Du Plooy 'to represent the family'.

[19] Her evidence then proceeds as follows:

'When Robert was nominated to represent the family, please tell the Court who was present at the time the nomination was made? – All of us, the members of the Du Plooy family , were present.

Was Robert also present? –Yes.

And for what purpose was Robert nominated to represent the Du Plooy family? – We chose him because he was the eldest male in the family and he had to look after the interests of the family.

Was there anything that Robert had to do in relation to the two houses that had been built by the MMI? – No, there was nothing.

Was there any discussion about taking legal ownership, transfer, of the two properties? – No, that was never discussed.
Did Robert accept the nomination? – Yes.
And did he tell the members of the Du Plooy family that he accepted that nomination? – We were all together at home and he accepted in the presence of all of us.'

[20] As stated above the appellants closed their case without giving any evidence at all. The result, for the determination of the facts, has been set out as follows by Cloete JA as follows in *Lekup Prop Co No. 4 (Pty) Ltd v Wright*:[2]
'A referral to trial is different to a referral to evidence, on limited issues. In the latter case, the affidavits stand as evidence, save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.'

[21] There is no reason why the evidence of Phewa and Mkhize should not be accepted and I do not understand the judgment of the court below to take a contrary view. That means that the primary issue – the capacity in which Robert Du Plooy acquired title deeds to the houses in 1996 – must be decided on the basis of the uncontroverted oral evidence which I have set out above plus any additional undisputed evidence contained in the affidavits.

The judgment of the court below

[22] Ngwenya AJ decided that the matter should be dealt with in terms of Zulu customary law.[3] In this decision he was not supported by either of the parties. He then proceeded to set out the customary law position as he saw it. He was certainly able to take judicial notice of customary law[4] and he had a discretion as to the system of law to be applied[5] but, in my view, he erred in exercising that discretion.

[2] *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) para 32.
[3] I use the term customary law, rather than indigenous law, because that is the term used in the Constitution. See s 39.
[4] Law of Evidence Amendment Act 45 of 1988, s 1(1) which reads: 'Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.'
[5] *Ex Parte Minister of Native Affairs: In Re Yako v Beyi* 1948 (1) SA 388 (A) 395-396.

[23] He made an assumption that the Du Plooy family 'conduct their relationship and relate to one another in terms of customary law'. This conclusion is not, in my view, evident from the record, as he asserted. He also appears to have been influenced by the fact that Robert Du Plooy was regarded as the head of the family. Further than that, he considered no factors that may or may not have served as connections between the parties and a system of customary law and, as the parties made no assertions as to the application of customary law to their dispute, no evidence was led from which that choice could be inferred. Similarly, no specific evidence concerning the lifestyles or the prior transactions of the parties was tendered and that evidence which incidentally dealt with their lifestyles does not necessarily point to customary law as the appropriate choice of law.[6] Finally, Ngwenya AJ applied the Zulu customary law of succession to the dispute but the dispute had nothing to do with succession. It concerned whether or not an agreement of co-ownership had been reached or whether or not Robert Du Plooy had been mandated by his siblings to hold the property as a nominee.

[24] Ngwenya AJ arrived at the conclusion that Robert Du Plooy had, in terms of customary law, held the properties as head of the family and that he was not able to dispose of them without the consent of his siblings. He also found that the properties, although registered in the name of Robert Du Plooy, were in fact 'collectively and equally owned' by the respondents and Robert Du Plooy. Ngwenya AJ also dealt with the matter, in the alternative, on the same basis as the parties, finding that the evidence had established that Robert Du Plooy had been nominated by his siblings to look after the interests of the family. He accordingly granted all of the relief claimed.

The issues on appeal

[25] Two principal issues arise in this appeal. The first is the capacity in which Robert Du Plooy acquired title to the houses and the second is whether the second appellant, Mr Victor Nkosinathi Zikole, had knowledge of the dispute concerning Robert Du Plooy's right to alienate before transfer to him was effected.

[6] See generally, T W Bennett (assisted by N S Peart) *A Sourcebook of African Customary Law* (1991) at 123-129; T W Bennett *Customary Law in South Africa* (2004) at 51-57.

[26] Before turning to the first issue it is necessary to say something of what is meant by the term 'family'. In *S v Ndabesitha; S v Tshabalala*,[7] the court observed that the 'word "family" has no precise legal connotation but is clearly one of wide signification'. And in *Smith NO and Lardner-Burke NO v Wonesayi*,[8] Beadle CJ said that the 'word "family" again may have many meanings, according to the context in which it is used.' It is clear from these cases (and others cited in them) that the particular meaning of the word, in each instance, is fact-specific. For this reason, a general definition of its meaning (such as a dictionary meaning) serves little purpose in a case such as this. In the context of this case, in my view, it means the living siblings born of George and Irene Du Plooy – Robert Du Plooy and the respondents. That meaning emerges in particular from the context of the negotiations for the houses in New Emmaus and the way in which the houses were occupied thereafter. Most importantly, it is also the conclusion to be drawn from what the parties themselves considered 'the family' to be for the purpose of the mandate given to Robert Du Plooy.

[27] From the evidence that I have outlined, it is clear that the houses were allocated to the Du Plooy family while Robert Du Plooy was away from Emmaus. That was in 1991. They occupied them on the terms agreed to by the committee that represented them, namely as a family, rather than in the name of any individual. Indeed, at that stage there was no talk, according to both Phewa and Beatrice Mkhize, of the transfer of ownership to anyone. That came later.

[28] After Robert Du Plooy returned, in 1994, he must, as a matter of overwhelming probability, have become aware of the terms of the grant of the houses to the families. He could have been under no illusions on this score. And if there was any doubt, that would have been removed by his nomination as the representative of the family. It is most unlikely that Father Dieter, as one of the MMI representatives in the negotiations, would have told him, as he claims, that the houses would be transferred to him in his personal capacity, rather than as a representative of the Du Plooy family. As it happens, Robert Du Plooy did not testify

[7] *S v Ndabesitha; S v Tshabalala* 1966 (1) SA 827 (N) at 828F.
[8] *Smith NO and Lardner-Burke NO v Wonesayi* 1972 (3) SA 289 (RA) at 297F.

about his dealings with Father Dieter and allow this evidence to be placed under scrutiny. It can safely be rejected in the circumstances.

[29] He also did not testify about what transpired at the washing of the hands ceremony. The evidence of Beatrice Mkhize stands uncontroverted that he was nominated to represent the family and safeguard its interests. Even though there was no mention of the ownership of the houses at that stage, that is explicable: it was not then a live issue. Despite that, however, Robert Du Plooy, when he accepted the nomination must have understood his mandate to be in relation to all of the affairs of the Du Plooy family. Given the history of the acquisition of the properties, they, as part of the mandate, must have been uppermost in the minds of the entire family.

[30] The conclusion is inescapable that, either when the opportunity to acquire ownership of the properties arose or later when he discerned the chance to sell, Robert Du Plooy opportunistically snatched at a bargain and betrayed the trust that had been reposed in him by his siblings. He could not have believed that he was entitled to take ownership in his personal capacity.

[31] That said, however, I am of the view that the evidence of Beatrice Mkhize does not go so far as to establish that an agreement was reached that Robert Du Plooy and his siblings would own the property as co-owners, in the sense that the members of the family became owners of the properties 'simultaneously, not in physical portions but in abstract undivided shares'.[9] The broad terms of the mandate given to him are not capable of such an interpretation. Indeed, it will be recalled that Beatrice Mkhize's evidence was that Robert Du Plooy was nominated to represent the family and to look after its interests but there was no discussion at all about taking transfer of the houses.

[32] That does not mean that Robert Du Plooy was free to dispose of the houses. He held them, once transfer had been effected, on behalf of himself and his siblings. His nomination placed him in a position of trust in relation to all of the affairs of the

[9] Du Bois et al (note 1) 558; A J van der Walt and G J Pienaar *Introduction to the Law of Property* 6 ed (2009) 48-49.

family, including its proprietary interests. In that sense, he was in a similar position to the respondent in *Dadabhay v Dadabhay*[10] who, on the strength of an oral agreement entered into with the appellant, bought a house on behalf of and as nominee for her but refused to transfer it to her when called upon to do so. This court held that the oral agreement was not hit by s 1(1) of the Alienation of Land Act 68 of 1967 because it was 'in no sense a contract of sale between the appellant and the respondent' and neither was it a cession in respect of an interest in land because it was not a 'cession in the nature of a sale'.[11] In the context of the particulars of claim, the court held that the 'word "nominee" may well have been used to denote that the respondent would act as a trustee in buying the property and would thereafter sign all documents, when called upon by the appellant, in order that it could be registered in her name'.[12]

[33] The terms of the nomination of Robert Du Plooy are quite different to those in *Dadabhay* but the evidence nonetheless establishes that he was not free to alienate erf 17874 to the second appellant without the consent of his siblings: in terms of the nomination, he held the property in the best interests of the family and that meant that he was not free to do with it as he pleased.

[34] I turn now to the position of the second appellant in relation to the order setting aside the sale to him. In his affidavit, he makes no direct factual averments concerning when the property he bought from Robert Du Plooy was transferred to him and whether he was aware of the respondents' challenge to their brother's alleged right to alienate erf 17874. That he was aware of the dispute between Robert Du Plooy and his siblings is, however, clear from his affidavit.

[35] At the hearing of this appeal, the parties were afforded an opportunity to file further affidavits on whether the second appellant was aware, prior to the registration of transfer on 30 June 2009, of the challenge to Robert Du Plooy's alleged right to alienate erf 17874. In an affidavit deposed to by the respondents' attorney, Mr M L Dube, reference is made to correspondence attached to the founding affidavit that

[10] *Dadabhay v Dadabhay & another* 1981 (3) SA 1039 (A).
[11] At 1048A-1049H.
[12] At 1047F-G.

establishes that the second appellant knew of Robert Du Plooy's disputed title to the property prior to transfer having been effected. On 7 April 2009, he wrote to Mr ME Mbhele, who acted for both of the appellants. He stated:

'We confirm the telephonic conversation of the 7th April 2009 between Messrs Mbhele and Dube of our respective offices wherein we indicated as follows:

1. It has come to our clients' attention that you act for Mr Robert Mandlenkosi Du Plooy and Mr Nkosinathi Zikole in the transfer of the above-mentioned property.
2. Our clients inform us that Mr Robert Du Plooy is not the de facto owner of the Property, it is jointly owned by the whole family. He is merely a representative of the entire Du Plooy family.
3. That being the case he has no authority to sell the property without the consent of the family.

Our instructions are to request you, as we hereby do, to discuss the matter with your above-mentioned clients with the view not to proceed with the transfers until the dispute between them has been resolved.'

On 21 April 2009, Mr Mbhele wrote back to say that he had consulted with his clients and his instructions were to proceed with the transfer.

[36] On 28 April 2009, Mr Dube wrote a letter to Mr Mbhele because he had not at that stage received the letter of 21 April 2009. (He only received it on 14 May 2009.) In this letter he said that he had instructions to launch an application to interdict the transfer and asked that, if Mr Mbhele was intent on proceeding with the transfer, he at least hold the matter in abeyance 'to give us time to bring the application, to give the high court a chance to deal with the matter'. Mr Dube also wrote a letter, dated 7 May 2009, to the second appellant in which he stated:

'Our instructions are to demand, as we hereby do, that you discontinue with the said purchase; if you proceed to accept and receive transfer despite our warning, our client will make an application in court to prevent transfers from being effected in your favour, if transfers shall have been effected, for the sale to be set aside and for the transfers to be cancelled.'

Mr Dube attempted to serve this letter on the second appellant personally at the Pinetown Magistrates Court but the second appellant refused to accept the letter.

[37] The application was served by the sheriff, according to the return of service, on the second appellant by service on one Mzwawele Zikole, described as a son of the second appellant at the residence of the second appellant on 5 June 2009.

[38] In answer to these allegations the second appellant made no affidavit. Instead, his attorney, Mr Mbhele conceded that his clients were warned by the respondents' attorneys of the planned application for an interdict but they chose to continue with the transfer and instructed him to oppose any application that may have been launched. For the rest, Mr Mbhele's affidavit contains inadmissible hearsay evidence that must be disregarded.

[39] In addition, the evidence indicates that the second appellant was aware, over a fairly long period, that the respondents disputed Robert Du Plooy's right to sell the house to him. Indeed, so bitter was that dispute that it even resulted in violence directed at him. The second appellant lived in Emmaus. He leased a room on the property that he purported to purchase. That being so, it can as a matter of overwhelming probability be accepted that he knew of the history of the acquisition of the two houses by the Du Plooy family and the terms upon which they were allocated to them. He must be taken, in other words, to have known that Robert Du Plooy held the property that he purported to purchase as a nominee for his siblings. He must also have known that the dispute was a serious one in the sense that it could not simply be wished away as being without merit or frivolous. The basis for this is the letter that Mr Dube sent to Mr Mbhele on 7 April 2009, which was then brought to the notice of the second appellant when Mr Mbhele consulted with him in order to take instructions on whether to proceed with the transfer.

[40] In the result, I conclude that, prior to transfer being effected on 30 June 2009, the second appellant had knowledge that Robert Du Plooy's title was subject to challenge. When he instructed his attorney to proceed with the transfer, despite knowing that proceedings aimed at stopping or setting aside the transfer were in the offing, he did so at risk. He was not an 'innocent transferee' when transfer was

effected and it follows from this fact that the transfer of erf 17874 is liable to be set aside.[13]

The order

[41] In my view, some but not all of the relief granted by the court below was competent. The respondents were entitled to an interdict to restrain Robert Du Plooy from alienating the properties and the setting aside of the transfer to the second appellant. They did not establish that they were co-owners and so were not entitled to a declarator to that effect and an order directing the Registrar of Deeds to endorse the title deeds to reflect their co-ownership. In other words, the appeal succeeds in part.

[42] That raises the issue of the costs order in the court below and the costs of the appeal. In my view, the respondents achieved substantial success in the court below in the form of the interdict and setting aside of the transfer. These orders, after all, go to the heart of the protection of their interests in the properties. It follows that they have also achieved substantial success on appeal. They are entitled to their costs in the court below and in this court.

[43] I make the following order:

(a) The appeal succeeds to the extent that paragraphs 2 and 4 of the order of the court below are set aside.

(b) The appellants are directed, jointly and severally, to pay the costs of the respondents.

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C Plasket

Acting Judge of Appeal

[13] *Mvusi v Mvusi NO & others* 1995 (4) SA 994 (Tk) at 1006A-D; *Kazazis v Georghiades & andere* 1979 (3) SA 886 (T) at 892B-894C; *Cussons & another v Kroon* 2001(4) SA 833(SCA) para 9.

APPEARANCES:

For the First and Second Appellant:	M E Mbhele
	Instructed by:
	M E Mbhele & Co; Durban
	N W Phalatsi & Partners; Bloemfontein
For the First to the Eighth Respondents:	H A de Beer SC
	Instructed by: ,
	Mbele, Dube & Partners; Durban
	Mthembu & Van Vuuren Inc; Bloemfontein