

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 870/96

In the matter between:

SAMUEL SIPHO SIMELANE Applicant

and

THE DEPUTY SHERIFF FOR MANZINI

DISTRICT 1st Respondent

ORAH DLAMINI 2nd Respondent

MANDLA DLAMINI 3rd Respondent

CORAM: S.W. Sapire A.C.J.

FOR APPLICANT Mr. P.D. Msibi

FOR 1ST & 2ND RESPONDENTS Mr. P.R. Dunseith

Judgment

(18/4/96)

This is an application in which the applicant seeks a stay of execution pending an appeal against a refusal by this court to rescind a summary judgment granted against the applicant in favour of the second and third respondents.

The case originally started by way of action in which the respondents sued the applicant for return of moneys paid by them to the person alleged to be agent of the applicant. The moneys were paid on account of the purchase price of certain properties which had been purchased.

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These purchases it was alleged, and it seems common cause to be the case, fell through for some reason not presently relevant, and the respondents sought return of their money. The summons were served and an appearance to defend was entered. An application for summary judgment was presented to the court in each case but the applicant was in default of appearance in response thereto. A summary judgment was granted. An application for rescission was thereafter made and this application was refused on the grounds that the applicant was unable to show good cause for such rescission especially in so far as fulfilling the requirement of demonstrating a bona fide defence or even an arguable defence.

The applicant's case seems to be that the person to whom the moneys were paid was not his agent.

Documents before the court at the application for rescission, including even an affidavit attested to by the applicant himself made it quite clear that the man Ngwenya and attorney Carlston were the applicant's agents.

For those reasons the application for rescission was refused. The applicant then filed a notice of appeal against the decision of this court dismissing the application for rescission. The judgment was delivered on the 22 November 1995 and the notice of appeal was filed only on 4 January 1996. It was filed by an attorney and the applicant's counsel seem to be incorrect in submitting that I must treat this matter as if a layman were involved. I am not sure that even if I did treat it as a layman that there could be any different result.

In terms of Rule 8 of the Court of Appeal Rules, the appeal should have been noted within four weeks namely by the 20th December 1995. This did not take place and the filing of the notice of appeal after the period had elapsed is a nullity, and no appeal is presently pending.

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No application for condonation has been made and the granting of condonation cannot be decided by this court.

In terms of Rule 31 and Rule 34 that is subparagraph 1 and 4 of the Court of Appeal Rules, a record on appeal must be submitted for certification within two months of the date of noting of the appeal.

That should have been done therefore in this case by the 4th March 1996. If this is not done in terms of the rule, the appeal is deemed to be abandoned. In this case the appeal is deemed to be abandoned as there is no record which has been submitted and no application for condemnation has been made.

These difficulties are insuperable obstacles to granting to the relief which the applicant seeks and this application must therefore be dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE