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Elliot Dumela Mabuya Plaintiff

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Goodintent Phumuza Gama Defendant

Civil Case No. 1569/1994

Coram S.W. Sapire ACJ

For Plaintiff S.C. Dlamini

For Defendant D. Mazibuko

Judgment

(28/11/97)

This was an action in which the plaintiff had sued the defendant for payment of an amount of money.

The amount claimed as will be seen is not the amount to which the plaintiff will in any event been entitled. The claim arises in the following circumstances. The defendant sold a piece of land to the plaintiff and left his affairs in the hands of an attorney formerly practising in Swaziland. Among the affairs which were retained by this attorney was to deaf with the implementation of the Deed of Sale.

The plaintiff has come to Court and said that not only has he paid the deposit which was payable in terms of the contract but also he has tended a guarantee and later an amended guarantee as required by the defendant's conveyancer. This guarantee was to cover all the costs of the transfer and the balance of the purchase price to enable the attorney to transfer the property purchased, into the name of the plaintiflf. Unfortunately the attorney did not attend to his work and has left the country.

The defendant was never advised of the true position in the case.

What happened thereafter was that the property was expropriated and the plaintiff was paid a lump urn in respect of the property in question together with some other properties. The plaintiff now seeks payment of his share of the compensation money.

It is clear that the contract for the sale of the land has never been canceled and although some argument was advanced that the plaintiff was not entitled to tender a guarantee this argument cannot be maintained in the light of the fact that the defendant's agent the conveyancer indicated to the plaintiff that the amount of the guarantee was required to enable him to take transfer This does not amount to an alteration or amendment of the agreement

a: Mahuya

The plaintiff has calculated that his share of the compensation money amounted to E34 014.23 but he has failed to take into account that what must be deducted from this amount is the amount of the purchase price of the property which has in fact not been paid notwithstanding the fact that the guarantees were issued. He has calculated the amount which fee claims as being 31.789% of the E107.000. Clearly from this amount has to be deducted the purchase price of the property less the amount of E2 500 which was paid on account of the deposit and other incidentals of the agreement.

The amount of the purchase price was in terms of the agreement which is annexure "A" to the particulars of claim was E9 000. The amount which has to be paid is the amount as calculated less the purchase price but add back what was paid. This amount has to be paid for a number of reasons.

Firstly, as I said the agreement has not been cancelled and the defendant is still obliged to deliver the property against payment of the purchase price. Of course he cannot do so because of the expropriation. Risk of profit or loss in the land passed to the plaintiff once the agreement was concluded and signed. There was provision in the contract for agreement that possession be taken at a particular date but the blank was never filled so that the common law provision remains, that the risk passed on the contract becoming complete in the sense that it was agreed upon.

In accordance with the law as set out in LAWSA Volume 10 1995-1996 EXPROPRIATION par 44, and the authorities quoted in this connection where land is expropriated after a completed sale but before transfer the purchaser is entitled to be paid the expropriation compensation paid by the expropriator to the seller.

I therefore rule in favour of the plaintiff and order that payment be made by Defendant to the Plaintiff in the sum of E27 514,23 together with interest calculated at 9% per annum from the date on which the defendant received the compensation until date of payment and costs.

S.W SAPIRE

ACTING CHIEF JUSTICE