

IN THE HIGH COURT OF SWAZILAND

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CASE NO: 1275/94

IN THE MATTER BETWEEN:

THEMBI ALEANER HLEZA

PLAINTIFF

VS

MUSA DAVID SIBANYONI & OTHERS

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

CORAM:

S.B. MAPHALALA - A J

FOR PLAINTIFF

MR A. SHABANGU

FOR 2ND DEFENDANT

MR P. DUNSEITH

FOR 3RD & 4TH DEFENDANT

MR L. KHUMALO

JUDGEMENT

(14/07/98)

The matter came to court on the 12th November, 1997 on an exception raised by the Plaintiff. The crisp question of law which is raised by the exception relates to the effect of registration in the Deeds Office, of what purports to be a transfer of immovable property when such registration is admittedly unintended and erroneous. This is the question of law which arises in the pleadings and which the exception seeks to have addressed contended the Plaintiff.

Put in another way the question raised for decision in the pleadings is this: can registration, itself have the effect of passing ownership even though such registration was erroneous and was not intended to pass the specific property named in the Deed of Transfer and to the person to whom it was eventually registered i.e. the Defendant.

This is the case advanced by the Plaintiff. The Plaintiff filed impressive main heads of argument running for 10 pages supported by an array of decided cases and the writings of renowned legal authors on the subject. Mr Shabangu for the Plaintiff when the matter came for argument before me contended that it was rather common cause that the registration of the property in the name of the 2nd Defendant was in error and that it was not intended by the 1st and the 2nd Defendant. Further, that the present relief being sought against the 1st Defendant only and he has not filed

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any opposing papers to that relief. If the property is still rested on the 1st Defendant he can still pass ownership to the Plaintiff. The intention in the present case was completely lacking the parties were in

error as to the piece of ground the Deed of Sale sought to sell. Mr Shabangu argued that there was common error and thus making the contract void ab initio.

In reply Mr Dunseith for the 2nd Defendant expressed surprise that the matter was before court in the manner it has been brought. They are hearing the Plaintiff in court for the first time. These are new matters which were not mentioned in the Plaintiff's amended particulars of claim (pages 1 - 5 of the book of pleadings). Paragraph 5 of the amended particulars of claim does not allege that the transfer was by mutual error.

Mr Dunseith further argued that it was highly irregular for Mr Shabangu to argue an exception which was not mentioned in the particulars of claim. The court has to decide whether the matter has to go for trial or it can be decided on a point of law. The court needs a full trial in this case to determine the rights of all the parties concerned. Finally Mr Dunseith argued that the exception should be dismissed with costs.

On the other hand Mr Khumalo for 3rd and 4th Defendant agreed with Mr Dunseith that Mr Shabangu has irregularly approached the court in order to short circuit the proceedings in a matter with a complex set of facts. That his approach does not even serve his purpose. The rectification agreement is dated the 27th July, 1993 and yet the addendum dated 22nd May, 1994 about a year later. If we are to have an exception we have to look at the documents which initially set up the case. Particulars of claim do not even begin to allege against the 3rd and 4th Defendant. The exception is totally ill conceived a simply attempt to adopt a short-cut approach to a resolution to a matter which has a long history of complex transaction with a network of rights and obligations. The parties have to go to trial.

These are the issues before me. It is trite law that an exception may be taken to a pleading

1. If it is vague and embarrassing or,
2. If it lacks averments necessary to sustain an action or a defence as the case may be (Refer to Herbstein's Van Winsen "The Civil Practice of the Supreme Court of South Africa (4th ED) and the cases there cited).

I have read the papers before me and considered the able arguments by Counsel. I have considered very carefully the facts before me and the law applicable in such matter. I am inclined to agree with the respondents in this case for the reasons they have advanced. The Plaintiff merely sprung a surprise in launching these proceedings. His own amended particulars of claim do not raise the exception. The Plaintiff does not even attack the 3rd and 4th Defendant defences and they remain intact.

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For the arguments advanced by Mr Dunseith for the 2nd Defendant and Mr Khumalo for the 3rd and 4th Defendant and the reasons I have advance above. I dismiss the application for an exception with costs and rule that the matter goes to trial.

S. B. MAPHALALA

ACTING JUDGE