



THE HIGH COURT OF SWAZILAND

THEMBA MAGAGULA
Plaintiff

And

MELODY FRUHWIRTH
Defendant

Civil Case No. 1215/2001

Coram
For the Plaintiff
For the Defendant

S.B. MAPHALALA – J
MR. M. THWALA
IN ABSENTIA

JUDGEMENT
(30/07/2002)

(a) Introduction

This matter initially came under a certificate of urgency by way of motion proceedings. The plaintiff (who was applicant then) applied for an order *inter alia* interdicting the third respondent (The Registrar of Deeds) from registering transfer of certain Lot 385 Coates Valley Manzini district Swaziland until applicant has been paid his estate agents' commission of E25, 000-00; directing the first respondent (the defendant) to pay forthwith, the sum of E25, 000-00 being estate agents' commission due and payable in terms of a mandate given by the first respondent to the applicant; costs of the application and further and/or alternative relief.

The matter appeared before Sapire CJ on the 17th August 2001, where he converted the motion proceedings to trial proceedings as there was a material dispute of fact which could not be resolved in motion proceedings. The learned Chief Justice ordered as follows: "The notice of motion to stand as summons. The applicant to file declaration within 14 days. Rules of court to apply. Wasted costs to be reserved for trial..."

Indeed the plaintiff filed his declaration on the 28th August 2001, and the defendant filed her declaration on the 4th October 2001. The matter remained in abeyance until the attorneys for the parties convene a pre-trial conference on the 24th May 2002 where it was recorded *inter alia* in the pre-trial minute that:

"1...

2 Defendant denied the existence of any agency agreement between the parties.

3 Plaintiff persists that he was given a mandate to find defendant a house for sale..."

The matter was set down by the Registrar of this court for trial on the 19th June 2002. When the matter was called the plaintiff was present and the defendant was not in attendance nor was her legal representative. It emerged that the defendant's attorneys had filed a notice of withdrawal dated the 10th June 2002 with the necessary certificate of posting. I *meru motu* raised the issue with Mr. Thwala for the plaintiff that the *dies* had not expired in terms of the rules, that the defendant must within 10 (ten) days of receipt of this notice, appoint and notify the plaintiff and the Registrar of this court of its address where it may be served with all process in the proceedings. Mr. Thwala conceded the point and the matter was postponed to the 25th June 2002 to allow the *dies* to run its course.

On the return date when the matter was called the defendant was not in attendance and the plaintiff was in attendance nor was there any indication that she had complied with the rule afore-mentioned. The matter then proceeded on the basis that the defendant was in default. It is trite law that if, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim to the extent that the burden of proof lies upon him, and judgment must be given accordingly, in so far as he has discharged that burden (see *Herbstein at al The Civil Practice of the Supreme Court of South Africa (4th ED)* at page 661 and the cases

cited thereat). The court then heard the evidence of the plaintiff himself and one Mr. Nkabinde who gave evidence on his behalf.

(b) The cause of action

The plaintiff avers in his declaration that in or around August 2002, at Manzini plaintiff and defendant entered into a verbal mandate in terms of which defendant mandated plaintiff to find a residential property for sale. Plaintiff accepted the mandate.

It was an express or implied term of the mandate that defendant was to pay plaintiff, in the event of a sale being concluded as a result of plaintiff's efforts, the usual and customary commission of five per cent (5%) of the total purchase price.

In pursuance of this mandate plaintiff introduced defendant to two properties on Flamboyant Road, Coates Valley, Manzini. There were Lot 382 and Lot 385. In consequence of these introductions and as a direct result thereof defendant on or about 27th September 2000, bought Lot 385 for a sum of E500, 000-00.

Plaintiff contends that, consequently he is entitled to his commission and/or a reasonable remuneration of five percent. On that amount to wit, E25, 000-00. Notwithstanding due demand defendant has wrongfully and unlawfully failed, refused and/or neglected to pay the aforesaid sum of E25, 000-00. The plaintiff also claims interest thereon at 9% per annum a *tempore morae* and costs of suit.

© The defendant's defence

The defendant pleaded in her declaration that the first time she ever saw plaintiff was when the latter came to her house at Coates Valley which she was renting from Swaziland Property Market. Plaintiff came to show some people the house which was apparently up for sale. Rentals were being paid to Swaziland Property Market by her. Defendant never at any stage requested plaintiff to find a house to purchase. The defendant is also not aware of a customary and/or usual commission of 5% that she

agreed either expressly or impliedly to pay plaintiff upon the conclusion of a sale on her behalf.

Defendant avers that Lot 385 Coates Valley was advertised by a certain David Boxhall – Smith for sale in the Times of Swaziland newspaper of the 14th September 2000. Upon seeing the advertisement defendant contacted the aforesaid Mr. Boxhall – Smith with a view to seeing the house after which negotiations commenced between defendant and Mr Boxhall – Smith and it was finally agreed that the purchase price shall be the price of E500, 000-00. A deed of sale was subsequently prepared in respect of the sale by the offices of attorneys Samuel S. Earnshaw and Partners. Nowhere in the agreement is there any mention of the plaintiff's commission. Defendant denies that she is in no way indebted to the plaintiff in the sum of E25, 000-00 or any amount at all.

(d) Synopsis of the evidence

As I have stated earlier on in this judgment that the defendant did not appear, the plaintiff proceeded to prove his claim by giving *viva voce* evidence and he also called the evidence of one Mr. Nkabinde. The evidence of the plaintiff briefly put is as follows: The defendant at the material time was renting the house which was subsequently bought by Mr. Nkabinde. The defendant as she had to vacate this house instructed him to look for a house for her in the same area of Coates Valley in Manzini. The defendant was to pay him the standard rate of 5% as commission.

In pursuance to this verbal agreement plaintiff proceeded to look for houses and ultimately secured a certain Mr. Smith who eventually sold his house to the defendant for E500, 000-00.

Mr. Nkabinde who was called by the plaintiff to testify on his behalf confirmed that he bought the house which was then let out to the defendant. He pressurised the plaintiff for the defendant to vacate the house which he had purchased and needed to take occupation. There were discussions that went on between the three parties viz, the plaintiff, defendant and Mr. Nkabinde resulting in the latter giving the defendant a grace period of two months on which to vacate the house.

As the defendant has not given evidence in this matter there is nothing to gainsay the evidence led by the plaintiff.

(e) **The applicable law**

It is a trite principle of law that a party who engages an estate agent to find a purchaser of his property (the mandate usually given to an estate agent) is, unless otherwise agreed, only obliged to pay the agent his commission if the following requirements are met:

- i) The mandator has entered into a binding contract of sale with a person who, at the time entering into the contract, was willing and able to perform his obligations under it. A binding sale must be concluded. The maxim in this regard is “no sale, no commission”. (see *Robert Sharrock, Business Transaction Law 4th ED* at page 284 and the case of *Brayshaw vs Schoeman en Andere 1960 (1) S.A. 625 (A)*).
- ii) The estate agent’s efforts were the “effective” cause of the sale. It must be shown that the agent’s actions were the decisive factor in bringing about the transaction. Schreiner JA in the case of *Barnard’s Parry Ltd vs Strydom 1946 A.D. 931 at 936* had this to say:

“Often the first introduction of the seller’s property to the purchaser will be the decisive factor; this will be so in the ordinary case where nothing intervenes to prevent the introduction from leading straight on to the sale. But sometimes the purchaser does not act immediately on the introduction; there may be lengthy negotiations and other events may happen that may tend to promote the sale or discourage the parties from entering into it. In such cases the decisive factor may be some exercise of the art of persuasion, or the removal of financial obstacles, or the like”.

The *onus* is on the plaintiff to prove the above-mentioned requirements.

i) **The law vis a vis the facts of this case**

The first question is whether plaintiff had been given any mandate, on the facts as they appear on the papers and plaintiff's *viva voce* evidence it is clear that plaintiff relies on an express mandate given by defendant. The evidence of the plaintiff has not been controverted in *casu* that there was consensus between the defendant and plaintiff and that the latter acted on behalf of the former. When one look at the conduct of the defendant and all surrounding circumstance such that she was under pressure to find alternative accommodation; was about to purchase Mr and Mrs LeGrante's property through plaintiff's introduction. The evidence of Mr. Nkabinde who gave evidence on behalf of the plaintiff added more weight to the plaintiff's version.

The cumulative effect of all the evidence of plaintiff and the circumstances of defendant leads one to conclude that a mandate to find suitable accommodation was given. (see *Michael V. Vermeulen and another 1971 (1) S.A. 442 at 444H – 445A* and also *Karol vs Fiddel 1948 (4) S.A. 466 at 472*).

Once it is admitted that on the evidence before court that the services of plaintiff were retained by the defendant (as it should), what remains is for the plaintiff to prove that he was the "effective" cause of the sale agreement. This part of the inquiry turns to be decided on whether plaintiff was the one who first introduced the defendant to the property. (see *Munitz vs Steers Trust Co. (Pty) Ltd 1993 (2) S.A. 396 © at 391D* and *Barnard vs Parry (supra)* at 936).

On the defendant's version gleaned from her papers she asserts that she saw the property being offered on the Times of Swaziland. Plaintiff on the other hand contends that he is the one who saw the advert by the seller, phoned him for an appointment and later introduced the defendant to the property. The fact that the defendant came to view the property with plaintiff has not been disputed. From the evidence as a whole the balance of probability justifies the assertion that plaintiff did introduce defendant to the property.

In sum, I come to conclusion on the facts that the plaintiff has discharged his *onus* of proving firstly, that he was given a mandate to find an immovable property suitable to


the tastes of the defendant and secondly, plaintiff was that effective cause of the ultimate sale between the defendant and the seller.

As to the amount payable to the plaintiff it is trite law that the mandator must pay the mandatary the remuneration they have agreed upon. Where the amount of the remuneration is not expressly or tacitly fixed by agreement, it must be determined by reference to custom or usage of the profession concerned. (see *Robert Sharrock (supra)* at page 282). In *casu*, it is plaintiff uncontroverted evidence that they agreed on the customary 5% in the estate agents' trade. In the instant case it would be 5% of the purchase price of E500, 000-00 which would be a sum of E25, 000-00.

i) The Court Order

In the result, the following order is recorded, that judgement is entered in favour of the plaintiff that defendant:

- a. Pays a sum of E25, 000-00;
- b. Interest thereon at 9% per annum a *tempore morae*;
- c. Costs of suit.


S.B. MAPHALALA
JUDGE