

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3/2001

In the matter between:

RUDOLPH FAMILY TRUST

APPLICANT

and

MICHAEL MASUKU

1st RESPONDENT

THE REGISTRAR OF DEEDS

2nd RESPONDENT

CORAM

Q.M. MABUZA-J MR.

FOR THE APPLICANT FOR

MABILA MR.

THE RESPONDENT

SHILUBANE

JUDGMENT 12/06/07

[1] The Court herein first dealt with an application by Mr. Mabila for the amendment complained of by the Respondents namely that a trust not being a legal persona must be represented in civil proceedings by its

trustee. Mr. Shilubane had no objection to the amendment he merely asked for costs of the amendment. The amendment was granted and costs occasioned thereby awarded to the Respondents accordingly.

[2] The Applicant moved an urgent application herein for order in the following terms:

1. Dispensing with the usual time limits, procedures and manner of service provided for in the Rules of the above Honourable Court and hearing this matter as one of urgency.

2. Condoning the Applicant for non-compliance with the said Rules.

3. Declaring the 1st Respondent's purported cancellation of the sale agreement between himself and the Applicant of no force and effect.

4. Directing the 2nd Respondent to forthwith effect transfer and registration into the name of the Applicant (my edition) of the properties, being:

a) **CERTAIN :** **Farm No. 548 situate**
in

**the Shiselweni District,
Swaziland**

**MEASURING : 347, 6407
(Three Four Seven Comma Six
Four Zero Seven) hectares**

**b)CERTAIN : Remaining extent of Farm No.
549 situate in the Shiselweni District,
Swaziland.**

**MEASURING 337, 7406 (Three Three
Seven Comma Seven Four Zero Six)
hectares.**

5. Pending finalization of prayers 3 and 4 above, both the 1st and 2nd Respondents be interdicted and restrained from transferring and registering the properties subject herein into the names of other people other than the Applicant.
6. Costs against the 1st Respondents only.
7. Further and/or alternative relief.

[3] On the 5th February 2007 by consent of the parties prayers 5 herein above was granted.

[4] The background herein is that on the 30th June 2006 and at Mbabane the Applicant and the 1st Respondent executed a deed of sale in terms of which the 1st Respondent sold to the Applicant two properties described as:

**"7.1 CERTAIN Farm No.548
situate in the Shiselweni**

**MEASURING 347, 6407
(Three
Four Seven Comma Six
Four Zero Seven)**

**7.2 CERTAIN :Remaining extent of
Farm No. 549 situate in
the Shiselweni
District, Swaziland.**

MEASURING:

**337, 7406 (Three Three
Seven Comma Seven
Four Zero Six) hectares.**

**Both held by 1st
Respondent under Deed
of Transfer No.
147/1998.**

[5] Both properties were sold for the total sum of E838,000.00 (Eight Hundred and Thirty Eight Thousand Emalangeni Only) and the transfer of registration from the 1st Respondent to the Applicant proceeded. Attorneys Mj Manzini & Associates who are also conveyancers proceeded with the registration of transfer of the property.

[6] While the aforementioned was being effected, the 1st Respondent by letter dated 13th December 2006 written to Attorney Mj Manzini & Associates and copied to the Applicant purported to cancel the sale agreement between himself and the Applicant.

[7] The copy of the letter is reproduced herein under. The contents of this letter form the bone of contention:

"This letter serves to inform you of our intention to cancel the above mentioned contract. Please refer to our letter of 13th September 2006 addressed to Pam Golden (attached).

Your attention is further drawn to close 6.1 and close 9 of the contract of sale.

Finally we note that the guarantee of the purchase price by Standard Bank expired on the 30th September 2006 after which date it was automatically cancelled.

Under the foregoing circumstances the above contract is deemed to have been cancelled and Mof no legal force."

[8] The Applicant argues that the 1st Respondent cannot in law cancel the agreement because it is not in breach and has responded that the 1st Respondent cannot seek to rely on Clause 6.1 because clause 6.2 clearly states that clause 6.1 is for the benefit of the purchaser who is the Applicant.

[9] Clause 6.1 states: **"The sale is subject to the Purchaser (or the Seller or PGP on the Purchaser's behalf) by no later than 28th July 2000 raising a loan on security of a mortgage bond over the Property for not less than E838,000.00 (Eight Hundred and Thirty Eight Thousand Emalangi on such terms and subject to such conditions as are customarily imposed by mortgage lending financial institutions. The Purchaser warrants that he/she/it qualifies for such loan and knows of no factors which might prevent the loan from being granted. This condition shall be deemed to have been fulfilled on the date upon which the mortgage lender approves the loan in writing. If the loan is not granted by the date referred to above the period for raising the loan shall be extended automatically for a further 30 (Thirty) days."**

Clause 6.2 states: **"The provisions of 6.1 are inserted for the benefit of the Purchaser who/which may waive the condition expressly or by conduct."**

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sale and fail to remedy such breach within 7 (seven) days of the date of delivery of written notice by the Seller specifying the breach and demanding its rectification then and in such event the Seller shall be entitled:- to cancel this agreement of sale and to retain, after payment of brokerage to PGP, the balance of the deposit or any other monies paid on account of the purchase price and/or costs and held by PGP and/or the conveyancers and rouwkoop or penalty or as liquidated damages in respect of the prejudice suffered by the Seller, or

to cancel this agreement of sale and to claim and recover from the Purchaser damages sustained by the Seller as a consequence of the cancellation occasioned by the Purchaser's breach and pending

determination of such damages to require the deposit or any balance of the deposit (after payment of brokerage to PGP) and any other amounts paid by the Purchaser to the conveyancers or PGP on account of the purchase price to be retained in trust for ultimate application to satisfy any successful claim brought by the Seller. The provisions of this clause, if applied by the Seller, shall not prejudice the rights of PGP pursuant to clause 9.3

Either party shall be entitled to enforce the terms of this agreement of sale against the defaulting party without notice and without prejudice to any other rights contained in this agreement or in Law and to do so irrespective as to whether cancellation rights exist or are exercised or not.

9.3 Should the Seller choose to enforce rights by way of legal proceedings the legal costs so incurred shall be paid by the Purchaser on the scale as between attorney and client.

[10] The Applicant states that the 1st Respondent cannot rely on Clause 9 of the agreement as same can only come into effect in the event there has been a breach of the terms and conditions of the agreement. The Applicant goes on to say that the 1st Respondent cannot claim that the guarantee provided by Standard Bank expired on the 30th September 2006 when he knows quite well that a fresh guarantee which expired on the 30th November 2006 was provided by Standard Bank. The Applicant argues that the 1st Respondent was actually aware of this fresh guarantee because he signed the Power of Attorney to Give Transfer on the 17th November 2006 and the Declaration by the Seller on the 30th November 2006.

[11] The 1st Respondent also interdicted the Registrar of Deeds from registering the transfer. Hence these proceedings.

[12] The 1st Respondent in "Annexure JJR 7" refers to his letter dated 13th September 2006 and addressed to Pam Golding. Unfortunately the letter is not attached to the pleadings so I have no idea what its contents are. The letter dated 13/12/06 draws the Applicants attention to Clauses 6 and 9. Clause 6.1 and 6.2 are set out above and are really meant for the Applicant. There is no indication in the letter as to why the 1st Respondent is drawing the Applicants attention thereto.

[13] Finally the 1st Respondent refers to the guarantee of the purchase price issued by Standard Bank and that it had expired on the 30/9/2006 after which date it was automatically cancelled. He goes on to state that under the foregoing circumstances the above contract is deemed to have been cancelled and no legal force.

[14] Apart from the reference to the guarantee the rest of the letter does not clearly set out a cause of complaint that would justify the cancellation of the deed of sale.

[15] The guarantee that the 1st Respondent refers to is not attached to these papers. I have no way of knowing whether he was correct or not. The guarantee filed off record (Annexure JJR8) appears valid to me. Indeed Mr.

Shilubane did not say much about the guarantee referred to by the 1st Respondent in his letter dated 13/12/2006.

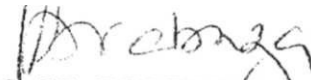
Mr. Shilubane based his submission on the valid guarantee (Annexure JJR 8) that it only provided for the amount of E753,000.00 and not E838,000.00 in terms of Clause 2 of the offer to purchase. Therefore the 1st Respondent was not obliged to accept the guarantee because it did not secure the balance of the purchase price.

In my view this is just splitting hairs. In business practice it is usual to phrase clause 2 as it has been phrased. It is acceptable practice to deposit a certain percentage to the agents in order to secure the agents commission and the rest to be furnished by bank guarantee. The 1st Respondent ***prima facie*** accepted this state of affairs that is why he signed the offer of purchase, Power of Attorney to give transfer (Annexure JJR 4) and the Declaration by seller (Annexure JJR 5). The estate agents Messrs Pam Golding were instructed by him. He may not have directly instructed the conveyancers but he did not object when his agents advised him to execute the transfer documents with Messrs MJ Manzini and Associates. When he signed the

offer to purchase he should have raised his objection as Clause 2.2 refers to the sellers conveyancers.

[17] I can find no valid reason to justify the 1st Respondents cancellation of the agreement. The Applicant in my view has discharged all his obligations in terms of the offer to purchase.

[18] In the event the ***rule nisi*** is hereby confirmed. The 1st Respondent is ordered to pay the Applicants costs.


Q.M. MABUZA J