

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1995/08

In the matter between:

SYLVIAN L. OKONDA

PLAINTIFF

and

DAVID T. DLAMINI

DEFENDANT

CORAM: Q.M. MABUZA -J

FOR THE PLAINTIFF: MR. Z. MAGAGULA

FOR THE DEFENDANT: MR. SHONGWE

RULING 24110/08

[1] This is an application for summary judgment in which the Plaintiff claims:

- (1) Payment of the sum of E280,000.00 (Two hundred and eighty thousand Emalangeneni only).
- (2) Interest thereon at the rate of 9% p.a.
- (3) Costs of suit.

(4) Further and alternative relief.

[2] The Plaintiff purchased immovable property belonging to the Defendant through an agent Bee Zee Kay Investments. The Deed of Sale was signed by the Defendant on the 10th October 2007. It has one witness. The Plaintiff signed on an unstated date. His signature has two witnesses.

[3] Clause 2 thereof states:

"The purchase price shall be the sum of E620,000.00 (Six hundred and twenty thousand Emalangi only) less E280,000.00 (two hundred and eighty thousand Emalangi only). The balance shall be payable in the bank of Building Society cherub against the registration of the transfer. The aforesaid purchase price shall be secured by a guarantee drawn in favour of the Seller's Conveyancers (R.J.S. Perry) for the account of the Seller within 60 (sixty) days of signing hereof, failing which the sale shall be cancelled and may be extended by a mutual agreement".

[4] Clause 9 which is the cancellation clause provides as follows:

"9.1 Should the Purchase for any reason whatsoever commit a breach of the terms and conditions of this Deed of Sale and remain in such breach for a period of 7 (seven) days of the demand being made to remedy the same, the Seller shall have the right to declare the sale cancelled and any issues from such cancellation shall be determined by a Court of Law.

9.2 The Seller shall hereafter cause the property to sold through the relevant Court procedure by public auction to recover from the sale the balance of the purchase price and the remaining balance shall be paid by the Purchaser".

[5] The signature of the Defendant to the deed of sale is not denied nor is the authenticity thereof. The payments to the agent are set out in Annexure ^aBZ^w at page 46 of the Book of Pleadings and they reflect the following payments:

18/08/2006 -	50,000.00
25/11/2006-	65,000.00
03/01/2007 -	100,000.00
20/04/2007-	65,000.00
Total	- 280,000.00

[6] It is not clear on the summons why the above payments were made long before the deed of sale was drawn up and signed. The deed of sale was signed on the 10/10/08 by the seller. The last payment was made on the 30/4/2007. Someone has to explain to the court this curious state of affairs.

[7] There seems to be substance in the denial that the agent was not mandated by the Defendant during the dates of the

payments set out above which are much earlier than the 10/10/200^ This fact has to be cleared up. Furthermore the payments were recorded as being for the property in dispute. How so? The sale occurred months later.

[8] Mr. Magagula's argument revolves around clause 2 of the deed of sale. It is that this clause states that "**the purchase price shall be the sum of E620,000.00 less E280,000.00...**" (my emphasis). He further argues that this sentence indicates that the Defendant was aware that payment had been made. My counter question is to whom had payment been made if the Defendant says it was not made to him. I suspect that like all transactions where an agent is involved, it is the agent who drew up the deed of sale and this fact of money having been paid was not disclosed to the Defendant.

[9] It is salutary that the Defendant has opted to draw the agent into the proceedings to explain what they did with the money. The Plaintiff ought to have joined the agent who probably still has the money. Had the agent been joined this court would most likely have entered judgment against it.

[10] In the event summary judgment is refused. Costs to be in the cause.

Q.M. MABUZA -J

