



THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO. 1011/2006

In the matter between

MANTA AGENCIES (PTY) LTD

Plaintiff

and

HOSSAIN INTERNATIONAL
INVESTMENTS T/A CITY INTERNET
AND PHONE

Defendant

Coram

Banda, CJ

For the Plaintiff

Mr. B.W. Magagula

For the Defendant

Mr. L. Malinga

JUDGMENT

[1] The plaintiff is claiming the refund of a sum of E100 000.00 (One hundred thousand Emalangeni) from the defendant. It is alleged that the said sum was paid to the defendant pursuant to a business sale agreement which was made between the two parties.

[2] It is the plaintiff's case that on or about the 11th February 2006 the plaintiff entered into a written agreement of sale of business with the defendant. The plaintiff was represented during the said agreement by its director Mr.

Sifiso Magagula and the defendant was represented also by its director Mr. Aktar Hossain. The terms of the agreement were that the purchase price for the business would be E130 000.00 and would be paid by making a deposit of E100 000.00 and that the balance would be paid after the plaintiff had taken possession of the business and was running it. It was the plaintiffs case further that he paid the E1 00 000.00 in three instalments two by cheque and with one cash payment. The first cheque was in the sum of E11 000.00 and was marked Ex. 2. The second cheque was in the sum of E77 000.00 and was marked Ex. 3. The balance of E12 000.00 was paid in cash. These payments have been admitted by the defendant.

[3] The particulars of claim had originally alleged that the plaintiff, during the month of February 2006, had taken possession of the business premises in terms of the agreement of sale and he further alleged that on or about the 28th February 2006, the plaintiff was ejected from the business premises by the landlord allegedly for outstanding arrears for monthly rentals. During the evidence of the plaintiffs director, Mr. Sifiso Magagula, it was sought to amend the particulars of claim to agree with the evidence which was to the effect that the plaintiff did not take possession of the business premises. The defendant has admitted, in his evidence, that the plaintiff did not take possession of the business premises.

[4] Mr. Malinga has taken issue with the amendment and, in particular, in the manner it was made. He has submitted that the amendment was not made properly in terms of Rule 28 of the High Court Rules. He has contended that there was no formal application for the amendment and

that as such the amendment should not have been allowed. I allowed the amendment because I did not see that any prejudice or failure of justice would be occasioned to the defendant especially when the latter had also admitted that there had been no occupation of the business premises. The purpose of the procedural rules is to facilitate the business of the courts. The learned authors of **The Civil Practice of the Supreme Court of South Africa** have this to say on the purpose of the Rules of Court at page 33 of the 4th Edition:-

"The rules of court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit that will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible."

- [5] And in the case of **Trans-African Insurance Co. Ltd. vs Maluleka** 1956(2) SA 273(A) at 278 F - G Schreiner JA stated as follows:-

"No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decisions of cases on their real merits."

[6] It was the evidence of Mr. Magagula for the plaintiff that following an advertisement which was published in the local papers for the sale of a business situated at Amalgam House in the Manzini area he responded to the advertisement. After discussions with Mr. Hossain for the defendant a Deed of Sale was concluded by the parties. The sale agreement was produced in court and was marked Ex. 1. Both parties signed the agreement by which it was agreed that the business would be purchased at a price of E130 000.00 as already indicated earlier in this judgment. It was further the evidence of Mr. Magagula that there was a verbal part of the agreement in which the parties agreed that it would be necessary for Mr. Magagula to be introduced to the owner of the premises where the business was located. It was necessary for this to be done at that time because the lease agreement for the premises was between the defendant and the landlord who was Mr. Moses Ncala at the time.

[7] Mr. Ncala gave evidence for the plaintiff. It was his evidence that Mr. Hossain for the defendant had betrayed Mr. Ncala's trust and that he was not prepared to deal with him. It, therefore, became difficult to achieve the introduction of Mr. Magagula to Mr. Ncala. Indeed it was the evidence of Mr. Magagula that during one such attempt at getting introduction it was aborted because Mr. Ncala did not want to see Mr. Hossain of the defendant and that they were literally chased away. It became impossible to have the introduction done so that

Mr. Magagula could take possession of the business premises. It became clear that the landlord was not going to sanction the occupation of the premises as long as Mr. Hossain for the defendant was involved. Mr. Hossain was consequently not able

to deliver possession of the premises to Mr. Magagula. It was because Mr. Hossain was not able to deliver the business premises that Mr. Magagula for the plaintiff proceeded to cancel the sale business agreement which the parties had concluded.

Mr. Malinga for the defendant has submitted that the issue of introduction of the plaintiff to the landlord was not part of the sale agreement and that it was only a "gentleman's agreement" between the parties. He contended, therefore, that failure to introduce the plaintiff to the landlord had nothing to do with the contract of sale and that the defendant had done everything in his power to allow the plaintiff to occupy the business premises. Mr. Malinga submitted that the plaintiff could have taken possession of the premises on the basis of the valid lease which the defendant had contracted with the landlord. I do not think, with respect, that Mr. Malinga is being practical and realistic to suggest that the plaintiff could have entered upon the business premises on the basis of a lease agreement between the landlord and the defendant which was valid until November 2006, without the landlord's agreement. This would not have been possible especially in view of the fact that Mr. Ncala the landlord had already made it clear that he did not want to have anything to do with Mr. Hossain. Mr. Malinga further contended that because it was not Mr. Hossain who was refusing the plaintiff to enter upon the premises he could not be blamed. Mr. Malinga has also referred to the issue of production of receipts to the plaintiff. He argued that the receipts, as evidence of payment, were only to be shown to the plaintiff before he took over possession. Mr. Malinga also referred to the issue of contents of a lease agreement which existed between the landlord and the defendant especially in respect of alterations to schedule "A" and paragraph 2. In my view these issues are not very relevant to the issue I have to determine in this case.

The issue I have to determine is whether the terms of the sale agreement have been discharged by the parties. There can be no doubt that the plaintiff had paid E100 000.00 as part payment of the purchase price of E130 000.00. The defendant has admitted receiving this sum of money as part payment for the sale of his business. The defendant has also admitted that he did not deliver possession of the business premises to the plaintiff as agreed. He has contended, however, that he cannot pay this sum of money because it was not his fault that the plaintiff did not occupy the premises. He has as a matter of fact contended that it should be the landlord who should refund the said sum. The landlord was not a party to the sale agreement. It was the duty of the defendant to deliver the business premises to the plaintiff as stipulated under the sale agreement. Failure to deliver the premises entitled the purchaser to cancel the sale agreement. Where a seller does any act which prejudices the purchaser's or his nominee the agreement of sale shall be void *ab initio* and the seller shall repay to the purchaser all payments paid in terms of the agreement. And the purchaser does not have to account to the seller for any fruits (rent) which he earned during

his possession of the property.....". See the case of

Vermaak vs Van Heerden N.O. 1978(4) SA 348.

I am satisfied and I find that the defendant failed to discharge or perform his part of the contract and was therefore in breach of the sale agreement. I find accordingly that the plaintiff was entitled to cancel the contract and it is the defendant's obligation to restore the plaintiff's status quo ante by refunding to the plaintiff the sum of E100 000.00 that he paid. This claim must therefore succeed with costs of suit to the plaintiff.



Pronounced in open court at Mbabane on the '71..day of **Juiij/**
2009.

^—.

BANDA, CJ