IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 3624/05**

In the matter between:

SWAZILAND DEVELOPMENT AND SAVINGS

BANK **Plaintiff**

And

DIVERSA HOLDING CORPORATION LTD **Defendant**

Date of hearing: 14 July, 2009

Date of judgment: 10 September, 2009

No appearance for the Plaintiff

Mr. Attorney A.M. Lukhele for the Excepient

JUDGMENT

MASUKU J.

[1] "If there is one thing which, more than any other,

> public policy requires, it is that all men of full age and competent understanding shall have the utmost liberty of contracting and that all their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts of justice."

[2] The impact of the above trenchant words, which fell from the lips of Jessel M.R. in *Printing Registering Co. v Sampson,* 19 Eq. at 465 resonate very strongly to the present day and may indeed prove decisive in the determination of the present matter.

[3] Briefly recounted, the circumstances in which the present matter arose are the following: The Plaintiff, a financial institution with its headquarters based in Mbabane, through the instrumentality of its officials, read an issue in one of the local daily newspapers. There was in that issue an advertisement of property therein described as a "Modern Warehouse For Sale In Matsapha". It was reported to include

two warehouses, which were 303 and 608 square metres, respectively.

[4] No doubt impressed by the nature and size and the improvements on the property in question, the Plaintiff commenced negotiations with the Defendant's agent, which culminated in the Plaintiffs officials proceeding to the property where the Defendant's agent allegedly pointed out the boundaries of the aforesaid property. This eventually resulted in the Plaintiff purchasing the said property for a staggering El, 180,000.00. The sale was, as is the norm, preceded by the signing of a deed of sale which incorporated certain clauses which may loom large as the judgment progresses.

[5] The Plaintiffs claim is for the payment of the sum of E420,000.00 allegedly being an amount of damages suffered by the Plaintiff as a result of the Defendant and/or its agents

representing to the Plaintiff that the property it purchased included two warehouses, whereas that fact was untrue, as one of the warehouses was, unbeknown to the Plaintiff, erected on some property other than that which it sought to purchase. The amount claimed is alleged to be the open market value of the warehouse and the land on which it stands but which does not fall within the boundary of the property actually purchased by the Plaintiff.

[6] I should state in particular, that in its particulars of claim, the Plaintiff alleges that the Defendant's agent was negligent in the making of the representation it did for the reason that it did not take reasonable and/or proper steps to ascertain the exact extent of the boundaries of the property it was putting up for sale, and particularly, to ensure that the second warehouse was indeed on the property it owned as proffered in the advertisement.

[7] In response thereto, the Defendant has raised an exception to the effect that the Plaintiffs claim lacks averments necessary to sustain a cause of action, as envisaged by the provisions of Rule 23 (1) of the Rules of this Court. The Plaintiff, it is alleged by the Excepient, may not rely for its claim on the cause of action it does for the reason that same runs counter to the material clauses of the deed of sale which was signed *inter partes.*

[8] It is important, in this regard, to mention that the Excepient makes particular reference to the non-variation clause of the agreement and articles 4.1 and 4.2, which on account of their centrality to the defence raised, bear repeating. They read as follows:

> 4.1 "No representation or warranties not stated herein have been made or given by the parties expressly or impliedly and this

agreement constitutes the entire contract between the parties.

4.2 The purchaser acknowledges having inspected the property."

[9] I had occasion to deal with the effect of parties to a contract having reduced the terms thereof into writing. This was in the case of *Busaf (Pty) Ltd v Vusi Emmanuel Khumalo t/a Zimeleni Transport* Case No. 2839/08. In particular, I placed reliance on the writings of the learned authors Zeffert *et al,* The South African Law of Evidence, (formerly Hoffman & Zeffert), Lexis Nexis, 2003, at page 322, where the following is recorded:

> "If, however, the parties, decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction it was intended to record. As the parties' previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is inadmissible."

[10] Botha J.A. also dealt with that same question in the case of *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) S.A. 16 (A) at 26, where the learned Judge of Appeal quoted with approval the writings of Wigmore On Evidence, where it was stated:

> "This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act. In other words: *when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*" See also *Venter v Birchholtz* 1972 (1) S.A. 276 (A.D.) per Jansen J.A.

[11] I propose to revert to the implications of the above quotations later in the judgment. For present purposes, however, I intend to deal with the issue of the exception proper. In its notice of exception, the Excepient alleges that the particulars of claim,

though purporting to rely on representations allegedly made by the Defendant and/or its agent regarding the boundaries of the property in question and the improvements thereon, the actual allegations made by the Defendant have not been disclosed. Furthermore, it is the Excepient's contention that the Plaintiff is precluded from relying on representations which are not embodied in the deed of sale.

[12] For its part, the Excepient relied on the case of *Wells v South African Alimente Co.* 1927 A.D. 69 and *Sissons v Lloyd* 1960 (1) S.A. 367 S.R.). It was held in the former case that the absence of an allegation that the representation alleged was fraudulent was fatal and that the defendant's plea disclosed no defence. In that case, the respondent had sued the appellant company for 35 Pounds 5 shillings paid on account in respect of a lighting plant. It would appear that there was an order behind the transaction and which included an

undertaking by the buyer not to rely for cancellation on any representations made by the seller's agent.

[13] The Court held that the appellant could not set up a defence inconsistent with the said undertaking. The Court, per Innes C.J. held the following at page 72:

"He could not admit the undertaking and at the same time attempt to get behind it. That is no doubt so, but upon one assumption, and that is that the specific representations alleged by the appellant to have been false were representations covered by the order. Now those words are as wide and general as they well could be. They refer to 'any representations' made by 'any of our representatives'. But clearly they would not cover representations not only incorrect but fraudulent. On grounds of public policy, the law will not recognize an undertaking by which one of the contracting parties binds himself to condone and submit to the fraudulent conduct of the other. The Courts will not lend themselves to the enforcement of such a stipulation; for to do so would be to protect and encourage fraud. As remarked by an eminent Judge, 'No subtlety of language, nor craft or machinery in the form of contract, can estop a person who complains that he has been defrauded from having that question of fact submitted to a jury'. . . Hence contractual conditions by which one of the parties engages to verify all the representations for himself, and not to rely upon them as inducing the contract, must be confined to honest mistake and honest representations. However wide the language, the Court will cut down and confine its operations within those limits. Had the appellant alleged' that the representations were not only untrue but fraudulent, he might, as a matter of pleading, have escaped the operation of the obnoxious clause. But he has not done so. And the language of the undertaking which he subscribed covers all non-fraudulent representations. Mr. *Fischer* suggested that, in view of the paucity of

> information in the order, the representations covered by the undertaking should be confined to such as were consistent with the order. But neither on the plain principle nor authority is there any ground for thus restricting the plain and general language used. No doubt the condition is hard and onerous; but if people sign such conditions, they must, in the absence of fraud, be held to them. Public policy so demands." (Emphasis added).

For similar reasons, in the *Sisson* case *{supra),* the Court per Young J. held that:

> "In my judgment, the plea in this case is inconsistent with clause 6 of the general conditions, and as there is no allegation, such as fraud, to justify the defendant in asking the Court to go behind clause 6, the plea is bad."

What emerges from the foregoing is the importance of the quotation at the beginning of the judgment. In terms thereof, the Courts should, as a matter of policy, hold parties who contract, to the terms of their contract, regardless of how onerous and burdensome the terms thereof may with the benefit of hindsight be perceived to be. It is only in instances where fraud is specifically alleged that the Court may be

authorized to pierce the general terms of the covenant and enquire into the allegations of fraud, thus going against the terms which the parties otherwise bound themselves to on their own free volition.

It is clear, regard had to the particulars of claim that the Plaintiff, in the instant case, does not deny that the parties entered into an agreement, which constituted a memorial of the terms. That memorial specifically stated that no representations or warranties not stated therein had been made by the parties expressly or impliedly and that the agreement constituted the entire contract *inter partes.* Furthermore, the Plaintiff signed and agreed that it purchased the property having inspected the same.

In view of the foregoing matters, which as I have said, are common cause, it would appear to me that the Plaintiff must be held to the terms of the agreement signed between the parties. This is a just demand by the solicitudes of public policy. If it

were otherwise, people would thereby be encouraged to easily resile from undertakings they made once they form the view, rightly or wrongly, that the requirements of what they signed constitute the carrying of a heavy cross to which they may ultimately be crucified. In that regard, the weight and honour of their word would be treated as trifling, an eventuality that would hardly be in the interests of justice or in consonance with the demands of public policy. It would be fair to say that the terms of such agreements should ordinarily be regarded as virtually inviolable, save on account of the demands of public policy.

[18] The only saving grace, if I may call it that, for the Plaintiff, and which would clothe this Court with the wherewithal to go behind the terms of the agreement, would be allegations of fraud. Even then, these must be fully pleaded and not merely constitute an assemblage of loose, weak and vacillating allegations, for fraud is so easy to lay but often so difficult to prove. It is beyond debate

that the Plaintiff has not made any allegation, formidable, or otherwise, that would tilt the demands of public policy toward the Court going behind the ordinary purport of clauses 4.1 and 4.2 above.

[19] It is in any event clear that the allegations of representation relied upon by the Plaintiff for its claim, are without the four corners of the contract document. These allegations are clearly inconsistent with the aforesaid clauses and the only basis upon which the Court may legitimately go behind the aforesaid clauses, would be the allegations of fraud, the absence of which renders the Plaintiffs claim bad in law. The reliance on other facts inconsistent with the aforegoing clauses, is irrelevant and inadmissible, as stated in the *Busaf* case above.

[20] It is fitting that I should mention at this juncture that fraud is not the only basis upon which the Court may go behind the terms of a written agreement, with a view to

ultimately defeat the terms of a written deed or contract. Extrinsic evidence regarding issues such as illegality, mistake, misrepresentation or duress will always be admitted in order to defeat the terms of a written contract. I mention *en passant* that the Plaintiff does not rely on any of the above variables for the relief it seeks and therefor stands to be non-suited. See in this regard Che try on Contracts, 28th Ed, Sweet and Maxwell, London, 1999 at page 632.

[21] From reading the Plaintiffs averrals as found in paragraphs 6, 7, 8, and 9 of the particulars of claim, it is abundantly clear that the Plaintiff relies for the relief it seeks on a "representation" and not a "misrepresentation" allegedly made by the Excepient. A question may even arise as to whether a representation is in such circumstances actionable in law. I need not decide that point herein. In my view, there is a marked and significant difference in the nature, effect and implications of the two terms.

[22] The learned author Kerr, in his work entitled, Principles of Contract, 6th ed, Lexis Nexis, Butterworths, 2002, states the following at p267 regarding representations on the one hand and misrepresentations on the other:

> "A representation has been judicially defined as
>
> > 'a statement made by one party to the other before or at the time of the contract of some circumstance relating to it'.
>
> It does not become part of the contract.
>
> If such a statement is incorrect, it is a misrepresentation."

It is, in my view, quite clear that in the present circumstances, the mere allegation of a representation is not sufficient to found a cause of action as it does not fall within the exceptions to the parole evidence rule referred to and mentioned in paragraph

[18] above. For that reason, the exception taken by the Excepient is good.

[23] Mr. Mdladla, in his submissions further relied on *Van Wyk v Rotcher Saw Mills (Pty) Ltd* 1948 (1) SA 893 at 990 for the proposition that a contract of sale of land in writing is in itself a mere abstraction, consisting of ideas expressed in words but the relationship of those ideas to the concrete things which the ideas represent cannot be understood without precedence. On the facts of that case, the conclusion by the learned Chief Justice may well be correct. That case is not authority for the proposition that where a party in an agreement states that it has, before purchase of the same, inspected the property, it may later, in the absence of allegations of fraud and the other exceptions referred to above, be allowed to go behind the terms of the agreement and consequently be sanctioned to adduce evidence inconsistent with the terms of the agreement.

[24] There was also reliance placed by the Plaintiff on the case of *Richter v Bloemfontein Town Council* 1922 A.D. 57 at 59. In particular, it was the Plaintiffs case that ". . . extrinsic evidence

is in the case of every document admissible of every fact which identifies any person or thing mentioned in the document, and of every fact to which the document refers or may be intended to refer." What should not be divorced from the case cited are the facts and the conclusion. That case is authority for the proposition that where words or expressions are used in a technical or special sense, extrinsic evidence is only admissible to explain the construction of a document where the words are either ambiguous either in themselves or as read with their context.

[25] In the present case, there is no allegation of any ambiguity in the terms of the agreement such as to require the invocation of oral evidence. The agreement of sale, whatever else the advertisement referred to may have stated, whether as a mere puff or not or as an invitation to treat, stated in very clear and concise terms what the property being sold was, together with the extent thereof. This was done with sufficient particularity to enable the Plaintiff to know what it is that it was actually purchasing.

[26] Secondly, the Plaintiff in the agreement, acknowledged that no representations outside the terms of the agreement were made to it and further signed that it had inspected the property, not as described in the advertisement, I may add, but as described in the deed of sale. I am of the considered opinion, in the circumstances that the case cited by the Plaintiff does not assist it in the instant case as there is no ambiguity arising from the agreement, even as to what property was being sold to it. Furthermore, any evidence, which would be led by the Plaintiff, outside the allegations of fraud, and the other issues mentioned in paragraph [20] above would be inadmissible and rendering hollow the terms of the agreement and without sufficient justification, as required by the dictates of public policy, stated earlier.

[27] Another observation that needs necessarily be made regarding the operation of the parol evidence rule is that the Courts have, over the years created certain exceptions thereto. In this regard, Chetty *{op cit),* states the following at page 625 (12 - 095).

> "However, the parol evidence rule is and has long been subject to a number of exceptions. In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement."

[28] Closer home, addressing the same point, the learned author R.H. Christie, The Law of Contract In South Africa, 5th ed, Lexis Nexis, Butterworths, 2006, states the following at page. 194:-

> "One does not need very fertile imagination to see how, necessary as the rule is, it can lead to injustice if vigorously applied, by excluding evidence of what the parties really agreed. It has therefore been the constant endeavour of the courts to prevent the rule being used as an engine of fraud by a party who knows full well that that the written contract does not represent the true agreement. In the nature of things this endeavour to achieve a fair result without destroying the advantages inherent in written contracts has led to some decisions which are difficult to reconcile with each other. Perhaps the best way to look at the rule is to see it as a backstop which comes into operation only in the absence of some more dominant rule. Thus, as will be seen in later chapters, it gives way to the rules concerning misrepresentation, fraud undue influence,

> illegality or failure to comply with the terms of a statute, and mistake."

[29 The learned author, in support of the above proposition quoted the remarks which fell from the lips of Lord Russell C.J. in the English case of *Gillespie Bros, and Co. v Cheney, Eggar and Co.* [1896] 2 Q.B. 59 at 62. There, the learned Chief Justice said:-

> "... although when the parties arrive at a definite written contract intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but instead continue in force with the express written agreement."

It would be fair to say that a mature consideration of the Plaintiffs papers does not bring the instant case within the ambit of any of the above exceptions. For that reason the full weight and impact of the parol evidence rule should apply in this case.

[30] Again relying on other cases, including *Du Preez en Andere v Nederdnitse Gereformeerde, De Deur* 1994 (2) S.A. 191 and

Sun Packaging (Pty) Ltd v Vreulink 1996 (4) S.A. 176, Mr. Mdladla, in his written submissions, contended that the Plaintiff is not relying on representations not stated because the improvements on the property were actually inspected by the Plaintiff. In my view, this argument does not assist the Plaintiff at all, regard being had to the terms of the deed of sale, as adverted to earlier, and in particular that the said deed stipulates a full description of the property in question, together with improvements thereon.

[31] It is well to recall that there is no mention of two warehouses in the deed of sale. This fact, considered in the light of the starkly absent allegation of fraud and/or the other variables mentioned in paragraph [20] above, on the part of the Defendant, in my view, render the Plaintiffs claim excipiable and therefor bad in law. To countenance the Plaintiffs claim in the present circumstances, would be tantamount to doing serious violence to the freedom of contract and would also result in a serious and unnecessary negation of the parole evidence rule, particularly considering that this case does not fall within the

rubric of any of the exceptions to the parole evidence rule mentioned earlier.

[32] I should, in fairness, and in conclusion, state that on the date fixed by the Court for arguing the exception, there was no appearance for the Plaintiff. Mr. Lukhele for the Excepient, was however, in attendance. There was no reason or explanation furnished for the absence. Since heads of argument had been filed on behalf of both parties, I decided to write the judgment based on the said heads of argument, rather than having to postpone the matter to little benefit, regard had to the crisp issue of law the Court was called upon to determine.

[33] In the premises, I order the following:

[33.1] The Defendant's exception be and is hereby upheld with costs.

[33.2] The Plaintiff be and is hereby granted leave, if so advised, to file amended particulars of claim within fourteen (14) days from the date hereof.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 10th DAY OF SEPTEMBER, 2009.

T.S. Masuku, Judge

Messrs. S.V. Mdladla Associates for the Plaintiff Messrs. Dunseith Attorneys for the Excepient