CASE MO. 523/2007

BETWEEN

TRIPLE TRADING (PTY) LIMITED... APPLICANT

AND

***SWAZILAND DAIRY B*OARD... RESPONDENT

CORAM AGYEMANGJ

FDR THE APPLICANT: J. HENWDDD ESQ.

FOR THE RESPONDENT-, D. MAZIBUKQ ESQ.

DATED **THE 23rd day OF SEPTEMBER 2009**

JUDGMENT

In this application, the applicant seeks prayers against the respondent in the following terms: an order,

1. Ordering the respondent to comply with its obligations in terms of the agreement of sale dated 18th July 2005 and in particular, to sign all documentation to give effect thereto within ten days of the grant of this order;

2. in the event of the respondent failing to comply therewith, that the Registrar of the High Court of Swaziland be authorised to sign whatever documentation is necessary to give effect to the order;

3. Granting the applicant costs of this application;

4. Further and/or alternative relief.

In this application the applicant herein seeks the enforcement of a written agreement of sale regarding a piece of property described in the said agreement as Plot No. 1/447 Matsapha Industrial Estates, District of Manzrni, Swaziland. The applicant herein was represented in the agreement by its Director Sean Stewart and the respondent by its Chief Executive Nicholas T. Gumede.

In an eighteen-paragraph founding affidavit, the said Sean Stewart a Director of the applicant and its representative in these proceedings (referred to hereafter as the deponent), alleged that he approached the Managing Director of the respondent, one Dr. Nick Gumede (referred to hereafter as Dr. Gumede) in connection with the sale of the land the subject of the contract. Of Dr. Gumede, the deponent inquired if a piece of land which he described as Portion 1 of Lot 447 Matsapha Industrial Estates said to belong to the respondent was for sale. This was after the deponent had been informed by a gentleman he found weeding the site that the land was for sale.

The deponent averred that Dr. Gumede confirmed that the land was for sale and directed him to the respondent's agent one Itallo Dlamini of Millenium Property Managers. Thus did the deponent seek out the agent Itallo Dlamini who entered into negotiations with him for the sale of the said piece of land. The negotiations culminated in an offer of E600.000 made on behalf of the applicant as the purchase price of the land. The said offer was allegedly accepted by the respondent who gave

the agent authority to sell the property to the applicant. The agent thus informed the deponent that he would arrange for a Deed of Sale to be drawn up. It is the case of the applicant that while he was waiting for the drawing up of the Deed of Sale, he came across an advertisement in the Swazi News of 11th June 2005.placed by another company Macacini (Pty) Ltd regarding the sale of the same parcel of land. When the deponent confronted Dr. Gumede over this, he was allegedly informed by that gentleman that the respondents' Board of Directors had decided to advertise the land for sale and that the land had in fact been offered to another person for a higher price. This was information allegedly contained in respondent's letter received by the applicant afterwards.

The applicant's attorneys then wrote a letter exhibited in this application and marked SS3 to the respondent setting out the terms of the agreement between them which had not been cancelled, and demanding that a written sale of agreement be entered into.

To this letter the respondent replied per letter exhibited in this application and marked SS4, confirming the agreement between the parties and agreeing to sell the land to the applicant. The agent Itallo Dlamini also followed it up with letter marked SS5 in which the land was offered to the applicant for E600,000.

An agreement of sale exhibited in this application and marked SS6 was drawn up and entered into by the parties.

It Is the case of the applicant that it immediately placed E60.000 in the trust account of its attorneys Cloete/Henwood/Dlamini/Magagula and furnished a guarantee to the respondents attorney in the sum of

E600,000.

On 3rd November 2005, the respondent per letter exhibited in this application and marked SS8 sought to resile from the agreement of sale, a matter that was firmly resisted by the applicant who in its letter of 21st November 2005 to the respondent, refused to accept the repudiation. The applicant also, after communicating with the respondent's attorneys, furnished a fresh guarantee in the sum of E600,000 to the respondent and offered to pay the full amount into the trust account of the

respondent's attorneys. It was the case of the applicant that although it had done all these in compliance with its obligations under the agreement of sale, the respondent had failed to comply with its obligation under the said written agreement of sale to sell the land to it.

In its twenty-three paragraph answering affidavit sworn to by one Tony Dlamini, the respondent raised points *in limine* and also addressed matters deposed to in the founding affidavit. The following points were raised *in limine:*

1. That the property was misdescribed and its extent uncertain;
2. That the applicant failed to comply with the material term of the contract by failing to furnish a Bank or Building Society guarantee within thirty days of the signing of the contract;
3. That the agreement was cancelled for the failure to furnish a guarantee in terms provided under the agreement.

On the merits of the application the respondent denied that Dr. Gumede had authority from the respondent's Board to sell the said property. The respondent also denied that the property in question was ever advertised for sale by Mackacini (Pty) Ltd but added that in any case, the agreement to sell the land to the applicant at the time was oral and unenforceable and so was the written agreement that followed, having regard to the matters raised *in limine.* The respondent thus contended that it had no duty to comply with the agreement of sale. In argument, learned counsel relying on the said points raised by the respondent in its answering affidavit, contended that there was no valid agreement of sale between the parties regarding which the prayers of the applicant herein may be made for argued that the agreement of sale relied on by the applicant sinned against the Transfer Duty Act of 1902 which governs the sale of all immovable property in this country and cannot be waived by either party.

In earned counsel's submission, the description of the land the subject of the agreement as Portion 1/447 Matsapha Industrial Estates makes the contract fatally defective for the respondent's land is Lot 447 Matsapha Town and not a subdivision of any land. The written contract he thus contended, was with respect to non-

existent land or at any rate, to land not owned by the respondent. Counsel added that the defect was compounded by the fact that no measurements were included in the contract, nor was the contract made referable to any document setting out the identity and measurement of the land the subject of the contract of sale. Relying on the insightful case of *Johnston v. Leal 1980 (3) SA 927 at 938D,* he contended that the omission could not be cured by extrinsic evidence which was excluded by the fact that the written contract was a single memorial of all the matters that had been agreed on by the parties. On the merits, learned counsel asserted that Clause 2 of the written agreement provided that the purchase price of E600,000 was to be secured by a Bank or Building Society Guarantee to be furnished to the respondent's conveyancers within thirty days of the signing of the agreement.

He submitted that by computation, the deadline of the tendering of the Bank or Building Society Guarantee was 18th August 2005 which was not complied with by the applicant. It was his contention that the applicant's failure to comply with the said provision of the contract of the agreement sought to be enforced was a breach of the applicant's obligation. The alleged breach he submitted, rendered the agreement unenforceable, as the manner of the payment of the purchase price which was not complied with, was a term of the contract.

Learned counsel in argument made no submissions on the alleged lack of authority of the respondent's Managing Director Dr. Gumede to negotiate and to sell the respondent's land saying, that he only relied on the two defences raised as points *in limine.* That leg of the respondent's case regarding lack of authority of its representative in the agreement: Dr Gumede was thus apparently abandoned.

Learned counsel for the applicant in answer to the points raised in *limine* and with regard to the merits of the application, urged the court to discountenance the defences raised by the respondent, and canvassed in argument by opposing counsel.

With regard to the former, learned counsel averred that the property was sufficiently described in the written contract as Plot No. 1/447, its description being ascertainable from Surveyor General Diagram No. 131/1986 and its measurement:

5.3690 hectares, from the Sub-Divisional Diagram SG 20/77 two public and official documents. He argued that the property, contrary to the assertion of opposing counsel was in existence as that sub-division had been framed, the property certain and identifiable, and so transferable.

Regarding this, learned counsel for the applicant relied on Van *Wyk v. Roitchers Saw {Ply) Ltd 1948 (1) SA 983* at 989 where the court stated, concerning a written contract executed under legislation analogous to the Transfer Duty Act, that a slavish adherence to the requirement of the description of land sold, may work an injustice, it being sufficient that the property is described in a way that it may be identified applying the ordinary rules of construction including the proper admission of parole evidence.

Learned counsel for the applicant furthermore contended that in any case, the parties before the written contract was signed, were ad idem as to the property the subject of the agreement of sale and the identity thereof, never in doubt. To this end, counsel invited the court to find from the communication between the parties during negotiation (exhibited in the application), that the description of the property as Lot No. 1/447 even if erroneous, was an error acquiesced in or endorsed by the respondent who in communication referred to it by the same designation.

With regard to the matter of the furnishing of the Bank guarantee, the applicant averred that it lodged E60,000 in the trust account of its Attorneys and provided a guarantee which was not accepted by the respondent. It was also asserted on behalf of the applicant, that it placed the full amount of the purchase price in the trust account of its attorneys Cloete/Henwood/Dlamini/Magagula which amount was placed at the disposal of the respondent. The applicant maintained that had the respondent appointed its conveyancing attorneys, the guarantee would have been furnished, for the full purchase price amount had been deposited in the trust account of the applicant's attorneys and had remained with the applicant's attorneys as the respondent haa to date not appointed conveyancing attorneys in whose hands the funds may be placed. The applicant contended that the present

respondent's attorneys were by their own admission, attorneys that gave advice to the respondent ajilno/Lthejie^p^ guarantee provided for.

It was also the contention of the applicant that the agreement remained subsisting as it was not cancelled in the terms provided therein which was to give the applicant ten days to remedy a breach. The applicant averred that it was not placed *in mora* by the respondent or called upon to remedy the alleged breach, and that the respondent only sought to repudiate the contract for the applicant's alleged breach, and not to cancel same. The applicant also, relying on the ubiquitous Turquand Rule propounded in ***Royal British Bank v. Turquand (1856) 6 E&B 327 Exch. Chamber*** maintained that Dr. Gumede the Chief Executive of the respondent, having held himself out as able to negotiate and contract on behalf of the respondent, the respondent which was not privy to the internal workings and procedures of the respondent were entitled to assume such authority.

As ! have observed before now, no arguments were presented on behalf of the respondent regarding the lack of authority of Dr. Gumede and the defence must thus be deemed to be abandoned. *Ex abundanti cautela* however. I must uphold the applicant's challenge of this defence alpplying the turquand rule and hold that the applicant was entitled to assume Dr. Gumede's authority to enter into the contract for the sale of the respondent's property on its behalf. The respondent may thus not resile from the agreement on this ground.

the agreement of sale which was executed by both parties ought to be enforced by this court as: in compliance with the Transfer Duty Act 1902, it was written and duly signed by the parties, and furthermore, contained all the material terms requisite in a contract for the sale of immovable property for formal validity: the parties, an adequate description of the land, and the purchase price.

At the close of these arguments, the following stand out as issues to be determined:

1. Whether or not the agreement of sale was valid, in terms of the requirements of the Transfer Duty Act of 1902;

2. Whether or not the applicant breached a term of the contract which was how to effect payment of the purchase price;

3. Whether or not the agreement was duly cancelled;

4. Whether or not the applicant is entitled to have the contract of sale enforced.

O, O 1 o f the Transfer Duty Act 1902 governs the transfer of immovable property in Swaziland. The said provision reads: *"No contract of sale of fixed property shall be of any force or effect unless it is in writing and signed by the parties thereto or by their agents duly authorised in writing".*

There is no gainsaying that for a written contract for the sale of immovable

the property the subject of the sale, the price and it must of course be signed the parties, see **Amler's Precedents of Pleadings <u>at</u> 20.**

The present written contract came into being after certain negotiations, and having been reduced into writing, it was duly signed by both parties. As aforesaid, the respondent who has sought to resile from the written contract of sale, contends that the land was not sufficiently described in the contract as the property owned by the respondent and described in the Crown Grant to the respondent as Lot No. 447 Matsapha Town, was mis-described in the written contract as Lot No. 1/447 Matsapha Industrial Estates. Nor were the measurements showing the extent of the land set out therein. The respondent contends therefore that the land described as the subject matter of the contract is in fact non-existent or not owned by it, This it contends amounts to a misdescription of the subject matter of the contract and renders the contract of sale void *ab initio.*

What does the requirement of the description of the property in a contract of sale include? In ***Van Wyk v. Rottchers Saw Mills (Pty) Ltd (supra)*** it

was stated that it was enough that the property in question be described in

such a way that it could be identified by the admission of extrinsic

evidence admissible under the parole evidence rule.

As aforesaid, the land the subject matter of the contract of sale was described as Lot 1/447 Matsapha Industrial Estates and the extent of it was not included in the written agreement.

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Learned counsel for the applicant in answer to the point regarding insufficient description of the subject matter has contended that the parties at the time of the negotiation knew what the property was, both parties having in communication referred to it by the same designation and furthermore, that there was no misdescription as the description Portion 1 of Lot 447 Matsapha Town was contained in the approved Sub-Divisional Diagram 131/86, and the extent 5,3690 hectares, contained in Sub-Divisional Diagram SG20/77. This is to say that the gaps in the description of the subject matter were to be filled by recourse to the said official documents.

What is the position of the law with regard to this? "When a contract has been reduced into writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties

which would have the effect of contradicting, altering, adding to or varying the written contract', see: ***Johnston v. Leal 1980 (3) SA 927 at 938*** Even so, it has been held that in certain circumstances, such as fraud, illegality, undue influence, mistake or even that the parties did not intend the written document to be the entire contract or intended certain documents et al to be taken into consideration in determining the intention of the parties, extrinsic evidence may be led to give effect to the written contract.

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contract sufficient, and if not can the defect be cured by recourse to extrinsic evidence for the purpose of identifying the property? It seems to me that the description: Lot 1/447 even of land that the parties were allegedly *ad idem* about was insufficient in itself in the light of the unchallenged assertion by the seller that its

land was not a portion of another, but was described as Lot 447 in the official grant to it. A little outside help such as a plan or diagram of the land would thus be necessary to identify the land in question as the land the subject of the contract. This is so particularly as no measurements were included in the written contract and it is trite learning that the extent of land the subject of a written contract for the sale of land is an essential term. In my inquiry as to whether extrinsic evidence, oral or written may be admitted to aid in the sufficient description of the subject matter of the present contract, I have been much helped by the enlightening dictum of

Sohreiner JA in ***Delmas Milling Co. Ltd v. Du Plessis 1955 3*** *SA* ***447 A:***

"Where although there is difficulty perhaps serious difficulty in interpretation but it can nevertheless be cleared up by linguistic treatment, this must be done. The only permissible additional evidence in such cases is of an identificatory nature."

There is however a distinction between evidence brought in to identify the subject matter and evidence that describes it. "The former is admissible because without it the contract could not be related to the facts, but the jatter is **inqdjiiJssililfiJK**

R H Christie The Law of Contract in South Africa 5th Ed. 216.

The applicant seeks to fill the gap in the description by having recourse to the description of the land as Portion 1 of Lot 447 Matsapha Town found in one official document, and the extent of the land found in another. It seems to me that even permitting the former p'ece of evidence to be led regarding the identification of the land, the evidence regarding the measurement might be introducing a new term into the contract. This is because the land described as Portion 447 Matsapha Town (which the applicant says is the same as the 1/447 Matsapha Industrial Estates contained in the written agreement), was said to contain 5,3690 hectares in approved Sub-Divisional Diagram SG No. 20/77 while the land said to be contained in Portion 1 of Lot 447 Matsapha Town contained in approved Sub-Divisional Diagram 131/86, was 2,6334 hectares.

Which one were the parties in agreement over as constituting the identity of subject matter of the contract? Regarding this uncertainty, opting for one against the other

would be to decide the extent of the land concerning which the parties may never have intended.

The present circumstance is to be distinguished from the *Van Wyk* case (supra) for it seems to me then that even if the documents sought to be introduced were admitted, the court (and I daresay the parties) would be no nearer identifying the land the subject of the sale. JMnJbygjquestic^

documents when the written contract was not made referable to them, as intended to be an integral part of the contract. It seems to me that it should not. I am reinforced in my opinion by the instructive dictum of Miller JA in ***Fourlamel (Pty) Ltd v. Maddison 1977 1 SA 333 at 345:*** "It is a condition of the incorporation of other writing into a written document required by law to contain the terms of the contract, if such is to have validity, that such other writing be referred to in the written document".

Learned counsel for the applicant has also canvassed this point in heads of argument: that in communication between the parties prior to the signing of the written agreement, there was indication that the parties were in agreement as to the identity of the property up for sale. Counsel thus seeks to introduce the said documents particularly one emanating from the respondent during negotiations, as an aid to construing what the parties intended to be the property the subject of the sale: that before the signing of the contract., the parties were at a consensus that the property was described as Lot 1/447.

But it is settled law that for property the subject of a sale to be sufficiently described, it must be identifiable on the ground from the contract document itself, without evidence of oral consensus, see: per ***Holmes JA*** *in* ***Clements v. Simpson 1971 3 SA 1 (A) 7:*** "The test...in regard to the res *vendita* is whether the land sold can be identified on the ground by reference to the**...proyisJQiiS**-jaL^

parties as to their negotiations and consensus". In the present instance the applicant who has been confronted with the respondent's contention that its property is not a portion or part of any land but is described as Lot 447 Matsapha

Town, has sought to demonstrate that: Lot 1/447 Matsapha Industrial Estates, Manzini Swaziland contained in the written agreement is the same as the property described as Lot 447 Matsapha Town owned by the respondent and with regard to which the agreement of sale was entered into, in order that the land may be identified on the ground. To do this recourse must be had to inadmissible evidence of oral consensus particularly as the extent of the property is not contained in the contract document.

It seems to me, that the description of the subject matter of the instant contract is clearly insufficient, for the property cannot be identified without evidence regarding negotiations prior to the written contract.

! find then that the subject matter of the written contract signed by the parties which should have read Lot 447, Matsapha Town (the property owned by the seller/respondent per Crown Grant), was misdescribed as Lot 1/447 Matsapha Industrial Estates, uncertain in extent, and thus not capable of identification on the ground from the contract document. I hold the same to be a fact.

The written agreement herein must thus be held to be invalid and unenforceable.

part of the applicant and whether the contract were properly cancelled seem to have become academic as the contract is in any case unenforceable. Even so it seems to me that it will be remiss of rne to leave the questions raised thereat unanswered.

The respondent seemed to have been fighting with all four limbs in the present instance, for not only did it rely on the formal invalidity of the contract, but it also sought to resile from it alleging among other defences now abandoned and the non-performance of a term of the written contract by the applicant which was that the applicant would furnish a Bank or Building Society guarantee within thirty days of the signing but did not, for which reason it allegedly cancelled the contract. As aforesaid the applicant's defence is that it was prevented from performing its obligation by the respondent which failed to appoint a conveyancing attorney. It seems to me that the said excuse is just what it is - an excuse. This is because no evidence was given that within the thirty days provided for in the contract, any

attempt was made by the applicant to furnish the requisite guarantee. It seems to me that the applicant's attorneys guarantee provided to the respondent's attorneys dated January 30 2006 did not comply with the stipulation of a Bank or Building Society guarantee. In this it matters not that the applicant lodged sums of money with its attorneys or paid the full sum into the trust account of its attorneys. The fact remains that the mode of payment which was a term oiiii^aiTJ^
respondent's attorneys within thirty days of the signing was not complied with see: ***Rehman David v. Gule Cyprian 1987 -1995 SLR Vol. 4 211 at 215*** citing with approval the dictum of *Rabie JA in Patel v. Adam 1977 (2) SA 653.*

The excuse that no conveyancing attorney was appointed as the present attorneys only gave advice to the respondent, is defeated by the applicant's own conduct in furnishing the present attorneys (who it now argues was not a conveyancing attorney and so could not receive the guarantee on behalf of the respondent), with the applicant's attorneys' guarantee. The applicant who dealt with the present attorneys regarding the furnishing of the guarantee may not be permitted to approbate and reprobate.

But as learned counsel for the applicant pointed out, the non-performance of that obligation by the applicant was not a cancellation in itself, it could

only be construed by the respondent, as a repudiation. The respondent could then elect to cancel the agreement. Moreover, the written agreement was not to be deemed to be automatically cancelled upon breach. This was so especially in this case when the respondent, contrary to the written agreement failed to call upon the applicant to remedy the breach.

Nor could the applicant however tardy in the performance of its obligation (of furnishing the Bank or Building Society guarantee) be said to be *in*

breach within ten days. A cancellation clause must be strictly construed and the defaulting party must be left in no doubt that he has committed a breach regarding

which the respondent had chosen to exercise its right to cancel the contract see: ***Motsa v. Carmichael Investments Pty Ltd;*** also *RH Christies book (supra) at 499:* "When the contract specifies certain action that must be taken by the creditor before he is entitled to cancel for breach, for instance that he must give thirty days' notice to rectify the breach...whether the debtor is in *mora* depends strictly on whether the creditor has taken the action required by the contract". For these reasons, it seems to me that but for the formal invalidity of the contract, the contract that was written down and duly signed by the proper representatives of the parties would have been held to be subsisting and thus, enforceable.

Having declared the written agreement for sale of land entered into by the parties duly represented as invalid for lack of sufficient description of the property the subject of the contract, I go ahead to uphold the points raised *in limine* by the respondent and accordingly hold that the applicant is not entitled to the orders it seeks. The application is hereby dismissed.

Costs to the respondent.

MABEL AGYEMANG (MRS)
HIGH COURT JUDGE