



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 113/2012

In the matter between:

**VUMILE MAGONGO
PATRIC NDZINISA**

**1st Appellant
2nd Appellant**

And

PHUMZILE SIMELANE

Respondent

Neutral citation: *Vumile Magongo & Another v Phumzile Simelane (113/2012)*
[2014] SZHC 117(13th June 2014)

Coram: **M. Dlamini J.**

Heard: **3rd December, 2013**

Delivered: **13th June, 2014**

The agent's duty to act in the best interest is towards its principal and from this emanated the business efficacy that the principal, usually the seller, would pay commission unless the circumstances of the case show that there was and agreement for the purchaser to pay.

Summary: Serving before me is an appeal against Principal Magistrate's orders granted in favour of respondent. The respondent had claimed against appellants' an agency commission following a sale of immovable property in which respondent acted as a sales agent. The appellants, who are purchasers, contend that the respondent having been paid commission by the seller, was not entitled to claim commission from them.

Grounds for appeal

[1] The appellants filed as basis for appeal the following:

- “1. *The Court a quo erred in law and in fact in finding that the Plaintiff did not have a legal duty to the Defendant to disclose that the seller would pay her a commission of E50,000.00;*
2. *The Court a quo erred in fact and in law, the Plaintiff having admitted that she received secretly, a commission of E50,000.00 from the seller, in finding that there was no evidence of fraudulent misrepresentation on the part of the Plaintiff;*
3. *The Court a quo erred in law and in fact in finding that the Defendants did not lawfully repudiate the agreement between the parties, the Plaintiff having admitted that she was informed of the repudiation;*
4. *The Court a quo erred in law and in fact in finding that the Defendants failed to prove the defence of fraudulent misrepresentation on a balance of probabilities;*
5. *The Court a quo erred in law and in fact in rejecting the evidence of Defendants without a legal basis;*
6. *The Court a quo erred in finding that that the agreement to pay commission was not induced by false and/or fraudulent misrepresentation;*
7. *Wherefore the Appellants herein pray that the Appeal be allowed with costs, the Judgment of the court a quo be set aside and the defence raised by the Appellants before the Court a quo be accepted and the Plaintiff's case be dismissed.”*

Brief resume

[2] The matter commenced in the *court a quo* by motion proceedings. The learned Principal Magistrate, after hearing submissions, then called for *viva voce* evidence on defined issues. She thereafter made her orders. When the matter first appeared before me, I remitted it to the Principal Magistrate, requesting for reasons. The reasons were duly filed and I am grateful.

Parties' contentions in the court a quo

[3] Respondent in her founding affidavit averred:

- “5. *On or about the last quarter of 2009, I was approached by the Respondent, among other people to find him a piece of land. I managed to find the land at Farm No.1321, Hhohho District;*
6. *This culminated in a deed of sale that was entered into by and between the sellers and the Respondent as part of a group of purchasers;*
7. *The terms of the engagement by the Respondent were inter alia that:-*
 - 7.1 *I should find a seller willing to depose a small holding/farm;*
 - 7.2 *Upon introducing the prospective seller willing to depose off his or her property, I was going to be paid a commission at the rate of 7% of the purchase price;*
8. *In compliance with the above terms, I duly secured on Respondent's behalf the aforesaid property, I was going to be paid a commission at the rate of 7% of the purchase price;*
9. *In due recognition of the commission to be paid to me as agreed, the Respondent who was a part of the group that purchased jointly, the remaining extent of portion 11, Farm 1321, agreed to payment of my commission. His pro rata share of the entire E94,500.00 being E15,750.00 and in liquidation of the debt, the Respondent has paid a sum of E600.00 leaving the balance of E15,150.00;*

10. *At no point in time did the Respondent question my entitlement to the commission, in as much as he became a co-signatory to the request for their employer to pay my commission separately from the purchase price.*
11. *Only two of the purchasers from the list of six paid their share of commission. The other four which includes the Respondent have not bothered to do so, despite numerous demands;*
12. *In the circumstances, I think that I have fully complied with mandate given to me by the Respondent. I have introduced a seller and indeed a sale has taken place and as such the commission agreed to between myself and Respondent is now owing due and payable.”*

[4] In answer the appellants contended:

AD PARAGRAPH 5

- 4.
2. *It is the Applicant who approached us, as a group, and informed us that she had a mandate to sell a farm, being Farm No.1321, Hhohho District;*
3. *The other members of the group are Kenneth Mashaba, Mhlabuhlangene Melizwe Dlamini, Johannes Ntshalintshali, Masotja Bernard Vilakati and Patrick Ndzinisa;*
4. *We inspected the farm and agreed to purchase it. For the above reason, I specifically deny that I approached the Applicant and requested hr to find me a piece of land;*
5. *We enquired from the Applicant whether the seller would pay her a commission for the sale of the property, as this was the standard practice. The Applicant presented to us and assured us that the seller was not going to pay her a commission;*
6. *It was on the basis of the presentation which we agreed to pay the Applicant a commission.*
7. *The presentation as it later turned out, was not only false but fraudulent, in that the seller paid the Applicant a commission of E50,000.00 (Fifty Thousand Emalangen). The Applicant was under a legal duty to disclose to us that the seller had agreed to pay her a commission;*
8. *I submit that the commission is of no force and effect, as it was induced by false and /or fraudulent misrepresentation*

Annexure “PS 2” is nothing more than a request from our employer to facilitate payment of the commission. This was done and signed before we became aware that the Applicant had falsely and / or fraudulently induced us to agree to paying commission.

10.

AD PARAGRAPH 10

1. *The truth of the matter is that after discovering that the Applicant had falsely and / or fraudulently induced us to paying commission, we repudiated the agreement. The Applicant was informed that she would receive “ex gratia” payments from the individual members. Those who paid were not paying commission but an “ex gratia” token of appreciation;*
2. *For the above reason and to the extent that the contents of this paragraph are inconsistent to what is stated above, they are denied;*

The respondent replied:

- “5.2 *The respondent has not stated when was the agreement repudiated;*
- 5.3 *Most importantly if my claim is based upon a repudiated agreement, the respondent should have resiled from the sale of the farm, but she did not;*
- 5.4 *The respondent cannot abide by the sale agreement if she repudiated my contract for payment of commission;*
- 5.5 *The respondent is aprobating and reprobating at the same time. If the agreement to pay the commission is cancelled, so should the agreement for the sale of the farm;*
- 6.2 *Worthy of note is that the respondent has never informed me that she was repudiating from the agreement. And how convenient for him to repudiate after he has benefited from my efforts;*
- 7.2 *The respondent does not state exactly where did I find them as a group. What was the occasion when I found them as a group;*

8. *I maintain that it was the respondent among other people that approached me to find them a piece of land, which I did and the transaction fell through;*
11. *I deny that I presented to the group or let alone assure them that the seller was going to pay me commission. The respondent as part of the group agreed to pay me 7% collection commission of the purchase price of the land, and never inquired about the commission being paid by the seller, that was irrelevant. I was executing the respondent's mandate and she had to pay the commission;*
- 12.1 *I admit that the seller paid me E50,000.00 but I deny that I was under a legal duty to disclose to the respondent that the seller paid me as this was an agreement between myself and the seller.*
18. *I reiterate that only two of purchasers from the list of six paid their share of the commission. The respondent paid an amount of E500.00 that is why I am claiming from her the balance of E15,250.00."*

Viva voce evidence

[5] The respondent gave evidence that appellants being aware of her part-time job of agency, once showed interest in purchasing immovable. She informed them about a property she was selling. There was an agreement between her and the seller that should she sell the property at E1,500,000.00, she would get from the seller a commission of E150 000.00. The property was however valued at E1,350,000.00. The seller refused to sell the property at the lower price, on the basis that he had to pay commission. It was her evidence that there was then an agreement between her and appellants' group that they should pay a 7% commission as the price was reduced. They agreed that they will solicit for a loan of the principal debt and a separate 7% commission. However, the financier refused to grant a loan in respect 7% commission. They came together again and that each member of appellants should pay E10,000 cash. They undertook to pay in installments and she told them that the seller would pay E50,000.00 and this amount was insufficient owing to the reduced

purchase price. The appellants and company did purchase the property and transfer took place. Three of appellants group paid the sum of E10,000 each while three of them refused. It was her evidence that 1st and 2nd appellants paid the sums of E600 and E500 respectively. The appellant refused to pay her the balance. The respondent closed her case.

[6] In rebuttal, the 2nd appellant gave evidence. He confirmed that he was one of the owners of land under which the contested commission arose. Respondent approached him and informed him that she had recruited about five people and one remained for purposes of joint purchasing of the land. Similarly, 2nd appellant was approached by respondent through telephone. They learnt that they had to pay commission as the seller would not do so. It was on the basis of the seller's decline to pay commission that they agreed to do so. They signed an agreement to pay commission further on the basis that the financier would pay it. He later gathered that the financier enquired on the basis for the purchaser to pay commission when the standard practice was that the seller should. After the bank rejected their application for commission, they held a meeting where they called the other seller and enquired whether she did pay respondent commission. The seller confirmed. They were shocked at such information. They invited the respondent and confronted her with that information from the buyer. Respondent confirmed having received commission of E50,000 and stated that the reason she did not disclose such information was because it was too low. Thereafter, they agreed to pay an *ex gratia* amount and the *ex gratia* amount was left to the decision of each member. It was on this basis that she was paid the sums of E600.00 by 1st appellant and E500.00 by him. It was 2nd appellant's evidence that the respondent did not accept the *ex gratia* payment but left the meeting unceremoniously. Thereafter respondent approached each member and requested a sum of E10,000.00.

They refused as they had taken a decision that each member would decide on the amount of *ex gratia*.

Issue

[7] The question for determination is whether respondent is, in the circumstances of the case, entitled to the commission claimed. The honourable Principal Magistrate as reasons for finding in favour of respondent stated:

“On the basis of the evidence of the Defendants adduced before court, both on the papers and viva voce it is the court’s considered view that Defendants have not discharged their burden on a balance of probabilities.

Further, or alternatively even if it could be holden that Defendants did prove on a balance of probabilities that for the reason that the agreement to pay the 7% commission was induced by fraud and consequently they repudiated it and they then gave so much as is in the evidence herein i.e. E600 and E500 respectively to have been given to the Plaintiff as “ex gratia” payment, such conduct would not have ensured to the fair and equitable justice of the case.”

[8] From the wording “...that the defendants have not discharged their burden on a balance of probabilities” it is apposite that I first address the relevant principle of law in evidence.

[9] Firstly, one must bear in mind what evidence is all about. **Stratford CJ in Tregea and Another v Godart and Another 1939 AD 16** at 30 had this to say on the subject:

“what is our law of evidence? It is a set of rules which has to do with judicial investigations into questions of fact... These rules relate to the mode of ascertaining an unknown, and generally a disputed, matter of fact. But they do not regulate the process of reasoning and argument ...when one offers ‘evidence’ in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact... In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that

we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence. Evidence, then, is any matter of fact which is furnished to a legal tribunal – otherwise than by reasoning or a reference to what is noticed without proof- as the basis of inference in ascertaining some other matter of fact.”

[10] On the rules of evidence the learned judge expounds:

*“The rule of evidence” which can be very simply stated thus:
substantive law lays down what has to be proved in any given issue and by whom, and the rule of evidence relate to the manner of its proof. This is expressed by Bentham (quoted by Wigmore) thus: “The question, on what facts the decision turns, is a question, not of evidence, but of the substantive branch of the law: it respects the probandum, not the probans”*

At page 33 the honourable judge continues:

*“In applying the rule, however, **a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever;** and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.”*

[11] **Corbett JA in South Corp v Engineering Management Services 1977 (3) SA 534** at 548 put it more succinctly as follows:

“The word onus has often been used to denote, inter alia, two distinct concepts:

- (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and*
- (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense.”*

[12] The above cited principle of our law informs that the onus or burden of proof lies with the party making a claim. And this onus does not shift throughout the proceedings. It may arise that once the onus has been discharged, giving rise to a *prima facie* case, then the opponent is called upon to adduce evidence in rebuttal. This is what is commonly referred to as the evidential burden. **Stratford CJ** in **Tregea supra**, at 33 explained this position as follows:

“If no evidence is called to rebut a presumption of law a judge should instruct a jury that the presumption must prevail.”

However, of most important, the learned judge points out:

“It is otherwise with a presumption of fact. For example, a Judge may rule that there is evidence to go to the jury, or that there is a prima facie case, such ruling does not compel a jury, even in the absence of any evidence contrary to the presumption of fact to be satisfied and persuaded by the prima facie evidence.”

[13] The above *ratios* all point to one direction, that it is a misnomer therefore to hold as *in casu* that “...that defendants have not discharged their burden on a balance of probabilities.” The above principle on evidence emanates from the judicial semantic morass that goes: ‘*he who asserts must prove*’.”

[14] It would be remiss of me further not to deal with another point, noticed from the present proceedings. The 2nd appellant having completed cross examination, was re-examined, *inter alia* as follows:

“Had you know [sic] that the Plaintiff had been paid commission would you have signed the minute agreeing to paying commission.

Matsebula: Objects to the question as being leading.

Court: Overrules objection.

Answer: Your worship I think it's very clear from my submissions that we signed the commission minute on the understanding that she is not paid by the seller meaning that if we knew she was getting something from the seller then there was no point of us signing the commission minute because now she would be getting double from us as well which is not acceptable."

[15] This question ought not to have been allowed, not by reason though that it was leading but that it does not serve the purpose of re-examination which is mainly, amongst others, to clarify ambiguous answers; omitted answers or questions misunderstood during cross examination. It in fact tends to give the 2nd appellant a second bite of the cherry, so to speak and this was appreciated by the witness himself as he states:

"Your Worship I think it is very clear from my submission that..."

The trial presiding officer ought to be attentive and direct trial proceedings accordingly.

On merits

[16] The evidence both on motion and *viva voce* was well summarised by the honourable Principal Magistrate.

[17] The appellant contends that the respondent had a legal duty to disclose to them as purchasers that the seller would pay her commission.

[18] *In casu*, I think the first question that arises is on whose instructions did the respondent act?

[19] On the affidavits one gathers that the respondent acted on the instruction of the appellants. However, when *viva voce* evidence was adduced, it became common cause that the seller was the principal of respondent and not appellants.

[20] For this reason therefore respondent was duty bound to act in the best interest of her principal. **Mallison v Tanner 1947 (4)** at **681** lays down the *dictum*:

“An agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.”

[21] From the above *ratio*, the agent’s duty to act in the best interest is towards its principal and from this emanates the business efficacy that the principal, usually the seller, would pay the agency commission unless the circumstances of the case show that there was an agreement that the purchaser would pay.

[22] The evidence of respondent in the *court a quo* was that she sold property on behalf of third parties during her spare time and this was communicated to appellants. She had an agreement with the seller (Mrs. Magongo as per deed of sale) to sell her farm. She clarified as follows:

“The agreement between myself and the seller of this small holding is that our engagement was that they would give me commission of One Hundred and Fifty Emalangeneni if the purchase price was one million five hundred thousand Emalangeneni.”

[23] The farm was valuated and the price reduced to E1,350 million she then stated:

“I took that back to the seller who said that he would not sell the property at that E1.350million because he had to pay me commission.”

[24] This evidence remained unchallenged. It stands therefore to be accepted that when respondent approached the appellants, the initial selling price was E1.5 million. This price was reduced at the instance of the valuation report.

[25] Interestingly the respondent then stated:

“The Central Bank approved E1.5million and when it reached Swaziland Building Society they gave it to a valuer for valuation. When it came back it was One Million Three Hundred and Fifty Emalangenzi.”

[26] This evidence again stood unchallenged. From this evidence it is clear that by this time, the appellants had submitted a loan request with the financier which was approved but declined upon the valuator’s report. In other words, at all material times, the purchasers agreed to purchase the property at E1.5 million and they solicited a loan to that amount. We do not hear that this loan application of E1.5m had a request for payment of commission as well. We only hear of a request for a loan of commission after the initial price of E1.5m was reduced to E1,350 000.00. In other words, had the respondent demanded commission from the appellants without divulging that the seller was paying for commission, the very first loan of E1.5m would have had the request for payment of commission as the 2nd appellant himself gave evidence that they agreed to pay the commission because the bank would finance it and problem commenced when the bank rejected the request for payment of commission. It is common cause between the parties that this was in the second application. The only irresistible inference that can be drawn from these facts therefore is that the question of payment of commission arose after the purchase price

was reduced and appellants had to pay commission because they were now expected to pay a reduced purchase price. It is upon this basis that they signed the two correspondences agreeing to pay respondent part of the commission in order to relieve the seller from paying the same amount of commission after the reduced purchase price. This position is fortified by the unchallenged evidence that the seller indicated that “*she would not sell the property at E1,350m as she had to pay commission.*” Clearly appellants agreed to foot the bill on commission. After all, payment of commission did not alter the agreed initial purchase price of E1.5m to the adverse of appellants and their co-purchasers. From this alone one again infers that they did agree to pay the commission.

[27] The 2nd appellant stated on the other hand:

“Your worship, the complainant told us that since she was not getting anything in terms of the commission fee from the seller that is why she was asking us to pay the commission from our side. With this Your Worship I am saying it is on that basis that we agreed to pay her commission.”

[28] This cannot stand in the light of the uncontroverted evidence that the loan of E1.5 million was approved. The respondent continued:

“I then came back to them, that is, the six of them and I negotiated with them that since the bank would not finance the property of E1.5 million, so let them pay 7% commission ...”

[29] Again it is clear that the purchasers when the valuator decreased the value, the purchase price also decreased. To make the necessary adjustment and on the information that the seller was not willing to reduce the purchase price as she was to pay commission, the duty to pay commission was

shifted in part to the purchasers. This led to two correspondences addressed to the financier which read:

“MINUTE

TO: ASSISTANT GOVERNOR

FROM: VUMILE MAGONGO
MHLABUHLANGENE DLAMINI
PATRICK NDZINISA
MASOTJA VILAKATI

DATE: 18 FEBRUARY 2010

Re: REQUEST FOR FINANCIAL ASSISTANCE

The undersigned have been offered a piece of land measuring 29,942 hectares situate at Farm 1321, in the Hhohho region, at Hawane to share six people. The total purchase price for the land is E1,350,000. Each person shall pay E257,081.33 including transfer and commission costs.

We kindly request the Bank Housing |Loan Scheme to purchase the farm on our behalf.

Attached herewith are our application forms, valuation report, and deed of sale.

VUMILE MAGONGO

MHLABUHLANGENI DLAMINI

PATRIC NDZINISA

BERNARD M. VILAKATI

“MINUTE

TO: GENERAL MANAGER FINANCE

FROM: KENNETH FANA MASHABA
PATRICK NDZINISA
VUMILE FORTUNATE MAGONGO
MHLABUHLANGENE DLAMINI
MASOTJA VILAKATI
JOHANNES NTSHALINTSHALI

DATE: 05 JANUARY 2010

RE: PURCHASE OF REMAINING EXTENT OF PORTION 11 OF FARM NO: 1331 IN HHOHHO DISTRICT

In connection with the above property that we are purchasing as a group, we kindly request that the agent commission of 7% amounting to E94 500 be paid separately from the purchase price of

E1,350,000.00. The Agent's (P. Simelane) account number is 57711168544 – First National Bank – Mbabane branch.

We would like to thank you in advance for your assistance.

*Kenneth Mashaba:
Patrick Ndzinisa:
Vumile F. Magongo
Mhlabuhlangeni M. Dlamini
Masotja B. Vilakati*

Each party signed.

The respondent continued to state:

“The problem started after the Building Society declined to finance the commission”

[30] The 2nd appellant testified that upon realising that respondent was paid commission, they flatly refused to pay, as this was double payment. However, he then states:

“After the discovery and at that juncture we agreed that each member should pay her ex gratia to be determined by each member as to how much he or she can be paid.

My understanding Your Worship of ex gratia payment is that it is just a token of appreciation in particular in this case for pulling us together as a group and also now that she proved to us that she is not someone we can trust.

Your Worship her reaction to this suggestion was that she just stormed out of our meeting in disagreement to our proposal.”

[31] However, it is not in issue that respondent received the sum of E600 and E500. The poser is, under the circumstances described by 2nd appellant, at what stage did respondent receive these sums if respondent at the same time did not agree to the proposal but *“just stormed out of our meeting”* as pointed out by 2nd appellant? The probability of the evidence is that it was agreed that as the bank would not finance the commission, the purchasers

would pay from their pockets and indeed the payments as reflected. The honourable Principal Magistrate correctly rejected the evidence that this was an *ex gratia* payment.

[32] What exacerbates the appellants' case is that all other four did pay the agreed sum except for the two, the last, as per the evidence of respondent under cross examination having paid when respondent instructed her attorney to issue court processes. The action of paying by the other co-buyers leads to the only reasonable conclusion in law that all the purchasers agreed to pay the respondent the stated commission. At any rate the appellants themselves paid although not the full amount. 1st appellant never gave evidence in the *court a quo* and this must weigh in favour of the respondent.

[33] In the totality of the foregoing, the following orders are entered:

1. Applicants' appeal is dismissed.
2. The orders of the *court a quo* are upheld.
3. 1st and 2nd applicants are ordered to pay costs.

M. DLAMINI
JUDGE

For Applicants : **M. Ntshangase**

For Respondent : **S. Matsebula**