IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 220/2015

In the matter between:

EUGENE DLAMINI **Applicant**

And

INTER AGENCIES (PTY) LTD **1st Respondent**

C. J. LITTLER AND COMPANY **2nd Respondent**

Neutral citation: ***Eugen Dlamini v Inter Agencies (Pty) Ltd And Another (220/2015) [2015] SZHC 169 (9th October2015)***

Coram: **M. Dlamini J.**

Heard: **18thSeptember, 2015**

Delivered: **09thOctober2015**

- *"It is after the weighing of the evidence adduced on an imaginary scale, that the Court decides whether a certain set of facts given in evidence by one party in a civil case in which both parties appeared and testified, weighs more than another set of facts. The Court then accepts the evidence that weighs more in preference to the other and then applies the appropriate law to it, before drawing its conclusions."* (as per Ota J)

Summary: Under a certificate of urgency, the applicantclaims a 10% agency commission following a sale of immovable property belonging to first respondent. First respondent opposes the claim on the basis that the sale was not effected by applicant.

Oral evidence

[1] By consent of the parties, the matter was referred to trial. Applicant gave evidence in his own case. He identified himself as a property consultant under a trade name Super Nova Investment. He sells both residential and commercial properties and collect rentals on behalf of clients.

[2] Applicant met one Mr. Nkonyane, a director of Carbon Electrial and Electronics (Pty) Ltd. Mr. Nkonyane (AW2) was renting premises for his business. He was at that time searching for premises to purchase in order to relieve his business from paying rentals. He advised Mr. Nkonyane,AW2 to enquire from his bank as to the amount it would loan him for purchasing of land. AW2 duly proceeded to the bank and returned with the information that the bank was willing to loan him the sum of about E5 million. It is then that he began to search for a piece of land as the one targeted had been purchased by Dups. He went to first respondent and met Mr. Kamenga (RW1). He introduced himself and advised him that AW2 was looking for a piece of land to purchase. RW1 informed him that he knew PW2. He enquired as to the value of his property and whether he had the latest valuation report. RW1 gave him an evaluation report indicating E4,840,000. He enquired as to how much the lowest price would be and DW1 suggested E4,6 million.

[3] He enquired whether the land was not mortgaged and owing municipal rates. He did respond to such questions. He also enquired whether he was giving him the mandate to sell his property. RW1 answered to the positive. He then advised him that if he sells it, he would charge him 10% commission. AW1 agreed and told him to go ahead. He duly did.

[4] He called AW2 who was excited over RW2's piece of land as he too wanted a landadjacent to his business. AW2 then suggested that he would verify the information from RW1 as they were residential neighbours at Sidvokodvo. It was his further evidence that AW2 did call RW1 and they eventually concluded the sale without involving him for the reason that RW1 advised AW2 not to involve him in the processing of documents. In the process however, AW2 called him and informed him that he had a confession to make. It is then that AW2 informed him that he was purchasing the property from RW1 who had advised him to conceal the matter from him. He enquired on how they had drafted the papers. AW2 stated that they had done two sets of deed of sale, for the bank which reflected a sale of E3.5 million and the balance for AW2 to pay in cash. He also advised him that the bank would be issuing a bank guarantee in two days. He however, advised him not to confront RW1 as he feared that the bank might withhold the bank guarantee.

[5] He then consulted with his attorney who lodged the present application. The bank delayed in processing the bank guarantee. RW1 consulted him for advice. He advised him to consult second respondent who was his attorney. He accompanied RW1 and AW2 to second respondent for conveyancing and it is then that he noted that the deed of sale did not mention him and his commission. He was further engaged by RW1 in payments of his bond with Standard Bank and rates for the municipality in

respect of the said property. He assisted RW1 until the property was registered. He then prepared a document for payment of commission for RW1 to sign but he refused. He organized a meeting for RW1, AW2 and himself to meet. RW1 did not turn up and instead advised AW2 to refute any knowledge of him. He rushed to court for an interim order interdicting first respondent from transferring the amount equal to commission to first respondent.

[6] Cross examination of AW1 centredaround specific dates of the agreement. AW1 could not remember dates. I will refer to the other aspect of his cross-examination later herein.

[7] The next witness on behalf of applicant was **Thembinkosi Zama Nkonyane**, AW2. He informed the court that applicant approached him while at Matsapha and informed him that RW1 was selling his property. He then approached RW1 and purchased the property at a capital of E4.6 million and had paid the sum of E3.5 million. He confirmed the contents of his affidavit that when they were drawing the deed of sale,RW1 advised him that they should not involve applicant because according to RW1, he had done nothing and that he had not signed any agreement with AW1 to pay him any commission.

[8] On his affidavit confirming the above evidence, it was his evidence further in chief that applicant called him to inform him that he was on his way with an affidavit to be signed by him. He then called RW1 who advised him not to sign the affidavit. However, when applicant arrived with it, he signed it. He later sent a short message informing RW1 that he had signed under duress. He did this in order not to anger RW1 who had allowed him to

occupy his property before the deed of transfer was finalized and had not charged him rentals.

[9] Like PW1, AW2 was cross examined at length. I will refer to his cross examination later. The applicant then closed his case.

[10] The respondents' first witness was **Modest LuchembeKamenga** (RW1). He identified himself as representative of first respondent and the seller in the matter. He informed the court he had been attempting to retired since 2010 from first respondent which he established in 1984. This business flourished very well and by 1984, they had purchased the property which is the subject matter. However the business declined such that in 2012 he had to retrench a number of workers. He therefore decided to sell the business. He approached a number of friends.

[11] In 2014 he was approached by AW2 to enquire about the sale of the business. He knew AW2 prior from his home area. He had also asked AW2 to attend to his electric fault at home. AW2 agreed to purchase the business. Two deed of sale were signed. Applicant was not in the scene.

[12] On 15 November 2014 he received a call while he had knocked off work. Applicant was calling. He went to his place of work and found applicant with a white man and his manager. Applicant informed him that he had heard from one lawyer, Mr. Mzizi that he had a deed of sale for his business. He asked tobe given the valuation report and that should the signed deed not see the light of the day, he would find another buyer. It was his further evidence that thereafter applicant kept on calling to find out on the progress of the deed of sale. Applicant also advised him that he knew AW2. Explaining how applicant received a letter emanating from his

bank to AW2's bank, he stated that applicant colluded with one of the bank employees to get the letter. Similarly with the letter indicating that he was owing rates. He stated that applicant colluded with the conveyancer to get it. He also informed the court that applicant called him at one stage saying that the conveyancer needed certain documents namely the deed of sale. He then asked applicant to let him talk to the conveyancer, Mr. Manzini. He asked Mr. Manzini as to who gave him the instruction to allow applicant to represent him. It is then that the following day, he wrote a letter to Mr. Manzini protesting about applicant's involvement in the matter.

[13] This witness was cross examined on AW2's evidence which confirmed that AW2 purchased the property because applicant informed him that this witness was selling it. However, RW1 chose to state that AW2 never gave such evidence in court.

[14] The next witness on behalf of respondents was **George SusikuMugaya**. He identified RW1 as his boss having worked for him for 18 years under first respondent. In November 2014 while at work, two people came through reception. He was called by the reception saying there were two people who had come to see RW1. He went to them. He found one black man talking to the cell phone. He then told them that RW1 was not present.

[15] The black man said he had just spoken to him and he was on his way back to work. RW1 did arrive and the black man introduced himself as Eugene Dlamini (AW1) and also introduced the white man. They then entered the office. They came back later and inspected the workshop. They thereafter left. He further stated in chief that RW1 told him that he was meeting applicant for the first time.He was cross examined. I shall refer to his cross examination later.

Adjudication

Issue

[16] The issue is crisp: Did first respondent engage the services of applicant as an agent? In law, was there a contract of agency between applicant and first respondent?

Principle of law

[17] From the evidence adduced, it is clear that the applicant asserts that first respondent engaged his services while on the other hand first respondent vehemently denies such. My duty is as propounded by **Ota J.** in **James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 (30...**.

> *"[32] I say this because a judgment of the Court is the reasoned and binding judicial decision of the Court delivered at the end of the trial. It is thus mandatory that it be clear in the judgment that the Court considered all the evidence at the trial and having placed them on an imaginary scale, the balance of admissible and credible evidence tilted towards the victor. In this venture, the Court is required to first of all put the totality of the testimony adduced by both parties on an imaginary scale. It will put the evidence adduced by the Plaintiff on the one side of the scale and that of the Defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses.*
>
> *[33] In determining which is heavier, the judge will naturally have regard to whether the evidence is admissible, relevant, conclusive and more probable than that given by the other party. Evidence that was rejected by the trial judge should, therefore, not be put in this imaginary scale.*
>
> *[34] This is because although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible relevant and credible evidence that is conclusive, and that commands such probability that is in keeping with the surrounding circumstances of the particular*

case. The totality of the evidence before the court however must be considered to determine which has weight and which has no weight.

[35] *It is after the weighing of the evidence adduced on an imaginary scale, that the Court decides whether a certain set of facts given in evidence by one party in a civil case in which both parties appeared and testified, weighs more than another set of facts. The Court then accepts the evidence that weighs more in preference to the other and then applies the appropriate law to it, before drawing its conclusions.*

[36] *In the* ***Nigerian Supreme Court Case of Ezeoke v Nwagbo (1998) INWLR 616*** *at* ***627****, the Court expatiated further on these principles. According to it the principle of weighing evidence adumbrated in the case comes into play at two stages of the trial.*

(1) When the Judge has to evaluate the evidence on every material issue in the case, he ought to put all the evidence called by each side on that issue on either side of an imaginary scale of justice and weigh them together, whichever side out-weighs the other in probative value ought to be accepted or believed. If this part of the exercise is properly done, the Court will come out with a number of findings of fact. The court warned:-

"A Judge cannot abandon this duty, as it were merely applying a magical periscope and taking refuge under the cloud of "I believe" or "I disbelieve" ***See AlhajiAkibu v Joseph Opaeye (1974) 11 SC 189p 203 also Samuel Oladehin v Continental Textile Mills Ltd (1978) 2SC 23"***

(2) After the findings, the Judge will again put those findings in favour of either side of the balance so as to reach his ultimate decision. Not losing sight of the onus of proof, he should weigh them together to arrive at a decision, based on the facts as found, as to which of the conflicting cases before him is more probable and in view of the law applicable to the case." (underlined, my emphasis)

Evaluation of evidence

[18] In support of his version the applicant stated under oath:

"I then informed him (AW1) that if I do such work I, from Super Nova, take, 10% commission."

He further pointed out:

"He agreed saying proceed and do the work because his aim was to go back home and pay his employees."

He also pointed out:

"*I thanked him and went to the office. I called Mr. Nkonyane (AW2) who is owning Carbon Electrical. Mr. Nkonyane was very happy for the reason that where he was renting was adjacent to the premises of first defendant. Mr. Nkoyane said he knew the owner of first respondent. He said he will verify from the owner what I was telling him as they were neighbours at Sidvokodvo*."

[19] He was cross examined as follows:

Mr. S. Masuku: *"I suggest that there was a meeting between Mr. Nkonyane and Mr. Kamenga and it was for discussion of the sale of property and it was agreed?"*

PW1: *From my knowledge for Mr. Nkonyane to go to Mr. Kamenga was because I went to do marketing to Nkonyane and it is where Nkonyane said he knew Kamenga and he went to him to verify what I was saying."*

[20] AW2, the witness on behalf of applicant stated:

"*The applicant came to Matsapha to inform me. He told me that Mr. Kamenga was selling his property and I said I know him. I will go to him.*"

[21] He was then led:

Mr. Ntshangase: *"You deposed to an affidavit that Kamenga requested you to sign the papers (deed of sale) without involving applicant. Did he do so?"*

AW2: *"Yes that is true Mr. Kamenga did say that we should not involve plaintiff because he does not see what he had done in this work and there is no agreement with him."*

[22] On the other hand, respondent through RW1, in chief testified after having narrated how AW2 approached him and they eventually concluded two deeds of sale:

> *"Applicant was no where. I have never seen him anywhere, I have lived in Manzini for 33 years. I have never seen him."*

[23] He later proceeded:

> "*On 15th November, I had knocked off and went home and at 4:30 p.m. I received a call as I am just eight (8) km away. I said I am coming. Applicant introduced himself with a white man and he was with my manager. He said he heard from Mr. Mzizi, the lawyer. He said I should give him the valuation report just in case it did not go well. He asked me who did you sell this business and I said Thembinkosi (Nkonyane). He said he knows him."*

[24] Supporting this piece of evidence, RW2 on behalf of first respondent stated:

> "*The receptionist came as I was workshop supervisor to tell me that there are people who had come to see Mr. Kamenga. I went there and when I arrived, I found them outside reception office. It was my first time to see them in that company. It was around 4:45 p.m. We were preparing to break off. I went to approach them. I found a black man talking to the cell phone. I waited for him to finish talking to the cell phone. I then told him that Mr. Kamanga you are asking for is not around. He replied to me saying, 'Do not worry. I have spoken to him. He is on his way'...."*

[25] He proceeded to state:

> *"Mr. Kamenga arrived. I told him these people had come to see you Sir. Mr.Kamenga approached. One of them introduced himself as Mr. Eugene Dlamini and introduced the white man."*

[26] This is the evidence before me. I am duty bound to apply the principle in **James Ncongwane v Swaziland Water Services Corporation (52/2012 [2012] SZCS 65***supra.*

[27] The evidence of RW1 was corroborated by AW2, the purchaser. As can be gleaned from above, AW2 informed the court that he became aware that the first respondent was selling its property through applicant. He further went on in chief to explain the circumstances under which he later sent a short message to RW1 informing him that he had deposed to an affidavit confirming that he was alerted by applicant that he (RW1) was selling the property.He then informed the court as follows:

> "*Between the two there was a fight on applicant having to be paid. I was in the middle. As I knew applicant and RW1 I did not want to take sides.*"

[28] The reason for not taking sides were stated by RW2 as that first respondent had allowed him to take occupation of its property before the transfer could be effected and that he was not paying any rentals.

[29] RW1 in chief pointed out that Mr. Manzini, the conveyancer, called and advised him that there was an interim order interdicting him from transferring a sum equivalent to 10% to his account. He then stated:

> "*After receiving the call from Mr. Manzini I asked AW2 as to who gave the supporting statement. That is when I got this text message*."

[30] It is not clear why RW1 a man of respectable age as he was, decided to confront AW2 as to who gave the supporting. The only reasonable conclusion to be drawn from RW1's action is that this piece of evidence

coming from RW1 juxtaposed with the evidence adduced by AW2 lends credence to the evidence by AW2 that in actual fact applicant was alone when he approached him to sign the confirmatory affidavit and that it was not true that applicant compelled him to sign the affidavit as borne out by the text message. He sent the text message in order not to infuriate RW1 as he (AW2) was "*in the middle*". For this reason the court accept the evidence of AW2.

[31] Both RW1 and RW2 informed the court that the first time they saw applicant was when he was in the company of a white man. According to AW1 by this time, the deed of sale between first respondent and AW2 had been concluded. When confronted with the evidence that he knew applicant prior as he later engaged applicant in the subsequent drafting of the deed of sale and he gave applicant two documents, one for the bank and another for the municipality, he then suggested that applicant colluded with Mr. Zwane of Standard Bank to obtain a confidential document pertaining to him. He also blamed Mr. Manzini, the conveyancer, for giving applicant the letter on municipality rates.

[32] It is again not clear why RW1 decided to include such men of high standing in this case in the manner he did. Mr. Zwane is a bank official while Mr. Manzini an officer of this court. RW1 did not tell the court what the duo would have benefited from giving applicant the two documents. These two documents were needed by the bank in order to clear the property from the mortgage bond as per applicant's case. I think the reason for RW1 to take such a bold stand lies in the piece of evidence discussed in the next paragraph herein.

[33] RW1 was cross examined:

Mr. Ntshangase: *"I put it to you that in the first meeting you had and where you agreed that he find you a buyer and you gave him the valuation report?."*

RW1: *"There was no such meeting. AW2 has also confirmed he was not sent to me. He came by himself."*

[34] This piece of evidence was repeatedly stated by RW1. Surprisingly RW1 was in court from the commencement of the case to its end. Despite AW2's evidence under both in chief and cross examination that he went to him on the information by applicant, RW1 decided to boldly maintain that AW2 gave evidence in support of him. This stand by RW1 borders on credibility. In fact under cross examination in relation to other questions, RW1 decided to respondby telling Counsel for applicant that he should have asked AW2 not him as AW2confirmed his (RW1) evidence. This was totally uncalled for, more particularly because AW2's evidence was not according to what RW1 stated and worse still, RW was in court sitting at close proximity to AW2 when he was giving his evidence.

[35] Turning to the evidence of RW2 which is that, following applicant introducing himself to RW1, it was his evidence that they met for the first time when he, applicant, was in the company of the white man. However, when cross examined:

When he was giving his evidence:

Mr. Ntshangase: *"I put it to you that Mr. Dlamini was given Mr. Kamenga's number by him at the meeting they had previously."*

RW2: *"I can not say anything,for me what I know is that I saw Mr. Dlamini for the first time on that day at the premises."*

[36] This response shows that RW2 did not maintain his story that RW1 saw applicant for the first time while in the company of the white man. This was expected as his evidence in chief which was somehow detailed he informed the court that having been alerted by the receptionist that there were people who were looking for RW1, he found applicant speaking on his cell phone. When he apoligised that Mr. Kamenga was not available, the response was:

"*Do not worry. I have spoken to him. He is on his way*."

[37] The manner in which the events unfolded suggests that applicant had met RW1 prior. I say this because it is highly improbable that RW1 having knocked off work, would have returned from eightkilometres afar to attend to total strangers. Further RW2 gave every minute detail in his evidence in chief, mentioning how he waited for applicant to finish his call and how he attended to them. If the evidence revealed under cross examination that applicant was given RW1's cell number by the receptionist was true, RW2 would have mentioned it in his evidence in chief. At any rate it is also highly improbable that the receptionist would have given total strangers her boss's number and proceeded to call RW2, the supervisor to attend to them.For the foregoing the probabilities of the evidence tilt in favour of applicant.

[38] Applicant under cross examination did accept that as the money paid in cash was a sum of E3.5 million, he would be satisfied with 10% thereof instead of 10% of E4.5 million.

[38] I hereby enter the following orders:

1. Applicant's application succeeds.
2. The Interim order granted on 25th February 2015 is hereby confirmed.
   2.1 First respondent is ordered to pay applicant the sum of E350,000-00; alternatively
   2.2. Second respondent is ordered to release the sum of E350,000-00.in terms of the interim order of 25th February 2015 to applicant forthwith; and
3. First respondent is ordered to pay costs of suit.

M. DLAMINI
JUDGE

For the Applicant: **Mr. Ntshangase of M. J. ManziniAnd Associates**

For the Respondent: **S. Masuku of Howe MasukuNsibandze Attorneys**