IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 999/2014

In the matter between:

JABULANI ELIOT SIHLONGONYANE		**Applicant**
And		
XOLILE SIHLONGONYANE t/a		
THE PROPERTY SHOP	**1st**	**Respondent**
ZANDILE SIMELANE	**2nd**	**Respondent**
MFANAWEMAKHOSI J. DLAMINI	**3rd**	**Respondent**
THE REGISTRAR OF DEEDS	**4th**	**Respondent**
THE ATTORNEY GENERAL	**5th**	**Respondent**
NEDBANK (SWAZILAND) LIMITED	**6th**	**Respondent**

Neutral citation: ***Jabulani Elliot Sihlongonyane v Xolile Sihlongonyane& 5 Others (999/2014) [2016] SZHC 28 (19th February 2016)***

Coram: **M. Dlamini J**

Heard: **28th January, 2016**

Delivered: **19th February, 2016**

Six attributes of an agent – "to do what he has been instructed to do, to exercise care and diligence; to impart information; to advise; to act in good faith; and to account"[1] – "...bare denial of applicant's material averment cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases."[2]

Summary: The applicant seeks mainly for an order cancelling a deed of sale and of transfer to third respondent with regard to his immovable property. He contends that when he appended his signature on the said deeds, he was selling and transferring only a divided portion of his property and not the entire farm. The first and third respondents have opposed the application on the basis that applicant signed the documents.

Parties' contentions:

Applicant's

[1] The applicant has deposed as follows:

> *"8. Sometime towards the end of December 2013 I was approached by a certain lady who was a complete stranger to me, who introduced herself as Xolile Sihlongonyane (she call herself Mrs. Dube). The lady informed me that she was working for an entity called "The Property Shop" whose business is that of estate agents.*
>
> *9. The said Xolile Sihlongonyane (Mrs. Dube) requested to do business with me. She requested me to engage her agency to sell my farm (a certain Portion 7 of Farm Calaisvaile II No.693 in the Manzini District, originally held by Jacobus Wynand Rautenbach under Crown Grant No. 22/1936 and lastly held by the Applicant under Deed of Transfer No. 210/2006), and that I would pay her agency a commission for their services. I bought the farm from its previous owner, Joseph Khalalempi*

[1] AJ Kerr, The Law of Agency, 3rd Ed. at 166
[2] Room Hire Co. (Pty) Ltd v Jeep Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 at 1165

Mndzebele, in 1994 for the sum of E170,000-00 (One Hundred and Seventy Thousand Emalangeni) and the same was transferred to me in June 1996 under Deed of Transfer 2010/1996. "

[2] Applicant pointed out that he did receive a sum of E1 million. He waited for the balance of E500,000 to no avail. He proceeded to point out that he thereafter received a call from a lawyer in Manzini advising him that he had a letter for him. He advised the lawyer to fax the letter to him. This was a letter of demand, instructing him to vacate the farm within three days. He then proceeded in averments:

> *"22. This demand came as a shock because no other communication was sent to me prior or even discussions about vacating the entire farm. I had never even met the said Mfanawemakhosi J. Dlamini in my lifetime. I only agreed to a subdivision the farm and I was so bewildered to be told to vacate the whole farm. My daughter then requested that she meet with the one Mfanawemakhosi J. Dlamini to ascertain what was going on. after getting an explanation from Dlamini my daughter then organized that I met with Dlamini on the farm in question for the first time where I explained the irregularities."*

Respondents' assertions

[4] The third respondent raised as a *point in limine* that the matter was fraught with dispute of facts which were foreseeable. In order not to burden this judgment, I shall refer to the respondent's answer to the applicant's founding affidavit later in this judgment.

[5] Having considered the pleadings, the matter was referred to trial. I however, directed that the Conveyancer and the Registrar of Deeds should also be called as witnesses in order to explain about the description of the farm.

Oral evidence

[6] The first witness was **Nkosinathi Sibusiso Manzini**, **(W1)** an admitted attorney of this court and a conveyancer. On oath, he testified that he received a deed of sale together with a mandate documents from first respondent. He also received instructions from the sixth respondent to register a bond over the farm.

[7] The purchase price was E1,500 000-00 and a bank guarantee was submitted to him. He noted that the description of the farm was different from the deed of sale and the letter of guarantee. The farm in the deed of sale was described as Portion 7 while the bank guarantee reflected Portion 8.

[8] He then decided to conduct a search in the fourth respondent's offices. He discovered that there was no Portion 7 but only Portion 8. He retrieved a copy of the title deed. He proceeded to prepare documents for conveyancing purposes. The farm was transferred to third respondent. He did prepare the Power of Attorney to pass transfer for applicant to sign. Applicant signed this deed while he was away but in the presence of his secretary who signed as a witness. The property was eventually registered in the name of third respondent on 3rd March 2014 under deed of transfer No.153/14. On 25th March, 2014 applicant received payment through internet banking. He was paid a sum of E1,000,000-00 (One million Emalangeni) while first and second respondents as agents were paid E500,000-00 as commission. However, he later learnt that the account number for applicant was incorrect. He called the applicant who advised him of the correct account number.

[9] On 1st April, 2014, he again did an internet transfer. He was, however, called by applicant enquiring on when he would receive his money. He enquired from the bank which advised him that the money had been transferred to applicant's account. He advised applicant of the same. It is then that applicant informed him that according to him, he ought to have received the sum of E1.5 million or above and not E1 million only. He read to him the mandate document on the commission. I will refer to it in full later in this judgment. He explained that the sum of E500,000 was paid to the agent. He later received a call from sixth respondent (the bank) that it had been served with court papers. It is then that he narrated to it the events that unfolded in the sale of the farm.

[11] Under cross examination, this witness pointed out that when he went to enquire from the fourth respondent about the property, he already had the bank guarantee. He also made enquiries to the offices of the Surveyor General. The main reason was to verify as to whether there was any Portion 7 as he believed that there could be a subdivision named Portion 7 which was, however not registered with fourth respondent. He, however, learnt that Portion 7 existed but was renamed Portion 8.

[12] The next witness was **Gabsile Nester Mabuza,** (**W2**) who appeared in her capacity as the Registrar of Deeds. She testified that there was an attempt to register Portion 7 in 1996 but it never succeeded. In 1995 a certain farm No.693 was subdivided into portion 3 and 8. Applicant applied to have it registered under portion 7. She submitted the title deed of the previous owner of farm 693. She referred the court to page 42 of the book of pleadings and stated that to her it appears that applicant attempted to register it as Portion 7 but the attempt failed. Under cross examination she testified that applicant has no other property in his name.

[13] The next witness was an officer from the Surveyor General's office by the name of **Albert Bhekizizwe Mhlanga, (W3)**. His evidence was brief but relevant to the issues at hand. In order to avoid repetition, I will highlight his evidence under the sub-title adjudication in this judgment.

[14] The applicant decided to call **Phindile Priscilla Sihlongonyane, (AW1)**. On oath she identified herself as the daughter of applicant and that she was married to a Dlamini. She advised a lawyer by the name of Mrs. Sukati of her fax number after Mrs. Sukati requested for the same and that this witness should receive a document for the attention of applicant. She did get a letter which was to the effect that the applicant should vacate the farm on 1st May 2014. She took the letter to applicant. Applicant was shocked and disappointed upon learning of the contents of the letter. Applicant explained that he had instructed first respondent to sell a subdivision of the farm.

[15] This witness then requested applicant to give her the contact details of first respondent. She then called first respondent and she introduced herself to the first respondent over the phone. She requested a meeting with first respondent in order to discuss the content of the faxed letter as applicant was disputing what was in the letter. First respondent responded that there was nothing further to discuss as the matter was closed. She insisted on meeting with her as the matter was urgent following that the faxed letter had been received on 29th April 2014 and its contents was to the effect that applicant should have vacated the farm by 1st May, 2014. First respondent stated that she was not near Mbabane. She undertook to meet the third respondent. She then gave this witness the cellular phone number for the third respondent.

[16] She called the third respondent and requested a meeting with him. Third respondent agreed and they met at Mbabane. She enquired from third respondent if he was aware of the property he had purchased. Third respondent confirmed having purchased the farm and he showed her proof of payment. Third respondent further informed her that he did call applicant advising him to vacate the farm but applicant insisted that what happened was contrary to his mandate given to first respondent, and that even the money deposited at the bank was not what he had expected. She then suggested that they meet at the farm with third respondent and applicant be present together with first and second respondents. The meeting was scheduled for Sunday.

[17] They met on Sunday at the farm. However, first and second respondents failed to honour the meeting. Applicant proposed that they walk along the farm in order for him to show third respondent the portion he had sold to him. Third respondent declined, saying that he was in the company of his father who had to be rushed somewhere by him. They remained by the gate of the farm. Applicant then pointed out the demarcation of third respondent's property. Shortly, third respondent left. They also left for Mbabane.

[18] She then called first respondent to bring all the documents signed by applicant. Respondent responded that she was not in Mbabane or Manzini. This witness was cross examined. I will refer to her cross examination later in this judgment.

[19] **Beauty Pat Sihlongonyane, (AW2)** also took the witness stand. She identified herself as married to applicant. She referred the court to exhibit 6

(deed of transfer). She acknowledged having signed the deed at the offices of C. J. Littler & Co. (W1's offices). She signed for Portion 8 of Farm 693 to be transferred to third respondent. She believed that Portion 8 was a subdivision of Portion 7. The reason was that since they purchased the farm, they knew it as Portion 7.

[20] The matter adjourned at the instance of applicant's counsel who pointed out that he intended to call the applicant but was indisposed due to illness. The court adjourned the matter to 5th February 2015. On this date, Counsel for applicant applied for a further postponement on the basis that applicant's condition had not improved. There was no objection from respondents as was the case previously. The matter was scheduled for the 16th March 2015. A similar situation obtained on the 16th March 2015 and the matter was set to resume on 20th April, 2015. On this date, applicant's counsel informed the court of very sad news that the applicant has passed on.

[21] This court's deep condolences goes to the Sihlongonyane family especially his surviving spouse and daughter. Applicant was the Accountant General of this Kingdom for a number of years. He retired with a clean record.

[22] The applicant closed his case, and the matter was postponed to 11th June 2015. On this date applicant's counsel applied for substitution of applicant with the Executor of applicant deceased's estate. The respondents did not object and the substitution prayer was granted. First and second respondents' counsel applied that the Master of the High Court be joined as well. It was so ordered. Counsel on behalf of first and second respondents applied for a postponement by reason that his client was indisposed due to ill health. The matter was postponed to 3rdSeptember 2015 and

10th September 2015. The matter could not proceed on 3rd September as I was in a High Court full bench matter.

[23] On 10th September 2015, counsel for first respondent called her to the witness stand. While in the witness box, first respondent demonstrated that she was in excruciating pain. She was twisting and bending, showing that she could hardly talk and stand. After enquiries, the court ruled that she be given another date. The matter was postponed to 25th September 2015. On this date Counsel for applicant appeared alone and informed the court that first respondent's counsel had advised him that his client was still indisposed and that in the next hearing date, he would apply for an application for absolution from the instance. The court ordered for dates of filing of heads, and the matter was postponed to 16th October 2015. The matter, however came back on 19th November 2015 where first and second respondents withdrew their application for absolution and closed their defence case. The other respondents took a similar procedure by closing their case. The matter was therefore postponed for judgment. The court went on recess thereafter.

Issue

[24] The question for determination is, "*What was the intention of the applicant? Did he intend to sell the entire farm or a subdivision thereof?*" Put directly, "*What was the mandate given to the first and second respondents*?"

Principles of law

Contract

[25] Writing on the subject of contract, **Van der Merwe et. al** stated:

> "*The conclusion that a contract has come into existence entails a juristic abstraction. From the proven facts (or events) one must extract those which, in accordance with legal norms, indicate a contract. The conclusion that a contract has been created is, therefore, based on the findings of an historical fact*.[3] *(*my emphasis*)*

[26] The learned authors then eloquently pointed out:

> *"One must then assume that an agreement will be a contract only if the parties intend to create an obligation or obligations and if, in addition, the agreement complies with all other agreements which the law sets for the creation of obligations by agreement (such as the contractual capacity of the parties, possibility of performance, legality of the agreement and prescribed formalities)..... This construction of the concept "contract" accords with the practice of classifying contract as a legal fact,that is something which has its basis in empirical reality and has legal consequences*."[4] (emphasis again*)*

[27] They also proceeded:

> "*It is evident from the discussions of the nature of a contract as a form of agreement that a meeting of the minds of the contractants in other words consensus is the basis of a contract. In principle it is therefore quite acceptable to say that a contract comes into existence if the parties are agreed (are ad idem) on creating between themselves an obligation ..."* [5]

[3] "**Contract General Principle" 3rd Ed. 2007 at page 7**
[4] Supra at page 8
[5] Supra at page 21

Duties of an agent

[28] **Innes CJ** [6] propounded:

> *The modern idea of an agent – that is, of a person who enters into contracts for his principal, on which, as a general rule, he cannot himself be sued – was not known to Roman law, though that law fully recognized the position of one who transacted business for another, and dealt with some detail with his rights and liabilities. And it laid down as a fundamental principle in all such cases that good faith should be strictly observed, and that property belonging to the employer should be accurately accounted for."* (emphasis)

[29] The learned Judge further emphasized:

> *"...but it is well that those who occupy fiduciary positions should realize that they are bound not only to refrain from acting dishonestly, but to exhibit to those whose interests they represent the fullest good faith and render them the fullest information in all matters directly or indirectly connected with their business."*[7] (emphasis)

[30] While **Mason J** in the same case:[8]

> *"To use the language of Story, the principal bargains for the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit, in the confidence that he will act with a sole regard to the interests of the principle so far as that may be lawfully done; and, as other writers say, the commercial agent by undertaking the mandate which is offered to him guarantees that he has the requisite skill and is in a position to perform the work entrusted to him. He must, while holding his position of trust and confidence, prefer the interests of his principal even to his own in a case of conflict, and to his skill, diligence, and zeal must be added the utmost good faith."* (emphasis)

[6] In Transvaal Cold Storage Co. Ltd v Palmer 1904 TS 4 at 19
[7] Supra at page 23-24
[8] (supra) at page 33

Adjudication

Parties' contentions

[31] The applicant avers that he gave first respondent a mandate to first subdivide the farm and sell the subdivision. In support of this deposition, applicant annexed to the founding affidavit annexure marked "**EJ2**" which reads:

AGREEMENT OF MANDATE
THIS AGREEMENT IS BETWEEN
Mr. Eliot JabulaniSihlongonyane
P. O. Box 6162
Mbabane.
(hereinafter referred to as the "owner of the property")
AND
***THE PROPERTY SHOP** and MrsZandileSimelane*
(hereinafter referred to as "agents")
P. O. Box 211
Matsapha.

TERMS AND CONDITIONS

The following terms and conditions represent a mandate given to the Agents by the "Owner" of the property as outlined below.

DESCRIPTION OF PROPERTY AND SIZE

The agents are hereby mandated and authorized to effect a subdivision of Portion 7 of Farm Calaisvale II No. 693, Manzini District, currently measuring 47 hectares in total extent. After the subdivision the Agents are authorized to sell the first portion of the said property and the remaining extent thereof to continue owned by the "Owner" of this property for his dwelling and livestock farming.

COST AND COMMISSION

The purchase price of the portion to be sold after the subdivision is estimated at E1.5 Million (One Million Five Hundred Thousand Emalangeni), but the agents shall evaluate the property and to secure the highest price possible for the sale of the portion of the farm.

PAYABLE

The commission is payable to the agents upon payment in full of the purchase price of the property to sell by the purchaser according to the terms and conditions of the deed of sale. This commission shall be 10% of the purchase price which shall be shared by the Agents.

*(*Page2*)*

BREACH

In the event of the above clauses are breached by the agreement will become null and void and any costs applicable paid as stated in the agents act under the property laws of Swaziland.

The seller will not allow or accept offers from agents or sell directly before the expiry of this agreement or consent of the appointed agents.

Any Agent or person who sells the property either than the appointed agents will forfeit any commission payable to the appointed agents.

Any violation of the agency act or laws of the country by either party will result in breach and the party affected will have liberty to sought legal cause.

SELLER /OWNER..... DATE 2014
AGENT 1..... ..... DATE 2014
AGENT 2..... DATE 2014

[32] Applicant then deposed that having signed the "**EJ2**":

> "*14. In the afternoon of that very same date on which I had executed the Agreement of Mandate, I was later called by the said Xolile Sihlongonyane (Mrs. Dube) who requested to meet me to sign certain documents as part of the transaction I had mandated them to do that morning. Indeed Xolile Sihlongonyane (Mrs. Fakudze) at Nandos in Mbabane and she produced some type-written document, without affording me an opportunity to read it as she said she was rushing somewhere, she would tell me "sign here", produce another page and tell me "sign here" and this happened page by page until I had signed a lot of pages*."

[33] Applicant further states:

> "*To be honest, I did not know what I was signing since I was not afforded an opportunity to read it. I did not suspect that the agent would trick me or even engage in any unscrupulous conduct. Nonetheless, a few days later I did make telephone calls to Xolile Sihlongonyane (Mrs. Dube) requesting that she avails me with copies of the documents which I had signed in order to apprise myself with the contents thereof , but she kept on making empty promises that I would get them.*

[34] The applicant further contends that after signing the said documents, he was invited to W1's office where he was caused to sign a Power of Attorney. He gladly signed the said document and he explains as follows:

> *17. However, when I signed the Power of Attorney, I had laboured under the impression that the document was a necessary step towards the subdivision of my farm in order for my agents to efficiently execute their mandate. I must mention that I am unfamiliar with the complexities involved in conveyancing, hence, I put my absolute trust in the agents who professed to be specialists in the trade. I trusted my agent that she would act to the best of my interests as she promised from the onset. What added salt to the wound in me overly trusting the said Xolile Sihlongonyane is that we share the same surname, thus I trusted her as my own daughter.*

[35] He further expands:

> *When I signed the Power of Attorney, I did notice that it mentioned the passing of transfer but I was under the impression that what was being transferred was a subdivided portion of the farm not the entire farm. The reason for this assumption is because by then I only had the Agreement of Mandate I had signed with the agents in which we agreed to the subdivision of* ***Portion 7*** *of Farm Calaisvaile II No. 693. In the Power of Attorney to pass Transfer, however, it appeared that the property being transferred was* ***Portion 8*** *of Farm Calaisvaile II No. 693 hence I reasonably believed that this* ***Portion 8 was a subdivision of Portion 7*** *as per the Agreement Mandate.*

[36] Applicant proceeded to state that it came as a shock to him to learn that he had to vacate the farm on the basis that the entire farm had been sold for "*a song*" of E1 million.The applicant then sums up his contentions as follows:

> *"24. Whilst I do not deny that the signature on the Deed of Sale is mine, I wish to sincerely state that I was not afforded the opportunity to read it as my agent, the 1st Respondent told me to 'sign here' .... sign here .... sign here ....as she produced page by page to me on the day she called me to sign some documents at Nandos in Mbabane. I did not suspect that as my agent she would breach her fiduciary duty to me and deceive me. I acted on the strength of the mandate I had given to her, that she was to subdivide the property first and sell only a portion thereof not the hole farm.*
>
> *25. I humbly submit that the agents acted fraudulently in making me to hastily and inadvertently sign the Deed of Sale for the whole farm when I had mandated them to subdivide and sell only a portion thereof. I wish to point out the following factors which will readily indicate the fraudulent conduct of the agents and perhaps the buyer in the whole transaction:*
>
> *25.1 The 1st and 2nd Defendants (agents) approached me in the morning of the 14th January, 2014 where we signed the Agreement Mandate (I hereby refer to Annexure "EJ2" of this affidavit).*
>
> *25.2. Hardly eight hours after conferring them with the mandate to subdivide the property and find a buyer for the subdivided portion, in the afternoon*

of the same day, the 14th January, 2014, the 1st Defendant was back to give me some documents to sign, which documents I was not afforded the opportunity to read as she dictated, 'sign here' .... sign here .... sign here'. No reasonable person of my age and lack of sophistication in matters of conveyancing would have thought that in less than eight hours the agents could have already subdivided the property and secured a buyer as well.

I wish to refer the Honourable Court to the Deed of Sale attached as Annexure "EJ5" which attests to the fact that I signed the Deed of Sale (unwittingly though) on the 14th January, 2014 just as the Agreement Mandate.

25.3. To put it beyond doubt that the 1st and 2nd Defendants fraudulently tricked me into selling my property for a 'a song' by the time I conferred the agents (1st and 2nd Defendants) with authority through Annexure "EJ2" on the 14th January 2014, the 3rd Defendant (Buyer) had already signed the Deed of Sale on the 13th January, 2014. Effectively, the 1st and 2nd Defendants sold my property even before I clothed them with authority to subdivide and sell the portion thereof. On the 14th January 2014 I was made to 'endorse' the illegality they had already conspired to commit upon me, hence the denial of the opportunity for me to carefully read the documents.

25.4. From the time I conferred the agents with the mandate to subdivide and sell my property, reference has constantly been made to a certain Portion 7 of Farm Calaisvaile II No.693 in the Manzini District, which indeed is the property I have always known is owned by me. However, when I was called to sign the Power of Attorney to Pass Transfer, reference was made to a certain Portion 8 of Farm Calaisvaile II No. 693 in the Manzini District. Never in my life had I owned such property, hence the assumption that the newly subdivided portion was named Portion 8.

25.5.2 That the property in the computer system is still described as Portion 7 of Farm Calaisvaile II No. 693 in the Manzini District, and that however, somebody has fiddled with the hard-copy file of the property by handwriting in terms of which "Portion 7" was altered to read "Portion 8" of this affidavit. The officers at the Deeds Registry were left wondering as to how, when and by whom this was done as it is not dated. In light of this discrepancy, a further search had to be conducted on the hard-copy file of Deed of Transfer No.30/1977 which was held by the previous owner of the property in order to ascertain as to what portion did Joseph Khalalemphi Mndzebele transfer to me under Deed of

*Transfer 210/1996, Portion 7 or Portion 8)? The evidence gathered was to the effect that indeed my property is Portion 7 and there is nothing such as Portion 8 in the Deeds Registry. I beg leave to referthis Honourable Court to Annexure "**EJ6**"being a certified copy of Deed of Transfer No. 30/1977.*

27. I therefore humbly submit that in light of the totality of the facts presented above, I never sold my property to the 3rd Respondent but was only a victim of the fraudulent acts of the first three Respondents jointly and severally.

29. To make matters worse, there is no way I could have sold a farm measuring 47 hectares for only E1.5 million. In terms of the Agreement of Mandate, I mandated the agents to sell the subdivided portion of the farm for the highest price possible. I humbly submit that notwithstanding the fact that the agents acted contrary to the mandate, they did not do anything at all to find the highest possible price for the portion of the farm."

[37] In answer, the first respondent deposed:

"3. I state that the application before court is based on dishonesty, fraud, and forgery, on the part of the applicant. The applicant has circumvented facts which are wholly not true in as far as the alleged cause of application is concerned and further went on to create documents which he annexed to his application. Such documents are forgery and the original documents have been altered. Such will be apparent hereunder and I submit that the above honourable court, as I will pray, deals with an iron hand with such conduct in order to discourage the applicant and would be doers of same.

[38] First respondent states further:

"7.2 I admit the description of the farm however I mention that in the process of preparing the Deed of transfer, and power of attorney to effect transfer the conveyance discovered that the farm said to be a certain portion 7 of farm Calaisvaille was portion 8 not portion 7 as described. I state that such was explained to the applicant. Applicant never at any point was registered owner of portion 7. He has always been the owner of portion 8."

[39] She then contends:

> *"10.2 I mention that my instructions were to dispose off the entire farm not a portion. I mention that I am hearing about subdividing the farm for the first time.*
>
> *11.1 Save to admit the presence of my business partner and making a call to the applicant to come and sign an agreement which mandated my business to sell the applicant's property on his behalf. I deny the entire contents thereof and the said annexure "**EJ2"***
>
> *11.2 I mention that the agreement that was signed between myself and the applicant, as agreed, was to sell the entire farm being Portion 7 of Farm Calaisvaile II No.693, Manzini District measuring 47 hectares in total for the price of E1,500,000-00 (One comma five Million Emalangeni).*
>
> *11.3 I state that prior to the signing of the agreement the applicant read through it and noted that he had no issue with the contents thereof and thereafter appended his signature. Kindly see attached hereto and marked "F" a copy of the agreement of mandate referred to herein."*

Annexure "**F**" reads:

AGREEMENT OF MANDATE
THIS AGREEMENT IS BETWEEN
Mr. Eliot Jabulani Sihlongonyane
P. O. Box 6162
Mbabane.
(hereinafter referred to as the "owner of the property")
AND
***THE PROPERTY SHOP** and Ms Zandile Simelane*
(hereinafter referred to as "Agents")
P. O. Box 211
Matsapha.

TERMS AND CONDITIONS

The following terms and conditions represent a mandate given to the Agents by the "Owner" of the property as outlined below.

DESCRIPTION OF PROPERTY AND SIZE

Portion 7 of Farm Calaisvale II No.693, Manzini District. Measuring 47 hectares in total extent

COST AND COMMISSION

The agreed purchase price of the property is E1.5 Million (One Million Five Hundred Thousand Emalangeni only). Commission amount is payable to the above mentioned Agents is E500,000-00 (Five Hundred Thousand Emalangeni only).

PAYABLE

The commission is payable to the Agents upon payment in full of the purchase price of the property to the seller by the purchaser according to the terms and conditions of the deed of sale. This commission will be paid as follows: E462,500-00 to the Property Shop and E37,500-00 to Zandile Simelane.

(page 2)

BREACH

In the event of the above clauses are breached by the agreement will become null and void and any costs applicable paid as stated in the agents act under the property laws of Swaziland.

The seller will not allow or accept offers from agents or sell directly before the expiry of this agreement or consent of the appointed agents.

Any Agent or person who sells the property either than the appointed agents will forfeit any commission payable to the appointed agents.

Any violation of the agency act or laws of the country by either party will result in breach and the party affected will have liberty to sought legal cause.

SELLER /OWNER..... DATE 2014

AGENT 1..... DATE 2014

AGENT2..... DATE 2014

[40] She further points out:

> "*12. I state that applicant honoured my call and came to Mbabane to sign the power of attorney, and prior to appending his signatures he went through the document and thereafter signed same.*"

[41] On applicant's averment that the deed of sale was signed before the date of mandate agreement, she contends:

> "*26.1 I deny the contents thereof. I admit however that it appears that the deed of sale was signed on the 13th January. I wish to clarify that the Deed of Sale was signed by both parties on the 14th January 2014 however the applicant mistaken the day of the signing of the Deed of Sale as the 13th January 2014 hence the date entered therein to the 13th January 2014 instead of 14th January 2014. I however state that same does not render the agreement invalid.*"

[42] First respondent also points out:

> *"31. The applicant is no victim of any fraudulent act as everything was done according to the instruction of the applicant and he knew very well what he was doing."*

Analysis of the evidence

[43] Before court are two contradictory documents ***viz*. "EJ2"** and **"F"** filed by applicant and first respondent respectively in support of each other's contentions. This court's duty is to ascertain which of the two documents was availed at the onset of their contractual relationship. The answer lies within the evidence presented before court.

[44] I must hasten to point out that both documents **(**exhibits**"EJ2"** and **"F")** were susceptible to manipulation for the reason that although both have two pages, the signatures' page of the parties appears in both exhibits at page two. Each signature page reads *pari materia* to the other. There is therefore no issue with page two in both documents. However, by reason that pages one of both exhibits do not reflect the parties' initials, manipulation was easy to come by.

[45] The approach to be taken *in casu* was well canvassed by **Wessels JA:**[9]

> "*Where there are two stories mutually destructive, before the onus is discharged, the Court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other is false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A.*"

[9] National Employer's Mutual General

[46] Commenting on the above *ratio decidendi* by **Wessels JA, Davis J**[10] however clarified the approach correctly as follows:

> "*With the very greatest deference I venture to think that the use by learned Judge of the word cannot be correct. Even in a criminal case, the jury would not be told that they must be satisfied that "absolute" reliance could be placed on the version of the complainant: they would, I suggest, be instructed that they must be satisfied that sufficient reliance could be put on it, so that they were certain beyond reasonable doubt that it was true. And in a civil case, of course, the onus is less heavy. For judgment to be given for the plaintiff, the Court must be satisfied that sufficient reliance can be placed on his story for there to exist a strong probability that his version is the true one. And I have one further remark to make. When I speak of "his version" and "his story" being true, I mean not necessarily entirely true, but true in the main and in its essential features."*(myemphasis)

[47] Applying this principle of our law to the present case, I turn to the evidence of **Mr. Manzini, W1.** It was his evidence that he received a signed deed of sale which was between applicant and third respondent. He also received an agreement of mandate between applicant and first and second respondents. Under cross examination, **W1** informed the court that the said documents were brought to him by the first respondent. He was quizzed further:

Mr. Mavuso:	*"From whom did you receive instructions to effect transfer?"*
W1:	*"The Deed of Sale says who the conveyancer was. So instructions are contained in the Deed of Sale but the one who brought the Deed of Sale was first respondent."*

[48] From this evidence, it was not surprising therefore, for **W1** to testify that the agreement of mandate received by him was **"F",** one attached by first respondent in her answering affidavit. This mandate **"F"** instructs first

[10] Maitland & Kensington Bus Co. (Pty) Ltd v Jennings 1940 CPD at 492

respondent to sell "*Portion 7 of farm Calaisvale II No.693, Manzini District, measuring 47 hectares in total extent*".

[49] He also received instructions from sixth respondent to register a bond over the property. He noticed that the description of the property in the deed of sale and in the letter of guarantee received from the bank together with the instruction to register a bond was different. He then proceeded to fourth respondent to obtain a copy of the title deed. It was his evidence that the deed of sale also reflected the property as "Portion 7". **W1** then stated:

> *"I found that the property under applicant was Portion 8 of Farm Calaisvaile No.693. There was no Portion 7, neither was it registered in the name of Sihlongonyane nor in existence in fourth respondent's offices."*

[50] **W1** testified further:

> *"Upon realizing that there is Portion 8, we then prepared documents to effect conveyancing".*

[51] **W1** divulged in his testimony:

> *"The title deed obtained from fourth respondent indicated an alteration by hand from 7 to 8."*

[52] He was cross examined by applicant's counsel:

Mr. T. Mavuso: *"What was the findings? Was it that Portion 7 never existed or that it did exist and it was later changed to Portion 8."*

W1: *"I do not know about that but what I know is that there was an alteration and as to when it was done I do not know."*

[53] **W1** referred the court to the said title deed. Glaringly, the title deed does confirm **W1's** observations that it was altered from a typed print reflecting "**7**" to a pen or long hand "**8**".

[54] The witness who clarified on the position of the description of the farm was Surveyor, **Mr. Mhlanga, W3**. He clarified as follows:

> "*Yes, there was in the original survey as Portion 7 of Farm 693. During the course of maintenance of our records, it was discovered that there was an error. The surveyor made an error when he presented the diagram of Portion 7. He omitted to note that there was another farm in that portion of land. It was at that time Portion 3 of Farm 693. Following the rules of survey and a withdrawal of Portion 7, it ceased to exist. A correct diagram was then prepared and this was diagram for Portion 8 which excluded Portion 3. So Portion 8 exists on its own without being a portion of Portion 7."*

[55] From this evidence, applicant's Counsel cross examined **W3** as follows:

Mr. T. Mavuso:	*"When Portion 7 was buried, who was the client of the surveyor?"*
W3:	*"Our office only deals with the surveyor."*
Mr. T. Mavuso:	*"So you are not aware if the surveyor did inform the client?"*
W3:	*"I am because he had to present evidence that he had informed his client of the error."*
Mr. T. Mavuso:	*"Would you be surprised to hear that applicant was never informed about the change?"*
W3:	*"The surveyor was not dealing with applicant but the previous owner, Mr. Mndzebele."*
Mr. T. Mavuso:	*"Why was it that he was dealing with Mr. Mndzebele as transfer took place in 1996?"*
W3:	*"I got the impression that it still belonged to Mr. Mndzebele."*

[56] **W2**, **the Registrar of Deeds**, **Ms Mabuza** was cross examined by first and second respondents' attorney as follows on the description of the farm:

Mr. M. S, Dlamini:	*"Portion 7 and Portion 8 means the same property?"*
W2:	*"Yes except that Portion 7 was 47 hectares while Portion 8 is 42."*
Mr. M. S, Dlamini:	*"Portion 7 also incorporated Portion 3 hence the extent?"*
W2:	*"Yes.*

[57] From the above evidence, could it reasonably be concluded that the version by applicant stands to be rejected, mainly that: *"However, when I signed the Power of Attorney, I had laboured under the impression that the document was a necessary step towards the subdivision of my farm in order for my agents to efficiently execute their mandate. I must mention that I am unfamiliar with the complexities involved in conveyancing, hence, I put my absolute trust in the agents who professed to be specialists in the trade. I trusted my agent that she would act to the best of my interests as she promised from the onset. What added salt to the wound in me overly trusting the said Xolile Sihlongonyane is that we share the same surname, thus I trusted her as my own daughter. When I signed the Power of Attorney, I did notice that it mentioned the passing of transfer but I was under the impression that what was being transferred was a subdivided portion of the farm not the entire farm. The reason for this assumption is because by then I only had the Agreement of Mandate I had signed with the agents in which we agreed to the subdivision of* ***Portion 7*** *of Farm Calaisvaile II No. 693. In the Power of Attorney to pass Transfer, however, it appeared that the property being transferred was* ***Portion 8 of Farm***

Calaisvaile II No. 693 *hence I reasonably believed that this Portion 8 was a subdivision of Portion 7 as per the Agreement Mandate?"* I do not think so, by reasons so glaring which are:

- There once existed Portion 7.

- The Surveyor General, upon subsequently updating its records, discovered that as there was Portion 3 of the same farm, there was need to rename Portion 7 as Portion 8.

- As testified by **W3** (Surveyor) applicant was not advised of the change of name of Portion 7 to Portion 8 as the Surveyor General laboured under the wrong impression that the property was still owned by Mr. Mndzebele whereas at that time (1996), Mr. Mndzebele had sold it to applicant. It was common cause that applicant purchased the farm in 1995.

- That this Portion 7 did measure 47 hectares as reflected in the mandate document unlike the said Portion 8 which measured less hectares than Portion 7 as attested by W2.

[58] Further aspect of the evidence before court which lends credence on applicant's version is from the pleadings. The third respondent ferociously opposed the application. His main contention was that:

> *"I am advised by Attorney Mr. Nkosinathi Manzini, who was the conveyancer in transaction, from C. J. Littler and Company that when Applicant came to sign the Power of Attorney, the full import thereof was explained to him and it was even indicated to him that in actual fact the farm which he wanted to sell was not portion 7 but portion 8 as the former was non-existent and he agreed that*

the necessary correction be made and thereafter proceeded to sign the Power of Attorney as property corrected.

I am further advised by Mr. Manzini that in actual fact, the Applicant never mentioned, either in passing or otherwise, any sub-division to him and neither did he query the contents of the Agreement of Mandate instead he agreed that the appropriate corrections aforementioned be made."

[59] In his evidence in chief, the very same **Mr. Manzini, W1**, testified that when applicant came to sign at his offices, he was not present. His Secretary was. In fact **Mr. Manzini**, under cross examination, applied that the assertion by third respondent, as cited above, should be expunged as he was not present and the only time he spoke with applicant was after the transfer had been processed and it was pertaining to payment.

[60] **Mr. Manzini (W1)** further testified that he learnt that applicant never intended to sell his entire farm when called by sixth respondent. Respondents' counsel, during *viva voce* evidence, seemed to be under the impression that the applicant ought to have complained to **Mr. Manzini** if his mandate was not carried accordingly. He ought to have done so when he was demanding payment. However, it is clear from the evidence of **AW1**, applicant's daughter, that applicant became aware of the non-compliance with the mandate with regards to the subdivision when he received the letter of eviction from third respondent's attorneys. This letter came after the conversation with **W1** although applicant was still protesting for the balance of E500,000-00.

[61] Further **Mr. Manzini**, when quizzed in the light of the contradiction that the mandate and the deed of sale referred to Portion 7 while the title deed to Portion 8, testified that he had believed the mandate and deed of sale were drafted by an attorney and therefore it was a genuine error to insert Portion

7 instead of Portion 8. He testified that he had learnt his lesson that he should have had the mandate and deed re-written to read accordingly. In other words, as correctly conceded by **W1**, the error which was assumed by **W1** of the description of the farm, ought to have been brought to the attention of the applicant. **W1** conceded that he did not do so.

[62] First respondent in her answering affidavit does allude that the content of the Power to pass transfer was explained to applicant. Of note from first respondent's contention is that she does not state as to who explained the contents to applicant. From the evidence of **W1,** the only person who was present was the Secretary when applicant signed the said documents. **W1** testified that he never explained anything to applicant pertaining Portion 8 or the Power to transfer. At any rate, applicant in his reply, denies that it was ever explained to him that he was passing transfer of the entire farm.

[63] Further, respondents' counsel suggested that as applicant brought with him the original title deed to **W1**'s office as testified by **W1** in *viva voce* and therefore was fully aware of the description of the property. However, this position does not alter the evidence by **W1** that he researched for the description of the property at the Deeds office and the Surveyor General's offices. By the time applicant came with the original title deed, the conveyancing documents had been fully prepared. In other words, **W1** did not rely on the original title deed to effect transfer, nor does his evidence suggest that the title deed in applicant's possession was perused and discussed. In fact, under cross examination **W1** was asked if he did contact the applicant to obtain a description of the property and he answered in the negative.

[64] In totality of the above, it is my considered view as demonstrated that the principle enunciated in **Maitland** *supra* must be upheld in favour of applicant in that on the balance of probability, applicant's version is reasonably probable and therefore true.

[65] If I am wrong in my analysis on the above, there is another approach to this matter. This approach was adopted in **Van As v Du Preez**.[11] The court was faced with two mutually destructive scenarios. A lease agreement, concluded between the parties carried a clause to the effect that no waiver or variation shall be effective unless reduced into writing as forming part of the lease agreement. The appellant contended that there was a verbal agreement to reduce monthly rentals. Allowing the appeal, the court held that in a contract where there are conflicting versions, despite that there existed a clause that any terms of variation ought to be written down, the court was endowed with considering the actions of the parties and not confine itself to the written contract. That the lessor accepted reduced monthly rentals for a period spanning thirteen months, an inference was drawn that appellant's version was probable in the circumstances.

[66] I now juxtapose that case (**Van As**) with the present case. **AW1** (applicant's daughter) testified that she arranged a meeting between applicant, first and third respondents in order to discuss the matter. She pointed out that applicant was kin to meet the first respondent as he was always disputing the mandate carried out by first respondent.

[67] She testified that the meeting did take place at the farm. However, only third respondent turned up. Applicant pointed out the boundaries for third

[11] 1981 (3) S.A. 760

respondent. However, first respondent did not attend the meeting. She then testified:

> *"On our way back, we tried calling Xolile (first respondent) as my father (applicant) was insisting that Xolile should bring all the documents they have signed together."*

[68] She proceeded:

> "*Xolile said that she was not around Mbabane or Manzini*."

[69] It was her evidence that although she personally called first respondent for the meetings, first respondent would say that she was not around Mbabane or Manzini. In her evidence she mentioned three instances where she called first respondent in order to meet over the issue. She testified that neither her nor applicant ever met first respondent. This evidence that first respondent always came up with excuses when called upon to meet with his principal, the applicant, gives rise to the only reasonable and plausible explanation that first respondent was not prepared to meet with his principal. The reason for her to act in this manner is not very far from seeing. It is because her mandate was in terms of "**EJ2**" and not "**F**" as she contends. I hasten to point out that the evidence of **AW1** stood unchallenged.

[70] Further, first respondent preferred not to take the witness stand. Why in the face of a document such as "**EJ2**", one cannot fathom. In fact, as fully appearing in the pleadings before court, first respondent did not file her answering affidavit until she was out of time. The third respondent, a purchaser herein, filed timeously on 28th August 2013. First respondent on the other hand, a person one would have expected to file in time especially

as she was armed with annexure **"F"** filed on the 24th September 2014, way out of time. She filed her answering affidavit after pleadings had closed, the applicant having replied and a book of pleadings preparedand served upon all parties.[12] She did so without seeking for leave of court and without an iota of explanation as to her protracted delay. This necessitated the applicant to seek leave to file a second reply. Why she caused the applicant to be out of pocket in her *laizzes faire* attitude, again the answer is not far from fathoming. She was still using that time to manipulate the mandate document as I pointed out earlier in this judgment that the mandate document was vulnerable to such by reason that she (first respondent) did not cause it to be initialed in every page as she did so with the deed of sale.

[71] It is no wander therefore that when first respondent eventually filed her answer, it was riddled with contradiction and ambiguities. For instance at paragraph 6 she avers:

> *"I deny the contents thereof. I do admit that I did approach him to negotiate a sale of the farm upon getting information that he was selling the farm. I state that he mentioned that he preferred to engage my services as he did not want to burden himself and let people who provide the service and have expertise do the work for him."*

[72] She then deposes:

> "*7.1 I deny the contents of this paragraph. I submit that applicant is the one who requested that I assist him by disposing off his farm, by finding him a buyer*."

[73] She states:

> *"12.1 I deny the contents thereof. I mention that I called the applicant after a few day of execution of the agreement of mandate, to inform him that we*

[12] See page 160 of book of pleadings

> *had to meet so he could sign the power of attorney to pass transfer. I state that applicant honoured my call and came to Mbabane to sign the power of attorney, and prior to appending his signatures he went through the document and thereafter signed same.*"

[74] This evidence contradicts that of **W1** who states that the only person who was present when the Power of Attorney was signed was his secretary. She however, chose to depose in this manner giving the impression that she was present when applicant signed the Power of Attorney.

[75] Further applicant deposed that a few days later he called first respondent and requested for a copy of the document he was caused to sign in order to read it. Applicant however, kept on "*making empty promises*"[13] first respondent answered with a blanket denial to paragraph 15 which entails a number of unwarranted actions by first respondent. The court in **Room Hire**[14] stated:

> "*bare denial of applicants' material averment cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary examination .... and ascertain whether the denials are not fictitious intended merely to delay the hearing.*"

[76] Such bare denial by first defendant *in casu* by virtue of the *ratio* in **Room Hire**[15] carries a less probative value.

[77] Second respondent did not file any affidavit in opposition to applicant's application, although she benefited immensely in terms of the commission from this transaction. It is not clear again as to why second respondent was

[13] See page 10 paragraph 15
[14] Room Hire Co. (Pty) Ltd v Jeep Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 at 1165
[15] (op. cit.)

made to benefit as at all material times, as confirmed by first respondent, applicant gave the mandate to first respondent and not second respondent.

[78] From the above highlighted first respondent's subsequent actions, this court is inclined to accept applicant's version that first respondent told him "*sign here', produced another page and tell me 'sign here', and this happened page by page until I had signed a lot of pages*"[16], with reference to the deed of sale. The court further accepts applicant's observations as can be confirmed from the deed of mandate and deed of sale that the deed of sale was signed prior to the agreement of mandate.

[79] **AJ Kerr**[17] laid down six attributes of an agent as follows:

> *"The agent is obliged to fulfill all obligations which he expressly or impliedly undertook to fulfill, and, if appropriate to his contract, failing express or implied agreement on any of the following points he is obliged (1) to do what he has been instructed to do; (2) to exercise care and diligence; (3) to impart information; (4) to advise; (5) to act in good faith; and (6) to account."*(my emphasis)

[80] On "*acting on good faith*," he writes [18]

> *"Every agent holds a "position of trust and confidence". His relationship with his principal is a fiduciary one. He must conduct the affairs of his principal in the interest of the principal and not for his own benefit." (my emphasis)*

[81] *In casu*, it is my considered view that the first respondent as an agent dismally failed to discharge her duties as propounded by **AJ Kerr** *supra*. She failed to carry out her principal's *instructions* as she did not subdivide the farm. She did not revert to her principal to have the deed of mandate and sale amended to read accordingly and neither did she disseminate the

[16] See page 10 paragraph 14
[17] The Law of Agency 3rd Ed. At 166
[18] See page 173

information that Portion 7 was renamed Portion 8. In this way, she neither *exercised due care and diligence* nor imparted *information* to her principal. She acted far below the expected *standard of good faith* by failing to *account* to her principal when called upon by applicant. She ignored calls from applicant's daughter to come and discuss the matter.

[82] It would be remise of me not to mention that third respondent's claim as purchaser, does not lie against applicant or his estate. He stands to be advised accordingly. An order for restitution entails applicant or his estate reversing the transaction of E1 million received from the sixth respondent as it was, according to the evidence, paid directly from that account. First and second respondents should also deposit the sum of E500,000 to sixth respondent's account. Sixth respondent also stands to be advised as to from whom to recover other expenses or damages, if any, together with interest incurred on capital loan.

Cost of suit

[84] The applicant prayed for cost of suit at a higher scale. I have not been persuaded otherwise. The circumstances of this case support applicant's prayer for cost at such scale. Agents of first and second respondents' calibre deserved to be mulcted with such costs. Not only have their *mala fides* affected the applicant negatively but also innocent parties such as third and sixth respondents.

[83] For the above reasons, I enter the following orders:

1. Applicant's application succeeds;

2. The transfer of Portion 7 or 8 as the case may be, of Farm Calaisvaile II No. 693 situate at Manzini District is hereby rescinded, set aside and reversed;

3. The parties' *restitutio in integrum* is hereby ordered, mainly:

   3.1 The contract of sale between applicant and third respondent is hereby declared *void ab initio*;

   3.2 The mortgage bond executed by third respondent in favour of sixth respondent on Portion 7 or 8 as the case may be of Farm Calaisvaile II No. 693 situate at Manzini District is hereby declared cancelled.

4. First and second respondents are hereby ordered to pay costs of suit at own client – attorney scale.

_____

M. DLAMINI
JUDGE

For Applicant: **T. Mavuso of Motsa Mavuso Attorneys**

For 1st & 2nd Respondents: **M. Dlamini of M. S. Dlamini – Legal**

For 3rd Respondent: **Advocate Mabila of Mabila Attorneys**

For 6th Respondent: **K. Motsa of Robinson Bertram**