



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 594/2014

In the matter between:

**PRINCE MMELELI DLAMINI N.O.**

**Plaintiff**

**And**

**DR. THOKOZILE E. SIBIYA**

**Defendant**

**Neutral citation:** *Prince Mmeleli Dlamini N.O. v Dr. Thokozile E. Sibiya*  
*(2039/2016) [2017] SZHC 76 (21<sup>st</sup> April 2017)*

**Coram:** M. Dlamini J.

**Heard:** 07<sup>th</sup> April 2017

**Delivered:** 21<sup>st</sup> April 2017

- **Where there is contradiction or variance on a material fact, the court must consider amongst others, the most probable story and the credibility of the witnesses.**

Summary: Simple summons at the instance of plaintiff reflects a claim for the sum of E53,000 as a refund for payment made on the behest of defendant pursuant to a written contract. There is a claim for 9% interest and costs of suit. The amount claimed was later amended to E64,000-00 by notice in terms of Rule 28. The defendant pleads that plaintiff failed to perform in terms of the contract.

### The parties

[1] In terms of the plaintiff's declaration, plaintiff, is an adult Swazi male who litigates in his nominal capacity as the Trustee of Prince Mmeleli Family Trust. The defendant is a Swazi adult spinster.

### Plaintiff's case

[2] The plaintiff on oath stated that he sold a piece of land situate at Hawane measuring 2.7 hectares (2.7 hectares) to the defendant. Defendant solicited funding from Standard Bank and used the 2.7 hectares as security.

[3] A year later, defendant approached plaintiff and expressed that she intended to have the 2.7 hectares subdivided. He advised the defendant that it would be impossible to do so because the 2.7 hectares was the minimum size at law. They then devised means to assist the defendant who was behind in terms of servicing the mortgage bond with the bank. It was agreed that plaintiff, who needed the 2.7 hectares as it was situated at an area demarcated for industry, would exchange his two properties for the 2.7 hectares. His two properties were situate at Maguga and Hawane areas.

- [4] In order to make the exchange possible, the 2.7 hectares had to be free of any incumbrances. It is then that a written agreement was concluded where plaintiff would assist the defendant accelerate payment of the mortgage bond with the bank. It was plaintiff's evidence that he would contribute a sum of E5,000 every month for the next twelve months. The parties duly signed the agreement.
- [5] Plaintiff duly paid each month. Within a period of twelve months, plaintiff paid the sum of E64,000. It was further plaintiff's evidence that he had anticipated that by this period the bond would be fully paid as defendant was expected to continue paying her E5,000 monthly instalments. However, that was not to be so as defendant failed to advise him of the state of the bond. He decided to stop payment.
- [6] He later learnt from the grapevine that the property had been sold following an execution order of this court at the instance of the bank. He decided to approach his attorney for the refund of his money.
- [7] The plaintiff was cross examined at length. The essence of his cross examination was that the plaintiff failed to pay the sum of E5,000 each month within the specified time in the contract. It was demonstrated to him that the contract called upon him to commence payment immediately upon signature. With the contract signed in 2009, he ought to have commenced payment that year. It was put to him further that he failed to pay the whole balance due under the bond. This witness stood his ground that the bond could not be paid by him as it did at all material time remained in the name of the defendant. He was merely assisting in paying. At the end, it was put to this

witness that he had breached the agreement by paying two years later and by failure to pay the entire balance.

[8] Plaintiff denied under cross examination that his postal address was Box 21 Eveni. On paying two years later, the plaintiff explained that he was delayed by the process of subdivision of the two properties which were to be subject of exchange in the agreement and that defendant was advised of the delay.

[9] The plaintiff closed his case. Defendant opened her case by giving evidence. On oath, defendant testified that she approached the plaintiff for purposes of purchasing the 2.7 hectares. She obtained a loan for the same from the bank. Later plaintiff came to her and requested that she sells back the 2.7 hectares to him as he needed it for commercial purposes. Plaintiff offered her the two plots at Maguga and Hawane.

[10] She proceeded to mention that plaintiff then drew the written contract which was submitted by plaintiff in his evidence in chief. In the contract, plaintiff undertook to pay off the mortgage bond. The bond ought to have been paid up by September 2010. She signed the contract.

[11] Plaintiff failed to commence payment immediately. He only did so two years later. Plaintiff defaulted several times. She was in constant communication with plaintiff reminding him to pay up the bond. Plaintiff promised to update payments. As a result of plaintiff's default, she was blacklisted. The 2.7 hectares was sold by the bank due to plaintiff's default. She never benefited from it.

[12] The defendant was cross examined. I will refer to her cross examination later on in this judgment. Defendant closed her case.

### Adjudication

[13] My duty at this stage is to access the evidence. Where there is contradiction or variance on a material fact, the court must consider amongst others, the most probable story and the credibility of the witnesses.

[14] The plaintiff's *viva voce* evidence is consistent with his declaration. This bears on his credibility in a positive manner. It is worth noting that the defendant does not dispute that the plaintiff did pay to her personal account the sum of E64,000. She however makes issue that the plaintiff breached the material term of the contract by failing to pay in the year 2009. If the period of payment was a material term of the contract, defendant would, upon plaintiff's failure have cancelled the contract. However, she allowed the contract to subsist.

[15] Further, defendant was happy to receive the money deposited to her personal account two years later. She did not stop plaintiff from depositing money contrary to the term of the contract. Such actions by defendant are inconsistent with the defence that plaintiff breached the contract. If he did, such term was not material as defendant accepted payment. Startling, is the evidence by defendant that in terms of the mortgage bond, full payment ought to have been done by 2010. One wonders therefore, whether the payments tendered by plaintiff was ever applied to the mortgage bond. This is so as

defendant pointed out that payment by plaintiff was directed into her personal account.

[16] The defendant contended further that in terms of the agreement, plaintiff was to pay the entire balance on the mortgage bond. Glaringly, is that the contract does not state how much the balance was. All we know is the undisputed evidence of plaintiff that he was to pay the sum of E5,000 for a period of twelve months. Defendant herself clarified under cross examination that the monthly payments due to the bank were E5,000. Inference can safely be drawn that plaintiff got to know of this figure from defendant who was the only party privy to the loan with her bank. Plaintiff did pay a sum equal twelve months, plus.

[17] Further, it stands to reason that, had plaintiff been called to pay the entire bond balance, the contract would have reflected the figures. The evidence by plaintiff that the purpose of payment on his part was to assist defendant expedite payment lends credence therefore.

[18] Defendant pleaded with this court not to grant the plaintiff's orders as she lost the property and was blacklisted. However, it is worth to note that defendant provided plaintiff not with the bond account but her own personal account. If indeed it was the intention of the parties that plaintiff pays off the balance due under the mortgage bond, defendant would have provided plaintiff with the bond account in order for the payment to be applied to the bond. By plaintiff paying to defendant's personal account, this created doubt as to whether at the end of the day money deposited into defendant's personal account ever served its purpose.

[19] In the final analysis, I find that the plaintiff has made out a case and I enter the following orders:

1. Plaintiff's cause of action succeeds;
2. Defendant is hereby ordered to pay plaintiff:
  - 2.1 the sum of E64,000;
  - 2.2 Interest thereof at the rate of 9% per annum, a *tempore more*;
  - 2.3 Costs of suit.



**M. DLAMINI  
JUDGE**

**For Plaintiff:**

**I. Motsa of Cloete / Henwood - Associated**

**For Defendant:**

**M. Mthethwa of C.J. Littler & Co.**

