



**IN THE HIGH COURT OF ESWATINI
RULING:ABSOLUTION FROM THE INSTANCE**

HELD AT MBABANE

CASE NO: 1728/20

In the matter between:

NTANDO LUKHELE

PLAINTIFF

And

SIMO C. MNGOMEZULU

FIRST DEFENDANT

WANDILE WILSON MAZIYA

SECOND DEFENDANT

DUCO INVESTMENTS (PTY) LTD

t/a RE/MAX REAL ESTATE SPECIALIST

THIRD DEFENDANT

Neutral Citation: *Ntando Lukhele v Simo C. Mngomezulu and Others*
[1728/20] [2022] SZHC 137 (30 June 2022)

Coram: LANGWENYA J

Heard: 6, 7, 30 June 2022

Delivered: 30 June 2022

Summary: *Civil Practice-plaintiff's claim against third defendant arises from an alleged estate agency agreement that was entered into and executed through its servant; Sibonelo Mamba-It is alleged that Mamba made certain representations that were negligent and or unlawful-representations which resulted in damages suffered by the plaintiff.*

Civil Procedure-Application for the instance made at close of plaintiff's case by third defendant-test for absolution from the instance-application for absolution from the instance dismissed with costs.

RULING: ABSOLUTION FROM THE INSTANCE

Introduction

- [1] The plaintiff is an adult male LiSwati of Lukhula area in the Lubombo district¹.
- [2] The first defendant is Simo C. Mngomezulu, an adult male LiSwati practicing as an attorney of this Court in Mbabane, in the district of Hhohho.
- [3] The second defendant is an adult male LiSwati residing in Matsapha in the district of Manzini.

¹ See plaintiff's particulars of claim at page 4 of the Book of Pleadings.

[4] The third defendant is a company registered in terms of the company laws of eSwatini and doing business at eZulwini in the district of Hhohho.

[5] The plaintiff led the evidence of two witnesses and after he had closed his case, Mr Sibandze on behalf of the third defendant moved an application for absolution from the instance.

Background with reference to pleadings

[6] The plaintiff's claim against the third defendants arises from an alleged estate agency agreement that was entered into and executed through its servant-Sibonelo Mamba. It is alleged that Sibonelo Mamba made certain representations that were negligent and or wrongful-representations which resulted in damages suffered by the plaintiff. The plaintiff now sues the third defendant and holds him vicariously liable for the negligence and wrongful conduct of its servant Sibonelo Mamba. The plaintiff claims damages totaling three hundred and sixty-nine thousand Emalangeneni (E369,000) against the defendants, the one paying absolving the others; interests at nine percent *a tempore morae* and costs of suit

[7] The third defendant denies liability and argues that Sibonelo Mamba is not its employee but an independent agent; and that the third defendant was never a party to the negligence and wrongful acts complained of herein and therefore it is not liable pay the damages claimed.

The plaintiff's case

[8] Sibonelo Mamba was called as the first witness for the plaintiff. He testified that he was employed as a property sales associate by the third defendants from the year 2016 until the year 2019. His duties were to facilitate the sale and purchase of property by clients of the third defendants. He also assisted

clients with any other matter regarding sale and purchase of property on behalf of third defendant's clients.

- [9] Sibonelo Mamba testified that he was employed on contract and was remunerated by the third defendant by way of commission.
- [10] Mr Mamba testified that with regard to the matter before court, he was telephoned by third defendant's secretary regarding plaintiff's request to buy property through the offices of the third defendant. He also received a call from the plaintiff concerning his request to buy property. He agreed to assist the plaintiff to buy property within his budget. At the time plaintiff made the request to buy property, Mamba informed him that he did not have property that fitted plaintiff's budget under his portfolio. He undertook to find it for the plaintiff. According to Mr Mamba, there was nothing untoward about his offer to the plaintiff in this regard as this was normal practice within the estate agency sector.
- [11] Mr Mamba testified that he subsequently found the property and showed it to the plaintiff. Plaintiff was happy with the property. Mamba then facilitated the signing of the deed of sale and the payment of the purchase price to the first defendant.
- [12] The plaintiff performed his part of the bargain as advised by Mr Mamba and in terms of the deed of sale. However, the property could not be registered in his name because the money plaintiff paid was misappropriated by the first and the second defendants.
- [13] It was the evidence of the plaintiff that when he decided he wanted to buy title deed land, he opted to use the offices of the third defendant because they had previously assisted his sister buy title deed land. Plaintiff then

commenced his dealing with the third defendant by calling their offices via their landline. He was referred by the office of the third defendant to Sibonelo Mamba. He then dealt with Mamba who assisted him, as he put it, in terms of his contract of employment with the third defendant.

- [14] It was the evidence of the plaintiff that he had trust and confidence in the third defendant who was assisting him through Sibonelo Mamba that he acted on his every word and even signed the deed of sale and paid the amount stated thereon, in the process fulfilling the terms of the deed of sale.
- [15] Plaintiff testified that the third defendant is vicariously liable for the negligence of its employee who induced him to pay the amount stated in the deed of sale to his detriment.
- [16] At the close of the case of the plaintiff, it is submitted that there was evidence that Sibonelo Mamba was a property sales associate working with and for the third defendant. This evidence, plaintiff submits was not disputed. Plaintiff submits that the evidence led on his behalf *prima facie* establishes the existence of an employer-employee relationship *ex lege* between Sibonelo Mamba and the third defendant.
- [17] It was contended on behalf of the plaintiff that alternatively, *prima facie*, there existed an agency relationship clothing Sibonelo Mamba with the necessary authority to act on behalf of the third defendant. The court is urged to find that the apparent authority created by the agency relationship between Sibonelo Mamba and the third defendant imputes liability on the principal (third defendant) to pay damages resulting from the negligent and wrongful conduct of its agent-Sibonelo Mamba.

Opposition to the application for absolution from instance

[18] The third defendant submitted that the plaintiff had failed to prove a *prima facie* case against the third defendant. It is submitted that Sibonelo Mamba conceded that the third defendant was not involved in the transaction of the plaintiff with Sibonelo Mamba and the first and second defendants; that even though plaintiff phoned the third defendant's offices from where he was referred to Sibonelo, plaintiff was aware that in securing the property in question, Sibonelo did not use third defendants as agents in as much as he used the second defendant. Re/max submits further that plaintiff did not object to Sibonelo using an agent outside of Re/max-an agent which dictated terms of the deed of sale as well as payment thereof. It is for these reasons that Re/max argues it was never party to the transaction which is the subject of this litigation. Re/max submits that at all material times during the course of the transaction involving the plaintiff herein, Sibonelo Mamba was working within the scope and authority of another agent and not that of the third defendant.

[19] It was further contended on behalf of the third defendant that the witnesses called on behalf of the plaintiff gave evidence that was riddled with inconsistencies; that their evidence is therefore unreliable and not credible².

[20] The third defendant submitted further that it is unclear whether plaintiff's cause of action is predicated on restitution or unjust enrichment. Third defendant submits that it matters not however whether plaintiff's claim is based on restitution or unjust enrichment. Plaintiff has not proved that third defendant has been enriched; that plaintiff was impoverished and that third defendant's enrichment was at the expense of the plaintiff; and that the third

² See paragraph 4.5.7 of third defendant's heads of argument.

defendant's enrichment was proved to have been unjustified-so the argument of the third defendant goes.

[21] The third defendant contends also that plaintiff's claim based on vacarious liability must fail because Sibonelo Mamba's acts regarding the transaction with plaintiff was neither authorized nor ratified by the third defendant. The said transaction was repudiated soon after third defendant became aware of it from the police. The third defendant rejected and denied having authorized Sibonelo Mamba to act on its behalf when it was served with a letter of demand-so the argument goes.

[22] The third defendant submits also that the plaintiff has not only failed to prove a *prima facie* case against the third defendant, but has also failed to prove damages in general³.

Legal principles applicable to an application for absolution from the instance

[23] The principles that apply in application for absolution from the instance have been set out in a plethora of cases. I will briefly refer to the said principles.

[24] The applicable test to be applied by a trial court when absolution from the instance is sought at the close of the plaintiff's case has been stated by Miller AJA in the matter of *Claude Neon Lights SA Ltd v Daniel*⁴ as follows:

'...when absolution from the instance is sought at the close of the case of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, not ought to) find for the plaintiff. (Gascogne v Paul & Hunter 1917 TPD 170 p. 173; Ruto Flour Mills (Pty) Ltd v Adelson (2), 1958 (4) SA 307(T).

³ See paragraph 6 of third defendant's heads of argument.

⁴ 1976 (4) SA 403(A) at 409G-H.

[25] Harms JA in *Gordon Lloyd Page & Associates v Rivera & Another*⁵ further explained that:

‘This implies that a plaintiff has to make out a prima facie case-in the sense that there is evidence relating to all the elements of the claim-to survive absolution because without such evidence not court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26(A) at 37G-38A; Schmidt Bewysreg 4th ed. At 91-2. As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one (Schmidt at 93).’

[26] The learned authors, Herbstein and Van Winsen⁶ state that:

‘...it is clear that a trial should be extremely chary of granting absolution at the close of the plaintiff’s case. In deciding whether or not absolution should be granted, the court must assume that in the absence of very special considerations, such as inherent unacceptability of the evidence adduced, the evidence is true. The court should not, at this stage evaluate and reject the plaintiff’s evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. When the plaintiff relies on an inference the court will refuse the application for absolution unless it is satisfied that no reasonable court can draw the inference for which the plaintiff contends⁷.’

[27] Also see *Build-A-Brick Bk en ‘n Ander v Eskom*⁸ where Hattingh J found that the test to be applied in determining the question whether the defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding for the plaintiff, or put differently whether a reasonable court can find in favour of the plaintiff. The plaintiff’s evidence should consequently at the absolution stage hold a reasonable possibility of success for him and should the court be uncertain whether the plaintiff’s evidence has satisfied this test absolution, absolution ought to be refused. Where the claim is based on a document of which the interpretation is in dispute, the interpretation on which the defendant relies should be

⁵ 2001 (1) SA 88 (SCA) at 92H-93A.

⁶ Herbstein & Van Winsen ‘The Civil Procedure of the High Court & Supreme Court of Appeal of South Africa 5ed Juta & Company (2009) at 923.

⁷ See also *Atlantic Continental Assurance Co of SA v Vermaak* 1973(2) SA 525(e) at 526-527.

⁸ 1996 (1) SA 115 (O).

established beyond reasonable doubt before his application for absolution can succeed.

Discussion

[28] Schreiner AJ observed that ‘as a rule when a trial court refuses absolution at the close of the plaintiff’s case it should avoid an unnecessary discussion of the evidence, lest it seem to take the view of its quality and effect that should only be reached at the end of the whole case⁹.’ For this reason, I will decline the invitation by the third defendant’s submission to comment on the credibility or otherwise of the plaintiff’s witnesses at this stage of the proceedings. I am guided by the directions of the learned judge in this regard.

[29] The evidence led so far shows that there was an arrangement between Sibonelo Mamba and the third defendant which arrangement gave rise to plaintiff dealing with Mr Mamba in his quest to buy the property which is the subject of this matter. The determination of whether Sibonelo Mamba was an employee, property sales associate and or an independent contractor with the third defendant and the import thereof, should, in my view stand over to the end of the case, as the proper assessment of the contract of engagement of Sibonelo Mamba by Re/max may be affected by circumstances appearing in the evidence of the third defendant. To make a proper determination of this matter, I would need to consider the conspectus of all the evidence at the end of the matter.

[30] I have considered the very able arguments advanced on behalf of the plaintiff and the third defendant but cannot find that the third defendant’s version is beyond question and as a result this court must give the benefit of

⁹ *Gafoor* 1998 (2) SA 289 (O) at 293B-C and at 293G-H and 296G.

doubt to the plaintiff. Consequently, the third defendant's application for absolution from the instance must fail.

[31] My order is as follows:

1. The application for absolution from instance is hereby dismissed with costs.

M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the plaintiff:

Mr M. C. Simelane

For the first defendant:

Mr Simo C. Mngomezulu

For the second defendant:

No appearance

For the third defendant:

Mr T. N. Sibandze