IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.1/98

In the matter between:

GOODINTENT GAMA APPELLANT

VS

ELLIOT DUMELA MABUZA RESPONDENT

CORAM : LEON J A

: STEYN J A

: TEBBUTT J A

FOR THE APPELLANT :

FOR THE RESPONDENT :

JUDGEMENT

Steyn J A

Respondent was the Plaintiff in the Court below and Appellant was the Defendant. I refer to them as in the High Court proceedings. Because of the importance of the pleadings in this matter I set them out in full.

Plaintiffs particulars of claim read as follows:

1. "Plaintiff is ELLIOT DUMELA MABUYA an adult male Swazi businessman of Mbabane.

2. Defendant is GOODINTENT PHUMUZA GAMA an adult male Swazi of Esicelwini location, Manzini near Khula Ngwane's residence.

3. On the 20th April 1983 at Ngwenya Village the parties entered into a written deed of sale in terms of which defendant sold to plaintiff immovable property described as Remaining Extent of Portion 158 of Farm 188 Hhohho District measuring 1.4 hectares. A copy of the deed of sale is attached hereto, marked "A".

4. In terms of annexure "A" the purchase price had to be settled by payment of a deposit of E500.00 and thereafter in instalments of E200.00 per month.

5. Plaintiff paid defendant the sum of E2,500.00 inclusive of the deposit.

6. Plaintiff obtained with the consent of the defendant a loan for the payment of the balance of the purchase price.

7. Defendant failed to give plaintiff transfer of the land.

8. In or about 1989 the Swaziland Government expropriated defendant's land including the piece that had been sold to plaintiff.

9. The Swaziland Government paid defendant the sum of E107.00.00 as compensation for the expropriated land. Defendant's land which was expropriated by the Swaziland Government measures 4,4040 hectares. Plaintiff's land is therefore equal to 31.789 of the expropriated land.

10. In the premises plaintiff is entitled to 31.789% of E107.00.00 which is the sum of E34,014.23 which defendant fails to pay despite demand.

WHEREFORE plaintiff claims:

a) An order declaring that the contract of sale between the parties has been cancelled.

b) Payment of the sum of E34,014.23.

c) Interest on the said amount at the rate of 9% per annum a tempore morae.

d) Other or alternative relief.

e) Costs of suit."

Defendant pleaded his defence in the following terms:

"1. SPECIAL PLEA

The Defendant avers that the issue between the Plaintiff and Defendant is already pending before Honourable Court on the same cause of action under Case No.405/88. Alternatively the matter was finalised under Case No.405/88 and is therefore res judicata.

It is accordingly averred that the above Honourable Court is not seized with jurisdiction to entertain Case No. 1569/94.

ON THE MERITS

In the event that the special plea fails the Defendant avers on the merits as follows:

Ad Paragraph 1 - 4

The contents herein are admitted.

Ad Paragraph 5

The Defendant has no knowledge of the contents herein in as much as the alleged payment was not made to the Defendant. The Plaintiff is put to proof thereof.

Ad Paragraph 6

The contents herein are denied. The agreement of sale is clear in its terms on how the Plaintiff had to pay the balance. The Defendant has no knowledge of how Plaintiff obtains income. However Defendant avers that the Plaintiff failed to pay the balance.

Ad Paragraph 7

The contents herein are denied. The Plaintiff failed to comply with clause 2 of the agreement of sale that being payment of the balance of the purchase price in the manner stated therein.

Defendant had no duty to transfer the property to Plaintiff until clause 2 of the agreement is fully complied with.

Ad Paragraph 8

The contents therein are admitted save to add that this happened in 1988.

Ad Paragraph 9 - 10

The contents herein are not relevant. The land that was expropriated by Swaziland Government belonged to the Defendant. The Plaintiff was neither owner nor lawful possessor thereof and is not entitled to share in the compensation for expropriation.

The Defendant denies liability herein and prays that he action be dismissed with costs."

The special plea was not proceeded with and the matter went to trial on the pleadings cited above. A pre-trial conference was held, the minutes whereof read as follows:

"MINUTES OF PRE-TRIAL CONFERENCE" Issues Agreed Upon

1. It is agreed that there was a Deed of Sale entered into between the plaintiff and defendant.

2. It is further agreed that the plaintiff did not take transfer of the property.

3. Further that the property in question was expropriated by Swaziland Government.

4. Further that the defendant has tendered to refund the plaintiff the amount paid by the plaintiff to defendant (subject to proof) which tender the plaintiff refused.

Issues In Dispute

1. The defendant denies that the deed of sale was amended to allow the plaintiff to furnish a bank guarantee as opposed to paying the balance of the purchase price as provided in the Deed of Sale.

2. The defendant denies that the plaintiff paid the purchase price in full as provided for in the Deed of Sale. The defendant denies further that time had arrived for him to perform his obligation in terms of the Deed of Sale."

At the commencement of the hearing of the appeal I put it to Counsel for the Defendant that the issues to be adjudicated upon in the Court below and before us were the following:

1. Plaintiff was obliged to prove that he paid Defendant the sum of E2,500 "inclusive of the deposit."

2. Plaintiff had to prove that he had paid the balance of the purchase price - more particularly that he had complied with the provisions of paragraph 2 of the Deed of Sale, which in summary, provided for payment of the balance of the purchase price by way of instalments. Paragraph 2 of the Deed of Sale reads as follows:

" THE PURCHASE PRICE is the sum of E9 000.00 (NINE THOUSAND EMALANGENI) payable as to a deposit of E500.00 (FIVE HUNDRED EMALANGENI) on signing of this Agreement and the balance at the rate of E200.00 per month commencing 1st March 1983, and continuing not later than the same date of each succeeding month. The Purchase Price shall attract interest at the rate of 12% (twelve per centum) per annum calculated in advance on the balance owing from time to time."

3. Although not specifically pleaded it would be implicit in the challenge posed in paragraph 2 above that it would be an obligation for plaintiff to prove that he had in fact discharged his obligation to pay the purchase price in some other form - in this case by bank guarantee - and that the manner through which he sought to discharge his obligation had this effect and was accepted by Defendant or his agent.

Counsel agreed with this summary of the issues, However, he did later in his argument seek to contend that Plaintiff had not proved "his damages". He sought to argue that the method of calculation employed by him - and by the court a quo - to determine the amount due was flawed and inappropriate. I will deal with this contention in due course.

The first question to be decided therefore is, did Plaintiff prove on a balance of probability that he had paid the amount of E2,500.00 he alleges he paid to the Defendant. It must be borne in mind that the latter did not positively deny that this amount was not paid, but pleaded that he had no knowledge thereof in view of the fact that the amount concerned was not paid to him personally.

Plaintiff gave evidence and confirmed that he paid the ES00 as a deposit and that he paid the instalments due to the Defendant's attorney, one Carlston. He subsequently and in negotiations with the attorney arranged for the payment of the balance of the purchase price as well as transfer duty and conveyancing fees and that this would be effected via a bank guarantee. The first guarantee he provided was from Swazi Bank on the 5th of September

1994 for an amount of E7,653.40. A subsequent guarantee from the bank BCCI was requested by Defendant's attorney and duly provided. This was done because the property in question had been "placed as security" in the BCCI. The transfer would accordingly be facilitated if the guarantee was provided by the Bank that had secured the property, probably by way of a mortgage bond.

In so far as proof of payment of the E2,500.00 is concerned, Plaintiff said he no longer had the receipts for the payments that he had made. However, he had requested Carlston for any letters

that he had which "related to this matter" on the issue of funding and that the latter then gave him a letter which was handed in as an exhibit.

The letter reads as follows:

"Dear Sir,

RE: GOOD-INTENT PHUMUZA GAMA

We thank you for the cheque of E2,503.16 in respect of Mr. Gama which we have accepted without prejudice to his rights in the concerned matters and we holding the money in our trust pending -

a) your giving us a detailed break down of the amount as to who paid what amount to enable us to advise client properly and

b) Mr. Gama's acceptance of the amount in terms of the requested breakdown.

Yours faithfully,

MASINA, MAZIBUKO AND CO.

Per:"

The first issue in dispute is in my opinion disposed of with reference not only to the uncontradicted evidence of the Plaintiff and the contents of the letter, but also if regard is had to the fact that the quantum of the funds referred to in the bank guarantee clearly reflects the fact that Plaintiff received credit for amounts paid not only by way of the deposit of E500 but also by way of instalments. It is probable, again bearing in mind the amount reflected in the guarantee, that he was also debited with costs and interest leaving the balance of E7,653.40 as reflected in the guarantee, Exhibit "A". Moreover, it is clear that Defendant's agent accepted both this guarantee and the subsequent one issued by BCCI as both adequate

and an appropriate of discharge Plaintiff's obligations. The only reason, according to Plaintiff, why the transaction was not perfected by way of transfer was because the transfer was interdicted by the Government as a precursor to expropriation.

Defendant was unable to challenge these facts or the probable inferences to be drawn from them because his agent had fled the country whilst on bail. However that may be, in my view the evidence of the Plaintiff established a prima facie case that:

1. He paid the sum of E2503.16 to Defendant's agent and that this amount constituted a discharge of his obligations under the Deed of Sale to pay the deposit and the instalments due and such other charges for which he may have been liable.

2. The two bank guarantees furnished by him were accepted by Defendant's agent as a sufficient discharge of Plaintiff's obligations both in respect of quantum and in respect of the methodology employed, i.e. a bank guarantee.

3. These two payments made by Plaintiff and accepted by Defendant's agent constituted a

discharge of the obligations conferred upon him by the Deed of Sale.

It follows that Defendant's contention in his plea that Plaintiff "failed to comply with clause 2 of the agreement" and that he "failed to pay the balance" cannot be sustained.

I come to deal with the issue of the manner in which the Plaintiff and the court a quo computed the amount due to him being a proportionate share of the amount the Crown paid for all the land. The property consisted of four plots of land of which Plaintiff bought one. It is my clear view, certainly on the pleadings, that the propriety of the method of computation was never placed in issue. Neither was it adverted to in the minutes of the pre-trial conference. When Plaintiff gave evidence he referred to the fact that he was never paid his proportionate share of the funds allocated by the Government in respect of the four units. The matter was referred to by Defendant in his evidence. He confirmed that the E107,000 was paid in respect of "the four plots of which Plaintiffs plot was one of the four plots." He also confirmed that the total area concerned measured some 4 hectares, that the plot acquired by the Plaintiff was 1.4 hectares and that the properties were adjacent to one another. At no stage did Defendant suggest that there were distinguishing features that rendered an

arithmetical proportionate determination inappropriate. It was for the first time raised during the course of argument when the amount claimed was referred to as "damages" by Defendant's counsel and when he contended that Plaintiff had not proved his damages because it was not clear that all four plots were equal in value "per square metre."

In my opinion it was not open for Defendant in view of his pleadings, the pre-trial agreement concerning issues to be decided and the evidence led, to raise this issue in argument or to advance it on appeal. In any event Plaintiff's claim did not sound in damages. An analysis of the facts pleaded in his particulars of claim makes it clear that he was claiming that amount by which Defendant had been unduly enriched at his (Plaintiff's) expense. This Plaintiff succeeded in proving on a balance of probability.

It follows that in our view the court a quo was right in finding for the Plaintiff in the amount awarded. The appeal is dismissed with costs.

J. H. STEYN J A.

I agree:

R. N. LEON J A

And so do I:

P. H. TEBBUTT J A

Delivered in open Court on this day 2nd October 1998