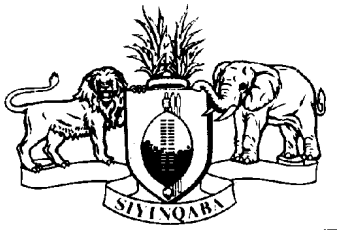

IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.9/2002

In the matter between:

SHYNE CARR		**APPELLANT**
AND		
ERNESTO FIGUERIDO		**RESPONDENT**
CORAM	**:**	**BROWDE JA**
	:	**STEYN JA**
	:	**BROWDE JA**

JUDGEMENT

Browde JA:

On 14th December 2001 at the instance of the respondent summary judgment was entered against the appellant in the High Court. This appeal is brought against that judgment.

The summary judgment appeal against rose in the following manner.

In a combined summons dated 31st May 2001 the respondent claimed an order against the appellant for ejectment of the latter from a property known Lot 2499 Thembelihle Township, Mbabane, District of Hhohho, Swaziland.

Briefly stated, the respondent's cause of action was that during 1999 he and the appellant entered into an oral agreement in terms of which the respondent agreed to construct a residential house upon the property and then sell the property together with the house to the appellant for the sum of E250 000 00. The respondent was to procure the mortge loan from Swaziland Building Society in the sum of E117 500 00

and although the property was registered in the name of the respondent, the monthly instalment in terms of the bond was being paid by the appellant. On full payment of the amount due to the Building Society the respondent would procure transfer of the property into the name of the appellant. In order to obtain the bond, the respondent paid the Building Society the deposit of E32 500 00 which amount was to be repaid by the appellant to the respondent before 31st December 1999.

The summons went on to allege that the appellant failed to fulfil his obligations regarding repayment of the sum of E32 500 00, and 5th February 2001 he addressed a letter to the respondent acknowledging that he was in breach of the oral agreement and seeking an extension of time within which to remedy that breach.

On 26th March 2001 the respondent through his attorneys addressed a letter to the appellant notifying the latter that he was in breach of the agreement and that the respondent was forthwith exercising his rights to cancel the agreement because no response was received from the appellant, the agreement was cancelled.

The respondent who was the registered owner of the plot in question thus sought the eviction of the appellant who had at all material times being in occupation of the property in terms of the agreement between the parties.

After entering the (inaudible) to defend the action the appellant plead and counterclaim was filed on 17th July 2001. (inaudible) since the defence raised by the appellant was that he had a lien as ***bona fide*** possessor of the property to secure compensation for the costs of necessary and useful improvements to the value of E145 000 00 which he had effected on the property. The details of the alleged improvements were set out in the annexure to the plea and contained, ***inter alia***, a claim for E6 000 00 for carpeting. Together with the plea a counterclaim was filed of the said amount E145 000 00.

On 15th August 2001 the respondent served on the appellant a notice of application for summary judgment dated, strangely enough 16th

August 2001. In the supporting affidavit the respondent stated as follows:-

> "I verify and confirm the cause of action and each and every allegation contained in the particulars of claim to the summons of issued and served on the defendant and the amount claimed by the plaintiff against the defendant has been correct. (my underlining) In the affidavit resisting summary judgment the point was taken that the respondent's application was vaguely defective because it did not comply with the Rule 32(3) of the Rules of Court in this much as the respondent's affidavit refers to "an amount claimed" whereas, of course, the summons is one for ejectment. That affidavit is dated 23rd August 2001.

There are further steps appear to have been taken until 21st November 2001 when the respondent's attorneys filed a notice of withdrawal in which the summary judgment application against the defendant was formerly withdrawn. Thereafter, on the 22nd November 2001 a fresh notice of application for summary judgment was filed in which the respondent corrected the error which has been made in his original affidavit. This time he got the relief right namely:- the ejectment of the appellant from the property, affidavit for summary judgment.

In this affidavit for summary judgment the respondent went on to deal with the plea in counterclaim filed by the appellant and stated that a full set of pleadings will be placed before the court at the hearing of the application for summary judgment. He then proceeded to deal with the counterclaim stating that it was not made in good faith dealt in particular with the carpeting item which I have referred to above. He stated that the carpeting was not paid for by the appellant and that infact the appellant had been sued for the purchase price by the seller. He also proceeded to enclose another (inaudible) which he stated was obtained by the seller after judgment had been entered against the appellant for the purchase price of the carpeting. The respondent also stated that a full set of

pleadings in that case would be placed before the court at the hearing of the application for summary judgment.

In regard to the counterclaim the respondent tendered the return of each and every item set out in annexure to the counterclaim specifically stated that it was not the monitory value of the items but the items themselves which are being tendered. Now the furnishings to the bathroom and the bedrooms which are claimed for in the annexure can be returned, is not dealt with. (inaudible) it explains how the cementing to the entrance, dining room and kitchen which are also referred to in the annexure and the item “bathroom” would be returned also not surprising, not made clear.