IN THE COURT OF APPEAL OF SWAZILAND

Civil Appeal No.37/02

In the matter between:

MIDI (PROPRIETARY) LIMITED Appellant

And A.A. FARMS LIMITED Respondent

CORAM: BROWDE J.A.

BECK J.A.

ZIETSMAN J.A.

JUDGMENT

Zietsman J.A.

In its summons dated 1st December 1995 the plaintiff claims an order rectifying a written agreement allegedly entered into between the plaintiff and the defendant on 6th May 1992. The said written agreement is attached to the plaintiff's particulars of claim and marked annexure "A". In terms of the said agreement, which was signed on 6th May 1992, the plaintiff purchased from the defendant Farm No.6 of Portion 1 of Farm 837 in the district of Hhohho for the sum of E61000, 00. The agreement provides that the purchase price is to be paid by a cash payment of E15000, 00 on the date of the signature of the agreement and by the payment thereafter of monthly instalments of E909, 58 each as from 1st June 1992. The written agreement provides further that the balance of the purchase price will bear interest at the rate of 18.5% per annum as from 6th May 1992 and that on 1st June 1995 whatever balance is still owing must be paid in full on that date.

The plaintiff alleges in its particulars of claim that prior to entering into the written agreement the parties entered into a verbal agreement the terms of which they intended should be incorporated in the written agreement but which due to a bona fide mutual error were not so recorded. The terms of the alleged verbal agreement give the plaintiff the option to extend the period within which the final balance of the purchase price is to be paid.

Plaintiff's claims, as set out in its initial particulars of claim, are merely for the rectification of the deed of sale to include the terms of the alleged verbal agreement.

In its plea the defendant denies that the plaintiff was the purchaser of the farm. It alleges that it concluded the written agreement of sale with Edward John Bruce and Hester Loubser, acting for a company to be formed, that it was never advised that the plaintiff company, MIDI (PROPRIATARY) LIMITED, had been registered, and that the plaintiff company never ratified the said agreement. The defendant denies further that it entered into any antecedent oral agreement with the purchaser of the property and it prays that the plaintiff's claims be dismissed with costs.

During September 1997 the plaintiff filed a notice of intention to amend its particulars of claim by introducing an additional prayer seeking an order declaring that the Agreement of sale was in fact entered into between MIDI (PROPRIETARY) LIMITED and the defendant. Its other claim, namely

for rectification of the written agreement, remained.

The matter was apparently set down for hearing before Dunn J. but no conclusion was reached as the learned judge passed away before he could deliver his judgment. We are toid by Counsel that no amendment of the plaintiff's particulars of claim was applied for and no amendment was granted by Dunn J.

The matter was then again set down for trial before Matsebula J. on 2nd August 2002. On that date the plaintiff filed a further notice of intention to apply for an amendment to its particulars of claim. This amendment, if granted, would have changed the plaintiff's whole cause of action as well as the orders sought by the plaintiff. All references to an alleged prior oral agreement and a claim for rectification of the written deed of sale were to be

deleted. What the plaintiff now sought to allege in its amended particulars of claim was that the plaintiff had paid more than 50% of the purchase price of the farm and was therefore entitled to registration of the property into its name in terms of section 28 of Act No. 11 of 1969. The new prayers in the amended particulars of claim would be for an order declaring that the written agreement was in fact entered into between the plaintiff and the defendant, and for a further order that the defendant be compelled to transfer the property to the plaintiff subject to the plaintiff furnishing the defendant with a bank guarantee for the sum of E56 238.00 to secure the balance of the purchase price, or a first mortgage bond over the property in favour of the defendant to secure the balance of the purchase price and the interest payable.

In the Notice to Amend the following further allegation is also made:

"5.1. In the event the defendant refuses to give transfer to Plaintiff within three (3) months from date hereof, cancellation of the agreement and payment of the sum of E35.820.00 (Thirty Five Thousand Eight Hundred and Twenty Emalangeni) plus damages in the sum of E150,000.000 (One Hundred and Fifty Thousand Emalangeni)."

However in the new prayers sought to be introduced there is no alternative claim for a cancellation of the agreement and for the payment of the said alleged damages.

To find out what happened on 2nd August 2002 we are referred to the judgment delivered by the trial judge on 22 August 2002. According to the judgment the plaintiff was first represented by Mr Gumedze. He applied for the amendment in terms of the 2002 Notice to Amend. This application was dismissed with costs. The Court then adjourned. After the adjournment the plaintiff was represented by Mr Shilubane who then applied for an amendment in terms of the 1997 Notice of Amendment. That application was also dismissed. Mr Shilubane then closed the plaintiff's case without calling any evidence. Mr Flynn. who appeared for the defendant, then closed the defendant's case. Matsebula J. granted an order of absolution from the instance and ordered the plaintiff to pay the defendant's costs, including the costs of a witness who had come from the USA and was declared a necessary witness.

When the application by the plaintiff to amend its particulars of claim in terms of the 2002 Notice to Amend was dismissed, the claim for transfer of the property into the plaintiff's name fell away. The only issue that then remained between the parties was the question whether the contract of sale was entered into by the plaintiff i.e. whether the plaintiff (MIDI (PROPRIETYARY) LIMITED) was the purchaser of the property, and if so whether the written deed of sale stood to be amended by the incorporation of the alleged antecedent verbal agreement. No evidence was led

by either party. There was no evidence before Matsebula J. on which he could determine who in fact signed the written agreement as purchaser of the property. There was also no evidence to enable him to decide whether or not the alleged verbal agreement had been concluded by the parties and whether the written agreement should be rectified to include the terms of the said verbal agreement. The order he made was one of absolution from the instance.

The appellant submits that the application by the plaintiff to amend its particulars of claim in terms of the 2002 Notice to Amend should have been granted. Mr Flynn, on behalf of the defendant, submits that for several reasons Matsebula J. was correct in refusing to allow the amendment. The application, notice of which was given on the day of the trial, sought to introduce an entirely new cause of action and to claim relief entirely different from the relief claimed in the original summons. The grant of the amendment would clearly have severely prejudiced the defendant who had come to Court to meet the cause of action and claims set out in the original summons.

Mr Flynn's further submission was that the amendment, if granted, would for the following reasons have rendered the plaintiff's particulars of claim excipiable.

1. In the Notice to Amend the plaintiff alleges that it has paid to the seller the sum of E35000.00 "which is more than 50% (percentum) of the purchase price." It then goes on to allege that the plaintiff, on obtaining transfer of the property, would furnish the seller with a bank guarantee for the sum of E56 233.00 "to secure the balance of the price." These figures do not tally and are not explained.

2. The plaintiff alleges in the Notice to Amend that it is entitled to transfer of the property, having paid more than 50% of the purchase price, "in terms of section 28 of Act No. 11 of 1969." This section provides that the buyer of immovable property who

has agreed to pay the purchase price in more than two instalments, and who has paid not less than 50% of the purchase price, can demand from the seller in writing transfer of the property, against registration in favour of the seller of a first mortgage bond over the property to secure the balance payable in terms of the agreement. The plaintiff seeks to rely upon this section but it does not alleged any written demand to the seller for transfer of the property to the plaintiff.

3. If it was intended by the plaintiff to include an alternative claim for cancellation of the agreement, repayment of the portion of the purchase price already paid, and damages, there are no averments in the Notice to Amend to support the damages claim or to enable the defendant to assess the quantum of the alleged damages, as is required by High Court Rule 18 (10).

Mr Flynn, referring to the cases of Cross v. Ferreira 1951 (2) S.A. 435 (C), Benjamin v Sobac South African Building and Construction (Pry) Ltd. 1989 (4) S.A. 940 (C) and Minister of Defence, Namibia v. Mwandinghi 1992 (2) S.A. 355 (NmSC) submitted that because the plaintiffs particulars of claim, if amended in terms of the Notice to Amend, would be excipiable Matsebula J. was correct in refusing the amendment.

Mr Shilubane submitted that the particulars of claim, if amended in terms of the Notice to Amend, would not be excipiable. He conceded, however, that the particulars of claim would then at least be vague and embarrassing. Mr Flynn's response was that if the judge in such a case in his discretion decided to refuse the application to amend, this exercise of his discretion would not lightly be set-aside on appeal.

It appears to me that the particulars of claim, if amended in terms of the Notice to Amend, would in fact be excipiable. If not, the particulars of claim would certainly be vague and embarrassing. In

either case the judge a quo would have been justified in refusing the amendment. He did so, and I am not persuaded that he erred in doing so.

There is a further possible difficulty for the appellant (Plaintiff). When the amendment was refused the plaintiff closed its case. The defendant did likewise. Having closed its case can the plaintiff now appeal against the order disallowing the amendment to its pleadings? In view of the finding that the amendment was in any case correctly refused, it is not neccessary that I decide this further point.

The defendant has noted a cross-appeal. The point taken is that the trial judge erred in granting an order of absolution from the instance instead of granting judgment in favour of the defendant.

After the amendments sought to the particulars of claim had been refused, the issues between the parties were whether the plaintiff was a party to the written agreement of sale, and whether the said agreement should be rectified to incorporate the alleged antecedent verbal agreement. No evidence was led by either party to enable the trial judge to decide these issues. The mere fact that the onus of proof rested with the plaintiff did not, in my opinion, mean that the trial judge was obliged to grant judgment in favour of the defendant. He, in his discretion, decided that an appropriate order would be one of absolution from the instance, and I am not persuaded that that order was an incorrect or invalid order.

For the reasons set out above I would dismiss the appeal with costs and also dismiss the cross-appeal with costs.

N.W. ZIETSMAN J.A.

I agree

J.BROWDE J.A.

I agree

C.E.L. BECK J.A.

Delivered on this. 21st... .day of November 2002