

SUPREME COURT OF SWAZILAND

APPEAL CASE NO. 11/07

In the matter between:

MICHAEL MANDLENKOSIMASUKU

APPELLANT

VS

JOHAN JACOB RUDOLPH N.O.

1ST RESPONDENT

THE REGISTRAR OF DEEDS

2ND RESPONDENT

CORAM

BROWDE JA

TEBBUTT JA

RAMODIBEDI JA

FOR THE APPELLANT

:

MR. P.M. SHILUBANE

FOR THE RESPONDENTS

:

MR. M. MABILA

JUDGMENT

Browde JA

By notice of motion dated 4th January **2007** the applicant approached the High Court seeking an order:-

(a) Declaring the 1st Respondent's "purported" cancellation of a sale of land agreement between the applicant and the respondent to be of no force or effect and

(b) Directing the 1st respondent to effect transfer of the land in question and registration thereof into the name of the applicant;

Because of the relief claimed in the notice of motion the Registrar of Deeds was joined as 2nd respondent as a formality.

For reasons which emerge from the founding affidavit, pending finalization of the prayers referred to, the applicant sought an order interdicting the respondents from transferring the property into anyone's name other than the applicant.

The applicant in the application is the respondent in this appeal, while the respondent in the application is the appellant. For convenience sake the parties will continue to be referred to as the applicant and respondent respectively.

The relevant details set out in the founding affidavit and which were common cause are the following:-

1. On 30th June 2006 and at Mbabane the applicant and the respondent executed a deed of sale in which the respondent sold

to the applicant the two properties which were fully described in the deed. Their description is common cause and they will herein be referred to as "the properties".

2. Both properties were sold for the total sum of E838 000-00 and a copy of the deed of sale was annexed.
3. Attorney M.J. Manzini and Associates were instructed to attend to the transfer and registration of the properties into the applicant's name. The applicant alleged it was the respondent who gave the instructions to the attorneys, while the respondent deposed to it having been Pam Golding Properties, the estate agents, who gave them. Nothing turns on this denial because a document was placed before the court in the applicant's replying affidavit which was not denied, and which clearly demonstrates that the respondent appointed Pam Golding Properties his sole agent for the period from 7th June 2006 (on which date the document was signed by the respondent) to 7th September 2006, to sell the properties.
4. Manzini and Associates proceeded to carry out their instructions and lodged all the requisite documents to effect the transfer and registration of the properties into the applicant's name with the Registrar of Deeds.
 6. While the Registrar was processing the transfer and registration the respondent wrote a letter to the applicant wherein he purported to cancel the sale agreement.

It is that purported cancellation which gave rise to these proceedings and one must here pause to examine the grounds on which the

respondent relied for the cancellation. His letter of 13th December 2006 reads as follows:

"This letter serves to inform you of our intention to cancel the above mentioned contract.

Please refer to our letter of 13th September 2006 addressed to Pom Golden (attached) (sic)

Your attention is further drawn to close 6.1 and close 9 of the contract sale, (sic)

Finally we note that the guarantee of the purchase price by Standard Bank expired on the 30th September 2006 after which date it was automatically cancelled.

Under the foregoing circumstances the above contract is deemed to have been cancelled and of no legal force".

Clause 6.1, which appears to be one of the grounds on which the respondent seeks to justify the cancellation reads as follows:

"6.1 This sale is subject to the purchaser (or the seller or PGP on the Purchaser's behalf) by no later than 28th July 2006 raising a loan on security of a mortgage bond over the property for not less than £838 000-00 (eight hundred and thirty eight thousand Emalangeneni) on such terms and subject to such conditions as are customarily imposed by mortgage lending financial institutions. The purchaser warrants that he/she/it qualifies for such loan and knows of no factors which might prevent the loan from being granted. This condition shall be deemed to have been fulfilled on the date upon which the mortgage lender approves the loan in writing. If the loan is not granted by the date referred to above the period for raising the loan shall be extended automatically for a further 30 (thirty) days".

The respondent, in his letter of cancellation, omitted (whether by design or oversight is not clear) sub-paragraph 6.2 which reads:-

"6.2 The provisions of 6.1 are inserted for the benefit of the purchaser who/which may waive the condition expressly or by conduct".

The applicant stated in the founding affidavit that the respondent could not rely on Clause 6.1 because 6.2 made it clear that the provisions of

6.1 were for the benefit of the purchaser. This is obviously correct. It is the usual provision inserted for the protection of the purchaser in case he cannot obtain a bond which would enable him to pay the purchase price. That is the reason why the purchaser can waive the condition. If, for example, he had sufficient cash to pay the purchase price he would not need a bond at all, and if he had some cash, though not sufficient for the whole purchase price, he would require a bond for less than that provided for in the deed of sale.

The respondent seeks to insist that the bond must, under all circumstances, be obtained by the purchaser for the full amount of the purchase price and that, presumably, whether he had the cash available or not. This is an untenable proposition.

The letter of cancellation also refers to Clause 9 of the deed of sale as a basis for justifying his cancelling the contract. The relevant portion of Clause 9 reads:-

"should the purchaser breach any terms of this agreement of sale and fail to remedy such breach within 7 days of the date of delivery of the written notice by the seller specifying the breach and demanding its rectification then and in such even the seller shall be entitled:- to cancel this agreement of sale..."

In the circumstances of this case that is also without foundation, because the only suggestion of a breach by the applicant is that instead of obtaining a bond for E838 000-00 he obtained one for E753 000-00 and paid the balance of E85 000-00 in cash as a deposit direct to the respondents agent Pam Golding Properties. In regard to the question as to whether Pam Golding Properties was the agent of the respondent the founding affidavit contained the following averment,

"10. Pursuant to the said sale agreement the 1st respondent duly instructed attorneys MJ Manzini and Associates to attend to the transfer and registration of the properties into the

applicant's name. A copy of the power of attorney to that effect is annexed hereto marked "JJR4".

10.1 Pursuant to annexure "JJR4" attorneys MJ Manzini and Associates proceeded to carry out their instruction and lodged all the requisite documents (to effect the transfer and registration of the properties into the applicant's name) with the 2^{*d} respondent".

JJR4 was the Power of Attorney signed by the respondent but in answer to paragraph 10 the respondent stated:-

"Contents are denied. Messrs MJ. Manzini and Associates were instructed by Pam Golding the estate agents."

This is disingenuous since in reply the applicant filed the document proving, as I have said above, that the respondent appointed Pam Golding Properties his sole agent to sell the properties for him.

This is disingenuous since in reply the applicant filed the document proving, as I have said above, that the respondent appointed Pam Golding Properties his sole agent to sell the properties for him.

It should be mentioned that Pam Golding Properties addressed a letter to Manzini and Associates confirming receipt from the respondent of the deposit of E85 000-00 referred to above. The respondent also annexed to his founding affidavit the guarantee from the bank which was delivered to Manzini and Associates.

The attempt by the appellant to avoid the consequences of a perfectly valid sale of the properties to the respondent is illustrated:

- (a) by his patently unjustified denial that Manzini and Associates were his agent and;
- (b) his denial that he received the guarantee "***because it was addressed to Messrs MJ Manzini and Associates who were appointed by Pam Golding to do the transfer***".

Even if the reliance on Clause 9 of the agreement was justified, which in my judgment it clearly was not, there is no suggestion by the appellant that he gave the written notice (or any notice) that specified the alleged breach of the agreement by the respondent and called upon him to remedy it. The reliance on this clause is also untenable.

The appellant was obviously clutching at straws and Mabuza J was undoubtedly correct in stating in her judgment, "***lean find no valid reason to justify the 1st respondent's cancellation of the agreement***".

That expresses precisely my view of the matter and consequently the appeal is dismissed with *costs*.

BROWDE Judge of Appeal

I AGREE

F.H. TEBBUTT
Judge of Appeal

I AGREE

M.M. RAMODIBEDI

DELIVERED IN OPEN COURT ON THIS **15** DAY OF NOVEMBER 2007.

I AGREE