IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 52/2011

In the matter between

OK BAZAARS (KUNYE) PROPERTIES LIMITED	**Appellant**
and	
SIBUSISO DERRICK MAMBA	**1st Respondent**
REGISTRAR OF THE HIGH COURT	**2nd Respondent**
REGISTRAR OF DEEDS	**3rd Respondent**
THE ATTORNEY GENERAL	**4th Respondent**

Neutral citation:	*OK Bazaars (Kunye) Properties Limited v Sibusiso Derrick Mamba* (52/2011) [2012] SZSC 26 (31 May 2012)
Coram:	RAMODIBEDI CJ, DR. TWUM JA and AGIM JA
Heard:	**18 May 2012**
Delivered:	**31 May 2012**

Summary: Civil Appeal; breach of contract for sale of land; dispute about signatory to Deed of Sale; applicability of Turquand's rule; alleged failure of trial judge to consider fully or at all, appellant's case; appeal allowed.

TWUM J.A.

[1] This is an appeal from the judgment of M.C.B. Maphalala J. sitting at the High Court, Mbabane, dated 5th December, 2011, wherein he upheld the applicant's claim for specific performance of a contract for the sale of land, with costs.

[2] The Pleadings

(i) There were two separate applications which appeared to have been consolidated by the learned trial judge in his judgment.

(ii) The first application ("the main application"), filed on 30th January 2008, was by SIBUSISO DERRICK MAMBA (hereafter the "1st Respondent") under Civil Case No. 238/08. It was against OK BAZAAR (KUNYE) (PROPERTY) LTD (hereafter "the appellant"). He prayed for the following:-

> "1. Interdicting the 1st Respondent from selling and/or encumbering Portion 128, Farm 188 Dalriach, situate in Mbabane in the district of Hhohho to any person other than the Applicant pending the determination of prayer 2.
>
> 2. Directing the 1st Respondent to comply with all requirements necessary to pass transfer of the property described as Portion

128 (a portion of Portion 4) of Farm Dalriach No. 188 situate in Mbabane in the district of Hhohho, Swaziland, hereinafter referred to as "the property" from the 1st Respondent to the name of the Applicant, Sibusiso Derrick Mamba.

3. Directing and authorizing the 2nd Respondent in her capacity as Sheriff of the honourable Court to take all the necessary steps on behalf of the 1st Respondent and to sign all necessary documents including a Power of Attorney, for the Respondent for any reason fail to comply with an Order in terms of the preceding prayers after due service on the 1st Respondent.

4. That conveyancer Musa Dlamini or any other duly admitted conveyancer practising in Swaziland, be appointed to prepare all documents necessary inclusive of a Power of Attorney to effect the transfer of the property from the 1st Respondent into the name of the Applicant.

5. Directing the 1st Respondent to pay the costs of this application. The 2nd, 3rd and 4th Respondent to pay only in the event of unsuccessful opposition of this Notice of Motion."

(iii) The second application, a sequel to the main application, ("the counter-application") was filed by the appellant against the 1st respondent under the same case No. 238/08. It prayed for the following orders:-

"1. An order confirming the cancellation of the agreement in terms of which the Respondent, his privies and all those holding title through him occupy premises described as **Portion 128, (a Portion of Portion 4)** of the farm **Dalriach, No. 188** situate in **Mbabane, District** of **Hhohho, Swaziland.**

2. An Order ejecting the Respondent, his privies and all those holding title through him from the premises described as **Portion 128, (a Portion of Portion 4)** of the farm **Dalriach, No. 188** situate in **Mbabane, District of Hhohho, Swaziland.**

3. An Order that Respondent or his privies pay occupational interest or rental of the premises from the **1st April 2003** to date of final payment at the rate of **E2000.00 (Emalangeni Two Thousand)** per month.

4. An Order that the Respondent and or his privies pay the sum of **E28, 757.50 (Emalangeni Twenty Eight Thousand Seven Hundred and Fifty Seven and Fifty Cents)** being in respect of municipal rates, taxes, levies and charges levied for the period from **1st April 2003 to 31st March 2009** and for such further period as the Respondent remains in occupation of the premises up to the date of Judgment.

5. Costs of the application.

6. Granting Applicant herein further and or alternative relief."

[3] In a nutshell, the 1st respondent's case which could be gathered from the various affidavits (both for and against) was that on 8th June 2007 he entered into a written agreement of sale with the appellant whereby the appellant agreed to sell to him the property more fully described in his Notice of Motion. The agreed purchase price was E620,000.00. It was an express term of the agreement that he was to provide the appellant with a bank guarantee issued by a recognized financial institution as security for the due payment of the purchase price. Upon the provision of the guarantee, the property was to be registered in his name. He contended that he fulfilled all his obligations under the Deed of Sale, yet the appellant failed or wilfully refused to have the property transferred and registered in his name. Hence the main application.

[4] Needless to say the appellant opposed the application and filed an Answering Affidavit. It was not to be outdone. It filed the counter application. Its case in that application was that it was the exclusive owner of the property referred to above. Even though there was an agreement between the parties that the first respondent's company, Quick-Mamba (Pty) Ltd could occupy the property, the parties agreed that the 1st

respondent should pay occupational rent in the sum of E2,000.00 per month with effect from 1st April 2003. This the 1st respondent had failed or wilfully refused to do and owed arrears of E72,000.00 with regard to occupational rent. It was also the case of the appellant that the first respondent owed municipal and other levies. Up to 31st March 2009, those arrears stood at E28,757.50. In the circumstances, it sought an order ejecting the 1st respondent and all his privies, etc, from further occupation on the ground that it had no right in law to occupy its said property.

[5] With respect to the 1st respondent's main application, the appellant's defence was that there was no agreement between the parties which gave the 1st respondent a right to occupy the property. It was the appellant's further contention that the Deed of Sale upon which the 1st respondent claimed the relief in his main application was invalid or void for a number of reasons:-

(a) The person who purportedly signed that agreement on its behalf, had to the knowledge of the 1st respondent, no lawful authority to do so. In particular, the said MOSES MKHONTO, was not an employee of the appellant's and that in the absence of a resolution of the Appellant's Board of Directors expressly authorizing him to sign the Deed of Sale on behalf of the appellant, he was no agent of the appellant and his signature could not bind it. The appellant further

explained that it was as a result of that defect that a fresh agreement was prepared and signed by the 1st respondent as "purchaser" on 6th July 2007. This was sent to the appellant's Board for approval, but the Board withheld its approval having regard to the history of their relationship with the 1st respondent.

[6] Another defence set up by the appellant to the main application was that in respect of the Deed of Sale dated 6th July 2007 (or even 8th June 2007) the 1st respondent was to provide a bank guarantee to the appellant within 10 days of the last signature to the Deed. If he defaulted to fulfil that obligation it was a term of the Deed of Sale (clause 3.2) that the agreement lapsed and was of no further force or effect.

The appellant further relied on clause 7 of the Deed of Sale which emphasized that "possession of the property shall be given by the Seller to the Purchaser on the transfer date and that all parties understood that the purchaser had at the date of signature hereat, no right of occupation of the property of any nature whatsoever. Finally, the appellant claimed to have cancelled all agreements allegedly existing between itself and the 1st respondent on 12th November, 2007.

[7] In paragraph 5 of his Replying Affidavit, filed on 2nd June 2010 the 1st respondent admitted that there was delay in furnishing the bank guarantee but contended that it was due to failure of the appellants to return the Deed of Sale to him timeously and added that the appellants accepted the situation and waived its right to terminate the agreement.

[8] The final word on the issue of delay came from the appellant. It denied that it waived any breaches of the Deed of Sale by the 1st respondent and relied on Clause 15 under the rubric of "GENERAL CONDITIONS" which clearly stated that all indulgence, etc shall not be construed to be waivers.

Judgment of the court a quo

On 5th December 2011 the court a quo gave judgment and upheld the 1st respondent's application and gave him judgment accordingly with costs on the attorney and client scale without specifying any reason for it.

The appeal to this court:

The appellant was dissatisfied with that judgment and on 19th December, 2011, appealed against it to this court. It noted some 16 grounds of appeal as follows:-

> "1. The learned Judge erred in fact and in law in granting the First Respondent the relief sought in his application in prayers

(a), (b) and (c) of the judgment, and in dismissing (without stating that he was doing so) the relief sought by the Appellant in paragraphs 1 and 2 of the Appellant's Notice of Motion in the counter-application.

2. The learned Judge erred in fact and in law by finding (in paragraph [24] of the judgment) that the Appellant waived its rights to terminate the agreement between the parties on the basis that it was not furnished with the bank guarantee within a period of ten days after the date of signature of the agreement.

3. The learned Judge erred in fact and in law in not finding that the suspensive condition set out in paragraph 3 of the agreement between the parties had not been complied with, and that the agreement had lapsed and was of no further force or effect, save that the First Respondent's obligations in terms of occupational rental remained and that the First Respondent was obliged, in terms of paragraph 3.2.2 of the agreement, to *"…forthwith vacate the property and restore vacant possession thereof to the seller in the same condition as that in which it was at the date of the original occupation referred to in clause 7.1"*.

4. The learned Judge erred in not finding that the First Respondent had failed to make out a case for any of the relief claimed in the main application, that he failed to make any of the essential averments required for the grant of an interdict, and that his claim for the transfer of the property was based on averments which are, and have for a considerable period of time been, strongly disputed by the Appellant.

5. The learned Judge erred in not attaching any weight to the fact that the averments made by the First Respondent were not only disputed on oath by the Appellant's deponents, but were contradicted by the contents of the documentation contained in the application and in the First Respondent's own affidavit opposing the Appellant's counter-application.

6. The learned Judge erred in law in dismissing the averments contained in the affidavits deposed to on behalf of the Appellant out of hand, without stating that he was doing so or stating why he was doing so, and not having regard to the rule that where there were factual disputes concerning the validity of the agreement on which the First Respondent relied, the version of the Appellant must prevail, as set out *inter alia* in **Plascon Evans v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 632 (AD).**

7. The learned Judge erred in not attaching any weight to the fact that the First Respondent contradicted himself in a number of respects in his affidavits and was clearly being untruthful.

8. The learned Judge *a quo* erred in not attaching any weight to the fact that the First Respondent contradicted himself, *inter alia*, in following material respects in the affidavits deposed to:

8.1 In his version as set out in paragraph 15 of his founding affidavit he claimed that the agreement was signed by Mr Jeff Coskey on behalf of the Appellant and returned to him. In this version, he contended that at the time that the agreement was delivered to him "*…the representative of the seller had not appended his signature on page 12 of the deed of sale"* and that it was to be forwarded to Mr Coskey who was to sign on behalf of the Appellant. It is further clear from the agreement on which the First Respondent relies that it purports to have been signed at Mbabane, Swaziland, on 8 June 2007, whilst it is common cause that Mr Coskey was at all relevant times in Durban. The First Respondent's first version which can, for the reasons set out above, in any event

not possibly be true, is denied by Mr Mkhonto and Mr Coskey on behalf of the Appellant.

8.2 The First Respondent's first version concerning the signature of the agreement on which he relies is contradicted by his second version. In paragraph 8.2 of his replying affidavit he states the following:

"The agreement of sale document was brought by Moses Mkhonto, a manager of the First Respondent, who professes to be representing the First Respondent, **and it was already signed when it was presented to me for signature."** (Own emphasis)

8.3 The First Respondent's second version is repeated in paragraph 9 of the reply, and in paragraph 18 and 19 and in paragraph 35.

8.4 In paragraph 36 of the reply, the First Respondent puts up yet another version:

"I still reiterate that ***a certain page*** *of the Deed of Sale was* ***not signed*** *by the seller's representative, which made it necessary to return the Deed of Sale to the First Respondent, so that all the pages were numbered."* (Own emphasis)

8.5 In his answering affidavit in the counter-application, the First Respondent put up yet another version relating to the

signature of the agreement on which he relies. In paragraph 12.2 he states:

"When the agreement was presented to me for signature by the deponent to the founding affidavit, Moses Mkhonto, it was already signed in the space provided for the seller ***and its witnesses. After appending my signature*** *in the space provided for the purchaser and my witnesses had appended their signatures,* ***Moses Mkhonto gave me a copy of the Deed of Sale which I took to Swaziland Building Society for the purpose of applying for a loan which was approved and the bank guarantee was issued. …"*** (Own emphasis)

8.6 On this version of the First Respondent, the agreement was not sent to Durban in South Africa for Mr Coskey to sign, and there was no delay on the part of the Appellant in signing the agreement. The contradictions and blatant untruths were highlighted by the Appellant, for example in the replying affidavit in the counter-application in paragraph 15.3.

9. The learned Judge erred in finding (in paragraph [17] of the judgment) that Mr Mkhonto was a branch manager of the Appellant. As is apparent from the affidavits deposed to in the application and counter-application (and admitted by the First Respondent), he is employed by another company.

10. The learned Judge erred (paragraph [22] in relying on clause 16 of the agreement relied upon by the first Respondent to (apparently) find that Mr Mkhonto was authorized to sign the agreement on behalf of the Appellant. As Mr Mkhonto was at no stage authorized to sign on behalf of the Appellant, the fact that he signed without such authority means that the Appellant is not bound by the agreement.

11. The learned Judge further erred (paragraph [22]) in relying on the fact that the agreement signed by the First Respondent on 8 July 2007 does not refer to the agreement of 8 June 2007 as being mutually cancelled, varied or novated as the former was not a new agreement but the same agreement.

12. The learned Judge erred in finding (paragraph [30]) that a valid deed of sale was concluded between the parties on 8 June 2007 on the basis that the agreement was signed by Mr Mkhonto as the "*Manzini Branch Manager*" of the Appellant. The learned Judge accordingly erred (paragraph [31]) in finding that *"the (Appellant) cannot deny the authority of the* ***Manager*** *to conclude the deed of sale between the parties"*.

13. The learned Judge erred in finding (paragraph [32]) that the Appellant breached the terms of the agreement and in (apparently) dismissing the Appellant's contention that the

First Respondent was obliged to, and did not, comply with the provisions of clause 11.1 in terms of which 14 days' written notice had to be given to the defaulting party to remedy the breach before a party could exercise its rights either to claim specific performance of the terms of the agreement or to cancel the agreement. It was not contended by the First Respondent that such notice had been given, and on this basis as well, the learned Judge erred in granting specific performance.

14. The learned Judge erred in ordering the Appellant to pay the costs (presumably of the main application), and in particular costs on the scale as between attorney and client, without providing any reasons for so ordering.

15. The learned Judge erred in not specifying whether the Appellant's counter-application for the eviction of the First Respondent was dismissed, and if so, on what grounds.

16. The learned Judge erred in fact and in law by directing the Appellant and the Second Respondent to take all steps necessary to effect transfer of the immovable property to the First Respondent, without stipulating that the First Respondent should effect payment for the property to be transferred to him before transfer could be effected, and

without stipulating that the outstanding occupational rental and municipal rates, taxes, levies and service charges levied by the local authority with effect from 1 April 2003, as referred to in paragraph (d) and paragraph (e) of the judgment, first be paid by the First Respondent to the Appellant."

Analysis of grounds of appeal

[1] The grounds noted by the appellant collectively add up to a formidable armada against the judgment, even if they are rather unwieldy. Although the appellant is entitled to have the full plenitude of its grounds of appeal considered by this Court, after a very careful and fair reading of the record, I have come to the conclusion that those grounds need not be considered seriatim. In my view, they cover 3 broad areas of complaint by the appellant which if sustained, would lead to the appeal being allowed. These are:

(i) Whether or not the Deed of Sale dated 8th June 2007 was valid?

(ii) Whether or not the 1st respondent failed to tender a bank guarantee to the appellant on or before the time stipulated in the said Deed of Sale dated 8th June 2007?

(iii) Whether or not, if the 1st respondent did not tender the bank guarantee timeously, the appellant waived the default?

[2] The learned trial judge devoted a lot of time, energy and thought to the two applications. However, in the process, his Lordship inadvertently made one fundamental error of procedure. As I have appointed out above, under "Pleadings" there were two separate applications and even though for the purpose of the trial the court could consolidate them, it would have been preferable if the court had considered each application separately and written two separate judgments. A fair reading of the judgment, starting from page 338 of the record, shows that the learned trial judge analysed the pleadings and legal submissions of the two applications, juxtaposing pleadings from one application against others from the other application. For Example, while considering the validity or otherwise of the Deed of Sale in paragraphs 9 and 10 of the judgment, he left it to discuss the appellant's claim for occupational rent. (See paragraph 11). Soon thereafter, the learned judge went back to the delay or otherwise in furnishing a bank guarantee. This is an issue which arises from the main application. In paragraph 13 of the judgment, His Lordship reverted to the appellant's application seeking an order confirming the cancellation of the Deed of Sale, an order evicting the 1st respondent from the premises and an order compelling the 1st respondent to pay occupational rent. Indeed, pages

339 to end of paragraph 16, of page 343 of the record, were devoted to the counter-application. He then interjected paragraph 17 dealing with new negotiations by 1st respondent to have the property sold to him and quickly went back to the issue of occupational rent in paragraph 18. In that paragraph there is a mixture of a discussion of payment of occupational rent and even a gratuitous ruling that an Agreement signed on 3rd December 2004 was not legally valid and enforceable. When he eventually settled on the issue of the validity of the Deed of Sale signed on 8th June 2007, he spoke of a letter of demand dated 19th October 2009 and in paragraph 26 of the judgment, went back to the issue of occupational rent. In my view this way of dealing with the two separate applications completely obfuscated the issues and contributed in no small measure to the litany of grounds of appeal marshalled by the appellant against the judgment.

[3] I now discuss the 3 rehashed grounds of appeal I stated above.

Validity of Deed of Sale of 08.06.2007

One fact is certain. Mr Moses Mkhonto, was not a Manzini Regional manager of the appellant's. He was a Manager of OK Bazaar (Swaziland) Pty Ltd. Mr Moses Mkhonto, the supposed agent denied that he had authority to sign the Deed of Sale so as to bind the appellant. His position was that he was merely to take the agreement to the 1st respondent and he signed it intending it to be as a witness for the 1st respondent. He

mistakenly signed in the space reserved for the Seller. He said later a similar document was prepared to correct the error. This one was signed by the 1st respondent on 6th July 2007.

In the events that subsequently happened, as has been explained above, the appellant's Board refused to approve the entire sale, and of course, the Deed of Sale. In my view, the Board were entitled to pass a resolution disavowing the sale of the company's main asset to the 1st respondent, in view of his financial difficulties.

[4] The first respondent insisted that Mr Mkhonto signed it to bind the appellant. The appellant denied that and emphasized that Mr Mkhonto had no such authority.

[5] <u>*Turquand's Rule*</u>

In his Heads of Argument the 1st Respondent cited the case of *Royal British Bank vs Turquand* (1856) 119 All ER. 886 and submitted that in terms of this rule, a third party contracting in good faith with a company is entitled to assume that all internal requirements and procedures of the company have been complied with.

In my view, there is more to the Rule than has been stated above. What the Rule actually states is that third parties who have dealings with a company

need not enquire into the regularity of the *indoor management* but could assume that its requirements have been complied with.

The indoor management of a company is set out generally in the Articles of Association. The rule deals with acts of a company's agents. Generally, the authority of an agent may be express or actual or it may be an ostensible or apparent authority. If the third party has information that the agent has no authority, the rule has no application. Further, if an agent who purports to act on behalf of the company purports to make a contract which is not within the ordinary ambit of the powers of such an agent, the outsider is not protected by the Turquand's rule.

In the case of *Houghton & Co v Nothard, Lowe and Wills,* Sargant L.J., said at (1927) lKB 246 at 266

> "But in my opinion, this is to carry the doctrine of presumed power far beyond anything that has hitherto been decided, and to place limited companies, without any sufficient reason for doing so, at the mercy of any servant or agent who should purport to contract on their behalf. On this view, not only a director of a limited company with Articles founded on Table A, but a secretary or any subordinate officer might be treated by a third party acting in good faith as capable of binding the company by any sort of contract, however

exceptional, on the ground that a power of making such a contract might conceivably have been entrusted to him."

The high water mark is that all transactions which *are outside* the scope of the usual authority of persons in the position of acting for the company, are not within the scope of the rule.

The rule obviously relates to officers of a company. Where the person who allegedly did the act is not an officer, the rule does not apply. In this present case, as has been pointed out above, Mr Moses Mkhonto, was not an officer of the appellant company. He was the General Manager of OK Bazaar (Swaziland) (Pty) Ltd, Manzini.

Secondly, the transaction in question was not one coming within the ambit of the usual business of the appellant company. It was for the sale of the appellant's main asset. It is not something which a third party will be entitled to assume has been entrusted to a person who is not even an officer of the appellant company.

In the circumstances, I hold that the Turquand's rule is inapplicable to the facts of this case.

[6] *Date of signature*

The 1st respondent, in various affidavits explained his view of who signed the Deed of Sale in various scenarios. The evidence proffered by the 1st respondent when he tried to fix the "date of signature" was anything but credible. A scrutiny of the 1st respondents versions of who signed the agreement, where and when, did his credibility little good.

In his Founding Affidavit, pages 8 and 9, paragraph 15 he said the agreement **was signed by Mr Jeff Coskey on behalf of the appellant and returned to him.** Mr Coskey was, of course, in Durban. So the agreement was signed not in Mbabane as it appeared on the face of it but in Durban. By that very statement, the 1st respondent disavowed his earlier contention that one Moses Mkhonto freely **signed** the agreement, without any coercion, on 8th June 2007 at Mbabane. Indeed at paragraph 35 of his reply (page 155) the 1st respondent stated:

> "The Deed of Sale was already signed when it was presented to me by Mkhonto. The deponent (ie Mkhonto), never signed the agreement in my presence."

At pages 155-156 paragraph 36, the first respondent volunteered another version of how he signed the Deed of Sale. He said:

> "I still reiterate that **a certain page** of the Deed of Sale was not signed by the Seller's representative, **which made it necessary to**

return the Deed of Sale to the First Respondent (ie. Appellant) so that all the pages were numbered."

At page 254 paragraph 12.2, the 1st respondent offered yet another version. He stated :

> "When the agreement was presented to me for signature by the deponent to the founding affidavit, Moses Mkhonto, it was already signed in the space provided for the seller and its witnesses. After appending my signature in the space provided for the purchaser, and my witnesses had appended their signatures, Mr Mkhonto gave me a copy of the deed of sale which I took to Swaziland Building Society for the purpose of applying for a loan which was approved and the bank guarantee issued."

I hold therefore that the Deed of Sale was invalid.

[7] *Waiver of appellant's rights*

On his final version, the first respondent conceded that the agreement was not sent to Durban, South Africa, for Mr Coskey to sign. Therefore if there was any delay, which indeed he later conceded there was, in delivering the bank guarantee, he could not blame it on the appellant.

It is common cause that the 1st respondent signed one Deed of Sale on 8th June 2007. He would therefore have had to provide a bank guarantee on or

before 18th June 2007. The 1st respondent has admitted that he was unable to keep that date and that he failed to deliver it as stipulated in that Deed of Sale. Assuming that a binding agreement was signed by the 1st respondent on 8th June 2007, the Deed would have lapsed on 19th June 2007 if the bank guarantee had not been tendered to the appellant. The next line of 1st respondent's defence was that the bank guarantee was delivered to Mkhonto who accepted it on behalf of the appellant. This constituted waiver in his opinion. Mr Mkhonto filed a Replying Affidavit in which he denied that the appellant waived its rights to cancel the Deed of Sale when the 1st respondent was unable to deliver the bank guarantee timeously. In paragraph 21.2 thereof (p.279) of the record he stated:

> "The applicant did not receive any bank guarantee from the First Respondent. The Applicant acknowledges a letter of assurance by the bank with regard to processing of a bank guarantee but denies that it received any bank guarantee in that regard. Mr Schoeman also denied that he received any bank guarantee on behalf of the appellant as alleged by the 1st respondent." (page 88 paragraph 3).

Under the **Plascon-Evans** rule, I am bound to accept that the 1st respondent failed to deliver the bank guarantee at all. I so hold.

[8] The learned trial judge erred in fact and in law by holding that the First Respondent (ie. The appellant herein) could not rely on the failure of the

applicant (ie. 1st respondent) to furnish the bank guarantee timeously, the reason being that he waived the right to terminate the contract by accepting the bank guarantee. (see paragraphs 24 and 31 of the judgment). The learned trial judge obviously overlooked the pertinent and peremptory words in clause 15.1 of the Deed of Sale which clearly required positive and not passive, indulgence to constitute waiver**.** Clause 15.1 states:

> **"No latitude, extension of time or other indulgence which may be given or allowed by any Party to the other Party in respect of the performance of any obligation hereunder, and no delay or forbearance in the enforcement of any right of any Party arising from this Agreement, and no single or partial exercise of any right by any Party under this Agreement, shall in any circumstances be construed to be an implied consent or election by such Party or operate as a waiver or a novation of or otherwise affect any of the Party's rights in terms of or arising from this Agreement or estop or preclude any such Party from enforcing at any time without notice, strict and punctual compliance with each and every provision or term hereof."**

I disagree with his conclusion that there ought to have been cancellation of the agreement before clause 15.1 could have effect.

Clause 15.2 which the learned trial judge referred to in paragraph 21 of the judgment did not deal with **waiver** at all. In the result I hold that upon a true and proper reading of clause 15.1, the appellant did not waive the 1st

respondent's delay in delivering a bank guarantee (if at all). The Deed of Sale lapsed without more. I further hold that the learned trial judge erred in fact and in law when he held that that the appellant waived his right to cancel the agreement any time thereafter, when the 1st respondent failed to deliver a bank guarantee timeously. In my considered view the appellant gave valid notice of cancellation to the 1st respondent.

[9] CONCLUSION

In conclusion, I hold that the pleadings of the parties and the legal submissions of counsel thereon, persuade me that the 1st respondent did not tender a bank guarantee to the appellant as required under the Deed of Sale dated 8th June 2007 (or even 6th July 2007). I also hold that Moses Mkhonto's explanation of how he came to sign the first Deed of Sale for seller when juxtaposed with the 1st respondent's various explanations of "the date of signature" chronicled above, leaves me, on a balance of probabilities, with no alternative but to conclude that he was not being candid with the court. I prefer Mkhonto's version of events. I hold further that the learned trial judge erred in law when he held that the appellant waived its right to terminate the agreement. I am fortified in my conclusion by the firm and peremptory wording in clause 15.1 of the agreement as well as the suspensive provisions in clause 3 of the said agreement. (See page 204of the Record – Vol. 2)

In the result, the appeal is allowed and I make the following orders:

(1) All orders made by the court a quo in its judgment of 5th December, 2011, are hereby set aside.

(2) In their place I order as follows:-

(a) The cancellation of the agreement in terms of which the 1st Respondent, his privies and all those holding title through him occupy the premises described as Portion 128, (a Portion of Portion 4) of the farm Dalriach, No. 188 situate in Mbabane, District of Hhohho, Swaziland, is hereby confirmed.

(b) An Order ejecting the Respondent, his privies and all those holding title through him from the premises described as Portion 128, (a Portion of Portion 4) of the farm Dalriach, No. 188 situate in Mbabane, District of Hhohho, Swaziland.

(c) An Order that Respondent or his privies pay occupational interest or rental of the premises from the 1st April 2003 to date of final payment at the rate of E2000.00 (Emalangeni Two Thousand) per month.

(d) An Order that the Respondent and or his privies pay the sum of E28, 757.50 (Emalangeni Twenty Eight Thousand Seven Hundred and Fifty Seven and Fifty Cents) being in respect of

municipal rates, taxes, levies and charges levied for the period from 1st April 2003 to 31st March 2009 and for such further period as the Respondent remains in occupation of the premises up to the date of judgment.

(e) Costs in the court a quo and also in this appeal. If the costs in the court a quo were paid by the appellant those costs should also be recovered from the 1st respondent by the appellant.

_____
DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

_____
M.M. RAMODIBEDI
CHIEF JUSTICE

I also agree.

_____
A.E. AGIM
JUSTICE OF APPEAL

COUNSEL:

For Appellant:	**Mr. Adv. Z.F. Joubert SC**
For Respondents:	**Mr. B.W. Magagula**