IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No. 57/2015

In the matter between:

INTER AGENCIES (PTY) LTD **Appellant**

And

EUGENE DLAMINI **Respondent**

Neutral Citation: *Inter Agencies (PTY) LTD vs Eugene Dlamini (57/2015)* [2016] SZSC 51 (30th June 2016)

Coram: M. C. B. MAPHALALA, CJ
S. P. DLAMINI, JA
Z. W. MAGAGAULA, AJA

Date Heard: 27th May 2016

Date Handed Down: 30th June 2016

SUMMARY: **Civil Procedure – Notice in terms of Rule 37 – Security for costs – When to be furnished – Appellant Company incola – Director of Appellant incola – General Rule incola litigant not required to furnish security – Each case to be decided on its own merits – Court not to fetter its own discretion – In the circumstances of this case Appellant not required to give security**

Law of Contract – Agreement of agency – When established express or implied contract – Express contract not established – Existence of agreement to be implied from proven facts – Preponderance of probabilities – Evidence not sufficient to prove agreement of agency – Appeal allowed with costs.

JUDGMENT

MAGAGULA AJA.

[1] The question in this appeal is whether the Respondent is entitled to recover from the Appellant the amount E350 000.00 as commission in respect of the sale of a property known as:

Certain: Portion 1 of Lot No. 368. Manzini Township, District of Manzini.

The Respondent instituted motion proceedings in the Court *a quo* claiming *inter alia*, payment of the sum of E350, 000.00 in respect of commission following the sale of the property herein above. The application was opposed. The matter was referred to oral evidence by the trial court. After listening to such oral evidence the court granted judgment for the Applicant (now Respondent). The Appellant, being aggrieved by the judgment of the trial court appealed on a number of grounds. More will be said later on the grounds of appeal.

[2] When the matter was called before this court, it became necessary to determine a preliminary issue raised by the Respondent. By Notice in terms of Rule 37 of the Supreme Court Rules, Respondent required the Appellant to furnish security for costs in the sum of E100 000.00 on or before 9.50 Hours on Monday 2nd November 2015. The grounds for demanding such security for costs being that

a Mr. Moses Kamenga, a director of, who gave evidence in the Court *a quo* for, the Appellant was a peregrinus of the court as he is a Zambian citizen, domiciled in Zambia, with no known assets in Swaziland. It was also alleged in the Notice that the Appellant itself had no assets in Swaziland which may provide security for costs. The Respondent further gave notice that should Appellant fail to furnish security on or before 09:50 Hours on the 2nd November 2015 application will be made at the hearing of the matter for an order staying and/or dismissing the appeal until such time that security for costs would have been furnished.

[3] The Appellant entered Notice of Intention to oppose thereafter Respondent filed an application to this court seeking that this court declare the appeal abandoned and that same be dismissed with costs. The application in terms of Rule 37 was premised on the fact that Appellant had not objected to the demand. This fact was, the hearing of the matters shown to be erroneous. In argument before us it was suggested that the Respondent

ought to have referred the question of security to the Registrar of the High Court for determination of the question of quantum. This does not appear to be the correct position. Rule 37 of the Rules of this court provides:

> ***37 "The Appellant shall, within such time as the Registrar of the High Court shall fix, and subject to rule 32, deposit with him two Hundred emalangeni or such other greater sum as may be determined but such Registrar, or give security therefor by bond with one or more sureties to his satisfaction for the due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the Appellant".***

[4] A failure to comply with a demand for security for costs in terms of Rule 37 is dealt with in terms of Rule 38. The Rule provides:

> ***"If the Appellant fails to comply with Rule 37, the Registrar of the High Court shall so inform the Registrar and the Court of Appeal may thereupon order that the appeal be dismissed with costs".***

In a case where the Appellant ignores the Notice or failing to comply with a determination by the registrar of the High Court in aspect of the amount to be deposited, then the provision of Rule 38 may be invoked. However, where the Appellant denies its liability to furnish security for costs then it appears to me that the Respondent may have that question determined by the court. In that regard this application is well taken.

[5] The leading case in over jurisdiction on security for costs is the celebrated (in the sense that both parties are relying on it) case of ***Sabelo Mduduzi Masuku N.O. vs Meidien Recoveries (PTY) LTD and Another Civil Appeal Case No. 10/1999,*** but I hasten to add that in that case their Lordships were confronted by an entirely different set of facts to the point. In that case the Appellant was acting in a representative capacity and **Beck A.J.A with Schreiner AJP and Leon JA** concurring, quoted Bristowe J. in ***Mears v Brooks and Mears trustee 1906 TS 546 at 550*** stated:

"I am very inclined to think, that where the Plaintiff is suing and has no real interest of his own in the subject matter of the action, that really is a very good ground for ordering him to give security for costs"

His Lordship then concluded:

"That was said of an incola Plaintiff and, with respect, I am in agreement with this observation".

[6] So the court may only dismiss the appeal in the event of a failure to deposit an amount determined by the Registrar of the High Court and I suppose the same could be said for an amount agreed to by the parties. In as far as Respondent is seeking a dismissal of the appeal for failure to deposit an amount in excess of Two Hundred Emalangeni, on or by a date not fixed by such Registrar, then this application in my view must fail.

[7] The Respondent contends that appellant is liable to give security for costs because its director is a peregrinus of this court and Appellant is not possessed of sufficient or any assets at all to be able to moot an adverse order for

costs. The first contention is obviously meet. In any case I am satisfied that Appellants director Modest Kamenga is incola as he has demonstrated in the Answering Affidavit.

[8] In respect of the second contention, the Respondent; that Appellant is not possessed of sufficient means in order to meet on adverse costs order. It has been held "[I] it appears by credible testimony that there is reason to believe that the company or body corporate will, be unable to pay the costs of Defendant or Respondent if successful in his defence..." See ***SASKO BPK vs Futurus Construction (PTY) LTD 188 (4) 170 at 171 H-I***. In earlier decided cases such as the SASKO Case (Supra) the view that the court may only exercise its discretion and refuse an application for security only if there are special circumstances. This special circumstances line of reasoning was jettisoned in ***Sheptone and Wylie vs George N.O 1998 (3) SA 1036*** where Hefer JA remarked;

> ***"In my judgment, this is not how an application for security for costs should be approached. Because a court should not fetter its own discretion in any***

manner and particulary not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features without adopting a predispontion either in favour of or against granting security".

[9] The question whether to order security for costs lies with the discretion of the court which must be exercised judicially. The court is not bound to order security in every case. The court need to consider the nature of the claim and the defence and what is fair and equitable to both parties. The Appellant being neither peregrinus to this court nor in liquidation; I am not able to find that the Appellant needs find security in the circumstances of this particular case. Costs of the application shall be costs in the cause.

[10] I now turn to the merits of the appeal. The Appellant relied on several grounds of appeal;

(1) The Learned *Judge a quo* erred in fact and in law in holding that the evidence led by the respondent (the

purported Agent who was Applicant in the Court *a quo*) supported by Mr. Thembinkosi Nkonyane (the purchaser who testified in support of the Respondent) established an agency agreement between the Appellant and the Respondent;

(2) The Learned *Judge a quo* erred in fact and in law in holding that the evidence led by the Respondent supported by Mr. Thembinkosi Nkonyane established that the Appellant had agreed to pay 10% agents' commission to the Respondent;

(3) The Learned *Judge a quo* erred in fact that the evidence of the Respondent and that of Thembinkosi Nkonyane had quality and/or was of probative value than that of the Appellant and it tilted the imaginary scales in favour of the Respondent;

(4) The Learned Judge ought to have found that the discussions on the sale of the property between

Appellant and Thembinkosi Nkonyane (the purchaser) took place on the 31st October 2014.

(5) The Learned *Judge a quo* ought to have found credible the evidence of the Appellant that he only met for the first time the Respondent when he came to his premises (2nd week of November 2014) with a certain Matsapha businessman introduced as a potential buyer interested in purchasing the property when he had already met Mr. Nkonyane.

(6) The Learned *Judge a quo* to have found that when Appellant met Respondent, 2nd week of November 2015, the Appellant and purchaser had already signed the Deed of Sale on the 13th November 2014.

(7) The Learned *Judge a quo* ought to have found that the purchaser was not a credible witness whose testimony was probative to be relied on, in that:-

(7.1) He had attested to a confirmatory affidavit to say he was introduced to the Appellant by the Respondent about the sale of the property.

(7.2) He had asked the respondent to arrange a meeting with the Appellant to sign a Deed of Sale;

(7.3) He did under cross-examination admit that he lied under oath in the confirmatory affidavit he had signed as there was no such approach and no meeting was ever arranged by the Respondent. He confessed that he had signed the confirmatory affidavit in support as he feared for his life.

(8) The Learned *Judge a quo* ought to have weighed the evidence given in the Court *a quo* in favour of the Appellant;

(9) The Learned *Judge a quo* therefore erred in law and in fact to have ordered that the Respondent had succeeded in establishing the agency agreement between the parties and that the Appellant be ordered to pay the Respondent 10% Commission being an amount of E350, 000.00 (Three Hundred and Fifty Thousand Emalangeni) and the costs against the Appellant.

[11] Despite the prolixity of Appellant's grounds appeal, the complaint may be crystalized to show that Appellant believes that there was no evidence or at least, sufficient evidence led in the Court *a quo* to enable the court to arrive at the conclusion that there was an agreement of agency between Appellant and Respondent. All the other grounds are dependent upon the first ground of Appeal.

Essentially this court has to answer the question whether or not, there has been established an agreement of urgency between the parties. If this court, as did the Court *a quo* finds that agency is established, that is end of the appeal and the converse is true. This much was conceded by Mr. Masuku who appeared for Appellant before this court.

[12] The Learned Author JT R. Gibson in his work South African Merchanille and Company Law 6th Edition Page 236 defines agency as:

> ***"(A) Contract whereby one person (the agent) is authorized and usually required by another (the principal) to contract or to negotiate a contract on the latter's behalf with a third person".***

The Author continues:

> ***"This authority may be express. It may be implied by law as on the facts. And in certain circumstances agency may arise where there has been no authority e.g. by estoppel or by ratification".***

[13] A. J. Kerr in The Law of Agency 4th Edition page 5 observes:

> ***"It seems to me to be beyond doubt that the usual or ordinary way in which actual authority is given to, or conferred upon another is by contract".***

The learned author continues:

> **"That parties may expressly or impliedly agree that one should have power to act for and on behalf of the other is well attested by authority".**

[14] The Respondent alleged in his founding affidavit that he was mandated by Appellant through its director Modest L. Kamenga [KAMENGA] to find a purchaser for its property. The terms of engagement were that Respondent should find a buyer willing to purchase the said property for a purchase price of not less than *Four Million Six Hundred Thousand Emalangeni* and in return Respondent would be paid a commission amounting to 10% of the purchase price. The Appellant further "handed over" to Respondent a copy of the Valuation Report of the said property.

[15] Acting on the mandate or so he thought, the Respondent was able to interest a Mr. Thembinkosi Nkonyane [NKONYANE], the Director of Corban Electrical and Electronics (PTY) LTD into purchasing the property. It is common cause that the property was eventually purchased by Corban Electrical and Electronics (PTY) LTD. In his Founding Affidavit Respondent stated that he received the mandate "on or during the month of November 2014'; in his evidence in chief he stated that it was in early November 2014. The significance of the time frame will become apparent later in this judgment. The Respondent argues that he had an express agreement with the appellant.

[16] According to Respondent, he informed Nkonyane that Appellant's property was up for sale; Nkonyane asked that a meeting be arranged with Kamenga for purposes of drafting a Deed of Sale. However, this meeting did not take place because Kamenga then "lured the purchaser into entering into a Deed of Sale behind his back". It was Respondent's further argument in the Court *a quo* that he

also assisted Appellant in having bonds with the First National Bank cancelled and the payment of Municipality rates to the Manzini City Council.

[17] The Appellant in the Answering Affidavit and during the presentation of oral evidence denied that it gave a mandate to the Respondent or that it entered into an agreement of agency with him. Appellant averred that having decided to sell its property it sent word around and on the 31st October 2014 Appellant's director, Kamenga received a telephone call from Nkonyane who was also a neighbour in their residential area of Ka-Gwebu. Nkonyane indicated his willingness to purchase the property and said he heard that it was for sale from his sources.

[18] On Monday the 3rd November 2014 Kamenga and Nkonyane proceeded to Mbabane where Appellants attorneys, T. L. Dlamini Attorneys, drew up a Deed of Sale and a deposit in the sum of E1000.00 was paid to the Attorney. Kamenga on behalf of Appellant negotiated with

Nkonyane and they finally agreed on a purchase price in the sum of Four Million Six Hundred Thousand Emalangeni. Nkonyane asked for and was given the Valuation report in respect of the property. Nkonyane did not sign the Deed of Sale there and then, but took it with him after expressing the need that same be signed by his co-director in Corban Electrical and Electronics (PTY) LTD. This agreement was eventually signed on the 13th November 2014.

[19] According to Kamenga he only got to know the Respondent in the 2nd week of November on or about the 14th, 2014 when he, - Respondent called him and indicated that there was a businessman who wanted to purchase the property. A meeting was arranged, on the same day, where Kamenga met Respondent and the businessman. He informed the Respondent that he already had a prospective purchaser with whom a Deed of Sale had been signed. He gave a copy of the valuation to Respondent, just in case the first purchaser was not to return. He denies giving Respondent a mandate to sell Appellants property.

[20] After listening to the evidence the trial Judge admirably re-stated the duties of the court in deciding or weighing of contradicting evidence and conclude by stating:

> ***"…the manner in which the events unfolded suggest that Applicant had met PW1 prior. I say this because it is highly impossible that PW1 having knocked off from work, would have returned from eight kilometres afar to attend to total strangers. Further PW2 gave every minute detail in his evidence in chief, mentioning how he waited for Applicant to finish his call and how he attended to them. If the evidence revealed under cross-examination that Applicant was given PW's cell number by the Receptionist was true, PW2 would have mentioned it in his evidence in chief. At any rate it is highly improbable that the receptionist would have given total strangers her boss's number and proceeded to call PW2, the supervisor to attend to them. For the foregoing the probabilities of the evidence tilt in favour of Applicant"***

[21] The trial court based this conclusion on the evidence of the Appellant's Kamenga who said he was eight kilometres away when he received Respondent's

telephone call. He then returned to Appellant's premises to entertain Respondent and the businessman. The other piece of evidence relied on by the trial court for this conclusion is that given by RW2; that he was called by the Receptionist to attend Respondent and his companion and he found Respondent talking on his cellphone Respondent indicated that he was talking to Kamenga, having been given Kamenga's number by the Receptionist.

[22] The question that looms large in my mind is: (i) Is this the only inference that can be drawn from the facts? The Appellant in his evidence sought to suggest that there was an express agreement where Appellant made on offer to him to sell its property and he accepted provided a commission of 10% was paid to him. On acceptance of the counter offer, a contract ensued between the parties. This is what Respondent said in his oral evidence in chief:

> ***"…He (Kamenga) told me that he was selling the Inter Agencies premises…I enquired from him the price and he said it was Four Million Eight Hundred and Forty Thousand Emalangeni. I enquired as to whether he had the latest valuation…after I had seen the valuation I***

asked what was the price if there was a customer that might be interested to buy. He stated that it was 4.6 Million. I asked if the property had not been bonded and whether it was not owing rates with the Municipality Council. I asked him whether he was giving me permission to sell the property as I had a customer who wanted to buy next door who had been overtaken and he stated that I should continue and work. Before we continued I explained to him that as an agent of Supa Nava Consultants I had 10% commission in such deals. He said I should continue to work because his aim was to go back home and he wanted to continue and pay his employees".

[23] In a nutshell, Respondent relied on this conversation to ground his claim to have been the duly appointed agent of the Appellant. He then went to call Nkonyane who then proceeded to Kamenga to verify the information. Now this conversation is denied by Kamenga. He argues on the contrary that he met Respondent for the first time on the 14th November 2014 when he (Respondent) was in the company of a businessman from Matsapha who was interested in purchasing the property. It is this denial, by

Kamenga, of the conversation, consequently the agreement, that compounds the issue. The events as stated by the Respondent are not supported by any independent evidence; while it is true that the cogency of evidence does not depend on the number of witnesses, it remains a factor to be considered by the court when it weighs the various aspects of the case.

[24] I pause here to refer to the wise wards of GREGOROWSKI J in ***Martin vs Currie (1921 TPD 50 at 54):***

> ***"I think it is essential in all these cases to prove a contract of employment. It is not sufficient for an estate agent to say:***
>
> > ***"I was instrumental in introducing you to a person who eventually bought your property. He must prove he was employed in his capacity as estate agent to do this; the mere fact of being instrumental is not sufficient".***

[25] In the absence of conclusive evidence of the express agreement between the parties, the court is then left to consider the surrounding circumstances such as the conduct of the parties in order to determine whether or not there was an agreement. In ***Joel Melamed and Hurwitz vs Vorner Investments 1984 (3) SA 155 (A) at 166 C-D Corbett J. A***. stated:

> ***"In cases concerning tacit contracts which have hitherto come before our courts, there have always been two people involved; and in order to decide whether a tacit contract arose the court has had regard to the conduct of both parties and the circumstances of the case generally. The general approach is an objective one. The subjective views of one or other of the persons involved as to the effect of his action would not normally be relevant".***

[26] Granted: the Joel Melamed Case (Supra) was a novel one where one person had contracted with himself, albeit in different capacities. The same judge, Corbett J. A. a year before in the case of ***Standard Bank of S. A. LTD vs Ocean Commodities Inc. 1983 (1) S.A. 276 at 292*** stated:

"…In order to establish a tacit contract on the terms it is necessary to show by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged".

[27] This formulation was however criticized as it appeared to indicate a higher standard of proof than that of the preponderance of probabilities. See The Comments of Botha J. A. in ***Spes Bona Bank vs Portals Water treatment 1983 (1) SA 978 at 981 A-D***

"The general rule is now well established that the onus of proof in respect of any factum probandum in civil cases can be discharged on a balance of probabilities. The instance of a tacit contract is no exception to the general rule. That such a contract needs to be proved by way of inference from circumstantial evidence does not render the criterion of proof on a balance of probabilities inapplicable, for in

a civil case that criterion applies also to the drawing of inferences from proved facts".

[28] It bears mentioning again that Respondent relied on an express agreement with Appellant. He called as his witness Thembinkosi Nkonyane one of the directors of the company that purchased the property. His evidence was that he was advised by Respondent that Appellant or Kamenga was selling the property, he told Respondent that he knew Kamenga and he would go to him. This is what Nkonyane says of his meeting with Kamenga in answer to a question by Respondent's counsel.

> ***"That is correct my lady, Kamenga told me that we must sign the Deed of Sale and exclude the Plaintiff because he does not see what he has done on this deal and that he had no prior agreement with him".***

[29] Nkonyane did not say Kamenga told him that Respondent was the appointed agent of the Appellant and throughout his testimony as appears in the record of the Court *a quo*, he never said Kamenga admitted to him that Respondent

was his or Appellant's agent. This is significant when consideration is had to this statement by Respondent;

> ***"My lady I met the representative of Corban Electrical who was Mr. Nkonyane and he was someone who wanted to buy a plot as he was tired of renting…I asked him if he had discussed with his bank as to how much the bank would offer him".***

He later continued:

> ***"…At the time my client wanted to buy a property situated between Inter Agencies and Dups…After that plot was purchased by Dups my client asked me to look for another plot and I went to Inter Agencies and spoke to Mr. Modest Kamenga. I introduced myself to him and he accepted me…"***

[30] I now pause to ask myself who is the client referred to in evidence by Respondent. If the said "client" is Nkonyane, then he could have been acting on his behalf when he went to see Mr. Kamenga. It is the finding of this court that Respondent failed to prove on a balance of probabilities the existence of an express agency agreement with Appellant; now can it be said that the only

inference that can be drawn from the evidence is that there was an agency agreement between the parties at the material time? I believe not. The evidence of the Respondent leaves many unanswered questions.

[31] The evidence of his witness, Nkonyane does not help the Respondent. Nkonyane stated in his Supporting Affidavit that he was informed of the sale of the property by Respondent at the end of November 2014, but the first Deed of Sale was signed on the 13th November 2014. Nkonyane also disowned the contents of his supporting affidavit by making a statement to Appellant that he signed the affidavit under duress and that a prior prepared statement was brought to him to sign. Nkonyane's evidence then cannot be accepted.

Hoffman and Zeffert 'The South African Law of Evidence' 4th edition Butterworths page 452:

"At common law a witness's previous inconsistent statement may be relevant to the witness's credibility because in the absence of

an explanation, the fact that he has previously made a statement inconsistent with his present testimony must weaken his credit…"

[32] The court, to adopt what was said by Davis A.J.A in Rex vs de Villiers (1994 AD 493 at pp 508 – 9) must weigh the cumulative effect of all the facts and circumstances; it must be satisfied on the evidence as a whole and not in its separate facts that it is proper to draw a particular inference. So in this case, the court must look at the evidence as a whole and determine whether it justifies the inference that the appellant employed the Respondent as its agent and undertook to pay him a commission.

[33] On these facts the balance of probabilities was in favour of the Appellant. Accordingly the appeal succeeds with costs.

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Z. W. MAGAGULA
ACTING JUSTICE OF APPEAL

I Agree _____

M. C. B. MAPHALALA
CHIEF JUSTICE

I also Agree

_____

S. P. DLAMINI
JUSTICE OF APPEAL

For the Appellant: Mr. Masuku

For the Respondent: Mr. Ntshangase