

HIGH COURT OF SWAZILAND

CIVIL CASE NO.310/03

In the matter between:

LINDA MHLANGA	PLAINTIFF
AND	
EB INVESTMENTS (PTY) LTD	DEFENDANT
CORAM	MATSEBULA J
FOR THE PLAINTIFF	MR. FLYNN
FOR THE DEFENDANT	ADV. D. SMITH

JUDGMENT

30TH OCTOBER 2003

By a combined summons dated 13th February 2003, plaintiff sued the defendant and prayed for the following prayers:-

- (a) Payment of the sum of E350,000-00;
- (b) Interest thereon at the rate of 9% per annum calculated from the 30th June 2001 to date of final payment;
- (c) Costs of suit;
- (d) Further and/or alternative relief.

The plaintiff's cause of action arises from, and this is common cause, a deed of sale by and between the parties and duly signed by them.

The deed of sale is part of the proceedings and filed of record as "A". The date reflected on "A" is the 23rd August 1996.

For the purpose of this judgment reference will be made to certain clauses of "A" which are relevant for the purposes of this judgment.

Paragraph 4 of plaintiffs particulars of claim states the following:-Paragraph 4

"Prior to the conclusion of the sale and with the intention of inducing plaintiff to purchase the property the defendant represented, by its agent Douglas Makhubu, orally represented to the plaintiff that South Easterly boundary of the said property was a road."

Paragraph 5

"Relying on the truth of the representation which was material to the sale, plaintiff purchased the property and paid the defendant the purchase price of E350.000-00."

Paragraph 6

'The South Easterly boundary of the property is not the road'.

## Paragraph 7

"By reason of the foregoing and on discovering that the property did not extent to the road the plaintiff, during June 2001 orally cancelled the agreement of sale."

It emerged during the hearing of this matter that defendant's legal representative was already aware that the particulars of claim as couched by the plaintiff especially considering the contents of clauses 12 and 14 of the agreement plaintiffs particulars of claim did not disclose a cause of action. Clause 12 of "A" is a voetstoots clause and clause 14 non variations, alterations, modifications or suspension clause INTERNATIONAL TOBACCO COMPANY OF SOUTH AFRICA LIMITED VS WOLLHEIM & OTHERS 1953(2) SA @ 613 A - C.

J A Centeivers CJ concurring remarked. [I]f it can be shown on exception that a declaration discloses no cause of action, an exception on this ground should be allowed; if the exception is that the declaration is vague and embarrassing, that fact should be shown, at any rate for purposes of his plea, that the defendant is substantially embarrassed by vagueness or lack of particularly, it equally should be allowed."

On the 26th May 2003 defendant gave a notice of intention to amend in terms of Rule 28 of the Rules of this Court. The amendment was a special plea and not an exception. But as Mr. Flynn in his heads of argument has indicated, it appears defendant did not persist in seeking the amendment. Mr. Flynn also stated that the intended amendment was introduced as a special plea which would have raised issues which ought to have been raised by way of an exception. The court in its ruling in the objection in leading viva voce evidence in contradiction to the contents of annexure did not specifically addressed itself to the application for an amendment but merely dealt with the pleadings as they stand.

I further agree with Mr. Flynn for the plaintiff that Mr. Smith's opening remarks at the inception of the trial that no purpose would be served in proceeding with the trial on the merits as the plaintiffs particulars of claim were fatally defective in that same did not disclose a cause of action was not in accordance with the rules. Mr. Smith urged the court of dismiss the matter even before hearing the merits. The court found in favour of the plaintiff and the matter proceeded to the merits.

It was only when the plaintiff sought to introduce viva voce evidence in violation of annexure "A" that an objection by Mr. Smith was made; and the court ruled in favour of the defendant. Thereafter Mr. Flynn did not persist in leading the evidence relating to annexure "A" which in terms of the courts ruling would be contrary to clause 11 and 14 of annexure "A". I have been referred to GOVERNMENT BS VIANINC FERRO CONCRETE PIPES (PTY) LTD 1941 AD 43 @ 47 and a number of other authoritative South African cases. I am convinced that the ruling I made disallowing the admissibility of the intended evidence by plaintiff was in my considered view correct I turned down an application by Mr. Flynn to amend plaintiff's particulars of claim at an advanced stage of the trial. This application for an amendment sought to introduce an element of a fraudulent misrepresentation which was not there in the original particulars of claim. In my view this amendment if allowed would introduce a new cause of action to the prejudice of the defendant. The plaintiff could not take its case any further. It rested its case.

The problem which then arose was whether in all the circumstances of the case a proper verdict would be one of absolution from the instance with costs in favour of the defendant or a dismissal of the case for the plaintiff with costs.

Although counsel for the litigants agreed to file further heads of argument within 14 days to deal specifically with an appropriate order as to costs as indeed an appropriate finding by this court. This, Mr. Smith on behalf of the defendant has done. I have however not received any submissions from plaintiffs counsel. Considering the manner in which Mr. Smith sought to apply for an amendment to include a special plea instead of an exception I am inclined to avoid any speculation on what plaintiff would have done had a proper procedure been followed by Mr. Smith on behalf of defendant.

If an absolution from the instance is granted. I am of the view that both litigants are at large to again

reinstate the matter in any form they each deem fit.

Considering all the circumstances of this case, I find that a proper order is one of absolution from the instance. I do not find this case to be one where punitive costs should be ordered; there being a very strong possibility that this is not the end of the matter. However, considering the dilatoriness on the part of the plaintiff's instructing attorneys I am of the view that the costs be those of an ordinary scale but these costs to include those of counsel for the defendant.

J.M. MATSEBULA

Judge