

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE NO.1226/91

In the matter between:

JORGE SIMIAO MARTINS MANJATE

Applicant

and

DON BOSCO GININDZA

Respondent

C O R A M

: DUNN J.

FOR THE APPLICANT

: MR C.J. LITTLER

FOR THE RESPONDENT

: MR L. MAMBA

JUDGMENT

16th April 1993

The parties to this application entered into a Deed of Sale in respect of Lot no. 688 Ext. 4 Mbabane, on the 22nd June 1990. The applicant was the purchaser. The respondent was the seller. I shall continue to refer to the parties as the purchaser and seller, respectively. Clause 1 of the Deed of Sale reads as follows -

The purchase price shall be the sum of E62,500.00 (sixty two thousand five hundred Emalangeni only) payable as follows -

The purchaser shall deposit the sum of E20,000.00 (twenty thousand Emalangeni) with the agent herein, Property Market Services (Pty) Ltd. The purchaser will furnish an approved Bank or Building Society guarantee in favour of the seller for the full balance of the purchase price payable free of exchange at Mbabane upon registration of transfer of the property into the name of the purchaser. The guarantee of E42,500 (fourty two thousand five hundred Emalangeni) shall be furnished within 45 days after the date of the last signature to this deed of sale.

Clause 6 provides -

Should the purchaser have failed to make any payment stipulated in Clause 1 hereof within the time stated, or failed to furnish any guarantee which the purchaser is required to make in terms of Clause 1 hereof within the time stated, then the seller may claim immediate payment of the balance of the purchase price, or of the full purchase price as the case may be, or alternatively, may cancel this Deed of Sale without notice to the purchaser, in which case any money already paid by the purchaser in terms of this Deed of Sale shall be forfeited by the purchaser to the seller as a pre-estimate of damages suffered by the seller.

It is common cause -

1. That the contract between the parties meets the requirements of section 31 of the Transfer Duty Act No.8 of 1902 relating to the sale of land. The contract itself clearly sets out the essential terms namely the identity of the parties, the identity of the subject matter and the amount of the purchase price.
2. That the purchaser did not furnish the guarantee referred to under clause 1 within the stipulated period.

The application turns, in my view, on the provisions of clause 6. The E20,000 deposit was paid to the seller's agent as required. The guarantee should have been furnished on or before the 6th August 1990. It was not furnished but instead and on that date an amount of E35,000.00 was paid by

/the purchaser...

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the purchaser to the seller's agent. The balance of E7,500.00 was paid on the 2nd October 1990. The agent accounted fully to the seller for the amounts received on his behalf. The seller accepted the payments.

The seller's case is that he acted under clause 6 and elected to cancel the sale following the purchaser's failure to furnish the guarantee. The cancellation, it was stated, was contained in a letter addressed to the agent by the seller on the 20th September 1990. The letter was telefaxed by the seller to attorney K.M. Nxumalo in Mbabane on the 3rd October, a day after the outstanding balance had been paid by the purchaser. The seller stated in evidence that he requested attorney Nxumalo to forward a copy of the letter to the agent. The letter reads in part -

I herein withdraw my property from the market forthwith in accordance with the terms of the deed of sale dated 22nd June 1990, reference paragraph 1 last sentence, and further paragraph 6. The purchaser has further failed to meet the above requirements after I had personally served him with a notice of default. I have personally incurred huge expenses, in trying to meet Jorge's requests with the purchase of this property. These I am claiming compensation for.

According to Mrs Sibanyoni of Property Services (Pty) Ltd (the agent) a copy of the seller's letter was received after the payment of E7,500 was made. No evidence was led of the "notice of default" referred to in the letter. The purchaser had by the time of receipt of the letter by the agent, already paid the transfer costs to the conveyancer nominated by the seller for the transfer of the property.

The purchaser gave evidence without objection from

/the seller...

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the seller to the effect that it was at the request of the seller that the E42,500.00 was paid in cash to the seller's agent. It appears from several decided cases referred to by the learned author RH Christie in his book **THE LAW OF CONTRACT IN SOUTH AFRICA** p109, that such evidence of a subsequent oral variation of the method of payment is not admissible. The present case is not, however, concerned with the question of a variation of the method of payment but rather with the question as to which of the rights under clause 6, the seller elected to exercise upon the purchaser's failure to furnish the guarantee. A distinction must, in my view, be made between cases where it is stipulated that a failure to comply with an essential or material term of the deed of sale will render the sale void and cases where the seller can elect to claim payment of the full purchase price or the balance, as the case may be, or in the alternative to cancel the sale. Evidence of the method of payment may become relevant and admissible in cases where the seller elects not to cancel and arrangements are made regarding the payment of the purchase price or balance thereof.

The evidence of the purchaser, which is supported by that of Mrs Sibanyoni is that even after the 6th August 1990 the day by which the guarantee should have been furnished and on which the E35,000.00 was paid, the seller demanded payment, in cash, of the outstanding balance. The balance at that stage was E7,500. Mrs Sibanyoni advanced the reason and this was not contradicted by the seller, that the seller was pressing for payment of the balance in order to meet personal obligations whilst he was pursuing his studies in the United Kingdom.

I am satisfied from the evidence that the seller's conduct amounted to an election not to cancel the sale but

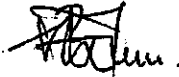
/to claim...

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to claim payment of the balance of the purchase price. The purchaser's evidence supported by that of the seller's agent places the matter beyond any doubt.

The application is granted. The seller is directed to take, within 30 days, from to-day's date all such steps as may be necessary to give transfer of the property in question to the purchaser. In the event of the seller failing and/or neglecting to comply with this order, the Sheriff or his lawful deputy is hereby authorised to take all such necessary steps and to sign all necessary documents and consents on behalf of the seller.

The seller is to pay the costs of this application.


B. DUNN
JUDGE