

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOSES ISAACS

Applicant

v

AYESHA BIBI GOOLAM MOHAMED FRANCIS      Respondent  
& 3 OTHERS

J U D G M E N T

Delivered by Hon. Mr. Justice F.X. Rooney  
on the 30th day of March, 1982.

Mr. Masoabi for the Applicant  
Mr. Sello for the Respondents

This is an application for the setting aside of an Order of this Court made by consent of the contending parties on the 2nd November, 1981. There is also a counter application by the respondent for the variation of the same Order. The matter has a long history which it is necessary to recount.

On the 4th April, 1977, the applicant and the respondent entered into a deed of sale in respect of certain immovable property on sites Nos B11, B12, B23 and B24 Cathedral Area, Maseru reserve. The agreement provided that the applicant as seller should transfer the property for a price of R30,000. Payment of the purchase price was to be effected by the settlement of R24,000 worth of debts owed by the applicant to various named creditors and the payment of R6,000 in cash. On the same day the applicant, who was the registered owner of the property in question, executed a power of attorney to pass transfer in favour of one Rashid Ahmed Karim who was then an attorney of this Court. The property was not transferred immediately and on the 15th April, 1980 the applicant wrote to the Town Clerk, Maseru repudiating the

contract. On the 21st June, 1981 the respondent commenced proceedings in this Court by way of Notice of Motion seeking what amounted to a mandatory interdict against the present applicant requiring him to transfer the property in accordance with the deed of sale.

The present applicant resisted these proceedings and he filed an affidavit in which he raised a number of defences including the following :

1. That his opponent had no locus standi in judicio.
2. That she has no valid permit for indefinite sojourn in Lesotho and was not therefore capable of holding a title to land in terms of section 6 of the Land Act 1979.
3. That the deed of sale was not signed or properly signed by the purchaser or her duly appointed attorney.
4. That the deed of sale was not a valid document by reason that all the material terms thereof were not reduced to writing and that the amount of the purchase price could not be exactly determined.
5. That the purchaser had not carried out her obligations under the said deed of sale.
6. That the purchase price had not been paid in full.
7. That the seller's signature had been forged on a letter to the Ministry of the Interior indicating his consent to the transfer of the property in the name of the purchaser.
8. That the seller had not executed a document described as a "declaration of sale".
9. That the proceedings should not have been commenced by way of notice of motion.

It can be seen from the above that the present applicant was prepared to go to considerable lengths in his effort to be released from the agreement for the sale of his property. His various defences were not put to the test because on the 23rd October, 1981, he agreed to compromise the proceedings in terms of the following agreement.

" Agreement between the Applicant and the  
4th Respondent

1. The 4th respondent hereby consents to an order in terms of paragraph 1 of the notice of motion.
2. The 4th respondent hereby undertakes to sign all documents and do all things necessary in order to effect transfer of the immovable property referred to in paragraph 1 of the notice of motion into the name of the applicant.
3. The 4th respondent abandons all his defences to the claim of the applicant and acknowledges in particular that the applicant has a permit of indefinite sojourn to enter and sojourn in Lesotho (Permit No. 659/81 of the 7th October 1981).
4. The applicant undertakes to pay to the 4th respondent the sum of R6,000 (six thousand rand) against transfer of the said immovable property into the name of the applicant. The said payment is being made ex gratia and entirety without admission of liability.
5. Each party shall bear its own costs in these proceedings.
6. Ave for what is herein contained, the applicant and the 4th respondent acknowledge that they have no claims whatsoever against each other. The 4th respondent also acknowledges that he has no claim against the following persons :-  
Auto-Care Lesotho (Pty) Ltd.  
A.R. Carrim  
M.A. Rehman
7. The parties acknowledge that the applicant is represented herein by her husband A.R. Carrim.  
Dated at Johannesburg this 23rd day of October 1981."

On the 2nd November, 1981 at the request of both parties, the above settlement was made an Order of this Court. That should have been an end of the matter as the present applicant was by Order of this Court directed to effect transfer of the immovable property in question into the purchaser's name.

The basis of the present application for the recall of the consent Order is contained in the founding affidavit of the applicant dated 29th January, 1982. In this he admits the compromise but states that he entered into it on the basis that the respondent held at that time a permit for indefinite sojourn in Lesotho. He produced a

4/ letter dated .....

letter dated the 18th November, 1981 from the Ministry of the Interior which advises him that the respondent's permit had been cancelled. The applicant alleges that the respondent had obtained her resident permit fraudulently without setting forth any facts in support of that serious allegation. He claims that the cancellation of the respondent's resident permit disqualified her from holding immovable property in Lesotho and that this "automatically rendered any prior deeds of sale or agreements of sale entered into by and between herself and myself purporting to transfer my immovable property to her null and void."

Before I deal with the submissions made by Mr. Masoabi, it is to be observed that the applicant raised in the original proceedings, the ineligibility of the respondent to hold land in Lesotho. It is a specific term of that compromise that the applicant abandoned all his defences and he acknowledged in particular that the present respondent was in possession of a permit of indefinite sojourn. Although the circumstances have changed and the respondent's permit has since been cancelled, the applicant is clearly in breach of the terms of the compromise in raising the matter again.

Mr. Masoabi submits that it was the intention of the legislature in enacting the Land Act 1979, that a person disqualified from holding land in Lesotho under the terms of the Act "should not use a nominee to obtain or own such properties". It is admitted by the respondent that the person in whose name the land would be vested would, be her nominee. Such an arrangement would create a fideicommissum. The proposed nominee would acquire a real right to the land and any rights which the respondent retained would be personal only. (Wille "Principles of S.A. Law" 4th Ed 216). The respondent's rights against her nominee would not constitute a title to land within the meaning of the Land Act 1979. Her position may be affected by section 16 of the Deeds Registry Act 1967 but, it is unnecessary for me to consider the problems of the respondent in this respect. Whatever may be her difficulties, they are in no way prejudicial to the applicant who remains bound by the

5/ compromise and the .....

compromise and the rights and obligations thereby created.

Mr. Masoabi further argued that the arrangements made by the respondent with the person to whom she now wants the applicant to convey the land violate the doctrine of privity of contract. Mr. Masoabi referred me to the case of Dunlop v. Selfridge (1915) A.C. 847 in support of his argument. In that case the House of Lords decided that a person who is not a party to a contract cannot be bound by it. This reaffirmed the position in English law that no one may be bound by the terms of a contract to which he is not an original party. The doctrine is a logical extension of the English common law rule which requires consideration to support a contract. The concept of consideration is unknown to the Roman Dutch Law, but, even if it were, Mr. Masoabi seems to have lost sight of the fact that his client is a party to the contract.

Mr. Masoabi's further submission that the cancellation of the respondent's residence permit not only disqualified her from owning any immovable property in Lesotho but rendered null and void any prior agreement entered into by and between the applicant and the respondent in regard to the land in question was not supported by any authority. However, he went further and submitted that the contract became illegal and that this Court should not enforce an illegal contract. He relied upon Mistry Amar Singh v. Kulubya (1963). All E.R. 499. In that case both parties entered into a patently illegal agreement in relation to land in Uganda. The Privy Council held that the plaintiff, who was the owner of the land, was entitled to recover possession because his right to possession did not depend on the illegal agreement but rested on his registered ownership of the land. The defendant could not rely on the agreement because of the illegality and therefore he could not justify remaining in possession. This decision does not assist the applicant in these proceedings.

The position here is that at the date of the compromise the agreement between the parties was legal and was made an Order of this Court. The subsequent change in the status of one of the parties in terms of Section 6 of the Land Act 1979 did not render the contract illegal but it rendered it impossible for the respondent to insist upon its performance in accordance with its terms. If the land had been conveyed to the respondent in accordance with the agreement before her residence permit was cancelled, her position would be governed by section 84 of the Land Act 1979. She could continue to hold the land for a period of 12 months and she would be entitled, during that period and with the consent of the Minister, to cede her rights to a person qualified under section 6. If she failed in that purpose section 84(2) provides for the reversion of her interest in the land (not to the present applicant) but to the State. Because the applicant failed to carry out immediately the terms of the compromise, this cannot have the effect of placing the respondent in a less favourable position than she would had been in if the applicant had performed the contract.

A contractual right may be ceded to a third person without the consent of the other party except in a limited number of cases none of which apply to the compromise. It does not make a substantial difference to the applicant whether the respondent cedes her rights under the agreement. It is not an obligation of a personal nature. "Where the obligation is to deliver property it cannot as a rule make any substantial difference to the debtor who the person is who is entitled to receive the property" (Wille supra 360).

There is no express agreement that the respondent shall not cede the benefits of the agreement. The cession proposed (whatever may be its form) is not contrary to law.

The respondent has asked this Court to vary the consent Order so as to stipulate that the applicant must transfer the property to her nominee.

The applicant is opposed to this. When the compromise agreement was drawn up, the respondent's legal advisers ought to have foreseen the possibility that circumstances might arise in which a cession became desirable and they should have so provided in the agreement. They did not do so and I am reluctant to vary/<sup>a</sup>consent order in the face of the opposition of one of the parties.

As I have said, the applicant is bound by/<sup>his</sup>obligations under the common law. If either party wishes to cede the benefits of the agreement, they may do so. The respondent is fearful that this may give the applicant an opportunity to offer further resistance to the enforcement of the compromise. I accept that this is so, but, the end result must be the same. This Court will come to the assistance of the respondent or to her cessionary in forcing the applicant to **fulfill** his obligations. If he fails to do so and continues to refuse to sign all necessary documents, then this Court may appoint a person to sign them on his behalf.

The application is dismissed with costs but no costs are allowed to the respondent in respect of the counter application.

F.X. ROONEY  
JUDGE

30th March, 1982.

Attorney for the Applicant : C.M. Masoabi & Co.  
Attorney for the Respondent: Mohaleroe, Sello & Co.