C. of A. (CIV) No.17 of 1985

IN THE LESOTHO COURT OF APPEAL

In the Appeal of

M. SHUPING — Appellant

v

E ABUBAKER — Respondent

HELD AT MASERU

CORUM

Schutz, P.
Odes, J. A
Miller, J. A.

JUDGMENT

Miller, J. A

On 2 September 1980 the Appellant and the Respondent entered into a written agreement entitled "Deed of Sale". In terms thereof the Appellant sold to the Respondent "certain site No. 332 situated in Teyateyaneng Reserve in the district of Berea together with improvements thereon" for the sum of R5,000. The purchaser paid R2,000 of the price at the time of signature and was required by the agreement to pay the balance "against registration of transfer of the property in the name of the purchaser." It was common cause that the requirement of "transfer of the property" did not, in Lesotho, signify that the seller would pass registered title in the property to the purchaser, for the term "title deed" is not known in regard to legislation about land and the seller of the property therefore had no "title deed"

/which ..

which he could transfer to the purchaser. What the seller did have was "a certificate of allocation extention or transfer of land" properly prepared and conforming to the terms of Sec 15(1)(b) of the Land Act of 1973. The Appellant was required in terms of Sec. 15(2) of the Deeds Registry Act, after obtaining the certificate of allocation, to apply for a registered certificate of "title to occupy or use" the site within three months of the allocation or such longer period as the Registrar or the Court might allow. It was also common cause that on the 13th September 1982 the Appellant signed the necessary papers to enable the Respondent to obtain registration of the relevant site in terms of the Land Act of 1979, which superseded the 1973 Act which had governed the situation at the time of conclusion of the agreement of sale. The Respondent encountered difficulty in obtaining the required registration of lease and use in terms of the 1979 Act for the reason that there was found to be an adverse claim to site 332 The problem of the rival claims to the site had necessarily to be resolved by the Land Tribunal established in terms of the 1979 Act before the desired rights could be passed to the Respondent. In due course the Land Tribunal resolved the dispute in favour of the Appellant It appears that the rival claimant proposed to appeal against the award made by the Land Tribunal. This circumstance was apparently utilized by the Appellant to serve as an excuse for resiling from the agreement concluded with the Respondent on 2 September 1980. It was common cause that the Appellant wished to resile from that agreement.

The Appellant's proposals for rescission of the sale agreement were not acceptable to the Respondent who was set upon acquiring the rights which he had purchased in 1980

/So firm ...

So firm was his desire and intent to acquire what was his due according to the contract of sale that he offered to pay the Appellant, the seller, an increased price of R10,000.

This offer was apparently neither accepted nor expressly rejected by the Appellant, despite many requests directed to him to discharge his obligations under the agreement of sale

During the time that correspondence (which it is not necessary to recount), was being maintained with reference to the subject of the sale, it came to the notice of the Respondent that the Appellant was engaged in negotiating for a deal with a third party in connection with that portion of site 332 which the lease and use of which had been awarded to him by the Land Tribunal and that an application had been lodged with the Commissioner of Lands "for the transfer of the site by way of exchange" An approach to the Commissioner revealeo that although he, the Commissioner, was now in a position which would ordinarily enable him to issue the desired rights to the respondent, he was frustrated in that regard because there were now two applications before him for the transference of the site rights and he could effect transfer only if one of the two withdrew his application or if the conflict were resolved by the Court. The third party in competition with the Respondent in the application before the Commissioner was the person with whom the Respondent had negotiated long after the conclusion of an agreement of sale between the Appellant and the Respondent relating to the site in question

In these circumstances the Respondent approached the High Court on notice of motion for an order in the follwing terms -

/In these ...

" 1. Restraining First Respondent (now Appellant) from selling, disposing of or transferring Plot No 332A, Teyateyaneng Reserve, district Berea, to one Peerbhai (the third party) or to any other person,

2 (a) Directing First Respondent (now Appellant) to withdraw from the Commissioner certain application for ministerial consent to transfer the aforesaid plot to Peerbhai,

Alternatively

(b) Directing the Commissioner to disregard the said application,

3 Directing the Commissioner to consider and process the application lodged by the Respondent for ministerial consent to transfer the aforesaid plot to him.

4. Directing First Respondent (now Appellant) to pay the costs of this application on the scale as between attorney and client".

Despite opposition by the Appellant, the nature of which will presently appear, the Court a quo granted paragraphs 2, 2(b) and 3 of the orders sought and directed that the Appellant pay the Respondent's costs on the attorney and client scale. Hence this appeal which is levelled against the whole of the orders made by the Court a quo. I should add that the Commissioner of Lands, who was cited as a Respondent in the Court a quo, offered no opposition to the orders prayed and abided the decision of the Court.

The grounds upon which the Appellant opposed the application in the Court a quo appear from para. 3 of his opposing affidavit which I reproduce -

/(a) . .

" I respectfully aver that the said Deed of Sale is illegal for the following reasons

(a) The alleged property purported to have been sold by me to the Applicant in certain land described as certain site Nr. 33 situate in the TEYATEYANENG RESERVE in the district of BEREA together with improvements thereon. There being no private land ownership in terms of the law in Lesotho the said deed of sale is null and void.

(b) At the time of the said Deed of Sale the Certificate of Allocation (FORM D) held by me was null and void and of no force and effect and consequently the said Deed of Sale was rendered null and void and of no force and effect. I annex hereto marked "L" the said Certificate of Allocation.

The said Deed of Sale was, for the aforesaid reasons, and is therefore illegal and uneforceable.'

Save for an objection relating to a failure adequately to stamp the written contract, which defect was rectified and need not detain us further, the grounds quoted above were the only grounds relied upon by the Appellant before us.

There is no substance in these defences. The contention that the written agreement of sale was a nullity by reason of the law relating to land ownership in Lesotho has no foundation, the Appellant could not refer us to any law in Lesotho which prohibits the conclusion of an agreement of sale such as the parties entered into nor are we aware of any such law. Dotran, C.J., in this judgment, clearly explained

/the ...

the steps which needed to be taken to achieve the "lease and use" of land and pointed to the circumstance that although there was no mention of title deeds in Lesotho land legislation, rights in land could be acquired pursuant to agreements ordinarily concluded.

It was also contended, as a further reason for the alleged illegality of the contract, that no valid allocation having been made at the time of the sale there could be no agreement for the sale of land to which the seller had no title. According to common law, it is permissible to sell land belonging to another. Whether the seller will be able to perform what the sale requires him to do (i.e. give transfer in due course is a matter between the Seller and purchaser and does not affect the validity of the agreement. There is, as I have said, no statutory provision to the contrary

It is not necessary to enter into any discussion as to whether the grant of the interdicts would in effect constitute an order for specific performance - a question touched upon, in passing, by the Court a quo. I agree with the Court a quo that no reason was shown why the interdict sought should not be granted.

Finally, regarding the award of attorney and client costs in the Court a quo, although I might possibly not have made such an order, when applying the well-known tests for interference on appeal with the trial Judges' order as to costs, I cannot say that there was no reasonable ground for such award. The Court a quo referred to the Appellant's "surreptitious"

/dealing . .

dealing with another in order to resile from the agreement concluded by him, and to his delays and attempts to frustrate the Respondent's claims. It was conceded in argument that to take those factors into account did not constitute any irregularity or misdirection

The appeal is dismissed with costs.

S. MILLER
JUDGE OF APPEAL

I agree

W P. SCHUTZ
PRESIDENT OF THE COURT OF APPEAL

I agree

M. W. ODES
JUDGE OF APPEAL

Delivered at Maseru this 25th day of July, 1986

For the Appellant Mr. T. Hlaoli

For the Respondent Mr. J. A. Koornhof