

IN THE HIGH COURT OF LESOTHO

In the matter of

MAHOMED MHAISKER

v

FIDELIA REZANT
MAHOMED ASLAM ABUBAKER
COMMISSIONER OF LAND

1st Defendant
2nd Defendant
3rd Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 26th day of March, 1986

The Plaintiff is asking this Court to make a declaration that the transfer of lease No. 22124-005 from the First Defendant to the Second Defendant is null and void and order that the Third Respondent should transfer the said lease to the Plaintiff. In the alternative Plaintiff claims payment by First and Second Defendants jointly and severally of the sum of R50,000 damages for loss of occupation and use of the said improvements on the said site. Alternatively payment by First Defendant of the sum of R50,000 damages for breach of contract.

The Plaintiff has testified that on the 6th February, 1979 he and the First Defendant entered into a contract of purchase and sale of three houses belonging to the First Defendant (Seller) built on an unnumbered plot situated at Maputsoe. The terms of sale read as follows

- "1. The full purchase price of the aforesaid plot shall consist of the payment of R1,000 and a flat of block of eight rooms to be built for the SELLER on the site of the said SELLER lying adjacent rooms at MAPUTSOE, in the Moholisa area.

/2. That the....

2. That the said flat of block of eight rooms shall be built in the following manner
 - (a) materials to be used in the building of the flat shall consist of cement blocks, iron roofs and each room shall be fitted with one wooden door one window of six lights in front and one window of six lights at the back of each room. Each room shall be 9 feet by 10feet in dimension.
- 3 In the intervening period the SELLER shall make efforts to obtain the Certificate of Allocation, Form C, transferring the plot on which the houses for sale are built from her late father's name on to hers in preparation for ultimate transfer to the BUYER
4. R1,000 shall be paid to the SELLER by the BUYER after transfer of the site

The BUYER shall continue to pay R40 per month in rent, in respect of the houses on the plot forming the subject of SALE here until the building of the said flat has been completed upon which the payment of rent shall terminate."

The Plaintiff told the Court that the negotiations preceding the signing of the deed of sale were conducted on his behalf by his elder brother, Mahomed Kassim Mhaisker. Prior to entering into this deed of sale the Plaintiff had been a tenant of the First Defendant. He rented a building which he used as a butchery and paid a monthly rental of R40-00 He claims that he used to give the rental to Kassim and expected him to pay it to the First Defendant. He did this because he did not personally run the butchery but hired a person who managed it He worked for his brother-in-law and got a salary of R200 per month.

Under cross-examination the Plaintiff admitted that on the 6th February, 1979 when he signed the deed of sale he did not have any money in the bank but hoped that Kassim or his brother-in-law would help him to pay the sum of R1,000 stipulated in the contract and also to build the eight rooms in terms of the contract. At the moment he is not working. He denied that the First Defendant did not know him

/Mahomed

He had told her that he had some problems. The terms of contract of sale to the Second Defendant were the same as those of the deed of sale between her and Kassim.

At the close of the Plaintiff's case an application for absolution from the instance was made in respect of the Second Defendant. I granted the application because in his evidence Kassim told the Court that he never discussed the transaction between his brother and First Defendant with the Second Defendant. There was no evidence that the Second Defendant knew that the property had been conditionally sold to the Plaintiff.

The parties put different interpretations to the contract of sale which was handed in as Exhibit A. To me the terms of the deed of sale are simple and unambiguous. The first term describes the "full purchase price" of the plot. The purchase price shall consist of R1,000 and a flat of block eight rooms to be built by the buyer for the seller on the plot. The second term relates to the materials to be used in the building of the rooms and their size.

The Third term is more important. It states that in the intervening period the seller shall make all efforts to obtain a Form C (Certificate of Allocation) transferring the plot on which the houses for sale are built from her late father's name to hers in preparation for the ultimate transfer to the buyer. It is important to determine what period is covered by the phrase the "intervening period". It seems to me that the phrase refers to the period between the signing of the contract and the time the Form C in the name of the First Defendant is obtained. The fact that the Form C had been obtained had to be communicated to the Plaintiff because he could not start building before the transfer into the name of the First Defendant had been done. Regarding this point we have the word of the First Defendant against that of Kassim. She says that after she had obtained the Form C she

/communicated.....

Mahomed Kassim Mhaisker confirmed that he negotiated the terms of the contract of sale on behalf of the Plaintiff and made his role quite clear to the First Defendant. He denies that the signature in the deed of sale is his. He was present when the Plaintiff and the 1st Defendant signed the contract before Mr Lephoma who had prepared it for them. He claims that when he paid the rentals the First Defendant knew that he was doing so on behalf of the Plaintiff. All the receipts were issued in his name. He says that the First Defendant never told him that she had obtained transfer of the property from her late father's name to hers. She only came to him when she was coming to tell him that she had already sold the property to the Second Defendant.

Kassim further told the Court that at one stage after the signing of the contract the First Defendant unilaterally and contrary to the terms of the contract increased the rental from R40 to R50. When she again attempted to increase it from R50 to R60 he (Kassim) decided to retain one room and allowed the First Defendant to let the other rooms to other people.

The First Defendant's version is that throughout the transaction she had been dealing with Mahomed Kassim Mhaisker and she never had anything to do with the Plaintiff. She saw the Plaintiff for the first time in Court. She claims that the signature appearing in the deed of sale is that of Kassim. After she had obtained the relevant documents i.e. the Form C in her own name, she informed Kassim but the latter suddenly stopped paying rent and vacated the premises leaving his brother-in-law Osman. The First Defendant regarded this as a cancellation of the contract by conduct on the part of Kassim. She then sold the property to the Second Defendant during the middle of 1983. She says that when she told Kassim that she had obtained the Form C he said he would come with his father but he never came back.

/He had.

communicated this fact to Kassim who told her that he would come with his father. He also said he had some problems and stopped paying rent. Kassim denies this.

That at one stage Kassim suddenly stopped paying rent is supported by the copies of receipts handed in as exhibits by the First Defendant. The last R40 paid in accordance with the terms of contract was on the 3rd June, 1979. No payments appear to have been made for July, August, September and October, 1979. The next payment was made on the 6th November, 1979 and it was the sum of R50. On the 4th December, 1979 the First Defendant gave Kassim notice that because of his carelessness in the use of the rooms the rent would be increased to R60 with effect from the 1st January, 1980. The point I am trying to make is that documentary evidence does show that Kassim suddenly stopped paying rent in July, 1979 and that when he again started paying in November, 1979 it must have been under a different agreement because the rent was then R50. By agreeing to pay the new rent different from the original agreement Kassim was accepting that he was then a tenant under new terms.

It seems to me that Kassim would not have accepted paying new rent if he had not known that the original agreement had been cancelled because of his breach by failing to pay rent. He would have realized that the First Defendant was breaching the terms of contract by increasing rent which was stipulated in the contract.

The fourth term is also interpreted differently by the parties. It reads R1000 shall be paid to the Seller by the Buyer after transfer of the site. The buyer shall continue to pay R40 per month in rent, in respect of the houses on the plot forming the subject of Sale until the building of the said flat has been completed upon which the payment of rent shall terminate. It is the Plaintiff's contention that the intention of the parties was that the money paid as rent was to be deducted from the

R1000 stipulated as part of the purchase price. The First Defendant has denied this. The terms of the contract are very clear that payment of rent had nothing to do with the purchase price of P1000, rent was to be paid until the building of the rooms was completed and R1000 was to be paid after transfer of the property to the Plaintiff (Kassim). If the parties had intended that R40 rent must be deducted from the purchase price they would have said so. They deliberately said R1000 would be paid after transfer of the property to the Plaintiff.

I have no doubt in my mind that this case is a typical example of a case of error in persona. The Plaintiff and his brother Kassim have a common first name of Mahomed. The negotiations in this sale were conducted by Kassim, he paid rent and all the receipts were issued in his own name of Kassim, he occupied the rooms and one of the rooms was used as a butchery. The butchery was managed by an employee of the Plaintiff and it could not have been easy for the Second Respondent to know that the employee was working for the Plaintiff and not for Kassim who was in occupation of the premises. Another factor which caused the mistake was that even before the deed of sale was contemplated Kassim was already the tenant of the First Defendant and was paying rent in his own name.


The question is whether or not the identity of the parties, especially the Plaintiff was a material element of the contract. If it was a material element of the contract error in persona will vitiate consent (Stephen v Pepler, 1921 E D L. 70). In her evidence the First Defendant said that if she had known that she was dealing with a boy of about 18 years of age, she would not have entered into this contract. At the relevant time the Plaintiff was a minor who had to be assisted by a guardian. It has been suggested that the Plaintiff was emancipated because he had been allowed to trade in his own name. The problem with this submission is that the Plaintiff and his elder brother have a common first name. His elder brother has several businesses in the Leribe district

/The butchery...

The butchery at Maputsoe could well be one of such businesses. If the licence is in the name of Mahomed Mhaisker, it may refer to any of them. I come to the conclusion that the identity of the Plaintiff in the instant case was a material element of the contract which had to be disclosed. Kassim behaved in a rather strange way because if he was paying rent on behalf of the Plaintiff it was his duty to see to it that the receipts are issued in the name of the Plaintiff. It seems to me that he deliberately misled the First Defendant into believing that he was dealing with him (Kassim)

It has been submitted on behalf of the Plaintiff that the fact that the contract was cancelled was never communicated to the Plaintiff (Swart v Voslon, 1965 (1) S.A. 100 (A.D.)). The First Defendant told the Court that after she had obtained the Form C she informed Kassim. By so doing she placed him in mora but he did not perform part of his contract. According to the contract he was supposed to start building the rooms as soon as the Form C in the name of the First Defendant had been obtained. Instead he stopped paying rent and vacated the premises. The First Defendant was entitled to accept that Kassim had cancelled the contract and to sell the property to whoever was interested. There is evidence that the First Defendant sold the property to the Second Defendant for the same purchase price that had been accepted by Kassim.

The Plaintiff's claim is dismissed with costs.


J L KHEOLA
J U D G E

26th March, 1986.

For Plaintiff - Dr. Tsotsi
For Defendant - Mr. Snyman