

IN THE HIGH COURT OF LESOTHO

In the matter between:

ARCHIE SALLEY

Applicant

and

UDO STATTSBUCHLER

Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice J.L. Kheola  
on the 14th day of March, 1994

On or about the 9th day of March, 1983, the applicant entered into a written Deed of Sale with the respondent, in terms of which, what was known as Plot 38, Cathedral Area, now known as Plot 13283-391 situated at Cathedral, Maseru Urban Area, was sold to the respondent (See Annexure "A" to the opposing affidavit).

There was an addendum signed by parties on the 25th day of April, 1983 (See Annexure "B"). The purpose of entering into the addendum was simply to formalise the interim arrangement and occupancy by the respondent of the premises in dispute, during the interim period between occupation and registration of transfer.

During 1983 the respondent enjoyed the status as a permanent resident of Lesotho and therefore satisfied the provisions of Section 6 (1) (b) of the Land Act 1979.

Shortly thereafter, it was agreed by and between the respondent and one Mrs. Elsa Haederli, his business partner, that Haederli would in fact take transfer instead of the respondent. She also successfully applied, shortly thereafter, for permanent resident status, in order to satisfy the provisions of Section 6 (1)(b) of the Land Act 1979.

Shortly thereafter, pursuant to this arrangement between the respondent and Haerberli, a cancellation agreement was entered into between the applicant and the respondent, in terms of which the agreement previously entered into between the applicant and the respondent, would now be substituted and Haederli would become the transferee. She duly entered into a Deed of Sale with the applicant after the cancellation agreement had been signed by the applicant and the respondent (See Annexure "C" and Annexure "D').

In terms of Clause 2 of Annexure "A" the purchase price was to be effected against registration of transfer of the sellers lease into the name of the purchaser.

After the 27th day of April, 1983, and before the second transaction was signed between the applicant and Haederli, the purchase price had in fact been paid in full to the applicant by the respondent (See Clause 3 of Annexure "D").

It is common cause that Haederli had already taken occupation by the 6th March, 1986 together with the risk of profit and loss. Their Deed of Sale with the applicant provided that should transfer not be effected for whatever reason, the original agreement between the applicant and the respondent would be reinstated. The transfer of the property into the name of Haederli was not effected before certain amendments to the Land Act 1979 were promulgated in 1987. Under the amendment Haederli was disqualified from holding title to land. It follows that the agreement between Haederli and the applicant became null and void, and that the original agreement between the applicant and the respondent was reinstated. That agreement would also have to suffer the same fate as that between Haederli and the applicant inasmuch as the respondent was disqualified from holding title to land because he is not a citizen of Lesotho who is a Mosotho.

It seems to me that at the present moment there is no valid Deed of Sale between the applicant and the respondent. The property in question has never been transferred into the name of

the respondent. What ought to have happened is that as soon as it became clear that the respondent did not qualify to hold title to land, the applicant should have claimed restoration of his property. In that case he ought to have refunded the purchase price. But that was not the procedure followed by the parties. Some new negotiations took place concerning the new price and the rentals to be paid by the respondent. Such negotiations failed. At the present moment the respondent or Haederli are still in occupation of the property. They are not paying any rent because according to the agreement between the parties rent was to be paid while the purchase price was still outstanding.

It is common cause that the purchase price in the sum of M75,000-00 was paid even before the Deed of Sale between the applicant and Haederli was entered into. During arguments of this matter before Court on the 4th November, 1993, Mr. Sello, attorney for the applicant, abandoned prayer 2 of the Notice of Motion which directed the respondent to pay to the applicant M900-00 rent per month from the 1st January, 1989 to date of restoration of possession of the property to the applicant.

It is common cause between the parties that the respondent and/or Haederli had effected certain improvements to the property which is still registered in the name of the applicant to the sum of M40,000-00. There is nothing in the papers to suggest that

there was express prohibition against effecting improvements without consent (Volker v. Maree), 1981 (4) S.A.651). The applicant has not made any tender as far as the improvements are concerned in bringing this application. (Silberberg and Schoeman - The Law of Property p. 479).

I am of the view that if the applicant succeeds in this application he will be required to pay for the improvements. On the other hand the respondent and/or Haederli have been using the property in question without paying any rent since 1987 when it became very clear in terms of the Land Act 1979 (as amended) that they could not hold title to land in this country. They remained in occupation and possession of the property on the understanding that they would form and register a company which would comply with the provisions of section 6 (c) of the Land Act 1979 (as amended). That has apparently not been done because such a company would have to enter into a new Deed of Sale with the applicant. The respondent and/or Haederli have never had a title to hold the property in dispute. They may have paid the purchase price and obtained a Ministerial Consent but there has been no transfer of title from the applicant into their names.

Section 84 of the Land Act 1979 reads as follows:

"(1) Any person who:-

(a) at the commencement of this Act held a title to land but is by reason of section 6 disqualified from so doing;

(b) by reason of loss of citizenship or otherwise ceases to be qualified to hold title to land,

shall continue to hold the same for a period of 12 months, and may during that period and with the consent of Minister cede his rights to a person qualified under section 6.

(2) A person who fails to become qualified or to cede his rights within the period of 12 months mentioned in subsection (1) shall, unless his title has been earlier terminated, be entitled to receive the value of all improvements lawfully made on the land upon the expiry of the 12 months' period and the then consequent reversion of his interest in the land to the State."

The respondent and/or Haederli have never held title to the property in question. They were merely in the process of acquiring title to the property when the amendment to the Land Act came into force. They cannot be protected by the provisions of Section 84 because that section deals with people who held title to land at the commencement of this Act. The company which

they intend to register or which they have already registered will not automatically take over from where they were stopped by the amendment to the Land Act. It will have to enter into new Deed of Sale with the applicant.

The parties have already reached a deadlock as far as the new Deed of Sale is concerned. In the meantime the respondent and/or Haederli continue to use the premises without paying any rent. For how long should this state of affairs be allowed to continue? The respondent and/or Haederli are being greatly enriched at the expense of the applicant.

In the present application I shall not determine the damages suffered by each of the parties. They shall be free to bring an action and claim whatever damages they think they have suffered.

In the result I make an order in terms of prayer 1 with costs of suit on condition that the applicant pays M40,000-00 to respondent for the improvements.

  
J.L. KHEOLA  
JUDGE

14th March, 1994.

For Applicant - Mr. Sello  
For Respondent - Mr. Fischer.