CIV\APN\488\95

IN THE HIGH COURT OF LESOTHO

In the matter between :

| | |
|---|---|
| AFSAL ABUBAKER | Applicant |
| and | |
| ZUBEDA ISSA | 1st Respondent |
| BARCLAYS BANK P.L.C. | 2nd Respondent |
| COMMISSIONER OF LANDS OF LESOTHO | 3rd Respondent |

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 26th day of June 1995

The two agreements between the parties dated 15th November, 1993 read at clause 13:

> "The agreement constitutes the whole contract between the parties and no variation of the terms thereof shall be binding on the parties unless set out in writing and signed by both parties."

These agreements concern the sale in respect of the rights in and to lease No. 17684-142 situate at Quthing and secondly, in

respect of the rights in and to lease No. 17684006 to the land described as plot no. 17684-006 situate at Quthing. It is common cause that the 1st Respondent sought to cancel the agreements and to take possession of the properties. It is also common cause that no notice has been given in terms of the agreements. The reason given by the 1st Respondent for the cancellation of the agreement is that the original agreed purchase price was varied and the agreement amended to reflect the reduced purchase price subject to the payment of the difference in terms of the collateral agreement for payment of additional M400,000.00.

The two agreements contained the following items in a summary form. That the application for ministerial consent shall be made in terms of section 35(1) of the Land Act 1979 and only if the application should be unsuccessful the agreements would be null and void. Possession of the property was to be given to the purchaser upon signature of the Deed of Sale. Occupation was given by the First Respondent to the Applicant on the 15th day of November 1993. It was stipulated that should Applicant fail to comply with any of the terms and conditions of the agreement the First Respondent had to give Applicant Fourteen (14) days notice calling upon Applicant to remedy such breach and should Applicant fail to do so the First Respondent would be entitled to institute action against Applicant to compel him to fulfil the obligation in terms of the agreement and to claim such damages

as the First Respondent may have suffered. Applicant submits therefore that there is no basis agreed upon in terms whereof the First can cancel the agreement and take possession of the properties. The M250,000.00 that the Applicant caused to be paid by the Second Respondent was to be paid back to the Applicant as Applicant deposed in his Affidavit. The First Respondent on the 24th November 1993 stated in her letter that :

> "There is no agreement between you and our client Mrs Issa and she shall deal with the properties in question in her sole and absolute discretion and without further reference to you."

Applicant says that on the strength of the agreement he had made arrangements for rentals of the properties to be paid out to him. He had then taken possession. It is in the letter of the 26th November 1993 that the Respondent had demanded for payment of a certain M400,000.00 again referring to a letter of the 24th November 1993 (Annexure H). It was also following on a letter to the Commissioner of Lands by First Respondent's Attorneys of the 30th November, 1993 that advised that

> "sale of above properties has become abortive, you are therefore advised not to effect transfer of the said properties, as she is no longer prepared to transfer

her interest therein. The reason being that the said Abubaker has failed to fulfil his obligation precedent to the intended transfer.

You are equally notified to advise the Honourable Minister to withhold ministerial consent sought for the said transfers.

By copy of this letter, Messrs Webber, Newdigate are accordingly notified and advised not to proceed with any transfers of the said properties, pending the institution of an urgent application for annulment of sale agreements."

The Applicant was thus compelled to approach this Court on the 8th December 1993. On that day an Order was granted in terms of the notice of motion, thus *inter alia* prohibiting First Respondent to alienate or encumber the two properties, to restore Applicant in possession of the properties and furthermore declaring that First Respondent purported cancellation of the agreements in respect of the said properties is of no force and effect. The remainder of the prayers are not so important to the ruling I have been asked to make.

The parties have on the 24th October 1994 argued the

following question of law to be dealt with first and separately from any other question in terms of Rule 32(7), the question being:

> "Whether on the version of the Respondents herein, together with such facts as are common cause, the Applicant is entitled to the relief set out in the Notice of Motion."

This application is made against the background of a decision I made in the instant matter on the 1st June 1994 that the matter is referred to trial, to hear *viva voce* evidence on the alleged collateral oral agreement which allegedly brought about the written agreement. Most specifically the circumstances that brought about the written agreement in relation to whether there was this oral agreement or both. This was based on the South African case of JOHNSTON vs LEAL 1980 (3) SA 927 (AD). This case dealt with the partial integration of a transaction between the parties, leaving the remainder as an oral agreement. In such a case the Court held that the effect of the parole evidence rule was to prevent the admission of extrinsic evidence to contradict or vary the written portion and did not preclude proof of additional or supplementary oral agreements (see page 944 at c). The evidence which the Court allowed in that case was to explain omission in the written document (as opposed to evidence which

contradicted it) (see paragraph 943 F of the judgment). To that extent it seems that it is to be distinguished from the instant case.

By the version of the 1st Respondent of the facts, this was understood to include the contents of the affidavit of Mrs Estelle Barnard. This is a supplementary affidavit where the 1st Respondent sought unsuccessfully to have admitted. The importance of the affidavit is that it reflects the circumstances and the transaction of the alleged oral collateral agreement which the 1st Respondent brought about the two written agreements which have been referred to earlier in this judgment. Mr. Penzhorn for the Applicant submitted that even dispite the First Respondent's version (Mrs Bernard's affidavit inclusive) the Applicant would still be availed of the remedy be sought on the basis of the exclusionary principle of the parole evidence rule. It is on the basis of the evidence before Court Mr. Sappire submitted that again if the existence of the oral agreement was proved this would also amount to proof of fraudulent intention and that it had never been the intention of the Applicant to pay up the amount of M400,000.00. The effect of this would be that, after all, the First Respondent was entitled to cancel the agreement, the Applicant having repudiated by conduct. First Respondent contended further that the agreement "became abortive" because the balance agreed to in a separate oral agreement was

not paid.

It is perhaps, necessary to quote the most relevant paragraphs of the affidavit of Mrs Barnard, to illustrate the attitude of the First Respondent.

"5

I consulted in the afternoon of 15th November 1993 with Mr. Zubeda Issa, Mr. Farouk Issa and Mrs A. Abubaker. The initial instruction was as indicated in the telephone conversation of Mr. Issa to Webber set out in 4 above. I accordingly had prepared draft Deed of Sale, one for each of the properties, including the purchase price for the rights in and for lease No. 17684-142 as M600,000.00 and the rights in lease No. 17684-006 as M750,000.00.

6

During the course of the consultation the parties indicated that they wished to reflect the purchase price at lower amounts and that a separate payment would be effected by the purchase to the seller of the difference. I advised and stated to the parties that I required from them that they inform me what amounts they wanted to be inserted in the Deed of Sale. Any

further arrangements or dealings they may have would be directly between the parties. The existing Deed of Sale as amended, reflect the reduced amounts, subject to what the parties had agreed to.

7

The parties instructed me that the amount were to be changed to M450,000.00 in respect of lease No. 17684-006 and M500,000.00 in respect of No. 17684.142. The parties and particularly Mr. Abubaker were insistent that the documentation be signed that day, 15th November, 1993. The Deeds of Sale in respect of each of the properties together with the declarations by the seller and by the purchaser of transfer duty purposes and the powers of attorney by the seller and the affidavit as to date of birth by the purchaser, together making up the transfer documentation, were duly signed by the parties." (my underlining)

The purchase price which the Applicant associates with is confirmed by other documents filed in pursuance of the application for minister's consent and other supporting documents. Suffice it to say that the fact of alleged agreement to show lesser sums in purchase price and that the balance would be paid in due course are denied by the Applicant. He deposed

that the agreement as shown in the written Deeds are the only agreements and there is nothing else. The First Respondent contended that the purpose of lowering the purchase prices was to enable that lower duties or taxes would be paid to Government when later such dues would fall for payment. This again was denied by the Applicant not only does Applicant submit that it is not permissible to prove such oral agreement, even if it is proved it is incapable of denying the Applicant the remedy he seeks based on the written contract. It should not frustrate the written contract.

I am satisfied that the Applicant under Rule 32 (7) for a separate determination of the issue specified is well placed. There being a different question from whether the application would succeed. I believe that this matter referred to in the application is not a triable matter strictly speaking. To that extent the application would still be suitably made where in application proceedings such as the present a point stood over for resolution by *viva voce* evidence as this Court had on the 1st June 1994 ordered the request in the application is: to "order that all further proceedings be stayed until such question is disposed of. It being a question of convenience". I agree with Mr. Penzhorn's submission that the test to be applied to be found in the (then) identical South African Rule 33(4) as authoritavely set out in MINISTER OF AGRICULTURE vs TONGAAT GROUP 1976 (2) SA

357(1) where at page 363D the following passage is to be found:

> "The word "convenient" in the context of Rule 33 (4) is not used I think in the various sense in which it is sometimes used to convey the notice of facility or expedience. It appears to be used to convey also the motion of appropriateness, the procedure would be convenient if, in all circumstances, it appeared to be fitting and fair to the parties concerned (see also LAW SA Vol. 3 1st Edition paragraphs 264 and 449). The other consideration which I accept, is that if the issue is decided in favour of the Plaintiff it would bring an end to the litigation with a commensurate saving of Court's time and costs. This being what the Rule 32(7) strives for (See also SANTAM VERSEKERINGMAATSKAPPY BPK vs NTSHONA 1974(4) SA 290 (c))

It is common cause that it is this transfer of the properties which the Applicant seeks to have given effect to, which is resisted by the 1st Respondent as "having become abortive" on the basis of an additional consideration (M450,000.00) despite the fact that such consideration is not reflected in the two written documents and more importantly, despite the fact that such additional consideration seemingly in

conflict with clause 13 of both documents which both read:

13

NO VARIATION

This agreement constitutes the whole contract between the parties and no variation of the terms hereof shall be binding on the parties rules set out in writing and signed by both parties". (my underlining)

The matter is then brought squarely within the ambit of the parole evidence rule; the general rule being that a document is conclusive as to the terms of the transaction which it was intended or required by law to embody as a matter of substantive law.

The effect of this rule as Mr. Penzhorn submitted is to render the collateral oral agreement even if (it is proved to exist) irrelevant where a party seeks to rely on the terms and conditions of the written agreement. Secondly the party seeking to rely on the separate collateral agreement can do so entirely separately without frustrating the execution of the conditions embodied in the written document. The question would be what useful purpose would be served by the quest to prove the existence of the collateral agreement if one party professes not

to be bound by it and the rule further provides that the evidence to prove such an agreement is inadmissible.

The parole evidence rule is formulated by Wigmore, in the 3rd edition of Evidence, Vol.9 at section 2425 as follows:

> " This process of embodying the terms of the jural Act in single memorial may be termed the integration of the act, i.e. its formation from scattered parts into an integral documentary unity. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect, they are replaced by a single embodiment of the act. In other words: <u>when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act."</u> (my underlining)

Another formulation of the rule is to be found in the 11th edition of Phipson or Evidence on page 795 at paragraph 1781, as follows:

> "When a transaction has been reduced to, or recorded in writing either by requirement of law, or agreement

> of the parties, extrinsic evidence is, in general inadmissible from the terms of the document to contradict, vary, add to or subtract from the terms of the document." (my underlining)

(See also LOWREY vs STEEDMAN 1914 AD 532 at 543 and MARQUARD & CO. vs BECCARI) 1921 AD 366 at 373) The underlined words briefly mean that extrinsic evidence must not be such as to effect a change in the written words being terms or conditions of the agreement. In UNION GOVERNMENT vs VIANINI FERRO-CONCRETE (PTY) LTD 1941 AD 43 in commenting about a similar problem Watermeyer JA held as follows at page 47:

> "Now this Court has accepted the rule that when a contract has been reduced to writing, the writing, is, in general, regarded as an exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence." (my underlining

(See also NATIONAL BOARD (PRETORIA) (PTY) LTD v ESTATE SWANEPOEL 1975 (3) SA 16 AD at page 267 B-C) The view is also held that the

effect of the rule can sometimes lead to in-justice if vigorously applied, by excluding evidence of what the parties really agreed.

Not only does the 1st Respondent seek to resist the Applicant's claim she claims an additional term, such being the additional consideration of M450,000.00 such can be proved as an exception to the parol evidence rule, if it can be proved at all, only where it does not contradict the written agreement. The following passage appears in the said Phipson's work in paragraph 1790 on page 800 :

> " Where a contract, not required by law to be in writing, purports to be contained in the document which the Court infers was not intended to express the whole agreement between the parties, proof may be given of any omitted or supplemental oral term, expressly or impliedly agreed between them before or at a time of executing the document, <u>if it be not inconsistent with the documentary terms</u>." (my underlining)

So that a departure can be seen when compared with the statement underlined in UNION GOVERNMENT vs VIANINI FERRO - CONCRETE'S case here the distinguishing factor is the requirement that the oral term must not be inconsistent with the documentary terms.

The word inconsistent is defined in the Concise Oxford Dictionary as meaning: "acting at variance with ones own principles or former conduct, not in keeping, discordant, incompatible, having self-contradictory parts." I would say that I am rather puzzled as to how a Court would be enabled to infer that the document was not intended to express the whole agreement between the parties as a basis for taking the step following which is the giving of proof unless the inference is to be gathered from the papers as they stand. I am settled however in understanding the Applicant's submission that inconsistent and in conflict may actually mean <u>different</u> hence the use of the <u>words to contradict, vary, add to or subtract from</u> the terms of the document. (See Phipson as quoted at paragraph 1781 on page 795". I would further understand that where there are two opposite versions they are in conflict, whether they are irreconcilable or mutually destructive being another consideration or investigation.

It seems that the real problem is what has frequently troubled the Courts namely the interlocked question of whether evidence may be given to prove a collateral oral agreement and whether evidence may be given to prove additional consideration. It means as in the instant case that a term is sought to be proved where such matter is already dealt with in the written document. It means that on the interpretation of the word conflict what is being sought is the introduction of evidence in

conflict with the document. This was held in DU PLESSIS vs NEL 1952 (1) SA 513 AD where such a term was held to be inadmissible being a prior oral term which was collateral and induced the written agreement. The following passage appear from the judgment of Centlivres CJ at 579H - 520A :

> " From all this it is clear that although a prior parole agreement is collateral to a written agreement and induced the written agreement, it does not per se follow that the parole agreement is admissible in evidence in order to found a cause of action on that. It is admissible in evidence only when its terms do not conflict with the terms of the written agreement."

I would myself hold that such evidence would not be admissible to found a defence such as to frustrate the execution of the written agreement. This is more so where such evidence is sought to be led in support of a defence involving *exceptio doli* where such evidence would be in conflict with the written document. See page 839 thereof at 840 E of the judgment. Reference is made in particular to the following passage in the judgment of Smit JP at 840 C :

> "It might equally be unconscionable for Respondent to admit signing a written agreement and to wish to put

up a contemporaneous oral agreement altering, varying or adding to the written terms. In my view *exceptio doli* cannot be involved by reason only of the alleged oral agreement."

Going back to the judgment of Du plessis vs Nel the following appear furthermore, at 534 G 535 A.

"I do not think it was ever intended to convey that where an instrument recording or constituting a sale states that the purchase price is $2,000 or that the subject matter of a sale is land without encumbrances evidence of prior or contemporaneous oral agreements may be led to prove that the purchase price was fixed at some other figure or that land is subject to savitude. Such a construction would frustrate the objects of the general rule, for if additional consideration in that sense may be proved by parole evidence, I cannot see or what general principle additional promises or promises with greater content than those stated in the deed, may not likewise be proved in which case we may as well do without written instruments."

In that case valid statements are made (which I approve of) of

the danger of negating lawful agreements and avoiding contracts by contending the existence of verbal collateral agreements. Furthermore that it is a different thing where no consideration is mentioned at all where then there would be need to prove such consideration aliunde. But proof would not be allowed of "enlarged consideration" which would have the effect of enlarging or contracting the terms of the written instrument. "If you wish to prove that anything less or more than that which is promised in the written contract was promised in an oral contract prior to or simultaneously with the execution of the former you seek to contract, vary, add to or subtract from the terms of the instrument, if words mean anything, and if that were permissible, the rule would be cast overhead." See DU PLESSIS vs NEL supra page 538-A.

The first Respondent's reason for a lower amount having been inserted in the agreement is that this was an agreed stratagem to attract lower taxes or levies on transfer and other process. In STRYDOM v PIENAAR 1956 (3) SA OPD the Court refused to allow oral evidence where the allegation was that the lower price was inserted to avoid duties which were payable, holding that to do so would be in conflict with the rule or defined in DU PLESSIS vs NEL (see page 53 7-B-H). As said hereinbefore it is a different case where these gaps or omissions in a written document (as opposed to evidence which contracted or vary the

document. JOHNSTON vs LEAL 1980 (3) SA 927 (AD) was such a case. There the Court dealt with partial integration of a transaction between the parties, leaving the remainder as an oral agreement. In such a case the Court held that the effect of the parole evidence rule was to prevent the admission of extrinsic evidence to contradict or vary a written portion. It did not preclude proof of additional supplementary agreements the purpose of which were in that case to explain omission in the written document. But this would not be permitted to explain the existence of an prior oral agreement or an alleged fraud or as an attempt to prove a fraud. The understandable effect of such a situation if it would be proved would be not to negate the validity of the written contract on the basis of which the present Applicant proceeds in his prayers. In other words the agreement as contained in the written agreement is independent of the existence of the alleged oral agreement. Whether or not either by way of a counter-claim or otherwise, the First Respondent can enforce the alleged oral agreement. This is so to such an extent that there need not be a frustration of the written agreement, which must be given effect.

The First Respondent is bound to what she signed unless she can indicate that there was a variation of the terms in writing signed by both parties. The argument that oral evidence cannot be relied upon in conflict with in particular, clause 13 of the

respective agreement is valid. The principle applicable has often been referred to in the Court of South Africa as the SHIFFREN STRUCTURE (See SA SENTRALE KO-OP MAANMAATSBAPPY BPK vs SHIFFREN EN ANDERE 1964(4) SA 760(A). In accordance with the principle it is irrelevant what the First Respondent contends when saying that evidence of an oral agreement ought to be led. Where the agreements read "Any amendments to this agreement shall be in writing and signed by both parties" and "The agreement constitutes the whole contract between the parties and no variation of the terms thereof shall be binding on the parties unless set out in writing and signed by both parties," the agreement cannot be varied other than by another signed agreement. The principle that the contract could not be amended orally has been followed through all the years more particularly that contracts entered freely and voluntarily ought to be enforced by Court of justice unless there is evidence that they have been varied in the manner described in the written agreements themselves (see STANDARD BANK OF SA LTD vs WILKINSON 1993 (3) SA 822 (c) at 830 (E), VAN TONDER EN ANDERE v VAN DER MERWE EN ANDERE 1993(2) SA 552 (a), BARCLAYS WESTERN BANK vs ERNEST 1988 (1) SA 243 (A) AT 2531. PLASCON-EVAN PAINTS (TRANSVAAL) LTD vs VIRGINIA GLASSWORKS (PTY) LTD & OTHERS 1983(1) SA 460(O) and NEDFIN BANK LTD vs MULLER & OTHERS 1981 (4) SA 229 (DTC) at 232 D.

Once the Respondent fails on the need to prove existence of another or prior oral agreement, which is a basis for alleged repudiation and a ground for wanting to cancel I did not see any entitlement to lead evidence to establish his entitlement to rectification. Even assuming that such evidence would be available and able to prove the existence of the alleged additional agreement that would not stand in the way of the Applicants asking the First Respondent to perform part of her bargain. The evidence on affidavit by ESTELLE BARNARD which was sought to be tendered to confirm and corroborate the circumstances alleged by the First Respondent in which the agreements were signed, which circumstance the First Respondent contends entitled her to lead evidence of the true intention of the parties and to rectification of the agreement, such evidence that would not be allowed on the principles advanced above. The effectiveness of the parole evidence rule in the circumstances of the instant matter seems to extent to the situation that even if the First Respondent's version be true the Court seems to be precluded (in the logic of the rule) to investigate the matter except if it was brought by way of a counter-claim. By way of emphasis. the existence of the prior oral agreement would not frustrate the claim of the Applicant based on the agreement as it stood and not varied after the date on which it was signed. I do nor see that contention that there was a mistake common to both parties would be valid.

I thought and understood that the First Respondent's defence and the success of the Applicant's claims depended on whether or not the First Respondent would be entitled in law to cancel the agreement. Once she was not so entitled (having canvassed each and every aspect of the Application) the Applicant's claims ought to succeed with costs. This takes into account the other aspect already decided which concerned the validity of the agreements themselves tested against the alleged condition that the validity of such agreements depended on the issuance of the Minister's consent.

This application is allowed with costs.

T. MONAPATHI
JUDGE

26th June, 1995

For the Applicant : Mr. Pennhorn

For the Respondent : Mr. Sapire