

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.28/2014

In the matter between

‘MASERAI KOBELI

APPELLANT

And

JOSEPH MOSENEKE MOSENEKE

1ST RESPONDENT

AMDEE ESTATES (PTY) LTD

2ND RESPONDENT

DEPARTMENT OF LANDS AND SURVEY

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

CORAM : SCOTT, AP
THRING, JA
LOUW, AJA

HEARD : 9 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

Widow of deceased to whom she was married in community of property seeking ejectment of respondent in occupation of property registered in name of deceased – respondent relying on deed of sale – sale concluded without knowledge or consent of widow – sale not shown to be valid – respondent failing to establish he did not know or could not reasonably have known that widow had not consented to the sale.

JUDGMENT

SCOTT AP

[1] The appellant is a sixty-eight year-old widow whose late husband, Mohloai Kobeli, to whom she was married in community of property, died on 14 October 2010. The said Mohloai Kobeli, to whom I shall refer as the deceased, was the lessee of certain immovable property known as plot Number 13281-489 situated in Maseru East under a lease granted to him in 1987 by the Minister of the Interior acting on behalf of and with the authority of His Majesty the King. The lease was an

asset in the joint estate of the appellant and the deceased.

[2] By notice of motion dated 25 March 2011 the appellant sought ex parte orders inter alia declaring the first respondent's occupation of the said property to be an infringement of her right to occupy same, directing him to vacate the property and directing the third respondent, the Department of Lands and Survey, to cancel any consent to the transfer of the lease of the property to the first respondent that might have been issued. On the same day **Mahase J** granted a rule nisi and interim order returnable on 4 April 2011.

[3] In her founding affidavit the appellant explained that on 21 March 2011 she was told by a friend that building operations were being carried out on the said property. The following day she herself visited the site and observed that it was the first respondent who was engaged in the building operation. On 23 March 2011 the appellant visited the office of the third respondent where, she said, the latter's records revealed that the site had not been transferred to the first respondent and that no ministerial consent had been granted for such a transfer. She also "*noticed*" the name of an estate agent,

Amdee Estates (Pty) Ltd, in the records she examined and accordingly cited that company as the second respondent.

[4] In his answering affidavit the first respondent says that the deceased “sold” his “*property lease*” to him as evidenced by a deed of sale, a copy of which he annexed to his affidavit. In terms of the deed, dated 5 November 2007, the deceased, who was represented therein by the second respondent “*by virtue of a special power of attorney dated 5 November 2007*”, sold his leasehold interest in the said property to the first respondent for a purchase price of M150.000. The special power of attorney, a copy of which is also annexed, is dated 25 September 2003. The reference to the date, 5 November 2007, in the deed of sale as the date of the power of attorney, would seem therefore to be an error. In terms of the power of attorney, which is stated to be irrevocable, the deceased authorised the second respondent to accept on his behalf any reasonable offer not less than M35 000 for the property and to “*to sign and execute any agreement of purchase.*” It appears to bear the signature of the deceased and, as I have mentioned, is dated 25 September 2003, being a date

prior to the enactment of the Legal Capacity of Married Persons Act, 2006.

[5] In terms of the deed of sale which was signed by the second respondent on behalf of the first respondent, possession was to be given to the first respondent “*on payment of the full purchase price.*” Also annexed to the answering affidavit are two receipts of payment, both of which appear to be signed by the deceased. The one dated 3 May 2004, is for payment of M5000.00 and the other, dated 15 June 2004, is for payment of M8250.00 and is said to be the “*final payment for my site situated at Maseru East.*” Three further documents were annexed to the first respondent’s answering affidavit. The first was a copy of the relevant page (and the embossed title page) of the original lease granted to the deceased by the Minister of Interior on behalf of and with the authority of His Majesty the King. The other two documents were copies of consents to the transfer of the lease by the Commissioner of Lands. One was dated 18 November, 2010, the other 29 March 2011. The reason for the second was that the transfer had not been effected within the period specified in the first consent.

[6] The answering affidavit contains no explanation for the fact that the two payments referred to (presumably the final two payments) were made some three years prior to the date of the deed of sale. A possible explanation is that the purchase price was paid in instalments in anticipation of the conclusion of a written agreement of sale or in terms of an oral agreement which was subsequently reduced to writing for the purpose of effecting transfer of the lease. But the truth of the matter is that the first respondent has not seen fit to tender any explanation for the three year gap between the final payment and the signing of the deed of sale.

[7] In her replying affidavit the appellant denied that the signature appearing on the power of attorney and the two receipts were those of the deceased. In support of her denial she simply annexed copies of three other documents bearing the signature of the deceased. In the absence of expert evidence it is not possible to conclude that the two sets of signatures were made by different persons. Although not an expert in the field, they look remarkably similar to me. The learned judge in the court a quo found himself in a similar position. He remarked:

“I am not a handwriting expert. I am not blind either and I am able to judge by observation and comparison. I am unable to see what difference the applicant sees in the sets of signatures presented by the respondent and those presented by herself.”

However, in this Court **Mrs Kotelo KC**, who appeared for the appellant, did not attempt to persuade us otherwise and accepted that the signatures on the receipts and the power of attorney were indeed those of the deceased.

[8] Although transfer of the lease into the name of the first respondent had not yet been effected, the latter’s contention was that this was of no consequence because once the purchase price had been paid he became entitled in terms of the deed of sale to take possession of the property and the appellant accordingly lost any entitlement she might have had to the relief claimed in the notice of motion.

[9] In this Court **Mrs Kotelo KC** contended that the deed of sale was invalid by reason of the provisions of the Legal Capacity of Married Persons Act, 9 of 2006 (“the

Act”) and that accordingly no reliance could be placed on its terms entitling the second respondent to possession of the property. It is common cause that when the power of attorney was signed the consent of the appellant was not required. But, as I shall show, it was required in terms of the Act (subject to certain exceptions that are not applicable) by the time the second respondent signed the deed of sale purporting to act in terms of the power of attorney. A mandatary under a power of attorney can do no more than that which the mandator himself can do. It follows that because by 2007 when the deed of sale was signed, the mandator (the deceased) would have required the consent of the appellant, the mandatary (the second appellant) would similarly have required that consent. The appellant’s case is that she had no knowledge of the sale or, for that matter, the power of attorney. This is not denied by the first respondent and it must accordingly be accepted that she did not consent to the sale.

[10] It is necessary to return to the Act. The relevant provisions of section 7 (1) read –

“Notwithstanding subsections (4) and (5) and subject to sections 11 and 12, a spouse married in community of property shall not, without the consent of the other spouse –

- (a) alienate, mortgage, burden with a servitude or confer other real right in any immovable property forming part of the joint estate;*
- (b) enter into any contract for the alienation, mortgaging, burdening with servitude or conferring of any other real right in immovable property forming part of the joint estate;.....*

Section 11 makes provision for the court to grant consent if the consent is unreasonably withheld or cannot be obtained. Section 12 gives the court the power to suspend in certain circumstances a power afforded to a spouse under the Act. Subsection 7 (4) makes provision for the consent required under subsection 7 (1) (b) to (j) to be given by way of ratification within reasonable time after the performance of the act. Subsection 7 (5) makes provision for certain exceptional situations where

consent of the other spouse is not required. None of these provisions is relevant in the instant case.

[11] Section 8 deals with the consequences of an act performed without the required consent. The relevant provisions read –

“8. (1) If a spouse married in community of property enters into a contract with another person without the consent required under section 7, or without leave granted by court under section 11, or contrary to an order of court under section 12, and –

(a) that other person does not know or could not have reasonably known that the contract is entered into without such consent or leave or in contravention of the court order, the contract shall be deemed to have been entered into with the required consent or leave or while the power of the concerned spouse has not been suspended;

- (b) *that spouse knows or ought reasonably to have known that he or she will not obtain such consent or leave or that the power concerned has been suspended,*

and the joint estate suffers a loss as a result of that contract, an adjustment shall be effected in favour of the other spouse –

- (i) *upon division of the joint estate; or*
- (ii) *upon demand of the other spouse at any time during the subsistence of the marriage.”*

It will be observed that the section deals with the situation where the “*other person*” to the contract does not know or could not reasonably have known that the consent of the other spouse was lacking. In that event the contract stands and the property rights of the spouses are adjusted as provided for in the section. The section does not deal with the converse situation where the other person does know or could reasonably have

known that the contract was entered into by one spouse without the consent of the other. However, it follows, I think, by necessary implication that in the light of the prohibition expressed in peremptory terms in section 7 (1) the contract must be regarded as invalid.

[12] The property is still registered in the name of the deceased to whom the appellant was married in community of property. She is accordingly a co-owner of the property and in the absence of evidence to the contrary, enjoys a possessory right to the property. The first respondent's answer and claim to possession is founded on the deed of sale concluded subsequent to the promulgation of the Act in pursuance of a power of attorney signed by the deceased prior to the Act without the apparent consent of the appellant. Prima facie the deed of sale is therefore invalid. The first respondent bears the onus or, at the least, the evidential burden of establishing that the deed of sale on which he relies is valid. (see **Milne NO v Singh NO 1960 (3) SA 441 (D)** at 456 C-E.) To do so he would have had to establish that he did not know or could not reasonably have known that the deceased was married in community of property and did not have the consent of his spouse to enter into the contract of sale. The first respondent, however,

makes no allegations in his answering affidavit as to his dealings with the deceased and the second respondent prior ultimately to signing the deed of sale. Nowhere does he say that he had no knowledge of the deceased's marital status or what inquiries he made from, or what he was told by, the second respondent. His failure to do so is all the more significant in the light of the appellant's averment that she was married to the deceased in community of property and the fact that she had no knowledge of the sale until after the death of the deceased. In the circumstances the first respondent has in my view failed to discharge the burden of proving that the sale upon which he relies was a valid sale. It follows that the appeal must succeed. The fact that money was paid by the first respondent to the deceased in pursuance of the sale will presumably have serious financial implications for the deceased's estate, but that is not an issue in this appeal.

The following order is made –

- (1) The appeal is upheld with costs;

- (2) The judgment of the court a quo is set aside and the following substituted in its stead:-
- (a) The first respondent's occupation of plot number 13281-469 situated at Maseru East is declared to be an infringement of the applicant's right to occupy same;
 - (b) The first respondent is ordered to vacate the said plot;
 - (c) The third respondent is ordered to cancel the consent to transfer issued to the first respondent;
 - (d) The first respondent is ordered to pay the applicant's costs of suit.

D.G. SCOTT
ACTING PRESIDENT

I agree:

W.G. THRING
JUSTICE OF APPEAL

I agree:

W.J. LOUW
ACTING JUSTICE OF APPEAL

For the appellant : V.V. Kotelo KC

For the first respondent : M.M. Kao

