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MDUDUZI HENRY ZULU

APPLICANT

RESPONDENT

RESPONDENT

V

APHRA MANGALI BHEMBE

&

LAURENCE SIGIDLANA DLAMINI

Case # 2260/96

Judgment

The Applicant seeks an order on motion ejecting the respondents from premises described as "Portion 52 (a portion of portion 85) of Farm # 1117 Mbabane urban area District of Hhohho."

The Applicants case for this relief is made out in the Founding Affidavit, in which he attests the following facts :-

The first Respondent sold portion 102 of the Farm named in the prayer to the Notice of Motion on 2nd May 1994.

(The difference between the portion number stated in the prayer and that of the land sold to the Applicant is not explained). The deed of sale and the Deed of transfer reflecting the Applicant as the owner of the property described therein refer to portion 102. No amendment of the prayer has been applied for As the error has not been noticed by either of the parties and no

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point has been made thereof, I will treat the application and counter application s relating to the property described in the relevant documents).

The property was transferred to the Applicant, who is now the owner thereof. Copies of the Deed of Sale and the Transfer Deed are attached to the founding affidavit.

The Applicant further alleges that on 6th April 1994 the Respondents entered into an agreement with the Applicant, a copy of which is attached to the founding affidavit marked MHZ3 in terms of which the Respondents were to have a right to live on the property for the rest of their lives. The Applicant submits that the agreement is invalid " as it is contrary to section 30 of the Transfer Duty Act, 1902"

The Applicant has sold the properly to a third party for E45 000, but cannot comply with his obligations to the purchaser while the respondents remain in occupation.

The agreement of 6th April 1994 is in writing. Its provisions are in Siswati, but no translation thereof is

before the court. I will therefor assume its provisions to be those which the Applicant has stated, and with which statement the Respondents appear to be in agreement. It is clearly written evidence of a term ancillary to the Deed of Sale" MHZ1" which was agreed upon prior to the execution of the Deed of sale itself. The parol evidence rule excludes only evidence of oral collateral terms and does not apply in this case to a document signed by the parties recording a term of a transaction they contemplated concluding. I fail to see any reason why the provisions of "MHZ3" are not effective and binding on the parties inter se.

The agreement is a servitude which was identified by Hoexter J in VESTIN ESHOWE (PTY) LTD v TOWN COUNCIL OF THE BOROUGH OF ESHOWE 1978 (3) SA 546 (N) in the following terms

A personal servitude may be constituted in favour of a particular person to use the land of another for almost any specified purpose. Dealing with the topic in Willolighby's Consolidated Co Ltd v Copthall Stores Ltd 1913 AD 267 INNES CJ observes at 281 - 2:

(See Voet 7,1. 2.) There is nothing in principle to prevent portion of the globular dominium of fixed property being transferred to an individual for his life, instead of to the owner of an adjoining property in perpetuity. (See Voet 8.1.4.) And there are many instances in which South African Courts have recognised as personal servitudes rights which, had they been

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attached to the ownership of other land, would have constituted praedial servitudes. See Dreyer v Ireland 1874 Buch 193; Oosthuizen v Plessis 5 Juta 69; Louw v Van der Post 11 CLJ 151 etc. Now, the right of trading upon the property of another amounts to the right of using and occupying that property or part of it for the specified purpose. And that right (when not embodied as a condition in a lease) seems to me theoretically capable of being granted and registered as a personal servitude."

It is convenient at this stage to examine the nature and extent of the rights acquired by the Town Council against Zieglar. The essence of the agreement embodied in annexure "A" is an irrevocable consent by Zieglar to the future registration of a servitude enabling the Town Council to lay pipes across the property - the exact route of the pipe-line having yet to be determined. That agreement, though binding on the parties, did not by itself vest the legal title to the servitude in the Town Council. In such a case;

"The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected coram lege loci by an entry made in the Register and endorsed upon the title deeds of the servient property"

(per INNES CJ in Willoughbys Consolidated Co Ltd v Copthall Stores Ltd 1918 AD 1 at 16)."

The agreement concluded by the parties in "MHZ3" is creates an obligation to register such a servitude and not only is it binding on the parties, but the respondents are in accordance with the authorities quoted entitled, as they have claimed in their counter application, to have the servitude registered against the title of the property. While its terms are not closely defined, the intention expressed in the document to bestow a life servitude of use and habitation is clearly manifest.

The judgment of the court is, and it is so ordered 1 The Application is dismissed with costs, and

2a The Applicant is ordered to register a servitude of usus and habitatio over Portion 102(a portion of portion 85) of Farm No. 1117, situate in Mbabane Urban area, District of Hhohho, Swaziland in favour of the respondents securing the rights of the respondents to live upon, use and occupy the property until the death of the last of them to die. Should the Applicant fail to execute the documents necessary to have the servitude registered when called upon to do so, the Sheriff or his lawful deputy is authorised and required to do so on his behalf.

2b The Applicant is to pay the costs of the counterclaim.

S W Sapire

Acting Chief Justice