

IN THE HIGH COURT OF SWAZILAND

Lawrence Pops Jacobs

1st Applicant

Thomas Jacobs

2nd Applicant

V

Nicholas Baleni Vilane

1st Respondent

The Registrar of Deeds

2nd Respondent

The Attorney General

3rd Respondent

Civ. Case No.426/99

Coram

S.B. MAPHALALA- J

For the Applicant

MR. C. NTIWANE

For the 1st Respondent

MR. M. MANZINI

JUDGEMENT (02/09/99)

Maphalala J:

This is an application by way of motion for an order in the following terms:

- a) That the transfer of the under-mentioned property in terms of deed of transfer No. 143/1981 being a transfer of the under-mentioned property from the applicants to the 1st respondent and executed on the 25th May, 1981 be cancelled and/or set aside;

2

Certain: Portion 7 (a portion of portion B) of farm No, 152 situate in the district of Lubombo, Swaziland; Measuring: 25,6960 (twenty five comma six nine six zero),

- b) Ejecting 1st respondent and all those holding title under him from the aforementioned property;
- c) Costs of suit
- d) Further and/or alternative relief.

The background to this matter is that 1st and 2nd applicants are children bora by the late Lourens Johannes John Jacobs who died on the 18th September 1968, hereafter referred to as the "deceased". At the time of his death the deceased was the registered owner of the said property. On the death of the deceased Eric Martin Carlston was appointed executor dative of the estate and proceeded to administer same. Applicants allege that notwithstanding that the executor dative was administering the estate he never contacted both applicants such that to date they have never signed any powers of attorney or acquittances after the estate had been wound up nor have they ever

received any inheritances or bequeaths from the estate. Applicants only established during 1999 that in fact the estate of their father had transferred the property to them when they sought the service of an attorney to look into the matter of the description of the property and to establish in whose name such property was registered. Applicants only established during 1999 that the property they inherited from their father had been sold by them for a mere E2, 500 - 00 to the 1st respondent and that transfer of the property from the estate of the deceased to them had been simultaneously done with the transfer of the property to 1st respondent.

During the period 1980 and 1981, 1st respondent approached 1st applicant at Siteki KaMzilikazi with a view of leasing the property for a period of one year. During January 1981 after the death of the applicant's mother and when applicants' who were minors were in desperate need of money for funeral expenses 1st respondent again approached the 1st applicant with a view of leasing the property. Applicants verbally agreed to lease the property to 1st respondent for a yearly rental of E2, 500 -00. 1st respondent it is alleged paid the sum of E2, 500 - 00 part of which money was used in respect of funeral expenses for the applicants' mother.

During 1982 to 1990 1st applicant has attempted to contact 1st respondent with a view of receiving rental for the period. 1st respondent had successfully avoided 1st applicant throughout. It is submitted that 1st applicant in the company of his friend and neighbour Phathizwe Maziya have over the year tried to confront 1st respondent about the rentals but each time they have been informed that he was unavailable or at least they did not find him. It is alleged by the applicant that during 1990 1st applicant tried stopping 1st respondent along the Mpaka - Lohlupheko public road. There was a speed car chase and 1st respondent sped away and made a report to the police that 1st applicant wanted to kill him. Since that time applicants have not confronted 1st respondent about the rentals. It was only during 1999 that applicants sought an opinion from their attorneys that the question of the transfer of the property from the applicants to the 1st respondent came to light. Applicant deny having sold the

3

property to the 1st respondent for the sum of E2, 500 -00 or any sum at all. Applicants never signed any deed of sale in respect of such transaction nor did they authorize anyone to pass transfer of the property to 1st respondent.

The applicants' case is that transfer of the property from the estate of the deceased to the applicants was effected on the 25th May 1981 simultaneously with the transfer from the applicants to 1st respondent. The applicants further allege that the transfer of the property from the applicants to 1st respondent is fraudulent in that applicant never sold the property to 1st respondent. No deed of sale was ever signed by the parties in as much as applicants never intended selling the property. At the time of the purported sale applicants were minors who could not enter into such a contract of sale without the assistance of a guardian or cutator. That 1st and 2nd applicants were born on the 1st May 1963 and 2nd February 1965 respectively. Annexures "C1" and "C2" are annexed to the applicant's papers being copies of their birth certificates.

Applicants submitted that 1st respondent acted unlawfully and fraudulently and in concert with Eric Martin Carlston in the quest to have the property transferred and registered in the name of 1st respondent. Birth affidavits purporting to have been deposed to by both applicants were filed when the property was transferred from the estate of the deceased to the applicants. In this regard annexures "D1" and "D2" are annexed. The false affidavits of birth certificate enabled 1st respondent to deceive the 2nd respondent into believing that the applicants had contractual capacity and could lawfully have sold the property to 1st respondent. At the time of the purported sale of property 1st and 2nd applicant were only 17 and 15 years old respectively. Applicants deny having deposed to annexures "D1" and "D2". It is significant to note that the said annexures appear to have been deposed to before Eric Martin Carlston.

It is submitted that 1st respondent has been in occupation of the property since during 1981. Other than the initial payment of E2, 500 - 00 in respect of rentals 1st respondent has not paid the applicants any sums at all much to their financial prejudice. 1st respondent has benefited by using the property for a period of ten (10) years well knowing that it was fraudulently obtained.

An affidavit of the 1st applicant one Thomas Jacobs is attached to the founding affidavit of Lawrence

Pops Jacobs to the effect that he confirms that 1st applicant is his elder brother and that he was born on the 2nd February 1965, as appears in annexure "C2" of the founding affidavit which date he has always regarded as his birthday. An affidavit of Phathizwe Maziya is attached in support of the founding affidavit.

The application is opposed by the 1st respondent who filed his own affidavit. Essentially his opposition is that the applicants have always been aware of the fact of the sale of the property and its purchase price. He admits paragraph 7.1 of the founding affidavit that he approached 1st applicant and the purpose of his visit was to discuss and negotiate the sale of the property. He never discussed any lease agreement with the 1st applicant. Their negotiations culminated in a deed of sale which was signed by all parties concerned the only E2, 500 - 00 paid to the applicants was in respect of the purchase price of the property, which had been sold to him for that amount. The applicants both signed the power of attorney to pass transfer and same was duly witnessed as appears from annexure "E".

4

A deed of sale was signed by both applicants and himself. A copy thereof was submitted to the Swaziland Development and Savings Bank when he made an application for a loan to purchase the property. He had made efforts to obtain a copy thereof but was informed that records of his loan application are at the bank's archives in Mbabane and are being searched for. 1st respondent submits that the applicants connived with Petros T. Jacobs by giving false information to the District/Assistant Registrar at Manzini in order to reduce their ages. To this end 1st respondent directed the court's attention to a certified copy of entries in the Registrar of Births, obtained from the Central Registry of Births, Marriages and Death at Mbabane, which reflects that the 1st applicant was born at Good Shepherd Hospital, Siteki, on the 1st August 1956. A true copy is annexed as annexure "NBV1" it will be noticed from the said annexure that the birth of the 1st applicant was registered on the 12th June 1992. If the official who issued annexure "C1" and "C2" had made a proper search before issuing the certificate, he would have discovered that the information supplied by the applicants and the said Petros T. Jacobs in respect of their dates was false. The 1st respondent submit that the issue of the birth dates of the applicants is a real dispute and cannot be resolved on affidavit and that ought to be referred to oral evidence.

The matter came for arguments in the contested motion of the 2nd July 1999.

Mr. Ntiwane contended on behalf of the applicants that there are two issues to be determined in this case viz, whether applicant sold the farm to the 1st respondent and secondly the issue of minority in the event the court finds that there was a sale. On the former Mr. Ntiwane argued that there is no deed of sale in conformity with Section 31 of the Transfer Duty Act. 1st respondent has not affixed the deed of sale in his papers nor does he annex affidavits of witnesses on the deed of sale. He does not even file an affidavit of the bank official to state that they filed a deed of sale for a loan. Further that annexure "E" the power of attorney was granted to Eric Martin Carlston and at the same time he was the Commissioner of Oaths. On the latter issue that there are two sets of birth certificates. The disputes of fact has been cured by annexure "YY" of the replying affidavit.

The court was referred to the case of Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) SLA 1155 (I), On the question of the alleged fraud applicants relied on Christies Law of Contract (2nd ED) page 277,

On the other hand Mr. Manzini advanced submissions in opposition. He contended on behalf of the 1st respondent that the applicant signed the deed of sale and they cannot be heard to say they did not. Paragraph 8.3.4 of the founding affidavit is testimony to that fact. It is either that the document was signed or not. These are two conflicting averments in one pleading. The paragraph in the applicant's founding affidavit reads ipsissima verba as follows:

"8.3.4. Applicants fiuther deny having appointed Eric Martin Carlston and/or Barend Jacobs Van Heerden to be their attorneys or agent and to process transfer of the property. The power of attorney filed with the 2nd respondent when the property was transferred is fraudulent and was never signed by the applicants' (see annexure "E" hereto (my emphasis).

In any event it is submitted that applicants were minors who had no guardian to assist them (my emphasis).

Mr. Manzini argued that according to the rules of pleading the applicants can either confess or avoid but they have not done either, Mr. Manzini went on to show that there are several disputes of fact in this matter. The deed of sale which is disputed is the property of the Swaziland Development and Savings Bank. Bank officials need to be called to testify on this point.

Further on the question of minority of the applicants on a balance of probabilities they have not proved that they were minors when they contracted in this matter. Here there is a dispute of fact. He argued that the court need to call the evidence of the officials from the Birth, Marriages and Deaths to enlighten us more on annexure "NBV1" as it is not a birth certificate. Also Petros Mthethwa need to be called.

All in all he submitted that justice can be served if the two issues are referred to oral evidence.

These are the issues before me. I have carefully read the papers before me and considered the submissions by counsel. It appears to me that the Mr. Manzini is correct that there are a number of disputes in this matter. The disputes arise in two instances viz, whether applicant sold the farm to the respondent and secondly whether the applicants were minors when they signed the deed of sale. These two matters are pivotal in the determination of this case. In view of the dicta in the case of Room Hire (Pty) Ltd vs Jeppe Mansions (Pty) Ltd (supra) it is trite law that where at the hearing of application proceedings, a dispute of fact arises on the affidavits filed and cannot be decided without the hearing of oral evidence, the court has a discretion as to the future course of the proceedings, and may i) dismiss the application with costs; ii) order that oral evidence to be heard in terms of the rules of court, or iii) order parties to trial (see page 383 of Herbstein et al the Civil Practice of the Supreme Court of South Africa (4th ED) and the cases cited thereat). My considered view is that for the justice of this case to be served the second course mentioned above should be adopted.

I thus rule that the matter be referred to oral evidence for the determination of the two issues I have mentioned above.

Costs to be costs in the cause.

S. B. MAPHALALA

JUDGE