

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE In the

CIVIL CASE NO. 570/04

matter between : ALLEN

THEMBA KHOZA AND

PLAINTIFF

SIMANGELE KUNENE

DEFENDANT

FOR PLAINTIFF FOR

DEFENDANT

MR. A. LUKHELE MR. J.

MASEKO

JUDGEMENT 12th

October, 2004

The plaintiff who seeks eviction of the Defendant from certain premises described as Portion 14 of Lot 345, situate in Zakhele Township, Extension No. 2, District of Manzini, Swaziland, measuring 221 square metres, has applied for summary judgement. From paragraphs three and four of the plaintiff's particulars of claim the plaintiff's cause of action as pleaded appears to be the *rei vindicatio*.

In response to the summary judgement application the defendant has filed an affidavit resisting summary judgement which he has given the title "Answering affidavit." During the hearing Mr. Maseko raised an objection in limine in respect of the attestation of the affidavit filed in support of the application for summary judgement. In a "notice to raise a point in limine" the objection is formulated as follows;

"2. The Plaintiff's affidavit verifying the particulars of claim together with the verifying affidavit are improperly attested to in that the names and designations of the Commissioner of paths are not reflected. These must appear ex facie the papers or on the face of the affidavit. "

This point was developed during argument by saying that even though the person who has signed the affidavit as commissioner of oaths has attached a rubber stamp mark of the station commander, Matsapha such a person may possibly not be an ex officio commissioner of oaths because according to Mr. Maseko an ex officio commissioner of oaths in the Royal Swaziland Police Force is a member who holds the rank of Sergeant and above. The argument went on to say that in the absence of an indication that the person was indeed a sergeant one cannot say if the person who signed this affidavit and apparently administered the oath on the plaintiff is indeed a commissioner of oaths. Mr Maseko's submission was not supported by any case law authority requiring that the designation of the Commissioner of Oaths must appear on the face of the affidavit. What is clear on the affidavit is that the signatory describes himself as a Commissioner of Oaths and in my view that is sufficient. The defendant's point in limine is misconceived in that at best it may well be that the defendant is denying that the signatory is a commissioner of oaths, which denial he is entitled to make, but it cannot be raised as a point in limine. The defendant is entitled to dispute the fact that the signatory is a Commissioner of oaths and thereby bringing evidence in support of its contention that the signatory is not a Commissioner of Oaths. The signatory having described himself as the Commissioner of Oaths it can only be a factual or evidential matter whether he is indeed a Commissioner of Oaths. In any event even the legal notices upon which the defendant relies for the proposition that it is only a sergeant in the Royal Swaziland Police Force who can execute a document as a Commissioner of Oaths may not be something I can take judicial notice of because such a legal notice is not legislation or law, but at best it is an administrative act or delegated legislation which has to be pleaded and proven by evidence if necessary. On this basis the point in limine fails.

On the merits of the application the defendant's case appears to be that the property belongs to the defendant simple because the intention of the previous owner, the Swaziland National Housing Board as transferor in transferring the property to one Albert

Lubhaca Dlodlu was induced by a misrepresentation which the said Mr. Dlodlu made to the said Board to the effect that, the property was under the said plaintiff's occupation. The defendant's case proceeds further as follows, that had the Swaziland National Housing Board been aware of the fact that the Mr Dlodlu was not in occupation of the property it would not have transferred the property to him who in turn transferred same to the Plaintiff. The Defendant says the property belongs to it. The defendant states that the plaintiff had purchased the property from one Albert Lubhaca Dlodlu. The defendant says he had given occupation of the property to the said Albert Lubhaca Dlodlu when he (the defendant) left this country to reside in South Africa in 1994. Apparently according to defendant the said Albert Lubhaca Dlodlu was not authorised by him to relinquish the occupation to any other person or to sell the property to any such person. It appears that the defendant had occupied the property with the hope that some day it would be transferred to him by the Swaziland National Housing Board or the crown, by virtue of the fact that he regarded himself as the occupant of the said property. According to the defendant the said Albert Lubhaca Dlodlu had possessed or occupied the property on the basis of authority granted by the defendant. The question which arises for decision therefore is whether the above facts as set out by the defendant would constitute a defence, if proven at a subsequent trial. The answer to that question it would seem to me would depend inter alia on whether an effectual transfer of the property from the said Albert Dlodlu to the plaintiff did occur. The answer to the latter question would in turn depend on whether there was an effective conveyance of the property from the Crown to the said Albert Lubhaca Dlodlu. This is so because if the property had not passed to Mr Dlodlu in the first place then he could not, in conformity with the principle expressed in the maxim *nemo dat quod non habet*, have passed the property to the Plaintiff and on that basis the plaintiff cannot be the owner. Similarly the said Albert Lubhaca Dlodlu could not have been the owner at any stage. The plaintiff's cause of action is the *vindicatio rei* and if the defendant can successfully show that the plaintiff is not the owner that would be a valid defence to the claim. Now, the reason given by the defendant for disputing that the ownership of the property vests in the plaintiff is the alleged misrepresentation allegedly made by Mr. Dlodlu to the Swaziland National Housing Board to the effect that he was the occupier of the property. This alleged

misrepresentation is said to have induced the act of the crown or the Swaziland National Housing Board to transfer, the property to the said Albert Lubhaca Dlodlu who subsequently sold and transferred same to the plaintiff. The essential elements in the transfer or conveyance of real rights is dealt with by SILBERBERG & SCHOEMAN, in their LAW OF PROPERTY, 2nd edition at page 73. Our law follows the so-called abstract system in the conveyance of real rights from one person to another. The Roman Dutch law makes a distinction between the so-called underlying agreement, for example a sale, on the one hand and the so-called *real agreement* on the other hand and treats the two transactions as being independent of each other. The real agreement which is the transaction which ought to convey the property from one owner to a new owner is not necessarily vitiated or affected by defects in the underlying transaction, like a sale. This doctrine has also been expressed by saying, in so far as the element of the intention of the parties is concerned, that the conveyance of dominium in the Roman Dutch law occurs by *traditio* accompanied by *justa causa traditionis* as opposed to contracts such as a sale and the *justa causa contractus*. By *justa causa tradidonis* is not meant an underlying contract for the real agreement which is the transaction for the conveyance of dominium or other real rights from the transferor to the transferee, but all that is meant is an appropriate reason for the transfer or simple a serious and deliberate intention to transfer the ownership. In COMMISSIONER OF CUSTOMS AND EXCISE V. RANGLES BROTHERS AND HUDSON LTD 1941 369 the principle was stated as follows by WATERMEYER J.A.,

"If the parties desire to transfer ownership and contemplate that ownership will pass as a result of the delivery, then they in fact have the necessary intention and the ownership passes by delivery. It was contended, however, on behalf of the appellant that delivery accompanied by the necessary intention on the part of the parties to the delivery is not enough to pass ownership; that some recognized form of contract (a causa habilis, as Voet, 41.1.35, puts it) is required in addition...! do not agree with that contention. The habilis causa referred to by Voet means merely an appropriate causa, that is, either an appropriate reason for the transfer or a serious and deliberate agreement showing an intention to transfer. "

J.E. SCHOLTENS in his article titled JUSTA CAUSA TRADITIONIS AND CONTRACTS INDUCED BY FRAUD, appearing in 1957 SALJ 280 states;

"Our law, following Roman law, distinguishes between contractual relations or, more generally, the circumstances underlying the intention to transfer ownership by traditio, and the passing of ownership itself. ...It is, of course, a common place statement that the law relating to transfer of ownership differs widely in various countries, even in those which have a Roman law background. Moreover, a similar terminology may cover divergent doctrines and conceptions. First, an appropriate contract may forthwith transfer ownership without passing of possession being a requisite to that effect. For instance, in England and France ownership of movable property will generally pass immediately on the conclusion of the contract of sale. "

From the above quoted passages, therefore, it is clear that our law draws a distinction and treats independently the real agreement (i.e. the reciprocal intention of the parties) to pass ownership as distinct from the underlying obligatory transaction which provides a reason for the transfer of the property and that defects such as error or fraud in one of these transactions will not affect the validity and effectiveness of the other. See also DALRYMPLE, FRANK AND FEINSTEIN V. FRIEDMAN (2) 1954 (4) SA 649 (W) @ 664, PRELLA V. JORDAN 1956 (1) SA 483 (AD). MCC BAZAAR V. HARRIS AND JONES (PTY) LTD 1954 (3) SA 158 (T).

Applying this principle to the defendants' case as formulated in the affidavit resisting summary judgement, the best view in favour of the defendant that can be taken of his case is that the crown as represented by the Swaziland National Housing Board resolved or intended to pass the ownership of the property to a person who had been in occupation of the property and that the said board acting in the aforesaid representative capacity though clearly intending at the time of the conveyancing transaction to pass ownership to the said Albert Lubhaca Dlodlu was operating under a mistake induced by Mr. Dlodlu's misrepresentation to the effect that he (the said Dlodlu) was the occupier of the property at the time. It seems to me that the misrepresentation or error relates to the attribute of the said Albert Lubhaca Dlodlu as an occupier of the property. Put differently the misrepresentation relates to the qualifications of the said Albert Lubhaca Dlodlu to receive transfer of the property in terms of a resolution of the Swaziland National Housing Board as a representative of the Crown which was the owner immediately preceding Dlodlu in the ownership of the property. The misrepresentation relates to the process of identification or selection of the aforementioned Albert Lubhaca Dlodlu as the

intended transferee. The misrepresentation though affecting the process by which Mr. Albert Lubhaca Dlodlu was identified or selected as the person to whom the property was to be conveyed or transferred does not result in a complete absence of an intention to transfer the property to Dlodlu, but actually provides the underlying reason as to the intention to pass transfer. In other words it does not vitiate the intention to pass the transfer but it actually elicits or induces the intention between the crown as represented by the Swaziland National Housing Board on the one hand and the said Albert Lubhaca Dlodlu that the ownership of the property should pass from the crown to the said Dlodlu. As already observed once there was an intention that the ownership should pass from the Crown to Mr Albert Dlodlu, on registration of the property into his name the ownership of the property would pass in accordance with that intention in spite of the effect that the underlying reason for the transfer, is vitiated by fraud or more specifically that the selection of Mr Dlodlu as the intended transferee was affected by the misrepresentation, would not affect the conveyancing transaction, under the abstract system of property conveyance as discussed above. On that basis it seems to me that since there is no suggestion that the Swaziland National Housing Board as a representative of the Crown in the transaction did not intend that ownership of the property be conveyed or transferred to Albert Lubhaca Dlodlu there is no other basis for saying that the ownership did not indeed pass and for disputing that the plaintiff who derived his ownership from the said Dlodlu, is the owner of the property.

Furthermore even if it can be said that the selection or identification of Mr. Albert Lubhaca Dlodlu as the intended transferee was induced by a misrepresentation which affected the real agreement in a manner which renders the transaction voidable, the ownership would have continued to vest on Mr. Albert Dlodlu until the conveyancing transaction would be set aside as a voidable transaction at the instance of the Swaziland National Housing Board, or the crown or even possible at the instance of the defendant himself as an aggrieved party, once it is shown that the intention to pass transfer or convey ownership of the property to Mr. Dlodlu was induced by the misrepresentation, more so if the misrepresentation was a fraudulent one, and assuming there is no innocent third party like the plaintiff who has since received transfer of the said property from

Albert Lubhaca Dlodlu. That is not the same thing as saying that the misrepresentation affected the real agreement (i.e. the conveyancing transaction) such that it can be said that the intention to convey the ownership of the property to Albert Lubhaca Dlodlu was absent and that therefore the conveyancing transaction was void ab initio. In the circumstances just described the plaintiff would not be the owner. Similarly, Albert Lubhaca Dlodlu would never have acquired ownership of the property which he could have passed to the plaintiff. However where the conveyancing transaction was accompanied by an intention to pass ownership to Albert Lubhaca Dlodlu, even though that intention was induced by misrepresentation or fraud the transaction would not be void but voidable.

Scholtens formulates the application of the principle to transactions tainted by fraud or misrepresentations as follows;

"The conclusion for our law is that if the defrauded owner intended to pass ownership although induced to do so by fraud, ownership will pass to the alienee who in his turn will be able to transfer ownership to a third party as long as his right of ownership exists. Whenever there is fraud but no intention to pass ownership on the part of the transferor, ownership will not pass to the transferee. Consequently the latter will not be able to transfer ownership to third parties in his turn. The same applies when the law impedes the passing of ownership as in the case of prohibited donations between spouses, "

Similarly in DALRYMPLE, FRANK & FEINSTEIN *supra* @ 646 and as quoted with approval by JTR BIBSON in his SOUTH AFRICAN MERCANTILE AND COMPANY LAW 4th edition at page 67, it was observed

"A transaction induced by ... [misrepresentation] may, in some cases, be void ab initio; in other cases it is voidable only, at the option of the party...[misled]. Where the ... [misrepresentation] is such that there is no consensus ad idem, or no consent, the transaction is void. But where there is consent, even where the consent was obtained by fraud...[misrepresentation] the transaction is not void but voidable. There is ample authority for this proposition." DALRYMPLE,

*FRANK AND FEINSTEIN V. FRIEDMAN & ANOTHER (1) 1954 (4) SA (W)
AT 646.*

Therefore even if the defendant wishes to argue that the conveyancing transaction (i.e. the agreement between the Crown on the one hand and the said Albert Lubhaca Dlodlu is

voidable having been induced by the misrepresentation it is only until the transaction is set aside on that basis that it can be said that the plaintiff is not the owner.

Finally, in paragraph seven of the defendants' affidavit resisting summary judgement, the defendant states that when Albert Dlodlu vacated the property he never disclosed that the property was already registered in his name. The defendant continues to state that 'it was upon refurbishing the property and reconnecting electricity supply and water' in her name that she says she discovered that Albert Dlodlu had sold the property. It is not clear what is meant by "refurbishing" but in view of the fact that it was not claimed that useful or necessary improvements were effected and because no lien of any kind was claimed I will not interpret the refurbishing as amounting to improvements which would have entitled the defendant to some lien pending payment of compensation to him by the plaintiff. Indeed Mr. Maseko did not even attempt to raise such an argument. In the circumstances no defence is raised in the defendants' affidavit resisting summary judgement. Accordingly summary judgement evicting the defendant from portion 14 of Lot 345, situate in Zakhele Township, Extension No. 2, District of Manzini, Swaziland and all those in occupation of the premises through her is granted. The plaintiff is also awarded costs of the action.

ALEX S.



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