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IN THE HIGH COURT OF SWAZILAND

CASE NO. 509/2004

HELD AT MBABANE

BETWEEN

EDWARD MAPHUMZANE DLAMINI... PLAINTIFF

AND

SWAZILAND GOVERNMENT … DEFENDANT

CORAM
AGYEMANG J
FOR THE PLAINTIFF:
S. MASUKU ESQ.
FOR THE DEFENDANT:
S. KHULUSE ESQ.

DATED THE 5TH DAY OF FEBRUARY 2010

JUDGMENT

The plaintiff herein has sued the defendant for the following reliefs:

1. An order directing the defendant to pass transfer of a parcel of land described as Lot No. 1253 Extension 12 Manzini Town, Manzini District, Swaziland into the name of the plaintiff within one month, failing which, authorising the Registrar of the High Court to sign all such documents as may be necessary to effect transfer of the property into the name of the plaintiff;
2. An order for the ejectment of the defendant and all persons in occupation through or under the defendant, from the said property;
3. Payment of the sum of E14,500 per month from 1st March 1999 to the date the plaintiff obtains occupation of the said property;
4. Costs of suit;
5. Further and/or alterative relief.

These are the matters of common cause:

On 1st March 1999, the parties herein entered into an agreement for the sale of land described as Lot No. 1253 Extension 12 Manzini Town, Manzini District, Swaziland, by the defendant to the plaintiff. The plaintiff entered into the contract on his own account while the defendant was represented by the Minister of Housing and Urban Development. The purchase price of the property was E106, 500 which was paid in instalments by the plaintiff.

After the contract was entered into, the plaintiff in the discharge of his obligations tendered transfer costs, including transfer duty, and stamp duty. He also submitted his plans for the property sold to him, to the Ministry of Housing and Urban Development. After these, he made a demand that the said Ministry, acting on behalf of the defendant, pass transfer of the property sold to him under the agreement of sale. The defendant per the Ministry of Housing and Urban Development failed to do this, rather the defendant sought to revoke the agreement of sale as from 30th January 2004 per letter 29th December 2003.

It is the case of the plaintiff that he is entitled to a conveyance of the land afore-described as he signed an agreement of sale, paid the purchase price, and carried out his obligations.

Giving a background to this case, the plaintiff recounted that sometime in 1994, he approached the Manzini City Council which he understood to be the agent of the Swaziland Government, for vacant land he could purchase. The plaintiff referred to the said land as bush land which was described as Lots 85 and 87, together with another parcel of land contiguous to it. The land was situate next to the City Council building at Manzini, near the Mzimnene River. His expressed wish was to use the land for a commercial purpose which he said was the building of a nine-storey building to be used as a shopping complex which would house shops, offices and residential houses. The plaintiff alleged that at the Manzini City Council, he was referred to one Mbuso Dlamini at the Ministry of Natural Resources who was alleged to be responsible for the sale of government land. When he met the said gentleman, the latter informed him that the piece of land belonged to the

Ministry of Works and Public Transport which was going to use it in the construction of a highway from Mbabane to Manzini. He was referred to that Ministry. The plaintiff shuffled between the two Ministries until he was finally informed that the said land could not be allocated to him because it would be used in the construction of the highway. Sometime after this, the Ministry of Housing and Urban Development informed the plaintiff that they had allocated an alternative piece of land which would suit his purpose.

Thus was the transaction for the sale of the parcel of land described as Lot No. 1253 Extension 12 Manzini Town, begun.

The transaction commenced in this way: In June 1995, the Manzini City Council's Crown Lands Allocation Committee wrote to the plaintiff indicating that it had approved an offer to him of the said land for the price of E106,500. The said land was offered to the plaintiff to purchase. The plaintiff testified that per the contract document a deed of sale (exhibit B) which he signed in December 1998, he was to pay twenty-five per cent of the purchase price and defray the balance in three instalments. Thus did he pay E26,000 as a deposit. The plaintiff subsequently paid the purchase price in full.

The transaction was concluded by the signing of the said deed of sale exhibit B, by the Minister for Housing and Urban Development and it was to be completed when the defendant passed transfer of the land to him.

The plaintiff alleged that before he signed the deed of sale, he inspected the land and found houses thereat.

It was the crux of the plaintiff's case that before he entered into the contract with the defendant for the purchase of the property described as Lot 1253 Extension 12, Manzini, he knew the extent thereof and also, that it included

houses. He thus alleged that when he accepted the offer for the sale of that property to him, he believed the houses found thereat to be included in the property. His knowledge he said, was acquired from the several years he worked at Manzini as a Station Commander and later Regional Commander in the Police Force. He alleged also that after he received the offer to purchase the said Lot 1253, he asked the Surveyor General's officials to place pegs on the land so he could fence it. It was then that it came to his knowledge that Lot 1253 included houses, a matter that allegedly suited his purposes as he intended to develop the land for commercial purposes by expanding the development already on the land, for commercial purposes.

The plaintiff denied that the contract for the sale of the land: Lot 1253 Extension 12 Manzini was entered into under a mistake as the defendant alleged, maintaining that like himself, the defendant, knew for certain what it was that it was selling to him. Thus he rejected the defendant's purported revocation of the contract of sale contained in its letter to the plaintiff of 29th December 2003.

The matters following were relied upon by the plaintiff to insist that the defendant intended to sell to him all that was contained in Lot 1253: First, that it was the defendant that identified and offered him the property, which after all, had been offered to him as an alternative to what he applied for. Furthermore, that the defendant's intention to sell Lot 1253 together with all the houses thereon was clear from paragraph 5 of the deed of sale which stated that he was being sold the said land and all that was on it except mineral products and precious stones on or below the surface which were said to remain vested in the Crown.

The plaintiff also denied the possibility that more than one Government department, all involved in the sale of the property to him, would make the same mistake. Moreover, he alleged that land officers and one John Carmichael of the Ministry of Housing whom he corresponded with between the time he paid the deed of sale and when paid the last instalment, failed to inform him that an error had been made.

Lastly, he alleged that it was only after the defendant had sent the Surveyor-General onto the site to place pegs thereat at his urging, that the defendant changed its mind and alleged that there had been a mistake in the sale to him of the property described in the deed of sale. According to the plaintiff, prior to this, it had never been mentioned to him that the property was developed**.**

It was the plaintiff's case that he was entitled to the transfer of ownership in the land described as Lot 1253 Extension 12, Manzini Town, in the deed of sale which he had paid for, and regarding which he had entered into a contract of sale with the defendant. He alleged that by the provisions of the contract, his right of possession accrued after he paid the first instalment as a deposit. He complained that this notwithstanding, he had been denied access to the land. Thus is the present suit seeking specific performance of the contract of sale as well for payment of rental of the properties situate on the land from the time the plaintiff's right o possession accrued.

The plaintiff called as his witness, a property valuer of some fifteen years' experience who tendered in evidence, a rental valuation report he had authored. His evidence was simply to inform the court that the rental value of the houses on Lot 1253 Extension 12 Manzini consisting of six flats, one building and two houses, was (as at November 2005 when he carried out the

valuation), the sum of E14,500. Among the things he testified to was that during the valuation, the land in question 1.2523 acres in extent, together with the developments, was found to have a total market value of E,1 479, 000.

The defendant called three witnesses who gave evidence in support of its case. In its defence, the defendant acknowledged that it indeed entered into an agreement for the sale to the plaintiff of land described as Lot 1253 Extension 12 Manzini Town, per the Minister of Housing and Urban Development. It was however the case of the defendant that it did so, labouring under a misapprehension that the said land was vacant land and did not include the houses found thereat.

According to the defendant's first witness, Fred Kunda, he was a surveyor by profession and had worked for the Government of Swaziland from 1993 until 2001. He testified that in 1995, he was part of a team sent to survey certain lands at Manzini. He testified that although the property in dispute: Lot 1253 Extension 12 was not originally among those they were tasked to survey, it was added to the list in substitution for Lot 1251 which had been allocated to an unnamed person. He alleged that when he and his team went onto the land described as Lot 1253 Extension 12, they found that it included a number of houses which were across a street from a vacant piece of land. The witness then allegedly informed the then Ministry of Housing about this state of affairs.

He alleged that the team was told that the Ministry of Housing would consult with the Manzini City Council which had identified the land for the survey. About two days later, he was allegedly given instructions by telephone to

survey the vacant land only. So it was that the team surveyed the vacant portion of the land only, leaving out the houses that were across the street but which they had discovered to be part of Lot 1253. The team then conducted a valuation of the surveyed portion and referring to it as Lot 1253 Extension 12, they described it as vacant land in a valuation report compiled on all the lands surveyed in Manzini during that exercise.

The survey/valuation report was admitted in evidence as exhibit 1.

The land's value was said to be E213,000, at E17 per square metre. The witness alleged that as so often happened, although his team gave property values upon survey, the sale price of land surveyed by them was a discounted price fixed by the Ministry of Housing and Urban Development, acting in concert with the Crown Lands Allocations Committee.

The second witness for the defence was the Minister for Housing and Urban Development from 1999 until 2003: Mrs. Stella Lukhele. According to this witness, she signed the deed of sale exhibit B on behalf of the Government of Swaziland, being the Minister responsible for the sale, lease and donation of Government lands. It was her evidence that she signed the deed of sale herein having satisfied herself that the papers laid before her by her subordinates were in order regarding the surveyor's letter, the calculations and the price paid. She averred that in the discharge of the public trust, she performed her functions to the best of ability and in the public interest. This she said did not however include the conduct of a physical inspection of land she sold on behalf of the defendant. Her duty as Minister in such a circumstance, was not to conduct a physical inspection before she signed the

deed of sale, but rather, to satisfy herself regarding what was being sold from the papers placed before her by officials of the Ministry, her subordinates. It sufficed for her to rely on the advice contained in official documents, given by her subordinates. It was her evidence that these officials were expected to perform their duties well in order that she may be advised properly for the due execution of her duties. Thus it was that in the instant transaction in which she represented the defendant, she relied on information contained in official documents furnished her by her subordinates for her advice and information. Among these documents, was exhibit 1 the report of the surveyor. Exhibit 1, she said, informed her that the land the subject of the sale described as Lot 1253, Extension 12 Manzini, was vacant land and upon this information, she signed the deed of sale.

The witness testified that when she signed the deed of sale by which Lot 1253 was purportedly sold to the plaintiff, she had no idea that there were houses on the land described in the deed of sale as Lot 1253 extension 12 Manzini, and had no intention of selling developed land to the plaintiff; nor indeed could she have sold developed land at all as the mandate to sell houses belonging to the Government, belonged not to the Ministry of Housing and Urban Development where she worked, but to the Ministry of Works and Transport. The witness alleged that at all material times, her understanding was that the plaintiff who had applied for vacant land, needed same to put up structures for commercial purposes. Thus, when she signed the deed of sale, her intention was to effect the sale of vacant land on behalf of the defendant to the plaintiff, and not land which had houses thereat (partly developed) as Lot 1253 turned out to be.

The last witness for the defendant Mr. Mbuso Dlamini, was the Principal Secretary at the Ministry of Housing and Urban Development from 1996 until 2002, that is, at all times material to the instant transaction. The said gentleman took pains to enlighten the court regarding the procedure of the defendant relating to the sale of vacant urban Government land which he referred to as a policy. He testified that the Minister of Housing and Urban Development was the one responsible for effecting the sale of vacant Government land, and who alone could sign deeds of sale and issue Crown Grants over Government property in urban areas. This task he said, was carried out in stages. He testified that the first stage was done through the Local Authority in whose jurisdiction the land was located and that for this reason, an application to buy such land had to be lodged with the local authority. The next stage, he averred, was the consideration of the application by the Allocations Committee set up by the Minister of Housing and Urban development. The local authority was involved in this process as well and was responsible for transmitting the approval of the application to the applicant, making offer of sale as agents of the Government in the transaction. At the third stage, the Ministry of Natural Resources would per its valuer, value the land. The valuation would be used in the fixing of the purchase price which in a sale to a Swazi national, was usually at a discounted price. After the valuation and the fixing of the purchase price, the last process was the signing of the deed of sale. He emphasised that a purchase of Government land regarding which an application to the Ministry of Housing and Urban Development may be made, had to be vacant land as that Ministry's mandate was in relation to vacant land only. He alleged that

the rare circumstance in which developed land was sold by the defendant was when the defendant exchanged its property with somebody else's or a developer wished to tear down old and disused Government structures in order to put up new structures on the land. Even so, it had to be after due valuation of the land as well as the development thereon was done, and in consultation with the Ministry of Public works which alone had oversight of Government houses.

In casu, the witness confirmed that the plaintiff had applied for land which could not be sold to him as it was zoned as a public open space (and for possible use in the construction of a highway). He testified that the plaintiff would not accept their explanation as to why he could not be given the land he applied for until it was used for a park at Manzini. It was following this that the defendant offered the plaintiff another parcel of land. The said land was identified by the Manzini local authority which had searched for vacant land that could be used for commercial or industrial development. The witness alleged that at all times material to this transaction and until the deed of sale was signed, the defendant's officials at the Ministry of Housing and Urban Development believed that the land in dispute was vacant, and that it was not until after the deed of sale had been signed that it was discovered to be partly developed.

Tendering an autho-photo map of the area which showed the aerial view of the entire land comprising houses separated from vacant land by a road (exhibit A), the witness alleged that the physical inspection of the land that was carried out did not include the beacons and coordinates of Lot 1253 Extension 12, Manzini. The inspection simply took into account the vacant

land below the Government houses where Fire and Emergency Officers lived. He testified that these houses were fenced and separated from the vacant land by a road. Furthermore, the land was zoned for use as a light industrial area, thus, residential houses, in compliance with the Building Act, were not expected to be found there. He alleged that such a seeming incongruity had obtained on Lot 1253 because the residential houses found on land designated as industrial land, were built by the Ministry of Works which was exempt from seeking the approval of the local authority to put up buildings.

According to this witness, as part of the business of selling Government land, Lot 1253 as all others, was surveyed and valued by the Ministry of Natural Resources at the instance of the Ministry of Housing. He testified that it was his information (obtained after the fact from the record of a Ministerial inquiry into the sale herein), that during the survey exercise, the surveyor Fred Kunda (DW1) who carried out a physical inspection of the land and found houses on the land described as Lot 1253, made a report of this to the Ministry of Housing. The surveyor allegedly received an instruction telephonically, to survey value the vacant land only. Thus did the surveyor carry out his task which he concluded by issuing a report exhibit 1 in which he described Lot 1253 Extension 12, as vacant land.

The witness alleged that the aforesaid matters misled the officers of the defendant who did not realise that the entire land, including the institutional houses were included in the coordinates of Lot 1253. Thus was Lot 1253 offered to the plaintiff (who had applied for vacant land to develop for commercial purposes), to purchase.

Supporting the case of the defendant the witness maintained that the sale of Lot 1253 which included the buildings thereat was so done under a mistake of fact. He alleged that the misdescription of Lot 1253 Extension 12 as vacant land in exhibit 1, the surveyor's report which was received by the Ministry of Housing and Urban Development resulted in a belief erroneously held that Lot 1253 was vacant land. Corroborating the evidence of the Minister, this witness who as Principal Secretary was the advisor of the Minister, testified that when the deed of sale was signed, the Ministry of Housing and Urban Development and the Minister who relied on his advice, held the erroneous belief based on exhibit 1 the surveyor's report, that Lot 1253 was vacant land. The witness alleged that it was after the deed of sale was signed and the officials of the defendant proceeded to prepare documents of transfer that the defendant became aware that Lot 1253 contained institutional houses. As this was not what the defendant, acting by the Minister of Housing intended in the transaction, the defendant could thus not complete the transaction and make a Crown grant to the plaintiff. This was also in face of the fact that the Minster of Housing who purported to alienate Lot 1253 had no authority to sell Government houses which in this case was occupied by firemen.

Thus, he insisted that the defendant never intended to sell the houses found on the land to the plaintiff, but rather, intended to sell the vacant land below the fenced houses, to him. These houses he described to be institutional houses occupied by firemen. The witness acknowledged that the mistake was caused by the neglect of officials of the defendant to subdivide Lot 1253, to separate the developed portion from the vacant portion and to describe the

two portions differently after they received information that the said property included institutional houses.

It was the further testimony of this witness that the alleged mistake on the part of the defendant was brought to the attention of the plaintiff who attended a meeting of 9th December 1999 to which he was invited by defendant's officials, accompanied by his attorney. The plaintiff informed of this, subsequently refused to accept that there had been a mistake in the transaction, alleging that the defendant did in fact intend that its institutional houses be sold to him. The plaintiff then threatened legal action to claim the entire property as well as rental from the use of the houses by the firemen, as an ancillary relief.

The witness insisted that the plaintiff who had applied for vacant land had not known of the existence of the houses on Lot 1253 contrary to his assertions. This was because he had never made reference to the houses on the land, the matter coming up only at the meeting of 9th December 1999 when he was informed that the defendant had made a mistake in selling Lot 1253 to him. Furthermore, the said houses which had been on the land since the 1980's were not generally known to be part of Lot 1253; indeed, even the defendant's officials responsible for the sale of Government land had not known this until their attention was drawn to it by the surveyor. It was the evidence of the witness therefore that while he could not dispute that the plaintiff may have conducted a physical inspection of the land at some point, he did not believe that the plaintiff who had applied for vacant land to use for commercial purposes, at the point of signing the deed of sale knew of the

inclusion of the houses on that plot, more so, to intend a purchase that included the said houses.

At the close of the pleadings these matters stood out as issues for determination:

1. Whether or not the contract for the sale of Lot 1253 Extension 12 Manzini Town was entered into under a mistake of fact;
2. Whether or not the mistake of fact if any, vitiates the contract for the sale of the land in dispute;
3. Whether or not the plaintiff is entitled to his claim.

It seems to me that the case of the plaintiff in a nutshell is as follows: that he purchased property described as Lot 1253 Extension 12, Manzini Town from the defendant; that he complied with his obligations under the contract of sale including the payment of the full purchase price; that the defendant had however, failed to complete the transaction having refused to pass transfer of the ownership of the property to him. It is upon these matters that the plaintiff has made the instant claim.

The defendant has denied that there was a valid contract between the parties for the sale of the aforesaid property. Even so, the defendant has not denied that an offer was made to the plaintiff which was accepted when he paid the purchase price, or that a deed of sale was executed by the parties for the sale of Lot 1253 Extension 12 Manzini. The defendant's case is that the contract purportedly entered into, was so done under a mistake of fact regarding the nature of the subject matter. This mistake, the defendant alleged, was that its representative in the transaction: the Minister of Housing and Urban Development, was not aware that Lot 1253 was a partly

developed land which included institutional houses occupied by Government employees when she signed the deed of sale.

The defendant averred therefore that it was mistaken in its belief regarding the subject matter when it purported to sell Lot 1253 to the plaintiff per the deed of sale, in that what was intended to be sold was vacant land and not the partly developed land that Lot 1253 turned out to be.

It was defendant's case therefore that the contract of sale did not reflect the true intention of the parties and must be held not to be legally binding, the parties not having been *ad idem* when they entered into it.

Does the evidence led show that the contract was not what was intended, the parties having operated under a mistake? It seems to me that it does.

The defendant who alleged the mistake assumed the burden of proving what it alleged. Thus officials of the defendant adduced evidence aimed at demonstrating how it was that the Minister who represented the defendant in the sale was placed under the false impression that the said Lot 1253 was vacant land only. This was that the documentation on the land indicated other than the true position which itself was caused by the neglect of the relevant Government Ministries to subdivide the land, separating the portion of the land on which were institutional houses, from the vacant land, after it became known to them that Lot 1253 contained houses as well as vacant land. The evidence included how the description of the entire Lot 1253 as vacant land came to be, how that description was brought to the attention of the Minister, per exhibit 1, and how the latter signed the deed of sale upon the information provided to her which informed her belief that Lot 1253 was vacant land. Indeed evidence was led to show that as Minister for Housing and Urban

Development, the representative of the defendant who signed the deed of sale had no authority to sell Government houses at all and would not have entered into the contract had the existence of the houses been known to her.
It seems to me that the evidence led, consistent in content in my view, establishes that the Minister of Housing and Urban Development who signed the deed of sale purporting to sell Lot 1253 Extension 12 Manzini Town to the plaintiff herein, was labouring under the misapprehension that the said land was vacant land so described in the documentation she relied on in the transaction and upon which as Minister she was entitled and expected to rely.

Learned counsel for the plaintiff in his submissions before the court pointed out that in June 1995, the Manzini City Council offered to the plaintiff the land in dispute: Lot 1253 and that this was after it had come to the attention of the surveyor during an inspection carried out in January 1995, that the land had institutional houses on it. He pointed out also that the Manzini City Council had the management of Government lands within its jurisdiction and had identified the land in dispute as suitable and available for sale to the plaintiff. Learned counsel for the plaintiff relied on these matters to contend that in June 1995 when the offer was made to the plaintiff, the extent and description of the land was known, so that the offeror must have intended the offer of Lot 1253 to include the institutional houses found thereat.
The reason why this argument is not tenable is that on the evidence led before this court, although the surveyor Fred Kunda (DW1) found out about the existence of the houses, he did not indicate such in the report exhibit 1 which he laid before the Ministry of Natural Resources and which was

ultimately presented to the Ministry of Housing at whose instance the valuation was carried out and which per its Minister, entered into the contract of sale with the plaintiff.

There is controversy over the fact that institutional houses were found to be included in Lot 1253 when the surveyor went onto the land in 1995, and furthermore, on the admission of DW3 the Principal Secretary of the Ministry of Housing to whom exhibit 1 was sent, there was a communication of that fact to officials of the Ministry of Housing at the point of inspection in January 1995. Even so, it cannot be denied that the description of Lot 1253 which was contained in the official valuation report was that it was vacant land. Surely, the only matter that cannot be disputed in this, is that the surveyor/valuer failed in his duty to properly describe the land in the official valuation report exhibit 1. The surveyor's assertion that an official of the Ministry of Housing informed him telephonically that he should survey the vacant land only was confirmed by DW3 who said the matter came to his attention after the fact, and during an inquiry held with regard to the instant transaction. It seems to me that there was thus clearly a failure in the performance of duty, first by the surveyor who misdescribed the land, and also by the officials who knew of the institutional houses still included in what was described as Lot 1253, but who neglected from January 1995 when the true state of affairs became known, until March 1999 when the deed of sale was executed, to either subdivide the land giving the two portions different descriptions, or to properly describe the whole of Lot 1253 as developed land.

This failure in the performance of their duty however does not alter the fact that when the Manzini City Council acting as the mouthpiece of the

Allocations Committee offered Lot 1253 to the plaintiff in June 1995, the said land was described in the valuation report exhibit 1 as vacant land. Nor does it belie the allegation of the Minister who entered into the contract on behalf of the defendant, that it was the said description, contained in an official document exhibit 1 which she relied on in the sale, believing the sale to be in respect of vacant land. The plaintiff's contention that the defendant must have intended to sell Lot 1253 as it was as he was never informed of the mistake from 1995 until he signed the deed is not tenable. This is because the evidence led demonstrated that although at the point of survey in 1995 the existence of the houses became known, due to the negligent act of the surveyor Fred Kunda, the official record on Lot 1253 Exhibit 1 was that it was vacant land. No wonder the Principal Secretary testified that the officials at the Ministry of Housing to whom Exhibit 1 was directed laboured under a misapprehension that Lot 1253 was vacant land. It seems to me that as there is no evidence that the defendant's officials went onto the land between the time exhibit 1 was sent to them (as an official record of what obtained on the ground), and the time the deed of sale was signed, there was no discovery of any error in exhibit 1 of which the plaintiff should have been informed.

In my judgment, the allegation of the defendant that it did not intend to sell the institutional houses included in Lot 1253 Manzini Town to the plaintiff (although by the deed of sale what was being sold was Lot 1253), finds support from the evidence led by the witnesses for the defence including the Minister who signed the deed of sale as agent of the defendant. The fact that officials of the Ministry of Housing brought home this state of affairs to the plaintiff, acknowledging their error, in a bid to come to an amicable

agreement regarding the matter of the non-inclusion of the institutional houses in the sale, buttresses my opinion.

Learned counsel for the plaintiff in his address submitted that the defendant had not operated under a mistake and that its state of mind indicating its intention to sell Lot 1253 with all its appurtenances, is demonstrated by the fact that it was long after the purchase price had been paid - in December 2003, that it purported to revoke the agreement. Yet the facts speak otherwise, for it is evidence uncontroverted that in December 1999 when the defendant attempted to fulfil its contractual obligation, its officials acting for it having realised that the land described in the deed of sale had government houses which was never intended to be sold and which in any case, the Ministry of Housing, the party to the transaction, had no mandate to sell, called the plaintiff to a meeting and informed him of their mistake. The 2003 letter of revocation it seems to me, followed these events and put an end to the controversy, for there is no evidence that between the 9th of December 1999 when the plaintiff was informed that a mistake had been made, and December 2003 when the letter of revocation was written by the defendant, the defendant changed its position which it communicated to the plaintiff, that it had entered into the contract of sale under such mistake of fact as to the nature of the land being sold.

I hold it to be a fact therefore, that in the instant transaction what the defendant intended to sell to the plaintiff was vacant land and not the institutional houses included in Lot 1253. There was thus clearly a mistake on the part of the defendant at the point of contract in that it believed itself to be selling vacant land, not the partly developed land that Lot 1253 turned out

to be. The mistake was wholly the fault of the defendant's servants. I must also add that the mistake herein was one of fact, and very material to the contract indeed, as it was with respect to the nature of the subject matter of the sale, an integral part of the contract.

But could the plaintiff the other party to the sale transaction, be said to have operated under a mistake of fact also when he entered into the transaction, the case of the defendant?

It is the case of the plaintiff that when the said land was offered to him for sale, he understood the offer to include the houses found thereat. Not only did he maintain that there was no mistake on his part, but he denied that the plaintiff had operated under a mistake when it purported to sell Lot 1253 with all its appurtenances (save for minerals found on or under the soil).

This was because on his showing, he knew the said land very well, having lived in Manzini for a long time, and also, worked as a Police Officer in the positions of Station Commander and Regional Commander in Manzini. Although the plaintiff contradicted himself when he alleged in the same breath that it was after the Surveyor–General's officials went onto the land at his instance, following the offer of sale made to him that he knew of the existence of the houses on the land, it seems to me that there was no challenge of his assertion that at the point when the deed of sale was signed, that is, four years after the offer was made to him, he knew of the existence of the houses on the land.

The plaintiff thus made the case that he entered into the contract with open eyes in strong terms. The Principal Secretary of the Ministry of Housing who alleged himself to have been involved, personally and per his subordinates in

the transaction from its inception acknowledged that the plaintiff could very well have been aware of the extent of the land and the fact that it contained institutional houses. I have thus no reason to doubt the plaintiff's assertion that he was not mistaken in the transaction.

I hold the same to me a fact.

It is apparent then that there was a unilateral mistake on the part of the defendant.

But will this unilateral mistake of a material fact which was due to the fault of the defendant's servants entitle the plaintiff to an enforcement of the contract of sale, or could it, unilateral as it may be, be held to be a *iustus* error entitling the defendant to avoid the contract?

In considering this, I must first of all, bear in mind the trite principle of the sanctity of contract which ordinarily excludes extrinsic evidence to contradict the contents of a written contract see: ***Johnston v. Leal 1980 (3) SA 927 at 938.*** "When a contract has been reduced into writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract'.

I also bear in mind also the settled principle of contract that when a person alleges that a contract he entered into freely and willingly does not represent what he intended, and it is proven that he laboured under a misapprehension as to some material fact at the point of contract, he will ordinarily not be permitted to avoid the contract or escape liability where the matters bringing about his mistaken belief, was of his own making. Such a circumstance may

include the failure of that party to carry out due diligence in that he fails to do his homework, see: *R.H. Christie's The Law of Contract in South Africa 315,* citing *Wiggins v. Colonial Government (1899) 16 SC 425 at 429.*

In the instant case, as aforesaid, the Minister who testified in support of the defendant's case and who represented the defendant in the transaction alleged that she believed herself to be selling vacant land rather than the partly developed land that Lot 1253 turned out to be. Evidence was also led to show that the misdescription that misinformed the Minister who as agent of the defendant, entered into the contract with the plaintiff on the defendant's behalf was the fault of the servants of the defendant who failed in the performance of their duty. This failure was the negligent act of the officials of Government who neglected to describe Lot 1253 Extension 12 Manzini, properly as a developed land, or to separate the vacant land from the houses included in it, giving the portion with the houses, a different description.

That the Minister was not advised properly is evident from exhibit 1 which was among the documentation of the land and which the Minister said she relied on.

As aforesaid, the mistake was unilateral, on the part of the defendant for the plaintiff testified that he knew of the existence of the houses on the land at the point of contract.

The question then is: did the plaintiff know that the defendant was operating under a mistake, or could he reasonably have known that the defendant was not aware of the existence of the houses?

The importance of this question lies in this: It is settled law that a person who is found to have entered into a contract upon a unilateral mistake which is

material even if the mistake was not caused by the other party, may avoid liability under the contract, if he demonstrates that the other party knew of his mistake, or as a reasonable person ought to have known of it, see: ***National and Overseas Distributors Corporation (Pty) Ltd v, Potato Board 1985 2 SA 473 (A);*** also per ***Fagan CJ in George v. Fairmead (Pty) Ltd 1958 2 SA 465 (A)*** at ***471***

It seems to me from all the evidence that it is more probable than not that the plaintiff knew, at the point of contract, that what was known to him: the existence of the houses on Lot 1253, was not known to the defendant. Although the defendant's case was that the parties operated under a common mistake, it seems to me that the evidence adduced in support of this position rather, in view of the evidence of the plaintiff, supports the fact that the plaintiff was not mistaken but kept quiet regarding what he knew in order that he may snatch a bargain. I am persuaded of this for the reasons following:

The defendant led evidence to show that the transaction for the sale commenced with an application by the plaintiff for vacant land which he said he was going to use for commercial purposes. More particularly, the plaintiff said that he would erect structures thereat to be used as a shopping complex. There was no reason thus to give the plaintiff land which included developments thereon for it could not be described as vacant land, nor could the intended use: the erection of a shopping complex, be unaffected when there were residential houses on the land.

The Principal Secretary of the Ministry of Housing who alleged himself to have been involved in the transaction from the beginning both personally and

per his subordinates, gave unchallenged testimony that when the defendant offered the plaintiff the land in dispute as a replacement for the one he had applied for, there was no discussion that anything other than vacant land which the plaintiff had applied for to use for the commercial enterprise, was on offer.

It was also the uncontroverted evidence of the said witness that the houses on Lot 1253 were tenantable and in use by officials of Fire Service. If the plaintiff who had applied for vacant land to use for a set purpose knew as he alleged, that the land offered him was not entirely vacant, and had residential houses, it is reasonable to expect that he would comment on the land so offered to him and in respect of which the deed of sale was signed.

In my judgment also, the plaintiff's fulsome praise of the defendant, calling it a good Government which gave out such substantial property to its citizen, uttered tongue-in-cheek in this court, suggests that he knew or suspected at the least, that the inclusion of the houses in the sale was not intended, for it was so much more than he deserved under the instant transaction in which he was sold land containing both partly developed land (not the vacant land he had applied for), and for which he paid E106,500. In this there was no mention of the inclusion of a valuation of the houses which were in use.

The Principal Secretary testified that the plaintiff never mentioned the residential houses on the land. Indeed he testified that it was the defendant's officials who first brought the said matter to the attention of the plaintiff who then demanded the transfer of the entire property to him and threatened legal action inclusive of a demand for rental payment.

Indeed it must be borne in mind that the instant transaction commenced when the plaintiff applied for vacant land for use in the erection of structures for a shopping complex inclusive of shops and offices. Lot 1253 which had six semi detached houses and two houses was more than the plaintiff had applied for. Furthermore, the use of the land, since it contained residential houses, would necessarily be different from the vacant land the plaintiff had applied for and wished to use for a commercial purpose. Under these circumstances, it was not reasonable conduct for the plaintiff who alleged he knew of the existence of the said institutional houses, to hold his peace from the time he was offered the land until the deed of sale was signed, unless he suspected that the defendant did not know this important fact and he wished to take advantage of the latter's mistake. It seems to me that the plaintiff's conduct of not mentioning the existence of the houses actually occupied by employees of the Government at all times material to the transaction, suggests the lack of bona fides on his part, for indeed, if the plaintiff had held an honest belief that the houses were included in the land the subject of the transaction, he would have asked what would become of the employees of the Government who continued to be in occupation even after the deed of sale was signed. Surely a reasonable person would have mentioned it either towards an inquiry on the way forward with the occupants of the houses, or simply because as he exclaimed so often in court, he was overwhelmed by "what a good government" the defendant was, to give him so much, against his expectation when he had applied for vacant land. The plaintiff's silence in such a circumstance is capable of three different explanations: that the plaintiff believed that the defendant had made no mistake in the transaction,

that the mistake of the defendant was suspected or known to the plaintiff, or that the plaintiff like the defendant, did not know of the existence of the said houses on Lot 1253 Extension 12 Manzini Town. The first circumstance appears to be unlikely in the face of the matters I have already referred to. The third circumstance, the plaintiff has denied and asserted the contrary. It seems to me that the second circumstance is more probable than not to have obtained, having regard to the evidence led. I find from the evidence therefore that the plaintiff more probably than not, knew that the defendant was operating under a mistake at the time of contract. I hold the same to be a fact.

In these circumstances, the plaintiff will not be permitted to enforce a contract which he knew did not express the true intention of the defendant, for the latter was clearly operating under the mistaken belief that the land was vacant. As aforesaid, the mistaken belief on the part of the Minister for Housing who represented the defendant in the sale, was due to her reliance on documentation which unfortunately, did not reflect the true state of affairs and which she had no reason to suspect was incorrect. As Minister, she was entitled to rely on the assertions of her officials contained in an official document. Her mistake was thus, not unreasonable.

In ***Sonap Petroleum (SA) (Pty) Ltd. V. Pappadogianis 1992 3 SA 234 at 241,*** Harms AJA faced with a situation in which a party who knew his contracting party was labouring under a mistake, failed to speak up, he had this to say: “If he realised or should have realised as a reasonable man)” that there was a real possibility of a mistake in the offer, he would have had a duty to speak and to enquire whether the expressed offer was the intended offer”.

The conduct of a party who knowing the other party was labouring under a mistake during contract, was decried as “snatching a bargain”, the other party was held entitled to rescind the contract.

Also, *R.H. Christie (supra) 318* in the discussion of “snapping up an offer” regarding a similar circumstance, refers to *Sherry v. Moss 1952 WLD Unreported.* The learned author postulated that “if the mistaken party has so conducted himself as to give the other party reasonably to believe that he was contracting with him on certain terms, he is therefore bound on the basis of quasi-mutual assent unless there is some special reason for classifying his mistake as a *iustus* error. One such reason ...exists when the other part knew of the mistake. Actual knowledge...disables the party having knowledge of the mistake from relying on the doctrine of quasi-mutual assent, so the mistaken party will be able to rescind the contract if his mistake was material”.

It seems to me therefore that even if the plaintiff knew of the extent of the land and that it included the institutional houses still occupied by employees of the Government, his knowledge will not aid him, for it seems to me that he was aware that the defendant’s representatives were mistaken in their belief that what was being sold to him was vacant land and not the partly developed land that Lot 1253 turned out to be. Learned counsel for the plaintiff in his submissions stated that the conduct of the defendant should operate to estop him from relying on a mistake. First of all as I have held, the defendant was clearly operating under a mistake of fact regarding the nature of what it was it was purporting to sell when its representative signed the deed of sale exhibit B. Secondly, estoppel was not pleaded, and the plaintiff may not rely on

same. Lastly, learned counsel, no matter how well-meaning, may not introduce a new cause of action in his submissions before this court.

I go further to say that even if the evidence had not supported a finding that the plaintiff knew of the defendant's mistake, it seems to me that it would support a finding that the plaintiff, a reasonable person ought in the circumstances have known that the defendant operated under a mistake of fact regarding the nature of the land it sold. There are a number of reasons for this:

It seems to me the fact that Lot 1253 which contained institutional houses in use by employees of the Government, was sold for E106,500 without any mention being made of the said houses, or a valuation of the houses being referred to, should have alerted the plaintiff, a former Police Officer and clearly a man of the world that such houses were perhaps not intended to be included in the instant transaction.

It seems to me that the evidence that the plaintiff was offered land in exchange for what he applied for, which he knew to contain more than what he had applied for and which (at the least as to part thereof), was for a different use, ought to have alerted him, as a reasonable man, to the possibility of a mistake having been made by the defendant.

That the plaintiff recognised that what had been sold to him was much more than he had applied for, or was in expectation of, in that instead of just vacant land, he had received vacant land to which was attached six houses semi-detached houses and two main houses, was evident from the effusive praises

he poured on the defendant for giving him such a bargain when he had not even asked for it.

These pieces of evidence clearly belie a basis for an assumption by the plaintiff that the defendant intended to sell developed land to him.

It is my view from all the evidence led, that the plaintiff who was informed by the defendant's officials of their blunder (when the true state of affairs was brought to his attention: that Lot 1253 the subject of the deed of sale had houses on it), saw an opportunity to get much more than he was entitled to, or was in expectation of, in the sale thereof, for the price of E106,500. In other words, he intended to "snatch a bargain" by insisting that he was never in doubt that the institutional houses found of Lot 1253, was part of the contract of sale, at the point of contract.

I am satisfied from all the evidence led before this court, that the contract for the sale of Lot 1253 Extension 12 Manzini by the defendant to the plaintiff, was entered into under a mistake of fact. This mistake regarding the nature of the property being sold which was a unilateral one, being on the side of the defendant whose representative in the transaction misapprehended the nature of what it was she agreed to sell on behalf of the defendant. The mistake was material as it was regarding the subject matter of the sale – an integral part of the contract. It was also reasonable as the defendant's representative relied on documentation furnished her which she was entitled to do. Lastly, this mistake was known to the plaintiff who maintained that he was never in doubt regarding the subject-matter of the sale, or ought to have been known to him as a reasonable person.

In the circumstances, I hold that the mistake of the defendant vitiates the contract between the parties as they were clearly not ad idem regarding the nature of the property purportedly sold under the deed of sale exhibit B. The plaintiff's claim must therefore fail and is accordingly dismissed.

Costs awarded to the defendant.

MABEL AGYEMANG

HIGH COURT JUDGE