IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU **CCA/0112/2022**

In the matter between:

BOIPABOLO JUNIOR SCHOOL **APPLICANT**

And

MZA ESTATE AGENCY (PTY) LTD **1ST RESPONDENT**

ESTATE LATE MARATANG ANTHONIED MOHAPI **2ND RESPONDENT**

TANKISO ERICK SHALE **3RD RESPONDENT**

LAND ADMINISTRATION AUTHORITY **4TH RESPONDENT**

Neutral Citation: Boipabolo Junior School v Mza Estate Agency (Pty) Ltd & 3 others [2022] LSHC 101 COM. (9th May 2022)

CORAM: MATHABA J

HEARD ON: 10th March 2022

DELIVERED ON: 9th May 2022

Summary

Law of agency – A deed of sale of land signed by agent and third party – Agent clothed with power of attorney by principal to sell land – Third party paying full amount agreed with the agent – Agent failing to remit the full amount to the principle – Principal refusing to transfer land to the third party – Whether the principal is liable to the third party – Principal is liable to the third party and cannot escape liability on the ground that he did not sign the deed of sale or that he did not receive the full amount from the agent.

ANNOTATIONS

LESOTHO

Matime and others v Moruthoane and Another 1985-1989 LAC 198

Makoala v Tlokola and another (CIV/T/243/01) [2005] LSHC 7

Nkekeletse Mamosa Jonathan v Mosiuoa Nthati Lephole and others C of A (CIV) No 5/2018

SOUTH- AFRICA

Bothma v Chalma Beef (Pty) Ltd case No 2145/2017

Feinstein v Niggli 1981 (2) SA 684

Geldenhuys v Marre 1962 (2) SA (A) 511

Glofinco v Absa Bank Ltd 2002 (2) SA 470

Hlumisa Investment Holdings (RF) Ltd and another v Kirkinis and others (1423/2018) [2020] ZASCA

Itzikowitz v Absa Bank Ltd [2016] ZASCA 43

Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984 3 SA 155 (A)

Makate v Vodacom 2016 (4) SA 121 (CC)

Nordis v Construction Co (Pty) Ltd v Theron Burke and Isaac 1979(2) SA 535

Salomon v Salomon and Co Ltd [1897] AC 22 HC

JUDGMENT

INTRODUCTION:

[1] This application was brought on an urgent basis on the 30th October 2020 with prayers in the notice of motion couched as follows:

> *''1. Dispensing with ordinary rules pertaining to modes and periods of services in the matter.*
>
> *2. A Rule Nisi be and is hereby issued and returnable on the date and time to be determined by this Honourable Court calling upon respondent to show cause (if any) why:*
>
> *a) The 1st, 2nd and 3rd respondents shall not be directed and / or ordered and restrained from entering into further agreements in respect of the plot bearing lease number 15264-121 pending finalization of the present application.*
>
> *b) The 4th respondent shall not be directed and/ or ordered not to effect transfer of rights and interest of plot number 15264-121 to any other person except the applicant pending finalization of the present application.*
>
> *c) Cancellation of the deed of sale agreement entered into by the parties on the 28th day of March, 2019.*
>
> *d) The 1st, 2nd and 3rd respondents shall not be ordered to pay the applicant the sum of Six Hundred and Thirty Thousand Maloti*

(M630, 000.00) paid as the purchase price for the plot situated at Marabeng Maseru Urban Area under plot number 15264-121.

e) *Payment of purchase price with interest at the rate of 18.5% per annum.*

f) *The respondents shall not be ordered to effect transfer of rights and interests of plot situated at Marabeng, Maseru Urban Area under plot and / or lease number 15264-121.*

g) *The respondents herein shall not be ordered to pay costs of this application in the event of opposition.*

h) *Applicant shall not be granted further and / or alternative relief as this Honourable Court may deem fit.*

3. Prayers 1,2(a) and (b) operate with immediate effect as interim Orders.''

[2] Only the 3rd respondent opposes the application. The application was moved before my brother **Moahloli J** on the 17th November 2020 who granted the interim reliefs in terms of prayers 1 and 2(a) and (b) in the notice of motion. With pleadings having been closed, the matter was subsequently re-allocated to me on the 12th November 2021 and argued on the 10th March 2022. On the date of argument, Ms. *N Pheko* for the applicant indicated that the applicant was pursuing only prayers 2(c), (d), (e) and (g) in the notice of motion.

PRELIMINARY ISSUES:

Mis – joinder of the 2nd respondent

[3] The application is no longer being pursued against the 2nd respondent, the estate of the late director and shareholder of the 1st respondent. This followed my question to Ms. *Pheko* why the 2nd respondent was joined in the proceedings yet the 1st respondent is a company, thus a separate legal entity from its directors and shareholders.

Non – joinder of surviving shareholder of 1st respondent, Tlokotsi Nkoe

[4] The 3rd respondent took the preliminary point of non – joinder in its answering affidavit. Though the point was not pursued during argument, it was not expressly abandoned. I therefore propose to quickly deal with it. Considerations of convenience militated in favour of the determination of this point with the substantive issues, particularly because it was apparent that the point was untenable.

[5] According to the seminal company law case, **Salomon v Salomon & Co Ltd** [1897] AC 22 (HC) a company is a separate legal person from its shareholders. This principle has been codified by section 9 of the Companies Act No. 18 of 2011 which indicates that upon its incorporation, a company is separate from its shareholders and that it has the capacity to own property and has rights and privileges of a natural person. A company further has a right to sue or be sued on its own name.

[6] The situation is not only unique to Lesotho. In **Itzikowitz v Absa Bank Ltd** [2016] ZASCA 43 the Court said the following at paragraph [9] of the judgment:

> *"…The notion of a company as a distinct legal personality in no mere technicality – a company is an entity separate and distinct from its members and property vested in a company is not and cannot be, regarded as vested in all or any of its members. Generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity. A company's property belongs to the company and not its shareholders. A shareholder's general right of participation in the assets of the company is deferred until winding – up, and then only subject to the claims of creditors…".*

[7] **Itzikowitz,** *supra***,** was quoted with approval in **Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis** and Others (Case no 1423/2018) [2020] ZASCA 83 where it was concluded that a shareholder does not suffer any personal loss merely because the company in which he is a shareholder has suffered damages. Where a company suffers loss as a result of breach of duty owed to it, only the company can sue in respect of that loss. In terms of section 79 (1) of the Companies Act, *supra*, a shareholder can only have a claim in respect of a loss caused to it by breach of duty owed to the shareholder.

[8] Taking into account the position of a company vis a vis that of a shareholder, the surviving shareholder, *Tlokotsi Nkoe,* does not have a direct and substantial interest in this proceedings. He remains just a shareholder or co – director as he is alleged to be elsewhere in the papers filed of record. A party

is joined in litigation when it has a direct and substantial interest or when adverse orders are being sought against it. *See*: **Matime and Others v Moruthoane and Another** 1985 – 1989 LAC 198 and 200; **Nkekeletse Mamosa Jonathan v Mosiuoa Nthati Lephole and Others** C of A (CIV) No. 5/2018 at page 4 to 6. In the premises, the point of non – joinder is without merit and therefore dismissed.

THE FACTS:

[9] The geneses of the dispute is agency agreement entered into between the 1st and the 3rd respondent. The 1st respondent was represented by the 2nd respondent in entering into the agency agreement. The agreement related to the sale of the 3rd respondent 's piece of land situate at Marabeng Maseru and registered with the 4th respondent as plot No 15264-121.

[10] The agreement between the parties was that the 1st respondent would sell the site for M600,000.00 at a commission of 10% of the purchase price and that upon payment of 50% of the purchase price, the 3rd respondent would apply for ministerial consent in order to transfer the said site into the names of the buyer. The 3rd respondent did also sign a power of attorney granting the 1st respondent power to act on his behalf concerning the sale of the site in question.

[11] The 1st respondent acting on behalf of the 3rd respondent on the 28th March 2020 entered into a deed of sale for the above-mentioned site with the applicant. A copy of the deed of sale is attached to the founding papers filed of record and marked annexure "BS 1". *Ex facie* the agreement, the purchase price for the site is M630,000.00 which the seller would apply for ministerial consent once it is paid in full. The buyer would pay a deposit of M300,000.00 and pay

the balance in two instalments, the first one at the end of May 2019 and the second and last instalment in June 2019.

[12] It was also another term of the sale agreement that if the seller fails to effect transfer of the subject of purchase in terms of the provisions of the Land Act, he shall pay back the purchase price in full to the purchaser within 14 days.

[13] The Applicant complied with the agreement and on the 29th March 2019 made payment of the deposit amount of M300,000.00 to the 1st respondent by depositing the said amount in the 1st respondent's bank account which was provided for on the agreement. The first instalment was subsequently paid into the same account number on the 8th of May 2019 in the amount of M165,000.00 and about a month later on the 11th June 2019, the last instalment was effected in the amount of M165,000.00 bringing the total amount to the M630,000.00 that was agreed upon by the parties.

[14] The site was not transferred to the applicant in terms of the deed of sale after full payment was made. The deponent to the founding affidavit learned that the 1st respondent 's representative who facilitated the deed of sale had passed on. The applicant sought the assistance from Mr. *Tlokotsi*, a co-director of the 1st respondent, and the third respondent to have the site transferred into its names, but in vain.

[15] As it turned out, the 3rd respondent had only received an amount of M290,000.00 from the 1st respondent and not M300,000.00 that they had agreed upon according to the agency agreement, that once it was paid the transfer process shall be initiated. The 3rd respondent acknowledges that the deponent to

the founding affidavit approached her with her dilemma and that he in turn approached the surviving shareholder of the 1st respondent, Mr *Tlokotsi,* who promised to pay back the applicant's money.

[16] No refund was paid despite the promise to do so. Instead, in October 2020 the deponent to the founding affidavit saw people unknown to her inspecting and measuring the plot in question without her knowledge nor consent, which brought her to a suspicion that arrangements were being made by the respondents to sell and transfer the property to another party while the applicant had paid the full purchase price for it. This compelled the applicant to approach this Court with the present application.

[17] There is a confusion in the papers filed of record regarding the correct names of the surviving shareholder or director. In some instance he is referred to just as Mr. *Tlokotsi*, while in other instances he is referred to as Mr. *Tlokotsi Nkoe,* in both the founding and the answering papers. Be that as it may, this confusion is not material to the resolution of this matter.

APPLICANT'S CASE:

[18] It is the applicant's case that the 1st and 3rd respondents are in breach of the deed of sale concluded by the parties in March 2019. It is the applicant's contention that the respondents are liable to it following the breach of the deed of sale.

3RD RESPONDENT'S CASE:

[19] Besides taking a preliminary point of law relating to non-joiner of the surviving shareholder of the 1st respondent, *Tlokotsi Nkoe*, in this proceedings, the third respondent contents that he is not privy to the deed of sale filed of record as he never endorsed it and he can therefore not be held liable for its

breach. He denies that he disposed of his rights over the site. He argues that the 1st respondent only paid him M290,000.00 as opposed to M300,000.00 for him to initiate the transfer of his rights and interest in relation to the site in issue.

ISSUES FOR DETERMINATION:

[20] The main issues for determination before this court is whether in concluding the deed of sale agreement, the 1st respondent was acting on behalf of the 3rd respondent as his agent and whether the 3rd respondent is therefore liable to the applicant for breach of the said agreement.

THE LAW:

[21] The following remark by **Musi AJP** in **C A. Bothma v Chalma Beef (Pty) Ltd** Case No. 2145/2017, at page 5 para 17 is instructive in demystifying the concept of agency:

> *"Agency is the phenomena of representation where one person, duly authorised to do so, performs a juristic act on behalf of another, which act then confers rights and duties directly on the person on whose behalf it is done. The agent's actual authority to act on behalf of and bind his or her principal can be express or implied"*. (footnotes excluded)

[22] Therefore as a general principle, an act of an agent needs to be authorised by the principal. *See*: **Joel Melane and Hurwits v Cleveland Estates (Pty) Ltd** 1984 (3) 155 (A) 164G-165G. In **Makate v Vodacom (Pty) Ltd** [2016] ZACC 13, **Jafta J**, delivering majority judgment said the following:

> *"[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority…"* (my emphasis)

[23] In short, an agent is a person who is authorised to act on behalf of another, being his principal. The concept of agency is based on the common law principle "*qui facit per alium, facit per se"* which translates to mean that, "*he who acts through another, acts personally"*.

[24] In **Nordis Construction Co (Pty) Ltd v Theron, Burke and Issac** 1972 (2) SA535 at 544, **Leon J** was referred to a profound remark by **Innes CJ** in *Blower v Van Noorden* 1909 T.S 890 at 899 where he said the following:

> *"During the two hundred years which have passed since Voet wrote, the doctrine of commercial agency has been developed along lines then already recognised, though not fully explored, with the result that an agent is now regarded as one to whom no contractual liability in respect of agreements entered into in the name of his principal, can possibly attach. He is simply and solely the representative of another. This view of the position of a modern agent is now so firmly established and so generally recognised, that no person dealing with an agent, as such, can be held to have intended to contract with him personally unless the terms of the contract itself make it clear that he did. To hold under these circumstances that an agent, acting in the name of an existing principal, but in excess of his authority, is liable on the contract itself, or takes the place of the named principal as a party thereto, would be to make a new contract which neither of the parties contemplated. And it is impossible to fall back upon the doctrine of the general liability of an agent upon all contracts made by him, because that doctrine cannot co-exist with the modern idea of his position and responsibilities."*

[25] The essence of the decision in **Nordis Construction Co (Pty) Ltd v Theron, Burke and Issac,** at page 546, *supra*, is that where an agent and a third party intended and believed that the agent was acting on behalf of a principal, to hold the agent personally liable on the contract would be to make a new contract for the parties which neither of them intended. The case involved

an agent, the defendant, who had entered into a contract with plaintiff on behalf of a company which both believed was in existence. But the company was then not yet in existence and it refused to ratify the contract when it was eventually incorporated. It is when the agent was aware that the principal for which he is contracting is not in existence that he is taken to contract on his own behalf.

ANALYSIS:

[26] The following paragraphs in the founding affidavit deserve attention in the resolution of this dispute:

> *"4.1 On the 28th March, 2019, the applicant and the 1st respondent who has been at all material times acting on behalf and agent of the 3rd respondent, entered into a deed of sale in respect of certain immovable property of plot number 15264-121 situated at Marabeng, Urban Area in the district of Berea. A copy of the deed of sale is attached and marked Annexure "BS1". It is self explanatory. I must indicate that I do not have in my possession, a signed copy of the deed of sale agreement by both parties as same are in possession of the 1st respondent.*
>
> *4.2 I must indicate that before the deed of sale could be entered into before the parties, the applicant's representatives were informed by the late Mrs. Maratang Anthonied Nkoe/Mohapi who was the representative of the 1st respondent that the 1st respondent has power of attorney from the 3rd respondent to act on his behalf and as its agent in this transaction of sale of property"*

[27] The 3rd respondent noted the contents of paragraphs 4.1 and 4.2 of the founding affidavit in his answering affidavit and then proceeded to say the following:

> *"4.3 Contents herein are noted with the rider that at all material times I was never privy to the agreement annexed as "**BS 1"** and*

have never annexed my signature thereto. All I did was approach the office of the 1st Respondent in need of their services as agents to sell the site in question on my behalf. I then made an agreement with the 1st Respondent represented by the late 'Maratang Mohapi that she would sell my site for ***Six Hundred Thousand (M600 000.00)*** *and get a commission of 10%.*

The agreement was that upon payment of 50% of the purchase price from the 1st Respondent, I would apply for ministerial consent to transfer the said site into the names of the buyer. I then signed a Power of Attorney granting the 1st Respondent authority to act on my behalf concerning the sale of the site in question. A copy of the said Power of Attorneys is still with the 1st Respondent as I do not have a copy thereof. I aver that the Power of Attorney is the only document I signed concerning the site in question.

In or around March 2019, I got a call from the late 'Malerata Mohapi that my site had obtained a buyer and that the 1st Respondent would transfer the agreed purchase price to my account upon full and final payment of the said purchase price, I would fully cede my rights to the site (sic) in question and transfer it to the buyer. I aver that to date, only ***Two Hundred and Ninety Thousand Maloti (290 000.00)*** *was transferred into my account and not the full and final agreed purchase price of the site in question. I attach copies of the transactions depicting the said amounts and mark them annexures* ***"TES 1"*** *and* ***"TES 2"*** *respectively."*

[28] Based on the above extracts from the founding and the answering affidavits, it is beyond disputation that the 1st respondent had the actual authority from the 3rd respondent to sell the site in issue. That he appointed the 1st respondent as his agent, the 3rd respondent does not dispute. The case of

Glofinco v Absa Bank Ltd t/a United Bank 2002 (6) SA 470 (13) relied upon by the 3rd respondent to the effect "… a representation must be rested on the words or conduct of the principal himself and not merely in that of the agent…" has no application taking into account the facts in *issue*. The case is applicable where a party relies on ostensible authority.

[29] The argument by the 3rd respondent that he did not sign the deed of sale between the 1st respondent, his agent, and the applicant is of no moment. It is significant that before the deed of sale was entered into, it was made clear to the applicant's representatives that the 1st respondent was acting for the 3rd respondent as its agent and that it had the power of attorney to sell the property on his behalf. It was therefore clear to the applicant that it was contracting with the 3rd respondent. Tellingly, the 3rd respondent is reflected as the seller and the applicant as the buyer in the deed of sale.

[30] The contention that the 3rd respondent did not sign the deed of sale personally and therefore is not liable to the applicant is legally untenable. It is not disputed that the site was sold in March 2019 and that 1st respondent called the 3rd respondent around March 2019 to notify him that it obtained a buyer for the site. If the 3rd respondent had not intended for the 1st respondent to contract on his behalf, he would have demanded to be furnished with the contract when the 1st respondent called him to notify him that the site had obtained a buyer.

[31] Again, the 3rd respondent cannot claim that he was not privy to the contract or deny it, when as a result of the same contract he received and accepted part of the purchase price of the site. The 3rd respondent cannot have his cake and eat too. I cannot deny the fact that the 1st respondent might have obtained a secret profit and stole from the 3rd respondent by failing to deliver

part of the proceeds of his mandate but that cannot be visited on the applicant, it is not its cross to carry.

[32] In **C.A. Bothma v Chalmar Beef (Pty) Ltd**, *supra*, at page 10, para 31, Musi AJP, referred to the headnote in *Randbank BPK v Santam Versekeringsmaatskappy BPK* 1965 (4) SA 363 (AD) which reads as follows:

> *"It is the principal, who also selects his agent and represents him as a trustworthy person, and not the other party to a contract who has no say in the selection, who bears the risk of his possible dishonest representations and concealments, as also where the dishonesty assumes such proportions that the agent, in the nature of things, will undoubtedly conceal it from the other party and the principal would have no knowledge thereof."*

[33] As in the instant case, both the plaintiff and the defendant, the principal, were victims of agent's deception in **C.A. Bothma v Chalmar Beef (Pty) Ltd,** *supra*. The principal was not relieved of its liability in law and was ordered to pay plaintiff M649,373.14 for 79 cattle. The principal had already paid a different company R579,886.15 for the said cattle based on misrepresentation by its agent. The agent made the principal believe that the cattle were sourced from the company whereas the agent had sourced the cattle from the plaintiff. In fact, the company from which the agent purported to have bought the cattle belonged to him.

[34] If indeed the 3rd respondent did not receive all the money that was paid to the 1st respondent by the applicant, I sympathise with him, but in law, he cannot escape contractual liability based on that fact. He is taken to have contracted with the applicant notwithstanding the fact that he did not append his signature on the deed of sale. *See*: **Nordis Construction Co (Pty) Ltd v**

Theron, Burke and Issac, *supra;* **C.A. Bothma v Chalmar Beef (Pty) Ltd,** *supra*.

[35] During argument, the 3rd respondent sought to argue that the 1st respondent exceeded its mandate in signing the deed of sale as it sold the site for M30,000.00. This cannot avail the 3rd respondent. Firstly, the 1st respondent did not exceed its mandate because its mandate was to sell the site and that is exactly what it did. Selling the site at M30,000.00 more may mean that the 1st respondent made a secret profit, but the 3rd respondent cannot escape liability as he is the one who appointed unscrupulous agent. More tellingly, this defence should have been raised in the answering affidavit and it was not. The gist of the 3rd respondent's defence in his answering affidavit is that he is not a party to the deed of sale and that he did not receive the full payment.

[36] It is clear that there has been a material breach of contract in *casu* as the site has not been transferred to the applicant despite full purchase price being made. The applicant is therefore entitled to cancellation of the deed of sale and restoration of the purchase price. The deed of sale does not only make provision for restoration, but it is also a matter of law, especially because the applicant is no longer pursuing specific performance. *See*: **Makoala v Tlokola and Another** (CIV/T/243/01) [2005] LSHC 7 (19 May 2005); **Feinstein v Niggli** 1981 (2) SA 684 (A) 700F; **Geldenhuys v Marre** 1962 (2) A 511(0) 513E.

CONCLUSION:

[37] On these premises, and in the light of the totality of the foregoing, I hold the view that the 3rd respondent as the principal of the 1st respondent, is liable to the applicant to refund the purchase price for the site that had been paid to the 1st respondent. As against the applicant, I cannot find the agent liable in

the circumstances of this case. The contract was eventually between the applicant and the 3rd respondent.

ORDER:

[38] In the circumstances, it is ordered as follows:

38.1 That the deed of sale entered into between the 1st and the 3rd respondent on the 28th March 2019 is cancelled.

38.2 That the 3rd respondent is ordered to pay the applicant Six Hundred and Thirty Thousand Maloti (M630,000.00) paid as the purchase price for the plot/site situate at Marabeng Maseru Urban Area under plot number 15264-121.

38.3 That the 3rd respondent is ordered to pay interest on the amount at para 38.2 at the rate of 8.5% per annum.

38.4 That the 3rd respondent is ordered to pay cost of suit at a party and party scale.

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A.R. MATHABA J
Judge of the High Court

For Applicant: **Adv. N. Pheko**

For the 3rd Respondent: **Adv. L. Mainoane - Marabe**