

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL COURT)

HELD AT MASERU

CCA/0144/2019

In the matter between:

‘MATHATO MATSELISO LEFOKA

APPLICANT

AND

BARALI ESTATES PROPERTIES

1ST RESPONDENT

TSEPO THOAHLANE

2ND RESPONDENT

Neutral Citation: ‘Mathato Matseliso Lefoka v Barali Estates Properties and Another [2022] LSHC 177 Comm. (25 AUGUST 2022)

CORAM: MOKHESI J

HEARD: 07TH JUNE 2022

DELIVERED: 25TH AUGUST 2022

SUMMARY

LAW OF CONTRACT: *Cancellation of contract based on breach- fairness and unreasonableness as grounds for avoiding enforcement of a contract- Held, that these cannot be the basis for avoiding enforcement of a contract- undue influence as a ground for terminating an agreement- mistake as to the motive for entering into a contract- Held, that such does not vitiate a contract- Practice and Procedure- foreseeability of a material dispute of fact arising in motion proceedings- the approach to be adopted articulated and applied.*

ANNOTATIONS

BOOKS

D. Hutchison et al, **The Law of Contract in South Africa 3rd ed.**

CASES

Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (09 July 2021)

Diedericks v Minister of Lands 1964 (1) SA 49 (N)

Di Meo v Capri Restaurant 1961 (4) SA 614 (N)

Lombard v Droprop CC and Others 2010 (5) SA 1 (SCA)

Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13: 2012 (4) SA 593 (SCA)

Napier v Barkhuizen [2005] ZASCA 119; 2006 (4) SA1 (SCA)

Plascon-Evans Paints Ltd v [1984] ZASCA 51: 1984 (3) SA 623

Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

South African Forestry Co. Ltd v York Timbers Ltd [2004] ZASCA 72; 2005 (3) SA 323 (SCA)

JUDGMENT

[1] Introduction

The applicant had lodged this application seeking the following reliefs: interdict, declarator, cancellation of agreement, vindication and damages.

[2] Factual Background

On 05 March 2017 the parties entered into a Memorandum of Agreement (contract/agreement) in terms of which they agreed to bring their resources together to develop and carry out a housing development project. The development was to take place on the land belonging to the applicant, with the 1st respondent carrying out the developments. The development was to be predominantly for building houses. In terms of clause 3 of the agreement the 1st respondent's responsibilities are:

- a. *To take responsibility for all costs related to the transfer of interest in land from 'Mathato Lefoka [applicant] to Qhobosheane Housing Development Project and to the buyers in instances where the project is completed and the houses are successfully sold.*
- b. *To take responsibility for all the costs that shall be incurred in the development of the said houses on all the plots of land the parties have agreed to use as development sites for the projects.*
- c. *To take responsibility for the marketing and sale of the houses once the project is finalised and deal directly with third parties in matters relating to the development project.*

- d. *To take responsibility for all the legal and financial aspects of this project and shall be, at all material times, the first point of reference for matters relating to the project.*
- e. *To use five (5) sites out of the thirty (25) (sic) to construct a building for 'Mathato Lefoka which shall be used for commercial purposes and the leases of the same sites shall remain in her name and not form part of the houses to be sold.*

[3] The applicant, in terms of the same clause 3 undertook to:

- a. *To transfer her interest in the said 25 plots of land, average of which a 500m² per plot, to the Qhobosheane Housing Development Project as soon as the sites' respective leases are released to her.*
- b. *To do all that is legally required or otherwise needed to her for the transfer of her interests in the said plots of land and registration of the same in favour of Qhobosheane housing and Development project.*

Clause 4 provides that:

- a. *'Mathato Lefoka shall transfer her interest in 25 plots of land to Qhobosheane Housing Development project for a consideration of M30,000.00 (Thirty Thousand Maloti) per plot which shall be due and payable to her upon the sale payable to her upon the sale of each developed plot.*
- b. *Barali Estates (Pty) Ltd shall be entitled to all balance of the total proceeds accumulated after the sale of each developed plot after the M30,000.00 has been paid to 'Mathabo Lefoka and the amount shall be inclusive of all the costs which*

are incurred in the development, the marketing and the transfer of interests in the said land.

These clauses constitute the essence of the agreement.

[4] **Parties' respective cases.**

Applicant' case

It is the applicant's case that she met the 2nd respondent who is a housing developer. They concluded an agreement in terms the latter would develop twenty-five (25) site leaving aside five for the benefit of the applicant and her children. She avers that the 2nd respondent proposed that they conclude an agreement, and for this purpose he approached his lawyers to draw up the Memorandum of Agreement. The 2nd respondent unilaterally decided to fix the purchase price for each site at M30,000.00.

- [5] The applicant states that she objected to this amount but was persuaded to accept it on the promise that they stood to make good profits. She says they went to the 2nd respondent's lawyer's office whereat they were made to sign the agreement by the secretary without the contents of the agreement being explained to her. She indeed signed the contract. She states that because the flat rate of M30,000.00 per site did not sit well with her, she requested a meeting with the 2nd respondent, which was held at Mpilo Boutique Hotel, where she demanded that the flat rate be raised to M80,000.00. After much bargaining they settled on M40,000.00 per site. The amendment was never signed. She avers that because she recently sold one site for M80,000.00 she feels "The value of my sites exceeds what the 2nd Respondent was giving me, which values are only the asking price..." She states that the 2nd

respondent does not declare profits from the sold houses, and that to date they have not agreed on how to share profits on the sold houses.

[6] **Breach of Contract**

- (i) The applicant says the 2nd respondent breached their agreement by failing “to pay me money for my sites in time and when demanded to do so.”
- (ii) The 2nd respondent failed to disclose and pay the profits for sold houses.
- (iii) The 2nd respondent only paid purchase price for 5 sites when 6 have been sold.
- (iv) She says she only received M10,000.00 as profits over five (5) houses that were sold.
- (v) The parties had agreed that the 2nd respondent will start by constructing buildings for the applicant on her five sites worth M700,000.00 each, but failed to do so.
- (vi) That the 2nd respondent made piecemeal payments for sites sold.

[7] **Invalid Agreement**

The applicant contends that the agreement is invalid because:

- (i) She demanded M80,000.00 as consideration for each site sold but the 2nd respondent persuaded to accept M30,000.00 “because it is reasonable, while it is not ...”
- (ii) Qhobosheane Housing Development Project does not exist because it “has never been used in our project’s activities such as the Expo pamphlets shows Baradi Estate and Lefoka Estates.”
- (iii) The 2nd respondent has taken lease documents and refuses to hand them back.

It is for these reasons that she terminated the agreement before completion of the project.

[8] **Respondents’ case**

The 2nd respondent deposed to an answering affidavit on behalf of 1st respondent. He denies that he is a surveyor but rather a property developer. He concedes that it was agreed that five sites would be reserved for the applicant. On the issue of signing of the agreement, he avers that the applicant was contacted telephonically by Adv. Motlamelle to confirm that she received a draft agreement for her comments. He states that the applicant took a week seeking a second opinion on the draft agreement and she came back saying her lawyer was satisfied with the contract. The affidavit of Adv. Motlamelle has been annexed in support. The 2nd respondent avers that the applicant was content with the flat rate of M30,000.00 per site. He says the Mpilo Boutique Hotel meeting was not for renegotiating the purchase price but was for celebrating the project. He

avers, contrary to the applicant's version, that he was buying sites from the applicant. He is not engaged in profit-sharing enterprise with applicant.

[9] **Breach of Contract**

The 2nd respondent denies that profit-sharing was part of the contract. He says the issue regarding sharing of profits never formed part of the agreement. The 2nd respondent says the parties agreed that a shopping centre valued at M700,000.00 would be constructed on three, not five lots as the applicant alleges, at the end of the project. He says the sublease agreements were handed over to him in terms of the agreement, and that he incurred expenses for their 'preparation and existence.'

[10] **Invalid Agreement**

The 2nd respondent denies that their agreement is invalid. He says they were always *as idem* when the contract was signed.

[11] **Issues for determination**

- (i) Whether the Agreement is void *ab initio*
- (ii) Whether the Agreement should be cancelled
- (iii) Whether the applicant is entitled to payment of monies claimed from the respondents.

[12] **Agreement void *Ab initio***

It is the applicant's contention in this connection that she was not of the same mind with the 2nd respondent when the agreement was signed, as she was under the impression that profit-sharing was part of the deal, while the

2nd respondent is of the view that it was not. The 2nd respondent is of the view that he was buying sites only, from the applicant. The other leg on which the applicant's case stands, in this regard, is that the termination clause is ambiguous, as it is not possible to make estimates on the profits since the value of development differs with every plot. She says she "was unduly persuaded to sign the agreement quickly in order to start the project..." As already stated, the 2nd respondent disputes that the applicant was unduly influenced to sign the contract or that profit-sharing was part of the agreement or

[13] At this point it is important to reproduce the relevant clauses of the agreement. The relevant clause is clause 4, which provides that:

"4. Terms and Conditions

- a. 'Mathato Lefoka [applicant] shall transfer her interest int 25 plots of land to Qhobosheane Housing development project for a consideration of M30,000.00 (thirty Thousand Maloti) per plot which shall be due and payable to her upon the sale of each developed plot.*
- b. Barali Estates (Pty) Ltd shall be entitled to all balance of the total proceeds accumulated after the sale of each developed plot after the M30,000.00 has been paid to 'Mathato Lefoka and the amount shall be inclusive of all the costs which are incurred in the development, the marketing and the transfer of interests in the said land."*

[14] This case, concerned in some parts, as it is, with interpreting the clauses of the agreement between the parties, the trite approach which takes into

account the triad of text, context and purpose of the provision as espoused in the **Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13: 2012 (4) SA 593 (SCA) para. 18**, will be followed. As the court warned, this triad should not be approached “in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined...”(**Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (09 July 2021) at para. 25**). When approaching contracts, the courts firstly have to bear in mind the principle of *pacta sunt servanda* – contracts freely concluded should be honoured – unless public policy considerations militate against keeping such a contract alive (see: **Napier v Barkhuizen [2005] ZASCA 119; 2006 (4) SA1 (SCA)**).

[15] Reverting to the facts of the case, clause 4 of the agreement is clear and admits of no ambiguity, the parties agreed that upon the developed site being sold off, the applicant will get M30,000.00 and the 1st respondent will keep the balance of the monies which will be generated by such sale. As I understand the applicant’s discontent with the agreement, she seems to be arguing that it is either unfair or unreasonable that she will only get M30,000.00 per site. This argument is foreshadowed in her founding where she says:

“20.6 We agreed that the project will have profits for the benefit of both us as reflected in the background of the MoA, which same

document, MoA also dictates that Barali Estates (Pty) shall be entitled to all balance of the total proceeds accumulated after M30,000.00 has been paid to me, which is ridiculous because I am not selling sites but in the housing project with the developer for profit earnings.”

- [16] While I may sympathise with the applicant for having concluded an agreement which may possibly be unfair or unreasonable to her, it needs to be recalled that in our law the notions of fairness or unreasonableness of contracts or their terms are no free-standing grounds on which the courts can refuse to enforce the contractual terms. Judicial control of contracts based on unreasonableness, fairness and good faith, is done only through the instrumentality of the doctrine of public policy (***Barkhuizen above***). In **South African Forestry Co. Ltd v York Timbers Ltd [2004] ZASCA 72; 2005 (3) SA 323 (SCA) at para. 27, the court stated:**

“[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity, will give rise to legal and commercial uncertainty.

- [17] The applicant, by agreement, has excluded herself from any entitlement to whatever profit will accrue upon the sale of the developed sites. Although as I said, the arrangement may seem unfair to her, there is nothing this court

can do to come to her rescue, unless public policy considerations are implicated, which is not the case in this matter.

[18] **Mistake**

Allied to the above issue of profits, is the applicant's contention that there was no meeting of the minds between the parties as she entered into the agreement with the aim of sharing in the profits to be made from selling the developed sites. The 2nd respondent disputes this, and points to the provisions of clause 4 which has been alluded to above. As I see it this relates to an error in motive. The parties were conscious of what they were agreeing on, but it appears the applicant's motive for entering into the agreement was so that she could share in the profits. This is a non-material mistake because the parties concluded a binding agreement (there was consensus). (See. **Diedericks v Minister of Lands 1964 (1) SA 49 (N)**). It is trite that an error in motive is a non-material mistake which does not affect consensus between the parties. (**D. Hutchison et al, The Law of Contract in South Africa 3rd ed. P. 89**). The applicant's assertion that she was induced into contracting by means of misrepresentation by the 2nd respondent that she should not be concerned with a flat rate of M30,000.00 per site because they stood to make a lot of profit, which assertion is disputed by the latter, should be decided in favour of the respondents, on the basis of **Plascon-Evans Paints Ltd v [1984] ZASCA 51: 1984 (3) SA 623 at 634 E – 635 C**).

[19] **Undue Influence**

D Huytchison et al (above) at p. 145, describes undue influences as follows:

“like duress, undue influence is a form of improper pressure brought to bear upon a person in order to induce him or her to enter into contract. However, in the case of undue influence, the pressure is more subtle, involving an insidious erosion of the victim’s ability to exercise a free and independent judgment in the matter, rather than threats or intimidation.”

In this connection, the applicant contends (at para. 20.1 of the founding affidavit) that “[t]here was no consensus because I was unduly persuaded to sign the agreement quickly in order to start the project, with the pretext that I will recover losses of land proceed from the housing profits.” These averments are disputed by the 2nd respondent who aver that the applicant was given a draft agreement to go and seek legal opinion on. She returned a week later content and ready to sign the agreement. The supporting affidavit of Adv. Motlamelle in support, has been annexed. The same approach as espoused in **Plascon-Evans** case (above) should be followed in this regard, the version of the 2nd respondent should be preferred. It is unnecessary for me to traverse the legal principles applicable, given that factually, the applicant has not been able to prove undue influence. On the conspectus of the above discussion, my considered view is that there is a valid contract between the parties.

[20] **Cancellation of Contract on the basis of breach.**

The applicant has put forth incidences she alleges constitute breach of contract justifying cancellation of the agreement, namely, (i) the 2nd

respondent failed to disclose and pay over to her the profits over sold houses. I have already dealt with this issue in the preceding paragraphs and there is no need to revisit it, profit-sharing is not in the signed agreement between the parties; (ii) The respondents only paid her the purchase price for five sites when in fact six were sold. In response, the 2nd respondent avers that there was problem with the sixth plot due to the applicant complaining to Central Bank and Standard Lesotho Bank thereby causing the withholding of payments by the latter bank and cancellation by one of their clients. The cancellation letter from one of their clients has been annexed as proof. In this regard, the 2nd respondent offers an explanation why the sixth unit was not successfully sold. The money for the sixth unit could not be paid for this reason, and in this regard, I have no problem preferring the version of the respondents over that of the applicant. The applicant further complains that the parties had agreed that the 2nd respondent will start with the construction of the applicants building on five sites, worth M700,000.00, before commencing with the main project. The 2nd respondent disputes this version by alleging that they had agreed that the said construction will be undertaken at the end of the project. At this point it is apposite to quote the provisions of the relevant clause, and it is clause 5 (e) which provides:

“(e) To use five (5) sites out of the thirty (25) sic to construct a building for ‘Mathato Lefoka which shall be used for commercial purposes and the leases of the same site shall remain in her name and not form part of the houses intended to be sold.

Description of the Commercial flat. Complex shall be a three roomed building with separate entrance doors. The rooms will not be fitted however, fully wired, painted and appropriately branded outside.

The value of the same shall plus/or minus SEVEN HUNDRED THOUSAND MALOTI (±/-M700,000.00) and not more than twenty percent (20%) less.”

Nothing in this clause support the applicant’s contention, if anything, the respondent’s version cannot be rejected on the known exceptions.

[21] 2nd respondent refuses to hand over 20 lease documents to the applicant.

It is no doubt that the 2nd respondent refuses to hand over the lease documents to the applicant. In his answering affidavit he avers that:

“14.3 I aver that I have a right to hold on to those leases as they were handed over to me by Applicant by agreement. I incurred expenses for their preparation and existence. All that Applicant has to do is to sign over for the transfers on completed plots.”

[22] As I understand the applicant’s case, it is not her contention that the 2nd respondent is in breach for keeping the lease documents, she is merely saying that the 2nd respondent refuses to return them despite she having indicated to him that she has terminated the contract. But as already said the agreement is valid, and in terms of the agreement the subleases were handed over to the 2nd respondent by the applicant.

[23] **Claims sounding in money (damages) and foreseeability of dispute of facts**

In terms of prayers 5 and 8, the applicant claims an amount of M200,000.00 being purchase price for five sites (each at M80,000.00) for purchase price and profit for plot No. 12311 – 317; M500,000.00 being for profits of an amount of M100,000.00 per developed and sold site.

[24] Where a final relief is sought in motion proceedings and dispute of facts arises it is trite that, the court will accept the version put forward by the respondent, unless the version of the latter is not such as to raise genuine disputes fact or it is far-fetched, clearly untenable that the court will be justified in rejecting it merely based on papers (*Plascon-Evans Paints Ltd at 634 E – 635 C*). It is important to restate that the applicant has included a prayer couched as follows, in her Notice of Motion:

“8. Leave of Court to turn this matter to trial and hear viva voce evidence in the event that there is a dispute of fact which cannot be resolved on papers only.”

[25] It is probably an understatement to say that in this jurisdiction the courts are inundated with applications which rightly should have been action proceedings from the beginning. A wrong choice of procedure has consequences, if an applicant chooses motion as against action proceedings where it was reasonably foreseeable that genuine and material disputes fact will arise, a dismissal of the case in such circumstances is guaranteed. This principle was aptly stated in **Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162:**

“...[A]pplication may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy ascertainment ... what essentially is essentially the subject of an ordinary trial action.”

And in **Lombard v Droprop CC and Others 2010 (5) SA 1 (SCA)** at p.11, the court said:

“...Therefore if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed.”

[26] In the present matter all the amounts and the circumstances under which they are claimed are disputed genuinely. What the applicant did in the present matter was to include the above-quoted relief for referral. But as can be seen, the relief is made on condition that this court finds that material disputes fact arises. The question, then is whether this kind of procedure is appropriate or sufficient to avoid the consequences of dismissal on account of foreseeable material dispute of fact. The answer should surely be in the negative. The stratagem employed by the applicant in this matter is not sufficient to avoid the dismissal. The disputes were reasonably foreseeable even before the application could be lodged. The remarks by the court in **Di Meo v Capri Restaurant 1961 (4) SA 614 (N)** at 615 H – 616 A, are apposite, where the court said:

“It is, I think an unsatisfactory practice for applications to be made in this manner. When an opposed motion, or opposed action for provisional sentence, reaches the stage that it is ready to be argued, there is available to both parties all the information and affidavits which are to be argued, there is available to both parties all the information and affidavits which are to be before the court. In my view, it is at that stage that a party should make an application for leave to lead viva voce evidence to resolve any conflict which, it appears from the papers, is incapable of being decided without it. In the present instance, the matter was not even mentioned until after the plaintiff’s counsel had completed his argument and until near the end of the argument for the defendant. In my view, too, an application of this sort should be made in unequivocal terms and should not be made conditional upon the court coming to the conclusion, after hearing and considering argument in the whole case, that the conflict cannot be resolved without hearing evidence.”

[27] In the present matter, the applicant’s counsel did exactly what she was not permitted to do: made a prayer for referral conditional upon the court finding that a genuine dispute of facts exists. In fact, the applicant’s counsel, was adamant, even during arguments that disputes of fact existed. In my considered view the reliefs should be dismissed on this score.

[28] In the result;

(a) The application is dismissed with costs.

MOKHESI J

For the Applicant: Mrs Lephatsa from Lephatsa Attorneys

For Respondents: Adv. T. Mpaka instructed by Du Preez, Liebetrau & Co. Attorneys