

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCT/0178/2021

In the matter between:

PHELEKA QHALANE

PLAINTIFF

AND

MOKUENA MAKHETHA

DEFENDANT

Neutral Citation: Pheleka Qhalane v Mokuena Makhetha [2023] LSHC 23
Comm. (16TH FEBRUARY 2023)

CORAM: MOKHESI J

HEARD: 07TH DECEMBER 2022

DELIVERED: 16TH FEBRUARY 2023

SUMMARY

LAW OF CONTRACT AND DAMAGES- *Payment of mora interest for repudiated sale of a landed property- Claim for loss of profits on account of repudiation- Principles applicable considered and applied- Defendant claiming that the plaintiff contributed negligently to his incurring damages-Held, unlike in the law of delict, a party's contributory negligence cannot be defence to a claim for damages for breach of contract unless the plaintiff's conduct is the only cause of damage.*

ANNOTATIONS

Books

Potgieter et al **“Visser & Potgieter, Law of Damages” 3rd ed.**

Van Huyssteen et al ***Contract, General Principles* 5th ed.**

Cases

M & C Construction International v Lesotho Housing and Land Corporation
(C of A (CIV) 09 of 2015) [2016] LSCA 4 (29 April 2016)

Whitfield v Phillips 1957 (3) SA 318 (A)

JUDGMENT

[1] Introduction

This is an action for breach of contract in respect of which the plaintiff issued summons against the defendant seeking the following reliefs:

1. Cancellation of the sale agreement
2. Repayment of the sum of M55,000.00 (Fifty-Five Thousand Maloti) purchase price
3. Payment of M10,000.00 (Ten Thousand Maloti) for damages
4. Payment of M18,000.00 (Eighteen Thousand Maloti) for loss of business opportunity
5. Payment of interest thereon at the rate of 18.5% per annum
6. Costs of suit on attorney and client scale.

[2] Factual background

It is common ground that the parties concluded an agreement for sale of a landed property. The purchase price for the site was M55,000.00, and was paid in full. The site is located in the prime area of the Mohale's Hoek town. The defendant did not deliver the site as agreed between the parties thereby prompting the plaintiff to initiate the current proceedings.

[3] Respective Parties' Cases

Plaintiff's case

Plaintiff testified that he lives at Tsoloane Taung in the district of Mohale's Hoek, and that he bought a site from the defendant on the 26 November

2019. The purchase price of M55,000.00 was paid in full after the defendant showed him the title deeds to the property. He told the court that the purpose for buying the site was for construction of rented double-roomed flats, and that for this purpose he had contracted one Mr Thebe Selemela (PW2). PW2 charged him Two Hundred Thousand Maloti (M200,000.00) to construct the building. The plaintiff advanced an amount of Hundred Thousand Maloti (M100,000.00) as deposit. The plaintiff and PW2 had agreed that the latter would take 10% handling fee should the former fail to proceed with the project as planned. The plaintiff testified that the agreement between him and PW2 was verbal.

- [4] It is the plaintiff's case that the defendant failed to deliver title documents to him for purposes of registering the site. He told the court that the defendant failed to honour several promises he made to deliver the said documents. The defendant made a commitment to refund the plaintiff the purchase price by October 2020, but that did not happen.
- [5] The plaintiff told the court he had hoped to start constructing the flats in January 2020 and for same to be completed by September of the same year. He had projected that he would charge M6000.00 per month for each unit.
- [6] Under cross-examination it was put to the witness that the defendant did not know the purpose for which he bought the site, to which question the plaintiff replied in the negative. It was further put to the plaintiff that the defendant sold a site which did not belong to him, but his parents. The plaintiff told the court that he saw the defendant's names on the title deeds.

[7] The defence counsel put to the witness that he prematurely paid the contractor to construct the building before the land could be transferred to him and was for this reason negligent. The plaintiff replied that he paid the contractor because the defendant had promised to subdivide the site in a month's time.

[8] PW2 Mr Thebe Selemela testified that he knew the plaintiff as he was contracted by the latter to construct rented flats for him. He confirmed that they concluded a verbal contract in December 2019. They had further agreed that construction would start in January 2020. They agreed that for constructing ten rooms he would charge M200,000.00 and that, half of this amount should be paid upfront as deposit. He told the court that when the plaintiff told him he was no longer going ahead with the project in October, per their verbal agreement, he charged him 10% handling fee on the deposit and returned the balance to him.

[9] Under cross examination the witness was questioned on why there was no written agreement when such huge sums of money changed hands. The witness's response was that they trusted each other because they had previously worked together on a construction project.

[10] **Defendant's case**

The defendant acknowledged that the plaintiff bought a site from him in November 2019 for an amount of M55,000.00. He testified that since the title deed to the land was in his parents' names it took long to change the title into his names. He inherited the site from his parents.

[11] Under cross examination he was asked whether he was aware that the plaintiff has a residential home at Tsoloane. The defendant's answer was in the affirmative. He was asked whether he was aware that Tsoloane is further away from business opportunities which are offered by Mhales Hoek town. The defendant's answer was also in the affirmative. It was put to him that since the plaintiff had his known residential home at Tsoloane there was no need to build another residential home. The defendant replied that he understood. The defendant could not deny that the plaintiff bought the site for business purposes as he already had a residential home. It was put to him that he made the plaintiff suffer damages for loss of business opportunities for three months totalling M18,000.00 being the amount of rentals he would have collected had the building been completed, and had further caused him to suffer damages in the amount of M10,000.00 being a handling fee which he paid to the contractor (PW2).

[12] **Issues for determination**

(a) Whether the plaintiff's claim for payment of M10,000.00 as damages should succeed.

(b) Whether the plaintiff's claim for payment of M18,000.00 for loss of business profits should succeed.

[13] As already said, the purchase price of M55,000.00 was paid to the defendant and on cancellation this amount should be returned to the plaintiff and this is not in dispute in this matter. What remains in contention is how the plaintiff arrived at an amount of M18,000.00 for loss of business opportunities and

the amount of M10,000.00 the plaintiff alleges he paid to the contractor as handling fee. Having heard evidence, I do not feel that there is any genuine disagreement that the plaintiff paid M1000,000.000 as deposit and that based on the verbal agreement between the parties the contractor retained M10,000.00 as handling fee on discontinuance of the project.

[14] **A claim for M18,800.00 (Eighteen Thousand Eight Hundred Maloti) for loss of business profits.**

Where I think the defendant has a valid point is on how the amount of M18,000.00 for loss of business profits was arrived at. The plaintiff merely told the court that on completion of the flats, each unit was going to be rented out at an amount of M6000.00 and therefore, it would seem seemed to think that he was entitled to given this amount as damages for lost profit. It is trite that the assessment of damage for breach of contract is done in terms of positive interesse which refers to actual and prospective losses. Positive interesse is also used where, as in this case, the contract is cancelled and restitution is sought (**Whitfield v Phillips 1957 (3) SA 318 (A)** at 328). Put differently, the plaintiff is entitled to be placed in a position he would have occupied had there been no breach of contract (**M & C Construction International v Lesotho Housing and Land Corporation (C of A (CIV) 09 of 2015) [2016] LSCA 4 (29 April 2016) at para. 34**) (hereinafter “**M & C Construction case**”).

[15] The essence of the plaintiff’s claim under this head is that had the defendant performed his side of the bargain and transferred the site to him, he would have built rented flats and earned money in the form of rental and that, but for lack of performance he lost on the opportunity to make profit on the

intended building. In support of this position he cited **M & C Construction** case. That case concerned a dispute over unpaid claims by the appellant consequent to an agreement to design and construct (by the appellant) water reticulation scheme for a certain residential development of a housing project. Dealing with a measure of damage in such a situation, the court held that the appellant was entitled to be placed in a position it would have occupied had due performance been rendered by the respondent expressed as a percentage, usually 6% in order to “obviate[] the need to prove in every case what the capital sum would naturally and probably have earned had it thus been productively employed

- [16] The facts of **M & C Construction** case, as can readily be seen are markedly distinguishable from the facts of the present matter because in that case the court was concerned with what the money in the hands of the defaulter (employer) would have earned had it duly been paid to the creditor on time and productively been employed by the latter. Put differently, that case concerned *mora* interest as a form of damages for breach of contract. In the present matter, however, we are concerned about the breach of a contract of sale and whether the buyer in the circumstances of this case can claim damages for loss of profits consequent to breach by the seller. Under the contract of sale, as a general rule the buyer is not entitled to claim loss of profit on the basis of the transaction (agreement of sale). This principle is trite as was stated by the learned authors Potgieter et al “**Visser & Potgieter, Law of Damages**” 3rd ed. at p.p 371 – 372:

“In the case of a contract of sale, the general rule is that neither the buyer nor the seller may claim a loss of profit concerning that

transaction or a possible future transaction. The ratio is apparently that a seller may resell the res vendita and make the same profit (taken in conjunction with his or her claim for compensation as discussed above) Similarly, a buyer may repurchase on the open market and in conjunction with his or her claim for compensation as discussed above, make good any possible loss. It is not normally foreseen that a purchaser will make a special profit above the market value out of a transaction or a possible further transaction ...”

[17] In the present matter based on the above general rule, the plaintiff is not entitled to claim loss of profit on the intended project. It was not foreseeable that the plaintiff would make special profit above the market value of the contract of sale of land.

[18] The defendant had placed much stock in what he referred to as the plaintiff’s negligence in proceeding to pay the contractor before securing transfer of the site into his name. Unlike in the law of delict the party’s contributory negligence cannot be a defence when faced with a claim unless the plaintiff’s conduct is the only cause of damage. This position was aptly stated by the learned authors. Van Huyssteen et al ***Contract, General Principles 5th ed.*** p. 403 para. 11.142:

“If the conduct of the plaintiff is actually a concurrent cause, the plaintiff’s claim is not affected by it unless her conduct can be designated as the only cause of loss. Unlike the position in the law of delict, the plaintiff’s ‘contributory negligence’ therefore affords no defence against a claim based on breach of contract. The liability of the defendant under circumstances of this nature could be excluded by an appropriate contractual term.”

[19] In the result, the following order is made:

1. The agreement between the parties is cancelled.
2. The defendant should pay to the plaintiff an amount of M55,000.00 (Fifty-Five Thousand Maloti) being the purchase price of the landed property;
3. The defendant should pay to the plaintiff an amount of M10,000.00 as damages;
4. Payment of 18.5% interest per annum on the amount in (2) above from October 2020 to date of final payment;
5. Payment of 18.5% interest per annum on the amount in (3) above from October 2020 to date of final payment and
6. The costs of suit.

MOKHESI J

For the Plaintiff: Adv. W. Chondile instructed by K. Ndebele Attorneys

For the Defendant: Adv. Mpakanyane from the Legal Aid