IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCA/0018/2022**

In the matter between

PEGASUS SUPPLIES (PTY) LTD **1ST APPLICANT**

And

LIRAHALIBONOE (PTY) LTD **1ST RESPONDENT**

ECONET LESOTHO (PTY) LTD **2ND RESPONDENT**

Neutral Citation: Pegasus Supplies (Pty) Ltd v Lirahalibonoe (Pty) Ltd & another [2023] LSHC 48 Comm. (21st March 2023)

CORAM: **M. S. KOPO, J**

HEARD: **09th January 2023**

DELIVERED: **21st March 2023**

SUMMARY

Law of contract- Elements of a valid contract – essentials of a partnership - what constitutes termination of a contract.

Annotation

Books

Christie R.H: The law of Contract in South Africa. Butterworths Durban-Pretoria 1983

Banford, B: Banford on the Law of Partnership and voluntary Association in South Africa. Juta and Co, Ltd Cape Town 1982

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Cases

Lesotho

Khabo v Khabo (C of A (CIV) 72/18) [2019] LSCA 56 (01 November 2019)

Khabo v Lesotho Bank (CIV/T/450/87) (CIV/T/450/87) [1999] LSCA 80 (09 August 1999)

Maphaong v Minister of Education and Others (CIV/APN/155/2020) [2021] LSHC 42 (22 April 2021)

Sogreah and Others v Director of Public Prosecutions and Others (CRI/T/111/99) [2000] LSCA 81 (20 June 2000)

South Africa

Allen v Sixteen Stirling Investment (Pty) Ltd 1974 (4) SA 164

Bester v Van Niekerk 1960 (2) SA 779 (A)

Jordaan v Trollip 1961 (1) SA 238

Strachan v. Lloyd Levy 1923 AD 670

Watermeyer v Murray 1911 AD 61

Statutes

High Court Rules No. 9 of 1980

Partnership Proclamation No 78 of 1957

JUDGMENT

[A] BACKGROUND

[1] On the 23rd day of February 2022, the Applicant instituted this Application on an urgent basis. Two days later, the 1st Respondent filed a Notice of Intention to Oppose. On the same day, both counsel appeared before my brother Mathaba J and agreed that the interim order could be given. The prayers that were to operate with immediate effect were prayers 1. 2, 5 and 6. They stood thus:

> *I. Dispensing with the periods and modes of service of this Honourable Court*
>
> *II. …*
>
> ***(a)*** *The 1st Respondent directed to file the opposing application within 7 days of granting of the order.*
>
> ***(b)*** *The Applicant to file its Replying Affidavit within 7 days of receipt of the Respondent's Opposing Affidavit.*
>
> ***(c)*** *The parties to file heads of argument within 5 days of filing of the Applicant's replying (sic) Affidavit.*
>
> *(e) (sic)The matter be set down for hearing within a period of two weeks of filing of the heads of argument.*
>
> *III. …*

IV. …

V. *Interdicting the 1st Respondent from substituting Applicant with another partner in circumstances that will diminish the Applicant's interest in the business or render the implementation of a favourable order in Para. 3 and 4 of this notice of motion impossible.*

VI. *Directing the Respondent to maintain proper records of business especially the expenditure with adequate narration explaining the purpose of the expenditure including the beneficiary entity pending the finalisation of this Application.*

[2] The next time the parties appeared before court was on the 04th day of August virtually, but the matter was stood down due to some technical problems. On the 17th day of September 2022, the matter was enrolled for arguments again. Having seen the trajectory of the proceedings, I directed the parties to appear before a court annexed mediator. This is because having seen the papers, I realised that the urgency of the matter had not been pursued. Moreover, the parties were still in business and there was therefore a possibility that they would get to a common ground. I also directed that the parties should appear in November and argue the matter if the mediation failed. The mediation failed and the matter was eventually argued on the 09th day of January 2023.

[3] The reason for being this elaborate in this introduction is the rather worrying lack of urgency the matter was handled by the parties even though it was instituted on an urgent basis. The abuse of the urgent applications has been rebuked by this court and the Court of Appeal. This seems to be a problem that does not seem to go away. It is true that when the matter was eventually enrolled before me, it was no longer on the

urgent roll. Be that as it may, the initial haste the matter was enrolled with and the subsequent lackadaisical way it was handled gives credence to the worry and displeasure of the courts about the abuse of the court process. Something must be done to arrest the problem.

[B] INTRODUCTION

[4] When the arguments commenced on the 09th day of January 2023, both counsel placed it on record that the only two issues that they have agreed to place before court for determination were;

I. Was there a contract between the parties?
II. If there was a contract, has it been terminated?

[5] The dispute before court is between the Applicant and the 1st Respondent only. The 2nd Respondent has not defended the matter and by and large, is not part of the dispute. Reference to the Applicant and Respondent therefore only refers to the parties who have joined issues in this matter except where it is mentioned otherwise. They are both companies that are duly registered as such in terms of the laws of this country.

[6] The business relationship between the Applicant and the 1st Respondent commenced with a meeting around June 2020 in which the Applicant sought some kind of assistance in trying to bring to fruition its agreement with the 2nd Respondent as the distributor of Ecocash service. The Applicant did not have enough money to go it alone and needed M300, 000.00 (Three Hundred Thousand Maloti) cash assistance. It is one of the issues in this matter as to what kind of assistance and/ or relationship was borne by the said meeting.

[C] THE APPLICANT'S CASE

[7] It is the Applicant's case that in the mentioned meeting the parties entered into a verbal agreement. In that agreement, the parties agreed that the Applicant will and did provide 70% of the required amount as an investment, not a loan. The Applicant also avers that the Respondent was to raise the 30% balance which amounted to M90,000.00 (Ninety Thousand Maloti). According to the Applicant, the Respondent did not have the said M90,000.00 and as a result the parties agreed that the said money will be paid by the Applicant on condition that the Respondent would place a vehicle and a lease as collateral.

[8] The Applicant further avers that it was a term of the contract that to ensure its investment in the business as well as its loan to the Respondent, it would co-manage the said business with the Respondent. Moreover, the Applicant avers that the parties agreed to share the profits at a 70:30 ratio, 70% going to the Applicant.

[9] The agreement between 1st Respondent and 2nd Respondent was in phases. The first phase was to end in August 2021 at which time it was extended for a period of three (3) months. It was in the process of the Applicant and 1st Respondent reviewing their continued relationship that the disputes emanated. According to the Applicant, there was an amount of M36,000.00 (Thirty-Six Thousand Maloti) that was unaccounted for by the 1st Applicant. A further discussion that ensued between the parties was to review the sharing formula and move the business from Mokhotlong to Maseru. The parties did not agree on these issues to the extent that the 1st Respondent purported to terminate the contract, but the Applicant did not agree.

[10] Advocate Metlae for the Applicant, relying on **Khabo v Lesotho Bank**[1] contends that the agreement is still in subsistence and that what the Respondent did amounts to repudiation of the contract. To this repudiation, the Applicant avers that it chose not to resile from the contract but to continue with it.

[11] It is apposite to show at this stage that Advocate Metlae, in answer to the argument by Advocate Molefi that the parties were in a partnership, argued that in this country, an unregistered partnership is not a partnership.

[C] 1ST RESPONDENT'S CASE

[12] The 1st Respondent argues that it approached the Applicant for a loan to start the business in question. The Applicant however refused and proposed that it will invest in the business and actively participate in the running of such a business. Moreover, the 1st Respondent avers that the averment by the Applicant that it loaned it (the 1st Respondent) M90, 000.00 is false.

[13] The deponent to the Answering Affidavit, further says that the fact that the Applicant or deponent to the Founding Affidavit demanded the pledge of leases just confused him, but it is not proof that the arrangement was anything else but an investment. He further says the deponent to the Founding Affidavit demanded the leases as security but that was of great concern to him as to why one would invest in a business and then take his leases.

[1] (CIV/T/450/87) (CIV/T/450/87) [1999] LSCA 80 (09 August 1999)

[14] The 1st Respondent agrees that the parties were to share the profits at a 70:30 ratio. However, it is its case that the Applicant always took the profits and never shared anything with the 1st Respondent.

[15] To the assertion by the Applicant that one of the disputes that caused the 1st Applicant to want to terminate the contract was the M36, 000.00 not accounted for by the 1st Respondent, the 1st Respondent does not agree. In counter, the 1st Respondent says the Applicant was the one responsible for the management of the company and therefore is responsible for the missing money. Moreover, the 1st Respondent says the reason that caused it to show its intention to resile from the contract was the fact that the Applicant was holding secretive meetings with the runners of the business to its (1st Respondent's) detriment. Over and above that, 1st Respondent says it was not benefiting from the business relationship as the Applicant was not sharing the profits as agreed.

[16] It is, finally, the 1st Respondent's case that the business relationship between the parties was a partnership. Advocate Molefi argued that since the Applicant provided all the funds, there is no evidence that the Applicant loaned 1st Respondent the M90,000.00 as alleged and the 1st Respondent contributed to the relationship with its running of the business and its contract with the 2nd Respondent. He argued further that the relationship of the parties was a partnership and had all the elements of a partnership.

[17] Advocate Molefi argues that the actions of Applicant entitled the 1st Respondent to terminate the partnership through the process of renunciation. He argues that since the Respondent says the Applicant was contacting the runners of the business unilaterally and behind its back, renunciation was open to it. For that reason, therefore, it is Advocate

Molefi's argument that the letter by the Respondent addressed to the Applicant terminating the relationship does not amount to termination of the contract but to renunciation of the partnership.

[D] ISSUES FOR DETERMINATION

[18] At the commencement of the hearing of this matter, both counsel placed it on record that the issues that they would request the court to determine is, firstly, whether there was a contract between the parties (the Applicant and the 1st Respondent), and secondly, whether the said contract, has been terminated.

[19] In the process, this court will determine if the business relationship between these parties was that of a normal contract or that of a partnership. Secondly, if indeed the relationship was a partnership, was it dissolved per the letter terminating the relationship by the Respondent.

[E] THE LAW ON FORMALITIES OF A CONTRACT AND ITS REPUDIATION

[20] The first port of call in deciding if a contract exits is finding out if the parties in question have agreed by consent to be in a contract. This is called "the agreement by consent, or true agreement, or a meeting of the minds, or a coincidence of the wills, or *consensus ad idem…"*[2]. To find this, the surrounding facts and evidence are investigated. In buttressing this point, Christie[3] cited with approval the following quotation by Wessels JA as cited in **Jordaan v Trollip**[4].

[2] Christie R.H. The law of Contract in South Africa. 1983 Butterworths Durban-Pretoria at p13
[3] ibid
[4] 1961 (1) SA 238

> *"Although the minds of the parties must come together, courts of law can only judge from the external facts whether this has or has not occurred. In practice, therefore, it is the manifestation of their wills and not the unexpressed will which is of importance."*

I need not go deeply into the subjectivity or objectivity or any other test to be applied in trying to ascertain the minds of the parties. My Brother Mokhesi J did this elaborately and very expertly in **Maphaong V Minister of Education and Others**[5]. Suffice to say that the surrounding facts will assist us in coming to a conclusion on the minds of the parties and that I subscribe to the approach of Howard J in **Allen v Sixteen Stirling Investment (Pty) Ltd[6],** where he says;

> *"Numerous cases were cited, and counsel debated at length on the question whether the true basis of contract is our law is subjective (the theory of 'consequentiality' or objective (the 'reliance' theory). I accept that our law follows a generally objective approach to the creation or existence of contracts… but I cannot accept that this approach is so uncompromising that it precludes the plaintiff from advancing the cause of action which he has pleaded [mutual error in corpore]. In Trollip v Jordaan Steyn CJ considered a series of decisions relevant to this question, including the Potato Board case and South African Railways & Harbours v National Bank of South Africa Ltd and held, in effect, that the objective approach to contracts did not exclude the operation, according to the established principles of our law, of mistake as a ground for avoiding contractual liability. I do not think that the majority judgment in Trollip v Jordaan reveals any disagreement with the conclusion of Steyn CJ on this point."*

[5] (CIV/APN/155/2020) [2021] LSHC 42 (22 April 2021)
[6] 1974 (4) SA 164

[21] The next step in ascertaining if there is a contract is to find out if there was an offer and if such offer was accepted. **Christie**[7], incorporating the words of Solomon J in **Watermeyer v Murray**[8] puts it thus;

> *"The most common, and normally the most helpful technique, for ascertaining whether there has been agreement, true or based on quasi-mutual assent, is to look for an offer and an acceptance of that offer. In fact … 'every contract consists of an offer made by one party and accepted by the other'."*

It is therefore clear from the quotation above that in any attempt to ascertain if there is a contract, the question as to whether there was an offer that was accepted is vital.

[22] For the purposes of this judgement, I will not go into other formalities of a contract. The two mentioned above will suffice.

[F] FORMALITIES OF A PARTNERSHIP

[23] It is apposite to first consider the provisions of the **Partnership Proclamation of 1957**[9] for the relevant law on partnership. For the purposes of this judgment the relevant provisions therein are **section 2** and **28 (1)**. Section 2 (1) states as follows:

> *The terms of every partnership agreement entered into after the commencement of this Proclamation shall be recorded in a deed of partnership, which shall be signed by all the partners*

[7] supra
[8] 1911 AD 61
[9] Proclamation No 78 of 1957

before a notary or administrative officer, who shall attest the same accordingly….

[24] Section 28 (1) reads as follows:

> *If any partnership formed after the commencement of this Proclamation is not registered hereunder, the rights of such partnership and any members thereof, under or arising out of any contract made or entered into by or on behalf of such partnership or member, in relation to the business of the such unregistered partnership, shall, subject to the provisions of sub-sections (2) to (6) inclusive, not be enforceable by civil action or either civil legal proceedings, whether in the partnership name or otherwise, while such partnership remains unregistered, but any other party of such contract may so enforce his rights under or arising out of such contract against such unregistered partnership or member thereof.*

[25] Section 2 (1) is peremptory. It is therefore informative that it was the intention of the legislature to have all partnerships formed after the coming into effect of this proclamation registered. Be that as it may, section 28 takes into effect that there may be situations where the partnership may not be registered. In such situations, the partnership and members of the partnership are the ones who will suffer the consequences and not anyone who enters into a business relationship with the partnership or partners in the name of the partnership.

[26] Having looked at the Proclamation, I turn now to consider the essentials of a partnership. Cullinan ACJ had occasion to consider the essentials of a partnership in **Sogreah and Others v Director of Public Prosecutions**

and Others[10]. Quoting with Approval the judgment of Holmes AJA in **Bester v van Niekerk**[11], he put is thus;

> *"First, that each of the partners brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally the contract between the parties should be a legitimate contract.....Where all these four essentials are present, in the absence of something showing that the contract between the parties is not an agreement of partnership, the Court must come to the conclusion that it is a partnership. It makes no difference what the parties have chosen to call it; whether they call it a joint venture, or letting and hiring. The court must decide what is the real agreement between them."*

It is worth noting that the above quotation is almost like for like with the definition of partnership by **Banford**[12]. The learned author defines it as follows;

> *"A partnership is a legal relationship arising from an agreement between two or more persons not exceeding twenty each to contribute to an enterprise with the object of making profits and to divide such profits."*

Four (4) essential elements can be gleaned from the above two (2) quotations. They are; a) agreement to contribute, b) by two or more persons, c) who share the profits and/loses and d) the agreement must be

[10] (CRI/T/111/99) [2000] LSCA 81 (20 June 2000)
[11] 1960 (2) SA 779 (A)
[12] Banford on the Law of Partnership and voluntary Association in South Africa. Juta and Co, Ltd Cape Town 1982 at 1

legal. These essentials may be stretched by some, but in general, their presence mean a partnership is in existence.

[G] ANALYSIS OF THE MATTER

[27] It is common cause that the parties met in June 2020 and entered into some commercial relationship. It is common cause that the reason the parties met is that the 1st Respondent had secured a contract with the 2nd Respondent and that contract needed it (the 1st Respondent) to have the amount of M300 000.00 for it to be affected. The 1st Respondent then approached the Applicant to source the said funds. It is further common cause that the Applicant contributed the 70% of the M300, 000.00 as its contribution to the funds needed. Moreover, it is common cause that the remaining 30% which amounted to M90, 000.00 was also from the Applicant. And finally, it is common cause that the parties agreed that they would share the profits at 70:30 ratio. This is as far as the parties are in agreement concerning their business relationship.

[28] There is a dispute as to the nature of the M90, 000.00 that the Applicant paid into the business. According to the Applicant, it paid the said amount as a loan to the 1st Applicant on condition that the 1st Respondent pledged a lease and a vehicle as collateral until the said money is paid. On the other hand, the 1st Respondent alleges that even the M90,000.00 was part of the contribution by the Applicant. In other words, the 1st Respondent's case is that the entire M300, 000.00 was from the Applicant. There was never a loan agreement. The 1st Respondent agrees that it pledged its lease and vehicle but was always baffled as to why the Applicant wanted it to put them as collateral.

[29] The first issue that this court has to decide is, therefore, whether the said dispute is material to the issue to be determined. Secondly, if it is material, was it foreseeable to the applicant? (See **Khabo v Khabo**[13]). Both counsel did not venture into the argument concerning the dispute of fact mentioned herein and its effect thereto to the application. Perhaps this is telling of the nature of the dispute.

[30] Parties are agreed that there was a lease and a vehicle pledged as collateral. The 1st Respondent argues that it was surprised when the Applicant demanded collateral. If that was the case, why would the 1st Respondent not quiz the Applicant on that but on the contrary just placed its property with the Applicant as collateral? This does not have any logical sense at all. This is not a dispute that can prevent this court from making a decision on this particular fact. It is not a material dispute, and it is a farcical one. Advocate Molefi argued that if it was a loan then there would be some documentation proving such. However, the entire agreement between the parties was oral. It is therefore not surprising that the loan part of the agreement was also oral. This denial by the 1st Respondent is therefore analogous to a bare denial.

[I] WAS THERE A CONTRACT

[31] Having concluded that the dispute on the terms of the agreement is not necessarily a real dispute, I turn now to consider if the parties were *ad idem* to the effect that we could conclude that there was an agreement.

[32] According to the 1st Respondent, the initial reason it Approached the Applicant was to get funding for the Econet (2nd Respondent) Contract. The

[13] (C of A (CIV) 72/18) [2019] LSCA 56 (01 November 2019)

Applicant on the contrary offered to enter into business with it. For this reason, therefore, it is my considered view that the offer was from the Applicant and the 1st Respondent accepted the offer. The parties agreed that they will share the profits and run the business together. As shown, both parties agreed that they would share the profits at a 70:30 ratio. This is not in dispute. The little dispute that was there was how the parties may have arrived at the said ratio. However, as shown, that dispute could not be considered as a genuine dispute. There is no other logical or reasonable inference that the Applicant loaned the 1st Respondent the M90, 000.00 to enable it (the 1st Respondent) to contribute to the term of the contract. Objectively (see **Maphaong v Minster of Education and others**[14] and **Allen v Sixteen Stirling Investment (Pty) Ltd**[15]**)**, no reasonable man can eschew the conclusion that there was an agreement between the parties. The only reasonable conclusion therefore is that there was an agreement between the parties.

[II] WAS THE RELATIONSHIP A PARTNERSHIP

[33] I have already concluded that the parties had a contractual relationship. The next question therefore is whether the relationship between the parties is only a pure contract or it can also be classified as a partnership agreement.

[14] supra
[15] supra

[34] Section 2 of the Proclamation quoted in paragraph **[23]** above is peremptory in as far as the registration of partnerships is concerned. When it is read with section 28 (1) of the Proclamation, it becomes clear that it was the intention of the legislature to make it mandatory for partnerships to be registered. Section 28 (1) makes it impossible for an unregistered partnership or its members to enforce their rights under a contract entered into by the partnership of members of the said partnership. Only a third party (a party who has entered into a contract with the partnership or members of the partnership) can do so.

[35] It is apposite that we look at the provisions of section 28 (1) in conjunction with 28 (5) as sub-section (1) is subject to sub-sections (2) to (6). Section 28 (5) states thus:

> *If any civil action or proceedings is commenced by any other party against such unregistered partnership or member thereof, to enforce the rights of such party in respect of such contract as is mentioned in sub-section (1), nothing contained in this section shall preclude the unregistered partnership or any members thereof from enforcing, in such action or proceeding, by way of counter-claim, set-off or otherwise, such rights as it or he may have against such party in respect of such contract.*

This sub-section allows an unregistered partnership or members of an unregistered partnership to defend an action brought against it or them fully. It, however, does not give power to the partnership to institute the action. There may be an argument that “any other party” in this section means even a member of the partnership. It is my considered view that it does not include the members of the partnership but rather an innocent

third party who would have entered into a contract with the unregistered partnership not knowing that it was not registered. The legislature intended to protect innocent third parties.

[36] It is common cause that the parties did not register their contractual relationship or association. For this reason, therefore, as between the parties, their association cannot be a partnership. However, but for the lack of registration, the relationship could easily pass as a partnership. The parties agreed inter alia on the contribution and the sharing ratio of the profits. Their association was therefore for the purpose of making profit. These essentials tally with the definition by **Banford**[16] quoted in paragraph **[26]** above. The inevitable conclusion, therefore, is that the commercial relationship between the parties is not a partnership agreement but a contract.

[III] HAS THE CONRACT BEEN TERMINATED

[37] It is common cause that the 1st Respondent, wrote a letter to the Applicant that it is terminating the contract. Advocate Metlae argued that this is an intention by the 1st Respondent to resile from the contract and therefore amounts to repudiation. There is not much to say on the counter by Advocate Molefi as he was basing it on the premise that the relationship between the parties was a partnership. I need not go much into the renunciation as a ground under the law of partnership.

[38] Advocate Metlae cited the case of **Khabo v Lesotho Bank**[17] in support of his argument with which I am in total agreement. Kheola CJ, citing with

[16] Supra
[17] supra

approval the judgement of de Villiers, J.A in the South African case of **Strachan v Lioyd Levy**[18]**,** stated that,

> *"It is trite law that a contract cannot be cancelled by one party to it against the wish of the other. As it requires the consensus of two parties to conclude, it equally requires the consensus of both for its dissolution. But if one party to it purports to cancel it, or commits such a serious breach that it amounts to a repudiation; the other party can either hold him to his contract or sue him for damages for the breach…"*

[39] The letter in question is clear that the 1st Respondent was no longer willing to perform his side of the deal and attempted, without any stated reason, to resile from the contract. I need not go into the disputed issue of the funds that each party is putting a blame on the other that the funds were misappropriated since it looks like it was solved way before the letter in question. The letter only says that the parties are now at gross purposes without elaborating. It is my considered view that the letter amounts to repudiation and the innocent party is at liberty not to accept it.

[H] **CONCLUSION AND ORDER**

[40] Having read the papers and having heard both counsel, it is my considered view that the parties entered into a binding contract, that the letter in question penned on behalf of the 1st Respondent, amounted to

[18] 1923 A.D. 670 at p.671.

repudiation and the Applicant has a right not to accept it. Having concluded thus, the following order is made:

I. The 1st Respondent correspondence of the 24th day of December 2021 amounts to a repudiation of contract between the 1st Respondent and the Applicant.
II. The contract between the Applicant and the 1st Respondent is valid and binding on the parties at all material times since the agreement of the parties in June 2020 until the contract between the 1st Respondent and the 2nd Respondent is terminated lawfully.
III. Respondent to pay costs of this Application.

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Kopo J.
Judge of the High Court

For Applicant: **ADV. METLAE**

For 1st Respondent: **ADV. MOLEFI**