

SOUTH AFRICA / JUDGMENT

## Mosebo and Another v Mangaung Metropolitan Municipality (840/2015) [2015] ZAFSHC 153 (7 August 2015) [2015] ZAFSHC 153

COURT

Free State High Court, Bloemfontein

BEFORE

B.C. Mocomie

CASE / FILE NUMBER

840/2015

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### Source record

IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Case Number: 840/2015

In the matter between:

TISETSO PETRUS

MOSEBO

1st

Applicant

RTK ADVISORY CENTRE

CC

2nd

Applicant

and

MANGAUNG METROPOLITAN

MUNICIPALITY

Respondent

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**JUDGMENT**

BY:

MOCUMIE, J

HEARD ON: 4

JUNE 2015

DELIVERED ON: 7 AUGUST 2015

Mocumie, J

[1] The applicants apply for an order in the following terms:

‘(a) That the respondent refund the applicants in the amount of R402 188.00 within 14(fourteen) days of date of this order.

(b) That the respondent pays the costs of the application on an attorney and client scale.

(c) Further and/or alternative relief.’

[2] The essential facts of this matter are to a large extent common cause. The salient facts are as follows. The first applicant is a businessman in Bloemfontein, Free State and the sole member of the second applicant, RTK Advisory Centre Close Corporation (RTK) registered in terms of the laws of the Republic of South Africa. The respondent is the Mangaung Metropolitan Municipality (the municipality), a municipality established in terms of the provisions of s12 of the Local Government: Municipal Structures Act, 117 of 1998, with its administrative head office situated at Bram Fischer Building, Bloemfontein, Free State Province.

[3] In the founding affidavit the deponent, Mr Tisetso Petrus Mosebo (Mosebo), averred that during June 2013 RTK decided to invest in property. Mr Jaco Rothman (Rothman) of Rothman Attorneys, RTK’s attorney, performed a deed search in Lourier Park Bloemfontein and identified two empty ervens situated there; Erf 22519 and Erf 22520. Rothman approached the municipality on behalf of RTK and requested the purchase price of the properties. He also applied for clearance figures from the municipality. The request was submitted to the clearance division of the municipality’s Finance Directorate and Centlec, the official electricity supplier.[1] Draft Deeds of Sale of both properties were also submitted for the municipality’s consideration.

[4] During July 2013, Rothman was informed that the purchase price of the properties was obtained and that the clearance certificates were available. The valuation price for Erf 22519 was R196 460 .The valuation price of Erf 22520 was R184 704. Some alterations were subsequently made to the amounts provided. But those alterations are of no moment.

- [5] On 27 May 2014 Rothman paid an amount of R208 248 in respect of erf 22519 and R193 940 in respect of erf 22520. On 4 August 2014 the municipality issued a certificate in respect of erf 22520. However, no clearance certificate was issued in respect of erf 22519. Rothman thereafter made the necessary arrangements to transfer erf 22520 into the second applicant's names. On 13 June 2014 Rothman was informed that the documents were not signed because the properties in issue had been promised to someone else prior to RTK's offer to purchase the properties concerned. Thus they could not be sold to RTK. As a result, on 22 October 2014 Rothman requested a refund of the money, R403 188 and he received no response from the municipality. On 11 November 2014 Rothman attorneys again requested the refund of the applicant's monies. The municipality ignored this letter.
- [6] Rothman subsequently engaged the municipality's property management unit and interacted with the General Manager of the unit, Mr Nelson Mofokeng (Mofokeng), who informed him that he, Mofokeng, 'deemed the transaction in terms of which the applicant had proposed to purchase the properties and paid over the purchase price to the respondent to be fraudulent in nature and that this matter [was to] be investigated.' The application was, as a result, referred to the municipality's Legal Division. Rothman pursued the matter with the municipality's Legal Division until the unit referred him to the Chief Financial Officer because the money had been paid to the latter as the municipality's financial officer and retained by him.
- [7] It is common cause between the parties or at least not seriously disputed by the municipality that RTK through Rothman paid the money into the municipality's account on the basis of a purported agreement of sale of two properties. It is further common cause that the municipality informed the applicants that no such agreement came into existence nor could it because the land was already promised to someone else prior to the purported sale between it and the applicants. Thus the agreement was void ab initio.
- [8] The main issue to be determined is whether the municipality is entitled to keep the money deposited into its account by RTK or Rothman.
- [9] The case for the applicants is simple. RTK paid R402 188 and R208 248 into the municipality's account for the purchase of erf 22519 and R193 940 in respect of erf 22520. The agreement was based on a purported sale agreement which was void ab initio. The municipality's case is that the applicants were speculating with its property, unlawfully.[2] Based on an internal investigation, it came to the conclusion that the money paid were never paid by the applicants and thus did not belong to either of the applicants. Its investigations pointed a further purchaser(s). The purported sale(s) was to bypass the procedures set out in section 14 of the Local Government: Municipal Finance Act 56 of 2003[3].
- [10] Adv Heymans submitted that there was a material dispute of facts regarding the ownership of the money which could never be resolved or adjudicated upon on the papers. Thus the application should be dismissed summarily with costs.

[11] The decision to proceed by way of application instead of an action has been utilised more frequently due to it being less expensive and more favourable in obtaining an expeditious order. In the authoritative decision of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd*[4] the court held as a general rule that the choice between the procedures depends on whether a bona fide material dispute of fact

should have been anticipated by the party launching the proceedings. When such a dispute is anticipated, a trial action should be instituted.

[12] It held further,

‘an application 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 a applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy scertainment... what is essentially the subject of an ordinary trial action...’[5]

[13] In *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[6] the court stated the test as follows

‘...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[14] This has been reaffirmed by the Supreme Court of Appeal in *Lombaard v Droprop CC and Others*[7] where it stated

‘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.

[15] The municipality has not placed anything in dispute except to allege collusion between Mosebo, Rothman and some of its unknown employees in an unlawful venture; speculation with its property. From the common cause facts between the parties, particularly the inexplicable refusal to refund the money to RTK, and in the light of the *Plascon Evans* rule, there is simply no dispute of fact in this case.

[16] The relief sought under paragraph 1 of the Notice of Motion is for a refund of the amount of R402 188. This relief is repeated in the founding Affidavit where Mr Mosebo stated the purpose of the application as follows: ‘The purpose of this application is to obtain an order in terms of which the respondent refunds the amount of R402 188.00 to the applicants, which amount was erroneously paid to the respondent.’[8]

- [18] A party suing is dominus litis as (s) he chooses the claim most suitable on the facts of his or her case. The plaintiff is not obliged or required to attach a label to his or her cause of action; all (s) he needs to do is satisfy the court that the facts pleaded and proved entitle him or her to the claim (s) he makes.[9]
- [19] The claim in this case is a simple claim based on money paid based on an agreement that is void ab initio. The ordinary remedies available in such a case are well known and include cancellation of the agreement and a claim for a refund.[10] All RTK had to prove is that (a) it paid money into the account of the municipality on the basis of an agreement which did not materialise, (b) upon being informed by the municipality that the sale will not materialise it demanded a refund which amounted to an acceptance of the repudiation of the purported sale agreement (c) despite demands made for the return of the money, the municipality refused to refund the money on no legal ground(s). If RTK satisfied these requirements, it would be entitled to the return of the money.
- [20] Mosebo and Rothman denied colluding with anyone to speculate with the municipality's property. Rothman transferred the money to the municipality, on behalf of RTK, to conclude a sale agreement in respect of two properties. The sale did not materialise. There is no dispute that Mosebo is the sole member of RTK and acted on behalf of RTK at all times. In law although RTK has a distinct legal persona, it cannot negotiate or participate physically in business deals except through Mosebo. That is common sense. To say that Mosebo and RTK had to prove to whom the money belonged smacks of ignorance on the part of the municipality. Furthermore, apart from the suspicion the municipality harboured that there was fraud committed, there is no evidence which pointed to an unknown benefactor who deposited the money into the municipality's account. Even if there were, there would be no nexus between the municipality and the alleged benefactor that entitled the municipality to retain the money. There is simply no legal basis for the municipality to do so. From the papers and the submissions made in court, RTK has satisfied all the above requirements and is entitled to the return of its money.
- [21] Lastly the issue of costs. It boggles the mind why the municipality refused to refund the money when it was clear right from the beginning that it had no legal basis to stand on. The municipality's case is unfounded and based on no authority. The only case it could make is based on suspicions which are unsubstantiated i.e that the applicants were involved in some fraudulent scam to sell houses belonging to it at a commission even before they could have paid the full purchase price, speculating. If the municipality suspected fraud it ought to have registered a criminal case so that the police can investigate; and not keep, without lawful cause, the money of a hereto innocent buyer. There is no indication where the money was kept since the refusal to refund RTK. There is no indication that whatever account the money was kept in is interest bearing; which interest RTK would be entitled

to from date on which summons was issued to date of the order that will follow. From a very cursive reading of the papers, it was clear from the onset that the municipality's case will see no light of the day in any court. Yet it persisted up to this stage. I see no other way why this conduct can be discouraged in the strongest possible way than through a cost order on a punitive scale of attorney and client.

[22] In the result the following order is granted.

#### ORDER

1. The respondent is ordered to refund the applicants in the amount of R402 188 within 14(fourteen) days of date of this order.
2. The respondent to pay the costs of the application on attorney and client scale.'

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B.C. MOCUMIE, J

On behalf of the applicants: Adv. S. Grobler

Instructed by:

Peyper Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. Heymans

EG Cooper Majiedt Inc

BLOEMFONTEIN.

[1] See FA3,FA4,FA5 and FA6 appended to the paginated papers

[2] See Supporting Affidavit on page 82 of the paginated papers.

[3] Section 14(5) provides: 'Any transfer of ownership of a capital asset in terms of subsection (2) or (4) must be fair, equitable, transparent, competitive and consistent with the supply chain management policy which the municipality must have and maintain in terms of section 111.'

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

[5] Room Hire Co (Pty) Ltd at ...

[6] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634H-635B. See also Stellenbosch Framers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957

- [4] SA 234 (C) where the court stated ‘where it is clear that facts, though not formally admitted cannot be denied, they must be regarded as admitted...’
- [7] Lombaard v Dropprop CC and Others 2010(5) SA 1 (SCA) at 11.
- [8] See page 9 of the Founding Affidavit.
- [9] Davidson v Bonafede 1992 (3) SA 190 (W) at 199E-F. at 505D.
- [9] Davidson v Bonafede 1992 (3) SA 190 (W) at 199E-F.  
at 505D.
- [10] Christie, The Law of Contract 5th Edition.
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