

SOUTH AFRICA / JUDGMENT

Mothuloe Attorneys v Microzone Project CC and Others (1684/2009) [2016] ZANWHC 14 (21 April 2016) [2016] ZANWHC 14

COURT

North West High Court, Mafikeng

BEFORE

Hendricks

CASE / FILE NUMBER

1684/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: 1684/2009

DATE:

21 APRIL 2016

In

the matter between:-

MOTHULOE

ATTORNEYS.....Plaintiff

And

MICROZONE

PROJECT

CC.....First

Defendant

LEBOGANG

KEVIN

SERIBA.....Second

Defendant

NORTH

WEST HOUSING

CORPORATION.....Third

Defendant

MEC

DEPARTMENT OF LOCAL GOVERNMENT &

HOUSING.....Fourth

Defendant

DATE
OF HEARING : 25 JANUARY 2016
DATE
OF JUDGMENT : 21 APRIL 2016
COUNSEL
FOR THE PLAINTIFF : ADV ROSSOUW SC
COUNSEL
FOR THE THIRD DEFENDANT : ADV LEVER SC
COUNSEL
FOR THE FOURTH DEFENDANT : ADV KHOZA SC
with
ADV NXUMALO

JUDGMENT

HENDRICKS J

Introduction:-

- [1] The Plaintiff is a firm of attorneys practicing as such under the name and style of Mothuloe Attorneys, Notaries and Conveyancers. It instituted an action for damages on the 06th June 2009 against the four defendants, which embodies various claims. The original particulars of claim was subsequently amended. In terms of the amended particulars of claim, the total amount eventually claimed is R667 856 260.00 (six hundred and sixty seven million eight hundred and fifty six thousand two hundred and sixty rands) based on the assumption that there were 98106 (ninety eight thousand one hundred and six) houses over which the Plaintiff would have registered transfers and bond registrations.
- [2] It is alleged that the conveyancer fee that the Plaintiff would have charged per transfer of a house is R3960.00 (three thousand nine hundred and sixty rands) for the 98106 houses and R2600.00 (two thousand six hundred rands) per bond registration for 85% of the houses, totaling 83 390 houses. In addition, so it was contended, the Plaintiff would have earned on a bond of R50 000 (fifty thousand rands), a bond originating fee of R750.00 (seven hundred and fifty rands) for the 83 390 houses. This is how the amount of R667 856 260.00 is computed. This aforementioned amount is claimed from the North West Housing Corporation ("NWHC") as the Third Defendant and the Member of the Executive Council [MEC] for the Department of Local Government and Housing in the North West Province (the Fourth Defendant), jointly and severally, the one paying the other to be absolved, plus interest. The case against the First Defendant (Microzone Projects CC) and the Second Defendant (Mr. Lebogang Kevin Seriba) was withdrawn by the Plaintiff at the commencement of the trial.
- [3] Mr. Wycliff Thipe Mothuloe (Mr. Mothuloe) testified on behalf of the Plaintiff. His evidence can be succinctly summarized as follow.

He is an attorney and the sole practitioner of the Plaintiff. During 2007 he was telephonically contacted by one Mr. Dichabe Molefe, an attorney of Mahikeng and informed about conveyancing work that need to be performed for and on behalf of the NWHC. He drove from Johannesburg to Mahikeng in order to meet Mr. Molefe and the former Second Defendant (Mr. Seriba). He was informed that there were houses belonging to the NWHC across the North West Province which need to be sold and transferred because the NWHC was to be wind-down. Mr. Seriba was alleged to have acted as consultant for the NWHC.

[4] Mr. Seriba instituted an action for damages based on breach of contract against the NWHC under case number 379/2005, in which he claimed the amount of R31 393 242.81 (thirty one million three hundred and ninety three thousand two hundred and forty two rands and eighty one cents). The matter was settled. On 06th September 2007 a draft order with the following terms, was made an order of this Court, namely:-

- (1) “That Plaintiff [Mr. Seriba] withdraws his claim against Defendant [NWHC], subject to paragraph two of this order.
- (2) The parties shall pursuant to this agreement and in accordance with the Public Finance Management Act enter into a service level agreement for the disposal of the Defendant’s rental portfolio by Plaintiff [Mr. Seriba]
- (3) Each party to pay his/its own costs.”

What appears in brackets is my insertions.

[5] A service level agreement (SLA) was concluded on the 08th October 2007 between Mr. Seriba and the NWHC. Flowing from this SLA, the Plaintiff and the First Defendant (Microzone) represented by the Second Defendant (Mr. Seriba) concluded a joint venture agreement (JVA) on 21 January 2008. According to the negotiations, it was proposed that the Plaintiff must buy exclusivity, which Mr. Mothuloe refused to do. It was agreed that the Plaintiff would lend and advance money to Mr. Seriba representing Microzone which need to be repaid from the 10% commission which was supposed to be earned by Microzone. A loan in the amount of R1 000 000.00 (one million rands) was advanced to Mr. Seriba. An induction workshop and a due diligence tour took place between Mr. Mothuloe, Mr. Seriba, Mr. Mothlamme and Mr. Letsela of NWHC, amongst others. The aim was inter alia to determine the number of houses that comprises the rental portfolio of NWHC.

[6] After the amount of one million rand was dissipated, Mr. Seriba approached Mr. Mothuloe again for another amount of money. Mr.

Mothuloe emphasized that repayment of this amount was peremptory. Mr. Mothuloe also insisted that he be given a power of attorney (POA) by the NWHC. On 28 February 2008, Microzone through Mr. Seriba, purported to cancel the JVA, by letter. In response thereto, Mr. Mothuloe accused Mr. Seriba of delaying with the POA because he wanted more money. He placed Mr. Seriba on terms to produce the signed POA within thirty (30) days upon payment of another amount of one million rand. On 11 June 2008, Microzone cancelled the JVA. Mr. Mothuloe on

behalf of the Plaintiff accepted the cancellation. This culminated in the institution of this action for damages, as alluded to earlier on. Various defences were raised by the NWHC and the Fourth Defendant, which will be dealt with in some detail, later on in this judgment.

[7] It is trite that he who allege must proof. Therefore, the onus is on the Plaintiff to proof:

- (a) the existence of a contract between it and the Third and Fourth Defendants;
- (b) that the contract had been breached or repudiated;
- (c) that the Plaintiff suffered the damages as alleged;
- (d) and that there is a link between the breach of contract and the damages allegedly suffered.

[8] For the existence of the contract, Mr. Mothuloe relies on a partly oral and partly written agreement which Plaintiff entered into on or about November 2007 with NWHC. Because the NWHC resorted under the Fourth Defendant, it was also alleged by implication that the Fourth Respondent together with the Third Defendant are liable to the Plaintiff for the damages suffered. Mr. Mothuloe placed much emphasizes on an undated letter, signed by one Z.P Tolo for and on behalf of the NWHC. The contents of the letter read thus:-

“ TO WHOM IT MAY CONCERN

Dear Sir/ Madam

K.L. SERIBA T/A MICROZONE PROJECTS & NORTH WEST HOUSING CORPORATION:
APPOINTMENT OF MOTHULOE ATTORNEYS AS SOLE CONVEYANCERS

This serves to confirm that the NORTH WEST HOUSING CORPORATION appointed MR K.L. SERIBA trading as MICROZONE PROJECTS, to attend to the disposal of the entire rented residential property portfolio across the North West Province.

MICROZONE PROJECTS in turn retained the services of MOTHULOE ATTORNEYS NOTARIES & CONVEANCERS of 20A ST. JOHN ROAD HOUGHTON (“MOTHULOE”) as the sole Conveyancers and Attorneys for this entire project.

The North West Housing Corporation has accepted the appointment of MOTHULOE and hereby undertakes to assist both Microzone Projects and Mothuloe in the discharge of their mandate in this project.

The project covers the disposal of approximately TEN THOUSAND houses which are in zoned townships and are serviced according to value. MOTHULOE Attorneys are to attend to the registration of both the transfers and mortgage bonds over these properties.

Kindly assist them accordingly.

Yours Faithfully

Z P TOLO

CHIEF EXECUTIVE OFFICER”

- [9] The onus rested on the Plaintiff to satisfy this Court that Z.P Tolo had the requisite authority to bind the NWHC in the manner as alleged. It is common cause that the NWHC is a Body Corporate established in terms of the North West Housing Corporation Act 24 of 1982 (“the NWHCA”). It is also an organ of State upon which the provisions of the Public Finance Management Act 1 of 1999, is applicable. In terms of section 2 (3) of the NWHCA, it is provided that the NWHC “shall be managed, controlled and represented by a Board of Directors...and all acts of such Board shall be deemed to be Acts of the Corporation.”

In terms of section 22 of NWHCA, it is provided that:

“every contract agreement, authority, cheque, bill, promissory note, document and any other instrument, executed for and on behalf of the Corporation, shall, if it complies with the provisions of this Act in all other aspects, be duly executed if signed by the General Manager or the chairperson of the Board, and any other member of the Board duly authorised thereto by the Board, or, if so authorised by the Board, by any two members of the Board authorised thereto by the Board or the General Manager and any other officer of the Corporation duly authorised thereto by the Board”.

- [10] There was no evidence led, proving that Z.P Tolo was authorised, as envisaged by section 22 of the NWHCA or was exercising powers that had been delegated to Z.P Tolo by the Board, when the aforementioned letter was written. It is also apparent from the letter that it was only signed by one Z.P. Tolo and not counter signed by any other person (e.g. the General Manager or Chairman of the Board or any other person so authorised by the Board.) Mr. Monale, the then Chairperson of the NWHC’s Board, testified that at no stage was the alleged contract tabled at a Board meeting of the NWHC nor was Mr. Mothuloe’s name mentioned. The first time that he became aware of the existence of Mr. Mothuloe was when the current litigation had commenced. He was never challenged on this, nor was it denied. This means that the said letter was not issued with the necessary approval of the Board of NWHC as required by Section 22 of the NWHCA.

- [11] Mr. Mothuloe failed to raise the existence of a contract between the Plaintiff and the NWHC until the institution of this action. If there was a contract in place, so it was contended, Mr. Mothuloe would have relied on it throughout his interaction with Microzone and /or Mr. Seriba or the NWHC. In fact, Mr. Mothuloe would have sought to enforce it by the serving of a notice of breach in the same way he did to Microzone. I am of the view that Mr. Mothuloe must have known that the letter of Z.P Tolo on behalf of the NWHC never created a legal relationship between the Plaintiff and NWHC. This much Mr. Mothuloe conceded during cross-examination when he testified:

“No, Tolo’s letter is not a legal relationship.”

- [12] Mr. Mothuloe on behalf of the Plaintiff furthermore contended that a vinculum iuris came into being between the Plaintiff and NWHC. He testified:-

“I was accepting the, I was accepting the repudiation of the contractual relationship between the Third Defendant and the Plaintiff and the First and Second Defendants and the Plaintiff.”

... to say that Plaintiff was cancelling that letter is to put it in incorrect terms at the very least I have no capacity as the Plaintiff

to cancel a letter that had been issued by the North West Housing Corporation, it is not in, it is not, it was not my purpose to do that and that letter, my letter does not say that.”

[13] It is quite apparent from Mr. Mothuloe’s evidence and the documents relied upon that in fact, it was Microzone who retained the Plaintiff’s services and not the NWHC. A proper interpretation of the letter signed by Z.P Tolo which was addressed “To All Whom It May Concern” only records of what has happened. To reiterate, in my view this letter does not create any legal relationship (*vinculum iuris*) between the Plaintiff and the NWHC. All that the NWHC did, was to give an undertaking to assist Microzone and the Plaintiff in the execution of their mandate. Ironically, it was Microzone and not the NWHC that terminated the contract which repudiation the Plaintiff accepted.

[14] Mr. Mothuloe was also relying on the principle of agency in an attempt to implicate the NWHC. He alleged that:

“A relationship between Mothuloe Attorneys and Microzone therefore is a relationship with an agent, an agent of the Corporation under the service level agreement between the North West Housing Corporation and Microzone. The North West Housing Corporation is under the same agreement the principal of Microzone.”

[15] He further testified that the Plaintiff accepted the repudiation by Microzone, as also representing repudiation by the NWHC. For this assertion, Mr. Mothuloe relied on the fact that Microzone used a letterhead which had the NWHC’s logo and details on it. The idea of the joint letterhead was solely for the purpose of convincing the people who are going to be approached, the occupants of the houses and other public institutions such as radio stations who were going to be fighting the adverts of this project, that there is legitimacy to this project because it bears the letterhead of the NWHC, as testified by Mr. Mothuloe.

[16] The letterhead contains nothing to suggest that Microzone was NWHC’s agent. This letter referred to bears nothing but Microzone’s letterhead with the emblem of the NWHC on it. A mere letterhead without more simply cannot establish agency. In fact, even if Mr. Seriba purported to act as an agent of the NWHC, when he was not, it would not have assisted the Plaintiff in proving agency.

See: *Van Niekerk v Van den Berg* 1965 (2) SA 525 (A).

[17] Interpreted in its proper context, the said letter was meant to facilitate interaction between the Plaintiff as a member of the Microzone team and the staff of the NWHC at the different locations they visited as part of the due diligence tour. Mr. Mothuloe’s reliance on agency is further fatal to Plaintiff’s case in that it undermines the claim of a partly written and partly

oral agreement between the Plaintiff and NWHC. In my view, Mr. Mothuloe on behalf of the Plaintiff, failed to prove on a balance of probabilities, that the Plaintiff had a contract with the NWHC.

- [18] It follows that because the Plaintiff failed to establish that a contract between it and the NWHC and also by implication the Fourth Defendant came into existence, there cannot be a breach of such a contract. However, Mr. Mothuloe on behalf of the Plaintiff also contended that the NWHC failed to “provide or procure the necessary power of attorney to the Plaintiff, to enable the Plaintiff to register any deed of transfer, mortgage bonds and other similar documents,”...

It must be mentioned that Mr. Mothuloe presented a POA which he drafted for signature by the NWHC/ Fourth Defendant. This was an all inclusive POA to cater for all the houses in the rental portfolio of the NWHC that are registered in the names of either NWHC and / or the Fourth Defendant. This POA was never signed as it did not conform to the prescripts of the Deeds Registries Act 47 of 1937, as amended (DRA).

- [19] Mr. Mothuloe on behalf of the Plaintiff, demanded from or through Microzone that he be furnished with a POA. The Deeds Registries Act (DRA) and its regulations stipulates that deeds of transfer shall be prepared in the form prescribed by law or by regulation and it must

be done by a conveyancer. Therefore, a POA could not be provided by Microzone for the NWHC nor the Fourth Defendant. It only need to be signed by any one of them who was the rightful owner of the property.

So, instead of demanding a POA from the NWHC or even the Fourth Defendant, the Plaintiff, as the alleged appointed conveyancer should

have prepared a POA for each of the properties that need to be transferred. This was not done.

See: Section 20 of the Deeds Registries Act 47 of 1937, as amended.

Regulation 43 (1)

Regulation 44(1)

- [20] A further aspect that need to be dealt with is the rental portfolio of the NWHC. This lies at the heart of Plaintiff's case as correctly submitted by Adv. H Lever SC, counsel for the Fourth Defendant. That this is so, is evident from the following documents:

- The order of court dated the 6th September 2007 refers to an agreement for the disposal of “the defendant’s rental portfolio in annexure “B”.
- The service level agreement defines the rental portfolio as meaning "all properties listed and described in annexure "B" allocated for disposal to the consultant"

[21] It must be mentioned at the onset that the Plaintiff was unable to produce annexure "B" or to indicate the properties that were listed in annexure "B" referred to in the SLA. Accordingly, it was left to the imagination as to the nature and contents of annexure "B" which defined the rental portfolio of the NWHC. The joint venture agreement between the Plaintiff and the erstwhile First and Second Defendants, in its preamble recorded that the service level agreement (SLA) conferred the sole mandate to Mr. Seriba to dispose of the NWHC's "rented property portfolio". Clause 1.4 of the JVA makes it clear that the words and terms of the JVA are to be read together with the court order and the SLA. It follows that "the rented property portfolio" and "the rental property portfolio" are one and the same thing.

[22] The prayers sought by the Plaintiff against the NWHC and the Fourth Defendant are for declarators in that the Plaintiff has suffered damages because:

- "all the properties of the third defendant's rental portfolio in total 98 106 units would have been sold;
- the plaintiff "would have acted as the appointed conveyancer and registered the transfers of all the properties making up the rental portfolio".

It follows therefore that if this Court were to give any order in favour of the Plaintiff, it could only do so in respect of the properties in the NWHC's rental portfolio and not in respect of properties in any other portfolio.

[23] It seems to me that confusion was introduced by the Plaintiff in paragraph 9 of its amended Particulars of Claim by alleging that "the rented property" is referred to in different terms as set out in annexures "MA1" to "MA4". Annexure "MA1" attached to the amended Particulars of Claim is a letter from the NWHC dated 18 June 2001 addressed to YOURS PROPERTIES, a company of the erstwhile Second Defendant, entitling that firm to market its "property portfolio". Generally where different words are used, they refer to different things. There is no reason to believe that a "property portfolio" is to be construed as being the same as a "rental portfolio". In fact, the evidence of Mr. Moolman Wessels on behalf of the Fourth Defendant, makes it perfectly clear that the "property portfolio" on which Mr. Seriba sued the NWHC under case no 379/2005 is distinctly different from the "rental portfolio". Mr. Wessel's evidence in this regard was not contradicted by the Plaintiff. Mr. Monare, the former Chairman of the NWHC, also distinguished the portfolios of the NWHC. His evidence too, in this regard, was not disputed. This fact is also borne out by the documentary evidence of the advertisement for tenders which appears in the Minutes of the Board of NWHC.

[24] The onus is on the Plaintiff to show that the "property portfolio" is the same as the "rental portfolio". In my view, the Plaintiff has not discharged this onus. I reiterate, it is clear that the rental portfolio and the property portfolio are not one and the same thing. Furthermore, a number of different figures have been presented as to the size or the number of properties which comprise the rental portfolio. The numbers which have been mentioned are 5000, 5316, 5070, 10000, 10750, and 98106. Z.P Tolo's letter estimated the rental portfolio at 10 000

(ten thousand) houses. This was a mere estimate and did not establish the precise number comprising the rental portfolio of the NWHC. It was quite apparent that the Plaintiff cannot prove the correct figure. That being so, the Plaintiff cannot succeed in proving its case.

[25] In conclusion on this topic, the scope and extent of the rental portfolio was not defined by the relevant court order. Neither was the scope and extent of the rental portfolio defined in the JVA. The only definition of what comprises the NWHC's rental portfolio is to be found in the SLA. In terms of clause 2.2.2.6 of the SLA the "rental portfolio shall mean all properties listed and described in annexure "B" allocated for disposal to the Consultant."

I am therefore unable to determine what properties constitute the NWHC's rental portfolio. That being the case, the proper order should be one of dismissal of the Plaintiff's claims. Evidence was also presented to prove that some of the properties are registered in the name of the Fourth Defendant and some in the names of municipalities.

See: Herbstein And Van Winsen, *The Civil Practice Of The High Courts Of South Africa*, 5th Edition, Volume 1, Page 924.

[26] At the close of the Plaintiff's case, applications for absolution from the instance were made by the NWHC and Fourth Defendant. These applications were refused. The test for absolution from the instance at the end of the plaintiff's case is not a particularly stringent one. It simply inquires whether "a reasonable man might or could hold in his favour; in other words, if he has made out a *prima facie* case for his opponent to answer."

See: May, *South African Cases and Statutes on Evidence*, p.62

MILLER AJA in *Neon Lights v Daniel* 1976 (4) S.A. 403 at (A) page 409G states:-

"...when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter*, 1917 T.P.D. 170 at p. 173; *Ruto Flour Mills (Pty.) Ltd. v Adelson* (2), 1958 (4) SA 307 (T))."

What this Court had in front of it at that stage was only the evidence of Mr. Mothuloe and the relevant documentation referred to. In my view, there was at that stage, a case made out calling for an answer from the Defendants. It is for this reason that the applications for absolution from the instance were refused.

[27] Lastly, I need to deal with the quantum of the Plaintiff's claim. It was contended on behalf of the Plaintiff that it was at all relevant times the intention of the NWHC to sell its entire rental property portfolio consisting of 98 106 houses. The submission was made that it is "a simple exercise in arithmetic" as set out in paragraph [2], *supra*.

In suing for damages, the Plaintiff's claim is for the positive interesse to wit, the profit which the Plaintiff would have made had the contract been completed.

See:- Mainline Carriers (Pty) Ltd vs Jaad Investments CC and Another 1998 (2) SA 468 (C).

[28] It was submitted on behalf of the Fourth Defendant that in order for the Plaintiff to establish what economic position it would have been in had the alleged contract been completed, the Plaintiff would have to take account of the expenses it would have incurred had it in fact completed the daunting task of registering transfers and bonds over such a large number of properties. These included, but is not confined to:-

- the hiring of a number of qualified conveyancers,
- the hiring of a large number of conveyancing typists,
- the acquisition of a number of computers,
- the expenses of additional office accommodation,
- the mountains of paper involved and their expense,
- additional vehicles,
- transport expenses in travelling to various centres or instructing practitioners in the different jurisdictions of various Deeds offices, etcetera.

[29] All these matters were raised in the evidence of the conveyancing expert, Mr. Van Rooyen who testified on behalf of the Fourth

Defendant. His evidence in this regard was not disputed. These expenses which would have to be incurred in order to generate the

fees concerned have never been determined. If they had been, they would have been offset against the theoretical fees the Plaintiff

would have earned. In my view, the Plaintiff is making a calculation error if it considers that its task is a simple arithmetical one of multiplying numbers of properties against fees. In order to generate fees, it concerns time, expenses, labour personnel and equipment. This has been made clear by the evidence of Mr. Van Rooyen. These expenses are no longer incurred since the alleged breach took place before the expenses were incurred. The Plaintiff has not deducted the expenses involved in generating the fees and accordingly has not proved what profit it has lost in consequence of the alleged breach. The Plaintiff has not proved these expenses which are no longer required and accordingly it has not established what financial position it would have been in, had the alleged contract been fulfilled. Another way of formulating this principle is to state that the Plaintiff's "net loss has to be ascertained and, where there is a difference, he is not entitled to be compensated for his gross loss."

See:- Christie, The Law of Contract In South Africa, Third Edition, Page 281.

Mouton vs Die Mynwerkersunie 1977 (1) 119 (A).

Cooper and Others vs Syfrets Trust Ltd [2000] ZASCA 128; 2001

(1) SA 122 (SCA)

[30] It need to be mentioned that the Plaintiff has not led any expert evidence on the quantum of its claim despite the fact that notice of an expert had been given. Without the testimony of an independent expert (preferably an actuary), the Plaintiff cannot establish its loss of profit. Mr. Mothuloe who testified on behalf of the Plaintiff also testified as a conveyancer and presumably an expert in his own case. This is unacceptable. There is no acceptable reason why the expert evidence led by the Fourth Defendant in this regard, should not be accepted. In my view, the Plaintiff has not established its loss of profit.

[31] There is also the issue of the feasibility of whether such a large number of properties listed by the Plaintiff [98106], could have been transferred by the Plaintiff within the two (2) year period contemplated in the SLA. The evidence of Mr. Van Rooyen, the expert witness called by the Fourth Defendant, must be accepted in this regard. He submitted that it would have been extremely difficult, if it was at all possible, to do so, if no additional personnel were to be appointed and no additional equipment were to be acquired.

[32] Furthermore, it was contended on behalf of the Fourth Defendant, that in considering the feasibility of transferring such a large number of properties, it should be borne in mind that during the tenure of Mr. Monare's chairmanship of seven (7) years, less than a thousand properties had been transferred, as testified by him. The NWHC was anxious to dispose of all its properties in order to wind-down its affairs and also to give its tenants ownership. Yet, despite these goals, less than a thousand properties had been transferred. This has to be compared with Mr. Mothuloe's bald statement that he could transfer the entire rental portfolio and register 85% of the bonds, which, so it was submitted, is not only unlikely but impossible in such a short space of time.

[32] It was submitted on behalf of the Fourth Defendant that the Plaintiff fails on every aspect required of it to establish the quantum of its claim. This is so with regard to:

- the number of properties alleged to be 98106;
- the correct fee structure for both transfers and registration of bonds,
- the assessment of its loss of profit,
- the feasibility of registration of such a large number of properties.

I am in full agreement with this submission.

Touting

[34] Adv. Lever SC, on behalf of the Fourth Defendant, contended that Mr. Mothuloe's behavior in buying exclusivity for the conveyancing work of the NWHC amounts to touting. He addressed this Court at length and dealt quite comprehensively with this aspect in the written submissions he presented.

[35] Clause 10.2 of the joint venture agreement (JVA) between the Plaintiff (Mr. Mothuloe) and Microzone / Mr. Seriba provides as

follows:-

"The parties agree that, in consideration of MOTHULOES contribution towards the operating expenses, MICROZONE / SERIBA shall be barred, or restricted from appointing or outsourcing any part of conveying for the duration of this project."

It was conceded, quite correctly in my view, by Adv. Rossouw SC, counsel acting on behalf of the Plaintiff, that this clause does provide for exclusivity of the appointment of the Plaintiff as conveyancer for the duration of the project. The question arises whether this amounts to touting. Only Mr. Mothuloe testified with regard to how was it negotiated.

He testified:-

"I must mention, M'Lord, that whilst Ditshabe Molefe worked extensively at a law firm and has a junior degree, he is neither admitted as a practitioner, and much more so, not as a conveyancer, so when they said that whoever the conveyancers are going to be, they must buy exclusivity, I said alright then chaps that is the end of me and you, I am getting into my car, I am going back to Joburg because I do not do such things. I explained to them the standpoint of the Law Society and the ethical responsibility I have that I would not get involved in arrangements as unethical as to buy exclusivity in a transaction like that. They invited me because they needed a conveyancer."

Mr. Mothuloe testified further:-

"A few minutes later we resumed discussions and they said sorry, alright but then we are going to need you to work with us. That money that you are going to loan and advance us is also going to benefit you, so can we ask you to at least write off the interest out of that loan because I had said it has got to be a proper loan because there had already been this red flag flying in my mind about buying exclusivity and those things that I did not agree with and I relented on the interest and said I am prepared to make it a soft loan, but loan it must be a loan.

So we agreed that this is the loan that I am going to give them and this loan is going to be paid out of the 10% commission that Seriba's Microzone are entitled to under his agreement with the North West Housing Corporation which agreement itself was derived from the court order of a month or so earlier."

[36] In the absence of any evidence to the contrary, the evidence as tendered by Mr. Mothuloe must be accepted. It must be excepted that the loan was to provide for operating expenses towards the project in order to get it off the ground, which loan would be repaid to the Plaintiff from the commission earned by Microzone / Mr. Seriba. This does not mean that

the agreement was contra bones mores, as correctly pointed out by Adv. Rossouw SC, counsel acting on behalf of the Plaintiff. Mr. Mothuloe was invited to accept a nomination to act as conveyancer for the project by Mr. Molefe and Mr. Seriba. He did not tout for the work. This is also not in contravention of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

Conclusion

[37] In my view, the Plaintiff did not succeed in proving its claims against the NWHC (Third Defendant) and the Fourth Defendant and the claims should consequently be dismissed. Costs should also follow the result. It behoves no argument that this was indeed a difficult case which was undoubtedly very important for all the parties concerned. The claims were for an amount of more than six hundred million rands [R667 856 260.00] which is, without any stretch of the imagination, an enormous amount of money. That explains why the services of senior counsel was employed by all the parties (and where necessary also a junior counsel). In my view, the costs should also include the costs consequent upon the employment of senior counsel.

Order

Resultantly, the following order is made:

1. The Plaintiff's claims against the Third Defendant and the Fourth Defendant are dismissed with costs.
2. Such costs to include the costs consequent upon the employment of senior counsel and where applicable also the costs of the junior counsel.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE PLAINTIFF :- SMIT STANTON INC

ATTORNEYS FOR THE 3RD DEFENDANT :- D C KRUGER ATTORNEYS

ATTORNEYS FOR THE 4TH DEFENDANT :- THE STATE ATTORNEY

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