

SOUTH AFRICA / JUDGMENT

Tubane v Machakela and Others

(799/2014)

[2014] ZAFSHC 193 (30 October 2014)

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COURT

Free State High Court, Bloemfontein

BEFORE

N.P. Jaji

CASE / FILE NUMBER

799/2014

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 799/2014

In the matter between:

KESEBELWANG REBECCA TUBANEApplicant

and

TEFU DAVID MACHAKELA1st Respondent

RAYMOND KHOKHOP2nd Respondent

THE FREE STATE ADVICE CENTRE3rd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY4th Respondent

HEARD ON: 26 JUNE 2014

JUDGMENT BY: JAJI, AJ

DELIVERED ON: 30 OCTOBER 2014

[1] This matter came before me in the form of an application for an order in the following terms:

- (i) that the first to third respondents be ordered and directed to repay to the applicant within ten (10) days of the granting this order – the following amounts:

(i) First respondent

R100 000.00

(ii) Second respondent

R39 000.00

(iii) Third respondent

R22 500.00

(ii) that the first respondent be ordered to furnish to the applicant, within ten (10) days of the granting of this order, a true and proper statement, together with substantiating documents, reflecting how the amount of Two Hundred Thousand Rand (R200 000.00) which was paid into the first respondent's FNB account with number 62033622350 on 11 April 2013, was disbursed;

(iii) that the applicant be granted leave to approach this Honourable Court, on the same papers duly amplified – if so advised – for an order that the respondents be ordered to pay to the applicant the balance of whatever amount(s) appears to be due to the applicant in terms of the aforesaid statements rendered;

(iv) insofar as the applicant is unable to recover any of the amounts being successfully claimed from the first and second respondents, that the applicant be granted leave to approach the Honourable Court, on the same papers – duly amplified – if so advised – to claim any damages it may be able to prove against the third respondent;

(v) that the first, second and third respondents are ordered – jointly and severally to pay the costs of the application on the scale as between attorney and client.

[2] The first, second and fourth respondents have not opposed the application. Service has been properly effected against these respondents. Only the third respondent has filed papers opposing the application. The applicant does not seek relief against fourth respondent. The applicant's claim against first and second respondent for the monies that it had received from the third respondent is undefended and unopposed. Both first and second respondents have not delivered answering affidavits opposing relief sought against them. The cost order against them on an attorney and client scale is also

not contested. The applicant is not proceeding with the debatement claim.

[3] The applicant contended that the third respondent has caused payment to be made to the first and second respondents in breach of its mandate and to the applicant's detriment. The third respondent was negligent in the discharge of its duties and the applicant averred that insofar as she may not be able to recover any of the monies that were paid to the first and second respondents, it is submitted that it was entitled to an order which will allow it to seek damages against the third respondent.

- [4] She submitted that despite service of this application the third respondent has not effected payment of the amount that it presently hold in trust and the amount that it debited in respect of fees and charges. It claimed that the present application was occasioned by the third respondent's disregard of its mandate and for its negligent conduct.
- [5] It was alleged that the third respondent's opposition was frivolous because it lacked a defence. Applicant submitted that the third respondent should be ordered to pay costs on attorney and client scale jointly and severally with the first and second respondent.
- [6] The issue that had to be decided was whether applicant has made a proper case for repayment of certain monies received and or kept by the first to third respondents pursuant to the deed of sale. Whether the deed of sale was void ab initio alternatively voidable.
- [7] The second issue was whether the third respondent was negligent in the discharge of its duties in terms of its mandate with the applicant.
- [8] The first issue was whether the applicant has made out a proper case for repayment of monies paid to first and second respondents. The first, second and fourth respondents did not oppose the relief sought. The third respondent does not object to relief sought in as far as other respondents are concerned. The third respondent will abide by the court's decision.
- [9] It had no objection to transfer the money back to the applicant. It submitted that the main dispute in the application as far as it was concerned related to its alleged negligence and the applicant's entitlement to recover any hypothetical damages from the third respondent.
- [10] It admitted and conceded that it was not entitled to the amount of Three Thousand Five Hundred Rand (R3 500.00), was only entitled subsequent to registration of property. Property was never registered. The abatement claim was abandoned by the applicant.
- [11] On the papers, based on submissions by the applicant and concessions by the third respondent, a proper case for repayment of the monies has been made. The first and second respondents have not opposed the application. Clearly on papers, the deed of sale was void ab initio or at least voidable. The first and second respondents have elected not to contest the validity of the deed of sale. They were parties to same. The third respondent has no instructions to argue and oppose on their behalf.

The first respondent fraudulently misrepresented the facts and made the applicant to believe that the property concerned belonged to him. The law states that if the misrepresentation was fraudulent or negligent, the innocent party is entitled to damages. Once it has been discovered that representation was incorrect, it is against good faith for the party who made it to continue to hold the innocent party to a contract so obtained on these basis, it is apparent that the deed of sale was void ab initio.

(See: Viljoen vs Hillier 1904 TS 312;

Woodstock, Claremont, Mowbray and Rondebosch

Councils v Smith 1909(26) SC 681, 700 – 701;

Corbelt v Harris 1914 CPD 535 – 545.)

[12] It is generally accepted that the person to whom a misrepresentation has been made is under no obligation to ascertain whether it is a misrepresentation and may rely on it without making further enquiries even if the ascertainment of truth would be a simple matter and he was negligent or stupid in not ascertaining it. (Law of Contract in South African Law, 5th Ed by R.H. Christie at page 285)

Fraudulent misrepresentation is a delict, as with all the claims for delictual damages, the plaintiff must prove that the delict, in this case, fraudulent misrepresentation was related to the loss suffered as cause and effect in a sufficiently direct fault to be regarded as the legally effective cause of the loss.

(See: Beukes v Bekker 1924 EDL (4) 13;

Case of Good Hope Bank v Fischer (1886) 4 SC 368 at 378 – 379;

Ranger v Wykerd 1977 (2) SA 976 (A) 991 F.)

[13] The applicant submitted in the main dispute regarding the third respondent, the following:

- The third respondent purported to be a provider of legal services. It should therefore act in the best interest of the mandatory;
- Applicant contended that an implication, which was basic requirement when the third respondent advised and drafted the contract, was for the third respondent to establish that the first respondent, being the seller had the right to pass ownership to the applicant. It was indicated that the first respondent was the owner and before payment of money to it, third respondent should have satisfied itself that first respondent was indeed the owner.

It submitted that this could have been verified by a mere Deed's Aktek search. Further, the third respondent as a drafter of the agreement which represented the memorial of the parties ought to have known or should have been aware of the terms of the agreement between the parties. Clearly, the third respondent should have not paid over monies until registration to applicant's name. This is a simple measure to safeguard interests of the applicant. The third respondent varied the terms of the agreement without express authority of the applicant by paying monies to the first and second respondent. Indeed this was an invalid variation without express authority from the parties concerned. In any event, applicant submitted that the third respondent did not even warn her of the dangers of paying monies without proof of ownership from the seller, assuming or believing that the third respondent was authorized to pay the monies over which is in any event vehemently denied by the applicant.

[14] Applicant submitted that the third respondent was negligent and as such the applicant may on the same papers, properly amplified if needs be, apply to court for damages that it may prove.

Applicant contended that the third respondent alleged that it had no problem to pay over the monies it hold in trust. It had however failed to pay in spite of a letter of cancellation a year ago. It further opposed the application and as a result the applicant was entitled to cost whether on attorney and client or party and party scale. The court had to show disapproval of the conduct of the third respondent.

[15] The third respondent correctly pointed out in the heads of argument that the main dispute as far as it was concerned related to its alleged negligence and the applicants entitlement to recover any hypothetical damages from the third respondent. Clearly, all other submissions by the third respondent that do not deal or go to the root of this alleged negligence are irrelevant. The third respondent is not acting on behalf of the first and second respondents. Therefore it cannot comment on the voidability of the deed of sale. It cannot introduce hearsay evidence in interpretation of a contract to which it was not a party to it. It actually conceded in the papers that it was not party to the agreement but only drafted it. There is no answering paper from the first and second respondents opposing the relief against them. The applicant's submissions stand unchallenged in that respect. The third respondent, as it had conceded, had to deal with the alleged negligence and applicant's entitlement to recover from it any proven damages.

[16] In its opposing papers, third respondent claimed to render certain legal professional services, which primarily consists of drafting contracts, preparation of legal opinions to corporate entities and the public at large. Surely, from the above, the third respondent had to have some certain skill and expertise to do this kind of work. This clearly required some expertise which could not be done by a lay man. (page 57, para 3.1 of the papers)

He alleged that he was informed that the first respondent was the owner of the immovable property. He further alleged that he drafted a document titled "Consent to Sale Property" to ensure that there was no misunderstanding. (page 59, paragraph 3.6)

Clearly, the consent given by the first respondent was invalid as he was not the owner and could not have given such consent.

[17] He claimed that the first respondent informed him that he may pay commission and as such discussed with the applicant who in turn authorized payments. (page 61, ad paragraph 3.9). The applicant denied this assertion and submitted that even the deed of sale did not cater for commission. It was written in it "zero" commission.

[18] The third respondent denied that it was appointed by the applicant as its agent or was mandated either expressly or impliedly to facilitate purchase of the property and/or to conduct negotiation prior to the conclusion of the deed of sale (page 67, ad paragraph 10 thereof, especially, paragraph 8.1). In the third respondents own papers, he submitted that it was mandated and consulted by the parties prior to the conclusion of the deed of sale that he now denies in this paragraph.

In paragraph 3.3 and 3.3 on page 57 of the opposing affidavit, third respondent confirmed the consultation and mandate to draft the deed of sale. It is therefore not correct that there was no mandate prior to the conclusion of the deed of sale. It claimed that it was requested to draft a written deed of sale which would have complied with all the legal requirements and which would encapsulated the agreed terms and conditions of the sale agreement.

The alleged deed of sale made no mention of commission but the commission was paid out. Clearly the agreed terms as per the mandate (page 68, ad paragraph 8.3.1) were not followed. The third respondent unilaterally without authority varied the terms of agreement. He claimed that he had informed the parties that he was a paralegal (page 68, ad paragraph 11). The statement or above submission is irrelevant if it seeks to abdicate responsibility regarding legal consequences of his action (page 57, paragraph 3.1 third respondent renders legal professional services, not ordinary services but professional, primarily consisting drafting of contracts and preparation of legal opinions, to corporate entities and the public at large). In light of the above contention, it becomes nonsensical and disingenuous to plead that the third respondent is a mere para-legal.

- [19] The third respondent strangely submitted that it was within the parties contemplation that the estate agent's commission was payable (page 78, ad paragraph 24 thereof, especially paragraph 25.2). He went on to further allege that the first respondent was by law entitled to do with his money as he pleases, the third respondent has elected not to include the issue of estate agent commission in the deed of sale (page 79, ad paragraph 34, especially 25.3). The third respondent gave two
- (2) explanations regarding commission i.e. it was contemplation of parties that it would be paid and that he had elected not to include it in the deed of sale because the first respondent was entitled to do as he wishes with his money.

There are legal challenges emanating out of the submission by the respondent. Firstly, the deed of sale is the contract between the parties. They should be on the same understanding as to the terms of contract. They had to reduce into in writing all the terms and sign the agreement to confirm their wishes. Clearly the issue of commission was excluded by the deed of sale and could not be contemplated otherwise. Secondly, the third respondent could not boldly claim that the monies belonged to the first respondent when the property was not of yet transferred and registered in the applicant's name. Surely, somebody who purports to render professional legal services especially to corporate entities and give legal opinion should be aware of at least how ownership passes.

- [20] He conceded that he was mandated to attend to the transfer of the immovable property (page 80, ad paragraph 37 thereof, especially at paragraph 28.2). Strangely this submission is not stated at (page 21, ad paragraph 14.2) in the heads of argument. It is deliberately ignored.

It narrated and tried to account for the monies in its position. It referred to fees, charges, money to pay all the charges and fees to be levied by a firm of attorney, who would have attended to the transfer (page 81, ad paragraph 38, especially 29.1.1 and 29.1.2). Third respondent in his own

papers submitted that he was mandated to attend to the transfer of the immovable property not the firm of attorneys. He purported to render professional services. Clearly he could not render these services hence reference to Messrs Hill, McHardy & Herbst. He also as is the first respondent was in collusion misrepresented facts to the detriment of the applicant.

The third respondent, in light of the above cannot attempt to absolve itself by submitting that he told the applicant and respondent that he was a paralegal (ad paragraph 40 thereof, page 82 ad paragraph 30.1). It cannot at this late stage as alleged(in page 22 of its head of argument, especially paragraph 14.5) claim that

“the third respondent is not an attorney or an estate agent or an auditor for that mattertherefore it cannot be inferred that it had certain usual and customary instructions”.

This submission is sterile, clearly cannot hold water because the respondent professes to be an expert who

“renders professional legal services, and give legal opinions, draft contracts for corporate entities”.

Clearly, it was normal to expect a certain standard of skill and expertise from him.

The mandate of the third respondent is conceded as per page 80 of the opposing papers, ad paragraph 37 thereof, especially at paragraph 28.2

“to receive; to keep; to administer and pay the money received in respect of the purchase price and attend to the transfer of the immovable property”.

It did not carry the mandate professionally as expected of him and as per his mandate.

The third respondent cannot reconcile his submission that it was not his mandate or instruction to make enquiries into the ownership of the property. How would he attend to transfer the immovable property as per his agreed mandate if the issue of ownership was not relevant to him? Obviously, the issue of ownership of the property and all other consequential issues relating to transfer of property should be within the third respondents mandate and understanding.

[21] It denied that it made payments to the first respondent without the permission of the applicant. It is common practice that monies are transferred to the seller only after the property has been transferred and registered to the buyer. This is a security measure and also to safeguard interest of the buyer in the event something untoward or contrary the contract occurs. For the third respondent to allege that there's no clause vitiating against payment before transfer of property is really clutching straws. Normally, the applicant would be justified in the circumstances to allege that the third respondent effected the payments without its authority to its detriment.

[22] On the papers, the applicant has made out a case against first, second and third respondents. First and second elected not to oppose but the third respondent opposed the application in so far as it related to its negligence. The third respondent alleged that it was entitled to a fee for his services that were rendered (page 26, third respondent's head of argument,

paragraph 15) Legally, the third respondent could not claim for services rendered when its actions were the direct result of the damages to the applicant. In any event the services rendered are not explained. The mandate to him was not carried but the contrary occurred i.e. variation of the deed of sale without express authority of the parties.

- [23] In the case of *Mlenzana v Goodrick & Franklin Inc* 2012 (2) SA 433(FB), a case for liability for professional negligence, the court found that, S, on behalf of the defendant, did not take reasonable steps, not only to obtain information she believed was required, but also exercise the skill, knowledge and diligence expected of an average attorney. As a result of such “disturbingly” shocking lack of skill, knowledge, diligence and care, she failed to appreciate the value of the vital information her client had supplied before the expiry of the prescriptive period.....

”Since S, had failed to exercise the skill, knowledge and diligence expected of an average attorney, she had acted negligently and her negligence rendered the defendant liable to the plaintiff.”

- [24] There is duty which was owed by the third respondent to the applicant. Its failure resulted in the applicant suffering damages. Accordingly, the application should succeed.

COSTS

- [25] The court agrees with the contention of the applicant that it must show its disapproval of the third respondents conduct. There is no explanation justifying non-payment of monies when a letter of cancellation was addressed to the respondent a year ago. It was obliged to pay the money because the money was in trust, held on behalf of the applicant.
- [26] When the applicant cancelled, the mandate ended and the money should have been paid less whatever disbursements. The third respondent, a year later claims that it has no problem paying the money. There was no justification to delay payment and even to oppose payment by opposing the application. The applicant has been needlessly put out of pocket by the third respondent who used dilatory defences attempting to contest an indefensible application with no prospects of success. Clearly, the fact that first and second respondents never bothered to oppose this application, third respondent should have clearly considered its position. The third respondent attempted to take away applicant’s right of recourse in the event the applicant does not recover monies paid to first and second respondent. This is a bad attempt and should be discouraged. Courts can never take away the constitutionally guaranteed rights of litigants to have their disputes adjudicated upon by competent courts.

The third respondent had hoped to dispose any claim that the applicant might have against it before the applicant could even bring

it before court.

- [27] Accordingly, the application succeeds as prayed for in paragraphs 1, 4 and 5 of the notice of motion dated 24 February 2014.

ORDER

[28] 1. The first to third respondents are ordered and directed to repay to the applicant, within ten (10) days of granting this order – the following amounts:

(i) First respondent

R100 000.00

(ii) Second respondent

R39 000.00

(iii) Third respondent

R22 500.00

2. Insofar as the applicant is unable to recover successfully the monies claimed from the first and second respondents, the applicant is granted leave to approach this Honourable Court on the same papers duly amplified – if so advised – to claim any damages it may be able to prove, against the third respondent;

3. The first, second and third respondents are ordered – jointly and severally, the one paying the other to be absolved, to pay costs of this application on an attorney and client scale.

N.P. JAJI, AJ

On behalf of applicant: Adv WA Van Aswegen

Instructed by: Phatshoane Henney Inc

BLOEMFONTEIN

On behalf of third respondent: Adv JC Kotze

Instructed by:

Hill McHardy & Herbst

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Prepared on 13 October 2026 · Esheria