THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 4726 / 2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

27 June 2022 ....
DATE SIGNATURE

In the matter between:

MPAKENI MLEGENI COMMUNITY PROPERTY ASSOCIATION **APPLICANT**
Registration no. CPA/12/1329/Z

And

CASTELLAZZO (PTY) LTD **FIRST RESPONDENT**
Registration no. 2018/5536838/07

MONTE GRAPPA (PTY) LTD **SECOND RESPONDENT**
Registration no. 2015/117195/07

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 27 June 2022.

[1] This is an application for an order declaring a lease agreement signed between the Applicant and the First Respondent, dated 23 November 2020 in respect of four listed properties, declared null and void. Further relief sought is an order for the First and the Second Respondent (the Respondents) to vacate these properties with immediate effect with no claim against the Applicant in respect of damages suffered and/or expenses incurred resulting from the signing of the said lease agreement. The Applicant further seeks a relief in which the First Respondent is ordered to reconstruct thirty-eight compound houses demolished or damaged by it after occupation of the properties, or compensate it for such reconstruction within 180 days from the date of the court order.

[2] The two respondents oppose the application and there is a counter application by the Second Respondent in which it seeks an order compelling the Applicant to sign all documents necessary to successfully effect registration of a lease agreement against the two title deeds, being T766/2013 and T753/2013. In case the Applicant refuses or neglects to comply within 48 hours of being presented with the necessary documents, the Second Respondent further seeks an order authorising and directing the Sheriff of this Court to attend to the signing of the

said documents in order to effect the registration of lease agreement against the title deeds. The Applicant opposes this counter application.

[3] Following is the background that culminated in the application and counter application before the court. The Applicant and the First Respondent entered into a lease agreement which was signed on 21 and 23 November 2020 respectively. In line with the provisions in the lease agreement, the Second Respondent was nominated by the First Respondent as an alternative entity to serve as the lessee. Around May 2021, the Applicant approached the Second Respondent with a proposal to have certain provisions of the lease agreement amended. After exchanging a few correspondences and meetings in between, the request for amendments was finally not acceded to by the Second Respondent. The Applicant then informed the Second Respondent that an application to declare the lease agreement null and void would be launched in that the Applicant did not have consensus with the First Respondent at the time it was signed. For that reason, the Applicant contends that there is no valid lease agreement in existence. The current lease agreement should be declared null and void as per notice of motion.

[4] It is important that the following clause of the disputed lease agreement be laid bare right from the beginning as it is determinative of the dispute between the parties. Clause 23 thereof provides,

> "WHOLE AGREEMENT
>
> 23.1 This lease constitutes the entire agreement between the parties.
>
> 23.2 Neither party relies in entering into this agreement on any warranties, representations, disclosures of opinion which have not been incorporated into this agreement as warranties or undertakings.

> 23.3 No variation or consensual cancellation, save for *de factu* early termination, of this agreement shall be of any force or effect unless reduced to writing and signed by both parties."[1]

[5] Although clause 3.1 provides that the Lessor was awarded the property in terms of the Land Restitution of Land Rights Act, 22 of 1994, and transferred to the Lessor, it is important to note that the application is not premised on this Act. As a result, this judgment should not be construed as evaluating the compliance or otherwise with the provision of this Act.

[6] The deponent to the founding affidavit, Mr. R Khoza, is the same person who signed the lease agreement on behalf of the Applicant on 21 November 2020, in his capacity as the Chairperson of the Applicant. He went into great length giving details as to why the Applicant could not have had the consensus with the First Respondent, to enter into a lease agreement in the format it was at the time he signed it. According to him, the idea of leasing out the Applicant's farms was first canvassed with its Executive Committee in a meeting held on 10 October 2020, by a certain Mr. S Mamba from the Mpumalanga Farmers Association, and the Executive Committee was interested.

[7] At the beginning of November 2020, a copy of the draft lease agreement, apparently prepared by the First Respondent and/or its legal representative was made available to the Chairperson and the Secretary of the Applicant, who in turn made it available to the Applicant's legal representative, Mr. Mazibuko of ME Mazibuko Inc. On 20 November 2020, members of the Board of the Applicant attended a meeting with the First Respondent's legal representative, Ms. Z van Rensburg of Van Rensburg Incorporated. It was in this meeting that the First Respondent's legal representative explained the clauses in the draft lease agreement to the Applicant's Board members. The Applicant's

[1] See p. 73 of the paginated bundle.

Chairperson laments the fact that the copies of the draft were not made available to each and every Board member in attendance by Ms. van Rensburg. This according to him, marked the beginning of lack of consensus.

[8] Following this meeting, Ms. van Rensburg forwarded an amended copy of the draft lease agreement by email to the Applicant's Chairperson, the Secretary and the Applicant's legal representative, Mr. Mazibuko on 21 November 2020. It was on this day that the Applicant's Chairperson proceeded to sign the amended lease agreement. From the founding affidavit, a picture gets gloomy as to what happened after the amended lease agreement was sent to him, before he signed it on 21 November 2020. He however makes it clear that the other members of the Applicant's Board never had sight of the amended lease agreement that he signed on 21 November 2020, except him and the Secretary. He claims not to have had time to apply his mind before signing the amended lease agreement.

[9] The picture gets clearer when one reads the answering affidavit deposed to by Mr. IJ Giuricich who was mandated by the two respondents to oppose the application. The amended lease agreement was sent by the Ms. van Rensburg to Mr. Mazibuko on 21 November 2020 at 14h07. At 14h45, Mr. Mazibuko responded having made two amendment proposals which were rather cosmetic in that they dealt with just typos – one where a reference was made to "lessee" instead of "lessor" and another which was to remove "the" before the word "behalf". No suggestions were made regarding removal or addition of any clause in the amended draft. I guess the first proposal was rather explained to the Mr. Mazibuko that it was intended to be a lessee and not a lessor. The second suggestion must have been accepted by Ms. van Rensburg, who

removed “the” from the final draft which was signed by the Applicant on that day.[2]

[10] The significance of the above is to illustrate that before the Chairperson of the Applicant could sign the lease draft, it had been seen by the Applicant’s legal representative who gave it thumbs up subject to the corrections he proposed. A document was attached to the founding affidavit purporting to be an extract from the Applicant’s Board meeting held on 20 November 2020, signed by the Board’s Secretary. The extract confirms that the Board resolved to authorise its Chairperson to sign the lease agreement between the Applicant and Castellazzo (the First Respondent). It further explained that the lease agreement was explained to the Board, the contents of which they understood and accept. The Chairperson was also authorised to “ratify all actions preceding.”

[11] The second leg of the Applicant’s application pertains to the destruction of 38 compounds in the leased properties of which the Applicant lays the blame on the Second Respondent. The Applicant demands that the compounds be reconstructed or that it be compensated for the reconstruction thereof. The Respondents oppose the application in that the destruction of the compounds had nothing to do with them. According to the Respondents, the destruction of the compounds was a direct result of the Applicant fulfilling its obligations as per lease agreement, to have all the occupants of these compounds evicted from the leased property before the occupation. The compounds’ occupants are said to have removed items such as the doors and windows which they claimed belonged to them, before moving out. It was the Second Respondent who confronted some of them and confiscated these items and informed the

[2] See p. 68 of the paginated bundle, para 14.1 of the Lease Agreement.

Applicant to come and collect, which it did. The Respondents oppose this part of the application for reason that there is dispute of fact.

[12] In *Estate Breet v Peri-Urban Areas Health Board*[3] the Appellate Division held,

> "The basic fallacy underlying appellant's contention is what I may call the apotheosis of *consensus*. According to this approach certain negative aspects of contract are given a positive effect. *Consensus* is normally evidenced by offer and acceptance. But a contract may be concluded without offer and acceptance other than pure fictions imported into the transaction for doctrinal reasons. Nor does every accepted offer constitute a contract. The absence of *consensus* may render an ostensible contract void, but it does not follow that whenever two or more persons are in agreement they contract with each other. Many legal situations arise in which *consensus* was a *sine qua non* to validity but cannot be said to be contractual."

[13] The approach by the Applicant raises important questions pertinent to the law of contract. The first question is whether the institution that mandates and authorises its Director or Chairperson as the case may be, to negotiate and enter into a contract, retains the powers to still negotiate the terms of the contract with the other party even after mandating a representative to do so. The second question is whether the other contracting party is obliged to inquire if the person representing the institution with whom a contract is being negotiated is updating and getting approval over the newly negotiated terms. In other words, should the other contracting party be concerned with whether the mandated representative fully informed the institution he represents of the final negotiated contract. These questions are relevant in that the Applicant's Chairperson received a mandate and authorisation to sign the lease agreement on its behalf on 20 November 2020. He was sent an amended draft to the lease agreement by email from the First Respondent's legal representative on 21

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[3] 1955 (3) SA 523 (A) at 532E-F.

November 2020 and signed it later the same date without further consulting the Applicant's Board.

[14] D Hutchison *et al* remarks as follows in their book, *The Law of Contract in South Africa*,[4]

> "Since a juristic person has no physical existence, it can act only through its organs or representatives. The latter are always natural persons. Only those natural persons who have the necessary power or authority to represent the juristic person can bind it by performing juristic acts on its behalf. For example, where ABC (Pty) Ltd, a company, wants to buy a piece of land on which to erect an office block, a deed of sale has to be drawn up and signed by the parties to the contract. As the company is an immaterial entity that cannot physically sign a document, the deed will be signed by one or more directors or officers of the company in a representative capacity."

[15] The Applicant referred this court to a judgment of *Jordan and Another v Farber*[5] where the court set aside a lease agreement citing *inter alia*, lack of consensus. The facts of that case are clearly distinguishable. In that case the applicants sought a declarator that the lease agreements concluded between the first applicant and the respondent were void (alternatively cancelled). They also sought the eviction of the respondent and any member of his family living with him, from the farm at the centre of the dispute. The applicants were co-owners of the farm. When they ran into financial difficulty, they consulted the respondent, a practising attorney, to defend an action against them. The respondent then indicated that he was interested in leasing the farm, and that he would negotiate with the Land Bank which was suing the applicants. He then took occupation of the farm in terms of written agreements of lease which were drawn by him in his capacity as the attorney for the applicants on the one hand and in his personal capacity on the other hand.

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[4] Third Edition, 2017, Oxford, at Chapter 5.4 p.6 of 9.

[5] (1352/09) [2009] ZANCHC 81 (15 December 2009), [2010] JOL 24810 (NCB)

[16] After analysing what constitutes public policy in line with the decision of *Barkhuizen v Napier*[6], the court declared the lease agreement null and void for reason that it was *contra bonos mores.* The court held that the respondent was obliged to inform the applicants of their right to seek independent legal advice now that he was conflicted. The court did mention though, that the fact that the respondent was disputing the rental amount that was in the lease agreement signified that the parties also lacked consensus. The finding that the agreement was null and void was not based on the parties' lack of consensus. It found that their lack of consensus simply made the agreement unenforceable.[7]

[17] Whereas it is a material mistake that precludes *consensus ad idem* between the parties, in this application there is no suggestion that the Applicant laboured under a mistake of whatever nature, factual or legal. The Applicant argues that its dissensus is rooted on the fact that the draft lease agreement it had at the time it authorised its Chairperson to sign, differs from the one he finally signed. This argument is not convincing for a number of reasons. According to the founding affidavit, all Board members of the Applicant attended a meeting with the First Respondent's legal representative, with whom they expressed their views while she took time to clarify clauses in the draft. The Applicant's Board members also signed a resolution mandating its Chairperson to sign the lease agreement.

[6] 2007 (5) SA 323 (CC), 2007 (7) BCLR 691 (CC)
[7] See *Jordan and Another v Farber (supra)* at para 33 where the court said, "If I am wrong to conclude that the written contracts were validly cancelled, still the contract cannot be enforced for the following reasons: 1. if the version of the respondent that he has at all material times laboured under the impression that amount of rent is R100 000 per annum , payable in R50 000 instalments, is to be believed it cannot be said that there was any meeting of the minds between the parties; and 2. further, the fact that the according to the respondent states (*sic*) it was the intention of the parties to conclude one agreement in respect of livestock and the farm whereas the applicants state the contrary indicates that there was no consensus. For these reasons I find that the contract should be declared *void ab initio*."

[18] I am of a view that once the Chairperson was mandated as such, he held the powers to negotiate and sign the lease agreement without having to report back to the Board about further clauses added or removed from the draft following the negotiations and legal advice. If there was such a duty on him, the resolution would have expressly made provision for that. Even if he was obliged to get further or fresh mandate; failure to get that mandate does not take away consensus in that it cannot be expected for the Second Respondent to have known that the Chairperson was not fully mandated by his Board, especially with the express provision to the contrary in the lease itself.[8] The Applicant or its Board could not have mandated its Chairperson to sign the lease agreement in its draft format without any amendment. There would have been a need for it to hire a legal representative. The role of a legal representative was to give advice which could lead to the amendment of the draft as it happened in this case. The Chairperson already had the mandate long before the proposals from its lawyer were made known.

[19] As pointed above, the Applicant appointed a legal representative who was to advise it regarding the draft lease agreement. The First Respondent's legal representative liaised directly with him in sending the amended draft so that he could advice his client the Applicant, which he did. The amended draft was given thumbs up by the Applicant's legal representative on 21 November 2020 and on the same date, its Chairperson signed it. Although the first draft originated from the First Respondent's legal representative, it was the Applicant who signed it first and the First Respondent only signed some two days later; making the Applicant to have made an offer to the Respondent.

[20] For two days, the offer stood unaccepted by the First Respondent, and the Applicant's Chairperson could have withdrawn it if he wanted to. Two highly

[8] See paragraph 4 of this judgment read with the Board's resolution mandating the Chairperson to sign the lease agreement.

responsible members of the Board, being the Chairperson and the Secretary, had full insight of the amended draft sent by the First Respondent's legal representative and the proposed amendments from their own legal representative. These are the people who also had insight of the first draft and were present in the meetings preceding the signing of the amended lease agreement. They surely knew very well what the Applicant wanted and if there was anything amiss in the final draft, I have no doubt that they would have brought it to the attention of the Board. It would appear they saw nothing worth of reporting to the Board at the time.

[21] The conduct of the Applicant after the amended lease agreement was signed does not display dissensus between it and the Respondents. It is common cause that several months after the signing of the amended lease agreement, the Applicant's legal representative wrote to the Respondents demanding payment of the rent in with the provisions of the lease agreement. This was specific performance demand. One can only demand specific performance if one believes the contract to be valid.

[22] What actually led the Applicant to launch this application was the failed attempts around May 2020 to have the lease agreement amended. It was only after the Second Respondent rejected those attempts that this application was launched. I agree with the Respondent's submission to the effect that it is only a valid agreement that can be amended. If the agreement was void *ab initio*, the Applicant should have gone the route to have it declared as such than to seek its amendment first. For these reasons, the application to declare the lease agreement null and void is bound to fail. The eviction relief would consequently face the same fate.

[23] As for the application to order the Respondents to reconstruct the damaged compounds and the declaratory relief that comes with it, it is clear

that there is dispute of facts on how and who damaged the compounds. These disputes cannot be resolved on papers and the court cannot find in favour of the Applicant notwithstanding the Respondent's dispute. As Harms DP observed in the judgement of the *National Director of Public Prosecutions v Zuma*[9],

> "Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[24] Given the exchanges that took place between the Applicant and the Second Respondent through their legal representatives over the subject, prior to this application, the Applicant should have foreseen that there was or would be a dispute of fact on who and how the compounds were damaged. The court cannot resolve a dispute without making a credibility finding. Credibility finding is not possible on papers. For this reason, this relief cannot be granted.

[25] The counter application is premised on the provisions of the lease agreement. Clauses 6.2 and 14.10 of the said document provide,

> "The Lessee (First Respondent), shall at its cost and endeavours, obtain the consent of the Minister to register the lease agreement against the title deed of the property."
>
> And

[9] 2009 (2) SA 277 (SCA) at para 26. See also *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 – 635.

> "The Lessor, in the registration of this lease agreement, shall consent to the removal of certain redundant conditions in the title deed."

[26] The lease agreement does not define who the Minister is. It however appears from the wording of this clause that the said Minister has the final say on whether to allow the registration of the lease against the title deed. Perhaps the visitation of the Applicant's constitution and the Land Restitution of Land Rights Act can shed some light. It is however irrelevant for determination of this application as the reasoning appears nowhere in the papers. What appears plain from the affidavits is that the Minister is an interested party. The court would as such have reservations in granting any order involving a government Minister who has not been cited as a party.

[27] Further to this, the obligations pertaining to the Applicant regarding this registration is only in giving consent to the removal of certain redundant conditions in the title deed. As it stands, the court has not been made aware of "certain redundant conditions" that could be in the title deed currently. Even if there were, the relief sought is not in forcing the Applicant to agree to the removal of these, but something else not provided for in the lease agreement. In fact, the reading of these clauses places the burden on the First Respondent to obtain the consent from the Minister to register the lease against the title deed, at its cost. The application to force the Applicant to sign all the documents to have the lease agreement registered against the title deed is misdirected and not in line with the lease agreement.

[28] I have also noted that the First Respondent claimed that being cited in the application was a misjoinder for reason that it has since nominated the Second Respondent as a lessee. There is no merit in this argument given the fact that the First Respondent is the person who entered into an agreement with the

Applicant and that the Second Respondent is a member of the First Respondent. This is evidenced by the fact that one affidavit deposed to by one person on behalf of the two Respondents was presented in opposing the application. In fact, failure to cite the First Respondent as a party would have been a non-joinder. It was rather appropriate to seek an order against the two, jointly and severally.

[29] As for costs, each party scored some limited success in opposing the application and the same should reflect in the costs order. I think this is an appropriate case in which each party should pay its own costs.

[30] For the reasons mentioned above, I make the following order.

[30.1] The application is dismissed.

[30.2] The counter application is also dismissed.

[30.3] No cost order is made.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPLICANT	**: ADV. J BOSHOFF**
INSTRUCTED BY	**: NTULI & MANANA ATTORNEYS**
	MBOMBELA
FOR THE RESPONDENT	**: ADV. GF HEYNS**

INSTRUCTED BY	**: SEYMORE DU TOIT & BASSON ATTORNEYS**
	: MBOMBELA
DATE HEARD	**: 24 MAY 2022**
JUDGMENT DELIVERED	**: 27 JUNE 2022**