



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: 5556/2017

In the matter between:-

MPHO SARA MOLOI N.O.

1st Applicant

MPHO SARAH MOLOI

2nd Applicant

And

THE PREMIER OF THE FREE STATE

1st Respondent

MEC: PUBLIC WORKS & INFRASTRUCTURE
FREE STATE PROVINCE
Respondent

2nd

MEC FOR HEALTH FREE STATE

3rd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

4th Respondent

HEARD:

22 AUGUST 2019

JUDGMENT BY:

MOLITSOANE, J

DELIVERED:

26 NOVEMBER 2019

- [1] The applicant seeks an order to declare an alleged agreement in respect of the sale of the property, Erf 1913 Botshabelo E Township, registration Division: Thaba Nchu RD Province of the Free State(the property), valid and binding. The application is opposed by the First to the Third Respondent (the respondents).No substantive relief is sought against the Fourth Respondent.
- [2] It is contended on behalf of the respondents that the evidence proves that the late Mr Moloi (the deceased) cancelled the alleged agreement, if indeed one came into existence.
- [3] It is further contended that if a finding is made that the purported agreement was indeed cancelled it renders moot and legally irrelevant the totality of the submissions by the applicants whether the agreement could have been concluded or alternatively was concluded or the effect of the ruling of the Public Protector.
- [4] I agree with the submissions by the respondents as set out in paragraph 3 above and as a preliminary point for adjudication, my view is to determine whether the purported agreement was cancelled or not. It follows that a finding in the positive would be dispositive of this matter. For the discussion in this regard I will have to assume that an agreement was validly concluded. The applicants also sought to file a further affidavit but that route was apparently abandoned. I will accordingly confine

myself to the customary three sets of affidavits filed and the submissions made.

- [5] The Fourth Respondent erroneously allocated a piece of land belonging to the deceased to the government. The Department of Health subsequently erected a clinic which rendered health facilities on the said immovable property to the community of Botshabelo. It is the undisputed evidence of the Applicants that the deceased made numerous attempts with the then Bophuthatswana government to resolve this matter to no avail. What the deceased did in order to resolve this issue with the then Bophuthatswana government has not been explained in the pleadings. The deceased did not seek to prevent or interdict the construction of the clinic.
- [6] In later years in his quest to seek resolution of this matter the deceased approached the Public Protector for assistance and mediation. The said office then issued a notice in terms of s 7(4) and (5) of the Public Protector Act, 1994 addressed to the deceased, the HOD of the Department of Public Works and its Acting Director of Legal Services. In the subsequent meeting presided over by an official of the Public Protector pursuant to the said notice the First Respondent was represented by its HOD while the deceased was represented by his legal representatives.
- [7] The mediation by the Public Protector culminated in a settlement agreement in terms of which the First Respondent undertook to negotiate with the deceased for the sale of the said property.

- [8] Pursuant to the apparent negotiations, the HOD of the First Respondent offered an amount of R9 500 000-00(Nine Million Five Hundred Thousand Rands) to the deceased for the sale of the property which offer was accepted. It bears mentioning at this stage that it is the contention of the respondents that the agreement is invalid and further that the HOD had no authority to make such an offer as the authority to dispose and to acquire land was vested in the Premier of the Province in terms of the Free State Land Administration Act. As indicated above I refrain from pronouncing on these contentions at this stage.
- [9] It is the case for the Applicants that the deceased signed all the necessary papers in order to effect transfer of the property to the Free State government. According to the Applicants, the deceased specifically signed the deed of sale, power of attorney and Regulation 68 form. Perusal of the founding affidavit reveal, however, that no deed of sale was signed¹ It is also not the contention of the Applicants that the deceased entered into a written agreement with any of the respondents for the sale of the property.
- [10] Non-payment of the offered amount led to an exchange of various correspondence between the deceased's legal representatives and the HOD of the First Respondent regarding payment. The HOD of the First Respondent requested numerous indulgences and made certain

¹ See Founding Affidavit page 18 par [18]

undertakings to pay the amount offered. That, however, never came to any fruition.

[11] When no payment was forthcoming the legal representatives of the deceased then sent a letter purporting to cancel the agreement. Adv. Masuku SC on behalf of the Applicants submits that the agreement was revived while Adv. Snullenburg SC on behalf of the respondents submits that the deceased cancelled the alleged agreement.

[12] It has to be borne in mind that there was never a written agreement of sale of this property. The Applicants seem to rely on a letter written by the HOD of the First respondent making an offer of R9, 5 million. On the facts of this case it appears that the deceased was an 'innocent party' in the non-performance of this purported agreement as the First Respondent failed to make a payment. Because of lack of a written agreement, there is no procedure laid down for the cancellation of the agreement but if a notice of cancellation is given, as in this case, same must be clear and unequivocal². Such a notice of cancellation takes effect from the date it is communicated to the other party.

[13] On the 2nd May 2015 the deceased attorneys wrote the following letter to the First Respondent³ when no payment was received:

1. *"We refer to the above and our letter of 18 February 2015.*

² See Putco Ltd v TV & Radio Guarantee Ltd 1985(4) SA 809 at 830E.

³ Annexure 'T' page 63 of the Founding Affidavit.

2. *It is with regret that your Department failed to honour the agreement we reached. On numerous occasions, the Department requested indulgence to which our client reluctantly obliged.*
3. *The department on numerous occasions requested an indulgence to pay on December 2014 to which our client agreed. The Department failed to honour its obligations. The department then requested an indulgence to make payment on January 2015 to which our client reluctantly agreed. Your client failed to keep its undertaking. It requested indulgence to pay on 27 February 2015. Lo and behold, the department failed to make such payment.*
4. *It is therefore our instruction to forthwith cancel the settlement agreement reached between the parties (my emphasis). We are further instructed that the department of health should vacate our client's premises by no later than Tuesday, 10 May 2015, failing which our client will institute legal proceedings to have the department of health evicted from the premises.*
5. *We are further instructed to demand as we hereby do, payment of R23 million for damages, inclusive of loss of income suffered by our client from the period the department of health has been in illegal occupation of our client's premises.*
6. *We are extremely disappointed by the mala fides demonstrated by the department in this regard.*
7. *Our client's rights are fully reserved"*

[14] In my view paragraph 4 above is crystal clear. The intention to cancel the agreement was communicated clearly and unequivocally. To crystallize it further, a demand was made, not of the R9, 5 million but of an amount of R23 million. A further demand was made for eviction.

[15] In paragraph 40 of the founding affidavit the second applicant avers:

“My attorneys wrote numerous letters to the Department of Public Works and in a letter dated 2 March 2015, they threatened to pull out of the agreement. In a letter of the 15th March 2015, Public Works assured them that they were still committed to the amicable settlement as per the agreement concluded on 4 November 2014. Copies of various correspondence are annexed hereto marked Ó-U’.

[16] The applicants in the founding affidavit are being disingenuous. The letter of the 2nd March 2015 quoted in full above is clear and unequivocal. It is not a threat as averred by the second applicant. It has to be borne in mind that affidavits in motion proceedings perform a dual function, namely, that of pleading and also of setting out the evidence to prove the allegations⁴The letter by the Director of Legal Services written without prejudice which was disclosed by the Applicants does not revive the cancellation of the agreement. The horse had already bolted when same was written. In any case that letter is just a plea to reconsider a cancellation. The deceased made his choice and elected to cancel the agreement and pursue a claim of R23 million and eviction. He is bound by the election

⁴ Transnet Ltd V Rubenstein 2006(1) SA 591(SCA) at par [28]

he made. There's no shred of evidence before me indicating that the agreement was revived and this application cannot succeed. This finding is dispositive of this matter and it is accordingly unnecessary to adjudicate on the validity of the agreement, whether the HOD had the authority to enter into the agreement and the effect of the ruling of the Public Protector. I cannot find a reason to depart from the practise that costs should follow the results. I

ORDER

1.The application is dismissed with costs.

P.E. MOLITSOANE, J

On behalf of Applicant:
With him

Adv N Snullenburg SC
Adv L Bomela
Instructed by:
The State Attorney
BLOEMFONTEIN

On behalf of the respondent:

Adv. M Khoza
Adv, Z Gumede
Instructed by:
Jan Hugo Attorneys
BLOEMFONTEIN