



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: **1481/2018**

In the matter between:

QUICKLEAP INVESTMENTS 438 (Pty) Ltd

Plaintiff

and

**THE DEPARTMENT OF HUMAN SETTLEMENTS
OF THE FREE STATE PROVINCE**

First

Respondent

THE MATJHABENG LOCAL MUNICIPALITY
Respondent

Second

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR COOPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS AND HUMAN SETTLEMENTS OF**

THE FREE STATE PROVINCE

Third Respondent

THE MINISTER OF HUMAN SETTLEMENTS
Respondent

Fourth

HEARD ON:

23 AUGUST 2018

CORAM: P MOLITSOANE, J

JUDGMENT BY: P MOLITSOANE, J

DELIVERED ON: 22 NOVEMBER 2018

[1] This is an application for a declaratory order in the following terms:

1. It is declared that the First Respondent 's purported cancellation of the agreement between the Applicant and the First Respondent pertaining to the development and construction of social housing in Hani Park Informal Settlement as a registered CDM Project is unlawful;
2. It is declared that the agreement between the Applicant and the First Respondent pertaining to the development and construction of social housing in the Hani Park Informal Settlement as a registered CDM Project is consequently still valid, in full force and effect and enforceable;
3. It is declared that the Applicant has the right to continue with the agreed upon works for the development and construction of social housing in the Hani Park Informal Human Settlement as a registered CDM Project and the First Respondent is obliged to pay to the Applicant the agreed upon compensation for such works;
4. It is declared that the Second Respondent's failure to, at its own costs, establish, install and complete a fully functional sewerage system at the relevant building site situated in the Hani Park Informal Settlement has no effect;
5. The Applicant's right to continue with the agreed upon works for the development and construction of social housing in the Hani

Park Informal Human Settlement as a registered CDM Project, and on

6. The First Respondent's obligation to pay to the Applicant the agreed upon compensation for such works;
7. It is declared that once the Second Respondent has, at its own costs, established, installed and completed a fully functional sewerage system at the relevant building site situated in the Hani Park Informal Settlement, which sewerage system should be capable of functioning within normal and acceptable engineering standards of a sewer network, and which sewerage system should in particular be able to sufficiently convey waste water and sewerage from each house on the aforesaid building site up to (and connected to) the main sewerage line of the Second Respondent, the Applicant and the First Respondent are entitled to deal with the applicable carbon credits in terms of the aforesaid agreement between them;
8. The First Respondent is ordered to pay the costs of the application.

[2] The 1st Respondent opposes the application while the third and fourth respondent indicated that they will abide the order of this Court. The 2nd respondent did not oppose the application.

[3] On the 4th April 2007 and at Welkom the Applicant and the 2nd Respondent entered into a written land availability agreement (the LLA) relating to the development of a residential township land described as 'Extension 19, Thabong and Extension 20, Thabong'. The purpose was to erect low cost housing. The LLA was subject to the following suspensive conditions that the second respondent shall:

“14.1.1 Proclaim the Land, attend to the infrastructure pertaining to roads, water, electricity and sewerage;

14.1.2 Arrange for movement of occupants on the individual plots to allow the Developer to erect the houses.

14.2 This agreement is further subject to the suspensive that the developer shall:

14.2.2 obtain funding from local or international; donors within 12(twelve) months of date of signature of this agreement.

14.3 If at the end of the period of 12(twelve) months the land remains underdeveloped, then same in the absence of an extension of this agreement, shall revert back to COUNCIL to be dealt with as they may deem fit, with the DEVELOPER having no right to claim whatever costs incurred during the duration of the agreement.”

[4] Pursuant to the conclusion of the LLA the Applicant and 2nd respondent concluded further addenda extending the duration of the LLA. The first addendum was concluded on the 6th October 2008 and was to endure for a period of 6 months beginning on the 1st November 2008 and ending on the 31 May 2009 while the second addendum was concluded on the 15th April 2010 and endured until the 1st June 2014.

[5] In order to provide for certain amendments of clauses 2 and 3 of the LLA the Applicant and the First respondent concluded written addendum to the agreement and again on the 19th June 2012 entered into a further written agreement. In view of my finding below it is unnecessary to discuss the contents of the agreements and the subsequent extensions thereof.

[6] The main grounds of the opposition by the 1st Respondent of this Application are the following:

1. That the applicant seeks relief by way of application while a dispute of fact exist;
2. That the Applicant seeks declaratory relief and cannot do so by means of motion proceedings;
3. That the LLA has an arbitration clause which the parties to that agreement may not withdraw from.
4. That the LLA has a non-variation clause and can only be amended in writing, which amendment needs be signed by the duly authorized representatives of the parties to the LLA.
5. That the suspensive conditions in the LLA were not fulfilled, which state of affairs means that the LLA never became *perfecta*;
6. That the contract depends on the existence of the LLA and as the LLA never came into existence, no contractual relationship between the Applicant and the First Respondent exist;
7. In the alternative, the First Respondent lawfully cancelled the contract as a result of the Applicant's breach thereof and failure to remedy such breach. In this regard the 1st Respondent apparently relies on the Applicant's alleged duty to sell '*carbon credits*.'

[7] At the onset this court was referred to the previous court applications involving the parties. In particular the Applicant caused an application to be issued in this court under case number 5963/16(the first application).This application was withdrawn after

the respondents filed their opposing affidavits. Mr Johannes Petrus Oosthuizen, the deponent in the founding affidavit in this case before me (the second application) was also the deponent in the founding affidavit in case number 5963/16. The parties in the first application were cited as in the 2nd application. In both these cases Mr Oosthuizen testified that the facts contained in the founding affidavits of both applications were, unless indicated within his personal knowledge and were to the best of his knowledge true and correct.

- [8] Mr Oosthuizen deposed in the first application that the Applicant and the 2nd Respondent entered into a *verbal land availability agreement* relating to the development of a residential township on the land described as 'Extension 19, Thabong' and 'Extension 20, Thabong' by erecting low income housing. In the 2nd application he makes the same allegations under oath save to now change and indicate *that the LLA was in writing*. He avers in the 2nd application that at the time of launching the first application he had forgotten about the existence of some of the written agreements between the Applicant and the 2nd Respondent. He further indicates that he realised that he had unintentionally failed to disclose all of the relevant facts in the first application as a result of which he withdrew the same. He subsequently brought an application in this court under case number 5377/2077 compelling the 2nd Respondent to provide it with the LLA and copies of any or all written approved extensions of the LLA. The 2nd Respondent, through its attorneys forwarded the LLA as well as an addendum to the LLA signed on the 6th October 2008. The attorneys to the 2nd Respondent also alluded to the fact that their client only had the LLA and the addendum dated 6th October 2008 in their possession

and that ‘*a diligent search was conducted in respect of other agreements [the applicant] requested but same could not be found despite such a search*’ (my emphasis).

- [9] Mr Oosthuizen in the first application emphatically states that:
 “5.6.2.1 Even though clause 3 of annexure ‘QL4’ [in *casu* it is annexure ‘QL7’] hereto may create...an impression, the Applicant and the First Respondent never concluded a written agreement prior to annexure ‘QL4’ hereto.” It is pertinently clear that the Applicant denied vehemently that LLA was ever concluded between the Applicant and the 2nd Respondent. Its existence was therefore denied. The explanation Mr Oosthuizen gives that he had forgotten about the existence of other agreements is simply too easy and unacceptable. The reason I say so is that the LLA is actually the agreement upon which this application or any action whatsoever the Applicant may have against the respondents and all the subsequent agreements are based on. It is actually the foundation upon which the whole cause of action is based or founded upon. It stands to reason that without the LLA he had no action. How could he then forget about this document which is a basis for a claim of millions of rands? It is difficult to fathom. Quiet apart from this, one is left wondering what else Mr Oosthuizen has forgotten or as he said in his own words that he ‘unintentionally failed to disclose’ certain facts.
- [10] Over and above the 2nd Respondent indicated that it had only the LLA and the addendum signed on the 4th April 2007 in its possession. Curiously the 2nd Respondent says a diligent search was conducted in respect of other agreements the Applicant requested but same could not be found. This leaves one with a

question mark of whether there are other agreements. The 2nd Respondent does not say that these were the only two agreements between the parties, but what it actually says is that they were the only ones in its possession. In these circumstances the Respondents have the right to cross examine the witnesses of the Applicant.

- [11] In view of the fact that I intend to deal with this matter on the basis of whether the Applicant ought to have brought an action or an application I will not deal with all other reasons for opposing the application as I am of the view that this fact may dispose of this matter.

- [12] The Applicant avers that the suspensive conditions in the LLA and the 1st and 2nd Respondent and 2nd addendum have been fulfilled. On the other hand, it is contended on behalf of the 1st Respondent that the suspensive conditions have not been fulfilled and as such no contract came into being. The 1st Respondent further contends that the conclusions of the addenda could not extend an agreement which did not exist or which had lapsed.

- [13] Perusal of both applications reveals that there is a dispute whether the suspensive conditions have been fulfilled or not. Mr Mokhesi testifying on behalf of the First respondent makes a bald statement that same have not been fulfilled. He does not explain in what way the suspensive conditions were fulfilled. On the other, the Applicant says if Mr Mokhesi alleges in respect of non- fulfilment of suspensive conditions that the second respondent has failed to “....attend to the infrastructure pertaining to roads, water, electricity and sewerage as clause 14.1,1 of the LLA provides then in that

case, the Applicant submits, *inter alia*, that the sewerage system that was installed by the 2nd Respondent in the Hani Park Informal Settlement will have to be rectified so that it becomes capable of functioning within the normal and acceptable engineering standards of sewer network.

- [14] The importance of the suspensive condition in the paragraph above arises when one has regard to the following: Following the conclusion of the LLA the Applicant and the 1st respondent entered into a Memorandum of Understanding meant to foster a co-operative working relationship between the two parties in order for the 1st Respondent to be a programme champion aimed at providing funding and housing solutions for the poor in Hani Park Informal Settlement. The understanding envisaged that the First Respondent would provide funding for building of 2000 households.
- [15] The applicant was to sell carbon credits to overseas markets whereupon 70% of the proceeds were to be reinvested to the 2nd Respondent to build a further 4000 households. According to the 2nd respondent the first 2000 houses were erected and the obligation to sell the carbon credits arose. The First respondent contends that the Applicant failed to sell the carbon credits and were thus in breach of the agreement.
- [16] The applicant contends that both the Applicant and 2nd Respondent had certain crucial roles to play for the successful implementation of the LLA. The 2nd Respondent's role included the establishment, *inter alia*, of a fully function sewerage system. According to the Applicant in order to qualify for carbon credits that could be sold in

the open market, carbon credits had to be monitored, assessed and validated as being reduced and avoided. This could only be done when a fully functional service, including sewerage system had been installed, connected and commissioned.

- [17] Applicant contends that the 2nd Respondent failed to install a fully functional sewerage system. This conclusion is based on a purported report of an engineer of the Applicant. Applicant appended to the founding affidavit a letter from Umfundo Professional Services CC. This letter appears to have been written by one Andre Van Rooyen, an engineer. This letter purports to give expert testimony. That letter and its purported testimony cannot be admissible for the following reasons. The Applicant has failed to qualify Van Rooyen as an expert. No evidence was led as to his qualifications. No evidence was led regarding which field of engineering he is qualified in and specifically whether he can be qualified in making opinions on sewerage connections. No evidence has been led as to area of his speciality. No evidence was led as to his practical experience. From the papers filed it is indeed difficult to conclude that he is an expert in the field relating to sewerage systems. His evidence was also not presented as required. The motion procedure does not relieve a party of the Rules applicable to the calling and presentation of expert testimony. In the absence of proper expert evidence it is difficult to conclude whether the sewerage system did function properly or not and if not, and what the cause therefore was. This in turn centres on a dispute of whether the suspensive condition in the LLA has been fulfilled or not. The Applicant bears the onus of proving the fulfilment of suspensive conditions and in the absence of credible evidence I am unable to find that the applicant has complied with

all its obligations. This is clearly a dispute of fact the Applicant should have foreseen.

[18] From the afore going it is clear that there is a serious dispute of facts which the Applicant should have foreseen in view of the fact that the issues raised herein were also the subject of contention in the first application. I find that the Applicant should have proceeded by way of action. Although the 2nd respondent did not oppose the application I am unable to find in favour or against it as the issues raised are equally applicable to it.

[19] In view of the importance of the matter to the parties as well as the constitutional impact of the matter to provide adequate housing to the poorest of the poor, I am of the view that the following order will be appropriate:

ORDER

1. The application is referred to trial;
2. The Notice of Motion and the founding affidavit shall stand as summons and the answering affidavit as entry of appearance to defend;
3. The applicant shall file its declaration within twenty (20) days of this order;
4. Thereafter the applicable provisions of the Uniform Rules of this Court are to apply;
5. The costs shall be costs in the cause.

P.E. MOLITSOANE, J

On behalf of Applicant:

Adv. JF KRUGER

Instructed by:

Graham Attorneys

Bloemfontein

On behalf of defendants:

Adv. N SNELLENBURG SC

With him

Adv. L.R BOMELA

Instructed by:

STATE ATTORNEY

BLOEMFONTEIN