

IN THE NORTH GAUTENG HIGH COURT (PRETORIA)
REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
24/04/2012 DATE	 SIGNATURE

Case No: 21046/2007

Date heard: 23 and 24/04/2012

Date of judgment: 24/04/2012

In the matter between:

ASMA'OU BOUBA

Plaintiff

And

PETRUS JACOBUS MARYN VAN STADEN N.O.
AND TIRHANI SITOS DE SITOS MATHEBULA N.O.

First Respondent

DEON MARIUS BOTHA N.O. and
KGASHANE CHRISTOPHER MONYELA N.O.

Second Respondent

RICHARD BARRY NEL N.O.

Third Respondent

ESTER EMERENTIA NEL N.O.

Fourth Respondent

MARIZE COETZEE N.O.

Fifth Respondent

MORAFIC BOND ORIGINATORS CC

Sixth Respondent

JUDGMENT

PHATUDI J:

[1] The plaintiff caused issue of summons against Morafic Homes CC (Morafic Homes) and Moraffic Properties CC (Morafic Properties) as the first and second defendants respectively. The first and second defendants have since been liquidated. The first defendant has been substituted by liquidators Petrus Jacobus Maryn Van Staden N.O. and Tirhani Sitos De Sitos Mathebula N.O. The second defendant substituted by Dean Marius Botha N.O. and Kgashane Christopher Monyela N.O respectively.

[2] The third, forth and fifth defendants(the defendants) are sued in their capacity as the trustees for the time being of Morafic Trust; a trust duly registered in terms of Trust Properties Control Act 57 of 1988. The sixth defendant is Morafic Bond Originators CC.

[3] At the commencement of the trial, plaintiff's counsel places on record that on or about 9 July 2005, the plaintiff purchased certain immovable property known as 83 Leisure Bay. Annexure B1 to particulars of claim is a copy of the deed of sale. During December 2006, plaintiff entered into a written building contract to build a house on the purchased property. Annexure B2 to the particulars of claim is a copy of the contract.

[4] The plaintiff paid R93, 000-00 as a deposit in terms of B2. The plaintiff further paid R529 954-23 being the total of R378, 000-00 (balance of purchase price in terms of B1) and R151 954-23 (in compliance with the collateral requirement) The plaintiff claims refund or restitution of the amount paid to Morafic Trust.

[5] The defendant raises two points *in limine* as special plea –non joinder as the first point and the second, Arbitration.

Non Joinder

[6] The defendant's counsel submits that Pretoria Waterfront (Pty) Ltd (Waterfront), the seller of the property the plaintiff purchased (a party to B1), has an interest in this matter and should have been joined as a party to the proceedings. The document purporting to be a deed of sale is duly signed by the parties thereto. Counsel further submits that an amount of R93, 000-00 has been paid as a deposit.

[7] In rebuttal, counsel for plaintiff submit that Waterfront has, by way of letter written by attorneys Etienne Bedeker Incorporated, confirmed that B1 is indeed a nullity. The letter written in Afrikaans is read on record in the "English version". The letter is annexed to the affidavit of plaintiff attorneys, Pieter Aubrey Van Eck.

[8] Plaintiff counsel further refers me to section 67 of Town Planning and Township Ordinance No 15 of 1986, which provides:

"67(1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 –

- (a) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;

(b) grant an option to purchase or otherwise acquire an erf in the township,

until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one of the erven therein will be transferred to the seller

67(2) any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.

67(3) any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.

[9] Further thereto counsel submits that a finding of joining Waterfront will be for academic purpose and time wasting in that Waterfront will simply be joined to confirm the invalidity of the agreement.

[10] In my evaluation of the submissions made by both counsel, it is clear that section 67 prohibits certain contracts. The contract concluded by and between Pretoria Waterfront (Pty) Ltd and plaintiff in respect of stand no 83, (as set out in the deed of sale) measures 423 square meters, in Township: Erasmuspark X1, District Pretoria, is alleged to be one such contract.

[11] If the plaintiff contends that the agreement is a nullity and Waterfront confirms the nullity, then, in my view, Waterfront must be joined as a party to the proceedings being the person who entered into the contract of sale that gave rise to the cause of action. Section 67(1) clearly states that **“...no person shall... (a) enter into any contract for the sale...of an erf in the**

township.” I am further of the view that joinder of Waterfront will neither be for academic purposes nor a waste of time. Waterfront has a case to answer.

Arbitration

[12] The defendants counsel first refers me to clause 15 of B2. The clause stipulate:

“15.1 Any dispute or difference between the Contractor and the Employer arising out of this Agreement shall be referred to Arbitration...”¹

He further refers me to clause 11 of B2 that stipulates:

“11.1 This clause is severable from the rest of this agreement and shall remain in full force and effect even if this agreement is terminated”

[13] He submits that no arbitration has taken place and as a result, plaintiff's case stands to be dismissed with costs.

[14] In rebuttal thereto, plaintiff's counsel submits that B2 agreement was concluded by the plaintiff and first defendant. Counsel submits that the third fourth and fifth defendants were not parties to the agreement. He further submits that the agreement is a nullity by virtue of B1 being void. He further thereto submits that this point is not fatal for the plaintiff in that it will only serve to postpone the hearing pending finalisation of arbitration proceedings.

¹ Page 51 – Clause 15.1 of B2

[15] In my evaluation of the submissions and consideration of the arbitration clauses read on record, it is clear that the defendants were involved in giving effect to the agreement. They were the “financial managers” or intended to be project managers of the agreement. They are, in my view, parties to the agreement.

[16] Clause 15.4 of B2 stipulate:” Cancellation in terms of [clause] 14 hereof shall not affect the validity of this agreement to refer all disputes to arbitration”

[17] Clause 11 tips the scale by its stipulation that “this clause is severable from the rest of this agreement and shall remain in full force and effect even if this agreement is terminated.”

[18] An arbitration clause is, in my view, peremptory when it refers any dispute first to arbitration. This creates an obligation on parties to first refer the matter on arbitration before instituting action at a court of law. I cannot agree more with the defendant’s counsel that this action is premature. It is correct, as both counsel submits that a special plea on arbitration simply suspends the matter pending finalisation of the dispute by the arbitrator

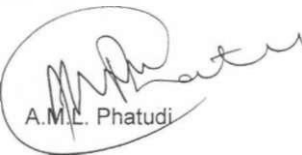
[19] It is trite that costs follow the event. The defendants succeed with their special plea and are entitled to their costs occasioned by this postponement. The following order is thus made.

19.1 The matter is postponed sine die

19.2 The plaintiff is to join Pretoria Waterfront (Pty) Ltd as a party to the proceedings

19.3 The matter is stayed pending finalisation of the dispute by the arbitrator.

19.4 The plaintiff is ordered to pay the defendants wasted costs occasioned by this postponement.



A.M.L. Phatudi

Judge of the High Court

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