REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Case Number: 1515/2020

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

2024-01-09 [redacted]

DATE SIGNATURE

In the matter between:

JOE PHALALA SIMANGO **PLAINTIFF**

And

KHAZAMULA MICHAEL NKUNA **DEFENDANT**

Coram: Kanyane AJ

Heard: 14 November 2023

Delivery: This judgment is handed down electronically by circulation to the parties through their legal representatives' e-mail addresses. The date for the hand-down is deemed to be 10 January 2024.

Summary: Commercial law – Partnership agreement – Dispute over whether partnership agreement exists.

ORDER

The plaintiff's claim is dismissed with costs.

JUDGMENT

Kanyane, AJ

Introduction

[1] The plaintiff alleges that he concluded an oral partnership agreement with the defendant in relation to the development of certain retail property in Limpopo, that the defendant is in default of his obligations in terms of that agreement, and claims specific performance of the alleged agreement, which the defendant denies.

[2] At issue in these proceedings is whether the plaintiff has established the onus that rests upon him to prove his case on a balance of probabilities. In my view, he has not.

[3] While the parties did not specifically request me to separate the issues of liability and quantum as contemplated in Rule 33(4), the matter had been certified trial ready on the basis of the parties' pre-trial agreement that the issue of liability be decided first, with the quantum of the plaintiff's claim standing over for later determination should this be necessary, and the trial proceeded on that basis.

The facts

[4] The defendant is a well-known developer of retail developments, especially in Limpopo. He conducts his business through various companies in which he holds interests. He testified that he has been in the retail development industry for 47 years. The plaintiff is a civil servant and apparent entrepreneur.

[5] The plaintiff's claim is founded on a partnership agreement that he allegedly concluded with the defendant at the latter's residence at Nkuzana, Limpopo, during April 2015.

[6] According to the plaintiff, the terms of the partnership agreement were that the plaintiff would seek out pieces of land which were feasible for retail developments, would negotiate purchase terms with the owners of that land, and would then present the proposed land to the defendant. Upon approval by the defendant of the proposed land parcel, the plaintiff would procure the transfer of that property to the defendant or his nominee.

[7] The plaintiff alleges that, in pursuance of the aims of the partnership, he procured the transfer of certain land to a company which was the defendant's nominee. It is common cause that the land is registered in the name of Mosail Trade and Invest (Pty) Ltd, and that a shopping centre reported to have been developed at a cost of some R1.5 billion – known as Mphephu Plaza – has been developed on the property and is operational.

[8] The plaintiff testified that, during April 2015, he visited the defendant at his home at Nkuzana, at which the oral agreement was concluded. The terms of this agreement were that the plaintiff would seek out parcels of land suitable for retail

development and negotiate purchase terms with the owners of that land on behalf of the partnership. Upon approval by the defendant of the proposed acquisition of the land parcel, the plaintiff would procure the transfer of that property to the defendant or his nominee. Upon transfer of the property, the defendant would pay the plaintiff 10% of the purchase price of that property and, once the envisaged development was completed, he would be entitled to a 1% share in the completed development.

[9] According to the plaintiff, he explored several options for a retail development of the kind envisaged, and he ultimately came upon a property located along the R523 in the Siloam area. This property was registered in the name of Malnet Holdings (Pty) Ltd, a company controlled by the traditional leader of the area, Hosi Ramovha. He approached the Hosi with a proposal to buy the land for purposes of a retail development that he and the defendant had envisaged. The Hosi was initially reticent and indicated that he wanted to develop the land himself. However, after the plaintiff extolled the virtues of the vision that he and the defendant had for their envisaged development on the land, the Hosi agreed to sell the land to the partnership, and the land was ultimately transferred to the defendant's nominee company, Mosail on 18 May 2017.

[10] The plaintiff testified that, after the registration of the property in Mosail's name, he had followed up with the defendant regarding what to do next and the payment of the 10% of the purchase price, but the defendant advised him that he was still busy. He took the defendant at his word, but the defendant never performed his end of the bargain. He has not been paid the 10% of the purchase price of the property; neither has the 1% share in the development that he was promised been realised. This action is the sequel.

[11] In his plea and testimony, the defendant denied that he had concluded any such agreement with the plaintiff. He testified that the plaintiff (who was until that point unknown to him) had contacted him by telephone in 2015 and requested to meet with him at the defendant's residence. It was not uncommon for people to want to meet with him as he is well known in the area, so he agreed to the meeting. At that meeting, the plaintiff offered to introduce him to the traditional leader of the area, Hosi Ramovha. He declined the offer, telling the plaintiff that he had known Hosi Ramovha for many years and that if Hosi Ramovha wanted to speak to him, they would do so directly.

[12] The defendant elaborated that, prior to the plaintiff's visit, at which the plaintiff proposed to introduce him to Hosi Ramovha, the Hosi had sought an audience with him, which he granted. At that meeting, Hosi Ramovha indicated to the defendant that he had begun development on the land that is the subject of this action and owed a considerable amount of money to the engineering company that had undertaken the earthworks, which money the Hosi did not have. Hosi Ramovha requested the defendant to advance him funds to pay the engineering company and the defendant agreed. One of the defendant's companies fronted the funds, which were accounted for against the defendant's shareholder loan account with that company.

[13] At about that time – the defendant's evidence continued – Hosi Ramovha requested the defendant to partner with him to realise the development on the property. The defendant then referred the Hosi to his subject-matter experts within his organisation to determine the feasibility of the envisaged project and to draw up the necessary documents. In 2017, the land was transferred to Mosail which appears

to be a special purpose vehicle, in which a company associated with the defendant holds a two-thirds shareholding, with the balance being held by Malnet, associated with Hosi Ramovha.

[14] The defendant's evidence was not shaken during cross-examination. For this reason, the plaintiff brought an application to reopen his case so that he could testify regarding his alleged communications with the defendant after the meeting at which he alleges that the agreement was concluded. For the reasons I gave at the time, I concluded that it was not in the interests of justice to grant the application and dismissed it.

Evaluation

[15] A party claiming specific performance must establish the terms of the contract sought to be enforced and breach (or threatened breach) of that agreement by the defendant.

[16] In my view, the plaintiff fails at the first hurdle, i.e., establishing the conclusion and terms of the agreement contended for. Both parties were agreed that I have two mutually destructive versions before me, and that it would eventually come down to the probabilities and, possibly, credibility findings.

[17] The proper approach in a case like this is that set out by Eksteen AJP in National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440E–441A and endorsed by the Supreme Court of Appeal in Baring Eiendomme Bpk v Roux [2001] 1 All SA 399 (SCA) at para 6:

> "*... where there are two mutually destructive stories, [the plaintiff] can only succeed if he satisfies the Court on a preponderance of probabilities that his*

> *version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.*"

[18] After a careful consideration of all the evidence, I hold the view that the plaintiff has not discharged the onus to prove his case on a balance of probabilities.

[19] The plaintiff could not produce a single document to support his claim. The defendant testified without challenge that, in his 47 years in the field, he had never concluded a business arrangement of the sort claimed by the plaintiff orally and had always insisted on written agreements. This is consonant with his other unchallenged evidence that he ensured that the transaction between him and Hosi Ramovha was properly structured and documented. The belated and unsustainable application to reopen the plaintiff's case so that he could testify about his alleged communications with the defendant after the alleged conclusion of the agreement made it plain that the plaintiff himself realised that, in view of the defendant's evidence, his evidence was insufficient to justify judgment in his favour.

[20] Neither could the plaintiff produce any evidence of written communications between him and the defendant in relation to the alleged agreement. At the least, one would have expected the summons to be preceded by a written demand, but there was none to be found. To be frank, the plaintiff's case had to stand or fall on his word.

[21] Unfortunately, the plaintiff's word is not enough. I have already expressed my reservations about the paucity of any evidence of the alleged oral agreement above. The magnitude of the plaintiff's expected return from this envisaged enterprise makes it unlikely that there would not have been any written communication between the parties in the days before and after the conclusion of the alleged agreement. It also makes it impossible that the defendant, a seasoned campaigner in the property development field would include such an agreement with a person previously unknown to him at their first meeting. In addition, the plaintiff had considerable difficulty in cross-examination to explain his role in the envisaged development once the land had been acquired.

[22] On the other hand, I have no reason to doubt the defendant's version, which appeared to be frank and sincere. He testified without challenge that the plaintiff had sought a meeting with him and had proposed to introduce him to Hosi Ramovha and that he had declined the offer as he had an existing relationship with Hosi Ramovha and did not need an intermediary. The probabilities do not incline in the plaintiff's favour. I find it difficult to believe that the parties could have negotiated and implemented a project of this magnitude and complexity without any correspondence having passed between them.

[23] Mr Desai for the defendant tried to press on me to find that, on the plaintiff's pleaded case, the plaintiff had conducted the business of an estate agent without a fidelity certificate required in terms of the then applicable Estate Agents Act, 112 of 1976, and therefore that which the plaintiff sought was the payment of an estate agent's commission, which is unenforceable in terms of s12 of that Act.

[24] It is not necessary to decide this point. If it was a proper point, it should have been taken as an exception to the plaintiff's particulars of claim. But it could not have been taken as such because the defendant clearly realised that, if the plaintiff's claim of a partnership were to be accepted (which it must for the purposes of an exception), the plaintiff's pleaded conduct in furtherance of the aims of the partnership would clearly fall outside the business of an estate agent. There is no evidence before me that the plaintiff in any way acted as an estate agent. It could hardly have been otherwise as the defendant denies an agreement of any sort with the plaintiff.

[25] It follows that the plaintiff's action must be dismissed.

Costs

[26] Costs must follow the result. Mr Marx, for the plaintiff, urged me without any enthusiasm that I should order each party to pay its own costs in case I found the scales to be evenly balanced. As should be apparent from what I have already said, this is not such a case where the scales are evenly balanced. The plaintiff has simply failed to prove that which he alleged held the defendant contractually liable to him.

Conclusion

[27] In the result, the following order is made:

The plaintiff's claim is dismissed with costs.

[redacted]

TM Kanyane

ACTING JUDGE

LIMPOPO DIVISION, POLOKWANE

Appearances:

For the Plaintiff: F Marx
Instructed by: Corrie Nel & Kie Attorneys
Polokwane
e-mail: leerklerk@cnilaw.co.za

For the Respondent: M Desai
Instructed by: Koor Attorneys
Houghton Estate
Le Roux Inc.
Polokwane
e-mail: zahaar@koorattorneys.co.za;
leroux@lerouxattorneys.co.za