



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

Reportable/Not reportable

Case number: 1481/2018

In the matter between:

QUICK LEAP INVESTMENTS 438 (PTY) LTD

PLAINTIFF

and

THE DEPARTMENT OF HUMAN SETTLEMENTS

1st DEFENDANT

OF THE FREE STATE PROVINCE

THE MATJHABENG LOCAL MUNICIPALITY

2nd DEFENDANT

THE MEMBER OF THE EXECUTIVE COUNCIL FOR

CO-OPERATIVE GOVERNANCE, TRADITIONAL

AFFAIRS AND HUMAN SETTLEMENTS OF THE

FREE STATE PROVINCE

3rd DEFENDANT

THE MINISTER OF HUMAN SETTLEMENTS

4th DEFENDANT

Coram: Loubser J

Heard: 11, 12, 13, 14 and 15 March 2024, 27 and 30 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by release to SAFLII. The date and time for hand down is deemed to be 13:00 pm on 19 December 2024.

Summary: Application for absolution from the instance at the close of the Plaintiff's case – whether there is evidence upon which a Court, applying its mind reasonably, could or might find for the Plaintiff.

ORDER

1. The application for absolution from the instance at the close of the Plaintiff's case, is dismissed.
 2. The costs of the application to be determined at the end of the trial.
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JUDGMENT

LOUBSER J

[1] In this matter the Court is now seized with an application by the 1st, 3rd and 4th Defendants to grant an order of absolution from the instance at the close of the Plaintiff's case. The 2nd Defendant has not participated in the trial proceedings at all. The application was made after the Plaintiff presented the evidence of two witnesses, namely the managing director of the Plaintiff, Mr. Johannes Petrus Oosthuizen and Mr. Bernard Jacob Balkin, a forensic chartered accountant, whereafter the Plaintiff's case was closed.

[2] Before the merits of the application are considered, I deem it apposite to refer briefly to the background of the proceedings that came before this Court.

[3] In August 2018 the Plaintiff made application against the Defendants on notice of motion for a declaratory order in the following terms:

1. It is declared that the 1st Respondent's purported cancellation of the agreement between the Applicant and the 1st 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 this agreement 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 the social housing as a registered CDM Project and the 1st Respondent is obliged to pay to the Applicant the agreed upon compensation for such works.
4. It is declared that the 2nd Respondent's failure to, at its own costs, establish, install

and complete a fully functional sewerage system at the relevant building site, has no effect.

5. It is declared that once the 2nd Respondent has, at its own costs, established a fully functional sewerage system at the relevant building site, which sewerage system should be capable of functioning within acceptable engineering standards and should be able to convey waste water and sewerage from each house to the main sewerage line of the 2nd Respondent, the Applicant and the 1st Respondent are entitled to deal with the applicable carbon credits in terms of the aforesaid agreements between them.

[4] This application was aimed at the specific performance of the agreement between the parties, and only the 1st Respondent opposed the application. While the 2nd Respondent did not oppose, the 3rd and 4th Respondents indicated that they would abide by the decision of the Court.

[5] The application was heard by Molitsoane, J of this Division. He mentioned in his judgment that the agreement concerned was a written land availability agreement (the LAA) entered into between the Applicant and the 2nd Respondent for the building of low-cost housing. He further mentioned that the LAA was subject to certain suspensive conditions, which conditions the Applicant averred have been fulfilled. The 1st Respondent, however, contended that they have not been fulfilled, and as such no contract has come into being. The learned Judge then found that there was a serious dispute of fact as far as this issue is concerned. As a result, he referred the application to trial.

[6] Subsequently the Applicant, which now feature as the Plaintiff, filed a declaration in which the very same relief is sought as set out in para 3 above. Later on, the Plaintiff amended its declaration to include a claim for damages against the 1st, 2nd and 3rd Defendants in the alternative. This claim for damages amounts to the total sum of R240 910 896.00. On the first day of the trial before this Court, the Plaintiff abandoned all the relief sought in the form of the declaratory orders, and the Court was informed that the Plaintiff was only proceeding on the damages claim that was pleaded in the alternative.

[7] In the amended declaration, it is stated that during the period 18th May 2016 and 23rd May 2016 the 1st Defendant repudiated the agreements between the parties by terminating the contracts without any reason or valid ground for doing so. This constituted a breach of the agreements, and the Plaintiff then elected to accept the 1st Defendant's repudiation. It is further pleaded that, as a result of the breach, the Plaintiff was prevented

from constructing the remaining 4 000 low-cost housing units at extensions 19 and 20 at Thabong, in the Matjhabeng Local Municipality. It is further pleaded that the amount of damages suffered by the Plaintiff as a consequence, represents the profit that the Plaintiff would have earned from the construction of the 4 000 units.

[8] When it comes to the application for absolution at the close of the Plaintiff's case, the test is whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might find for the Plaintiff. The test is not whether a Court should or ought to find for the Plaintiff.¹ In the present case, the evidence that the Court has to consider, is mostly the evidence of Mr. Oosthuizen, because the evidence of Mr. Balkin related only to the quantum of the Plaintiff's claim.

[9] The evidence of Mr. Oosthuizen relevant to the present enquiry, consisted of the following in chief: The Plaintiff made a presentation to the Provincial Government with a view to building houses in a clean environment. The Executive Committee of the Government agreed that the plan could be implemented at Hani Park, Welkom, but then the local municipality had to make land available for the project. The result hereof was a written Land Availability Agreement (LAA) that was concluded between the Second Defendant and the Plaintiff on 4 April 2007. In terms of the agreement, the land that was made available was identified as Extensions 19 and 20 of the area known as Thabong. The land was made available for the development of a low-cost housing township by the Plaintiff, on the basis that the Plaintiff would obtain funds from donors locally or internationally to fund the project. Further, the 2nd Defendant undertook to proclaim the township, service the stands, and create the infrastructure pertaining to roads, electricity supply, water supply and sewerage. The onus of proclaiming the township rested on the 2nd Defendant.

[10] The LAA contained three suspensive conditions stated as follows:

"14.1 This agreement is subject to the suspensive condition that the owner (2nd Defendant) 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 (Plaintiff) to erect houses.

¹ For instance, *McCarthy Ltd v Absa Bank Ltd* 2010 (2) SA 321 (SCA) at para 21

14.2 This agreement is further subject to the suspensive condition that the Developer (Plaintiff) shall –

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

[11] The agreement further stipulated that, if at the end of the period of 12 months the land remains undeveloped, then in the absence of an extension of the agreement, the land shall revert back to the council to be dealt with as they may deem fit. The agreement then concludes with a clause stipulating that the agreement constituted the whole agreement between the two parties and that no variation or cancellation shall be of any force or effect unless and until it is reduced to writing and signed by the parties or their duly authorised representatives.

[12] Mr. Oosthuizen further testified that the 2nd Defendant did in fact proclaim the land and installed the sewerage system. After the period of 12 months relating to the LAA had already run out the Plaintiff and the 2nd Defendant signed an Addendum to the LAA on 6 October 2008, whereby the period of the LAA was extended by another 6 months, namely to 31 May 2009. Mr Oosthuizen testified that the sewerage system was installed and they did obtain the funding of the project in terms of the initial project. This was followed by another Addendum between the same parties signed on 15 April 2010, whereby the LAA was extended to be valid until 1 June 2014. Then, on 18 May 2010, the 1st Defendant and the Plaintiff entered into a written agreement in terms of which the 1st Defendant would pay all monies due to the Plaintiff as per the agreed milestones set out in the agreement. When this contract was signed, there was no objection to the validity thereof, Mr. Oosthuizen testified. On the same day an Addendum was signed by the parties to make provisions for the payment of R2 million upon completion of the first hundred foundations. The Plaintiff then started building during the course of 2010.

[13] The witness then went on to take some time in relating how the Plaintiff had battled to have a functional sewerage system installed by the 2nd Defendant. The project of building the houses could not move forward because the manhole systems were filled with rubble and there was no flow from one manhole to another. The sewerage was spilling back all the time. Eventually the Plaintiff engaged with the 1st Defendant in respect of this issue. Although the 1st Defendant was upset about the issue, and although a Memorandum of Understanding was signed with the 1st Defendant on 15 June 2012, the situation did not improve. The Plaintiff complained about the non-functional sewerage system on numerous occasions, but received little or no response from the 1st and 2nd Defendants. The Plaintiff

also complained about the fact that the 2nd Defendant had not yet completed the list of beneficiaries for the houses, which failure also delayed the building of the houses.

[14] After the 1st Defendant had terminated its contract with the Plaintiff, Mr. Oosthuizen visited the building site and found another contractor there who was attempting to remedy the dysfunctional sewerage system. He told the Court that the 1st Defendant had failed for 5 years to connect the sewerage system, and only now had they appointed someone to rectify the problem after termination of the contract with the Plaintiff.

[15] The Memorandum of Understanding referred to by Mr Oosthuizen, recorded that the Plaintiff and the First Defendant had committed in 2010 to a Public-Private Partnership (PPS) to construct low cost housing on land belonging to the Second Defendant under a Clean Development Mechanism Project under the Kyoto Protocol which would be registered under that Protocol of the United Nations. That would eventually facilitate the sale of carbon credits internationally or locally.

[16] In cross-examination Mr Oosthuizen testified that the Plaintiff itself had initially provided the funding for the project, and that no other funding was obtained at the time. He approached the 1st Defendant only after the LAA was concluded. As for the LAA, he conceded the suspensive condition that the Plaintiff had to obtain local or international funding within a period of 12 months, and he conceded that extension 19 was only proclaimed on 16 November 2014 and extension 18 on 18 February 2012. Mr Oosthuizen then confirmed that both the proclamations did not take place within the 12 month period stipulated in the LAA or its addendum. He further conceded that every addendum was signed after the expiry of the previous one. When it was put to him that the suspensive condition of the installation of a sewage system was not fulfilled because what they provided was not a fully functional sewage system, Mr Oosthuizen said that he disagrees with this proposition.

[17] In re-examination Mr Oosthuizen testified that the 1st Defendant never told him that the suspensive conditions have not been met. The 1st Defendant should have said if there was a problem with the availability of the land concerned. They never conveyed to him that there was no land availability agreement any more. With this, the testimony of Mr Oosthuizen was concluded.

[18] The question now arising is whether a Court, applying its mind reasonably to this evidence, could or might find for the Plaintiff. On behalf of the Defendants it was submitted that no Court could or might find for the Plaintiff on the basis of the evidence presented by

Mr Oosthuizen. This is so, because two of the suspensive conditions of the LAA were not fulfilled during the 12 months period, with the result that the LAA lapsed at the end of the 12 month period. As both the addendums were only concluded after the LAA lapsed, the addendums could not revive the lapsed LAA. The two suspensive conditions concerned were the ones relating to the proclamation of extensions 19 and 20 of the land, and the creation by the 2nd Second Defendant of a sewerage system. The evidence of Mr Oosthuizen confirmed that these two suspensive conditions were not fulfilled during the 12 month period of the LAA, it was contended.

[19] It was further submitted on behalf of the Defendants that, as a result, the Plaintiff had no right in law to construct or to demand to construct houses on the land concerned. It can therefore not claim any right in law to construct 4 000 houses on the land made available in terms of the LAA, as that agreement had lapsed. The whole basis for the agreements with the 1st Defendant was in fact absent when the LAA lapsed, the subsidization agreement between the 1st Defendant and the Plaintiff came about only because the Plaintiff assured the 1st Defendant and the Exco that he had land available by means of the LAA. On the evidence of Mr Oosthuizen, the LAA had lapsed already by that time, it was argued.

[20] On behalf of the Plaintiff it was submitted that the Defendants are only shifting the evidentiary burden since they have raised special defenses to the effect that the agreements with the Plaintiff were not lawful, but they want the Plaintiff to prove all the essentialia of the contracts, including that they were lawful. It was submitted that the suspensive conditions between the 1st Defendant and the Plaintiff had no relevance to the contract between the Plaintiff and the 1st Defendant. That contract does not even refer to the LAA, and it does not contain any suspensive conditions. According to Mr Oosthuizen, he was not told by anybody that the suspensive conditions were not complied with. Furthermore, the agreements between the 1st Defendant and the Plaintiff, do not even refer to the sewerage system. It does not contain any suspensive condition to that effect, it was contended. In any event, nobody told the Plaintiff to stop the building of the houses because the LAA is not in place. For all these reasons, the Plaintiff has put up a prima facie case, it was argued.

[21] In view of all these submissions, the written agreement between the 1st Defendant and the Plaintiff dated 18 May 2010 needs closer scrutiny. This agreement was signed by the parties some 3 years after the LAA came into being. In the agreement the project concerned is described as the development, improvement and/or completion of 300

housing units to be built in Hani Park, Matjhabeng Local Municipality. The building of the 300 units would serve as a pilot project under the stipulations of the Kyoto Protocol of the United Nations. The units must be built with the period ending 31 March 2011. Further, the 1st Defendant would facilitate the acquisition of a signed services and authentic land availability agreement on or before the signing of the contractor's agreement. If the Plaintiff has good reason for requesting delay in commencement or completion dates or in the programme for sale of residential properties to beneficiaries, it may submit motivated representations for the extension, to which the 1st Defendant shall give reasonable consideration. The 1st Defendant also undertook to pay all monies due to the Plaintiff as per the agreed milestones reflected in the agreement. Finally, the parties agreed that the agreement thereto and the appendices correctly reflects the intention of the parties and constitutes the entire agreement between the parties. No variation to the agreement shall be of any force and effect unless reduced to writing and signed by the parties.

[22] In the first appendice to the agreement, the following appears: "If the contractors has entered into a land availability agreement in respect of the land contained in the project, the contractor hereby cedes to the Defendant in *securitatem debiti* for the obligations of the contractor in all its rights, title and interest in and to the aforesaid land availability agreement." An addendum to the agreement made provision for the advance payment to the Plaintiff for the building of the first hundred foundations.

[23] In a Memorandum of Understanding signed by the parties on 19 June 2012 the parties agreed that the Plaintiff would build altogether 6 000 houses. Phase 1 of the project will consist of 300 houses, phase 2 of 1 700 houses and the balance of 4 000 houses will commence in the 2014 – 2015 financial year will be completed during the 2016 – 2017 financial year. The building of the last phase of 4000 houses appear to be the bone of contention in the present action for damages instituted by the Plaintiff.

[24] Notably, the agreement of 18 May 2010 was concluded between the 1st Defendant and the Plaintiff. The 2nd Defendant was not a party to the agreement at all. There is no reference to the LAA of 4 April 2007 or to any suspensive conditions, for that matter. The nearest that the agreement comes to the LAA, is where it is stipulated that "if the contractor has entered into a land availability agreement in respect of the land contained in the project", then certain things will happen. This means that if the contractor has not entered into such an agreement, then such things will not happen. More importantly, the 1st Defendant undertook to facilitate the acquisition of a signed serves and authentic land availability agreement by itself. With this undertaking the 1st Defendant made it clear that

it is not relying on the LAA of 2007 at all. The agreement was a new agreement concluded between different parties than those who featured in the LAA. Assuming then that the suspensive conditions of the LAA have not all been fulfilled and that the LAA has lapsed irretrievably after its period of 12 months, then it surely cannot be said that this LAA purported to form the basis of the new agreement that followed three years later. The new agreement stands on its own legs. The failed LAA has not made the new agreement unlawful.

[25] In terms of the new agreement, the 1st Defendant would pay to the Plaintiff all monies due for the building of the houses. I therefore find that so far, there is evidence upon which a Court, applying its mind reasonably, could or might find for the Plaintiff.

[26] The following order is made:

1. The application for absolution from the instance at the close of the Plaintiff's case, is dismissed.
2. The costs of the application to be determined at the end of the trial.



 P.J. LOUBSER, J

For the Applicants (Defendants) in the
absolution application:

Adv. N Snellenburg SC, with him Adv L
Bomela

Instructed by:

The Office of the State Attorney,

Bloemfontein

For the Respondent (Plaintiff) in the
absolution application :

Adv. D Mtsweni, with him Adv S Maelane

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