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**IN THE HIGH COURT OF SOUTH AFRICA  
(LIMPOPO DIVISION, POLOKWANE)**

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>

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DATE.....

SIGNATURE:.....

**CASE NO: 3972/2016**

In the matter between:

**JUANITO MARTIN DAMONS N.O**

**FIRST APPLICANT**

**KGASHANE CHRISTOPHER MONEYLA N.O**

**SECOND APPLICANT**

**JOHANNES ZACHARIAS HUMAN MULLER N.O**

**THIRD APPLICANT**

**SOPHIE THABANG KEKANA N.O**

**FOURTH APPLICANT**

(In their capacities as liquidators for and on behalf of  
**EUPHORIA GOLF ESTATE (PTY) LTD** [in liquidation],  
Registration Number: 2004/023480/08

**JUANITO MARTIN DAMONS N.O.**

**FIFTH APPLICANT**

**KGASHANE CHRISTOPHER MONEYLA N.O.**

**SIXTH APPLICANT**

**LIZETTE OPPERMAN N.O.**

**SEVENTH APPLICANT**

(In their capacities as liquidators for and on behalf of

**EUPHORIA LODGES (PTY) LTD** [in liquidation],

Registration Number: 2007/015246/07

and

**EUPHORIA HOME OWNERS ASSOCIATION NPC** **FIRST RESPONDENT**

(Registration Number: 2005/031867/08)

**THE MASTER OF THE HIGH COURT,  
PRETORIA**

**SECOND RESPONDENT**

**RAND MERCHANT BANK LIMITED**

**THIRD RESPONDENT**

**ABSA BANK LIMITED**

**FOURTH RESPONDENT**

**SAMPADA LODGES (PTY) LTD**

**FIFTH RESPONDENT**

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## **JUDGMENT**

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**MAKGOBA JP**

[1] On the 22 September 2016 and after hearing argument in this matter, I granted the following order and indicated that my reasons for the order would follow in due course:

1.1. The First Respondent is ordered to issue clearance certificates in respect of the properties situated at EUPHORIA GOLF ESTATE and described in Annexure “A” to the Notice of motion of EUPHORIA GOLF ESTATE (Pty) Ltd ( in Liquidation) within 2 days from date hereof for the transfer of such properties to SAMPADA LODGES (Pty) Ltd.

1.2. The First Respondent is ordered to issue a clearance certificate in respect of Erf [...] EUPHORIA TOWNSHIP within 2 days from date hereof in order for the transfer thereof to EUPHORIA LODGES (Pty) Ltd (in Liquidation) to be effected.

1.3. The First Respondent is ordered to pay the costs of this application such costs to include the costs of Senior Counsel.

1.4. The Counter-application is dismissed with costs.

- [2] My reasons for the order follow hereunder.
- [3] The Applicants, as liquidators of the developer, Euphoria Golf Estate(Pty) Ltd (in Liquidation) brought an urgent application for an order to compel the First Respondent, Euphoria Homeowners Association NPC, (“HOA”) to issue clearance certificates in respect of properties they had sold to the Fifth Respondent, Sampada Lodges(Pty) Ltd ( “SAMPADA”).
- [4] The HOA (First Respondent) opposed the application. HOA also counter-applied for an order that the relief sought by the Applicants be postponed for a period of 60 days during which the parties, by order of Court, be compelled, to negotiate in good faith in order to reach agreement on the outstanding issues of a restructuring agreement. HOA contends that the Constitution and the principle of Ubuntu direct that the parties must be given a further opportunity to negotiate in good faith with a view to reach agreement on the minor outstanding issues of the restructuring agreement.

**Factual Matrix against which the Development of  
Euphoria Golf Estate took place**

- [5] The development at the centre of the dispute comprises of 745 erven. The majority of the erven comprise of residential erven. The remainder of the erven comprise of roads, a golf course, erven for the provision of municipal services (such as water treatment plants, sewer treatment plants, water reservoirs) a golf clubhouse, a hotel, a restaurant and even a cableway.
- [6] The development was established as a leapfrog development. This necessitated a costly investment into municipal services by the developer. That huge investment was totally dependent upon rapid sales of erven. That would have guaranteed a sufficient levy income in order to maintain all municipal services infrastructure, security and other operational expenses necessary to keep the development afloat.
- [7] Unfortunately, the 2008 economic downturn affected sales so negatively that only approximately 50% of all residential erven were sold. This in turn resulted in the liquidation of the developer

and the appointment of the liquidators ( Applicants) on behalf of the two secured creditors, the Third and Fourth Respondents respectively.

[8] The Third and Fourth Respondents are the secured creditors of the liquidated companies Euphoria Golf Estate(Pty) Ltd and Euphoria Lodges (Pty) Ltd, the erstwhile developers of this massive development. The Fifth Respondent, SAMPADA is the purchaser of the properties for which the clearance certificates are sought in order to effect transfer of the properties to the purchaser.

[9] The HOA wants the following issues to be discussed between the parties with a view to reaching a consensus and thus enter into a restructuring agreement:

9.1. Preparedness of the HOA to accept certain levy payments in full and final settlement of levies due;

9.2. The leasing of Stand 529 to the HOA;

9.3. The development of Stand 718 (Chapel) and 719

(Community hall) by the Fifth Respondent and transfer thereof to the HOA after a period of time;

9.4. The joint development of Stand 720(airstrip);

9.5. Access arrangement to stands necessary for services;

9.6. Reduced levies on commercial stands;

9.7. Amendment of the Memorandum of Incorporation to make the above possible.

[10] The Fifth Respondent's stance is that it negotiated with the HOA in good faith, but that the HOA is exploiting such negotiations in order to obtain ownership of properties to which it is not entitled. That further negotiations with the HOA would frustrate its contractual rights.

The Fifth Respondent contends that the HOA is not in law entitled to the order sought in the Counter-application and that the Fifth Respondent should not be compelled to negotiate with the HOA.

## Issues

[11] The following issues arise from this case:

- 11.1. Whether the Court has the power to order parties to negotiate in the circumstances where one of the parties is unwilling to enter into such negotiations.
- 11.2. Does the present case demonstrate the need for the development of the common law to infuse it with the principle of Ubuntu and other constitutional values as per the instruction of Section 39(2) of the Constitution?
- 11.3. Has the First Respondent (HOA) *in casu* made out a case for an order compelling the parties to negotiate a restructuring agreement?

## The Legal Position

[12] Our Courts, including the Constitutional Court have always been very careful not to interfere with the right of parties to contract



freely. The well-known principle repeatedly applied in the context of interpretation is that a Court should not make a contract for parties even if it would have been very reasonable to do so.

See **Natal Joint Municipal Pension Fund v. Emdumeni Municipality 2012(4) SA 593 (SCA) at 604 par 18.**

[13] The Constitutional Court had the opportunity to confirm the legal position in regard to agreements to negotiate in good faith (*pactum de contrahendo*) in the recent case of **Makate v. Vodacom Limited 2016(4) SA 121 (CC)**. At par 97, pages 152 to 153 the Court confirmed the legal position in terms of the common law that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus.

In **Everfresh Market Virginia (Pty) Ltd v. Shoprite Checkers (Pty) Ltd 2012(1) SA 256 (CC)** it was stated that agreements seriously entered into should be enforced and that the value of Ubuntu which inspires much of the Constitutional compact may tilt the argument in its favour. Moseneke DCJ at par 72 states:

*“Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith”.*

- [14] It should be noted that in the two decisions, the **Makate** case and **Everfresh** case, there was a “Contractual obligation” as referred to by Moseneke DCJ. *In casu* there is no agreement to negotiate a specific term of agreement. There is thus no “contractual obligation” no *pactum de contrahendo*. Negotiations for a restructuring agreement between HOA and the Fifth Respondent had been going on but there was never a stage of consensus or an agreement to negotiate further. The situation has been reached where HOA is withholding the clearance certificates to force its views on the other parties and drag them to a negotiating table.

### **Whether HOA has made out a Case**

- [15]. The HOA alleges that by refusing to negotiate in a bona fide manner, the Applicants and Fifth Respondent have caused the situation whereby they need to approach the Court for relief. In my

view the HOA has no right to withhold the clearance certificates pending an agreement being entered into.

[16]. The attitude of HOA is bizzare and difficult to understand. While they repeatedly state that the holding back of the clearance certificates required for transfer to take place is not in order to hold a lever to seek to obtain rights and properties to which they are not entitled, no basis in law or otherwise is submitted as to why the alleged obligation to negotiate a restructuring agreement should stand in the way of the transfer of the properties or, at the very least, the provision of the clearance certificates. In my view there is nothing to prevent the negotiations of such agreement after transfer of the properties to the Fifth Respondent has taken place. This shows lack of *bona fides* on the part of the HOA.

[17]. A party who wishes to negotiate and who requires the Court to compel another party to negotiate with it in good faith must surely demonstrate to the Court that it is, from its side, prepared to negotiate in good faith. On this point the HOA fails completely. Most blatant is the fact that they wish to withhold what is immediately due to the Fifth Respondent pending the outcome of a

protracted negotiating period. This is blackmailing. Thus in order for the Fifth Respondent to minimise its losses, it will be in the position where it would make sense to make otherwise unwarranted concessions in order to finalise the negotiations to the satisfaction of the HOA. Surely such negotiations can never be said to be *bona fide*.

[18]. It is unconscionable that the HOA will be entitled to abuse the negotiation process in order to force a party into such a negotiation and to make concession to which the HOA is not entitled. Needless to say that the HOA wants to obtain ownership of some of the Fifth Respondent's properties for free.

All of this is done where no basis in law is alleged for the implied submission that in law the entitlement to clearance certificates is reciprocal upon the Fifth Respondent entering into an agreement with the HOA.

[19]. Under the circumstances the Applicants are granted the relief as set out in the notice of motion and the Counter – application is dismissed.

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**E M MAKGOBA JP**  
**JUDGE OF THE HIGH COURT OF**  
**SOUTH AFRICA, LIMPOPO**  
**DIVISION, POLOKWANE**

**APPEARANCES**

**Heard on : 22 September 2016**

**Order pronounced on : 22 September 2016**

**For the Applicants : D M Leathern SC**

**Instructed by : Rorich Wolmarans & Luderitz Inc.**  
**c/o Pratt Luyt & De Lange**

**For First Respondent : A Liversage**

**Instructed by : Krügel Heinsen Inc.**  
**c/o Kampherbeek Twine & Pogrand**

**For Third Respondent : I.A Van den Ende**

**Instructed by : Cox Yeats**  
**c/o Pratt Luyt & De Lange**

**For Fifth Respondent : J.L Van der Merwe SC**

**Instructed by : E.Y Stuart Inc.**  
**c/o Corrie nel & Co.**