REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO	
(2) OF INTEREST TO OTHER JUDGES:NO	
(3) REVISED: YES	
	19/03/2021
…….	……..
SIGNATURE	DATE

CASE NO: 1089/2020

In the matter between:

ETIENNE JACQUES NAUDE First Applicant

JOHANNES PETRUS KOEKEMOER Second Applicant

JOHANNES LOODWYK BOUWER Third Applicant

JUSTICE VAN WYK Fourth Applicant

MAWEWE COMMUNAL PROPERTY ASSOCIATION Fifth Applicant

and

MATHONOLO CONSTRUCTION (PTY) LTD First Respondent

RCL FOODS, SUGAR AND MILLING (PTY) LTD Second Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] To avoid confusion, I will refer to all the Applicants jointly as the Applicants. However, where the context warrants it, I will single out the Fifth Applicant and refer to it as the MCPA. I am mindful that there are two Respondents but since the Second Respondent has been cited as a party which might have interest or be affected by the outcome hereof and that it is not actively involved in the opposition of this application, I will only refer to the First Respondent as Mathonolo.

[2] When I was ushered into court and settled down, I had known the above matter to be serving before court. Shortly after the matter had been called and Counsel for both parties had placed themselves on record, Counsel for Mathonolo stood up to announce that insofar as this application was concerned, his instructions were limited to moving an application for my recusal. Naturally, the court enquired what the position would be in the event that the court refused the application. Counsel for Mathonolo was categorical that his further instructions were to move an application for postponement.

[3] Asked why he would not proceed to argue the matter on behalf of Mathonolo, he stated that Counsel who was suppose to argue the matter was involved in another matter in Middleburg. His instructions to apply for a postponement were as such, to be understood against the background of the unavailability of Counsel for Mathonolo not being able to attend court. Subsequently, the court dismissed both the recusal and postponement applications.

[4] The main application proceeded without the Counsel for Mathonolo. While I gave orders in the recusal and postponement applications, I reserved judgment in this application. The idea was that prior to considering the main application, I would furnish reasons for the dismissal of the two applications. Below follows the reasoning of the court in both matters.

RECUSAL APPLICATION

[5] The nub of the recusal application is that on 16 October 2020 during an urgent application concerning the liquidation of Mathonolo, I expressed myself on the merits in a manner that suggested bias. The observations that I made during those proceedings, so continues the argument, disqualify this Court to preside over this application as they have raised reasonable apprehension of bias on the part of the First Respondent and its director, Happy Mkhatshwa, who deposed to the two answering affidavits of the applications heard on 16 and 29 October 2020.

[6] The correlation between the two applications is that they derive from the same set of facts and circumstances. That said, the distinguishing feature between those applications is that the former was launched as an urgent liquidation application of Mathonolo whereas *in casu* the proceedings have been brought during the ordinary opposed motion roll. A further difference is that the Applicants seek relief declaring the lease agreement between Mathonolo and the MCPA a sham and

therefore null and void alternatively, to determine whether or not the lease agreement between the parties is still extant. The parties in the application of the 16th of October 2020 and those *in casu* remain practically the same.

[7] The remarks that are said to have generated the disquiet that ultimately led to reasonable apprehension of bias are contained in the following paragraph quoted by the deponent in Mathonolo's founding affidavit in support of the recusal application. The paragraph reads: "*No,no,no Mr Du Plessis. It has not been tested before Court that there has been corruption. I am only saying look, obviously there are, according to the reports, I have read the report. There are things that are wrong. And something can still be done. We are talking about the urgency of the matter and not the merits of the matter."*

[8] It will be instructive to first make reference to pronouncements made by other courts that found themselves confronted with somewhat similar facts before turning to those that this Court is suppose to deal with. The court in **President of the Republic of South Africa and others vs South African Rugby Football Union and others 1999 (4) SA 147 (CC) at para 48** the court reasoned-

"… that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the ***correct facts*** *[emphasis] reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and submission of counsel. The reasonableness of the apprehension must be assessed in the light of oath of office taken by the judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that* ***they have a duty to sit in any case in which they are not obliged to recuse themselves*** *[emphasis added]. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself* ***if there are reasonable grounds on the part of a litigant for***

apprehending that the judicial officer, for whatever reasons, was not or will not be impartial"*]*

[9] **In Coop and others vs South African Broadcasting Corporation and others 2006 (2) SA 112 (W) at 214,** the court had the following to say:

"… the role of a judicial officer in civil proceedings is not necessarily that of a "silent umpire". A valid criticism of legal representatives would not only be justified, ***but might even be the duty of a judge*** *[Emphasis] The venting of frustration in regard to the conduct of counsel or even comments on the merits of a case, cannot per se be indicative of bias."*

[10] Having described the legal position against which my utterances in court on 16 October 2020 ought to be understood, it is now appropriate to refer to the exchange between Mr Du Plessis and the court before coming to the critical paragraph cited by Mathonolo. Mr Du Plessis, Counsel for the Applicants, was venting his frustration with court processes when the following ensued:

"…..the Court who are innocent, who are independent try their utmost to do the right thing, to stop corruption and we come up all the time against hurdles. We come up with …

COURT: You are using very heavy words. Because no one has been found guilty of corruption here.

MR DU PLESSIS: Well M'Lord the evidence is so clear.

COURT: The evidence …

MR DU PLESSIS: The evidence is so clear. If Y'Lordship wants to I will take you through this.

COURT: No, no, no Mr Du Plessis. It has not been tested before court that there is corruption. I only saying look, obviously there are, according to the reports, I have read the report. There are things that are wrong. And something can still be done. We are talking about the urgency of this matter, I am not talking about the merits of the matter. We are talking about urgency. I cannot just act because you say it is urgent, there is corruption, there is this and that and that. Then I must come to your assistance. I cannot do that.

MR DU PLESSIS: But the applicant is a creditor who says, well as a result of this fraudulent company I am going to suffer damages.
COURT: I do not want to go back there, please. Can you ..."

[11] Mr Du Plessis was obviously dissatisfied that the court seemed not to be entertaining his argument on urgency of the matter. He felt that the court was not coming to his aid when it should, and that as a result parties were getting away with corruption and fraud. It is at that point that the court reminded him that no one has been found guilty of corruption or fraud and that in any event, the court was only concerned with the urgency of the application. I went on to state that I have read the report and that from the contents of the report there is corruption but that such have not been tested. I added that something could still be done to address the corruption and fraud but emphasized that it was not the subject of the application before court.

[12] I then refused to be drawn further into the argument concerning corruption and fraud. In the end, I struck off the application from the roll of the16th of October 2020 for lack of urgency. It is incomprehensible why Counsel for Mathonolo in this application would ascribe a meaning that is perceptibly incorrect. His interpretation leads to one inexorable conclusion, which is that he was not prepared to argue the matter on 29 October 2020. If both he and the Counsel who was on brief for that day could not proceed with the application because the latter was involved in another matter somewhere else, the application for my recusal constituted a perfect excuse. This explains his confession that in the event of the recusal application failing, he would move for a postponement, which he did albeit unsuccessfully.

[13] In any event, to the extent that the issue pertaining to my recusal leaned heavily on the court declaring the lease agreement a sham and therefore null and void *ab initio*, the issue became moot. Counsel for the Applicants subsequently made it clear during the proceedings that he was no longer moving for an order declaring

the lease agreement to be a sham and therefore null and void *ab initio.* The Applicants' abandonment of the prayer as stated aforesaid completely ousts any hopes for a successful prayer based on my impartiality as the nexus between the applications of 16 and 29 October 2020 has been dealt a fatal blow.

[14] Accordingly, the facts and circumstances from which the application of 29 October arise being different from that of 16 October 2020, any notion of perceived prejudice cannot find application here. The current application concerns the determination of the validity of the cancellation of the lease agreement by the MCPA and not to declare the lease agreement null and void *ab initio*. In the circumstances, I found myself constrained to dismiss the application for my recusal. Now that the recusal application is out of the way, I turn my attention to the postponement application.

POSTPONEMENT APPLICATION

[15] The court was advised that Counsel who was expected to argue the matter had taken up another matter in Middleburg and had asked that the application be postponed to another date. When the court turned down the application for postponement, the court was requested to stand down the matter until later that afternoon but unfortunately it so happened that the court would not be available at that time. I am mindful that normally a court would bend backwards to accommodate a party applying for postponement as long as the ensuing prejudice to the other party in the proceedings can be assuaged by an appropriate cost order. That said, where there is a flagrant disregard of practice, the court should display displeasure.

[16] Ordinarily, the court would expect Counsel who subsequent to accepting instructions become unavailable, to make early appropriate arrangements to avoid costs being incurred. The only reason for the matter not to proceed was Counsel's unavailability, which came on the date of hearing. No other reasons

were provided. The court had to show its discontent at being advised on the day of the proceedings that Counsel who was supposed to argue the matter had become involved in another matter. This was the essence of the dismissal of the postponement application.

CURRENT APPLICATION

[17] The Applicants are the administrators of the MCPA appointed in terms of a court order granted by Roelofse AJ dated 10 March 2020. The relief sought in this application initially formed part of an application that served before this Court presided by Mali J on 23 June 2020. While the court per Mali J granted other reliefs sought by the Applicants, it specifically and deliberately circumvented making a decision on declaring the lease agreement between the MCPA and Mathonolo a sham and as such, *null* and *void ab initio.*

[18] The court per Mali J also steered free of declaring the Applicants' alternative prayer of cancelling the lease between MCPA and Mathonolo. The court reasoned that the nature of the orders sought with regard to the declaration of the lease agreement as *null* and *void ab initio* or declaring it cancelled could not be decided in urgent court proceedings because the declaratory orders would have a final effect. The court reckoned that for it to make such a decision it would need more time to avoid prejudice ensuing.

[19] During argument in court, Counsel for the Applicants stated that he was not persisting on the court declaring the lease agreement a sham and therefore *null* and *void ab initio*. He, however, asserted that the Applicants remained adamant that the lease be declared cancelled. Accordingly, all that this Court must do is to determine whether or not the evidence before this Court is consistent with the contention that the lease agreement between the parties has been legitimately terminated. This presents an opportune moment to turn to the BACKGROUND FACTS OF THIS MATTER.

FACTUAL MATRIX

[20] On 14 March 2018, the MCPA represented by Ms Happy Mkhatshwa as its chairperson, and Mathonolo represented by Ms Happy Mkhatshwa in her representative capacity as its sole director, concluded a lease agreement in terms of which:

20.1 The MCPA let three farm properties described as **Portion 3 of** t**he Farm Lekkerdraai No: 464 JU**, Province of Mpumalanga Measuring **355.0684**(three hundred and fifty five point zero six eight four hectares) held by **Title Deed No**: **T9295/2010** remaining extent of the **Farm Lekkerdraai No: 464 JU** Province of Mpumalanga measuring **519.8355** (five one nine point eight three five hectares held by **Title Deed No: T6397/2010 and Portion 0 of the Farm Sanbult No: 604 JU**, Province of Mpumalanga measuring **341.44457** (three four one point four four four five)

20.2 The commencement date of the lease was 12 April 2018 and it was to endure for a period of 35 years;

20.3 The rental amount was determined at R3 500.00 per hectare per annum of the cultivated land;

20.4 The rental would be payable after harvesting In each year at the following bank account: Mawewe Communal Property Association, **First National Bank Malelane Branch, Cheque Account Number: [….]**, or any other place which the lessor may determine from time to time in writing;

20.5 Interest would become payable at the current Interest rate per annum as determined by the Minister of Finance from time to time In terms of section

80 of the Public Finance Management Act,1999 (Act No.1999) in the event that Mathonolo failed to pay any of the rentals. A certificate issued by the accounting section of the LESSOR would be prima facie proof of such Interest rate; and

20.6 In terms of Clause 18.1, in the event that Mathonolo failed to pay rent on due date In terms of Clause 5.1 of the lease agreement and remained in default for more than 7 days after receipt of written notice, the MCPA would be entitled to:

20.6.1 cancel the lease agreement, without prejudice to any rights it may have In terms of this lease agreement or the law in general;

20.6.2 to take Immediate possession of the Property; and

20.6.3 to claim compensation for any loss that It might have suffered or would In future suffer as well as rentals In arears or any amounts due and payable.

20.7 The lease agreement was preceded by a resolution of Mathonolo. It was firstly, resolved that the representative of Mathonolo be altered; secondly, that Mr Mkakazi Elia Mkhatshwa be Substituted for Mrs Siphiwe Happy Sithole as the representative of Mathonolo; thirdly, that Siphiwe Happy Sithole was henceforth authorised to sign and take binding resolutions as the representative of Mathonolo and fourthly, that the MCPA would conclude a 30-year lease agreement with Mathonolo in respect of the Farm: LEKKERDRAAI No: 464, JU.

20.8 On 15 August 2020, the Applicants addressed a letter of demand in terms of Clause 18.1 of the lease agreement. The letter reminds Mathonolo of its obligations arising as a result of the provisions of Clause 5.1 which is

about rental being payable after harvest and Clause 18.1, which describes what would transpire if Mathonolo fails to pay rental as per the lease agreement. Mathonolo was advised that the total rentals due and payable to the MCPA for the years: 2018 and 2019 was R3 378 000.00. The letter concludes by giving Mathonolo 7 days within which to remedy the breach failing which the MCPA threatened to cancel and take possession of the lease property.

20.9 There is no evidence to suggest that Mathonolo responded to the letter from the MCPA dated 15 August 2020. This happened following the MCPA's attempt to have the lease agreement either declared a sham and therefore null and void alternatively, have it declared cancelled on 23 June 2020. The basis of the cancellation was that Mathonolo had failed to pay rentals for the years 2018 and 2019 and that the rentals remained due, owing and payable. As alluded earlier in this judgment, Mali J refused to make any pronouncements on the validity or breach of the lease on the ground that urgent proceedings were not well-suited to decide those questions due to their complexity.

ISSUES

[21] I have stated that Counsel for the Applicants said that it was not necessary anymore for the court to decide on whether or not the lease agreement is a sham and therefore *null* and *void.* That said, he wanted this Court to nonetheless declare the lease agreement between Mathonolo and the MCPA validly cancelled following Mathonolo's failure to observe its obligations arising in terms of the lease agreement.

ASSERTIONS OF THE PARTIES

[22] The Applicants argue that to the extent that the lease agreement between the

MCPA and Mathonolo might be valid, the MCPA has validly cancelled it as provided in Clause 18.1 of the lease agreement. Mathonolo has simply failed to discharge the onus that it had to demonstrate that it has paid as contemplated in Clause 5.1 of the lease agreement. The entries on the bank statement to which Mathonolo refers does not vindicate its claim of payment of rentals for the relevant period. Accordingly, conclude the Applicants, the lease agreement has been legitimately cancelled by the MCPA.

[23] On the other hand, Mathonolo is adamant that it has complied with its obligations of paying rentals as described in the lease agreement. Insofar as it is concerned, the rentals that it has paid to date is in excess of R9 000 000.00. The amount, claims Mathonolo, includes rental advance as well as loans to the MCPA. The total amount ultimately paid to the MCPA by Mathonolo amounts in all to R16 700 000.00 and the whole amount claimed by the MCPA as rental has therefore been paid in full.

LEGAL FRAMEWORK

[24] On the case authority of **RAMNATH v BUNSEE [1961] 2 All SA 22 (N),** which in turn relied on **Pillay v Krishna and Another, 1946 AD 946** the onus is upon Mathonolo to prove that it has made payment of the claimed rental. In the latter case it was held that upon a plea of payment of money, as is the case here, the *onus* is on a respondent/defendant, and that if he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgment must be given for an applicant/plaintiff.

EVALUATION

[25] The issue boils down to a simple enquiry – did Mathonolo establish that it has paid rental as stipulated in the lease agreement? The allegation that Mathonolo has paid an amount of R16 700 000.00 to the MCPA in the form of loans and rental

advance to the MCPA is, without more, too bare. Like Mali J, I find it hard to accept that the amount of R16 700 000.00 constitutes loans and early payment of rental to the MCPA in circumstances where the alleged rental advances are not recorded in the financial statements of Mathonolo and the loans are not supported by some form of loan agreements.

[26] Mathonolo has failed to isolate the amount for the loan from the rental yet it would boldly have this Court believe that since the amount demanded by the MCPA is less than what it has allegedly paid, it is in fact the MCPA that is indebted to it. This assertion cannot find favour with this Court until Mathonolo levies satisfactory evidence that it is owed by the MCPA. The Applicants alleged that entries captured on the MCPA bank statements show that Mathonolo has paid the sum of R962 149.00 to the MCPA between 2017 and 2019. Conversely and during the same period, MCPA has paid to Mathonolo the sum of R2 128 015.00.

[27] Mathonolo's counter argument is that it has since the beginning of the lease agreement, 2018, paid an amount of more than R9 000 000.00. The aforesaid amount, it claims, is made up of loans and early payment of rental. I have already pointed out elsewhere in this judgment the lack of buttressing material to sustain the assertion. Besides, there are contradictions in the exact amount that has been paid to the MCPA. At one stage, it is R16 700 000.00 and at another, it is an amount in excess of R9 000 000.00. It is manifest that Mathonolo is unable to prove the amount that it has paid rental as required or if it did, it is unable to demonstrate how much such amount was or which part of it was for rental and which was for loans.

[28] I have had regard to the entries to which Mathonolo refers. It is noteworthy that the bulk of the description of those entries, on the face of it, have nothing to do with Mathonolo as a party on which the onus to demonstrate payment to the MCPA rests. Mathonolo should have done more instead of simply throwing around different amounts claiming to have been paid by it. On the evidence before this

Court I am unable to find that Mathonolo has discharged its rental obligations arising in terms of the lease agreement. As such, I am obliged to find for the Applicants. The court makes the following order.

1. The lease agreement between the MCPA and Mathonolo is declared to have been lawfully cancelled by the MCPA;

2. Mathonolo is directed to pay the costs of the Applicants.

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B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 19 March 2021 at 10:00.

APPEARANCES:

Counsel for the Applicants:	**Adv HF Oosthuizen**
Instructed by:	**Swanepoel & Partners Inc**
Counsel for the First & Second Respondent:	**Adv L Zwane**
Instructed by:	**JF Shabangu Attorneys**
Date of Hearing:	**29 October 2020**
Date of Judgment:	**19 March 2021**