

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

Case Number: 4028/2021

1. REPORTABLE: YES/ NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

13 October 2022

[SIGNED]

DATE

SIGNATURE

In the matter between:

BOUTINA (PTY) LTD

Applicant

and

**THE MEC FOR THE PROVINCIAL
DEPARTMENT OF HUMAN SETTLEMENTS
(MPUMALANGA)**

First Respondent

MT SILINDA & ASSOCIATES INC

Second Respondent

JUDGMENT

Roelofse AJ:

INTRODUCTION

[1] The applicant (Boutina) seeks payment of an amount of R 16 million from the first and second respondents jointly and severally, the one paying, the other to be absolved.

[2] Boutina's cause of action is founded upon a written deed of sale (the deed of sale) of land. Boutina is seeking specific performance of the deed of sale in terms of which the first respondent (the department) agreed to pay the purchase price for Boutina's land on behalf of the third respondent (the municipality).

[3] No relief is sought against the municipality.

[4] The second respondent (Silinda) was appointed as conveyancer in terms of the deed of sale. The department paid the purchase price to Silinda but Silinda failed to pay Boutina and misappropriated the full purchase price.

[5] Only the department opposes the application and has filed an answering affidavit.

THE DEED OF SALE

[6] On 24 March 2020, Boutina, the department and the municipality entered into a written deed of sale in terms of which Boutina sold its land to the municipality for R 16 million.

[7] In terms of clause 3.1.1 of the deed of sale, the department agreed to pay the purchase price on behalf of the municipality to Silinda to be held in trust until the date of registration of transfer of the land into the name of the municipality.

[8] In terms of clause 6.1 of the deed of sale, the department appointed Silinda who had to cause the transfer of the property.

[9] In terms of clause 7.1 of the deed of sale, the department was responsible for all the costs of transfer including the conveyancer's fees.

SERVICE LEVEL AGREEMENT

[10] On 24 March 2020, the department and Silinda entered into a separate written service level agreement for the registration of transfer of Boutina's land to the municipality (the service level agreement).

[11] In terms of the service level agreement: Silinda undertook that, in the performance of professional duties, he shall keep an effective, efficient and transparent financial management and internal control system in placeⁱ; Silinda would be liable for damages suffered by the department as a result of Silinda's conductⁱⁱ; the department would instruct Silinda to prepare the necessary transfer documents and cause Boutina's property to be transferred to the municipality and to effect payment at the end of the transfer

[12] ³; Silinda would be entitled to the transfer fees⁴; the department would forward the money to Silinda when the properties have been transferred⁵.

EVENTS SUBSEQUENT TO THE DEED OF SALE AND THE SERVICE LEVEL AGREEMENT

[13] On 23 September 2020, Boutina gave a power of attorney to pass transfer of

the land to the municipality to Silinda. In terms of the power of attorney, Boutina nominated, constituted and appointed Silinda ‘...with power of substitution to be the true and lawful Attorneys and Agent/s of the Transferor [Boutina] to appear before the REGISTRAR OF DEEDS.....’

[14] On 26 March 2020, the department paid the purchase price in the amount of R 16 million to Silinda’s business account. The land was transferred to the municipality on 20 May 2021.

[15] On 1 June 2021, Boutina demanded payment of the purchase price from the department and Silinda.

[16] On 8 June 2021, Mr. Silinda and Boutina’s Mr. Marius Deon Mostert⁶ met. At the meeting, Mr. Silinda confirmed that the purchase price was paid into Silinda’s business account and that Silinda no longer has the money.

[17] On 6 September 2022, the department launched an urgent application, *inter alia*, interdicting Silinda, Mr. Silinda and certain banks from transacting Silinda’s bank account pending finalization of an action to be instituted by the department for the recovery of the R 16 million paid to Silinda in terms of the deed of sale.

[18] In the urgent application, the department relied upon the service level agreement. In paragraph 18.4 of the founding affidavit in the urgent application, the department alleges that Silinda and Mr. Silinda were appointed by the department as “*transferring agents*”. In paragraph 22 of the founding affidavit in the urgent application, the department alleges that reasonable grounds exist that show that Silinda and Mr. Silinda “....are refusing to execute the mandate which they hold.” In paragraph 67 of the founding affidavit in the urgent application, the department alleges that Silinda and Mr. Silinda “....failed to execute their mandate.....”.

[19] On 13 December 2021, the department issued summons against Silinda and Mr. Silinda. In support of the department's claim, the department relies on the deed of sale and the service level agreement. The department alleges that Silinda and Mr Silinda are in breach of the service level agreement. The department claims payment of the sum of R 16 million from Silinda and Mr. Silinda.

[20] Silinda and Mr. Silinda did not deliver a notice of intention to defend. The department will be moving for default judgment against the defendants.

THE DEPARTMENT'S DEFENCE

[21] The department denies that it is indebted to Boutina because the department fully complied with its obligations in terms of the deed of sale when the department paid the purchase price to Silinda. Perhaps, the department's defence is best summarised in paragraph 21 of its answering affidavit where the department states:

‘The question as to why Boutina now wants the Court to order the Department to dip again into the public purse and pay the amount of R 16 000 000 that it has already paid, and having done so in compliance with the terms of the written agreement, is unfathomable and it is a matter that should be rejected by the court.’

DISCUSSION

[22] During argument, Mr Makoti who appeared for the department ably attempted to convince me that the department as financier of the purchase price, has complied with its obligations in terms of the deed of sale when it paid Silinda. Unfortunately, he did not sway me for the law provides otherwise.

[23] There can be no doubt that in fact and law that Silinda acted as agent for the department in terms of the deed of sale and the service level agreement. Silinda held a mandate to register the transfer, receive the purchase price and to pay Boutina on

the department's behalf. The department itself relies on a breach by Silinda of the service level agreement in the action the department has issued against Silinda. In the urgent application, the department relies on the mandate that Silinda held in respect of the deed of sale and service level agreement.

[24] A contract of mandate is a consensual contract between one party, the mandator, and another, the mandatary, in terms of which the mandatary undertakes to perform a mandate or commission for the mandator.⁷ To this extent, the department was the mandator and Silinda the mandatary. Silinda was mandated to act as conveyancer in the deed of sale, supported by the service level agreement to register the transfer, receive the purchase price and to pay Boutina on the department's behalf.

[25] In terms of the power of attorney given by Boutina to Silinda, Boutina only appointed Silinda to appear before the Registrar of Deeds on its behalf. It was confined to that purpose and in accordance with conveyancing convention. Without the power of attorney so given to Silinda by Boutina, transfer could not be effected. All the other rights and obligations of the parties to the sale are found in the deed of sale. The rights and obligations of the department and Silinda are found both in the deed of sale and the service level agreement.

[26] The mandate which Silinda held was to act on behalf of the department. The mandate was specific in its terms and authorised Silinda to act on the department's behalf. The mandate created a legal relationship between the department, Boutina and the municipality. The effects of the mandate (save for the fees payable to Silinda in terms of the service level agreement) accrued to the department, Boutina and the municipality - so did their obligations remain their own and not only that of Silinda.⁸

[27] The fact that the MEC paid the purchase price to Silinda matters not because

the department had to effect payment to Boutina through Silinda who held the mandate to receive the money and pay same to Boutina on registration of transfer. The payment did not reach Boutina because Silinda, who was the department's agent, misappropriated the money. The department has as a result not complied with its obligation to pay Boutina in terms of the deed of sale despite paying the purchase price over to Silinda. The department remains indebted to Boutina.

[28] Silinda, having misappropriated the money that was due to Boutina is indebted to Boutina. Silinda has not opposed this application. Boutina is entitled to judgment in its favour against Silinda.

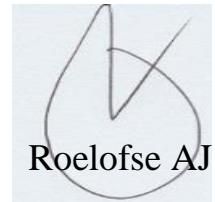
[29] Even if the department is ordered to pay Boutina, the department is not left without recourse. It has already begun to claim the purchase price from Silinda and Mr. Silinda which action is not defended.

COSTS

[30] There is no reason why the costs should not follow the result.

[31] In the premises, I made the following order:

- (a) The first and second respondents are ordered to pay the applicant an amount of R 16 000 000 jointly and severally, the one paying the other to be absolved.
- (b) Interest on the amount in paragraph 1 above at a rate of 7% per annum calculated from 21 May 2021 until date of payment.
- (c) The first and second respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.



Acting Judge of the High Court

DATE OF HEARING: 6 October 2022

DATE OF JUDGMENT: 13 October 2022

This judgment will be delivered by dispatching same by email to the parties on 13 October 2022. In addition, the judgment will be sent to SAFLII for publication on its website. The judgment shall be deemed to have been delivered at 09:00 on 13 October 2022.

APPEARANCES

FOR THE APPLICANT:

Adv CFJ Brand SC on instructions of Slabber Attorneys Inc.

FOR THE FIRST RESPONDENT

Adv M Makoti on instructions of NG Dlamini Attorneys

ⁱ Clause 3.1 of the service level agreement.

ⁱⁱ Clause 3.5 of the service level agreement.

³ Clause 4.1 of the service level agreement.

⁴ Clause 6.1 of the service level agreement.

⁵ Clause 6.3 of the service level agreement.

⁶ A director of Boutina and the deponent to the founding affidavit.

⁷ See: LAWSA, Mandate and Negotiorum Gestio (Volume 28(1) - Third Edition), paragraph 55.

⁸ See: *Ncqula v Muller's Book Shop* 1960 4 All SA 218 (E); 1963 4 SA 802 (E)