

**IN THE HIGH COURT OF LESOTHO**  
**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCA/0107/2021**

**In the matter between**

**MATŠEPANG MAPOTA**

**APPLICANT**

**AND**

**BERENG MAKOAЕ t/a MR PLUMBER AND**

**MAINTENANCE**

**RESPONDENT**

**Neutral Citation:** ‘Matšepang Mapota v Bereng Makoae t/a MR Plumber and Maintenance [2023] LSHC 149 Comm. (30 NOVEMBER 2023)

**CORAM: MOKHESI J**

**HEARD: 29 AUGUST 2023**

**DELIVERED: 30 NOVEMBER 2023**

## **SUMMARY**

**LAW OF CONTRACT:** *Cancellation of the agreement on account of breach of contract- Restitution of money paid- The application granted as prayed with costs.*

## **ANNOTATIONS**

## **LEGISLATION**

## **CASES**

## **LESOTHO**

*Makoala v Makoala LAC (2009 – 2010) 40*

## **SOUTH AFRICA**

*Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA)*

*Rosenberg v South African Pharmacy Board 1981 (1) SA 22 (A) 30H*

*South African Football Association v Mangope 2013 ILJ 311 (LAC)*

# **JUDGMENT**

## **[1] Introduction**

This is a contested application in terms of which the applicant is seeking the following relief:

*“1. Cancellation of the agreement between the Applicant and the Respondent;*

*2. Restitution of money paid to the Respondent in the amount of M34,314.50;*

*3. Costs of suit on Attorney and client scale”*

## **[2] Background Facts**

Before I deal with the facts which brought about this application it is important that I make it plain that when the matter was heard the respondent was not before court neither was he represented by a legal counsel. From the beginning the respondent was represented by Motšoari Chambers who withdrew as counsel of record on 03 October 2022. Before their withdrawal they had advanced the matter to the point where the heads of argument had been filed. The matter was scheduled to be heard on 31 May

2023. The respondent and Adv. Nyabela for the applicant appeared before me.

[3] I asked the respondent whether he would conduct the arguments personally or whether he would want to be given a chance to secure counsel to conduct the arguments for him. He chose the latter option. I gave parties an opportunity to settle the matter amicably in the meantime and then adjourned the matter to 07 June 2023 for mention on the progress on one sticking point as the respondent acknowledged liability for a lesser amount. On the 07 June 2023 both parties appeared before court. It was clear that the parties could not find each other. The only option remaining was to have the matter set down for hearing. As the respondent was still unrepresented, I then adjourned the matter to the 29 August 2023 with a stern warning that the matter will proceed whether or not he has counsel. On 29 August 2023 only Adv. Nyabela for the applicant was before court. There was no appearance for the respondent despite knowing about the date of hearing. The matter proceeded

accordingly. After hearing arguments, I reserved judgment and promised to deliver written judgment in due course. What follows are the reasons and the order.

- [4] The applicant had embarked on a project of building a house for her family around August 2020. The contractor was Mahlakeng Construction (Pty) Ltd. The respondent concluded a contract with the applicant for provision of bathroom material. This contract was concluded through the facilitation of Mahlakeng Construction. The contract was verbal. The applicant paid a total M90,410.00 into the respondent's Standard Lesotho Bank account. The respondent failed to deliver some of the material totalling M34,314.50 thereby prompting the applicant to seek mediation at Qacha's Nek Police Station. In the meantime, the applicant cancelled the contract between her and Mahlakeng Construction, through an email, on 25 October 2021 for breach of contract for not completing the project on time and for unsatisfactory work. When the efforts to get the respondent to deliver the material proved unsuccessful,

the applicant lodged the present application on 8 February 2022 seeking the reliefs outlined in the introductory part of this judgment.

[5] **Respective Parties' Cases**

**Applicant's Case**

The applicant's case is that she entered into a verbal agreement with the respondent for provision of bathroom materials. The agreement was facilitated by the applicant's erstwhile contractor Mahlakeng Construction (Pty) Ltd. The applicant paid an amount of M90,410.00 directly into the respondent's bank account on two occasions. The respondent failed to deliver materials to the value of M34,315.50. In the first payment of M60,790.00 material was delivered same for M15,375.50 worth of material - namely Elf dark warm grey flooring totalling M5,232.50, skirting Vintage pine worth M5, 175.00 and Elf dark wooden flooring worth M4, 968.00.

[6] **Respondent's Case**

Although the respondent denies that he had a verbal contract with the applicant, on the facts, it is clear that they had a contract for delivery of bathroom material. He does not deny that him and the applicant alone attended mediation proceedings. It was never really an issue between Mahlakeng Construction and the respondent. He contends that on 25 June 2021 he delivered “some of the materials that was quoted in annexure “MM3””. The delivery was made and an invoice “BM1” was attached as prove. The value of the invoice is M8,151.00. “MM3” (quotation) value was M11833.50. Material of the value of M3682.50 was not delivered. This is common cause.

[7] The respondent goes on to aver that he could not deliver all the materials because on 15 May 2021 he was assaulted, and medical report was attached as proof of same. However, the medical report shows that he was treated as an outpatient. The respondent acknowledges that the applicant made it clear that she wanted her money back as he could not deliver.

[8] Before pleading over the respondent raised three of the so-called points in *limine*, namely, (i) material dispute of facts, (ii) material non-disclosure, (iii) non-joinder of Mahlakeng Construction (Pty) Ltd. It should be stated that these points have no merit. Material non-disclosure and material disputes of fact are not points to be raised in *limine* as they do not entail the dismissal of the case (**Makoala v Makoala LAC (2009 - 2010) 40**). Even the point of non-joinder is misplaced as Mahlakeng Construction (Pty) Ltd has no substantial interest in the outcome of this matter as the dispute is between the applicant and the respondent.

[9] **Issues for determination**

**The Merits**

This matter is uncomplicated and without any dispute of facts as the respondent would have this court believe. At paragraphs 4.2 and 4.4 and 4.5 the applicant makes the following pointed averments:



*“4.2 I told him of the material I needed and he issued two quotations for such material. The initial quotation was in the tune of M60,786.70 (Sixty Thousand, Seven Hundred and Eighty-Six Maloti and Seventy Lisente) as evidenced by annexure “MM1”. I duly paid an amount of M69,790.00 (Sixty Thousand, Seven-Hundred and Ninety Maloti) for such materials as evidenced by annexure “MM2” and consequently the agreed materials were delivered save for:*

*a) Elf dark warm crey (sic) wooden floor in the amount of M5,232.50;*

*b) Elf dark wooden flooring in the amount of M4,968.00*

*c) Skirting vintage pine in the amount of M5,175.00;*

*Which the Respondent said were not available at the material time and all of which amounted to M15,375.50 (Fifteen Thousand, Three-Hundred and Seventy-Five Maloti and Fifty Lisente).*

*4.4 The second quotation was in the tune of M49,040.60 (Forty-Nine Thousand and Forty Maloti and Sixty Lisente) as evidenced by annexure “MM3”. However, before payment could be made we cancelled out the purchase of Trevi Follow stand-alone which amounted to 19,435.00 thus leaving the total to be paid at the tune of M29,605.60 for the rest of the quotation. I duly paid an amount of M29,620.00 (Twenty-Nine Thousand Maloti, Six-Hundred and Five Maloti and Sixty Lisente) to the*

*Respondent for the purchase and delivery of such material as evidenced by annexure “MM4”.*

*4.5 It was agreed that delivery would be made not later than the 15<sup>th</sup> day of June 2021 but only the Basin 600 White Tolanka, which amounted to M2,553.00 (Two Thousand, Five Hundred and Fifty Three Maloti only), was purchased and delivered by the agreed time.”*

[10] In answer to the above averments, the respondent plead as follows:

“ -5-

*AD PARA 4.2 THEREOF:*

*5.1 Contends therein are noted save to indicate that I was informed by one Kali Mahlakeng of Mahlakeng Construction (Pty) Ltd of the material that Applicant had wanted and I duly sourced the material and addressed the quotation to Kali Mahlakeng of Mahlakeng Construction (Pty) Ltd as evidenced by the annexure “MM1”.*

-6-  
*AD PARA 4.4 & 4.5 THEREOF contends thereon are noted.”*

[11] I have by design reproduced these averments to show that the applicant’s allegations are not denied. The respondent

seemed to have missed one cardinal point of pleading in motion proceedings. If by reacting to the applicant's pointed allegations by saying "the contents are noted" he was denying them, he was totally mistaken, because he has not adduced evidence contradicting the applicant's allegations. It should be recalled that in motion proceedings affidavits serve the dual purpose of pleadings and evidence. The party's case must be pleaded and evidence on which his/her case rest must be contained in his affidavit. (**Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA) para. 43; Rosenberg v South African Pharmacy Board 1981 (1) SA 22 (A) 30H - 31C**). The import of this is that the applicant must make out a *prima facie* in the founding affidavit and in answer the respondent must indicate which of the aspects of the applicant's facts he denies or admit and should set up his version of the facts in the process.

[12] It is not enough for the respondent to answer to the specific allegations by saying "contents are noted." This is not a

denial. In **South African Football Association v Mangope 2013 ILJ 311 (LAC)** at para.9 the court said:

*“.... The respondent is required in the answering affidavit to set out which of the applicant’s allegations he admits and which he denies and to set out his version of the relevant facts. In dealing with the applicant’s allegations of fact, the respondent should bear in mind that affidavit is not solely a pleading and that a statement of lack of knowledge coupled with a challenge to the applicant to prove part of his case does not amount to a denial of the averments of the applicant. Likewise, failure to deal with an allegation by the applicant amount to an admission. It is normally not sufficient to rely on a bare or unsubstantiated denial. Unless an admission, including a failure to deny, is properly withdrawn (usually by way of an affidavit explaining why the admission was made and providing appropriate reasons for seeking to withdraw it) it will be binding on the party and prohibits any further dispute of the admitted fact by the party making it as well as any evidence to disprove or contradict it.”*

[13] I agree with the above exposition of the law. The respondent has not denied any of the allegations made by the applicant. In light of this scenario there is no reason why this application should not succeed. The respondent’s

response is quite plainly without substance. The fact that he was assaulted does not excuse his non-performance especially when it is plain that he was treated as an outpatient. The respondent failed to deliver the materials within a reasonable time and is therefore in breach of the agreement.

[14] In the result,

(i) The application is granted as prayed with Costs.

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**MOKHESI J**

**For the Applicant: Adv. K. Nyabela instructed by Lephatsa Attorneys**

**For the Respondent: No Appearance**

