

SOUTH AFRICA / JUDGMENT

Freeman and Another v Beckett and Another (17570/2022) [2023] ZAGPJHC 896 (11 August 2023)

[2023] ZAGPJHC 896

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams

CASE / FILE NUMBER

17570/2022

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FLYNOTES:

SUMMARY JUDGMENT –

Liquidated amount – Breach

of contract –

Sale of immovable property cancelled –

Damages claimed for reduced purchase price, water, electricity and
occupationalrent – Addendum expressly providing for
defendants to be liable for liquidated damages and the manner of
calculation– Provision in addendum on the final price
equating to the reasonable market value – Plaintiff's
claim

is one “for a liquidated amount in money” –

Summary judgment granted – Uniform Rule 32(1)(b).

REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION,

JOHANNESBURG

case

NO: 17570/2022

DATE: 11th
AUGUST 2023
REPORTABLE: NO
OF INTEREST TO OTHER
JUDGES: NO
REVISED
Date: 11th August 2023
In

the matter between: FREEMAN,
VAUGHAN MICHAEL
First
Plaintiff
FREEMAN,
CORRINNE JEAN
Second
Plaintiff
and
BECKETT,
HAYLEY MARGARET
First
Defendant
VAN
NIEUWKERK, PIETER MASKEW
Second
Defendant
Neutral
Citation: Freeman
and Another v Beckett and Another (17570/2022) [2023]
ZAGPJHC --- (11 August 2023)

Coram: Adams J

Heard: 02 August 2023

Delivered: 11 August 2023 – This judgment
was handed down electronically by circulation to the parties'
representatives by email, being
uploaded to CaseLines
and by release to SAFLII. The date and time for hand-down is deemed
to be 10:00 on 11 August 2023.

Summary:

Application for summary judgment –
plaintiffs claimed liquidated damages as a result of defendants’
breach of contract
– such claim held to be ‘for a
liquidated amount in money’, as envisaged by rule 32(1)(b) –
Amended Uniform
Rules of Court 32(2)(b) and 32(3)(b) discussed –
the Court not satisfied by the defendants’ affidavit that they
have
a bona fide
defence to the action – summary
judgment granted.
ORDER
(1)
Summary judgment is granted in favour of
the first and the second plaintiffs against the first and the second
defendants, jointly
and severally, the one paying the other to be
absolved, for: -
(a)
Payment of the sum of R773 193;
(b)
Payment of interest on the above amount of
R773 193 at the applicable prescribed legal rate of interest of
7.75% per annum
from 23 May 2022 (the date of service of the summons)
to date of final payment; and
(c)
Payment of the plaintiffs’ costs of
suit.

JUDGMENT

Adams J:

- [1] I have before me an opposed application by the first and the second plaintiffs for summary judgment against the first and the second defendants, whose main defence to the plaintiffs’ claim is to the effect that the said claim is not for a liquidated sum, which means, so the defendants contend, that the provisions of Uniform Rule of Court 32(1)(b) does not find application.
- [2] The main action relates to a failed agreement between the parties for the purchase and sale of the immovable property of the plaintiffs in Fourways (‘the property’). The first sale agreement was concluded between the plaintiffs and the first defendant on 15 December 2019 for a purchase price of R4 600 000, payable as and when the first defendant had the funds available. Transfer of the property was to take place once the purchase price, together with all other charges due by the first defendant had been paid in full or secured to the satisfaction of the plaintiffs. In terms of the said agreement the first defendant was liable to

pay occupational rental in the amount of R40 000 per month from the date on which they took occupation until such time as the property was registered into her name, together with electricity, water and refuse charges actually levied by the local authority. The defendants took occupation of the property during February 2020.

- [3] This agreement was breached by the first defendant, as was a subsequent 'amended agreement' concluded between the parties on 7 December 2020, in that the first defendant failed to pay the purchase price or any part thereof as and when it fell due. In the 'amended agreement' the agreed purchase price had been increased to R5 000 000, payable within seven days from date of conclusion of the said agreement. In terms of the amended agreement of sale, the Defendants remained liable for occupational rental in the amount of R40 000 per month from 1 January 2021, together with electricity, water and refuse charges during the occupational period in terms of the amended agreement.
- [4] During October 2021, the first defendant, as purchaser, and the second defendant, as guarantor, concluded yet another addendum agreement with the plaintiffs, in terms of which the plaintiffs became entitled to continue marketing the Property. The said agreement further provided that, should the plaintiffs at any time, prior to the purchase price and transfer costs being secured / paid by the defendants, receive another arms-length bona fide offer, at reasonable current market value (willing buyer, willing seller), to purchase the property, which offer contains no suspensive conditions, alternatively, where all suspensive conditions have been fulfilled and wherein the purchase price has been secured, which the plaintiffs find favourable and wish to conclude, then the defendants were to be notified of same in writing and be simultaneously provided with a copy of the offer. The defendants would then be afforded an opportunity to secure the purchase price of R5 000 000

within a specified period of time, failing which, the first and the second plaintiffs would be entitled to accept the competing offer and cancel the amended agreement of sale, as further varied by the addendum.

- [5] The crucial provision of the addendum agreement is clause 3, which, in the relevant part, reads as follows: -

'(3) Should the agreement be cancelled and the sellers [plaintiffs] accept the competing bona fide offer, the purchaser [first defendant] & guarantor [second defendant] hereby acknowledge and undertake that they will be jointly

and severally liable for payment of damages due to the seller, the purchaser and guarantor to such extent in their personal and or business and holdings capacities. The basis for same is irrevocably agreed as the difference in the reasonable market value received as the final price versus the

purchase price agreed between the Parties in their agreement. Any unpaid rental, utilities or items that are required to be repaired if at all applicable and confirmed

at the exit inspection shall also be considered and are agreed as fair damages. Should the Seller need to litigate in respect of same, said costs shall also form part of the liquid amounts ascertained and agreed to form part of damages. Losses due to commitments made by the Seller off the back of the original agreement shall also be considered where so applicable. Any reasonable dispute in respect of same the Conveyancers shall first attempt to mediate if so required to resolve where possible without the need for legal intervention, failing which Parties will take the necessary steps to enforce same.' (Emphasis added).

- [6] The addendum further provided that, in the event of the agreement being cancelled in such instance, the first defendant would vacate the property within thirty days from cancellation as aforesaid.
- [7] On 30 November 2021, the plaintiffs notified the defendants that they had received a bona fide offer to purchase the property and were invited to secure the purchase price and transfer costs, as per the amended agreement, read with the addendum, within five days of receipt thereof. All suspensive conditions had been fulfilled and the purchase price of R4 400 000 had been secured. The defendants failed to secure the purchase price and the transfer costs of the property, which meant that the plaintiffs became entitled to cancel the sale agreement, which they duly did. On 31 December 2021 the first and the second defendants vacated the property, which was then sold, as per the bona fide offer alluded to supra, for R4 400 000.
- [8] The damages claimed by the plaintiffs, arising from the first and the second defendants' breach of the agreements, amount to R773 193, calculated as follows: (1) Occupational rental for the months of February 2020 to December 2021 = R905 000, less ad hoc payments made by the defendants, amounting in total to R365 374, leaving a balance of R539 626 for unpaid occupational rental. R400 000 of this sum was in fact incorporated, by agreement between the parties, into the new purchase price of R5 000 000

in the amended sale agreement, leaving a balance R139 626. (2) Water and electricity charges for the months of February 2020 to December 2021 in the amount of R82.836.00, less ad hoc payments R49 279 made by the defendants, leaving a balance of R33 557; and (3) R600 000 in respect of the reduced purchase price received by the plaintiffs for the property.

- [9] In their affidavit resisting summary judgment, the first and the second defendants raise, in limine, the legal point that the first plaintiff 'makes the bald allegation in his verifying affidavit' that he is duly authorised to depose to the affidavit in support of summary judgment on behalf of the second plaintiff. The defendants contend that no basis for this authority is alleged in support of this alleged bald allegation and that no factual foundation is laid for the alleged knowledge possessed by the first plaintiff on behalf of the second plaintiff to depose to on her behalf. There is no confirmatory affidavit, so the submission on behalf of the defendants goes, or even some other document, such as power of attorney, put up in support of the allegation.

- [10] The effect of the foregoing, so the argument is concluded, is that any and all allegations concerning the second plaintiff should be disregarded, which, in turn, renders the application for summary judgement defective and to be dismissed out of hand. There is no merit in this contention for the simple reason that the first plaintiff verifies the facts in support of the application for summary judgment, most of which are not seriously challenged by the defendants.
- [11] On the merits of the plaintiffs' claim and their application for summary judgment, the main defence raised by the defendants is that the claim by the plaintiffs is one for damages arising allegedly from the defendants' breach of contract. A 'damages claim', by definition and by its nature, so it is contended by the defendants, is not susceptible to a summary judgment application.
- [12] In that regard, the defendants rely on the provisions of Uniform Rule of Court 32(1)(b), which provides as follows: -
- '(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only -
- (a)
 - (b) for a liquidated amount in money;
 - (c)'
- [13] The defendants furthermore submit that the allegations made by the plaintiffs in the particulars of claim, with respect to the damages suffered by them, are bald and vague. There is no indication, according to the defendants, of how, for example, the municipal charges are arrived at as no vouchers have been submitted or any reconciliation prepared in terms of which payments were allocated. There is no merit in this contention by the defendants. The simple fact of the matter is that the plaintiffs' claim relating to the water and electricity and other municipal charges were for actual charges by the municipality. Moreover, the defendants do not seriously challenge the allegation made by the plaintiffs in that regard.
- [14] As regards the plaintiffs' claim for R600 000 in respect of the reduced purchase price received on the final sale of the property to a third party, the submission made by the defendants is that the said claim, being a 'damages claim', is not susceptible to summary judgment.
- [15] I disagree. The submission by the defendants conveniently loses sight of the fact that the addendum expressly provides that, in the event of cancellation of the amended agreement as a result of the defendants not complying with their obligation to raise the purchase price, they will be liable for liquidated damages calculated on the basis of the difference between the price for which the property was ultimately sold and the purchase price in terms of the agreement with them. It also does not avail the defendants to contend that the plaintiffs

have not made out a proper case in that they have failed to allege and prove that the R4 400 000

represents the fair market value of the property. This submission flies in the face of the provision in the addendum to the effect that the 'final price' received would, as per agreement between the parties, equate to the reasonable market value.

[16] 'A liquidated amount in money' is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment. In that regard see *Lester Investments (Pty) Ltd v Narshi* 1951 (2) SA 464 (C)[1]; *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd*[2]. In *Botha v W Swanson & Company (Pty) Ltd*[3] Corbett J puts the test as follows:

'[A] claim cannot be regarded as one for "a liquidated amount in money" unless it is based on an obligation to pay an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation.'

[17] Moreover, in *Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam*[4], it was held that, 'although the amount claimed from defendant was termed "damages" in plaintiff's particulars of claim, which term didn't usually denote a liquidated sum of money, it appeared from the particulars of claim as a whole that it was in fact only the purchase price of the vehicle, which the two parties had agreed upon, and which was therefore a liquidated sum of money, that was being claimed from the defendant as damages'.

[18] Applying these principles in casu, I conclude that the claim of the plaintiffs is indeed one 'for a liquidated amount in money'. This ground of opposition to the application for summary judgment is therefore without merit.

[19] The new Subrule 32(2)(b), introduced by the Amendment to the Rules which came into effect on the 1st of July 2019, requires the plaintiffs, in their affidavit in support of the summary judgment application, also to explain briefly why the defence as pleaded by the defendants does not raise any issue for trial. The plaintiffs comply with this requirement by stating the following in their affidavit in support of the summary judgment application: -

'(12) In my opinion, the respondents [defendants] have no bona fide defence to the applicants' [plaintiffs'] claim, have not raised any issue for trial, and have entered an appearance to defend solely to delay the matter..

(13) In the plea, the respondents admit the conclusion of the Offer to Purchase and the Amended Offer, that they took occupation of the property during February 2020, and that they vacated the property on 31 December 2021.

(14) The respondents further deny breaching the Amended Offer, but they do not aver:

(14.1) When they paid the deposit;

(14.2) When they paid the balance of the purchase price;

(14.3) When they paid the occupational rent and utilities in full in terms of and in compliance with the Amended Offer.

(15) Had they not breached the Amended Offer in the circumstances claimed and set out above, surely they would have consequently owned the property in terms of the Amended Offer and not vacated it? This is unexplained.

(16) Therefore, the Respondents have failed to plead why they have not breached the agreement, leading to the above absurdity. Their defence accordingly constitutes a bare denial.

(17) The Respondents also do not explain why they deny the conclusion of the Addendum, as their signature is contained thereon (whether it be for fraud or another reason), and why they vacated the property (if not due to the Applicants' cancellation thereof based on the terms of the Addendum). These two simultaneous averments are, without explanation, rendered contradictory.

(18) Moreover, it is probable that the parties did conclude the Addendum as the Offer to Purchase, and the Amended Offer, did not contain a vacation date - only the Addendum did. The Offer to Purchase, and the Amended Offer, only provided for vacation upon breach, which the Respondents deny. Furthermore, the Addendum stated that the Respondents must vacate the property within thirty days of cancellation, of the agreement, which they duly did. Therefore, the common cause facts lead to the deduction that the parties concluded the Addendum.'

[20] Not only does the foregoing comply with the provisions of rule 32(2)(b), but it also demonstrates that the defendants do not have a bona fide defence to the plaintiffs' claim. The defendants have not satisfied the court by affidavit, as they are required to do in terms of rule 32(3)(b), that they have a bona fide defence to the plaintiffs' action, the point simply being that their affidavit resisting summary judgment does not disclose fully the nature and grounds of their defence and the material facts relied upon therefor.

[21] For all of these reasons, the plaintiffs are entitled to summary judgment.

Order

[22] Accordingly, I make the following order: -

L R ADAMS

Judge of the High Court

Gauteng Division, Johannesburg

HEARD ON: 2nd August 2023

JUDGMENT

DATE: 11th August 2023 – judgment handed down electronically. FOR THE FIRST AND THE SECONDS PLAINTIFFS: Advocate C Louis INSTRUCTED BY: Emile Myburgh Attorneys, Fourways, Randburg FOR THE FIRST AND THE SECOND DEFENDANTS: Advocate Nel INSTRUCTED BY: David Hugo Attorneys, Highlands North, Johannesburg

- [1] Lester Investments (Pty) Ltd v Narshi 1951 (2) SA 464 (C);
- [2] Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd 1962 (1) SA 736 (T);
- [3] Botha v W Swanson & Company (Pty) Ltd 1968 (2) PH F85 (CPD);
- [4] Pick 'n Pay Retailers (Pty) Ltd h/a Hypermarkets v Dednam 1984
(4) SA 673 (O);

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