

SOUTH AFRICA / JUDGMENT

Koo v Breedts (12166/02) [2003] ZAGPHC 10 (8 October 2003)

[2003] ZAGPHC 10**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

12166/02

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO:12166/02

DATE:2003-10-08

In the matter between

CHUM HOCK KOO..... Applicant

and

JOHANNES AUGUSTINE BREEDT..... Respondent

JUDGMENT

WILLIS, J: This is an application in which the following relief is sought:

1. That the bar to the applicant pleading to the respondent's counterclaim be removed.
2. That the applicant be granted condonation for the late filing of his plea to the respondent's counterclaim, to the extent necessary in the light of prayer 1 above.
3. That the respondent be ordered to pay the costs of the application only in the event of it opposing same.
4. Further and/or alternative relief.

This is a matter which is proceeding to trial in November. It is, it would seem, a complex matter involving a number of different transactions and transactions which were concluded at times internationally. There are six different counterclaims. The bar relates to the pleas to those counterclaims.

The relevant principles applicable to the consideration of a matter such as this have been set out in the well-known case of *Ford v Groenewald* 1977 (4) SA 224 (GT) at 225G-226F. Essentially a court must consider the explanation for the delay and, secondly, the nature of the defence. The defence must comply with the requirements set out in the well-known case of *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T).

The explanation for the delay is varied. It is common cause that the plea to the counterclaim which was originally filed out of time was filed some four months late. Blame is placed on oversights, difficulty in obtaining instructions from a client who conducts business internationally and the expectation of settlement.

Mr Coetzee who appears for the defendant in the main action, accepts that in respect of the plea to all but one of the counterclaims,

there is a sufficient defence set out to straddle the hurdle that exists as set out in *Ford v Groenewald*. Taking a broad conspectus of the explanation for the delay, together with the nature of the defence in respect of all but the fourth counterclaim, and the fact that these matters are due to be ventilated in a trial that is set down in November, I am of the view that the explanation for the delay in this particular case should be accepted, albeit with some reluctance.

It therefore remains to be considered whether a sufficient defence has been set out in respect of the fourth counterclaim.

The defence reads as follows:

"Each and every allegation made in this paragraph is denied as if specifically herein traversed and defendant is accordingly put to the proof thereof. In amplification of the aforesaid denial plaintiff pleads that -

- (1) defendant repudiated his obligations arising from the agreement by inter alia instructing Mr Scholtz not to proceed with the transaction;
- (2) the amount of R250 000 previously paid for the acquisition of lot 22 was thereafter used to acquire other immovable property."

At a glance it is clearly apparent that this would ordinarily constitute no defence.

Mr du Plessis for the plaintiff in the main action, however, argued that this plea must be seen in the light of the allegations relating to the fourth counterclaim. In these allegations relating to the fourth counterclaim the following appears:-

"On 1 st May 2000 Attorney Scholtz on behalf of the defendant paid R250 000 of defendant's money to the plaintiff as the defendant's share of the purchase price of lot 22 for the partnership."

Mr du Plessis' argument was that the R250 000 had been paid into a partnership and until such time as the partnership was dissolved

ultimately by an order of court, the R250 000 was not to be payable.

Leaving aside the question of whether or not there was some kind of universal or general partnership in existence between the parties, it seems to me to be clear that the defence has been baldly and sketchily set out. I refer in particular to the allegation "the amount of R250000 previously paid for the acquisition of lot 22 was thereafter used to acquire immovable property". There is no particularity given as to which particular property was acquired and whether or not the acquisition of that property fell within the ambit of the alleged partnership agreement.

Accordingly, in my view, there is an entirely inadequate defence to this fourth counterclaim and therefore the bar should not be removed in respect thereof. It seems to me obvious that the ancillary relief which has been sought by the defendant in the main action, namely that default judgment should be granted in respect of this sum of R250 000 should follow.

In so far as costs are concerned, it seems to me right in view of the fact that the defendant in the main action has succeeded in resisting removal of bar in respect of the fourth counterclaim that the plaintiff should pay the defendant's costs. Certain costs were reserved on 22 September 2003 and in the light of the explanations given to me from the bar, it seems entirely appropriate for each party to pay their own costs in respect thereof.

The following order is made:

1. The bar to plea to all the counterclaims except the fourth counterclaim is removed.
2. The plaintiff is ordered to deliver his plea to the other counterclaims within three days of the date of this order.
3. Default judgment is granted in favour of the defendant against the plaintiff in respect of the fourth counterclaim for -

(I) Payment of R260 000;

(ii) Interest thereon at 15,5 percent per annum from 5 May 2000 to date of payment.

4. The plaintiff is to pay the defendant's costs in this application.
5. Each party is to pay their own costs in respect of the costs reserved on 22 September 2003.

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