

SOUTH AFRICA / JUDGMENT

Mbatha and Another v S & J Rademeyer (Pty) Ltd (79554/14) [2015] ZAGPPHC 293 (31 March 2015)

[2015] ZAGPPHC 293

COURT

North Gauteng High Court, Pretoria

BEFORE

Makhubele

CASE / FILE NUMBER

79554/14

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NUMBER:

79554/14

DATE: 31 MAY 2015

NOT REPORTABLE

OF INTEREST TO

OTHER JUDGES

In the matter

between:

CEDRIC

SIYABONGA NSIZWENHLE

MBATHA.....1st

Plaintiff

KHANYISILE

TAMARA

MBATHA.....2nd

Plaintiff

and

S

& J RADEMEYER (PTY)

LTD.....Defendant

REASONS FOR

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

[1] On 27 February 2015, I granted an order for summary judgment as prayed for and undertook to give my reasons at a later stage.

[2] Before I deal with the reasons for my order, I wish to mention an intervening issue that may not strictly be relevant for present purposes.

On 18 March 2015 and before I could finalize reducing my reasons into writing, I received a telephone call from my Registrar. She enquired about the whereabouts of the file in this matter as she wanted to place an application for leave to appeal that she had received. I may mention that in that week I had been released from acting duties to attend to a personal matter. When I resumed my acting duties on Tuesday 24th, she handed me a Notice of Appeal dated 18 March 2015.

[3] In terms of the Notice, the defendant seeks "leave to appeal against the whole of the Order " I made on 27 February 2015 " to the full bench of the High Court of South Africa, Gauteng Division".

The Notice further reads that "The applicant shall furnish its grounds of appeal within fifteen days from the date on which the reasons for the order are given by the Honourable Court, which reasons the Honourable Court undertook to furnish in due course"

[4] I do not have to express a view on the approach adopted by the defendant of filing a Notice of Leave to appeal before I give reasons for my judgment.

I now proceed to give my reasons:

[5] This is an application for Summary Judgment. The parties are referred to as they were cited in the main action.

[6] The plaintiffs instituted an action against the defendant in terms of which they prayed for judgment in the following terms:

"5.1 Confirmation of cancellation of the Sale Agreements.

5.2 Payment of the sum of R690 000.00 (Six Hundred and Ninety Thousand Rand) plus interest @ 9% per annum calculated from 8 September 2014 to date of payment.

5.3 Costs

5.4 Alternative relief"

- [7] The defendant entered appearance to defend, after which the plaintiffs duly filed an application for summary judgment that subsequently came before me for hearing on 27 February 2014.

CAUSE OF ACTION

- [8] The plaintiffs' cause of action arises from allegations of breach of conditions of three agreements entered into between the parties in terms of which the defendant sold to the plaintiffs three properties. The plaintiff purportedly cancelled the agreements and now seeks confirmation thereof and refund of the full purchase price.
- [9] Save for the allegations of the breach, the entitlement to cancel the agreements and claim for repayment of the purchase price, the material terms of the agreements and circumstances surrounding the cancellations are largely common cause and may be summarized as follows:
- [10] On 14 February 2013, the plaintiffs purchased three properties from the defendants that are identified as Portion 223, a portion of 110 of the farm Vlakfontein 546 I.Q, Portion 225, a portion of Portion 110 of the farm Vlakfontein 546 I.Q and Portion 226, a portion of Portion 110 of the farm Vlakfontein 546 I.Q.
- [11] The purchase price for each of these properties was R230 0000.00 (Two Hundred and Thirty Thousand Rand). The plaintiffs paid the full purchase price of R690 000.00 in two installments, the final one being on 12 August 2013
- [12] Save for the description of the properties, the three agreements are identical.
- [13] On 14 August 2014, a year after the last installment was paid, plaintiff's attorneys directed a letter to the defendant through its attorneys advising them amongst other things that the plaintiffs have complied with their obligations in terms of the agreements and that the latter's failure to transfer the properties constituted breach of the agreements.

The defendant was given 21 days to effect transfer of the properties, failing which the plaintiffs threatened that they would be entitled to "claim specific performance and damages or cancellation of the Agreements and damages which includes a refund of the purchase price paid to you".

- [14] The defendant did not respond to the letter of 14 August 2014. On 08 September 2014, the plaintiff's attorneys again wrote to the defendant's attorneys of record and advised them that the plaintiffs

"have elected to cancel the 3 (three) Agreements, and claim, as we hereby do, a refund of the full amount paid to you, which is R690 000.00 (Six Hundred and Ninety Thousand Rand) plus interest at the prescribed rate and unless payment of this amount is made to us within 14 (fourteen) days of date hereof, we will proceed with legal action for the recovery thereof"

[15] There is no indication from the documents before me that the defendant responded to this letter too. No argument was advanced to the contrary too.

[16] Summons in the main action was issued on 29 October 2014.

THE BREACH

[17] Clause 12.1 of the Agreement(s) provides as follows:

"Should either party commit a breach of any of the terms of this agreement and fail to remedy same within 7 (seven) days of being called upon to do so, the aggrieved party shall be entitled without prejudice to any other rights which the aggrieved party may have and without prejudice to his/her rights to claim any damages that he/she may have suffered as a result of such breach, to cancel the agreement by written notice to the defaulting party, or to claim specific performance from the defaulting party of his/her obligations in terms of this agreement"

[18] Clause 4.1 deals with transfer of the property(ies) and reads as follows:

" Transfer of the Property shall be effected by the conveyancing attorneys, appointed by the Seller as soon as the Purchaser has complied with all its obligations as set out in this agreement. All costs of transfer, including but not limited to, transfer duty, if applicable, and the costs of registering any mortgage bond which may be required, costs relating to the obtaining of clearance certificates, as well as survey and diagram fees (if applicable), and any VAT payable on such costs, shall be paid by the Purchaser. The Purchaser shall, on demand, pay all such costs as called for by the conveyancing attorneys" (highlighted for emphasis)

[19] The plaintiffs counsel, Strydom SC argued that they performed their obligations in terms of the Agreements by paying the purchase price. This is all that they had to do to trigger the transfer process in terms of clause 4.1. The defendant, it was argued, had an obligation, after receiving the purchase price, to appoint conveyancing attorneys, who, in turn would have made a demand for payment of transfer costs . As this was not done, they (plaintiffs) had no obligation to tender payment of transfer costs because this can only be done after they have been presented with a calculation of the amount payable for transfer costs . The costs mentioned in clause 4.1 must be calculated by the defendant's conveyancing attorneys and presented to the plaintiffs before an obligation arises for the latter to pay transfer costs.

[20] Plaintiffs contend further that there had been a proper demand and cancellation of the Agreements was effected within the timeframes provided therein. The summons was issued during October 2014. Consequently, they pray for summary judgment with costs.

AFFIDAVIT TO RESIST SUMMARY JUDGMENT AND DEFENCES RAISED

[20] On 17 December 2014, the defendant duly filed an affidavit to resist summary judgment and denied that it does not have a bona fide defence to the plaintiff's claim and that it has entered appearance to defend plaintiff's action solely for the purpose of delay.

[21] The defendant's counsel, Mr West argued that the plaintiff's purported cancellation of the Agreement is unlawful. It was further argued on behalf of the defendants that the plaintiffs did not comply with its obligations in terms of the Agreements. Furthermore, the defendant denies that it has failed to transfer the properties to the plaintiffs.

[22] I now proceed to examine the arguments to support the defence(s).

[23] The argument with regard to failure by the plaintiffs to perform all of its obligations is premised on defendant's reading / interpretation of clause 4.1 that I have quoted above. The high watermark of the defendant's defence is contained in paragraphs 19 and 20 of its affidavit that read as follows:

"19. The plaintiffs have not complied with all of their obligations in terms of the sale agreement and in particular they have not paid all costs of transfer in regard to any of the sale agreements.

20. The plaintiffs were accordingly not entitled to demand transfer of any of the properties and the defendant was not under any obligation to transfer any of the properties into the names of the plaintiffs until they had paid transfer costs associated therewith "

[24] In both his written and oral argument , counsel for the defendant, Mr West, contended that the plaintiffs' cancellation of the Agreements was unlawful and as such they were not entitled to restitution.

Furthermore, the Agreements , in particular clause 4.1 constitute reciprocal obligations which the plaintiff was obliged to perform before the defendant would be called upon to reciprocate by effecting transfer of the properties.

In this regard, I was referred to the Appellate Division matter of BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A).

[25] According to the defendant, it was immaterial whether the plaintiffs have been called upon to pay transfer costs because they admit on their own version that they did not pay, nor have they tendered to pay such costs. A submission was also made that the conveyancing attorneys were not part of this case.

DEFENDANT'S SUPPLEMENTARY AFFIDAVIT

[26] I received defendant's supplementary affidavit dated 24 February 2015 a day before the hearing of this matter.

The affidavit, deposed to by the defendant's attorney simply states that the properties that "form the subject matter of the three Sale Agreements as set out in paragraph 4.1 of the Plaintiff's Particulars of Claim have already been transferred and registered in the names of the Plaintiffs on 8 January 2015 in the Pretoria Deeds Office. The Defendant has accordingly rendered performance in terms of the Sale Agreements"

A copy of the Deeds Office Printout was attached as proof thereof.

- [27] This issue of transfer was not pursued in argument, instead Mr West, for the defendant, persisted with the argument that I should dismiss the application for summary judgment, not on the basis that there has been performance, but because the cancellation was unlawful as the plaintiffs have failed to perform their obligations to pay or tender transfer costs to the conveyancing attorneys.
- [28] My thought on receipt and perusal of the supplementary affidavit was that the parties had settled the matter and that plaintiffs had accepted the transfer of the properties. During the hearing, I enquired from the plaintiffs counsel what the effect of this transfer was on the summary judgment application. He was emphatic that the alleged transfer occurred when there was no agreement between the parties as the plaintiffs had lawfully cancelled the agreement.
- [27] In reply to the defences raised on behalf of the defendant, Mr Strydom submitted that the defendant had no bona fide defence that is valid in law against the claim as required in terms of Rule 32(3)(b) of the Rules of Court. I was referred to the matter of Breytenbach v Flat 1976 (2) SA 226 (T) at 228 B in this regard. Furthermore, there are no factual disputes that would require to be resolved in a trial.

On the correct approach to interpretation of the Agreements, I was referred to the Supreme Court of Appeal decision in the matter of Natal Joint Municipal Pension Fund v Endumeni Municipality¹

- [18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules in our own.¹³ It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.¹⁴ The present state of the law can be expressed as follows.

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a

contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable

point of departure is the language of the provision itself',¹⁶ read in context and having regard to the purpose of the provision and the

background

to the preparation and production of the document.”²

LEGAL PRINCIPLES OF SUMMARY JUDGEMENT

[28] In the matter of Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture³, Navsa JA4 restated the origin and principles of summary judgment and cautioned about the labeling of summary judgment as “extraordinary”.

“29] A summary judgment procedure was first introduced into our practice by the Magistrate’s Court Act of 1917. It was based upon a procedure introduced in England by Order XIV under the Judicature Acts whereby a plaintiff was able, by means of a summary proceeding, to obtain a final judgment when there was no bona fide defence to an action.”¹⁶

[30] In *John Wallingford v The Directors &c. of The Mutual Society*

(1880) 5 AC 685 (HL) at 699-700, Lord Hatherley referred to the objects of the new English procedure as follows:

‘I apprehend that from the first the objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end for which we can conceive the Legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a Judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.’

[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.¹⁷

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary

judgment

proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

[33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-426E.

[29] In the matter of Di Savino v Nedbank Namibia Ltd⁵, the appeal court, per Ngcobo AJA considered the principles of summary judgment, in particular the issue of whether the failure of the affidavit resisting summary judgment to measure up to the requirements of the Rule would result in the granting of summary

judgment.

Principles governing summary judgment

23. One of the ways in which the defendant may successfully avoid summary judgment is by satisfying the court by affidavit that he or she has a bona fide defence to the action. The defendant would normally do this by deposing to facts which, if true, would establish such a defence. Under Rule 32(3) (b) the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". Where the defence is based upon facts and the material facts alleged by the plaintiff are disputed or where the defendant alleges new facts, the duty of the court is not to attempt to resolve these issues or to determine where the probabilities lie.

24. The enquiry that the court must conduct is foreshadowed in Rule 32(3)

(b) and it is this: first, has the defendant "fully"

disclosed the nature and grounds of the defence to be raised in the action and the material facts upon which it is founded; and, second, on the facts disclosed in the affidavit, does the defendant appear to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.⁶ If the court is satisfied on these matters, it must refuse summary judgment, either in relation to the whole or part of the claim, as the case may be.

25. While the defendant is not required to deal “exhaustively with the facts and the evidence relied upon to substantiate them”, the defendant must at least disclose the defence to be raised and the material facts upon which it is based “with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence.”⁷ Where the statements of fact are ambiguous or fail to canvass matters essential to the defence raised, then the affidavit does not comply with the Rule.⁸
 26. Where the defence is based on the interpretation of an agreement, the court does not attempt to determine whether or not the interpretation contended for by the defendant is correct. What the court enquires into is whether the defendant has put forward a triable and arguable issue in the sense that there is a reasonable possibility that the interpretation contended for by the defendant may succeed at trial, and, if successful, will establish a defence that is good in law.⁹ Similarly, where the defendant relies upon a point of law, the point raised must be arguable and establish a defence that is good in law.
 27. But the failure of the affidavit to measure up to these requirements does not in itself result in the granting of summary judgment. The defect may, nevertheless be cured by reference to other documents relating to the proceedings that are properly before the court.¹⁰ In *Sand and Co. Ltd v Kolliasthe* the court held that the principle that is involved in deciding whether or not to grant summary judgment is to look at the matter “at the end of the day” on all the documents that are properly before the court.¹¹
- [30] The affidavit filed by the defendant to resist summary judgment and the defences raised therein should be considered in accordance with the above stated general principles.

ANALYSIS OF THE DEFENCE(S) RAISED: BONA FIDE AND GOOD IN LAW?

- [31] In line with the authorities, my duty at this stage is not to undertake an interpretation of the Agreements, in particular clause 4.1 that is alleged to constitute reciprocal obligations with the plaintiffs being the first to perform by tendering or paying transfer costs.
- [32] In the matter of *Millman NO V Klein 1986 (1) SA 465 (C)*¹², Rose Innes J was faced with an allegation that an offer lapsed partly because a party failed to furnish a banker’s guarantee in terms of the agreement. The learned judge re-iterated the legal position with regard to interpretation of documents at summary judgment stage. It is undesirable for a judge to attempt to interpret an agreement during summary judgment proceedings because one would not necessarily have the benefit of the surrounding circumstances under which the agreement was concluded to understand their true intention.

However, the learned judge qualified this by stating the following:

"Where however, a contention is advanced in summary judgment proceedings which may be refuted by pointing to a palpable misreading of a document and a palpable logical fallacy, and the meaning of the document is clear on the point in debate, whatever the surrounding circumstances may have been, the risk of error of interpretation of the words used may be so reduced as to be negligible, and the point in issue may be capable of summary decision"

- [33] For the reasons stated in the qualification crafted by the learned judge, I believe that I am in a position to consider the provisions of clause 4.1 of the Agreements before me. The intention is to determine whether there is a reasonable possibility that the interpretation contended for by the defendant may constitute a triable issue at the trial, and, if successful, will establish a defence that is good in law.
- [34] In its affidavit, the defendant does not say anything about whether or not the plaintiffs were called upon to pay transfer costs. Although in the letters attached by the plaintiffs there is reference to some communication with the defendant's attorneys, the latter chose not only to ignore the letters, but also not make reference to the allegations in the affidavit resisting summary judgment. In fact, the defendant does not dispute the allegation that the plaintiffs were not called upon to pay transfer costs. Instead, the attitude of the defendant in this regard is that whether the plaintiffs were called upon to pay transfer costs or not is immaterial because they did not tender the costs nor did they pay them.
- [35] Therefore, the only defence that the defendant relies on is the interpretation of clause 4.1. The issue is whether this clause creates reciprocal obligations, with the plaintiff having to perform first by paying or tendering to pay transfer costs .
- [36] In this regard, I am allowed to consider whether the interpretation that the defendant seeks to attach to clause 4.1 is tenable and whether the arguments advanced would constitute a triable issue at the trial of this matter should I refuse to grant summary

judgment.

- [37] In my view, the following consecutive steps are clear from an ordinary grammatical reading of Clause 4.1 :
- [37.1] The purchaser complies with its obligations in terms of the agreement. Having perused the Agreements, the only possible obligation before transfer of the properties is payment of the purchase price.
- [37.2] Soon thereafter, the seller appoints conveyancing attorneys to effect transfer of the properties.
- [37.3] The conveyancing attorneys shall identify / determine transfer costs that are applicable for this particular transfer from amongst others the ones listed in this clause.

[37.4] The conveyancing attorneys shall demand payment of the applicable fees from the plaintiffs.

[37.5] The plaintiff's shall, an demand (read "after the demand") pay the transfer costs so demanded.

[38] I pose the following 'questions in order to test whether the defendant's interpretation of clause 4.1 is logical in view of the consecutive steps in clguse 4.1.

[37.1] Did the purchaser (plaintiffs) comply with their obligations in terms of the agreement? The plaintiffs contend that their obligation was to pay the purchase price to trigger the steps in clause 4.1.

[37.2] Did the seller appoint conveyancing attorneys? If yes, were the plaintiffs advised? When? How? Proof?

[37.3] If the answer to 37.2 is NO, how were the plaintiffs supposed to know who the conveyancing attorneys are? How were they supposed to know what constitute transfer costs and the amount payable? To whom were they supposed to tender payment of transfer costs?

[38] Taking into account all the facts and documents before me , I am of the view that he contention that the plaintiffs did not perform their obligations in terms of clause 4.1 is not correct because that obligation did not arise. There is no reasonable possibility that defendant's interpretation of clause 4.1 will constitute a triable issue . It is correct that there are reciprocal obligations, but on the facts and a grammatical reading of the relevant clause, it is not correct that the plaintiffs had to tender or pay costs first before transfer could be effected.

[39] Consequently, in my view, the plaintiffs were entitled to cancel the agreement and claim a refund of the money paid as the defendant had breached the conditions in clause 4.1 by failing to effect transfer of the properties . Proper notice of the cancellation was given. The defendant ignored the notice and also failed to make good the breach.

CONCLUSION

[40] Having considered the defences put forward by the defendant and having found that none of them discloses a defence that is good in law and made in good faith as envisaged in Rule 32, the plaintiff is entitled to summary judgment.

[41] In the result, I make the following order:

Summary judgment is granted in favour of the plaintiff as follows:

[4.1] Confirmation of cancellation of the Sale Agreements.

[4.2] Payment of the sum of R690 000.00 (Six Hundred and Ninety Rand) plus interest @ 9% per annum calculated from 08 September 2014 to date of payment.

[4.3] Costs.

TAN MAKHUBELE

Acting Judge of the High Court

APPEARANCES:

Plaintiff: Advocate T Strydom SC

Instructed by: De Klerk Vermaak & Partners Inc

C/O Van Der Merwe Attorneys

COLYN, PRETORIA

Defendant: Advocate HP West

Instructed by: Louwrens Coetzer Attorneys

C/O Van Heerdens Inc

PRETORIA

1 (920/201

0) I 20121 ZASCA 13 (15 March 2012) (footnotes have been omitted)

1 (920/201

0) I 20121 ZASCA 13 (15 March 2012)

(footnotes have been omitted)

2 Wallis JA (Farlam, Van Heerden, Cachalia and Leach JJA concurring)

3 (161/08) [2009] ZASCA 23 (27 March 2009)

4 Harms DP, Brand, Mhlanta JJA and Bosielo AJA concurring

5

(SA 24/2010) [2012] NASC3 (21 June 2012)

6 Maharaj v Barclays National Bank Ltd, 1976(1) SA 418 (A) at 426A-C

7 Maharaj v Barclays National Bank, *supra*, at 426C-D

8 Arend and Another v Astra Furnishers (Pty) Ltd, 1974(1) SA 298(C) at 304A-B

9 Shingadia v Shingadia, 1966 (3) SA 24 (R) at 26A-B; Tseven CC and Another v South African Bank of Athens. 2000 (1) SA 268 (SCA) at para 26; Shepstone v Shepstone, 1974(2) SA 462(N) at 467A; Marsh and Another v Standard Bank of SA Ltd, 2000(4) SA 947 (W) at 949 para 3

10 Sand and Co. Ltd v Kollias, 1962 (2) SA 162 (W) at 165; Maharaj v Barclays National Bank Ltd, supra, at 423H

11 Sand and Co Ltd v Kollias, supra, id.

12 At p480

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