

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

**Case no: 2019/2016
Date heard: 2 August 2016
Date delivered: 10 August 2016
NOT REPORTABLE**

In the matter between:

PATRICIA ANN MAKAN

Plaintiff / Applicant

vs

CAROL GESWINDT

Defendant / Respondent

JUDGMENT

TSHIKI J:

[1] In this matter the plaintiff claims summary judgment against the defendant, basing her claim upon the following allegations contained in its particulars of claim to the summons:

“[1] That the plaintiff and Errol Ralph Makan (hereinafter referred to as Mr Makan) were previously the registered owners of Erf 2..... G....., in the Nelson Mandela Bay Municipality Division of Port Elizabeth situated at no 1..... R..... C....., G..... P..... P..... E..... (hereinafter referred to as “the property”). On or about the 4th September 2014 and at Port Elizabeth the plaintiff and Makan sold the property to Achmet Nasim Davids (hereinafter referred to as “the purchaser”) for the purchase price of R600 000.00 (six hundred thousand rand).

[2] During September 2014 the plaintiff and Mr Makan appointed the defendant as the attorney to attend to the transfer of the property to the

purchaser which appointment the defendant accepted (hereinafter referred to as the agreement).

[3] In terms of the Deed of Sale:

[3.1] the purchase price of the property was payable in cash by the purchaser on the date of registration of the property into his name;

[3.2] one half of the proceeds of the sale of the property would be transferred to the plaintiff's bank account at Nedbank on registration of transfer of the property;

[4] On 25 February 2015 the defendant provided the plaintiff with a written undertaking that the plaintiff would receive her one half share of the proceeds of the sale upon registration of transfer.

[5] It was an implied term of the agreement between the plaintiff, Mr Makan and the defendant that the defendant would render her services in a proper and professional manner and without negligence.

[6] In breach of the agreement the defendant was negligent in the performance of her duties, alternatively, the defendant failed to comply with her obligations in terms of the agreement in the following respects:

[6.1] the defendant authorised the registration of the property into the purchaser in the Cape Town Deeds Office on 18th March 2015 without securing or procuring payment of the purchase price of the property from the purchaser on or before the date of transfer; and

[6.2] the defendant failed to effect payment of one of the proceeds of the sale of the property to the plaintiff's bank account at Nedbank on registration of transfer of the property in compliance with clause 16 of the Deed of Sale;

[6.3] as at 18 March 2015 the plaintiff was entitled to payment in the sum of R300 000.00 which amount constituted one-half of the proceeds of the sale of the property;

[6.4] on 26 March 2015 and unbeknown to the plaintiff the purchaser paid the full purchase price of the property in the sum of R600 000.00 to Mr Makan on Mr Makan's instructions;

[6.5] as at that stage Mr Makan was only entitled to payment on registration of transfer of the property in the name of the purchaser with the balance being due owing and payable to the

plaintiff on registration of transfer of the property in the purchaser's name;

[6.6] Mr Makan was not possessed of the assets, nor is Mr Makan financially in a position to pay to the plaintiff the sum of R300 000.00 which was incorrectly and unlawfully paid to Mr Makan due to the aforesaid negligence of the defendant.

[7] The defendant, by the exercise of such care as could be reasonably have been expected of the reasonable attorney, would (and should) have ensured that;

[7.1] the purchase price of the property was paid into her trust account before the registration of transfer, alternatively;

[7.1.1] payment of the purchase price of the property was secured before registration of transfer, by procuring a guarantee issued by a bank on behalf of the purchaser for payment of the purchase price of the property on registration of transfer.

[8] It was within the contemplation of the parties, when the agreement was concluded that the plaintiff would suffer damages in the event of the defendant breaching the agreement.

[9] Accordingly, the plaintiff has suffered damages in the amount of R300 000.00 as a result of the defendant's breach of the agreement aforesaid."

[2] Plaintiff is now seeking from the defendant the remainder of the purchase price in the amount of R300 000.00 together with interest and costs of suit.

[3] The defendant has defended the action and in turn the plaintiff has filed an application for summary judgment with the necessary costs and the application for summary judgment has been opposed by the defendant.

[4] *Mr Williams* for the plaintiff has tried to justify the conduct and actions of the plaintiff by referring to the judgment of this Court in ***Standard Bank Ltd v Naude***

2009 (4) SA 669 (ECP). In my view, the judgment referred to me does not appear to be relevant to the issues involved in the case in issue.

[5] In response to the irregularity pointed out by *Mr Moorhouse*, *Mr Williams* referred to as a minor irregularity which could simply be ignored by the Court. His view was that such prejudice as pointed by *Mr Moorhouse* did not prejudice the defendant.

[6] In response to *Mr Williams'* contention *Mr Moorhouse* for the defendant submitted that if the particulars of claim are excipiable summary judgment cannot be granted. He referred this Court to the judgment in ***Dowson and Dobson Industrial v Van Der Werf*** 1981 (4) SA 417 where Marias AJ remarked as follows:

"In considering the affidavits filed by defendants, I have been mindful of the summary and final nature of the relief for which Rule 32 provides. I have also given due weight to the observations made in cases such as *Arend and Another v Astra Furnishers (Pty) Ltd* [1974 \(1\) SA 298 \(C\)](#); *Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd* [1978 \(3\) SA 807 \(C\)](#) and the other cases cited to me by Mr Carstens. I think it fair to say that an ever increasing reluctance to grant summary judgment in the face of opposition is evident from the more recent decisions in South African Courts. Given the exceptional nature of the remedy and the fact that it may result in a final judgment being given against a defendant without a full ventilation of the issues, this reluctance is entirely understandable. But the ease with which a defendant may avoid summary judgment in terms of Rule 32 is so apparent that I do not think one should balk at granting it in cases where, despite the ease with which he could have done so if a sufficient factual foundation existed, a defendant has failed to allege any recognisable defence ... It is important to note that a decision as to whether a plaintiff's case is unanswerable or not must be founded on information before the Court dealing with the application. This information is derived from the plaintiff's statement of case, the defendant's affidavit or oral evidence and any documents that might properly be before the Court. It would be inappropriate to allow

speculation and conjecture as to the nature and ground of the defence to constitute a substitute for real information as to these matters.”

[7] In addition to the above, I agree with *Mr Moorhouse* that the plaintiff's particulars of claim are excipiable in the following manner as gleaned from paragraph 9.1.1 as follows:

- “9.1.1 Firstly, the applicant alleges that an agreement was concluded between her, Mr Makan and me. At paragraph 9 of the Applicant's Particulars of Claim, the applicant alleges that I was negligent in the performance of my duties in terms of the agreement and/or failed to comply with my obligations in terms thereof. However, the applicant has failed to plead what the material terms of the said agreement were and what my duties and/or obligations were in terms of the said agreement.
- 9.1.2 Secondly, the applicant has failed to allege where the said agreement was concluded and whether the said agreement was written and or oral.
- 9.1.3 Thirdly, the applicant alleges in her Particulars of Claim that I was negligent in that I failed to ensure that the plaintiff's alleged share of the purchase was paid into my trust account prior to registration of the transfer.”

[8] Furthermore, in terms of clause 2 of the said Deed, the purchase price is only payable upon the date of registration of the transfer and not before. The purchaser, *Mr Davids*, was to pay the applicant's share of the purchase price directly into the bank account of the applicant and not into or via the trust account. I, therefore, agree with counsel for the defendant that the particulars of claim fail to disclose a cause of action, alternatively, are vague and embarrassing.

[9] Having said the above, I am of the view that the plaintiff is not entitled to the order applied for.

[10] Therefore, the application for summary judgment is hereby dismissed.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

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