

REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

M. J. J. 26/01/2018

CASE NO: 42328/17

26/1/18

In the matter between:

GOOLAM HOUSEN MOOSA

ZARINA JHAVERY MOOSA

First Plaintiff

Second Plaintiff

and

BE PROP

SHAMSOODIEN SHAIK OMAR

AZEEMAH SHIRAZ AHMED MAHOMED

HAMZAH BAVA

First Defendant

Second Defendant

Third Defendant

Fourth Defendant

JUDGMENT

SHANGISA AJ:

Introduction

- 1 The first and second plaintiffs bring the present application for Summary Judgment against the first and fourth defendants. Although they initially also sought relief against the second defendant, they subsequently withdraw the application against the second defendant.

- 2 The factual matrix is as follows. The plaintiffs were the owners of an immovable property which was sold to a third party. The first defendant purported to be an authorised agent of the plaintiffs. The second defendant is an attorney who transferred the property and paid the proceeds to the fourth defendant ostensibly on the instructions of the first defendant who alleged to have been acting as an authorised agent of the plaintiffs. Later, I deal at some length with the latter allegations.

3 Initially, the plaintiffs jointly instituted action proceedings against the first, second and fourth defendants, jointly and severally, the one paying the others to be absolved, for payment of the sum of R1 000 000.00 (one million rand) plus interest. In addition, the plaintiffs also sought against the defendants a punitive costs order on the scale as between attorney and own client. Upon receipt of the summons, the defendants entered their notice of intention to defend the action. Consequently, the plaintiffs launched the present application for Summary Judgment. They aver that the defendants have no bona fide defence and that they entered appearance solely to delay payment of the liquidated amount claimed.

4 The second defendant filed an Opposing Affidavit and thereafter the fourth defendant filed an Affidavit Resisting Summary Judgment on his own behalf and purportedly on behalf of the first defendant as well. It is worth mentioning that the plaintiffs have made it clear in their papers that Summary Judgment is not sought

against the third defendant. I might add, that although I was informed from the bar that the application would be withdrawn against the second defendant, as appears in the discussion of the background facts, I deem it convenient to also deal with the role of the second defendant as set out in is affidavit.

Plaintiffs' case and defendants' defence

5 The principles applicable in Summary Judgment applications are trite. I therefore do not intend rehashing them here. It suffices merely to have regard to the facts of this matter and determine whether the plaintiffs have met the threshold required to succeed in the relief they seek. Similarly, it is important to consider the defence proffered by the defendants and determine if it makes out a case for successfully resisting the plaintiff's application for Summary Judgment.

6 I must at the outset clarify a matter that may result in some confusion. In the initial short heads of argument and the practice

note filed on behalf of the plaintiffs by their counsel, it was submitted that the plaintiffs consent to the leave to defend being granted to the second defendant. In that regard, counsel for the plaintiff set out the following in his practice note:

“2nd Defendant has filed an Opposing Affidavit and the Plaintiffs consent that leave to defend should be granted to the 2nd Defendant.”¹

- 7 In the same vein, plaintiffs’ counsel repeated the plaintiffs’ stance on the second defendant by making the following submission in his heads of argument:

“However, 2nd Defendant has filed an Opposing Affidavit and the Plaintiffs consent that leave to defend should be granted to the 2nd Defendant.”²

- 8 However, at the commencement of the hearing, counsel for the plaintiffs handed up heads of argument which indicated that the

¹ Plaintiff’s Practice Note, para D, at page 1.

² Plaintiffs’ Counsel’s Heads of Argument, para 4, at page 2.

plaintiffs had revisited that earlier position towards the second defendant. Accordingly, it was submitted on behalf of the plaintiffs that although they were initially amenable to consenting to the granting of leave to defend to the second defendant, events in the matter had led to their change of position. The plaintiffs, so it was suggested, were no longer inclined to accede to the granting of leave to defend to the second defendant. The result was that the plaintiffs now sought relief for Summary Judgment against all the defendants, with the exception of the third respondent. It was submitted on behalf of the plaintiffs that their change of heart was caused by certain averments that had been made in the affidavit filed on behalf of the first and fourth defendants. However, I was later informed from the bar that the plaintiffs were no longer persisting with their application against the second defendant. Be that as it may, I think the affidavit of the second defendant, confirmed by the first and fourth defendants, assumes some importance and may not be ignored.

- 9 For their part, the plaintiffs asserted that there was a contradiction between the version of the second defendant and the one put up by the first and fourth defendants. The nature of such contradiction was said to be as follows. According to the second defendant the arrangement was that the fourth defendant was to pay to the first plaintiff instalments of R20 000.00 per month. However, the first and fourth defendants whilst purporting to confirm the second defendant's version, contradicted this by stating that the arrangement was that the money would in fact be paid by the fourth defendant to a certain Mr. Gani in instalments of R20 000.00 per month. The nub of the plaintiff's complaint is that Mr. Gani is conspicuously not mentioned at all by the second defendant in his affidavit.
- 10 The further reason advanced in the heads of argument on behalf of the plaintiffs concerning their supposed change of position towards the second defendant was that he had failed to allege or aver that the plaintiffs had instructed him in writing to act as their agent. That being the case, so it was argued, the second

defendant's defence that he acted as an agent of the plaintiffs was bad in law and therefore does not avail him.

- 11 In my view, because of the nature of the defence raised by the first and fourth defendants, it is necessary to have regard to the version of the second defendant as well.
- 12 In his opposing affidavit, the second defendant states that on 2 February 2016 he received instructions from the first defendant to attend to the registration of the transfer to the third defendant of property that was owned by the plaintiffs. The second defendant further averred that according to his knowledge the first defendant was at all material times acting as the authorised agent of the plaintiffs.
- 13 The second defendant further asserted that the plaintiffs signed the powers of attorney and the transfer documents on 5 March 2016, and that all documents were thus lodged in the deeds office in Pretoria for registration. Subsequently, the second defendant

received written instructions from the first defendant, acting as the plaintiffs' duly authorised agent, to transfer the proceeds of the sale of the property into the account of the fourth defendant.

- 14 According to the second defendant, the transfer of the property was registered at the deeds office on 11 May 2016. On the same day, the second defendant states that he spoke to the first plaintiff on the telephone and in the presence of the first defendant who was the plaintiffs' authorised representative. In his affidavit, the second defendant states that in the course of the aforementioned conversation, he advised the first plaintiff of the registration of the transfer and requested confirmation as to whether he should proceed with the instruction to pay the proceeds to the fourth defendant. The second defendant accordingly asserts that the first plaintiff confirmed that the instruction that the proceeds be paid to the fourth defendant was in order.

- 15 The second defendant thereafter duly paid the proceeds of the property sale to the fourth defendant, in the amount of R1, 011,420.13. He stated that his understanding was that the arrangement entailed that the fourth defendant was to pay to the first plaintiff instalments of R20, 000.00 per month. In that regard, the second defendant annexed to his affidavit nine payment confirmations issued by a bank which indicated that the fourth defendant had paid to the plaintiffs several instalments over a number of months.
- 16 For his part, the fourth defendant deposed to a confirmatory affidavit in which he confirmed the aforementioned version of the second defendant. In addition, the fourth defendant further deposed to an opposing affidavit in which he also set out the basis of his defence. Counsel for the first and fourth defendants submitted that they also persist with placing reliance on the version of the second defendant set out in his affidavit under oath.

- 17 The second defendant avers in his affidavit that some six months after the registration and transfer of the property, he was approached by the first plaintiff who advised him that one of the transactions purportedly paid by the fourth defendant did not materialize. He says he was asked by the first plaintiff to approach the fourth defendant and request that the outstanding amount should be paid as soon as possible. The second defendant asserts that he relayed the first plaintiff's message to the fourth defendant.
- 18 The second defendant expressed surprise that after a period of more than six months from the date of registration of the property, first plaintiff alleged that he never instructed him to pay the proceeds of the sale of the property to the fourth defendant. In that connection, the second defendant further asserted that in a telephone conversation between himself and the plaintiffs' attorney on 14 November 2016, the plaintiffs' attorney confirmed that the reason the first plaintiff is claiming the money is because one of the "underlying transactions" did not materialize.

19 In the subsequent summons issued by the plaintiffs and served on the defendants, the plaintiffs allege in their Particulars of Claim that:

- "1. It was an oral instruction from the Plaintiffs that the balance of the purchase price of the property (R1, 000,000.00, "the balance" was to be paid to the Plaintiffs.
2. The Second Defendant failed to inform the Plaintiffs that the transfer of the property was effected.
3. The Second Defendant unlawfully or negligently paid the balance to the Fourth Defendant."

20 In essence, the plaintiffs allege that the second defendant breached his mandate by unlawfully transferring the proceeds of the sale of the property to the fourth defendant. For his part, the second defendant strenuously denied such allegations of breach

and asserted that he acted in accordance with the instructions given to him by the plaintiffs, through their authorised agent the first defendant. He also averred that the fact that there was an arrangement between the plaintiffs and the fourth defendant is apparent from the fact that the first plaintiff has been receiving payments from the fourth defendant over a number of months. In that regard, he also raised the defence of estoppel.

21 The second defendant further denied the plaintiffs' assertion that they were not aware of the registration and transfer of property. In support of the latter contention, the second defendant attached correspondence which purportedly indicated that the plaintiffs were aware of the transfer of property and that there was some independent corroborating evidence which indicated that the plaintiffs had no further interest in the property.

22 Moreover, the second defendant mounted an attack on the amount of R1, 000,000.00 claimed by the plaintiffs. He pointed out that as evidenced by the proof of payment he attached to his

affidavit, the fourth defendant had already paid to the plaintiffs an amount of R180, 000.00. He further asserted that, over and above the mentioned amounts, it was possible that further amounts had been paid to the plaintiffs. That being so, the second defendant asserted that the plaintiffs' claim of R1000, 000.00 is not based on a liquid document, nor is it a claim for liquidated amount of money.

23 For their part, the first and fourth defendants made common cause with the second defendant. The fourth defendant filed a supporting affidavit confirming the version of events set out in the second defendant's affidavit. He further filed an affidavit on his and first defendant's behalf. I do not consider it necessary to repeat all the allegations set out in the fourth defendant's affidavit since they merely confirm the version proffered by the second defendant.

24 However, there is one aspect of the fourth defendant's version which warrants some consideration. Having confirmed the second defendant's version, the fourth defendant asserted that the proceeds of the sale of property were paid to him in terms of the

underlying transaction which included him, the first plaintiff and a third party who was their mutual acquaintance, a Mr. Javed Gani. He mentioned that he, the first plaintiff and Gani had entered into a tri-partite oral agreement. Accordingly, the fourth defendant was adamant in his affidavit that, following the aforementioned tri-partite agreement, the proceeds of the sale of the property were paid to him in accordance with the instructions of the first plaintiff and his agent, the first defendant. He confirmed the version of the second defendant. The latter version was attacked as marking a departure from the version proffered by the second defendant. In my view, on the evidence as a whole, this cannot be properly described as a contradiction. It may well be an additional factor that might not have been within the knowledge of the second defendant. There may well be an explanation for it which may be tested at the trial.

- 25 In my view, upon a consideration of the facts of this matter, it seems to me that the second and fourth defendants' version, constitutes a bona fide defence against the plaintiffs' application for Summary Judgment. On the evidence as set out in the

defendants' affidavits, the allegations that the second defendant paid the proceeds of the property to the fourth defendant on instructions of the first defendant who was a duly authorised representative of the plaintiffs, certainly raises a triable issue which, if proven to be true, that may avail the first and fourth defendants at the trial.

26 If there was no underlying agreement as suggested by the plaintiffs, then it would seem rather strange that the first plaintiff accepted monthly payments of instalments of R20 000.00. Indeed, the plaintiffs did not refute the allegation made by the first and fourth defendants that such monthly payments were still being paid even at the stage of the present hearing.

27 What is more, if it is later proven correct that the plaintiffs have been paid the aforementioned monthly instalments, the question arises concerning the liquidity of the amount claimed by the plaintiffs in the summons.

- 28 In my view, on the facts of this matter viewed as a whole, the defendants have made out a bona fide defence against the claim of the plaintiffs. In the circumstances, the Application for Summary Judgment falls to be dismissed.

Costs

- 29 It was urged on me on behalf of the first and fourth defendants that, should I find against the granting of the Summary Judgment, I should make a punitive costs order against the plaintiffs. I do not agree. Although the facts of this matter are somewhat convoluted, I do not think there is any basis for departing from the normal practice which requires that costs in the summary judgment applications be the costs in the main action. In my view, there are no circumstances which warrant that I saddle the plaintiffs with the punitive costs order.

Order

30 In the result, I make the following order:

1. The First and Fourth Defendants are granted leave to defend.
2. Costs shall be the costs in the cause.



SHANGISA AJ

**Acting Judge of the High Court,
Gauteng Division, Pretoria**

DATE OF JUDGMENT: 26 January 2018

APPEARANCES:

COUNSEL FOR THE PLAINTIFFS:

Adv. BP GEACH SC

INSTRUCTED BY:

MORRIS POKROY ATTORNEYS

COUNSEL FOR THE 1st and 4th DEFENDANT: Adv. SJ VAN RENSBURG

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