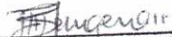


(1) REPORTABLE : YES / NO

INTERESTED TO THE JUDGES : YES / NO

REVISED

28/6/2017
DATE


SIGNATURE



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 3372/2016

In the matter between:

CIRCLE SEVEN TRADING 546 CC

PLAINTIFF/APPLICANT

And

DIATLA INVESTMENT HOLDINGS COMPANY

1ST DEFENDANT / RESPONDENT

WAYNE DERKSEN

2ND DEFENDANT/RESPONDENT

JUDGMENT

MANGENA AJ

1. The applicant, Circle Seven Trading 546 CC instituted Legal proceedings against Diatla Investment Holdings Company (Pty) Ltd, the principal debtor and Mr Wayne Derksen, the Surety.

2. The claim arises out of a written contract on the sale of land described as Portion 4 (A *portion of portion 2*) of the Farm Touwfontein 528, Registration Division LQ, Limpopo Province held by Deed of Transfer T149096/04.
3. The applicant alleges in the particulars of claim that the agreement provided for the payment of the purchase price as follows;
 - 3.1 R 2000 000.00 on the date of signature of the agreement.
 - 3.2 An amount of R 1 800 000.00 will be paid to the plaintiff in twelve consecutive monthly payments of R 150 000.00.
 - 3.3 An amount of R 2 200 000.00 in respect of the balance will be paid on the 1st day of the 13th Month from the date of signature of the agreement.
4. It was an express term of the agreement that the applicant will be entitled to claim immediate payment of the total balance outstanding in the event of default by the first Respondent to make payment as per the agreed terms.

5. It was further alleged that the contract provided for the payment of occupational rental in the amount of R 60 000.00 per month in the event of the First Respondent failing to make any payment timeously.
6. The First Respondent, so the Applicant alleges, failed to make payment of the initial payment of R 2000 000.00 and thereafter failed to effect any other payment timeously. As a consequence of the failure, to make timeous payment, the Applicant is entitled to claim occupational rental from the First Respondent effective from 01 May 2013. The Applicant fails to state in respect of which months did the first Respondent fail to effect payments. However a careful perusal of annexure "POC2" to the particulars of claim shows that the applicant has been receiving payment. It is unclear whether the payments made were towards the capital of the purchase price or occupational rental.
7. Upon receipt of the summons, the Respondents filed notices of intention to defend. The Applicant brought an application in terms of Rule 32 of the Uniform Rules of the Court in which it applied for summary judgment against the Respondents jointly and severally, the one paying, the other to be absolved for the payment of the following amounts.

CLAIM A

1. *Payment in the amount of R 1 860 000.00 being the balance of the purchase price.*

2. *Interest on the aforementioned amount at the rate of 10.50% per annum a temporae morae.*
3. *Costs of suit.*
4. *Further and/or alternative relief.*

CLAIM B

1. *Payment in the amount of R 1 860 000.00 in respect of occupational rent.*
 2. *Interest on the afore-mentioned amount at the rate of 10.50% per annum a tempore morae.*
 3. *Costs of suit.*
 4. *Further and/or alternative relief.*
8. The Respondents filed notices to oppose. The matter came before me as an unopposed application on 06 June 2017. The Applicant's counsel submitted that the application should be treated as unopposed in view of the fact that the Respondents did not file their opposing affidavits as required by Rule 32(3)(b).
9. Counsel for the Respondents, Mr Seepamore and Advocate Marais submitted that the matter is not ripe for hearing as the particulars of claim are excipiable. They could not however point out to me in what respects are they excipiable. I also enquired from them why did their clients fail to file affidavits in which they raise exception as a defence

to the summary judgment. They could not give an answer save to state that the applicant was informed by Justice Muller on 30 January 2017 that summary judgment cannot be granted due to the excipiability of the summons and the particulars of claim.

10. Counsel for the Applicant, Mr Marx argued with some force that the submission by counsel from the bar regarding the existence of a defence to the claim is of no significance and value when considered against the requirements of Rule 32(3)(b) which states as follows; -

(3) Upon the hearing of an application for summary judgment, the defendant may.

(a)

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

11. The rule does not in my view allow any other form of satisfaction regarding the existence of a *bona fide* defence other than by way of affidavit or with the leave of the court by oral evidence of the defendant himself or any other person who can swear

positively to the fact that the defendant has a *bona fide* defence. The position is stated by authors of Erasmus Superior Court Practice, volume 2.

"The defence must be put before the court on affidavit and not merely orally from the bar. Where all conditions have been fulfilled by the plaintiff entitling him to a summary judgment, a mere statement from the bar that the defendant has a defence on the merits without stating what the defence is, is insufficient to stay judgment."

12. Mr Seepamore conceded on behalf of the First Respondent that the First Respondent admits liability to the Applicant in respect of the balance of the purchase price. He argued that the dispute between the parties regarding claim A relates to the amount outstanding and same can be reconciled by the parties upon presentation of proofs of payment. He submitted that there is a defence with regard to the amount in Claim B relating to the occupational rent.

13. The Applicant relies on a spreadsheet titled occupational rent attached to the particulars of claim and marked annexure "POC3." The document is unidentifiable and does not explain of itself sufficiently to constitute a liquid document, though it is accepted that a claim for occupational rent is a claim for a liquidated amount in money.

14. Applicant's claim for occupational rent arises from paragraph 5.4 of the contract which states;

“Indien die koper in gebreke sou bly enige betalingsverpligting te maak soos uiteengesit in hierdie ooreenkoms sal die koper vanaf datum van die versuim aanspreeklik wees vir betaling van okkupasierhuur aan die verkoper in die bedrag van R60 000.00 (sestig duisend rand) per maand, maandeliks vooruit betaalbaar voor of op die 1^{ste} dag van elke opeenvolgende maand.”

15. On the basis of the above paragraph, Mr Marx argues the Respondents are liable for payment of occupational rent from May 2013 in that they failed individually and collectively to pay the initial sum of R 2 000 000.00.

16. I do not understand clause 5.4 to mean that in addition to the monthly payment of R 150 000.00 or the initial deposit of R 2000 000.00, the First Respondent will be required to pay R 60 000.00 as occupational rental once he defaults on either of the two payments. Counsels for the Respondents have taken point on this issue and submitted that there is an error in calculation and further that they do not agree with the figures/calculations on “POC2” and “POC3.” They made issue on the fact that the figures are on the letterhead of Hanneltjie Loots, a Psychologist.

17. I have considered the documents in their totality and my view, nothing really turns on it. It is clear from the contract itself that Ms Hanneltjie Loots is a member of the Applicant CC and this fact is confirmed under Oath in the affidavit deposed in support of the summary judgment application.

18. It is an accepted principle of our law that summary judgment proceedings are not and never have been intended as a forum for the resolution of factual disputes. A trial is the proper forum for that process, either because the nature of the relief presupposes a trial or because affidavits are not suitable for that purpose. (*Grove v Nedbank* (A3050/14) [2014] ZAGPJHC 330.¹

19. In this regard I align myself with the views expressed in *Shepstone v Shepstone*, 1974 (2) SA 462 (N)² where the court held that:

“The Court will not be disposed to grant Summary Judgment where giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case.”

The same views were stated by Navsa JA in *Joob Joob Investments v Stocks Mavundla Zek*, 2009 (5) SA³ 1 at paragraph 31 when he said:-

¹ A3050/14) [2014] ZAGPJHC 330

² 1974 (2) SA 462 CN

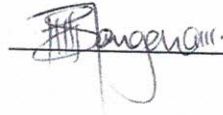
³ 2009 (5) SA 1 at paragraph 21

"The Summary Judgement 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 the parties by delay and at the same time causing great loss to plaintiff's who are endeavouring to enforce their rights."

20. In the circumstances and after a careful consideration of the facts placed before me, I am not persuaded that the Respondents have a valid defence in respect of claim A.

21. Summary Judgment is granted against the First and Second Respondents jointly and severally, the one paying the other to be absolved as follows:-

1. Payment of **R 1 860 000.00** in respect of the balance of the purchase price.
2. Interest on the Capital amount at the rate of **10.50%** per annum *a tempore morae*.
3. Costs of the summary judgment application.
4. Defendants are granted leave to defend the claim in respect of the occupational rent.

A handwritten signature in black ink, appearing to read 'Mangena', is positioned above a horizontal line.

MANGENA AJ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

REPRESENTATIONS:

1. On behalf of the Plaintiff/Applicant : Mr Franco Marx
Instructed by : Ettiene Rossouw Attorneys
C/o Franco Marx Attorneys
2. On behalf of the 1st Defendant/Respondent : Mr SG Seepamore
Instructed by : Kekana Attorneys
C/o SD Phoshoko Attorneys
3. On behalf of 2nd Defendant/Respondent : Adv C Marais
Instructed by : Du Toit Wolhurter Attorneys
C/o Badenhorst Attorneys
4. Date of hearing : 06 June 2017
5. Date handed down : 29 June 2017