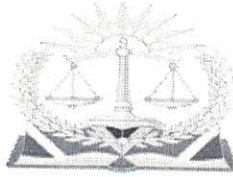


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: 630/2017

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 30/10/17

SIGNATURE

In the matter between:

THOMO WILLIAM CHACHANE MASHIANOKO PLAINTIFF

and

BLUE MOONLIGHT PROPERTIES82 (PTY) LTD 1ST DEFENDANT

CONRAD HENDRIK KRUGER 2ND DEFENDANT

JUDGMENT

KGANYAGO J

[1] The plaintiff has issued combined summons against both defendants and seeking an order for confirmation of the cancellation of the contract of sale and also refund in the amount of R663 458-38 from both defendants jointly and severally. The defendants have entered an appearance to defend the plaintiff's action. Thereafter within the time period allowed by the Uniform Rules of Court ("the Rules") the plaintiff applied for summary judgment against the defendants. The defendants are opposing the plaintiff's application for summary judgment. The defendants have also filed a notice of intention to except. The defendants have listed seven grounds upon which they intend to except to the plaintiff's particulars of claim.

[2] According to the plaintiff's particulars of claim, plaintiff entered into a contract of purchase and sale of immovable property with the first defendant for R650 000-00. The plaintiff duly paid the full purchase price and transfer costs in the sum of R13 458.38 in eight installments between 14th July 2010 up to 2nd August 2011. The said purchase price together with the transfer costs were paid into the trust account of Conrad Kruger Attorneys, who according

to the deed of sale was supposed to attend to the transfer of the property into the names of the plaintiff. It is alleged that the transfer of property into the names of the plaintiff did not occur and as a result of that, the plaintiff elected to cancel the contract.

[3] The second defendant is the sole proprietor of Conrad Kruger Attorneys. It is alleged that the second defendant has acted contrary to his fiduciary duty towards the plaintiff by misappropriating the purchase price. It is alleged that the second defendant misappropriated the purchase price by paying it over to the first defendant without the plaintiff's consent or instruction.

[4] The defendants in their answering affidavit to the plaintiff's summary judgment application have raised points *in limine* to the effect that the plaintiff has failed to properly verify all existing causes of action. The defendant is further alleging that the plaintiff's particulars of claim is fatally defective as it lacks averments necessary to sustain the cause of action and further that it contains averments which are vague and embarrassing. The defendant is also relying on the notice of intention to except the

plaintiff's particulars of claim which was delivered to the plaintiff's attorneys.

- [5] The remedy for summary judgment is extraordinary and stringent in nature as it effectively closes the door of the court on the defendant without been afforded an opportunity to ventilate the case by way of a trial.
- [6] The principles and what is required from a defendant in order to successfully oppose a claim for summary judgment where formulated in **Maharaj v Barclays National Bank Ltd 1976(1) SA 418(A)** at 426 A-D where the court said:
- "Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defense to the claim. Where the defense is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defense, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into*

is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defense and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defense which is bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word “fully”, as used in the context of the rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defense 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 defense”

[7] In Joob Joob Investment v Stocks Mavundla Zek 2009 (5) SA 1 (SCA) at para 31 the court said:

“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 defenses from defeating the rights of the

parties by delay, and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights”

[8] In this case the defendants are relying on technical defenses as they appear in their notice of intention to except the plaintiff's particulars of claim. In relation to the merits of the plaintiffs claim, the defendants does not dispute that the plaintiff has entered into a purchase and sale agreement with the first defendant, that the plaintiff has paid the full purchase price and that despite paying, the property in question was never transferred into the names of the plaintiff. Further the defendants does not dispute that the plaintiff has given them notice of intention to cancel the agreement and demanded a full refund of the purchase price plus transfer costs.

[9] The question which this court must now determine is whether the technical defenses raised by the defendants in the form of points *in limine* and notice of intention to except the plaintiff's particulars of claim can be said to disclose bona fide defenses.

[10] Where a point *in limine* or exception is put up as a defense, rule 32(3)(b) requires a full disclosure of the defense as well as the material facts upon which it relies. Failure to comply with those provisions will not necessarily mean however, that summary judgment will follow. In accordance with the provisions of rule 32(5), the court retains an overriding discretion to refuse summary judgment. (See *Soil Fumigation Services v Chemfit Technical Products* 2004(6) SA 29 (SCA) at para 10).

[11] In relation to the defendants' point *in limine* of alleged failure by the plaintiff to properly verify all his causes of action, the defendants are alleging that the plaintiff's action is premised on two alternative causes of action. What appears from the plaintiff's particulars of claim is that the two defendants' are sued jointly and severally and there is no other alternative claim. The plaintiff in his affidavit in support of summary judgment has verified his cause of action. The fact that he has stated "cause(s) of action" in his affidavit, in my view is immaterial and does not imply that he is

also claiming in the alternative. What is clear is that he was verifying his cause of action.

- [12] With regard to the exception which the defendants intends to raise against the plaintiff, in my view, the defendants have failed to make a full disclosure of the nature and grounds of the intended exception as well as the material facts upon which it relies upon. The grounds which have been stated in the said notice of intention to except, are just vague allegations which in my view will not be a sustainable defense in court.
- [13] In my view the defendants' points *in limine* and notice of intention to except are merely sham defenses which are intended to delay the plaintiff's right of claiming his refund. The defendants' intentions are to frustrate the plaintiff in his action against them.
- [14] As I have pointed out in paragraph 10 *supra*, even if the defendants' have failed to make a full disclosure, the court still retains an overriding discretion to refuse summary judgment. In my view the court would have been in a better position to exercise that

discretion if the defendants have also dealt with the merits of their defenses. The defendants did not at all attempt to deal with the merits of their defenses. Besides the technical defenses raised by the defendants, there is nothing appearing on their papers that discloses their actual defenses on merits of the plaintiff's claim. Since the defendants have failed to disclose their defense with regard to the plaintiff's claim on merits, in my view, their defense is incomplete. The defendants have adopted a wait and see attitude which is not helpful to this court. Under these circumstances the court is unable to exercise its discretion to refuse the granting of the plaintiff's summary judgment. Therefore, in my view, the defendants have failed to raise a bona fide defense that is good in law.

[15]

In the result I make the following order:

15.1 Summary judgment is granted in favour of the plaintiff against both defendants jointly and severally the one paying the other to be absolved for:

15.1.1 Payment of the sum of R663 458.38

15.1.2. Payment of interest on the aforesaid amount at the prescribed rate from 6th February 2015 to date of final payment.

15.1.3. Costs of the suit.


 MF KGANYAGO J
 JUDGE OF THE HIGH COURT OF
 SOUTH AFRICA, LIMPOPO
 DIVISION, POLOKWANE

APPEARANCES

1. For the Applicant : : Adv. FJ Labuschagne
 Attorneys for the Applicants : Stephan Van Rensburg Attorneys
2. For the Respondent : Adv. M Naude
 Attorneys for the respondent : Conrad Kruger
 : Boland Arcade Polokwane
3. Date argued: 18th October 2017
4. Date of judgment: 30th October 2017