

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA****(GAUTENG DIVISION, PRETORIA)**

4/5/15

CASE NO: 82314/2014

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

IN THE MATTER BETWEEN:

WALTER JOHAN SIEGL**PLAINTIFF****and****MARION SHIRLEY ROBERTSON****1ST DEFENDANT****PRIDE ROCK CC****2ND DEFENDANT**

JUDGMENT

KUBUSHI, J

- [1] This is a summary judgment based on a written agreement in terms of which the 1st defendant sold to the plaintiff 50% of her members interest in the 2nd defendant for an amount of R3 000 000.
- [2] In terms of the agreement the plaintiff was to pay the purchase price over to Messrs Livingston Chrichton, the defendants' attorneys of record, to be held in an interest bearing account, within 30 days from date of signature of the agreement.
- [3] The plaintiff paid an amount of R500 000 towards the purchase price into the banking account of the defendants' attorneys of record on 8 October 2010.
- [4] The 1st defendant cancelled the agreement and refuses to pay back the amount of R500 000 paid by the plaintiff. The plaintiff is in these proceedings claiming the return of the amount.
- [5] The defendants are resisting the summary judgment application. The defences raised by the defendants are the following:
- 5.1 The matter is *lis pendens*;
 - 5.2 The payment made by the plaintiff in terms of the agreement between the parties was of the nature of a non-refundable deposit which the 1st defendant was entitled to retain until such time as pre-estimate damages suffered by her are determined. The plaintiff breached the agreement and the 1st defendant

suffered damages as a result. The *quantum* of the damages has not yet been determined.

[6] In her heads of argument, the 1st defendant submits as follows:

- “4. To defeat an application for summary judgment the defendant is not required to prove that he has a defence to the plaintiff's claim. What is required is for the defendant to swear to a defence, valid in law, in a manner which is not seriously and inherently unconvincing.¹
5. Where the defence is based upon facts, in the sense that facts alleged by the plaintiff are disputed by the defendant or new facts constituting the defence are alleged by the defendant, the court does not attempt to decide these issues or determine whether the balance of probabilities favours one party over the other.²
6. All that the court need decide in determining whether the defendant has set out a *bona fide* defence is whether:³
 - 6.1 the respondent has disclosed the nature and grounds of his or her defence, and
 - 6.2 on the facts so disclosed the respondent appears to have, a defence which is *bona fide* and good in law.
7. It is sufficient if the respondent swears to a defence, valid in law, which if advanced may succeed on trial.
8. If the facts presented by the defendant, disclose an arguable defence, he has passed the test on paper and must be granted leave to defend.”

¹ See *Breitenbach v Fiat S.A* (EDMS) BPK 1976 (2) SA 226 at 228B.

² See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A.

³ See *Maharaj v Barclays National Bank Ltd* above at 426B.

[7] The submission is correct.

[8] It is, therefore, my view that the defendants have advanced their contention in resistance to the plaintiff's claim with a sufficient degree of clarity to enable me to ascertain that they have deposed to a good defence. The defence is *bona fide*, good in law and my opinion is that if raised at trial it may constitute a defence to the applicant's claim.

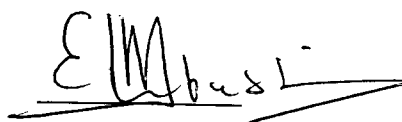
[9] An appropriate cost order should be costs in the cause.

[10] In the premises I make the following order:

10.1 The application is dismissed.

10.2 The defendants are granted leave to defend the matter.

10.3 Costs are costs in the cause.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE

DATE OF JUDGMENT

APPLICANT'S COUNSEL

APPLICANT'S ATTORNEYS

DEFENDANT'S COUNSEL

DEFENDANT'S ATTORNEYS

• 20 APRIL 2015

• 04 MAY 2015

• ADV. KRUGER

• MALHERBE RIGG&RANWELL INC.

• ADV L M SPILLER

• LINGSTONE CRICHTON ATTORNEYS