

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 17296/2015

Date of hearing: 30 June 2015

Judgment Delivered: 7 July 2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

LIONEL FRANK

Plaintiff

and

MICHAEL FRANK

Defendant

J U D G M E N T

MAKGOKA, J

[1] This is an opposed summary judgment application. The plaintiff instituted action against the defendant in respect of two claims. Claim 1 is based on a written sale agreement concluded between the parties (the sale agreement) and it is for payment of R3 350 000. Claim 2 is for an oral loan agreement (the oral agreement) and the plaintiff claims R150 000. In both instances the plaintiff also claims interest and costs.

[2] The sale agreement was concluded on 1 April 2010 in terms of which the plaintiff sold to the defendant all issued shares in the capital of Gearbox and Diff Centre (Pretoria) (Pty) Ltd; 25% of total member's interest in EZ Trade 207 CC t/a Parts International, and 50% total interest in LML Frank Property Investment CC, and 50% of the total member's interest in Starlight Property Investments 101 CC. The purchase price for the above was R15 000 000, payable in monthly instalments on certain terms. In subsequent arbitration proceedings for the resolution of an alleged breach of the agreement by the defendant, the parties entered into a written settlement agreement in terms of which the defendant agreed to pay R11 050 00 in instalments of R300 000 per month and two monthly instalments R15 000.

[3] The plaintiff alleges that the defendant breached the terms of the settlement agreement when it stopped making payments during April 2014. The plaintiff claims the alleged outstanding amount of R350 000 000, and seeks summary judgment in respect thereof.

[4] In his opposing affidavit, the defendant states that the payment of the last R3 000 000 referred in terms of the settlement agreement was conditional upon the sale and transfer of the property owned by Starlight Property, one of the entities referred to in paragraph 1 above. It being common cause that at the time of issue of summons such sale and transfer had not occurred, the defendant argues that the claim of R3 000 000 is premature.

[5] Furthermore, the defendant contends that the arbitration settlement agreement does not contain an acceleration clause entitling the plaintiff to claim the entire amount in the event of non-payment. For this reason the defendant argues that

the plaintiff can only have two claims of R350 000 (in respect of claim 1) and R150 000 in respect of claim 2. However, the defendant further avers that he has a counterclaim of R2 796 186 against the plaintiff. The counterclaim is said to arise from the payments that the defendant made on behalf of the plaintiff through his company Gearbox and Diff Centre in respect of the two properties in issue.

[6] The payments were made during the period March 2013 to January 2015, and recorded against the defendant's loan account in Gearbox and Diff Centre. The defendant therefore request that summary judgment be refused on the basis of his alleged counterclaim.

[7] The remedy of summary judgment is an extraordinary and drastic one, which has the hallmark of a final judgment in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. In *Dowson and Dobson Industrial Ltd v Van der Werf* 1981 (4) SA 417 (C) AT 419, it was noted that an ever increasing reluctance to grant summary judgment in the face of opposition, was evident from the South African courts. See also *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C) at 550, and *Standard Krediet Korporasie v Botes* 1986 (4) SA 946 (SWA). Therefore the court must always be reluctant to deprive the defendant of his normal right to defend, except in a clear case. See *Standard Bank of SA Ltd v Naude* 2009 (4) SA 669 (E) at 672C-676D.

[8] In the present case, I cannot see how it can tenably be argued that this is a clear case where the plaintiff is entitled to summary judgment. The issues between the parties can only be clarified and ventilated at the trial, after the plaintiff had delivered its declaration and full sets of pleadings and discovery had been exchanged. I do not have to be satisfied at this stage of the veracity of the

defendant's allegations. All I have to be satisfied about is whether the defendant has disclosed a defence, good at law, which if proven at the trial, would constitute a complete answer to the plaintiff's claim. I am further satisfied that the defendant has an arguable counterclaim against the plaintiff.

[9] For the above reasons, and considering the conspectus of all the relevant factors – the facts and the proper approach to applications for summary judgments, I am satisfied that the defendant has disclosed a *bona fide* defence to the plaintiff's claim. There is nothing inherently implausible about the defendant's version. As stated earlier, if established at the trial, it will be a complete answer to the plaintiff's claim. The defendant is therefore entitled to be granted leave to defend.

[10] In the result the following order is made:

1. Summary judgment is refused;
2. The defendant is granted leave to defend;
3. Costs are in the main action.



TM Makgoka
Judge of the High Court