

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A202/2013

In the appeal between:-

ROELOF CHARLES MALHERBE

Appellant

and

ABSA BANK LTD

Respondent

CORAM: VAN DER MERWE, J *et* VAN ZYL, J *et* MURRAY, AJ

HEARD ON: 13 OCTOBER 2014

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 30 OCTOBER 2014

[1] This is an appeal against an order granting summary judgment against the appellant. The appeal is with the leave of the court *a quo*.

[2] On 15 January 2013 a summons was issued in terms of which the respondent instituted two claims against the appellant. Claim 1 was for payment of the amount of R2 488 297,29 together with interest thereon calculated from 17 August 2012, being the outstanding balance of a loan made

by the respondent to the appellant and claim 2 was for payment of the amount of R2 948 869.32 together with the interest thereon calculated from 1 June 2012, being the outstanding balance owed by the appellant in respect of a cheque account with the respondent. After the appellant entered appearance to defend the action, the respondent applied for summary judgment. Despite the opposition of the appellant thereto, the court *a quo* granted summary judgment in respect of both claims.

- [3] The decisive issue in the appeal is whether a *bona fide* defence to the claims was disclosed in the answering affidavit of the appellant.
- [4] The test to be applied in summary judgment proceedings when a defendant relies on a defence based on fact, is trite. The defendant must satisfy the court that it has a *bona fide* defence to the plaintiff's claims. In order to do so the defendant must make factual averments under oath which, if they are proved, would constitute a defence in law and must set out the averments in such a manner as to satisfy the court that the defendant *bona fide* intends to rely thereon. The court therefore does not attempt to determine whether there is a balance of probabilities in favour of one party or the other. The degree of particularity in the answering affidavit is particularly relevant for determination of the requirement of *bona fides*. If in all the circumstances the answering affidavit displays a needless lack of particularity in

respect of the alleged defence, the court may conclude that the defence is not *bona fide*.

- [5] In the present matter the appellant relied on a *pactum de non petendo*. In the answering affidavit he explained that he is a grain farmer and gave particulars of the crop failures that he had suffered during the 2009/2010, 2010/2011 and 2011/2012 production seasons. He then continued as follows:

“5.2.5 As a result of the aforesaid unfortunate state of affairs, I decided to approach the Applicant in order to discuss my predicament. During **SEPTEMBER 2012** I met with the Applicant’s **BILLY MARX** (herein further referred to as ‘**Marx**’) in **KROONSTAD** and informed him of the fact that I experienced a complete failure of crops during the respective production-seasons of the past three years;

5.2.6 Marx then suggested that the Applicant suspend any legal action against me until the end of the production-season of **2012/2013**, provided that I settle my indebtedness to the Applicant in respect of the mortgage loan (i.e. the Applicant’s claim 1), as well as in respect of the overdraft facility on my cheque account (i.e. the Applicant’s claim 2);

5.2.7 In response to his suggestion, I informed Marx as follows:

5.2.7.1 During the production-season of **2012/2013** I intend to cultivate **440** hectares of maize and **728** hectares of sunflower;

5.2.7.2 From my maize-harvest I expect to generate an income of approximately **R 4 800 000-00** and from my sunflower-harvest I expect to generate an income of approximately **R 7 600 000-00**;

5.2.7.3 Bearing my input-costs in the amount of approximately **R 8 000 000-00** in mind, I therefore expect to make a profit of approximately **R 4 400 000-00** at the end of the production-season of **2012/2013**.

5.2.7.4 Even if I pay the total amount of **R 4 400 000-00** to the Applicant, I will still not be able to settle my indebtedness to the Applicant in respect of both the mortgage loan and overdraft facility on my cheque account.

5.2.8 Marx then reconsidered the matter, whereupon he informed me as follows:

5.2.8.1 Taking the value of my bonded immovable property into consideration, he is satisfied that the Applicant had sufficient security in place;

5.2.8.2 The Applicant will therefore not institute legal action for the enforcement of its rights in terms of the mortgage agreement (i.e. the relevant mortgage loan) and credit facility (i.e. the relevant overdraft facility on my cheque account) before the end of **DECEMBER 2014**, provided that I pay any

and all outstanding amounts (together with interest) that I owe to the Applicant in respect of the said mortgage agreement and credit facility by the end of **DECEMBER 2014**.

5.2.9 It is therefore my respectful submission that:

5.2.9.1 During **SEPTEMBER 2012** and at **KROONSTAD** the Applicant (as represented by Marx) and I reached a *pactum de non petendo* in terms whereof the Applicant and I (*inter alia*) agreed that the Applicant will not institute any legal action against me for the enforcement of the Applicant's contractual rights in terms of the relevant mortgage agreement, or in terms of the relevant credit facility before the end of **DECEMBER 2014**;

5.2.9.2 The Applicant's action and application under discussion are therefore premature."

[6] The court *a quo* considered the probabilities and concluded that the averments of the appellant had to be rejected as false. As I have pointed out (and as the court *a quo* realised when granting leave to appeal) this approach is not permissible in summary judgment proceedings and constitutes a misdirection. This court must therefore consider the matter afresh.

- [7] Upon application of the true test it is clear firstly that the factual averments made by the appellant, if they are true, would constitute a defence to the action instituted during January 2013 and particularly to the grant of summary judgment before the end of December 2014. Secondly, although the answering affidavit is not a model of clarity in all respects, it contains sufficient particularity in respect of the background to and the entering into of the agreement of September 2012 to satisfy me that the defence appears to be *bona fide*.
- [8] It follows that the appeal must succeed. Counsel were agreed that the costs of the application for summary judgment should be costs in the action. There is no reason to deprive the appellant of the costs of appeal.
- [9] The following order is issued:
1. The appeal is upheld with costs.
 2. The order of the court *a quo* is set aside and replaced with the following:
 - “1. Summary judgment is refused.
 2. Costs of the application for summary judgment are costs in the cause.”

I concur.

C. VAN ZYL, J

I concur.

H. MURRAY, AJ

On behalf of appellant:

Adv J.E. Kruger
Instructed by:
c/o Graham Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv P.J. Heymans
Instructed by:
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