

Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: A399/2007

In the matter between

RAPIPROP 31 (PTY) LTD
WILLY JEAN RENE WOESTYN

First Appellant
Second Appellant

and

ROSSOUW MALAN PETERSEN

Respondent

JUDGMENT DELIVERED ON 06 February 2009

SAMELA, AJ

[1] This is an Appeal against the granting of summary judgement in the magistrate's court, Somerset west on 17 of April 2007, in an amount of R127 785, 39 with interest and costs. For convenience sake I will refer to the parties as they were cited in the court a quo, namely the respondent as the plaintiff and the Appellants as the defendants. Miss M Ipsper appeared for the Appellants. Mr AP Moller appeared for the Respondent.

[2] The plaintiff sued the defendants for the balance of unpaid monthly interest instalments on a loan amount of R4 m for April, May, June and July 2006. The second defendant was sued for this amount in terms of his liability which flows from a suretyship agreement.

[3] Against the aforesaid, the court must decide whether the court *a quo* correctly granted summary judgment against the Appellants. Ms Ipsper, for the Appellants, argued that the court *a quo* erred and misdirected itself, inter alia, that:

- (a) there was no mention in any of the contracts of the possibility of setting off monies owed by the Trust to the first Appellant against the monies owed by the first Appellant to the Respondent;
- (b) disregarded the fact that the Appellants would be entitled to apply for rectification of the loan agreement so as to formally cite the Trust, which was a signatory thereto, as a party to the loan agreement and an entity against which the Appellants could raise the defence of set-off;

Mr Möller on behalf of the Respondent countered the Appellants' arguments by saying, amongst others, that:

- (a) the Appellants' defence of set-off was based on the "Deeds of Sale relating to Sectional Title Units" purchased by the Trust from the first Appellant. However, the Respondent was not a party to the purchase agreements;
- (b) the Appellants core allegation was that set-off would automatically occur between the loan agreement and the purchase agreements, though the sale was concluded between the Trust and the first Appellant;

The Appellants unfortunately did not attach the deeds of sale to the papers before court. The court was therefore unable to look and compare the loan agreement and the deeds of sale. Clauses 3.2 and 13 have to be read together. Clause 3.2 expressly prohibits set – off operating between first Appellant and the Trust, while Clause 13 excludes estoppel from operating.

[4] In the affidavit filed in opposition to the summary judgement application, the only defence raised was one of set – off. The grounds of appeal are however far more wideranging and include rectification, an argument for intergration of the loan agreement with the sale agreements (even though those agreements were not part of the record), estoppel and then, catch all phrase, that a bona fide defence had been made out.

[5] Summary judgement is stringent remedy.

Rule 14(3) of the Magistrates' Courts Rules of Court provides that:

"Upon the hearing of an application for summary judgment the defendant may -

(c) satisfy the court by affidavit delivered not later than noon of the day preceding the hearing of the application (which affidavit may by leave of the court be supplemented by oral evidence) that he has a bona fide defence to the claim on which summary judgment is being applied for or a bona fide counterclaim.

[6] The rule requires the defendants to place adequate facts which, if proved at the trial, will constitute an answer to the plaintiff's claim.

[7] A court will not allow in arguable or unsustainable defences to be raised in opposition to summary judgement. A court cannot be asked to speculate or to consider defences that were not properly established in the affidavit or which were raised from the bar or, as in this case, in the grounds of appeal. The defendants are obliged to disclose their defence and the material upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence

Maharaj V Barclays national bank, 1976 SA 418 (A) AT 423 F- H read with 426A – E).

[8] The defendants defence of set – off is based on a reference to certain deeds of sale relating to sectional title units purchased by RM Petersen's family trust from the first defendant. It is common cause that the plaintiff is not a party to this purchase agreement. Furthermore the defendant failed to annex copies of the deeds of sale to the opposing affidavit. Neither did they disclose any of the relevant provisions of the deeds of sale upon which they rely. All that is stated in the affidavit is:

"3.The Trust purchased two flats and two garages in the first respondent's development in Strand, better known as section A8 and F8 as well as P109 and P104 in the Cape sands sectional title scheme.

4. It was at all times expressly agreed the monies lent and advanced by the applicant to the first respondent would infact be the purchase price relating to the sectional title unit purchased by the applicant from the first respondent (payable on registration of transfer), and that it would be set – off (sic) against one another. The same would apply in respect of interest and occupational interest.

5. The occupational interest payable by the Applicant's Family Trust was due owing (sic) and payable in terms of the Deeds of Sale, from the date of practical completion until date of registration of transfer.

6. Date of practical completion was the 12th of April 2006, and date of registration of transfer was the 8th of July 2006, at the applicable ABSA Bank prime interest rate, alternatively, in the case of breach, the applicable prime interest rate determined by ABSA Bank from time to time plus 2%.

7. Neither the Applicant nor the Applicant's Family Trust has paid occupational interest or any part thereof, despite demand.

8. It was at all times expressly agreed, alternatively implied, that for all intents and purposes , the roles of the Applicant in this personal capacity and the Applicants Family Trust were effectively the same parties and that setoff (sic) would occur.

The defendants provide no detail of their unliquidated claim. There is no indication of what the purchase prices of the flats were, or of the calculation of occupational interest or the unliquidated amount that is allegedly due by the said Trust to the first defendant. The core allegation upon which the defendants rely is that set – off would automatically occur between the loan agreement and the purchase agreements despite the fact that the latter agreements were concluded between different parties.

[9] The requirement of set –off are well known. Wille's defines set off or compensatio as:

"....the extinction pro tanto of debts owed reciprocally to each other by two persons. If the debts are equal both are discharged: if unequal the smaller is discharged the larger remaining in force for the balance or excess only. Set-off is equivalent to payment, and it consequently operates ipso facto and ipso jure, or automatically, as discharge total or partial, of the debts in question, the moment for conditions or set of facts occur ... the four

conditions are that both debts must be (i) of the same nature, (ii) liquidated (iii) fully due and (iv) payable by and to the same person's in the same capacities".[see Wille's Principles of South African Law, Juta 2007 9th Edition at 832]. If set – off is contractually excluded, such a defence will fail. If a defendant's claim is not liquidated, it is obliged to bring a claim in reconvention – it cannot plead set – off.

[10] In the present case the alleged set –off upon which the defendants rely stems from an agreement between defendant and the Trust and is therefore not a claim between the same parties. The claim is unliquidated and therefore it cannot be raised as a set – off.

[11] Furthermore, clause 3.2 of the Loan Agreement provides that:

"For as long as any amount owed by RAPIPROP to PETERSEN in the terms of this loan agreement remains outstanding, RAPIPROP shall not be entitled to demand payment of any part of the purchase price due to it by the trustees for the time being of the RM Petersen Family Trust No T537/94 in respect of the purchase of apartments number A8 and F8 in the sectional title scheme known as Cape Sands (as will appear from the marketing material of said scheme), which scheme RAPIPROP intends to develop on erf 220074, 10469 and 20 Strand. Without derogating from RAPIPROP's obligations in terms of this agreement, RAPIPROP shall repay all amounts due to PETERSEN no later than the date on which transfer of the said two apartments are registered in the name of the R M Petersen Family Trust. The conveyancers of the Cape Sands scheme are hereby irrevocably instructed to proceed with registration of transfer of said apartments into the name of the RM Petersen Family Trust without collecting the purchase price, should this loan not have been repaid in full by RAPIPROP to PETERSEN when the apartment becomes registrable within the definition of the Sectional Titles Act."

This provision must be read with clause 13 of the Loan Agreement which provides that:

"13.1 No waiver, concession or any other indulgence which may be granted by a party shall be deemed to be a waiver or estoppel of or effect, prejudice or derogate from the rights of such party under this Agreement.

13.2 This agreement constitutes the whole agreement between the parties, and no prior negotiations, promotional material, or verbal communications between the parties hereto or their agents shall be of any force or effect unless specifically contained in this agreement.

13.3 No variation of this agreement shall be of any force or effect unless reduced to writing and signed by both parties.

[12] From the provisions of clause 3.2 it is clear that the reliance on the claim arising from the purchase agreements cannot be raised against the loan obligations. The defendants did not deal with the provisions of clause 3.2 (nor the provisions of clause 13) in their opposing affidavits. They did not raise any defence which can attack the effect of clauses 3.2 and 13.

[13] Clause 3.2 expressly prevents set- off from operating between parties, first defendant and the Trust. This exclusion and prohibition is a recordal aimed at avoiding the defendant's intended consequence of set- off. The provisions of clause 3.2 were inserted for the protection of the Trust and accepted on behalf of the Trust to avoid such a reliance of set – off.


[14] Clause 13 on the other hand excludes estoppel from operating. To uphold the defendant's counterclaim would result in a variation of the agreements, which is similarly excluded in terms of the loan agreement.

[15] On the facts set forth in the opposing affidavit I can see no basis in law or logic upon which the impression could have been created in the minds of the defendants that the set – off could be applied between the loan agreement on the one hand, and the deed of sale on the other. The terms are explicit and exclude the reliance on estoppel. The Magistrate was therefore quite correct in rejecting that defence.

[16] As regards the defence of rectification, this was not raised in the opposing papers and there is therefore no need to deal with it.

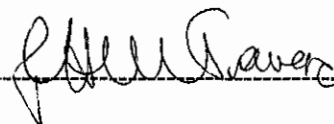
[17] The facts contained in the opposing affidavit do not set out a bona fide defence to the plaintiff's claim and I cannot fault the Magistrate in any way for having granted summary judgement.

[18] It follows therefore that the appeal must be dismissed. I would therefore propose the following order: The appeal is dismissed with costs



SAMELA, AJ

I agree and so it is ordered:



TRAVESO, AJP