18915/09-20/05/10 CRT 4

COPY

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **18915/2009**

In the matter between:

NOMAN KHAN	First Applicant
LAMEEZ MOOKREY	Second Applicant

and

OMAR ABRAHAMS	First Respondent
RUTHAYBA ABRAHAMS	Second Respondent

JUDGMENT: 20 MAY 2010

KLOPPER AJ.

Introduction

This is an application in terms of Rule 32 of the Uniform Rules of Court for summary judgment by the Plaintiffs (Applicants in this matter) against the Defendants (Respondents in this matter) for the relief sought in the particulars of claim being:

a) payment of the amount of R32 500.00
b) payment of the amount of R272 062.50
c) interest on the aforesaid amounts at 15.5% *a tempore morae*

d) costs of the suit.

For the sake of convenience I will cite the parties as they appear in the main action.

Summons was served on 15 September 2009 and the Defendants delivered a notice of intention to defend on 17 September 2009.

The application is opposed by the Defendants on a number of grounds and the Defendants have filed an affidavit in this regard.

Due to the nature of the numerous objections raised by the Defendants to the application for summary judgment it is appropriate to indicate in detail the provisions of Rule 32 which are relevant. Rule 32 reads as follows:

"(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

a) on a liquid document;

b) for a liquidated amount in money;

c) for delivery of specified movable property; or

d) for ejectment;

together with any claim for interest and costs.

(2) . . .

(3) Upon the hearing of an application for summary judgment the defendant may –

(a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one proceeding the day on which

the application is to be heard) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefore.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2) nor may either party cross-examine any person who gives viva voce or on affidavit. Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter."

Facts upon which the Plaintiff's claims are based

For purposes of this judgment I shall refrain from dealing in detail with the facts of the matter which are set out in the particulars of claim and in Counsel's heads of argument. The Plaintiffs who are estate agents entered into a written agreement of sale on 19 January 2009 with the Defendants for the sale of the Defendants' property for an amount of R512 000,00.

The Defendants were under threat of losing the property due to the fact that they were in arrears with the monthly mortgage payments in the amount of R32 500.00. As a result there was a sale in execution by ABSA Bank scheduled to take place on 19 January 2009. In an addendum to the deed of sale certain special conditions were attached to the sale as follows:

"The transaction between the parties shall be a two-fold process based on the following terms:

(a) *The Purchasers shall purchase the property from the Sellers on the agreed price; and*

(b) *The Purchasers have purchased the property with the intention to stay the sale in execution against the Sellers while intending to resell the property;*

(c) *It is intended that the above shall take place simultaneously as a simultaneous action."*

The Defendants were required to sign all necessary documentation upon request by the conveyancer.

The contract in the event of cancellation by the Defendants provided for:

i) *repayment of an amount of R32 500.00 and*

ii) *for the loss of any/all profit that the Plaintiffs would have made had the Defendants not cancelled the agreement.*

In terms of the agreement the Plaintiffs paid an amount of R32 500.00 which was in essence sufficient to ward off the sale in execution. This amount in terms of the agreement was taken as a deposit on the payment of the purchase price. Despite the Defendants signing a power of attorney on 19 January 2009, they indicated in a letter dated 20 January 2009 that they elected to cancel the sale and revoke the power of attorney.

As a result the Applicants have instituted a claim for damages as indicated *supra*.

As indicated previously a number of disputes concerning various facts has arisen and a number of defences were raised by the Defendants. I will deal with each one individually and will refer to the relevant facts at that stage.

The nature of an application for summary judgment

Although the principles to be applied are well known and appear from the clear wording of Rule 32, it is not inappropriate in the light of the defences raised in this matter to once again consider the nature of such an application. This in my view can be achieved with reference to the remarks of **Moosa J** in **First National Bank of SA Ltd v Myburgh and Another** 2002 (4) SA 176 CPD at 180. The learned Judge remarked at 180 A – F:

> *"The defendant, in order to resist summary judgment, must satisfy the Court that he has a defence which is good in law and bona fide. Rule 32 (3)(b) of the Uniform Rules of Court requires the defendant to disclose fully the nature and grounds of the defence and the material facts relied upon by the defendant for the defence. Such information must be disclosed with sufficient particularity and completeness to enable the Court to properly evaluate the defence which is good in law.* ***(Maharaj v Barclays National Bank Ltd (supra at 426 A – D); Arend and Another v Astra Furnishers (Pty) Ltd*** *1974 (1) SA 298 (C)at 303 H – 304 A;* ***District Bank Ltd v Hoosain and Others*** *1984 (4) SA 544 (C) at 547 I – 548 A – B). Summary judgment is designed to give Plaintiff a speedy and cost-effective remedy in the case where the Defendant does not disclose a valid and bona fide defence. It is an extraordinary and stringent remedy. It has the landmark of a final judgment and closes the door to the Defendant to ventilate his defence at the trial.* ***(Maharaj v Barklays National Bank Ltd*** *(supra at 423 F – G) and* ***Arend and Another v Astra Furnishers (Pty) Ltd*** *(supra at*

304 F – G). Because of the drastic nature of the relief sought, the Court has, in terms of Rule 32 (5), a discretion to grant the defendant leave to defend the action even where he has failed to comply with Rule 32 (3)(b). The Court will grant summary judgment where Plaintiff has an unanswerable case. If the Court has the slightest doubt, the Court will not grant summary judgment. ***(Fourlamel (Pty) Ltd v Maddison*** *1977 (1) SA 333 (A at 347 (H);* ***Gilinski v Superb Launderers and Dry Cleaners (Pty) Ltd*** *1978 (3) SA 807 (C) at 811 E – H)).”*

Defences raised

The defences raised by the Defendants, some of which may overlap are that:

a) the claims are not for a liquidated amount in money;

b) the particulars of claim are excipiable for being vague and embarrassing and not disclosing a cause of action;

c) the Defendant has a *bona fide* defence based on fraudulent and material misrepresentations made by the Plaintiffs;

d) the Defendants have a counterclaim against the Plaintiffs;

e) the Defendants in signing the agreement acted due to undue influence or under duress.

It must also be mentioned that the issue of security as indicated in Rule 32 (3)(a) arose due to a previous court order which was made after an agreement was reached between the parties. Some of the defences were raised *in limine* and others that were raised initially have been abandoned.

a) The claims are not for a liquidated amount in money

The claims are based on clauses 3 and 4 of the "Addendum to offer to purchase" which the parties signed and which reads:

"3. *All/any funds paid by the Purchasers for the purposes of staying the sale in execution of the Seller's property, up until signature hereof, shall form the deposit portion in relation to the purchase price as agreed between the parties. These amounts shall therefore be deducted from the agreed purchase price with the exception of any funds paid by the Purchasers on or after 1 February 2009.*

4. *In the event that the Sellers cancel this transaction for any reason whatsoever, the Sellers shall be liable to the Purchasers in the following terms:*

a. *The Sellers shall repay the Purchasers for all funds, costs and expenses as paid by the Purchasers for the purposes of staying the sale in execution of the Sellers property;*
b. *The Sellers shall be liable to repay the deposit as calculated to the Purchaser;*
c. *The Sellers shall be liable to repay all/any profit the Purchasers would have made should the Sellers not have cancelled the transaction. This shall be calculated either at the market value current at the time of cancellation or on any value of a transaction by a potential Purchaser the Purchaser may have in respect of the said property, whichever is the higher;*
d. *The Sellers shall be liable for interest as at date of signature hereof at the legally permissible rate of 15,5 % a tempore morae."*

The Plaintiffs are relying on contractual damages as stipulated in the agreement between the parties. It is not in dispute that Plaintiffs in fact paid the amount of R32 500.00 and it is clear that it would not be difficult to ascertain this amount. The problem lies with the claim for R272 062.50.

The events leading up to the last mentioned claim which the Plaintiffs have elected to base on an alleged actual transaction are as follows:

1) After concluding the agreement the Plaintiffs mandated one HAROON DAYA, an estate agent to sell the property on their behalf.
2) DAYA subsequently obtained an oral offer to purchase for R795 000.00 from an unnamed buyer on condition that the prospective buyer would be satisfied with the condition of the property.
3) The prospective buyer as it turned out was unable to view the property due to the fact that the Defendants would not allow this and subsequently indicated that they no longer wished to sell the property. They refused DAYA and any prospective buyer access to the property.
4) The Plaintiffs therefore allege that had the Defendants complied with the terms of the contract they would have made a profit of R272 062.50, being the amount for which the property would have been sold minus the contract price minus the agreed estate agents commission.

At first glance it would appear that the terms of the agreement as indicated in 4 (c) *supra* are very wide and may be subjected to different interpretations. In particular the term "value of a transaction by a potential purchaser" may be subjected to a different calculation depending on the time when it is applicable and depending on any conditions attached to the sale.

The well known principle is that a liquidated amount of money is an amount which is either agreed upon or which is capable of speedy and prompt ascertainment - See **Lester Investments (Pty) Ltd v Narshi** 1951 (2) SA 464 (C), **Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd** 1962 (1) SA 736 (T), **Botha v W. Swamson & Company (Pty) Ltd** 1968 (2) PH F 85 (C) and **First National Bank of SA Ltd v Myburgh and Another** *supra* at 181. In exercising my discretion as to whether the claim is for a liquidated amount or not I considered various factors.

Mr. **Janse van Rensburg** for the Defendants argued that there are numerous reasons why the court cannot accept that the claim is for a liquidated amount. I will deal with some of these aspects *infra*.

Ms. **Deetlefs** correctly argued that the nature of the cause of action is irrelevant to a determination as to whether the claim is a liquidated one or not – see **Meddent Medical Scheme v Avalon Brokers (Pty) Ltd** 1995 (4) SA 862 (D) at 865. Her argument is that the claim is a liquidated one and the court is able to easily ascertain on the papers alone what the amount is. Despite this argument various alternatives in ascertaining the amount were put forward including:-

a) *reference to records concerning sales of property in the area concerned*

b) *reference to the amount which the Defendants would have received as profit for the later sale of the property.*

It would appear that on this basis it becomes increasingly difficult to ascertain the amount. It is clear in my view from the papers that the fact than an unnamed prospective buyer was interested in the property and would have been willing to pay an amount of R795 000.00 for it, is not a fact which is within the personal knowledge of Mr. NOMAN KHAN who made the verifying affidavit. The oral offer to purchase was also subject to a condition that "the prospective buyer was satisfied with the condition of the property after inspection." The fact is that he never conducted such an inspection and there remains on the papers some uncertainty as to whether it would have met his expectations.

The determination of any loss which the Plaintiffs rely upon is dependant in my view on evidence of the offer, the amount and the probability that this would have formed the basis of a sale and therefore accurately reflects the loss sustained by the Plaintiffs due to the cancellation of the agreement between the Plaintiffs and the Defendants.

In my view the claim for R272 062.50 for all practical purposes in terms of Rule 32 is not capable of a speedy and prompt ascertainment and the application is not accompanied by a statement which can verify the claim in

the manner required by Rule 32. I therefore conclude that it is not a liquidated amount of money for the purposes of Rule 32 (1).

The particulars of claim are vague and embarrassing and no cause of action is disclosed

The Defendants rely on paragraph 21 of the particulars of claim together with paragraph 27 thereof to illustrate that there is a direct contradiction relating to agent's commission. I am inclined to agree with the Plaintiff's view that paragraph 21 indicates the normal position whilst paragraph 27 indicates the terms of an actual agreement between the Plaintiffs and their agent.

Mr. **Jansen van Rensburg** furthermore argued that the Plaintiffs' claim fails to allege:-

a) *that the Defendants' letter constituted a repudiation of a fundamental term of the agreement*
b) *an election to terminate; and*
c) *a communication of the election to the other party*
d) *that the Defendants have cancelled the agreement.*

As a result it is alleged that the Plaintiffs are not entitled to the relief based on breach of contract because a valid cause of action is not disclosed.

Ms. **Deetlefs** argued that the Plaintiffs are basing their claim on Defendants' cancellation and this is clear from the papers and admitted by the Defendants.

The pleadings as they stand indicate that the Plaintiffs are relying on Clauses 4 (a) and 4 (c) of the addendum to the agreement of sale which deals with a cancellation of the contract. As such it is generally an essential averment that the contract was cancelled and in such circumstances an exception may be made to it.

At the same time it does not appear that there is any doubt on the part of the Defendants as to what they are being sued for, and there does not appear to be any prejudice. Following practice in this regard it is highly probable that leave will be granted to amend the pleadings. For other reasons given in this judgment I do not deem it necessary to take this issue any further or to make any further pronouncement in this regard.

The Defendants have a *bona fide* defence

As far as the merits are concerned the Defendants raise two defences which I have decided to deal with jointly. The first is based on a fraudulent misrepresentation made by the Plaintiffs to the Defendants shortly before the agreement was entered into and the second based on the same facts is that the Defendant was unduly influenced or placed under duress.

It is trite that the Defendants are required to satisfy the Court that it is a *bona fide* defence to the action. It appears that what is required is not a standard equal to that which is required during the actual adjudication of the merits. In **Chambers v Jonker** 1952 (4) SA 635 (C) the Court refers to the fact that the rule appears to place an onus on the Defendant to satisfy the Court concerning a *bona fide* defence but that the onus is not a very heavy one.

In **Die Afrikaanse Pers Beperk v Neser** 1948 (2) SA 295 (C) at 297 the Court remarked *"Satisfy does not mean "prove". I take satisfy to mean therefore that the Court must feel that there is a fair probability that the Defendants' defence is a good one . . . "*

I hold the view that all that is required at this stage is that the Defendants set out sufficient facts in the affidavit to enable the Court to satisfy itself that there is a defence which is *bona fide* and good in law. The Defendants are therefore not expected to formulate the opposition to the claim with the same precision required of a plea and the Court's approach to it is not according to the standard required for a plea – See **Maharaj v Barclays Bank National Bank Ltd** 1976 (1) SA 418 A at 426 and **Tesven CC v SA Bank of Athens** 2000 (1) SA 268 (A).

When fraud is raised as a defence, a factual basis must be laid by the Defendant – See **Nedperm Bank Ltd v Verbri Projects CC** 1993 (3) SA 214 (W) at 220.

The Defendants' affidavits do deal quite extensively with the facts on which they base their defence of a fraudulent misrepresentation. I cannot find myself in agreement with Ms. **Deetlefs** that the sole purpose for entering into the agreement was desperation.

It is important to consider all the facts leading up to the agreement in order to assess the defence raised by the Defendants. Their desperate situation would most certainly have played a role but is in my view according to the papers merely a factor which requires consideration.

I do not intend for purposes of this judgment to repeat the facts on which the Defendants allege that a fraudulent misrepresentation, undue influence and duress took place except to highlight the following aspects:

a) The Defendants describe the history of their dealings with the First Plaintiff, who is an estate agent and allege a relationship based on trust.

b) The circumstances in which the Defendants found themselves when deciding to enter into the agreement are documented in the affidavits. The allegations are made that the Defendants were reluctant to sell the property at the price offered by the Plaintiffs but did so because the Plaintiff indicated that they would be evicted on the day following the sale in execution. It is alleged that this fact in false and not in accordance with the law and that the Plaintiffs knew it to be false.

c) It is furthermore alleged that the fear of eviction as a result of Plaintiff's misrepresentation was the sole reason for the agreement on the terms set out therein.

d) It is alleged that when the Defendants' received proper advice from family and later an attorney they elected to cancel the contract.

Mr. **Jansen van Rensburg** argued that the essential allegations for fraud are indicated in the facts put forward by the Defendants. It was also argued that a non disclosure of the true facts in these circumstances also amounts to a

fraudulent misrepresentation. It was also argued on behalf of the Defendants that based on the position of trust the Plaintiffs unduly influenced the Defendants or placed the Defendants under duress in the circumstances, which caused them to enter into the agreement.

Ms. **Deetlefs** quite correctly argues that given the predicament in which the Defendants found themselves at the time, the agreement held many benefits for the Defendants. She argued that what was said was mere advice. I do however find it difficult to see, if all the circumstances are considered including the relationship between the Defendants and the Plaintiffs, how what was said in the context in which it was said, could only amount to advice and particularly why such advice was given at that moment.

It is furthermore argued that the Defendants were not induced to enter into the contract by the advice given by the Plaintiffs and that no reasonable person would have been induced to contract on the advice given.

As far as the principle that the misrepresentation must be material is concerned, there appears to be agreement in all authorities. In essence the misrepresentation must be of such a nature that it induces the Defendant to enter into the agreement.

There is however a difference of opinion concerning the test for materiality. Christie in **"The Law of Contract in South Africa"** – 5th Edition remarks *"But the application of this purely objective test to the question of the sense in which the misrepresentation would be taken, or whether it would be believed, could lead to injustice. A person who makes a misrepresentation (whether innocently or fraudulently) to one he knows or ought as a reasonable person*

to know to be somewhat simple-minded or gullible must surely take his victim as he knows or ought to know him to be, and cannot be permitted to hold him to the contract just because a reasonable person would not have been induced by the misrepresentation."

In **Pathescope Union of SA Ltd v Mallinick** 1927 A 292 at 307, **Stratford AJA** states:

> *"To entitle her to succeed on the issue now being examined it is necessary that the misrepresentation must be of a material fact, that is to say, that the misrepresentation must be of a nature as would be likely – regarding the question from a common sense point of view – to induce a person of intelligence and in the position of the Plaintiff to enter into the contract."*

As far as the element of inducing the Defendants to enter into the contract is concerned it must be shown that the misrepresentation did in fact do so. It however appears that it need not be shown that the misrepresentation was the only inducement – See *Christie* at page 284.

It is also trite that because contracts are *bona fide*, proof that a misrepresentation was fraudulent is not necessary to invalidate a contract and an innocent party is entitled to rescind whether the misrepresentation was fraudulent or innocent . See **Pretorius v Natal South Sea Investment Trust Ltd** 1965 (3) SA 410 (W).

In considering the facts of this matter I am of the view that there may be substance in the allegations of undue influence, but agree with Ms. **Deetlef's**

contentions that the facts do not support the allegations of duress and the elements required to establish duress. I do not intend for the purposes of this judgment to stipulate all the elements required in order to establish duress or undue influence. It is useful to consider what is required in **Patel v Grobbelaar** 1974 (1) SA 532 (A) and *Christie supra* at 302.

I therefore conclude with some reservation concerning aspects of the defences raised, that the Defendants have established for the purposes of this application that they have a *bona fide* defence to the action, based on a misrepresentation made by the Plaintiffs.

The Defendant's counterclaim

The Defendant's counterclaim for an amount of R250 000.00 as damages for trauma, stress, pain and suffering, contumelia and general damages is related to the allegation that a material and fraudulent misrepresentation was made by the Plaintiffs. It is alleged that this misrepresentation was an assault on the Defendants' peace of mind and stability and even caused a serious set back in the medical condition of the First Defendant. The First Defendant suffers from a bipolar mood disorder. It is accepted that an unliquidated counterclaim for a lesser amount can be regarded as constituting a *bone fide* defence to a part of a plaintiff's claim and if successful, it would extinguish. – See **Soil Fumigation Services v Chenifit Technical Products** 2004 (6) SA 2((SCA) at 34. The merits of the counterclaim are as indicated in the affidavit, dependant upon the findings in respect of the alleged misrepresentation.

The Plaintiffs argue that there is no basis for a counterclaim. It is difficult on the facts given in the affidavits by the Defendants to determine whether the counterclaim is well founded – See **Globe Engineering v Ornelas Fishing Co** 1983 (2) SA 95 (C) at 102. This is also dependant on evidence which proves that the misrepresentation caused the conditions which the Defendants allege it did. I do not deem it necessary to take the issue any further due to my findings in respect of other defences raised, except to indicate that this is a further factor which must be considered when my discretion is exercised as to whether summary judgment should be granted or not. It is not a question as to whether the Defendants are likely to succeed with a counterclaim, but whether there is a possibility of success arising from the facts. – See in general the approach in **Arend and Another v Astra Furnishers (Pty) Ltd** *supra*.

The issue of security

The Defendants did not base their opposition to the application on the basis of giving security in terms of Rule 32 (3)(a).

At a later stage the point was taken and the Court referred to an order made by **Cleaver J** in an urgent application to prevent the Defendant from effecting transfer of the property to other persons. The matter was settled on the basis that the Defendants (Respondents in that matter) deposit an amount of R150 000.00 as security for the prospective claim of damages to be made by the Plaintiffs (Applicants in that matter). It is unclear how the amount of R150 000.00 was determined. It may be correctly argued that the furnishing of this

security should be sufficient to ward off the application for summary judgment for part of the amounts claimed.

If it is accepted that the requirement that the security must be given to the satisfaction of the registrar is not essential, it remains clear that the amount is insufficient security as required by rule 32 (3)(a) as it is less than the sum claimed including costs. – See **Cinemark (Pty) Ltd v Alfetta Tune-up Centre** 1979 (4) SA 802 (W) and **Mervis Brothers v Schmidt t/a Programmed Language Course** 1991 (1) SA 313 (W).

Because various defences are raised of which some may affect only part of the claim, I have decided in the exercise of my discretion that summary judgment should not be granted for part of the claim, but should be refused in its entirety. – See **Soil Fumigation Services v Chemfit Technical Products** 2004 (6) SA 29 at 34 – 35.

The issue of costs

Counsel for the Defendants have requested that I consider awarding punitive costs against the Plaintiffs because the Plaintiffs were aware of the exact grounds of the Defendants' defence well before the application for summary judgment was made and even before the action was instituted.

The fact of the matter is that the Defendants also raised a number of other defences which they subsequently abandoned. The Plaintiffs clearly continued with the application because they believe that the defences raised by the Defendants of a fraudulent misrepresentation, undue influence and duress were not good defences in law given the circumstances in this case.

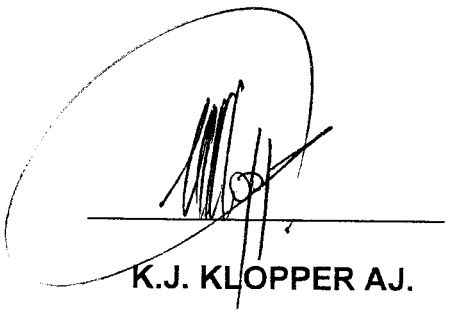
In light of all the circumstances I have decided that it is just not to make an order as to costs at this stage, but to allow the trial court to make a determination.

The following order is made:

a) ***Summary judgment against the Defendants is refused;***

b) ***The Defendants are granted leave to defend the action;***

c) ***The costs of this application stand over for determination by the trial Court***



K.J. KLOPPER AJ.