

[4] In terms of Settlement Agreement, in the event of the first defendant failing to make payment of any instalment on the due date, the full amount of R5 231 786.22, with interest thereon, less any amounts which may have been paid, would immediately become due and payable.

[5] The second defendant bound himself as surety and co-principal debtor jointly and severally with the first defendant in favour of the plaintiff for the repayment of any sum of money which the first defendant may owe to the plaintiff in terms of the Settlement Agreement.

[6] Certain instalments were paid by the first defendant before April 2013. However from the 1 April 2013 no payments were made.

[7] In May 2013 plaintiff instituted action against the defendants for payment of the sum of R4 631 781.22, interest and costs.

[8] Plaintiff contends that defendants do not have a *bona fide* defence to the claim and that the entering of an appearance to defend was made solely for the purpose of delay.

[9] In opposing the application for summary judgment, defendants contended that they have a counter claim against the plaintiff, that is in excess of R5 976 000.00, for damages incurred in relation to the conduct of the tender that was awarded to the joint venture in respect of the Housing Development Agency rectification contract.

[10] Subsequent to the filing of the opposing affidavit, defendants sought leave to introduce a supplementary affidavit. At this stage the defendants did not have legal representation and were represented by the second

defendant. The reason, as I understand it, for seeking to introduce a further affidavit is that they parted ways with two different firms of attorneys who represented them prior to deposing to the affidavit sought to be introduced. Both withdrew as result of disagreements with the defendants. The supplementary affidavit is intended to clarify defendants' defence and challenge the validity of the settlement agreement.

[11] The application to introduce a further affidavit is opposed by the plaintiff on the basis that it does not disclose a *bona fide* defence. In ***Juntgen t/a Paul Juntgen Real Estate v Nottbusch 1989 (4) SA 490*** it was stated that a court has a discretion to grant that relief which is necessary to make a party make a full representation of its true case. In *casu*, it would seem that the defendants, as they allege, had misgivings about the manner in which their case was conducted by their previous attorney(s). In my view, an injustice would be caused if the defendants are not allowed to introduce a further affidavit. I will therefore exercise my discretion by having regard to the supplementary affidavit filed by the defendants in determining the application for summary judgment.

[12] It is trite that in order to be successful in opposing an application for summary judgment, the respondent must depose to facts that, if accepted as the truth, would constitute a defence to the applicant's claim. It is also trite that the respondent must fully disclose the nature and grounds of his defence and the material facts upon which it is based. See ***Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)***.

[13] Defendants' defence as I understand it, is essentially that, the amount due and payable to the plaintiff is disputed. The settlement agreement was entered into on the advice of the attorney who represented the defendants

at the time despite the fact that they expressed misgivings about signing the agreement, given that second defendant did not believe they owed the plaintiff the amount claimed. The agreement was signed after he had been shown plaintiff's audited statement and was under the mistaken belief that amounts set therein were due and owing.

[14] Relying on *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd 1978 (1) SA 914 A*, Mr Nepgen, who is acting on behalf of the plaintiff, argued that the settlement agreement, being a compromise between the parties has the effect of *res judicata*. That is not open to the defendants to proceed on the original cause of action. The settlement agreement being "in full and final settlement of all claims between the parties arising from the joint venture and the Soweto-on-Sea contract" (paragraph 5 of the Settlement Agreement).

[15] In *Gollach and Gomperts supra*, the grounds for seeking the cancellation of a settlement agreement were more or less the same as those raised by the defendants in this matter. At page 922 *Miller JA* had this to say "A *transactio*, whether extra-judicial or embodied in an order of court, has the effect of *res judicata*. It is obvious that, like any other contract (and like any other court) a *transactio* may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is *justus*".

[16] Mr Nepgen submitted that defendants' allegations regarding the manner on which the mistake about the amount owing to the plaintiff is said to have arisen is too vague and sketchy. In the affidavit deposed to by the second defendant, he gives a detailed account why he believes that the amount in respect of which defendants acknowledged their

indebtedness is incorrect and the reasons that gave rise to the mistake on his part. These in my view cannot be characterised to be vague and sketchy. The facts disclosed by the defendants to support the contention that the acknowledgement of debt was based on mistake on his part are, *inter alia*, that:

He had misgivings about signing the settlement agreement because he did not believe the amount claimed was owed to the plaintiff;

The effect of the joint venture was that the plaintiff would have been entitled to half the profit in respect of each house, being R7 000.00 and not R14 000.00 as claimed by the plaintiff. The other half being due to the first defendant;

The audited statement was based on figures that were furnished by the plaintiff only;

First defendant paid in excess of R7.5 million to the plaintiff. When the value of the houses had they been completed would only have been R4.32 million;

That therefore defendants' indebtedness was overstated.

In my view the defendants have succeeded in showing that they have a defence that is *bona fide* and good in law.

[17] In the circumstances:

The application for summary judgment is dismissed.

The defendants are granted leave to defend the plaintiff's action.

Costs of the application for summary judgment are to be costs in the cause of the action.

**N G BESHE
JUDGE OF THE HIGH COURT**

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