

**REPUBLIC OF NAMIBIA**

**IN THE HIGH COURT OF  
JUDGMENT**



**NAMIBIA**

Case no: CA 4/2012

In the matter between

**HORST DIETER DOBBERSTEIN  
GERT JACOBUS BOLTMAN  
and**

**FIRST APPELLANT  
SECOND APPELLANT**

**EDWARD JOHANNES DU TOIT**

**RESPONDENT**

*Neutral citation: Dobberstein v Du Toit (CA 4/2012) [2012] NAHCMD 28 (15 October 2012)*

**Coram: Smuts, J**

Heard on: 1 October 2012

Delivered on: 15 October 2012

**Flynote:** Summary judgment - requirement of a bona fide defence meaning that material just in support of it should be sufficiently full – defendants not meeting this requirement.

---

**ORDER**

---

The appeal against the order of the magistrate in granting summary judgment is dismissed with costs.

---

**JUDGMENT**

---

**SMUTS, J**

[1] The magistrate for the district of Tsumeb granted summary judgment against the appellants in the sum of N\$21 066.67 together with costs on 14 November 2011. The appellants who appeared in person before the magistrate appeal against that judgment to this court.

[2] The plaintiff's claim against them is for occupational rental in the sum of N\$4 000 per month from their date of occupation of the property by the appellants until transfer. The particulars of claim allege that the plaintiff had sold the property in question to the defendants (appellants) and that the appellants would take vacant occupation of the property on 1 December 2008. It is further alleged in the particulars of claim that the property was registered in the name of the first and second defendants on 9 June 2009. The claim was then set out in paragraph 7 of the particulars of claim in respect of the occupational interest which had not been paid by the defendants who are also interchangeably referred to as appellants in this judgment.

[3] In prayer 2 of the particulars of claim interest is claimed in respect of the occupational rent to run from 2 December, 2 January, 2 February, 2 March, 2 April, 2 May and 2 June respectively in respect of the occupational rental for the respective months in question. The defendants opposed the application for summary judgment. Their defence to the claim was set out in the first appellant's opposing affidavit with the second appellant confirming what was stated by him. The defences are essentially two fold. Before they are addressed it also pointed out that interest would not arise from the second day of the months in question (as claimed in the prayers) because occupational interest was only payable on the 7<sup>th</sup> day of the following month.

[4] The appellants also state that they had paid rent for December 2008, although late on 13 January 2009 and attached a bank deposit slip made out to the plaintiff in support of this allegation. There is a further claim in the affidavit that occupation rent for the months of January 2009 and February 2009 had also been paid. But no facts are provided in support of this allegation, unlike in the case of the payment in respect of December 2008.

[5] A further defence is raised to the reminder of the claim, namely that it was not payable because the transfer had been unduly delayed by the plaintiff “for reasons which will be fully canvassed during the trial of the main action”.

[6] It was on this basis that the appellants contended that they had raised a bona fide defence to the plaintiff’s action.

[7] The point raised in respect of the date from which interest would run is valid. It is clearly correct that interest would only run in respect of the amounts in question on the day following the 7<sup>th</sup> day of the following month. But the magistrate did not grant the plaintiff any interest in the judgment. Nor was the issue of interest dealt with in the judgment or order. There is no cross appeal on that issue. The dual defences to the claim are namely payment in respect of December 2008, January and February 2009 and secondly undue delay on the part of the plaintiff to attend to registration of the transfer.

[8] Mr McNally appeared for the appellants in the appeal. The respondent (plaintiff) was not represented and did not appear in person. Mr McNally submitted that although the second defence (of delay in transfer) was not set out in detail, the appellants had sufficiently raised their defences to the claim and, given the drastic nature of the remedy of summary judgment, they should be afforded the opportunity to raise their defences in the trial.

[9] Mr McNally further submitted that the magistrate erred in accepting evidence from the bar concerning the payment in respect of the month of December with the plaintiff's representative conceding that such payment had been made and moving for judgment for an amount which excluded the claim in respect of that month. In my view, this argument is not well founded. It would certainly be open to plaintiff to concede that a portion of the claim fell away because of payment which had been correctly raised and to move for a judgment in a lesser amount. That would not in my view constitute giving evidence from the bar.

[10] Mr McNally also submitted that the magistrate erred in essentially requiring proof of the defences as opposed to being satisfied that a *bona fide* defence had been raised. But this approach overlooks the need repeatedly emphasised by the courts that a statement of the material facts should be sufficiently full to persuade the court that what the defendant has alleged, if proved at trial, would constitute a defence to the plaintiff's claim<sup>1</sup>.

[11] The appellants, with reference to their defence of having made payment in respect of December, attached a deposit slip in respect of a banking account of the plaintiff, in support of this defence. No reason is given why they could not attach some form of proof of payment in respect of the further sums for January and February 2009 which they claimed had been paid. Indeed there is no statement whatsoever as to how such payments were made and no further fact is contained in the affidavit in support of these alleged payments. This despite the fact that the appellants attract the onus of proving payment with this defence. They were thus in my view required to provide sufficient material facts to persuade the court that they had a bona fide defence to the claim in respect of their defence of payment for January and February 2009 yet failed to do so.

[12] As for the further defence raised with reference to the subsequent payments which should have been made in respect of occupational interest for March, April, May

---

<sup>1</sup>Breitenbach v Fiat SA (Edms)Bpk 1976(2)SA 226 (T) at 228 (Full Bench)

and the portion of June 2009 until the transfer was registered, there is merely an assertion that the plaintiff had unduly delayed the transfer. No further statement is made in support of this defence.

[12] The contractual term requiring payment of occupational interest makes it clear that this obligation continues until transfer. There is furthermore no contractual provision requiring transfer within any specific time limit. There are also no facts raised in support of a contention that the time taken for the transfer was unduly protracted. Furthermore, there is no statement on the part of the defendants (appellants) that they had placed the plaintiff in *mora*. This would plainly need to be established in order to found a defence based upon a breach of a tacit contractual term that transfer would need to take place within a reasonable time. There is also no allegation of such a term. Nor is there any allegation of breach and in what manner this occurred or that the plaintiff was ever put on terms in that regard. This defence is clearly not only unsupported by the contractual provisions but is so baldly and vaguely set out that it cannot meet the requirements of establishing a *bona fide* defence in opposition to an application for summary judgment based upon a claim which, on the contrary, is supported by the contractual provisions in question.

[13] It follows in my view that the magistrate did not err in granting summary judgment to the plaintiff/respondent. It further follows that the appeal against the order of the magistrate in granting summary judgment is dismissed with costs.

---

DF SMUTS

Judge

APPEARANCE

APPELLANTS:

P McNally

Of Lentin, Botman & Van der Heever

RESPONDENT:

No appearance