



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

In the matter between:

Case no: I 6071/2014

DEVELOPMENT BANK OF NAMIBIA LIMITED

PLAINTIFF

And

CRYSTAL CREST INVESTMENT CC

1ST DEFENDANT

SACKY I.K MALIMA

2ND DEFENDANT

SILAS T.E. NAMULO

3RD DEFENDANT

Neutral citation: *Development Bank of Namibia Ltd v Crystal Crest Investment CC* (I 6071-2014) [2015] NAHCMD 249 (16 October 2015)

Coram: MILLER AJ

Heard: 07 October 2015

Delivered: 16 October 2015

Flynote: Summary Judgment – Practice and Procedure – Defendant must have a bona fide defence against the claim instituted by the plaintiff – Such defence must not be for purposes of delay – Defendant claiming allegations of misrepresentation from a third party who is not a party to the agreement between the plaintiff and the defendants – Such not a defence to the plaintiff’s claim – Summary judgment granted.

ORDER

Summary judgment is granted in the following terms:

1. Payment of the amount of N\$ 1 458 480.63, against the defendants, jointly and severally, the one paying the other to be absolved;
2. Interest thereon at the FNB Prime rate plus 1.00 which is 10.75% per annum from 01 December 2014 to the date of final payment;
3. Costs on a scale as between attorney and own client.

JUDGMENT

MILLER AJ:

[1] The plaintiff claims that the defendant's defence to the claim of N\$ 1 458 480.63 is merely for delay purposes and that the defendants do not have a bona fide defence against the claim. The plaintiff claims against the defendants for monies advanced in a form of a loan in favour of the first defendant. Second and third defendant bound themselves as surety and co-principal debtors *in solidum* for the repayment of any debt that may be owed to the plaintiff by the first defendant.

[2] The third defendant deposed to the affidavit resisting summary judgment. The defence raised by the defendants is that the loan agreement signed between the plaintiff and the defendants was as a result of representations made by one Simasiku Nelson, employed by the plaintiff as its Senior Business Analyst, who facilitated the granting of the loan. Accordingly, the loan was secured to purchase a franchise business belonging to Kuhu Investment CC, which is owned by Simasiku and who represented to the defendants that the business made a profit of N\$ 31 000 per month; that the defendant would be able to repay a loan facility of about N\$ 24 000 per month

and that the machinery is in good working condition. It however transpired that all these were false and that the business makes only N\$ 5 000 per month and that the machinery are not in good working condition and that the business was sold at a value three times more than the business' actual value.

[3] The defendants states that the procedures of the plaintiff in obtaining the loan was not followed and that the process was fraudulent and that had the defendants known the true facts about the franchise business, they would not have entered into the loan agreement with the plaintiff. The defendants states that the action of 'Simasiku' should be imputed to the plaintiff since he acted in his official capacity and that the loan agreement should not be enforced.

[4] The question incumbent on the court is whether this is a bona fide defence against the claim instituted by the plaintiff.

[5] It is trite law that where a summary judgment has been applied for, the respondent is entitled to oppose, if he/she has a bona fide defence and in that opposition he/she must depose to an affidavit where he/she should positively state and show that he/she has a bona fide defence to applicants' claim. Respondent must not only show, but must satisfy the court, that he/she has a *bona fide* defence. In furtherance of the satisfaction to the court, respondent must at least disclose his defence and material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence. This, however, is not to say that he/she should do so by disclosing all the details and particulars as would be the case in trial proceedings.¹

Does the defendant have a bona fide defence against the plaintiff's claim?

[6] On the papers, it is clear that the plaintiff advanced monies to the first defendant. It is not disputed that 2nd and 3rd defendant signed as sureties. The allegations raised in the answering affidavit are related to misrepresentations which Mr Simasiku had made to the defendants regarding the viability of the business which Mr Simasiku sold. Such

¹Lofty-Eaton and Another v Noble 2014 (4) NR 952 (HC) At 955A-D.

allegations, if established, would form the basis of an action against Mr Simasiku and not the plaintiff. The defendants would be at liberty to seek an order for cancellation of the Sale of the business and repayment of the purchase price. Such however, does not establish a defence against the plaintiff, who is not a party to the sale of the business.

[7] For these reasons, summary judgment is granted in the following terms:

1. Payment of the amount of N\$ 1 458 480.63, against the defendants, jointly and severally, the one paying the other to be absolved;
2. Interest thereon at the FNB Prime rate plus 1.00 which is 10.75% per annum from 01 December 2014 to the date of final payment;
3. Costs on a scale as between attorney and own client.

PJ Miller,

Acting

APPEARANCE:

Plaintiff

P Muluti

Of

Muluti & Partners

Defendants

R Mondo

Of

Nixon Marcus Law Office