



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: HC-MD-CIV-ACT-CON-2016/04131

In the matter between:

CHENG-YUAN LEE

1st PLAINTIFF

LEE'S INVESTMENTS (PTY) LTD

2nd PLAINTIFF

and

KESTODIA LIALUKENI TOBIAS

1st DEFENDANT

DIVINE REALTORS CC

2nd DEFENDANT

Neutral citation: *Lee v Tobias* (HC-MD-CIV-ACT-CON-2016/04131) [2017]
NAHCMD 204 (31 July 2017)

Coram: MILLER AJ

Heard: 26 JULY 2017

Delivered: 31 JULY 2017

ORDER

Having heard both counsel for the plaintiffs/applicants and the defendants/respondents

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IT IS ORDERED THAT:

1. The application is dismissed.
2. The first defendant is granted leave to defend.
3. The costs of the application will stand over.
4. A case management conference will be held on 14 August 2017 at 14h00.

RULING

MILLER AJ:

[1] This is an application for Summary Judgment to be granted against the first defendant and in favour of the first plaintiff in the sum of N\$ 700 000.00 together with some ancillary relief.

[2] The application was opposed by the first defendant.

[3] It is common cause that on 1 August 2015 the first defendant signed a document (Annexure “A” to the Particulars of Claim) titled “Acknowledgement of Debt”. It was co-signed by the first plaintiff who accepted the terms contained in the document.

[4] That document actually records an acknowledgment to repay the sum N\$ 1 400 000.00 which it records the first defendant had received. It appears, however

that the only sum disbursed was the sum of N\$ 700 000.00, and in that respect the document does not accurately reflect the true position.

[5] The first defendant, despite an admission that she had signed the document nevertheless seeks to resile from it on two grounds viz –

- a. The document is not stamped in accordance with the provisions of Section 12 of the Stamp Duties Act, Act 77 of 1968 as amended. The submission lacks any resemblance of merit. The relevant case law is clear to the effect that an unstamped document can be stamped retrospectively and even after judgment on or appeal. (The South African Law of Evidence at p.802), Equally unmeritorious is the further submission that only the first defendant can have the document stamped.
- b. The first defendant contends that the sum in dispute was advanced by the second plaintiff to the second defendant, and further that she has assumed liability for the repayment due to undue influence induced by threats and harassment brought to bear upon her by the first plaintiff and his lawyers. The allegations are pertinently mentioned in her affidavit, although somewhat economically as far as the full details thereof are concerned.

[6] The first defendant seeks to bolster the veracity of the allegations with reference to the fact that the first defendant did not dispute the allegation in a replying affidavit. The fact that the filing of a replying affidavit is not permissible seemingly escaped the first defendant and those advising her.

[7] The power to grant or refuse an application for summary judgement is a discretionary power not to be influenced by which side of the bed I got up from this morning or what my personal and subjective view is of the merits or demerits of the defence raised. It is judicial discretion to be exercised objectively in accordance with the

principles properly formulated by Masuku J in *First National Bank Limited versus Andries Louw*¹

[8] Summary judgement is an extraordinary remedy to be granted only where there is no doubt that the plaintiff's case is unanswerable or to put it conversely the defendant demonstrably raises no possible sustainable defence were the matter to proceed to trial, or to put it bluntly the case is hopeless.

[9] The manner in which the defence is raised in the opposing papers leaves something to be desired and may well be criticised. A bit more detail may have been of some assistance. It is on the other hand not lacking to the extent that I should entirely ignore it or dismiss out of hand.

[10] I am inclined after all is said and done to conclude that some defence is raised, which may well be sustainable. Whether or not it will ultimately be an issue I need not dwell on or determine at this stage.

[12] As a consequence the following orders will issue:

1. The application is dismissed.
2. The first defendant is granted leave to defend.
3. The costs of the application will stand over.
4. A case management conference will be held on 14 August 2017 at 14h00.

¹ 1146/2014[2015]NAHCMD

K Miller
Acting Judge

APPEARANCES

APPLICANT: Ms Schimming-Chase
Instructed by Du Toit Associates

RESPONDENTS: Mr Amoomo
Of Kadhila Amoomo Legal Practitioners