

HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3979/2012

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LTD

PLAINTIFF

and

ALLIED INVESTMENTS CC

1ST DEFENDANT

HAROLD ARTHUR VON LUTTICHAU

2ND DEFENDANT

Neutral citation: *First National Bank of Namibia Ltd v Allied Investments CC* (I 3979/2012) [2013] NAHCMD 204 (19 July 2013)

Coram: MILLER AJ

Heard: 18 June 2013

Delivered: 19 July 2013

Summary: Summary judgment – Defendants raising defence of waiver – Requirements to establish the defence discussed.

Held that the facts relied upon to sustain the defence of waiver not established – Summary judgment granted.

ORDER

In case I 3979/2012 I grant judgment against the defendants jointly and severally in terms of prayers 1, 2, 3 and 4 of the application for summary judgment. In case I 3980/2012 I grant judgment against the defendants jointly and severally in terms of prayers 1, 2, 3 and 4 of the application for summary judgment.

JUDGMENT

MILLER AJ :

[1] The plaintiff instituted two actions against the defendants under case numbers I 3979/2012 and I 3980/2012 respectively. Both actions are based upon suspensive sales agreements concluded between the plaintiff and the first defendant. As far as the second defendant is concerned, the actions against him are based on written deeds of suretyship in terms of which the second defendant bound himself as surety and co-principal debtor for the first defendant's debts and obligations arising from the suspensive sale agreements.

[2] In case I 3979/2012 the plaintiff seeks the following orders:

1. An order confirming the cancellation of the agreement so concluded between the parties.
2.
 - 2.1 An order directing the defendant to immediately restore the 2009 MERCEDES BENZ to the plaintiff's possession, failing which the deputy sheriff is hereby authorized to take possession of and deliver the vehicle described herein to the plaintiff wherever it may be found.
 - 2.2 An order declaring the amounts paid by the defendant in terms of the agreement to be forfeited in favour of the plaintiff.
 - 2.3 Leave to apply for judgment at a later stage on the same papers duly amplified for damages if any, in an amount to be calculated by subtracting the current market value of the vehicle of the sale price of same as well as a rebate on unearned finance charges from the balance outstanding.

2.4 Interest on the said damages at the current prime rate plus 10% per annum as contemplated in clause 6.4 of the agreement.

3. Alternatively to prayer 2 above, and in the event of the 2009 MERCEDES BENZ not being found;

3.1 Payment in the sum of N\$217, 340.29.

3.2 Interest on the aforesaid amount at a current prime interest rate plus 10% per annum as contemplated in clause 6.4 of the agreement.

4. Costs of suit as between counsel and own client.

5. Further and/or alternative relief.'

[3] Likewise in case I 3980/2012 the plaintiff seeks the following orders:

1. An order confirming the cancellation of the agreement so concluded between the parties.

2.

2.1 An order directing the defendant to immediately restore the 2008 MERCEDES BENZ to the plaintiff's possession, failing which the deputy sheriff is hereby authorized to take possession of and deliver the vehicle described herein to the plaintiff wherever it may be found.

2.2 An order declaring the amounts paid by the defendant in terms of the agreement to be forfeited in favour of the plaintiff.

2.3 Leave to apply for judgment at a later stage on the same papers duly amplified for damages if any, in an amount to be calculated by subtracting the current market value of the vehicle of the sale price of same as well as a rebate on unearned finance charges from the balance outstanding.

2.4 Interest on the said damages at the current prime rate plus 10% per annum as contemplated in clause 6.4 of the agreement.

3. Alternatively to prayer 2 above, and in the event of the 2008 MERCEDES BENZ not being found:

3.1 Payment in the sum of N\$52 972.04.

3.2 Interest on the aforesaid amount at the current prime interest rate plus 10% per annum as contemplated in clause 6.4 of the agreement.

4. Costs of suit as between counsel and own client.

5. Further and/or alternative relief.'

[4] The defendants entered an appearance to defend the actions whereupon the plaintiff applied for summary judgment which became opposed.

[5] The separate actions were consolidated under case I 3979/2012 by me on 21 May 2013 and pursuant to an agreement reached between the parties the applications for summary judgment were heard by me on 18 June 2013.

[6] It is apparent from the affidavit filed in opposition to the application for summary judgment, which was deposed to by the second defendant that the defendants seek to rely on the provisions of the Credit Agreements Act, Act 75 of 1980 (the Act).

[7] The defendants allege that the agreements relied upon are subject to the provisions of the Act. With reference to section 11 of the Act, the defendants say that the plaintiff was obliged to give written notice to the first defendant to pay the arrears within 30 days from the notice. I should add at this juncture that in each instance, the plaintiff did on 22 August 2012 address a written notice to the second defendant, purportedly in terms of section 11 of the Act. The point taken by the defendants are that the notice should have been addressed to the first defendants instead. Thus, so the reasoning continued, the plaintiff's failure to address the requisite notice to the first defendant, has as its result that the cancellation of the agreements was premature and not valid.

[8] During the course of the hearing before me on 18 June 2013, Mr. Mouton, who appeared for the defendants correctly conceded that the provisions of the Act do not find application to the agreements in question. That is so because by virtue of Proclamation AG 67 of 1981 it was determined that the Act shall only apply to credit agreements in relation to a cost price of not more than N\$100 000.00.

[9] It is common cause that the agreements in the instant case stipulate a cash price in excess of N\$100 000.00

[10] It therefore follows that the defence relied upon in the opposing affidavit is not sustainable in law.

[11] Instead Mr. Mouton argued that the letters addressed to the second defendant on 22 August 2012 constitute a waiver on the part of the plaintiff to summarily cancel the agreements and requires in each case that the plaintiff became obliged to give notice prior to cancellation. Although this line of defence was not pertinently raised in the opposing affidavit, I will nonetheless proceed to consider the point. Since the letter form the cornerstone of the argument I quote it in full:

'Mr. Harold von Luttichau

P.O. Box 31805

Windhoek

Namibia

Dear Sir/Madam

Account Number :WFB68705J
Amount in arrears :N\$39 881.79
Next instalment :N\$13 222.33
Next instalment date :15/09/2012

In view of your failure, to effect payment of the installments, as set out in your agreement, we hereby call on you in terms of Section 11 of the Credit Agreements Act 75/1980 to remit the arrears within 30 days of the posting of this letter to prevent additional interest being debited to your account. It will be appreciated if you could send us a cheque for the above-mentioned amount.

If you should fail to pay according to this demand, we will consider the agreement cancelled and refer the matter to our Attorneys to institute legal action against you for:

1. Return of goods;
2. Damages and
3. Legal costs

If you have, however in the meantime forwarded payment to us, then please advise us urgently thereof, supplying details.

Yours faithfully

M TITUS (061-2997777)

CUSTOMER ACCOUNTS DEPARTMENT'

[12] It is apparent from the letter dated 22 August 2012, that the plaintiff, incorrectly so it turned out, considered that the Act was applicable. As a consequence and in response to the letter the defendant alleges that the amounts in arrear at that stage were paid on the 4th and 5th of September 2012 respectively.

[13] On their own admission and as at 31 October 2012 the first defendant was once more in breach of the agreement inasmuch as an amount of N\$13 300.34 was not paid on due date.

[14] In respect of that amount, a payment of N\$13 222.33 was paid only on 30 November 2012.

[15] The argument now advanced is that the plaintiff was obliged to once more give notice to demand payment of the amount which became due for payment on 31 October 2012, as a pre-requisite to cancellation of the agreement.

[16] In essence what the argument bails down to is that the letter dated 22 August 2012 constitutes a waiver on the part of the plaintiff of its rights flowing from clause 9 of the agreements to cancel the agreement, without notice in the event that any amount due is not paid on the due date for payment.

[17] In **Standard Bank of Namibia Ltd v Veldsman** 1993 NR 391 HC, Muller AJ (as he than was) stated the following at page 392 A to E:

'Rule 32(3)(b) of the Rules of this Court requires a respondent to "disclose fully the nature and grounds of the defence and material facts relied upon therefor." This means a sufficiently full disclosure of the material facts to persuade the Court hearing the application for summary judgment that, if the respondent's allegations are proved at a trial, it will constitute a defence to the plaintiff's/applicant's claim. See **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) at 228D-E. A reasonable possibility that the defence advanced may succeed on trial will suffice. See **Shepstone v Shepstone** 1974 (2) SA 462 (N) at 467 A-B. Summary judgment is a very stringent and final remedy which closes the doors of the Court for a defendant and should only be granted if it is clear that the plaintiff has an unanswerable case. It has often been stated by our and the South African Courts that, even if the defence

of the defendant does not sufficiently comply with the requirements of Rule 32 (3), the Court still has a discretion to refuse summary judgment. See ***Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd*** 1959 (3) SA 362 (W) at 366; ***Mahomed Essop (Pty) Ltd v Sekhukhulu & Son*** 1967 (3) SA 728 (D) at 732; ***Globe Engineering Works Ltd v Ornelas Fishing Co (Pty) Ltd*** 1983 (2) SA 95 (C) at 103G-H; ***Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd*** 1978 (3) SA 807 (C) at 811 C-G.’

[18] I will follow that approach even though there is some authority to the effect that the requirement of an unanswerable case is not always required.

See for instance ***Diesel Power Plant Hire CC v Master Diggers (Pty) Ltd*** 1992 (2) SA 295 (W).

[19] In order for the defence of waiver to succeed the defendants bear the onus to establish that there was decision taken by the plaintiff to abandon the right it now seeks to assert against the defendants with full knowledge of the right it abandoned.

Road Accident Fund v Muthupi 2000 (4) SA 38 SCA;

Nellon Ltd v Pacnet 1977 (3) SA 840 (A).

[20] It does not appear to me that the letter dated 22 August 2012 upon which the defendants now rely measures up to any of these requirements. The letter does not in express terms convey a decision to waive the right to cancel the agreement without notice. Nor was the letter prompted by a decision on the part of the plaintiff to abandon that right. Clearly the letter was prompted by a mistaken belief on the part of the author thereof that the plaintiff was obliged to do so by virtue of the provisions of the Act. I have no doubt that but for this mistaken belief the letter would not have been written.

[21] At best for the defendants the letter afforded the defendants an indulgence to pay the arrear amounts then due. It goes no further than that and cannot be

construed as a waiver of the right at any stage thereafter to cancel the agreement without notice should further breaches occur.

[22] The defendant no doubt will be aware also of the provisions of Clause 10 of the agreements which reads as follows:

'10 Indulgence

Should FNB not have insisted that you follow any of the terms and conditions strictly at any previous stage you may not assume that the terms and conditions have been altered. These terms and conditions will still apply.'

[23] It would have been plain for the defendants that an indulgence at some stage will not amount to a waiver.

[24] As a consequence and the exercise of my discretion I will grant summary judgment.

[25] I make the following orders:

- 1) In case I 3979/2012 I grant judgment against the defendants jointly and severally in terms of prayers 1, 2, 3 and 4 of the application for summary judgment.
- 2) In case I 3980/2012 I grant judgment against the defendants jointly and severally in terms of prayers 1, 2, 3 and 4 of the application for summary judgment.

P J MILLER
Judge

APPEARANCES

PLAINTIFF: A STRYDOM
 Instructed by Susanne P. Prins Attorney & Legal Practitioners

DEFENDANTS: C MOUTON
 Instructed by Andreas Vaatz & Partners

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