IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 2738/2010
Date heard: 03 June 2011
Date delivered: 07 June 2011

In the matter between:

HERMANUS ARNOLDUS VAN NIEKERK N.O.	First Applicant
MARTHINNIS JAKOBUS MöLLER N.O.	Second Applicant
LIZELLE MöLLER N.O.	Third Applicant
MARTHINNIS JAKOBUS MöLLER	Fourth Applicant
LIZELLE MöLLER	Fifth Applicant
and	
FIRSTRAND BANK LIMITED	Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

DAMBUZA, J:

1]This application is based on two grounds; the first one being that I erred in finding that "*the agent* (Alida Nel) *was not employed by the plaintiff*" and further that I erred in finding that the respondent had no duty of care towards the applicant when considering the loan application which is the subject of these proceedings.

2]Regarding the first ground, as it was submitted by *Mr Scott* who appeared on behalf of the respondent the applicants' understanding of my finding is incorrect. What I found was that it was common cause that Nel was an employee of the developer from which the applicant bought immovable property. I also found that there was "*no valid basis advanced for the allegation that Nel's representations were made on behalf of the plaintiff*".[1] Even in this application the applicant does not refer to any portion of the record which might be found by another court to support the contention that Nel represented the respondent in making the alleged representations. In the judgment I also found that even if the representations were made, they do not constitute a defence valid in law. This finding is not contested and therefore even the very remote probability that another court could reach a conclusion different from mine does not take the applicants' case far; in the end, no *bona fide* defence has been raised. Contrary to the submission by *Mr Moorhouse* in this application it was not sufficient for the applicants to merely "*make allegations*" in opposing the application for summary judgement, the allegations had to constitute a *bona fide* defence.

3]Regarding the second leg of the application *Mr Moorhouse* submitted that although the National Credit Act (Act 34 of 2005) is not applicable to the transaction which is the basis of these proceedings, the applicants should be afforded protection similar to that which is provided to consumers under that legislation. This is in support of the contention that the respondent owed the applicants a duty of care in considering their loan application. Firstly, in the main proceedings this submission was not advanced on the basis of the National Credit Act. In any event, viewed against the specific terms and conditions of the transaction in question I remain unpersuaded that another

1 Paragraph 5 line 4 of judgment.

court might reach the conclusion contended for by the applicants. In the opposition to the application for summary judgment this contention was founded on the fact that the developer was, at some stage, liquidated and that various investigations of the development scheme were being conducted. I remain unpersuaded that another court could reasonably find that such allegations support a contention that the respondent had an alleged duty of care towards the applicants and that it failed to discharge that duty.

4]In the result:

The application for leave to appeal is dismissed with costs.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicants: Adv A.C. Moorhouse instructed by Jacques Du Preez Attorneys of Port Elizabeth

For the respondent: Adv P.W.A. Scott SC instructed by Spilkins Attorneys of Port Elizabeth