REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT JOHANNESBURG)

CASE NO: 10061/2010

DATE: 22/09/2010

In the matter between:

S M FRASER TRADING AS SALKAENTERPRISES **Plaintiff**

and

COUNTER POINT FURNISHERS CC **Defendant**

JUDGEMENT

Mokgoatlheng J

(1) The plaintiff has instituted an action for provisionalsentence in the sum of R215 087.00 together with interest thereon at the rate of 11% per annum as from 9 November 2009 to date of payment. The action which is opposed, is predicated on a written deed of sale in terms whereof the plaintiff sold immovable property to the

defendant for the purchase price of R8 500 000.00. The defendant has in terms of the deed of sale paid a deposit of R2400 000.00 in respect

of the purchase price.

(2) In terms of Clause 4.1 of the deed of sale the defendant was obliged to furnish a bank or approved guarantee within 30 days to secure payment of the balance of R6 100 000.00.The defendant defaulted, was notified of such default, and only remedied same on the 3 September 2009. Consequently, defendant was liable to pay interest for the period of such default to the plaintiff pursuant the prescriptions of Clause 17.1.

THE DEFENDANT'S SUBMISSIONS

(3) The defendant's opposition to the action is textual and is predicated on the contention that the document the plaintiff relies on for provisional sentence is not a liquid one in that, Clause 17.1 does not encapsulate an unconditional acknowledgement of indebtedness for an ascertained amount.

(4) The defendant contends that the claim relies upon extrinsic evidence to supplement it in respect of:

(*a*) *the bank whose interest rate is used and the interest rate at which the amount is calculated;*

(b) the alleged date from which the defendant was in default and when notification of such default was given; and

(c) the date when the amount became due to the plaintiff and the alleged date when the default was rectified

(5) The defendant contends further that, its liability in terms of the deed of sale is conditional upon the finding that it was the cause for the delay in the registration of the transfer, is not a simple act, event or condition which is capable of proof by affidavit evidence.

(6) The impugned Clause 17.1 provides: *"Should any party to this contract cause any delay in the registration of the transfer he/she shall from the day of the notification of his/ her default, pay to the aggrieved party interest calculated on the purchase price at the rate charged by any financial institution on first home loan mortgages, until the date on which the defaulting party ceases to be in default."*

(7) The defendant's further contention is that, the deed of sale relied upon by the Plaintiff creates different and separate obligations for the Plaintiff and the Defendant in that the latter's obligation to pay the purchase price is separate and distinguishable from its potential liability created in Clause 17.1.

(8) The defendant argues that its obligations in respect of the purchase price, may be an unconditional undertaking to pay an ascertained amount of money in consideration of a promise made by the plaintiff to transfer the property, and may on a proper construction arise from the deed of sale which is capable of sustaining an action

for provisional sentence, this however, submits the defendant, does not render the potential liability created in Clause 17.1, such an unconditional undertaking to pay an ascertained amount of money, because the Plaintiff is not claiming the purchase price, but is claiming compensation in the form of interest for the alleged delay in the transfer of the property.

(9) The defendant submits that Clause 17.1 evidences a potential liability dependent upon the delay in the transfer caused by the breach of the party who is in default, consequently, the existence of the indebtedness is accordingly conditional upon thehappening of a future event, i.e. breach by the defendant.

(10) Clause 17.1 argues the defendant does not contain any unconditional undertaking to pay an ascertained amount of money, all that is does is, it creates a potential liability for either the Plaintiff or the Defendant, in the event of the delay of the transfer caused by the breach of the terms of Clause 17.1 by either of them.

(11) The defendant's further submission is, the fact that it has not dealt with the merits or any of the allegations in the particulars of claim, does not render the deed of sale to become a liquid document capable of sustaining acause of action. The plaintiff still has an obligation to discharge the onus resting on it to satisfy the requirements governing the granting of provisional sentence irrespective of the document relied upon and regardless of how the defendant reacts to such document.

(12) Distilled, the gravamen of the defendant's opposition is that the plaintiff's claim is not founded on a liquid document, further Clause 17.1 does not encapsulate an unconditional acknowledgement of indebtedness in an ascertained amount of money, because extrinsic evidence has to be relied upon to determine the defendant's liability.

The applicable legal principles

(13) Before dealing with these submissions, it is opposite to set out the legal principles relevant to an action of this nature As enunciated by *NESTADT, A.J in WESTERN BANK v PRETORIUOS 1976 (2) SA 481 (T):*

1. "*The principles upon which provisional sentence is granted are well-settled and clear. The difficulty really lies in their application to particular documents which involves a construction of such documents* (*Inter-Union Finance Ltd. v Franskraalstrand (Edms.) Bpk and Others, 1965(4) S.A. 180(W) at p. 181).*

2. As a general rule, provisional sentence is only granted on a liquid document (the Inter-Union Finance Ltd. case, supra at p.181: Rich v Lagerwey, supra).

3. A liquid document is one which on a proper construction thereof evidences by its terms and without resort to evidence extrinsic theret:

(a) an acknowledgment of indebtedness;

(b) in an ascertained amount of money;

(c) the payment of which is due to the creditor

(the Inter-Union Finance Ltd case supra at p. 181: Rich v. Lagerwey, supra at p. 754)

In specifying these three essentials of a liquid document I am not overlooking the requirement that the acknowledgement of indebtedness should be unconditional (Rich v. Lagerwey, supra at p. 754). It seems to me however that this can conveniently be grouped under para 3(c). If the acknowledgement of indebtedness is conditional, then payment would not be due to the creditor (unless by means of extrinsic evidence the condition was shown to have been fulfilled).

4. *Equivalent to an acknowledgment of indebtedness is an undertaking to pay. Many decisions use these expressions interchangeably (Union Share Agency & Investment Ltd v Spain, 1928 a.d. 74 AT P. 79; Inglestone v. Perreira, S.L.D. 55 at o. 65). However, a simple acknowledgment of indebtedness without a specific undertaking to pay is sufficient to sustain a claim for provisional sentence (and this notwithstanding that the causa debiti is not cited therein) (Barclays Bank v McCall, 1927 T.P.D. 512).*

5. *In regard to the other two requirements of a liquid document certain modifications have, over the years, become sanctioned by the Courts (Rich v. Lagerwey, supra at pp. 754 and 756).As regards the requirement that the acknowledgment of debt relates to an ascertained amount of money:*

(a) *where no sum is mentioned in the document, provisional sentence will not be granted.(Abrahams v. Campbell Bros., Carter & Co. Ltd., 1937 T.P.D. 269;*

Standard Bank of South Africa Ltd. v. Spedding,

1975(3) S.A. 510 (W))…"

(14) The Learned Judge after exploring various forms of documents encapsulating the concept of liquidity and such documents being the subject of provisional sentence applications in various cases concluded thus:

"I conclude, therefore, more particularly on the basis of Rich v. Lagerwey, supra, that:

(b) the basic principles of provisional sentence have so

been extended and modified that provisional sentence may be granted on a covering mortgage bond which contains an acknowledgment of indebtedness not in specific sum, but merely up to a maximum amount (and which is therefore not a liquid document), provided that a certificate specifying what the actual amount of indebtedness is and that it is due and payable is provided for in the bond and is alleged in and attached to the summons.

7. As regards the requirement that it appears from the document that payment of the indebtedness is due to the creditor:

(a) Where the document does not provide for the performance of any obligations by the plaintiff or the fulfillment of any conditions or problems concerning the existence of such requirement usually arise.

(b) (i) Where the document provides for the

performance of obligations by the Plaintiff (such

as in cases of agreements of sale and lease) but payment by the defendant and such performance are not reciprocal (the defendant having to first pay) then provisional sentence is competent;

Performance by the plaintiff need presumably neither be alleged nor tendered; non-performance by the plaintiff would be a matter of defence to be raised by the debtor (Inglestone v. Pereira, supra at pp. 64-5; the Inter-Union Finance Ltd.caseupra at p.183; Onay and Another v.Schmulian and Others, 1971(1) S.A. 626 (W); cf., however, Anastassiades v. Daniel, 1947(1) S.A. 298 (W).

(ii)Whether a particular document bears the meaning set out in sub-para. (i) or is to be interpreted as containing reciprocal obligations is a matter of construction. In this regard it is not the type of transaction which determines whether the related document signed by the debtor is one upon which provisional sentence may properly be granted. (Rich v. Lagerwey,supra).

(iii) A further example of the type of case referred to in sub-para. (i) (thus attracting the application of the same principles) is a bond in which the quid pro quo for the acknowledgment of debt (or undertaking to pay) only has to take place in the future. Here the assumption of the obligation creates an

indebtedness which is not put in abeyance by reason of the fact that payment by the creditor is to be made at a later date (National Bank of South Africa v. Seidel & Levy, 1907 T.H. 132; Abrahams' case, supra at p. 275-276; Inglestone v. Pereira, supra at p. 65; the Inter-Union Finance Ltd. case, supra at p. 182; the Bro-Trust Finance (Pty) Ltd. case supra at p. 525; Rich v. Lagerwey, supra).

(c) Where on a proper construction the document provides for the reciprocal performance of obligations by the plaintiff and the defendant or the fulfillment of a condition as a prerequisite to the plaintiff claiming payment by debtor, then the following is the position:

(i) Where the defendant's indebtedness (as distinct from the mere obligation to pay) is dependent upon the performance of an obligation by the plaintiff or the fulfillment of a condition, the document is not liquid and provisional sentence will not be granted thereon (even if performance or the fulfillment of the conditions alleged or tendered, as the case may be)

(*Inglestone v. Pereira, supra* at p. 62 and 65; the *Inter-Union Finance Ltd.* case, supra at p. 181; *Rich v. Lagerwey, supra).*

(iv) *Where (merely) the defendant's obligation to effect payment is dependent on the performance by the plaintiff of some "simple" act (e.g. the delivery or transfer of scrip) or the fulfillment of some "simple" conditions (e.g. a giving of a notice before payment by the debtor is due) then (this constituting a departure from strict principle, justified by long-standing practice) it suffices for the plaintiff to allege in the summons that the act has been performed or the condition has been fulfilled. Due weight must however be given to the adjective or qualification "simple". It connotes a condition or event of a kind unlikely, in the nature of things, to give rise to a dispute or, where it is disputed, is inherently capable of speedy proof by means of affidavit evidence. If the condition or event is not a "simple" one then provisional sentence is not competent. (Pepler v. Hirschberg, supra; Spain's case, supra; Rich v Lagerwey, supra at pp. 755 and 761).*

8. In all those cases where extrinsic evidence is permitted, namely to prove the occurrence or fulfillment of a simple event or condition (referred to in para. (7)©(iv) hereof) or, by means of a certificate, the extent of the defendant's indebtedness and the fact that payment is due (referred to in para (7)(c)(ii) hereof), the onus of proof rests on the plaintiff. If the relevant allegations made by the plaintiff in the summons are put in issue then, in so far as the Court has to rely on affidavit evidence only, it stands to reason that it will ordinarily hesitate to

find that a plaintiff has discharged such onus unless, in its opinion, the evidence is of such cogency as to persuade the Court that oral evidence, tested by cross-examination and given in circumstances affording the Court the opportunity of observing the demeanor of witnesses, is unlikely to affect such probabilities as might appear from a consideration of the affidavit evidence alone. Any other approach could result in gave prejudice to defendant and might disable him from proceeding to trial in the principal case (Right v. Lagerwey, supra at pp. 759-760) …"

(15) In **WOLLACH v BARCLAYS NATIONAL BANK LTD 1983(2) SA 543(A)** it was held: "*A distinction, however, was drawn between the indebtedness itself and payment of that indebtedness. Provided the indebtedness was clear and certain payment was dependent upon the fulfillment of a simple condition, provisional sentence could be granted...* "*The indebtedness itself could not be uncertain or unspecified. Without an acknowledgment of indebtedness in a specific amount, the document was not considered a liquid one."(the authoritics cited are excluded)*

(16) In **RICH AND OTHERS v. LAGERWEY (supra)** it was held:

"I think we may extract the principle that, where the acknowledgment of indebtedness is sufficiently clear but certain, and payment depends on some simple condition or event it is sufficient for the plaintiff to allege that the condition has been complied with or the event has happened, and that then the onus lies on the defendant to show that what was intended by a document sued on to be a condition precedent to entitled the plaintiff

to succeed, has not been complied with. If the defendant is unsuccessful in establishing that, then provisional sentence will be granted against him.

There is also reference to payment becoming due by reason of the failure of the debtor to carry out a term of the contract, e.g. a failure to pay interest on the due date. In such cases it was considered that a plaintiff could aver in the summons that the "simple" condition or event has been fulfilled or taken place, as the case may be. This undoubtedly constituted a departure from strict principle, which required that both the nature and extent of the indebtedness as well as the fact that payment thereof was due, must clearly appear ex facie the document itself. This departure from strict principle was, no doubt, justified by longstanding practice. In my opinion, however, due weight must be given to the adjectival qualification "simple". In the context, it seems to connote a condition or event of a kind unlikely, in the nature of things, to give rise to a dispute, or, where it is disputed, is inherently capable of speedy proof be means of affidavit evidence.

(17) ***Herbstein and Van Winsen*** **in The Civil Practice of the Superior Courts in South Africa** at 551 states as follows:

"*Where the plaintiff sues on a liquid document then, in so far as the merits of the action are concerned, the court will ordinarily grant provisional sentence unless the defendant produces such counterproof as would satisfy the court that the probability of success in the principal case is against the plaintiff …*"

"Moreover (apart from defences which arise ex facie the instrument), the question of probability must be based upon facts raised in the affidavits …

In other words, you do not look at the affidavits in deciding whether the document is liquid. Once you have decided, ex facie the document, that it is liquid, it is for the defendant to show from the affidavits that the probability of success in the principal case is against the plaintiff."

(18) It is trite that *"there is a distinction between indebtedness subject to a condition, and an unconditional indebtedness, the payment thereof, being so subject.*"See ***Pepler v Herschberg 1920 CPD 438, Union Share Agency and Investment Ltd v Spain*** *1928 AD 74 of 80,* ***Ingleston v Pereira 1939 WLD 55.***

The Analysis of Evidence

(19) Applying the above legal principles, in my views the deed of sale is a liquid document, which an encapsulates an unconditional indebtedness and an ascertained liability namely the purchase price; which notion, includes the balance thereof.

(20) Mr Steyn by his submission that Clause 17.1 does not contain any unconditional undertaking to pay an ascertained amount of money misconstrues the import of the deed of sale and consequently, Clause 17.1 because when

the deed of sale is duly interpreted in its totality, (Clause 17.1 alludes to a purchase price, which is an ascertained amount, further it alludes to the payment of interest calculated on the purchase price at the rate charged by any financial institution on the first home loan, from the day of notice until the defaulting partly ceased to be in default.)

(21) I agree with ***Howitz A J in Joosub v Edelson*** 1998(3) SA 534(W) that *the simplicity or complexity of a condition cannot render unconditional an otherwise conditional debt… that the simplicity or complexity of a condition such as the one in issue cannot render unconditional an otherwise conditional debt. The enquiry, when provisional sentence is sought, is a two-fold one: one must first determine whether the debt in question falls within the parameters set in cases such as* ***Union Share Agency & Investment Ltd v Spain (supra*****) and** ***Inglestone v Pereira*** **(*supra*)**. *If it does, one then examines the condition to ascertain whether it qualifies as a simple condition. If it is, then one can merely allege in the summons and, if necessary prove, fulfillment thereof. If the claim fails the first test, however, one does not proceed to the second phase of the enquiry."*

(22) Undoubtedly, the indebtedness in Clause 17.1 falls within the purview the above quoted cases and also ***Rich and Others v Lagerway*** *(supra)* ***Wollach v Barclays National Bank Ltd*** *1983 (2) SA 543(A).*

(23) The conditions set in Clause 17.1 certainly qualify as simple events, being namely,

(a) the defendant's default in timeously furnishing a bank or approved guarantee to facilitate transfer of the immovable property to the plaintiff; and

(b) a set ascertainable arithmatic calculation to determine the amount of interest due and payable based on the purchase price, (or an ascertained balance of the purchase price) until the date on which the defaulting party ceases to be in default.

(24) In my view, the indebtedness is set out with sufficient clarity and certainty, and is in conformity with the strict principle requiring that: "*both the nature and extent of the indebtedness as well as the fact that payment thereof was due, should clearly appear from the document itself*."

(25) "Ex facie Clause 17.1, it is patent that because the guarantee has not been furnished, the purchase price has not been secured, and is consequently, due and payable. Because the defendant has defaulted in timeously furnishing the guarantee, interest based on the purchase price (or the balance thereof) payable on default, accrues and it's a due, payable ascertained indebtedness.

(26) The obligation to pay the purchase price, and in particular the balance thereof after the deposit has been deducted, is an unconditional acknowledgement of liability to pay an ascertained indebtedness in an amount of money.

(27) The obligation to pay the indebtedness that is, the capital and the interest due, arises on the happening of a simple event, which is the failure to furnish the guarantee. This is on the cited authorities is a simple event or condition which may be proved by extrinsic affidavit evidence.

(28) Mr Morrison on plaintiff's behalf is correct in his submission that since the defendant's opposition is based on a technical point and the defendant has elected not to oppose the action on the merits, consequently, because the allegations in the summons are undisputed; the plaintiff has discharged its onus.

(29) In the premises the provisional sentence is granted against the defendant in the:-

(a) in the sum of R215 087.00 plus 11% interest as from 9 November 2009 to date of payment, and

(b) the defendant is ordered to pay the plaintiff's costs of the suite.

Date Signed: 22 September 2010 at Johannesburg

Judge R Mokgoatlheng

Judge of the High Court of South Africa

Date of Trial: 17 May 2010

Date Judgment Delivered: 22 September 2010

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