

REPUBLIC OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26955/14

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

ROBIN TENDAI VELA

PLAINTIFF

and

RAINBOW SHUTTLE SERVICES CC

1ST DEFENDANT

ELTON CHITONDO

2ND DEFENDANT

J U D G M E N T

TWALA AJ:

- [1] The plaintiff sues the first and second defendants for payment of the sum of R540 000 together with interest thereon at 12% per month *a tempore morae*, in terms of the acknowledgment of debt signed between the parties on the 5 March 2014. The total sum of the acknowledgement of debt is R680 000 of which R140 000 has been paid.
- [2] The defendants filed their opposing papers, disputing that the amount alleged to be due and payable is a sum of R540 000. Defendants contend that they have already paid a sum of R320 000 towards liquidating the debt.
- [3] It is common cause that the defendants borrowed a sum of R500 000 from the plaintiff at an agreed interest rate of R60 000 per month. The total sum owing was payable over 3 months as follows:
- 3.1 7 April 2014 – R60 000
 - 3.2 7 May 2014 – R60 000
 - 3.3 7 June 2014 – R560 000
- The defendants signed an acknowledgment of debt and undertook to pay the plaintiff the total sum of R680 000 within 3 months, as stated above.
- [4] The defendants experienced problems and failed to adhere to the agreed payment schedule. The defendants contend that the plaintiff has charged them an oppressive interest at the rate of 12% per month. The total amount they have paid to date is the sum of R320 000 and therefore the balance outstanding is not the sum of R540 000 as claimed.
- [5] In its replying affidavit, the plaintiff admitted that he has in fact been paid a sum of R320 000 by the defendants. However, he contends that the calculation of the defendants' indebtedness in the provisional

sentence summons is incorrect. The correct outstanding amount is the sum of R673 875-41. The calculation of this amount appears on a schedule attached to the plaintiff's replying affidavit. The difference between the sum R540 000 initially claimed and the sum of R673 875-41 is made up of interest.

- [6] The defendants brought an application for leave to supplement its papers with a supplementary affidavit. The reason therefor is that plaintiff has raised a new matter in its replying affidavit. The Plaintiff now claims a sum of R673 871-41 plus interest of R60 000-00 per month until date of payment in full. Defendants further contend that it is not correct that they approached the plaintiff for the loan because they had failed to secure funding from financial institutions since they were technically insolvent and were looking for rescue funds.
- [7] The plaintiff opposed this application. Plaintiff argued that provisional sentence proceedings allowed only two sets of affidavits. It contended that there is no new matter raised in its replying affidavit. It is merely a calculation of interest as was agreed upon in terms of the acknowledgment of debt. Only when special and exceptional circumstances exist should the court allow further exchange of affidavits.
- [8] Leave to supplement the defendants' papers was granted by the court since it was not shown that plaintiff will suffer any prejudice thereby. It is in the interest of justice and fairness for the court to give parties an adequate opportunity of putting their case before the court. The defendants would not have anticipated that the plaintiff would adopt a different approach in its calculation of the amount outstanding in its replying affidavit.
- [9] At this stage it is apposite to note that the defendants argued that the plaintiff's claim is based on a liquid document. Plaintiff has attached a copy of the liquid document to the provisional sentence summons. In

terms of the rules, plaintiff is supposed to provide the original liquid document at the trial of the matter. In this matter, plaintiff has not provided the original liquid document. The practice manual of this court requires that, the original liquid document upon which provincial sentence is sought, be handed to court when the plaintiff moves for provincial sentence.

[10] Plaintiff concedes that it does not have the original document. Plaintiff's counsel submitted that the original liquid document is in the possession of the defendants. Plaintiff's counsel argues further that the court can only refuse provincial sentence in this matter, if the court finds that the acknowledgement of debt is a promissory note as defined in Section 87 of the Bills of Exchange Act No: 34 of 1964. Plaintiff further concedes that the practice manual of this court does require the original liquid document, upon which provincial sentence is sought, to be handed to court when provisional sentence is sought.

[11] Section 68 of the Bills of Exchange Act 34 of 1964 provides as follows:

"In any action or proceeding a bill or note, other than a proceeding for provincial sentence, the court may order that the loss or non-production of the instrument shall not be set up by way of defence, provided an indemnity be given to satisfaction of the court against the claims of other persons upon the instrument in question".

The Practice Manual in Chapter 10.11 provides as follows:

1. *Proof of presentation of a negotiable instrument is unnecessary unless the presentation is disputed or the court required proof thereof.*
2. *The original liquid document upon which provisional sentence is sought must be handed to the court when plaintiff moves for provincial sentence.*

[12] Section 87 of the Act 34 of 1964 provides as follows:

“A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order or to bearer.”

[13] I am called upon to first determine whether the acknowledgment of debt signed by defendants does meet the requirement of Section 87 of Act 34 of 1964. In the acknowledgment of debt, the defendants undertook to pay to the plaintiff a sum of R680 000-00 no later than the 7th June 2014. In my view, the acknowledgement of debt signed by the defendants meet all the requirements of Section 87 of the Act. It is therefore a promissory note in terms of Act 34 of 1964.

[14] I am alive to the plaintiff's contention that this court has a discretion to condone the non-production of the original liquid document as required by the practice manual. However, plaintiff needs to take the court into its confidence to enable the court to exercise its discretion judicially and properly. Plaintiff has failed to place evidence before this court as to why it cannot hand up the original liquid document. Plaintiff knew at the time it instituted these proceedings that it did not have the original liquid document but failed to disclose this fact in its papers. Plaintiff has not tendered any explanation why it does not have the original liquid document. Counsel for the plaintiff could only say that her instructions are that the original liquid document is in the possession of the defendants. No explanation is tendered as to the reasons why it is in possession of the defendants and not the plaintiff as the person who needed the security for the debt. Therefore, this court has not been placed in a position to exercise its discretion properly and cannot therefore accede to the plaintiff's request.

[15] Both parties referred me to the matter of **SALOT VS NAIDOO 1981 (3) SA 959 (D)**. I agree with the defendants that the present matter is

distinguishable from the Salot matter on the basis that the acknowledgement of debt in the Salot matter does provide for a fixed date of payment.

[16] The plain interpretation of Section 68 of the Act is that it prohibits the court for granting provisional sentence if the original liquid document upon which provisional sentence is sought cannot be produced or is lost. In the circumstances, the plaintiff's claim on provisional sentence falls to be dismissed for non-production of the original liquid document upon which provisional sentence is sought.

[17] Having regard to the facts and circumstances of this matter, I make the following order:

1. Provisional sentence is dismissed.
2. Defendants are granted leave to defend and the normal rules of court shall apply.
3. Costs are reserved.

TWALA
ACTING JUDGE OF THE
HIGH COURT
JOHANNESBURG

DATE OF HEARING: 12 November 2014

DATE OF JUDGMENT: 03 December 2014

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