

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 13/345934

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

14 FEBRUARY 2014


FHD VAN OOSTEN

In the matter between

PLASTOMARK (PTY) LTD

PLAINTIFF

and

STEPHEN ASHLEY

FIRST DEFENDANT

GAVIN PETER WARMBACK

SECOND DEFENDANT

HADYN WARMBACK

THIRD DEFENDANT

Practice - Summary judgment - defendants sued as sureties and co-principal debtors for balance of debt of principal debtor in terms of acknowledgement of debt - defendants raising defence that additional payments were made by related entities pursuant to invoices delivered after the date of acknowledgement of debt - no relevance shown between those payments and indebtedness arising from acknowledgement of debt - no defence shown - court's residual discretion where sureties distant parties to accrual and computation of amount claimed - in absence of any possible defence plaintiff entitled to summary judgment.

J U D G M E N T

VAN OOSTEN J:

[1] This is an application for summary judgment. The plaintiff sues the defendants for payment of the sum of R7 113 817,32, interest thereon and costs, on the attorney and own client scale, in their capacities as sureties and co-principal debtors in

respect of the indebtedness of Gazelle Engineering (Pty) Ltd (the principal debtor) to the plaintiff pursuant to a written acknowledgement of debt in favour of the plaintiff, signed by the defendants, on 29 September 2010.


[2] The acknowledgement of debt as well as the fact that the principal debtor was finally liquidated in 2013, resulting in the total debt outstanding in terms of the acknowledgement of debt thereby becoming due owing and payable, are not in dispute. The defendants in essence dispute the amount claimed by the plaintiff to be payable on two grounds: firstly, that the plaintiff's own calculation of the amounts paid in terms of the acknowledgement of debt (as per annexure "POC3" to the summons) in reduction of the initial debt is incorrect and should be R13 131 121,34 and not R12 886 182,68 as therein reflected. The *error calculi* simply concerns the total amount stated in the annexure. Upon a re-calculation of the initial debt less the payments made in reduction thereof, the final amount claimed, as stated, remains as is and is correct.

[3] The second ground for resisting summary judgment consists of certain alleged additional payments that were made to the plaintiff by other entities. It is stated that the plaintiff and First Tech (having acquired the business of the principal debtor as envisaged in the acknowledgement of debt) through its division Gazelle Plastics (the trading name of two other entities, Serenade and Invest 19 (Pty) Ltd) continued to do business with the plaintiff subsequent to the liquidation of the principal debtor (First Tech) by the placing of orders through Gazelle Plastics "rather than through Gazelle Engineering". Various amounts derived from invoices rendered by the plaintiff to Gazelle Plastics, which are all dated subsequent to the date of the acknowledgement of debt, are then set out culminating in the astonishing contention by the defendants, based on the legal principle that the oldest debt must be allocated for payments first, that the plaintiff in fact was paid in excess of the amount now claimed in respect of the acknowledgement of debt. These payments, assuming the correctness thereof as alleged, have no relevance to the present action: all the payments referred to were made in respect of invoices delivered and therefore debts having arisen subsequent to and separate from the acknowledgement of debt on which the plaintiff's claim is based. The interplay of the various entities hatched on by the defendants merely further obfuscates the issue: the provisions of the

acknowledgment of debt are clear. The debt therein stated was due on 22 September 2010, and was to be paid by way of instalments into a designated bank account of the plaintiff. None of the payments now referred to by the defendants bear any relevance thereto. It follows that no defence has been shown to exist.

[4] In the exercise of my residual discretion I have considered the fact that the defendants, as sureties and not having been involved in the business of the principal debtor, are distant parties to the accrual and calculation of the amount now claimed by the plaintiff. The plaintiff however, has furnished sufficient particularity in its particulars of claim concerning the payments that were made in reduction of the debt pursuant to the acknowledgement of debt as well as the amount of the balance owing. There is nothing before me pointing to or even to suspect any errors to have been made. In the absence of any possible defence the plaintiff is entitled to summary judgment.

[5] In the result summary judgement is granted in terms of the draft order, marked "X".


 EHD VAN OOSTEN
 JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF

PLAINTIFF'S ATTORNEYS

COUNSEL FOR DEFENDANTS

DEFENDANTS' ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

ADV L HOLLANDER

PHILLIP SILVER & ASS INC

ADV J MOORCROFT

TANA VAN VUUREN & ASS

14 FEBRUARY 2014
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