

Summary: Hendriena Johanna Cooks v Matthys Johannes Nel

In this matter, the plaintiff brought an application for provisional sentence based on an acknowledgement of debt (AoD). The provisional sentence was refused on 11 October 2022. What follows is the summary of the reasons that informed the refusal.

By way of background, the plaintiff sold her property known as the Farmhouse to the defendant for R5 500 000.00. The parties agreed that the defendant would pay the plaintiff an amount of R1 000 000.00 as a deposit and obtain a home loan for the balance. The defendant was able to secure a loan of R4 500 000.00 but could not afford to pay the deposit as agreed between the parties.

The plaintiff then agreed to allow the defendant to pay the deposit amount over time. The plaintiff also sold several movables to the defendant for an amount of R1 000 000.00 which then meant that the defendant owed the plaintiff the amount of R2 000 000.00. The debt was reduced to writing in the form of an AoD which was duly signed by the Defendant on 27 August 2019.

The property was registered on 9 January 2020, and when the first instalment became due; the defendant failed to make the payment. The plaintiff sent him a letter of demand in which she demanded the full outstanding amount within five (5) days of receipt but the defendant failed to make the payment. Plaintiff then issued provisional sentence summons on 30 June 2020 for the total amount of R2 000 000.00 together with interest of 6,75% per annum.

The defendant claims that two conditions of the sale agreement were not met, one of which required the plaintiff to do some repairs to the property. On this basis he alleges that he has a counterclaim. He also alleges that he is unable to satisfy the judgment debt. The plaintiff denies that the AoD is conditional on the conditions being met in the sale agreement.

The Defendant also raised the possibility that the provisions of the National Credit Act (NCA) apply to the AoD. In his view he ought to have received a notice under section 129 of the NCA. However more importantly he points to the fact that because the AoD constitutes a credit agreement as contemplated in section 40 of the NCA, the plaintiff should have registered as a credit provider at the time the AoD was concluded unless the relationship between the parties was one that is not at arm's length as contemplated in the NCA. The plaintiff argued that the parties knew each other for almost 18 years, that the interest component was a special low price and that the relationship as evidenced by the WhatsApp and emails shows that they were not at arm's length but close friends.

The defendant argued that because the plaintiff was not registered as a credit provider at the time of signing of the AoD the agreement would be null and void but the plaintiff could still pursue the debt but through a claim for unjustified enrichment. The Defendant asks that the matter be referred to trial because in his view this would allow a full ventilation of the commercial relationship between the parties.

In deciding to refer the matter to trial the court considered whether the filing of additional papers in the matter would be of assistance. In this regard, and after considering relevant case; the court was view the matter could only be properly decided with a full ventilation of the issues, where evidence can be led and tested by cross examination by both parties, and with the benefit of full argument, and not in attenuated proceedings such as these. The court ordered that (i) plaintiff's summons will serve as summons in the action; and (ii) the defendant is required to file his plea within 15days of date of the order.

Held: The application to grant provisional sentence is dismissed.