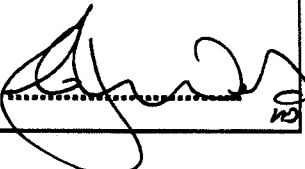


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

18/11/2016

CASE NO.: 93219/15

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
18/11/2016	
	

In the matter between:

JHL SERVICES & CONSULTING (PTY) LTD

Plaintiff

and

L MAROOS

First Defendant

G C CONSTRUCTION (PTY) LTD

Second Defendant

JUDGMENT

VAN DER WESTHUIZEN, A J

1. The plaintiff seeks that provisional sentence be granted against the first and second defendants in the amount of R4 264 140.76, together with interest thereon at the rate of 9% per annum and costs on the scale of attorney and own client. The provisional sentence is premised upon a written acknowledgment of debt and admission of liability to which it appears a deed of suretyship is attached.
2. The acknowledgment of debt was granted by the first defendant in his personal capacity and by the second defendant represented by the first defendant.

3. The first defendant entered into the said deed of suretyship in favour of the plaintiff in respect of the second defendant's obligations to the plaintiff.
4. The first defendant admits his signature on the acknowledgment of debt and admission of liability and on the deed of suretyship.
5. The defendants oppose the application for provisional sentence on a number of alleged defences.
6. During argument, it was submitted on behalf of counsel representing the defendants that the second defendant has commenced business rescue proceedings subsequent to the institution of the application for provisional sentence. The status of those proceedings has not progressed further than the issue and service of the required application.
7. Mr van den Berg who appears on behalf of the plaintiff submitted that he was unaware of the second defendant's commencement of business proceedings and was only advised thereof in court when Mr Groenewald, who appears on behalf of the defendants, raised the issue in court. The opposing affidavit makes no mention of that issue. Neither was any supplementary affidavit submitted wherein that issue was raised. It is merely mentioned from the bar. No attempt was made to place a copy thereof before the court, nor was any evidence of service thereof advanced. Mr Groenewald merely submitted that he is so instructed.
8. It follows that the issue of commencement of business rescue proceedings in respect of the second defendant, and the resultant effect thereof on the present proceedings cannot be definitively determined at present. It would thus follow that determination of provisional sentence proceedings against the second defendant

should be deferred until sufficient proof of the commencement of those proceedings is placed before court.

9. The defences raised by the defendants are the following:
 - (a) The debt claimed is not due and owing;
 - (b) There is a dispute of fact that cannot be determined upon the papers filed;
 - (c) The instrument of acknowledgment of debt is not a liquid document;
 - (d) The instrument of acknowledgment of debt does not contain a material term agreed upon by the parties;
 - (e) The deed of suretyship was signed by the plaintiff's attorney on behalf of the plaintiff and no authority in that regard has been pleaded and hence the instrument is invalid;
 - (f) The existence of an alleged oral agreement that payment in terms of the acknowledgment of debt is deferred until the second defendant receives payment from a third party, Eskom;
 - (g) Alleged non-compliance with the provisions of the National Credit Act, 34 of 2005.
10. In the heads of argument filed belatedly on behalf of the defendants, no submissions in respect of the defence relating to non-compliance with the provisions of the National Credit Act are made. However, Mr Groenewald made oral submissions in that regard. Those submissions were directed at the alleged commencement of business rescue proceedings on behalf of the second defendant. No submissions were made in respect of that Act as to its applicability to

the acknowledgment of debt in respect of the first defendant. I have indicated above that the issues pertaining to the second defendant is to be deferred.

11. In so far as the cause of action may also be premised upon the deed of suretyship, it can be dealt with summarily.
12. It appears that the first defendant has bound himself as surety in favour of the plaintiff in respect of the second defendant's obligations to the plaintiff in respect of a lease agreement.
13. The acknowledgment of debt clearly relates to an acknowledgment of liability in respect of *the supply of labour and the handling of all payroll functions* by the plaintiff. None of the further documents relied upon in support of the application for provisional sentence makes mention of any lease agreement.
14. The deed of suretyship was granted in respect of the second defendant's due compliance with its obligations to the plaintiff *vis-à-vis* the lease agreement. No mention is made in the acknowledgment of debt of any suretyship to be entered into, nor does the suretyship refer to the acknowledgment of debt.
15. Mr van den Berg submits that the suretyship is accessory to the acknowledgment of debt. Mr Groenewald echoes that submission. Whether that submission is correct is of no consequence for present purposes.
16. It follows that the deed of suretyship is of no relevance for present purposes.
17. The defences relating to the alleged debt not being due and owing, the alleged dispute of fact and the non-liquidity of the acknowledgment of debt are premised more or less on the same

alleged facts. I intend to deal with the aforementioned defences together.

18. The first basis upon which the defendants rely on in respect of the allegation that the acknowledgment of debt does not constitute a liquid document is rather curious. It is alleged that the said instrument stipulates an amount of R6 514 140.76 being owed, whilst the claim in the provisional summons is for an amount of R4 264 140.76. The defendants do not dispute these amounts, nor that the amount in respect of payments that were made is incorrect. The defendants admit that payments were made in terms of the acknowledgment of debt.
19. The submission, as I understand it, is that where the instrument being relied upon contains an amount different to that being claimed, albeit for a lesser amount, the document does not constitute a liquid document for the reason that the amount can no longer be determined readily. There is no merit in that submission. The document headed "Acknowledgment Of Debt And Admission Of Liability" clearly stipulates a specific amount admittedly due and owing in respect of clearly stipulated services and the acknowledgment of indebtedness is unconditional. It meets the requirements for a liquid document.¹
20. The defence that the amount is not due and owing is linked to the alleged material term that allegedly was agreed upon, yet does not appear in the said instrument. However, the defendants do not allege that the said instrument stands to be rectified, nor do they state the circumstances or reasons why the said express term was not included in the said acknowledgment of debt. The alleged express term not contained in the said instrument apparently relates to the condition that payment would only be made once the second defendant

¹ *Rich et al v Lagerwey* 1974(4) SA 748 (AD) at 755

receives payment from a third party. There is no merit in that submission.

21. Further in this regard, the defendants also allege that in terms of an alleged oral agreement, details of which are wanting, payment in terms of the acknowledgment of debt was deferred until the second defendant received payment from a third party.
22. Either the deferment of payment, or the condition in that regard, is an express term of the said instrument, or it is the subject of a further agreement. Should it be the subject of a further agreement, then it cannot be an express term agreed upon on conclusion of the acknowledgment of debt. In that regard, the acknowledgment of debt is unconditional. On a clear and purposive reading of that instrument, no such term can be inferred or read in.
23. In the event that the deferment of payment is the subject of a further and later agreement, the defendants have not discharged their onus in that regard. The plaintiff denies such agreement, whether at the time of conclusion of the acknowledgment of debt or at any later stage. No facts in support of the contention relating to a further and subsequent oral agreement are provided. The two versions as to when the term was supposedly agreed upon are mutually destructive.
24. In so far as the non-liquidity of the acknowledgment of debt relates to the aforementioned condition of deferment of payment is concerned, there is equally no substance in such submission.
25. The defence of alleged dispute of fact relates to the amount due and owing. I have already dealt with that defence. There is no merit in that submission.
26. It follows that the plaintiff is entitled to provisional sentence in the amount due and owing.

I grant the following order:

- (a) Provisional sentence is granted against the first defendant in the amount of R4 264 140.76;
- (b) The first defendant is ordered to pay interest on the amount of R4 264 140.76 at the rate of 9% per annum from 4 June 2015 to date of payment;
- (c) The first defendant is to pay the costs on an attorney and client scale;
- (d) Provisional Sentence against the second defendant is postponed *sine die*, and leave is granted to the parties to supplement their papers, if so required.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Plaintiff:
Instructed by:

J G van den Berg
Jonker Vorster Inc

On behalf of Respondents:
Instructed by:

J H Groenewald
L Smith Attorneys