

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 23508/16

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO  
Date: 28 October 2021 E van der Schyff

In the matter between:

D-KON DEVELOPMENT CC

PLAINTIFF / APPLICANT

and

M J NWEDAMUTSWU N.O.

1<sup>ST</sup> DEFENDANT/ RESPONDENT

T S NWEDAMUTSWU N.O.

2<sup>ND</sup> DEFENDANT/ RESPONDENT

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JUDGMENT

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Van der Schyff J

- [1] The plaintiff issued a provisional sentence summons claiming an amount of R5 152 079.00 from the defendants. The claim is based on payments certificates which are deemed to be liquid documents.

- [2] The defendants filed an answering affidavit as provided for in terms of Rule 8 of the Uniform Rules of Court. The defendants raised two points *in limine*, but persisted only with the first, namely that it claims that the claim prescribed. The defendants in addition aver that the 'apparent liquid documents relied upon by the plaintiff did not bind the Trust' and that provisional sentence should not be granted.
- [3] At the hearing, counsel for the plaintiff conceded that a number of factual disputes arise from the defendants' answering affidavit and submitted that the matter should proceed to trial and that the defendants be directed to file a plea. Counsel for the defendants submitted that this court should finally decide the prescription issue, and dismiss the application because the claim has prescribed.
- [4] The factual disputes, and the prescription defence raised by the defendant justify the refusal of provisional sentence. The defendants succeeded in convincing me of an even balance of prospects of success in the main case.<sup>1</sup> I am not at this juncture inclined to deal with the matter definitively. Theophilopoulos *et al.*,<sup>2</sup> explains with reference to applicable case law:

*'20.4 The further process when provisional sentence is refused*

Provisional sentence will be refused when the plaintiff fails to discharge his or her onus of proof on a balance of probabilities or when the defendant succeeds in discharging the onus of convincing the court that the probabilities of success in the principal case are against the plaintiff. The matter is converted into a trial action, and the rules of pleading and conduct of a trial action will apply *mutatis mutandis*. The matter proceeds to trial in the usual way, with the court ordering the provisional summons to stand as a normal summons and the defendant to file a plea in the stated time. ... During this conversion process the court has the

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<sup>1</sup> *Twee Jonge Gezellen(Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3) SA 1 (CC).

<sup>2</sup> Theophilopoulos, C., Van Heerden, CM., and Boraime, A. *Fundamental Principles of Civil Procedure*. 3<sup>rd</sup> ed. LexisNexis, 369.

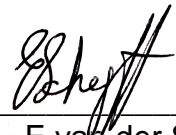
discretion to award an order of costs as it may deem just.'  
(Footnotes omitted).

- [5] As far as costs are concerned, the plaintiff submitted that the defendants should be held liable for the costs of the day since the plaintiff has indicated its view that the matter proceed to trial in correspondence to the defendants. In light of the existence of the factual disputes which were not denied by the plaintiff, and ought to have been foreseen, I am of the view that the defendants were justified to oppose the application. I am also of the view that it is in the interest of justice that the issues between the parties, including the prescription defence, be properly ventilated. In these circumstances, it is justified to order that costs be costs in the cause.

## ORDER

In the result, the following order is made:

1. Provisional sentence is refused;
2. The defendant is to deliver a plea to the plaintiff's provisional sentence summons within 15 days of the date of this order;
3. Costs are costs in the cause.




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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 28 October 2021.

Counsel for the plaintiff:

Adv. D R du Toit

Instructed by:

Rudman & Associates Inc.

Counsel for the defendants:

Adv. P Marx

Instructed by:

Tracy Sischy Attorneys

Date of the hearing:

26 October 2021

Date of judgment:

28 October 2021