IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No.: 4147/2017

In the matter between:

OMEDA TRADING CC	**PLAINTIFF**
and	
GOLDENDICE INVESTMENTS CC	**FIRST DEFENDANT**
MAHMOOD DAWOOD LIMALIA	**SECOND DEFENDANT**
ZUBAIR DAWOOD LIMALIA	**THIRD DEFENDANT**

JUDGMENT

ORDER:

As against the first defendant:

1. Provisional sentence is refused.
2. The first defendant is directed to file its plea within 20 days from the date of this order.
3. The costs are reserved for decision by the trial court.

As against the second and third defendants:

4. Provisional sentence is dismissed with costs.

Bezuidenhout AJ:

[1] The plaintiff, Omeda Trading CC, issued a provisional sentence summons ('the summons'), out of this court on 11 April 2017 against Goldendice Investments CC as first defendant, Mahmood Dawood Limalia as second defendant and Zubair Dawood Limalia as third defendant. The summons was served on 18 April 2017.

[2] The defendants filed a notice of opposition on 25 April 2017, and subsequently filed their answering affidavit on 14 July 2017. Thereafter, the plaintiff only filed its replying affidavit on 14 February 2020, which comprised of 281 pages.

[3] On 17 September 2020 the defendants filed an interlocutory application to seek leave to file supplementary and supporting affidavits. Although the application was initially opposed, counsel for the plaintiff, Mr Hershensohn, at the hearing of the matter before me, indicated that his client was no longer persisting with such opposition. I accordingly made an order in terms of the notice of motion, allowing the supplementary and supporting affidavits of the defendants to be admitted into evidence, with the costs of the application to be costs in the cause.

[4] The three defendants were summoned to pay to the plaintiff an amount of R13 480 537.45 (thirteen million four hundred and eighty thousand five hundred and thirty-seven rand and forty-five cents) together with *mora* interest as from 22 December 2015, for failure to make payment of the amount 'in terms of the Acknowledgment of Debt and offer to pay', annexed as annexure 'A' to the summons.

[5] In para 2 of the summons, an averment was made that an amount of R17 583 480 (seventeen million five hundred and eighty three thousand four hundred and eighty rand) would have been paid by the first, second and third defendants by way of instalments until the final payment, as set out in the acknowledgement of debt. It was also averred that payments in the amount of R4 102 942.55 (four million one hundred

and two thousand nine hundred and forty-two rand and fifty-five cents) had been made by the defendants.

[6] Attached as annexure 'A' to the summons was the acknowledgment of debt. For reasons which will become clear herein below, it is necessary to highlight certain portions of the document. The first paragraph on page 1 reads as follows;

'1. We, the undersigned members of Goldendice Investments CC (Reg no: 2006/168048/23) namely, represented by Zabair Dawood Limalia (ID No . . .) and Mahmood Dawood Limalia (ID No . . .) hereinafter referred to as the Debtor.' (My underlining.)

[7] The sixth paragraph on page 1 reads as follows:

'"The Debtor" hereby acknowledge that they are truly and lawfully indebted to Omeda Trading CC for the due and proper payment of the sum of R17 583 480.00 (seventeen million five hundred and eighty-three thousand four hundred and eighty rand) (capital sum) arising from a loan from the Creditor to the Debtor at the latter's special instance and request.' (My underlining.)

[8] In terms of the numbered paragraphs 2.1 and 2.2 on page 1, the debtor agreed to pay various sums, ranging between R1 million and R4 million, as monthly instalments starting on 3 September 2014 and concluding on 3 April 2015.

[9] At the conclusion of the document both the second and the third defendant signed on behalf of the first defendant, and Mr Sikunda Tayob, the sole member of the plaintiff, signed on behalf of the plaintiff as follows:

'_____*signed*_____ _____*signed*_____

FOR GOLDENDICE INVESTMENTS CC **FOR GOLDENDICE INVESTMENTS CC**

DEBTOR: ZD LIMALIA **DEBTOR: ZD LIMALIA**

_____ *signed* _____

FOR OMEDA TRADING CC

CREDITOR: SIKUNDA TAYOB'

All three parties signed the document on 21 August 2014.

[10] Attached to the acknowledgment of debt were two further documents, constituting so-called personal sureties, in respect of the second and the third defendants, respectively, which read as follows:

'I, the undersigned M. Limalia (ID No . . .), member of Goldendice Investments CC hereby bind myself in my personal capacity for the amount of R17 583 480.00 (seventeen million five hundred and eighty three thousand four hundred and eighty rand) owing to Omeda Trading CC as surety and co-principal debtor in solidum.'

[11] It is important to note that the summons itself contains no averments to the effect that the second and the third defendants are being sued in their capacity as sureties and simply reads as follows in paragraph 1: 'They are hereby summoned to pay. . . .'
The summons also contains no reference to the two suretyships, ostensibly attached or accompanying the acknowledgment of debt. The acknowledgement of debt itself also contains no reference to the suretyships.

[12] The defendants filed an answering affidavit and their defence to the plaintiff's claim can be very briefly summarised as follows:

(a) The plaintiff was a money lender, and part of the amount set out in the acknowledgment of debt consisted of a substantial amount of interest at very high rates which were usurious and in breach of the in *duplum* rule.

(b) The defendants had obtained many loans over time from the plaintiff, and the first defendant has made payments over that period and has in fact overpaid the plaintiff.

(c) The first defendant had no choice but to sign the acknowledgment of debt, and it was done in a situation where there was unequal bargaining power in favour of the plaintiff.

(d) The first defendant's attorney requested the plaintiff's attorney to provide it with, inter alia, a proper computation of how the sum of R17 583 480 was arrived at and a schedule of payments which were made by the first, second or third defendants as well

as the dates upon which the payments were made by the plaintiff to first defendant. The plaintiff's attorney refused to provide this requested information.

(e) Between 23 August 2014 and 22 December 2015, the first defendant paid R15 345 820.66 to the plaintiff in reduction of the debt. The calculation of the amount was set out in a schedule attached as an annexure to the answering affidavit, and based on the defendants' limited documentation as a fire had destroyed most of their records.

[13] The plaintiff filed a substantial replying affidavit deposed to by Mr Tayob's daughter. She apparently conducted her own 'full audit' of all the transactions entered into between the plaintiff and the defendants. Her findings, for want of a better word, was attached as annexure 'REP4' and comprised some 199 pages which included various schedules and bank statements.

[14] From the index to annexure 'REP4', it is clear that there were five different loans, described as 'deals', to which Ms Tayob allocated payments received from the first defendant.

[15] The first deal was in respect of a loan for the second defendant's house. A loan in the amount of R1,2 million was made and payments totalling R1 226 769.76 were received, and according to Ms Tayob's schedule of payments received, the loan was fully extinguished on 28 February 2015. Payments were made by various entities to the plaintiff.

[16] The second deal referred to the acknowledgement of debt, and showed an outstanding balance on 31 October 2019 of R12 180 537.45. The supporting schedules showed cheques and cash advanced to the first defendant by at least six different entities (one of them the plaintiff) and repayments made by various entities to at least two entities, one of which is the plaintiff.

[17] The third deal was a personal loan to the third defendant in the amount of R250 000, made on 24 September 2014 and was fully repaid by 31 October 2014.

[18] The fourth deal was a loan to the second defendant in the amount of R70 000, made on 9 January 2015 and fully repaid and extinguished on 16 February 2015.

[19] The fifth deal consisted of various 'sundry' loans totalling R8 585 172.15. According to Ms Tayob's schedules, a number of entities advanced various sums of money and various payments were made by a variety of entities to different entities, of which the plaintiff was one.

[20] Upon perusing all the pages and pages of bank statements, it is difficult to find any reference to the first defendant and to ascertain on what basis certain payments are allocated to certain deals involving the defendants.

[21] The defendants, in their supplementary answering affidavit had much to say about all the schedules and supporting documents now supplied for the first time by the plaintiff. The points of difference with regards to Ms Tayob's calculations and allocations are numerous and it is quite clear that there are substantial disputes of fact. It was, inter alia, alleged that the plaintiff had unlawfully chosen to appropriate payments made by the first defendant to other loans which ought to have been applied and appropriated to any valid indebtedness under the acknowledgment of debt. This was done allegedly contrary to the first defendant's wishes.

[22] The plaintiff of course conceded that it had done as much, and Ms Tayob stated: 'although the payments were made, they were made not towards the acknowledgement of indebtedness as the defendants would want it, but towards the other deals.' (My underlining.)

[23] The defendants, upon receipt of the bank statements contained in annexure 'REP4' engaged an independent auditor, Mr Sanjeev Lutchman, who analysed the statements and came to the conclusion that the first defendant had paid to the plaintiff,

subsequent to the conclusion of the acknowledgment of debt, an amount of R18 143 478.70.

[24] It is trite that a court will grant provisional sentence if:

'1. the plaintiff's claim is based on a liquid document; and

2. a) where the onus is on the plaintiff, he can satisfy the court that the probabilities of success in the principal case are in his favour;

or

b) where the onus is on the defendant, he is unable to produce sufficient proof to satisfy the court that the probabilities of success in the principal case are against the plaintiff.' (S Peté *et al Civil Procedure: A Practical Guide* 3 ed (2017) at 424.)

[25] A liquid document is defined as a written instrument, signed by the defendant or his agent, evidencing an acknowledgement of indebtedness which is unconditional and for a fixed amount in money. (D Harms *Civil Procedure in the Superior Courts* (August 2020 – SI 68) at B8.3.)

[26] The acknowledgement of debt in the present matter was signed by the second and third defendants, on behalf of the debtor, the first defendant. They did not sign the document in their personal capacities nor in their capacities as sureties for first defendant. That much is clear from the document itself. Furthermore:

'It should be remembered that the crux of the provisional sentence procedure is that the defendant has unconditionally admitted, in writing, that he owes a specified amount to the plaintiff.' (*Civil Procedure: A Practical Guide*, supra, at 425.)

[27] I am of the view that neither the second nor the third defendant has unconditionally admitted or acknowledged any indebtedness to the plaintiff in their personal capacities, no matter how widely one tries to interpret the acknowledgment of debt.

[28] As far as the plaintiff's reliance on the so-called sureties signed by the second and third defendants are concerned, it is, as mentioned hereinabove, clear that no

mention was made in the summons that the second and third defendants are being sued on that basis.

[29] Counsel for the defendants, Mr Harpur SC, submitted in his heads of argument as well as in argument before me, that the suretyships were defective in that neither of them specified the identity of the principal debtor and as such did not comply with section 6 of the General Law Amendment Act 50 of 1956, which reads as follows:

'No contract or suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety. . . .'

[30] Counsel for the defendants relied on the decision of *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345B, where Miller JA said the following:

'. . . it is manifest that, for example, identification of the principal debt and debtor is not only a term of the contract but is essential to the creation of the surety's liability, suretyship being an accessory obligation.'

[31] It was further submitted that it would not be possible for the plaintiff to rectify the suretyships as it would only be competent to do so once strict prerequisites were met. I was referred to *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) paras 8-10 where Smalberger JA said the following:

'[8] The "terms" contemplated in s 6 as essential to the validity of a contract of suretyship include the identities of the creditor, the principal debtor and the surety (*Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (A) at 345A - D).

[9] In *Magwaza v Heenan* 1979 (2) SA 1019 (A) this Court held that a contract for the sale of fixed property which is formally invalid (and consequently a nullity) for want of compliance with s 1(1) of the General Law Amendment Act 68 of 1957 cannot be rectified (at 1029A - C read with 1026A - D). This principle would apply equally to a contract of suretyship lacking in essential terms. The purpose of the governing statutory enactment in each case, namely to achieve certainty as to the true terms agreed upon and thus avoid or minimise the possibility of perjury or fraud and unnecessary litigation, is the same (*Fourlamel (Pty) Ltd v Maddison (supra* at 343A).

[10] That it is not competent to rectify a contract that is invalid for non-compliance with statutory formalities must therefore be taken to be established law despite the criticism that has been directed at this view (see, for example, De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed vol 1 at 323 ff; Tager 'Rectification of Invalid Contracts' (1977) 94 *SALJ* 8). On the other hand, where such formalities have been complied with, rectification is permissible if the requirements for rectification have been satisfied (cf *Litecor Voltex (Natal) (Pty) Ltd v Jason* 1988 (2) SA 78 (D); *Lazarus v Gorfinkel* 1988 (4) SA 123 (C)). There are therefore two separate and distinct enquiries in a matter such as the present. The first relates to the formal validity of the deed of suretyship; the second to whether the requirements for rectification have been satisfied. The factual allegations relevant to the second enquiry should not be allowed to impinge on the first.'

[32] As the identity of the principal debtor does not appear from the suretyship, I tend to agree with the submissions that it will not be competent for the plaintiff to rectify either of them. This is also in accordance with the authorities referred to hereinabove.

[33] Counsel for the plaintiff urged me to accept that the acknowledgment of debt and suretyships were drafted by laymen, that any defects could be remedied and that it did not warrant an outright dismissal of the plaintiff's claim against the second and third defendants.

[34] I am however unconvinced that any case has been made out that the second and third defendants were parties to the acknowledgement of debt in their personal capacities or that they had been properly sued as sureties in terms of valid suretyships.

[35] As far as the first defendant is concerned, and in order to ward off provisional sentence, it must show in its opposing affidavit and documentary evidence available that its defence will be successful and that the probabilities favour its defence.

[36] On the plaintiff's present version, the first defendant now owes it an amount of R12 180 537.45, which differs from the amount claimed in the provisional sentence summons, and which is supported by an audit done by a family member who relies on

schedules and bank statements from which it is impossible to determine exactly who paid what to whom. Reference is made to loans to the first defendant from entities other than the plaintiff such as F Tayob, Tayob's Discounters and Cetra. Payments were received from countless entities with no indication in the bank statements as to how such payments were allocated to which 'deals'.

[37] The first defendant, on the other hand claims to have paid an amount of R18 143 478.70 which figure was arrived at by an independent accountant.

[38] It is also clear from what is contained in annexure 'REP4' that the plaintiff has sought to allocate payments to 'deals' other than the one involving the acknowledgment of debt.

[39] Defendants' counsel referred me to *Wille's Principles of South African Law* where the following was said:

'Where a debtor owes her creditor various sums of money under different obligations and she makes a payment to the creditor which is insufficient to discharge all the debts, the debtor, in the absence of any prior agreement to the contrary, may appropriate the money to any debt she pleases by notifying the creditor to that effect . . . If the debtor makes no allocation, express or implied, the creditor may then and there appropriate the money to any particular debt he chooses . . . provided he acts equitably. Consequently he cannot appropriate the money to a disputed debt … in preference to the debts which are undisputed . . . If neither party has made an appropriation the common law steps in and allocates the money in accordance with definite rules . . . on the principle that such debt is cancelled first as is most to the advantage of the debtor to have discharged. . . If all the debts are equally onerous the money is appropriated to the oldest debt.' (F du Bois *et al Wille's Principles of South African Law* 9 ed (2019) at 822-823.)

The writer in this regard relied on the decision of *Macrae v National Bank of South Africa Ltd* 1927 AD 62 at 66.

[40] Just a cursory glance at how the different 'deals' were set out in annexure 'REP4' and how payments received were allocated, makes it clear, in my view, that the plaintiff has completely disregarded this principle.

[41] I am accordingly of the view that the first defendant has shown on a balance of probabilities that its defence will succeed. I do not deem it necessary to address the issues relating to interest as this can be dealt with by the trial court in due course.

[42] Defendants' counsel urged me not to reserve costs in the event of a refusal of provisional sentence. It was submitted that if the details of all the transactions had been provided from the outset, the matter could perhaps have been resolved a long time ago. I am not convinced by this argument, and I am of the view that the trial court can best decide this issue in due course.

[43] I accordingly make the following order:

As against the first defendant:

5. Provisional sentence is refused.
6. The first defendant is directed to file its plea within 20 days from the date of this order.
7. The costs are reserved for decision by the trial court.

As against the second and third defendants:

8. Provisional sentence is dismissed with costs.

_____

BEZUIDENHOUT AJ

Date of Hearing: 09 October 2020
Date of Judgment: 13 November 2020

APPEARANCES

Counsel for Plaintiff:	Mr Hershensohn
Instructed by:	Tingtingers Inc c/o Austen Smith Ref: Jolene Venter

033 392 0500

Counsel for Defendants:	Mr Harpur SC
Instructed by:	Shepstone & Wylie Ref: DJDV/LIMA31531.1 031 575 7000