"NCK1"

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 19694/2008

DATE: 24 NOVEMBER 2009

In the matter between:

THE LAND & AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA t/a THE LAND BANK PLAINTIFF

and

TWEE JONGE GEZELLEN (PTY) LTD 1st DEFENDANT

NICOLAS CHARLES KRONE 2nd DEFENDANT

JUDGMENT

DESAI, J:

[1] The so called Land Bank is the plaintiff in these proceedings. It claims, by way of provisional summons, the sum of R37 914 027,01, and ancillary relief, from the defendants jointly and severally. The claim is based upon an acknowledgement of debt signed by the 2nd defendant and by the 2nd defendant on behalf of the 1st defendant.

[2] In the answering affidavit deposed to by the 2nd defendant, the defendants do not deny the existence of the

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acknowledgment of debt or the authenticity of the signatures appearing thereon. They also do not place the fulfilment of any condition contained in the acknowledgement of debt in dispute.

[3] The defendants resist the granting of provisional sentence, both on constitutional grounds and on the basis that the plaintiff's claims have been novated or settled in a lesser amount. I will deal with the latter aspect first.

[4] The defendants contend that the plaintiff is not entitled to enforce the terms of the acknowledgement of debt against them as the plaintiff's claim has been novated in an amount of R20 million by way of an oral agreement between the parties and, in any event, the defendants have been afforded an extension of time within which to restructure their finances so as to make payment to the plaintiff of the said amount of R20 million. Furthermore, the defendants contend that the said amount of R20 million was not to be called up without reasonable notice to them and that as such notice has not been given, these proceedings are premature.

[5] With regard to this defence, it is noted that the defendants bear the onus of proving that the probabilities of success in the principal case are against the plaintiff. (See in

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this regard De Atouguia v Braz 1989(2) SA 807A-812H.)

[6] For the purposes of the alleged novation, reliance is placed by the defendants on a letter dated 8 April 2008, that is "Annexure NK4". The defendants allege that on that date an agreement was reached that they would pay to plaintiff an amount of R20 million in settlement of the defendants' indebtedness. The letter is written by the 2nd defendant to The Land Bank, Worcester, and reads as follows:

> "I refer to our numerous discussions and proposals and thank you for your support and advice. Following our discussions, we are currently finalising arrangements for alternative financing on commercial bank terms and now propose the following: We propose that we pay The Land Bank R20 million in full and final settlement of all claims between us. We await your confirmation that this is acceptable in order for us to finalise our new arrangements. We would then proceed with the cancellation of the existing bond and registration of the new bond, and the formal release of the personal sureties related to the indebtedness, on payment of the amount."

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[7] The defendants allege that one Hein van Wyk - an employee of the plaintiff's Worcester Office - had indicated to the 2nd defendant that he had cleared the proposal with head office and that it was acceptable to the plaintiff. It seems, on the 2nd defendant's version, that Van Wyk informed him that he should formally make a written offer in the amount of R20 million and that Van Wyk would get head office approval in respect thereof.

[8] It must have been clear to the 2nd defendant that any proposal for the settlement of the claim must be in writing and that such written proposal must be considered and approved by head office. It was for this reason that the proposal, that is "Annexure NK4", was indeed submitted in writing.

[9] Furthermore, the 2nd defendant was aware that Van Wyk, who was based in Worcester, had no authority to approve the proposal submitted by the defendants as such authority vested in the head office.

[10] "Annexure NK4" itself says that the proposal was subject to "confirmation that this is acceptable". There is no proof of the acceptance of the offer by the plaintiff.

[11] It is inconceivable that Van Wyk would have informed the

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2nd defendant "that an agreement was in place" if the written proposal was only handed to Van Wyk on 8 April 2008 and head office had not yet considered the written proposal. It is difficult to understand how on the basis of a written proposal, one could conclude, as the 2nd defendant appears to do, that a written agreement was in place. Furthermore, nowhere in the subsequent correspondence from the defendants' legal representatives in reply to the plaintiff's demand for payment of the capital sum in terms of the acknowledgement of debt, is there any reference to a novation or settlement.

[12] The defendants also allege that Van Wyk had agreed to the defendants being afforded time within which to obtain finance to discharge the alleged agreed debt of R20 million. No fixed period or time was allegedly mentioned and it appears that the 2nd defendant deduced that they "were afforded a reasonable time within which to do so". The alleged agreement to afford the defendants time to obtain finance, is marked by a distinct lack of particularity. There is no indication as to when the alleged agreement was concluded or what the exact terms of the agreement were. At best for the defendants, they "understood" that no legal proceedings would be instituted without prior notice to the defendants. On the probabilities, however, it seems that an agreement to that effect does not exist.

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[13] In any event, paragraph 4 of the acknowledgement of debt provides that in the event of default or insolvency, the balance of the principal debt shall become due and payable without demand.

[14] I accordingly conclude that the defendants have not succeeded in discharging the onus of proving that in the principal case the probabilities of success are against the plaintiff.

[15] I will briefly deal with the alternate basis upon which the defendants resist the granting of provisional summons. They contend that the common law remedy of provisional sentence is inconsistent with the Constitution of the Republic of South Africa and in particular sections 9 and 34 thereof. Section 34 of the constitution provides:

> "34. Access to Courts. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[16] Mr A G Binns-Ward SC, who appeared with Ms P F van

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Zyl, on behalf of the defendants, argued that a fair hearing before a Court as a pre-requisite to an order being made against anyone, is fundamental to a just and credible legal order and Courts are obliged to ensure that the proceedings before them are always fair. That is undoubtedly so. In this instance, Mr Binns-Ward contended, the defendants' complaint related to the impact of provisional sentence proceedings upon the fairness of a hearing, in particular to the extent that the remedy requires defendants, against whom provisional sentence has been granted, to satisfy the judgment debt and tax costs, albeit against the provision of security *de restituendo*, before they are allowed to enter into the principal case.

[17] The remedy undoubtedly places a constraint on the defendant in respect of its ability to enter into the principal case. Although a defendant is not deprived of access to the court, Mr Binns-Ward argued, it is evident that the requirement to pay the provisional sentence debt may very well exclude defendants with *bona fide* defences against the plaintiff's claim from having the dispute heard and determined in the course of a trial, in which the evidence for both parties is subject to being tested by way of cross-examination.

[18] Provisional sentence is a special procedure, designed to

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give a plaintiff, who is armed with a liquid document and who has *prima facie* proof of his claim, a speedy remedy without the expense and delay which an ordinary trial would entail.

[19] In terms of Rule 8(9), once a provisional sentence has been granted, the plaintiff is entitled to immediate payment or, failing that, to issue a writ of execution against the defendant's property. However against such payment of execution, the defendant can demand security *de restituendo*. If the plaintiff cannot find acceptable security, the plaintiff is not entitled to provisional relief and must wait for his money until he can obtain a final judgment in the principal case.

[20] The Rule 8 measures, which assist the plaintiff to obtain rapid and cost effective execution against the property of the defendant, do not remove the possibility of any recourse to the judicial system and do not necessarily result in the defendants receiving an unfair hearing. Rule 8 recognises that the plaintiff is required to have recourse to the Court before he or she can execute against the property of the defendant. The rule makes provision for the filing of two affidavits only, but the Court has a discretion to allow the filing of a further set of affidavits in exceptional circumstances. The entire procedure which governs Rule 8 does not exclude proper judicial intervention. The Court retains its discretion to refuse the

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granting of provisional sentence in certain instances. Rule 8(9), it seems, creates a balancing act which ensures fairness to both parties to the proceedings. Its proceedings are governed by the rules of court, which are at all times subject to judicial oversight.

[21] Malan et al, in their book, Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes (1986), note on page 243 of that work that provisional sentence violates, to a certain extent, the basic right of a party to present his case. In response to the question whether this deviation from one of the fundamental principles of civil procedure can be justified, they correctly highlight the following considerations, which are relevant to provisional sentence. Since a liquid document is regarded as *prima facie* evidence of a defendant's indebtedness, the plaintiff should be entitled to a speedy and extraordinary remedy; if a full oral hearing is permitted on all the issues, the remedy would lose most of its values; both parties are restricted to affidavits, thereby ensuring "a parity of weapons", and, of course, provisional sentence is only an interlocutory remedy.

[22] The learned authors go on to say:

"The limitation on a defendant's right to an oral

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hearing and cross-examination is justifiable. The law... has taken cognisance of the ideals and conceptions prevailing in a community. The law has to pay due regard to the needs of the commercial world... (see page 244)".

[23] Mr Binns-Ward also referred in argument to the potential inequity of the remedy, in that it only allows a provisional sentence judgment debtor, who is able to satisfy the claim and the cost of the provisional sentence proceedings, the right to proceed to trial. This, he says, offends against the equality provision of section 9 of the constitution, in that it differentiates between categories of people.

[24] It might seem unduly harsh upon an impecunious defendant who is required to pay the amount of the provisional sentence before being entitled to enter into the principal case. On the other hand one cannot lose sight of the fact that a plaintiff, armed with what is *prima facie* a liquid document, is entitled to the long established - albeit onerous - expeditious remedy of provisional sentence.

[25] The provisional sentence procedure seeks to strike a balance by ensuring fairness to both parties. It serves a rational objective of ensuring that indebted defendants do not

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unduly delay matters and avoid their obligations by engaging in lengthy and costly litigation at the expense of legitimate creditors. The provisional sentence proceedings contain sufficient safeguards which ensure fairness to both parties to the proceedings. That being so, such proceedings are, in my view, not inconsistent with the constitution.

[26] In the result the following order is made. Provisional sentence is granted against the 1st and 2nd defendants for:

(a) Payment of the sum of R37 914 027,01.

(b) Interest at the rate of 15,5% per annum, calculated from the date of service of summons being 26 November 2008 to date of payment.

(c) Cost of suit on a scale as between attorney and own client and collection commission at 10%.

DESAI, J

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