

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 17779/2010

In the matter between:

J W SUMMS N O
L T SUMMS N O
C F HAASBROEK N O

First plaintiff
Second plaintiff
Third plaintiff

and

CHANTILLY TRADING 30 (PTY) LTD

Defendant

JUDGMENT DELIVERED ON 20 DECEMBER 2010

BLIGNAULT J:

[1] This is an opposed application for provisional sentence. Plaintiffs act herein as the trustees of the J W S Trust. Defendant is a company duly incorporated under South African law, named Chantilly Trading 30 (Pty) Ltd.

[2] Plaintiffs claim from defendant an amount of R18 279 427,09 plus interest thereon at the rate of 7% per annum from 1 July 2010 to date of payment.

[3] In para 1 of the plaintiffs' summons it is alleged that their cause of action against defendant arises from:

- (1) An agreement of sale of certain immovable property concluded on 23 October 2006 between plaintiffs as seller and L K de Lange and L J Tapsell "*on behalf of a company to be formed as Purchaser*". A copy of the agreement of sale is annexed to the summons.
- (2) A statement that on a date subsequent to 25 October 2006 defendant "*ratified and adopted the rights of the purchaser in terms thereof, thus becoming bound as purchaser to the terms of the Agreement of Sale*".
- (3) A statement that the sum of R18 279 429,97 has become due and payable by the purchaser.

[4] In para 2 of the summons it is alleged that plaintiffs' claim in terms of the deed of sale is secured by a first mortgage bond over certain property, which was, pursuant to the deed of sale, executed and registered under bond No 35744/2007 at Cape

Town by Petra Van Nieuwholtz as the duly authorised agent of defendant.

[5] The agreement of sale is annexed to the summons. On the first page of the deed of sale the purchaser is defined as follows:

"LEONARD KRUGER DE LANGE
ID NO 551002 5134 08 4
MARRIED OUT OF COMMUNITY OF PROPERTY
and
CHRISTOPHER JOHN TAPSELL
ID NO 640831 5002 00 5
MARRIED OUT OF COMMUNITY OF PROPERTY
In our personal capacities on behalf of a company to be formed:
(hereinafter referred to as "**the Purchaser**")."

[6] The agreement of sale is replete with references to the purchaser. Clause 12 of the deed of sale reads as follows:

SURETY

LEONARD KRUGER DE LANGE AND CHRISTOPHER JOHN TAPSELL representing **the Purchaser** herein bind ourselves in their personal capacity unconditionally and irrevocably as sureties for and co-principal debtors jointly and severally with **the Purchaser** for the due and punctual performance by **the Purchaser** of all its obligations to **the Seller** due in terms of the

deed of sale and shall enter into a separate surety agreement with **the Seller.**"

[7] At the end of the deed of sale the signatures of De Lange and Tapsell appear in the following form:

"SIGNED at PAROW on the 23rd day of OCTOBER 2006

AS WITNESSES

1. _____	PURCHASER Chantilly Trading 30 (Pty) Ltd Herein represented by Leonard Kruger de Lange
2. _____	

SIGNED at PAROW on the 23rd day of OCTOBER 2006.

AS WITNESSES:

1. _____	PURCHASER Chantilly Trading 30 (Pty) Ltd Herein represented by Christopher John Tapsell"
2. _____	

[8] Defendant filed an opposing affidavit. It was deposed to by De Lange on behalf of defendant. Defendant's principal defence on the merits was the *exceptio non adimpleti contractus*. De Lange alleged, in short, that plaintiffs had not performed its obligations to deliver fully serviced erven to defendant. He provided details of the alleged breaches of the agreement of sale

by plaintiffs. Defendant also gave notice of its intention to institute a counterclaim for the damage suffered by it.

[9] Plaintiffs filed a replying affidavit in which defendant's allegations regarding its breaches of the agreement were denied.

[10] The application was heard by me on 3 November 2010. The heads of argument of counsel dealt mainly with the issues raised in the affidavits. At the hearing of the matter, however, additional issues were raised. The Trust was granted leave to supplement its written argument in order to deal with these issues.

[11] On 9 November 2010 plaintiffs gave notice of an application for the amendment of the summons by the insertion of the following words:

"and whether Defendant admits or denies Defendant's signature or the authority of Defendant's agent."

[12] At the same time plaintiffs' counsel submitted further written argument which was described as a *"Supplementary note filed on plaintiff's behalf"*.

[13] In this supplementary note counsel for plaintiffs submitted that the deed of sale and the mortgage bond are liquid documents for purposes of provisional sentence and that both these documents had been signed by defendant within the meaning of Rule 8. Defendant's complaint that the summons did not contain an invitation to defendant to admit or deny defendant's signature, he submitted, was cured by the amendment sought by plaintiffs. The remainder of counsel's submissions dealt with the *exceptio non adimpleti contractus*.

[14] Defendant filed a notice of objection to the amendment of the summons of plaintiffs.

[15] Counsel for defendant also filed additional written argument. He submitted that the deed of sale could not be a liquid document in the absence of defendant's signature or that of its agent. Counsel submitted further that plaintiffs had not made the essential allegation that the notification of the agreement by defendant had been in writing. The rest of counsel's argument dealt with the *exceptio non adimpleti contractus*.

[16] Counsel for plaintiffs retaliated with yet a further written argument.

[17] Before dealing with the merits of defendants' defence there are questions which require prior determination. I consider first whether the agreement of sale can support the application for provisional sentence.

[18] It is not clear from the agreement of sale whether defendant, Chantilly Trading 30 (Pty) Ltd, had been incorporated on 23 October 2006 when the agreement of sale was signed. If it had, the agreement would have been invalid for lack of compliance with the provisions of section 2(1) of the Alienation of Land Act 68 of 1981 ("the Act").

[19] If defendant had not been incorporated by 23 October 2006, section 35 of the Companies Act 61 of 1973 might have been applicable as a *law* falling within the ambit of sub-section 2(2) of the Act. Section 35 of the Companies Act reads as follows:

"35. Power as to pre-incorporation contracts. – Any contract made in writing by a person professing to act as agent or trustee

for a company not yet incorporated shall be capable of being ratified or adopted by or otherwise made binding upon and enforceable by such company after it has been duly incorporated as if it had been duly incorporated at the time when the contract was made and such contract had been made without its authority. Provided that the memorandum on its registration contains as an object of such company the ratification or adoption of or the acquisition of rights and obligations in respect of such contract, and that such contract has been lodged with the Registrar together with the lodgement for registration of the memorandum and articles of the company."

[20] It is apparent, however, that there are a number of requisites for the application of section 35 of the Companies Act. Plaintiffs have not expressly or impliedly pleaded that these pre-requisites have been complied with.

[21] A second problem in this regard is whether the ratification and adoption of the agreement by defendant, although alleged by plaintiffs, can be regarded as an unconditional acknowledgement of indebtedness by defendant for purposes of provisional sentence. See Erasmus *Superior Practice* B-64.

[22] It is accepted that where the defendants liability is dependant on a simple condition, an allegation that it has been complied with

would be sufficient for provisional sentence. In the present case, however, the very existence of the agreement is dependant upon the condition that it be adopted by defendant. This is not in my view a simple condition which would not be dependant upon the production of extrinsic evidence.

[23] I am accordingly of the view that plaintiffs are not entitled to provisional sentence on the strength of the agreement of sale.

[24] Plaintiffs' claim for provisional sentence also purports to be based on the mortgage bond annexed to their summons marked 'B'. It is clear from the summons and the mortgage bond that it is intended to secure the balance of the purchase price owing to plaintiffs under the agreement of sale. The mortgage bond is accordingly materially dependant upon the agreement of sale and can have no validity on its own.

[25] Sub-rule 8(3) requires that all documents upon which the claim for provisional sentence is founded shall be annexed to the summons.

[26] The judgment of Nestadt J in *Longtill Construction v Liberhorn (Pty) Ltd* 1987 (2) SA 240 (W) contains a full discussion of the authorities on the meaning and effect of this sub-rule. He summarised the position as follows, at 244CD:

"In the light of what has been stated above, any one of the following (similar) criteria fall to be applied in determining whether the building contract is a document upon which the plaintiff's claims are founded (thus necessitating it having to be annexed to the summons): Whether it is necessary to determine the defendant's liability; or material to the plaintiff's cause of action; or whether the action is so dependent on it that it cannot proceed without a consideration of it; or whether it forms a vitally important part of the plaintiff's claims against the defendant."

[27] In the light of the problems regarding the validity of the agreement of sale mentioned above, the mortgage bond similarly fails to provide a basis for provisional sentence.

[28] Plaintiffs' summons accordingly lacks averments to sustain the action.

[29] In the result, plaintiffs' application for provisional sentence is refused with costs.

A. P. Blignault
A P BLIGNAULT