



THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 4069/2011

In the matter between:

CLUVER MARKOTTER INC.

1st Plaintiff

versus

**GEORGIOS STAVROU
GEORGIOS STAVROU N.O.
CAROL CECILE STAVROU N.O.**

1st Defendant
2nd Defendant
3rd Defendant

JUDGMENT : 13 APRIL 2011

- [1] In this matter I propose to give short reasons for judgment in view of the fact that the matter was opposed and I heard argument from both parties.
- [2] The case concerns a claim by Plaintiff for provisional sentence against defendants on an acknowledgement of debt which defendants signed on 8th April 2009 for payment for the sum of R2 201 144.10.

- [3] The defendant have raised a number of defences which I will deal with more fully later. As far as the burden of proof is concerned, the onus is upon the Plaintiff and I propose to deal with this matter on the basis that the Plaintiff must satisfy this court that he or she will succeed in the principal case on a balance of probabilities.
- [4] That burden is not shifted by reason of the defendant's admission of their signature and the onus remains on the plaintiff to satisfy the court that it will succeed in the principal case as above stated.
- [5] The document upon which Plaintiff relies for payment must reflect defendant's liability as being unconditional. Where the payment is dependent on the happening of a simple event, the liability of the defendants will exist if that event is proved. See the cases cited in note 4 on page B164 and on note 4 on page B117 of Erasmus Superior Court Practice.
- [6] This is a case where liability depends upon plaintiff giving the defendant 180 days written notice demanding payment. See Clause 2.1 at p8 of the record.
- [7] Plaintiff's case is that such notice was given on the 10th June 2009 to the First Defendant in his personal capacity and on behalf of his wife second defendant and on behalf of the Trust, the third defendant. First and second defendants are the Trustees of the third defendant.

- [8] Plaintiff contends that first defendant acknowledged receipt of the demand in an exchange of emails on the 12th June 2009. See record page 12 to page 14.
- [9] Defendants first defence is that the letter of demand dated 10th June 2009 was not submitted or attached to the email that was sent to him. Defendants therefore contend that there is no proof that the letter of the 10th June 2009 was sent and or received. If regard is had to the exchange of emails on the 12th June 2009 – see pages 12-14 of the record then it is clear that the letter of demand was sent and was received and I reject this denial.
- [10] Defendants second defence is that plaintiff has failed to prove that third defendant was authorised by resolution of the trust to receive a notice of demand in the person of the first defendant (see para 16.1 of the plea at page 27). There is no onus or need for the plaintiff to produce such a resolution. A trustee who accepts service would be authorised to do so in his capacity as trustee and I reject this submission.
- [11] Defendants third defence is that because that the acknowledgement of debt contains an address of service a *domicilium citandi*, service can only be affected at this address. I reject this contention because service on a trustee who accepts same on behalf of the trust is good service. Third defendant is a family Trust controlled by first defendant and his wife (second defendant.)

[12] Defendant's fourth defence is that the service of the section 129 Notice in terms of the NCA was not properly effected.

This notice (a copy which is annexed to the papers) was sent by registered post and clearly complies with the section 129

[13] In the result I find that the defendants have not established any of the defences raised and that on a balance of -probabilities the plaintiff will succeed in the principal case. In the result I direct that

a) Provisional sentence is granted against the defendants jointly and severally the one paying the others to be absolved for payment of

i) the sum of R2201 144.10;

ii) interest calculated at the published overdraft lending rate of Absa Bank Ltd with effect of 8 April 2009 to date of payment.

iii) Costs of suit taxed on the attorney and client scale including collection commission.



L. WEINKOVE, AJ
JUDGE OF THE HIGH COURT