**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTH GAUTENG HIGH COURT, PRETORIA)**

Case Number: 63231/09

In the matter between:

NANSA IMPORT ENTERPRICES CC

t/a OLIFANTS RENTALS

(Reg No: 1993/010850/23 Plaintiffs

and

MECHTER CC

(Reg No: 2002/007321/23) 1st Defendant

RICHARD MICHAEL ASHMAN

(ID No: […]) 2nd Defendant

**JUDGMENT**

**MNGQIBISA-THUSI J**

[1] Plaintiff is suing the defendants for provisional sentence on an acknowledgement of debt signed by the second defendant on behalf of the first defendant on 10 July 2009. The second defendant also bound himself as surety of the principal debt in terms of the acknowledgement of debt.

[2] In terms of the acknowledgement debt the first defendant admitted its indebtedness to the plaintiff in the sum of R 279 990.00 and guaranteed payment thereof on or before 30 September 2009. The defendants have not paid the amount due. The plaintiff is now seeking provisional sentence in terms of which the defendants are held liable, jointly and severally, to pay the plaintiff the stated amount on the summons for provisional sentence.

[3] It is common cause that the signature on the acknowledgement of debt on which the application for provisional sentence is based is that of the second defendant signing in his personal capacity as surety to the principal debt and in his representative capacity, on behalf of the first defendant. However, the defendants have raised as a defence, the fact that the acknowledgement of debt was signed under duress, alleging that the

acknowledgement of debt was signed by the second defendant after the plaintiff had threatened the second defendant with arrest on a charge of theft. This issue will be dealt with later.

[4] The defendants have raised two points *in limine*:

> 4.1 that the acknowledgement of debt is not for an ascertained sum of money;
>
> and
>
> 4.2 that the acknowledgement of debt is not unconditional.

[5] The plaintiff and the first defendant, in which the second defendant is a member, entered into an agreement in terms of which the first defendant sold a trailer business to the plaintiff. After the plaintiff had taken over the business, disputes arose which resulted in the plaintiff removing some of the stock (trailers) from the first defendant's business premises and the second defendant in turn removed the axles from some of the trailers on first defendant's business premises so as to prevent the plaintiff from further removing any more trailers.

[6] The plaintiff laid a charge of theft against the second defendant. Facing the possibility of arrest, the second defendant signed the acknowledgement of debt on behalf of the first defendant with him as a surety for the first defendant's indebtedness to the plaintiff for an amount of R 279 999.00.

[7] Provisional sentence may be granted based on, *inter alia*, an acknowledgement of debt signed by a debtor in terms of which he unconditionally admits his indebtedness to a creditor for an ascertained sum of money. Rule 8 of the *Uniform Rules of Court.* The plaintiff only has to prove that the signature on the document is that of the defendant. The onus would then be on the defendant to prove that the probabilities in the principal case are in his favour.

**Points *in limine***

The acknowledgement of debt being conditional

[8] Clause 2 of the acknowledgement of debt reads as follows:

> "2.1 The DEBTOR guarantees to pay and cause the CREDITOR to be paid the total capital amount of R279 990.00 (two hundred and seventy nine thousand and nine hundred and ninety rand) on or before end of September 2009(date).
>
> 2.2 ...
>
> 2.3 As some of the parts and equipment has not been valued, the CREDITOR will accept part of the capital amount to be offset by means of replacing the parts or equipment with similar parts or equipment provided the acceptance thereof rests and lies solely upon the discretion of the CREDITOR."

[9] Firstly, the defendants contend that *ex facie* the acknowledgement of debt **(the document),** the amount stipulated therein as being owed is not an ascertained amount since the agreement provides that part of the capital amount can be offset by means of replacement parts or equipment. That before the total capital amount can be determined, the offset first has to be calculated.

[10] The plaintiff has correctly contended that the fact that the agreement refers to an offset, does not detract from the fact that the capital amount is ascertained. From the document, it is clear that the first defendant has

acknowledged that he owes the plaintiff a certain capital amount, which amount is stated as being R279 999.00. Nothing turns on the fact that part of such capital amount can be offset by replacement of parts and equipment. I am of the view that from the document the amount owed by the first defendant to the plaintiff is R279 999.00 and therefore this point *in limine* fails.

[11] Secondly, the defendants contend that the payment of the debt is subject to a condition that certain meetings between the parties were to be held during which the total indebtedness of the defendants to the plaintiff would be finalised. In this regard the defendants rely on hand written inscriptions made to an annexure attached to the document, particularly inscription 2 which reads as follows:

> "(2) The balance of the civil case will be addressed on Thursday coming week as soon as the criminal side has been sorted out. The meeting to move forward and sort out all the problems will be addressed at your earliest convenience preferably Thursday 16th July 2009 this coming week. I hope you find this in order."

[12] The above quotation refers to problems being sorted out by 16th July 2009. However, and taking into account the non-variation clause contained in the agreement, it is not clear how the defendants would argue that the further meetings between the parties will affect the agreed upon capital amount indicated on the document. In this regard I am of the view that the defendants point *in limine* should also fail.

[13] In order to avoid provisional sentence the defendants are alleging that the signature of the second defendant on the document was obtained through duress. The defendants base this allegation on the fact that after disputes arose as to who owed what, the second defendant had removed axles from some of the trailers on the first defendant's business premise in order to prevent the plaintiff from removing any further trailers from the first defendant's business premises. As a result the plaintiff had laid a charge of theft against the second defendant.

[14] The defendants contend that faced with the possibility of the second defendant being arrested and detained on a weekend, the second defendant had been coerced into signing the acknowledgement of debt in order to avoid being arrested. That the threat of arrest was imminent since a captain Packree had kept on calling the second defendant, threatening him with arrest if he did not sign the acknowledgement of debt.

[15] The second defendant further contends that even though his legal representative had advised him not to sign the document presented to him if he was not satisfied with him and promised to assist it should he be arrested, the second defendant had signed it as he felt that if he was arrested, he would be held in custody for the weekend and his minor child under whose care she was, would not be taken care of whilst he was in custody.

[16] The plaintiff denies that the second defendant was forced to sign the acknowledgement of debt. The plaintiff further contends that even if the second defendant was coerced into signing, the threat of arrest was not unlawful or *contra bonos mores.*

[17] In *Arend and Another* v *Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (CPD) at 306 A-B the court held that:

> "Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:
>
> > (i) The fear must be a reasonable one.
> >
> > (ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or *contra bonos mores.’"*

[18] I am of the view that the use of a possible prosecution of the second defendant unless he signs the acknowledgement is *contra bonos mores.* The threat of arrest unduly forced the second defendant to agree to terms which he would in all probability not have agreed to in view of the disputes between the parties as to the amounts each party owes to the other. The threat in this case was real in that charges had already been laid against the second defendant. The threat of arrest thereby rendered the agreement contained in the acknowledgement of debt voidable at the instance of the innocent party, in this instance being the second defendant. The second defendant did not sign the acknowledgement voluntarily. I am of the view that such dispute should be resolved through trial proceedings which the plaintiff could still pursue.

[19] In the premises I do not think that the plaintiff has satisfied all the requirements for the granting of provisional sentence in these circumstances.

[20] Accordingly the application for provisional sentence is dismissed with costs.

**MNGQIBISA-THUSI**

**JUDGE OF THE NORTH GAUTENG HIGH COURT**

**PRETORIA**