**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**
**(REPUBLIC OF SOUTH AFRICA)**

27/05/2011

Case No: 1574/10

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED

27/05/2011 DATE ..................... SIGNATURE

In the matter between:

**ABSA BANK LIMITED** Applicant

and

**SJ COETZEE INC** 1st Defendant

**COETZEE, SJ** 2nd Defendant

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**JUDGMENT**

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**MNGQIBISA-THUSI, J**

[1] The plaintiff is suing the defendants for provisional sentence on an acknowledgement of debt signed by the second defendant on 18 May 2009 on behalf of the first defendant and also as surety.

[2] The first defendant was not represented at this hearing as it appears that it is, as a consequence of an order granted in favour of the Law Society of the Northern Provinces, the first defendant is under the control and administration of the Law Society.

[3] As set out in the plaintiff's summons for provisional sentence, the acknowledgement upon which the claim reads in part as follows:

> "The Defendants acknowledged that they are truly and lawfully indebted, jointly and severally, one paying the other to be absolved, to ABASA Bank Limited, its successor in title and administrators or assigns in the agreed amount of:
>
> 2.1.1.1 R734 641, 79 (seven hundred and thirty four thousand six hundred and forty one Rand and seventy nine cents) owing to the Bank as at 1 June 2009 arising from and being in respect of a letter of undertaking issued in favour of the bank on 18 May 2009 ..;
>
> 2.1.1.2 the capital Sum would bear interest as follows
> On the R652 997,00 portion thereof at the rate of 10.5% per annum; and
> On the R81 644,79 portion thereof at the rate of prime plus 8% per annum;
> Calculated from 1 July 2009 to date of final payment. Such interest would be calculated on a compounded daily basis on the total balance owing to the Plaintiff from time to time. In the event that the acknowledgement of Debt is subject to the national credit act, no 34 of 2005 ("the Act"), such interest would be the maximum interest rate permitted by the Act."

[4] It is common cause that:

4.1 The second defendant signed the acknowledgement of debts;

4.2 At the time the second defendant signed the acknowledgement of debt she was acting on behalf of the first defendant; and

4.3 the defendants have not paid the plaintiff.

[5] The second defendant, in her answering affidavit and in argument, raised several points *in limine*. However, as conceded by counsel for the second defendant, the applicant has dealt with the defects raised in the answering affidavit in its replying affidavit.

[6] At the start of the proceedings the second defendant seemed to object to the admission of the replying affidavit on the ground that the applicant did not attach its resolution wherein the deponent to the replying affidavit, Lynn Ferguson, is authorised to act on behalf of the applicant. The second defendant has properly raised the non attachment of Ferguson's authorisation. However, this is not a material factor in that it does not appear that the applicant did not authorise Ferguson to depose to the replying affidavit on its behalf. Further, since the non attachment of the authorisation does not in any way affect the merits of the case as to whether the applicant should be granted provisional sentence, and in the interests of justice and in the absence of any evidence vitiating the authorisation of Ferguson, the replying affidavit is admitted.

[7] The remaining points *in limine* raised by the second defendant are the following:

7.1 that there is a material difference between the date in the certificate of balance and the date stated in the acknowledgement of debt.

7.2 that the Law Society of the Northern Provinces ("the Law Society") has not been joined as a party to these proceedings.

[8] The first point raised relates to the fact that the acknowledgement of debt refers to the date of 11 August 2009 as the date upon which the defendants' debt becomes due and payable whereas the certificate of balance attached to the applicant's papers mentions the date of 11 June 2009. As correctly pointed out by the applicant, it appears that the second defendant has misconstrued the two dates referred to. On reading the acknowledgement of debt and the certificates of balance it is clear that the date of 11 June 2009 reflected in the certificates of balances refers to the date on which the debt as acknowledged becomes due and the 11 August 2009 is the date when the debt is to be paid. I am of the view that this point raised by the second defendant has no merit.

[9] As appears from the replying affidavit the applicant only became aware that the second defendant has been suspended by the Law Society

from practising as an attorney on 16 November 2009 after it received the second defendant's answering affidavit and after making its own enquiries. It was contended on behalf of the applicant's that there was no need to join the Law Society in these proceedings as it is a condition precedent that before the plaintiff can make a claim to the Fidelity Fund, it must have exhausted its remedies against the affected attorney first. On this basis I do not find that there is a misjoinder of the law Society even though it does have an interest in the outcome of this case.

[10] A person may only be summoned to answer a claim made for provisional sentence where the claim is founded upon a liquid document. If a document on the proper construction thereof evidences by its terms and without resort to evidence extrinsic thereto, ... an acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor., it is upon which provisional sentence may properly be granted. *Rich v Lagerwey* 1974 (4) SA 748 (A) at 754H. Once served with a provisional sentence summons the defendant must file an affidavit to admit or deny his signature. He also has to set forth the grounds of his defence to the claim.

[11] It appears that the acknowledgement of debt was signed by the second defendant in her capacitv as an attorney and thereby representing the first defendant for a debt which was owed by certain Mr and Mrs Bernado with regard to a transaction of the sale of certain properties. As

indicated above, the second defendant does not deny that it is her signature which appears on the acknowledgement of debt. Further, the second defendant does not deny that she, together with the first defendant owe the amount indicated in the acknowledgement of debt to the applicant and that no payment has been made.

[12] The second defendant's defence to the claim for provisional sentence is that even though the money is owed, the money is not due and payable until, as evidence by the letter of undertaking, the registration of the properties which were the subject matter of the conveyancing transaction she performed for Mr and Mrs Bernado. It was argued on behalf of the second defendant that since the applicant had not attached the letter of undertaking (Annexure A to the acknowledgement of debt) to its summons for provisional sentence, which would have proven that the acknowledgement of debt did not contain an unconditional undertaking to pay. It was contended that the undertaking to pay the applicant was subject to the registration of the properties.

[13] In her answering affidavit the second defendant also alleged, as a ground of defence that the amount indicated in the acknowledgement of agreement was a loan she had obtained from the applicant for a debt of Mr and Mrs Bernado. Counsel for the second defendant did not during argument pursue this argument. Since the second applicant did not lay any basis for this allegation, I will not deal with it any further.

[14] With regard to the letter of undertaking referred to in the acknowledgement of debt, the plaintiff gave notice of its intention to amend the provisional sentence summons in order to effect the incorporation of the letter of undertaking referred to as annexure A in the summons. This notice of amendment was served on the second defendant and she did not object to such amendment. As a result the letter of undertaking forms part of plaintiff's application.

[15] As appears from the letter of undertaking, the defendants undertook to pay the amounts owed by a certain Mr and Mrs Bernado upon registration of certain property for which the first defendant, acting through the second defendant was the conveyancing attorney in the sale of the properties. Subsequent thereto it appears that the registration of the said properties was effected on 29 May 2009. However, the defendants did not pay the plaintiff as agreed on in the letter of undertaking. As a result thereto the defendants had signed the acknowledgement of debt which forms the basis of the plaintiff's claim.

[16] In view of the above, it does not appear that the letter of undertaking is relevant to the acknowledgement of debt in that by the time the acknowledgement of debt was signed the condition for payment to the plaintiff, namely, registration of the mentioned properties, had already taken place. Plaintiff's counsel has correctly pointed out that the

letter of undertaking is merely a historical recordal of the background leading to the signing of the acknowledgement of debt.

[17] In the premises, I am of the view that the acknowledgement of debt signed by the second defendant and whose signature is not denied by the second defendant, is an unconditional undertaking by the defendants to pay the plaintiff the amounts mentioned. It is a liquid document. The second defendant, as indicated earlier, has admitted that it is her signature that appears on the acknowledgement of debt. Secondly the second defendant has admitted that no payments to the plaintiff have to be made.

[18] In view of the fact that the acknowledgement of debt is a liquid document upon which provisional sentence may be granted, the issue to be decided is whether on probabilities the defendants have a defence which could succeed in the principal case.

[19] In submissions on behalf of the second defendant it is contended that the transaction which formed the basis for the signing of the acknowledgement of debt is a loan which the plaintiff gave to the defendants. It is therefore argued that such a loan falls within the provisions of the Credit Agreement Act and the plaintiff is not entitled to provisional sentence since the provisions of the Act have not been complied with. However, from the documents before me, nothing

evidences the fact that the debt owed by the defendants to the plaintiff was a loan the plaintiff had granted to the defendants. There is sufficient proof that the underlying cause was the letter of undertaking issued by the defendants to the plaintiff. The second defendant did not provide any proof of the existence of a loan save to allege that provisional sentence be refused and the matter go to trial where the necessary oral evidence would be given to prove the second defendant's allegation of a loan. The second defendant's argument sound hollow in view of the evidence before me.

[20] I am satisfied that the plaintiff has made a proper case for the granting of provisional sentence.

[21] Accordingly the following order is made:

1. Provisional sentence is granted in favour of the plaintiff in the sum of R734 641,79 against the first and second defendants jointly and severally between the two defendants.;

2. Interest on the capital amount to be paid as follows:
   - 2.2 the sum of R652 997,00 of the capital sum at the rate of 10.5% per annum;

2.3 the sum of R81 644,79 of the capital sum at the rate of prime plus 8% per annum, calculated from 1 June 2009 to date of final payment.

3. Costs of suit.

**NP MNGQIBISA-THUSI**

**Judge of the North Gauteng High Court**