

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 5791/2017

In the matter between:

Logan Loganathan Reddy t/a Logprop Realty

Plaintiff

and

Lingappen Chinsamy Govender

First Defendant

Sivagami Govender

Second Defendant

Judgment

Lopes J:

[1] On the 27th June 2017, the plaintiff issued a provisional sentence summons against the defendants claiming payment of the sum of R230 000 in terms of an acknowledgement of debt, signed at Chatsworth by the defendants on the 5th August 2014.

[2] The acknowledgement of debt contains an unconditional undertaking to pay the sum of R230 000 to the plaintiff by the end of December 2014. The matters giving rise to these proceedings, may be summarised as follows:

- (a) The first defendant was a member of a close corporation, Magally Engineering CC ('Magally Engineering'). The second defendant is his wife.
- (b) Magally Engineering was in financial difficulty and the defendants were referred to the plaintiff on the basis that he was an expert in insolvency matters who could give them advice.

- (c) The plaintiff was an insolvency practitioner who traded as Logprop Realty.
- (d) The plaintiff advised the defendants that they should apply for the voluntary liquidation of Magally Engineering. The defendants allege that his fees for doing so was to be R480 000. The plaintiff avers that the fees was to be only R230 000, which was to be paid by the end of December 2014.
- (e) The defendants allege that they paid him R250 000 in cash on the 31st July 2014. They also admit having signed the acknowledgement of debt for the sum of R230 000 on the 5th August 2014.
- (f) The plaintiff denies having received the R250 000 in cash. The allegation in the provisional sentence opposing affidavit is that the defendants paid the sum of R250 000 on the 31st July 2014. In separate proceedings the defendants allege that they paid R100 000 on the 30th July 2014 and R150 000 on the 31st July 2014.
- (g) Finding themselves unhappy with the plaintiff's services, and his referral of their legal problems to his daughter, an attorney of this court, the defendants engaged their present attorney, and laid a complaint against the plaintiff's daughter with the Law Society.
- (h) On the 24th July 2017 the defendants caused an action to be instituted against the plaintiff out of the Regional Court in Durban, for payment of the R250 000. That action is defended and proceeding in the Regional Court.

[3] Mr Crots, who appeared for the defendants, raised the following defences:

- (a) On the basis of the judgment in *Twee Jonge Gezellen (Pty) Ltd & Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank, & Another* 2011 (3) SA 1 (CC), provisional sentence procedures will only be constitutionally compliant if courts have a

discretion to refuse provisional sentence where the defendant is able to demonstrate the following:

- (i) an inability to satisfy the judgment debt;
 - (ii) that the prospects of success in the main case on the papers, are evenly balanced; and
 - (iii) there is a reasonable prospect that oral evidence may tip the balance of prospective success, in favour of the defendant.
- (b) That the plaintiff is an insolvency practitioner, who charges fees for the professional services which he renders. He is not, however, an admitted attorney, and, accordingly, in terms of s 41 (1) of the Attorneys Act, 1979 he is not entitled to practise as a practitioner for his own account unless he is in possession of a fidelity fund certificate. Section 41 (2) of the Act, provides that any practitioner who does so, shall not be entitled to any fee. Accordingly the plaintiff's claim is bad in law, or excipiable.
- (c) The document sued on is not a liquid document because the plaintiff admits that it wrongly recorded the cause of indebtedness as 'monies loaned and advanced'. However, an admission is made in the provisional sentence summons that the underlying cause of action was in respect of services rendered.
- (d) As the defendants have brought their defence within the parameters set out in *Twee Jonge Gezellen*, the liquid document relied on in the provisional sentence summons should be tested during the pending Regional Court trial instituted by the defendants against the plaintiff. In those circumstances the provisional sentence action should be transferred to the Regional Court and the plaintiff's version tested by way of cross-examination during that trial.

[4] Mr *Crots* described the *Twee Jonge Gezellen* judgment as a watershed decision in provisional sentence proceedings. He submitted that *Rich & Others v Lagerwey* 1974 (4) SA 748 (A), which is authority for the proposition that oral evidence may only be heard relating to the signature of the defendant or his agent, was of limited application in so far as it is suggested that a court had no inherent power to order *viva voce* evidence.

[5] Mr *Crots* conceded that the defendants were unable to satisfy the three criteria set out in *Twee Jonge Gezellen*, as they had not demonstrated an inability to satisfy the judgment debt. Mr *Crots* conceded that nowhere in the opposing affidavits had the defendants alleged that they were unable to satisfy the debt owed in terms of the acknowledgement of debt. However, Mr *Crots* submitted that *Twee Jonge Gezellen* is not authority for the proposition that a court has no discretion if a defendant is unable to satisfy any one of the three requirements set out above. He submitted that the ability of the defendant to pay the amount sued for is not a *sine qua non* for the court being able to exercise its discretion to refuse provisional sentence.

[6] I cannot agree with this suggestion by Mr *Crots*. In my view the constitutional court has laid down the circumstances in which a court will exercise its discretion to refuse provisional sentence. In the present matter, the ability of the defendants to pay the claim is somewhat complicated by the fact that there is an admission in the papers that an associated entity, Magally Properties CC owned the property on which Magally Engineering operated. The property was sold by private treaty, on the 8th April 2016, for the sum of R5 757 000. In addition certain movable goods and equipment of Magally Engineering were sold for R68 000. Although there were mortgage bonds registered against the property to the extent of R4 685 216.97, a considerable balance remained. No explanation was given by the defendants as to what happened to those monies.

[7] Moreover, I am by no means satisfied that the defendants are able to demonstrate the second and third requirements of *Twee Jonge Gezellen*. There are contradictions in the defendants' version relating to the time and place of the alleged payment of R250 000. In addition, the correspondence exchanged between the parties appears to indicate that the defendants freely acknowledged their indebtedness to the plaintiff, as recorded in the acknowledgement of debt. Had they been threatened into signing the acknowledgement of debt as they allege, the attitude adopted by them in the correspondence is inexplicable. Given their concern with the amounts charged by the plaintiff for his services, they would no doubt have complained about that as well, if they had already advanced the sum of R250 000 to the plaintiff. In those circumstances I do not view the probabilities of the defendants succeeding in an opposed hearing as being evenly balanced. Those probabilities favour the version of the plaintiff.

[8] Given the improbabilities in the defendants' version, as well as the contents of the correspondence sent by them to the plaintiff, freely acknowledging their indebtedness to him in respect of the acknowledgment of debt, I do not believe that oral evidence would tip the balance of any prospect of success in favour of the defendants. In addition, it is clear from the answering affidavits of the defendants, that very soon after becoming acquainted with the plaintiff, they realised that he was simply there for what he could get out of them, and not to assist them as he had undertaken to do. To be writing letters a year later openly acknowledging their indebtedness to him in respect of the acknowledgment of debt is contradictory in the extreme. In those circumstances any reliance on the *Twee Jonge Gezellen* judgment cannot assist the defendants.

[9] With regard to the fact that the plaintiff is not an attorney of this court, he does not profess to be so. He claims only to be an insolvency practitioner, and clearly does not fall within the definition of a 'practitioner' as defined in s 1 of the Attorneys Act, 1979. This defence accordingly has no merit.

[10] The suggestion that the acknowledgment of debt is not a liquid document, because the underlying cause of action is incorrectly described therein, cannot assist the defendants. The full court of this division in *Jenkins v De Jager* 1993 (4) SA 534 (N) decided that an incorrect description of the underlying causa in an acknowledgment of debt did not affect the liquidity of the document. In that case the incorrect description was only raised in reply. In the present matter it was raised in the provisional sentence summons itself. In any event, the parties are *ad idem* as to the underlying cause of action. In those circumstances there can be no prejudice whatsoever occasioned to the defendants by the incorrect description in the acknowledgement of debt.

[11] Mr *Crots* but faintly argued that there were different trading names used by the plaintiff, and that this created confusion and uncertainty as to the identity of the plaintiff, and in those circumstances provisional sentence should not be granted. In this regard a fourth set of affidavits was produced by the defendants dealing with the fact that the plaintiff is a member of a CC which trades under a name which is similar to, but not the same as, 'Logprop Realty'. In my view there is no confusion whatsoever on the part of the plaintiff, as to the alias under which he traded.

[12] Finally, Mr *Crots* submitted that I should exercise my discretion to disallow provisional sentence because the matter was already before the Regional Court and it was undesirable that two courts hear the same underlying cause of action. As pointed out above, the Regional Court summons was issued after the provisional sentence proceedings were instituted in this Court. If granted, provisional sentence does not prevent the defendants from defending the action. All they are required to do is put up security for the debt, for which they may demand counter-security from the plaintiff. They will then be able to enter the principal case and deal with the allegations. As the defendants have made no indication that they are unable to pay security to enable them to enter the principal case, there is no basis upon which I can exercise my discretion to refuse provisional sentence.

[13] In all the circumstances I grant provisional sentence in favour of the plaintiff against the defendants, jointly and severally, the one paying the other to be absolved for the following amounts:

- (a) Payment of the sum of R230 000.
- (b) Interest thereon calculated at the rate 10.5 percent per annum from the 27th June 2017 to date of payment;
- (c) Costs of suit, calculated on the scale as between attorney and client, such costs to include those consequent upon the supplementary affidavits of the defendants and the plaintiff's opposition thereto, including the costs reserved on the 8th August 2017.

Lopes J

Dates of hearing:	24 th April 2018.
Date of Judgment:	10 th May 2018.
Counsel for the Applicant:	Mr K <i>Naidu</i> (instructed by I.C. Meer, Kallideen & Company).
Counsel for the Respondent:	Mr E <i>Crots</i> (instructed by Mooney Ford Attorneys).