IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

Date: 14 September 2012

Case No: 2/12

In the matter between:

MOMENTUM GROUP LTD	**PLAINTIFF**
LE GRANGE AJ	**DEFENDANT**
AND	
In re:	**3/12**
MOMENTUM GROUP LTD	**PLAINTIFF**
SAUNDERSON CP	**DEFENDANT**

JUDGMENT

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[1] The plaintiff instituted two actionsfor provisional sentenceagainst the defendants respectively. The cases were heard simultaneously since the causes of action are the same and the arguments, exceptfor the application for the amendment of the summons in the matter against Le Grange, are the same.

[2] The plaintiff's claims for provisional sentence are based on the documents headed "OFFER: INDEPENDENT CONTRACTOR" which were attached to the summons as annexure "A" respectively. The plaintiff contended that the documents constituted acknowledgment of indebtedness by the defendants. The defendants in turn, although acknowledging their signatures on these documents, challenged their liquidity.

[3] In the Le Grange matter, the plaintiff alleges that on 21 June 2010 at Kimberley the plaintiff in writing offered to pay the defendant an amount of R1 300 000.00. In the case of Saunderson the amount involved is R600 000.00and the offer was made on 29 June 2010 at Kimberley. The offers in both matters were subject to the following terms:

3.1 Should the defendants accept the offer they would be bound by the plaintiff's standard agreements applicable to Independent Contractors, which they were required to sign.

3.2 The defendants' entitlement to the amounts of R1 3000 000.00 and R600 000-00 respectively depended,*inter alia*, upon the condition that the defendants should remain Independent Contractors for 48 months from date of signature of the contracts.

3.3 The defendants agreed to repay to the plaintiff 100% of the amountsthey received should they resign or should the Independent Contractor agreement for any reason whatsoever be terminated within 24 months from date of the contract by either party. If terminated any time after 24 months they would be liable to pay 75% of the amount paid to them respectively.

[4] It is common cause that the defendants accepted the offers by signing the contracts as Independent Contractors with the plaintiff. Le Grange signed on 7 July 2010 and Saunderson on 1 August 2010.The plaintiff paid theamounts of R1 300 000.00 and R600 000.00 less statutory tax to the defendants respectively.

[5] Le Grange resigned as IndependentContractor on 28 February 2011 and Sanderson resigned on 15 March 2011. The termination of the Independent Contractor’s agreements by the defendants occurred less than 24 months from the date of receipt of the money, and according to the plaintiff 100% of the amounts of R1 300 000.00 and R600 000.00 became immediately due and payable to the plaintiff. The defendants failed or refused to pay to these said amounts to the plaintiff.

[6] In response to the plaintiff’s claims the defendants have raised two *points in limine* in addition to their defence on the merits. The first point *in limine*is to the effect that the documents on which the plaintiff’s claimsare based do not record an unconditional liability of indebtedness. They contend that at most they create a conditional liability namely, that liability will only arise if the defendants do not remain Independent

Contractors for plaintiff for 48 calendar months. For this reason, they contend, thedocument isnot a liquid document.

[7] The second point *in limine* raised by the defendants is to the effect that although the plaintiff relies on annexure “A” which it attached to the summons, it also on own version, hold the defendants to the Financial Planner’s Agreement as part of its *causa*, meaning that there is no *causa*on Annexure “A” alone. The defendants contend further that the Financial Planner Agreement was only introduced in the action in the replying affidavits and it expressly replacesany previous agreementsthereby nullifying annexure “A”. The plaintiff’s claims are therefore not founded upon a liquid document that is in force. They further contend that the plaintiff failed to comply with Rule 18(6)[1] by attaching the Financial Planner Agreements to its summons.

[8] The defendants further took the point that the agreements provided that any party may cancel the agreement by giving 14 days written notice to the other and it shall not be required of such party to furnish reasons for such cancellation. The agreementsprovided further that a certificate signed by a department head of the plaintiff may serve as liquid document in any competent Court of Law for the purposes of provisional sentence, default judgment or summary judgment or any other legal proceedings. The defendants contend that such certificate was deliberately not presented to this Court because doing so would be an admission by the plaintiff that its Annexure “A” to the summons is not a liquid document thereby rendering these provisional sentence proceedings incompetent. They contend further that by providing that

[1]Rules for the conduct of Proceedings in the High Courts of South Africa.

the certificate should serve as a liquid document, the intention was that Annexure “A” would not constitute a liquid document.

[9] On the contents of Annexure “A” itself the defendants’ defence is as hereunder.

10.1 The defendants were in the process of becoming the plaintiff’s Financial Planners. The defendants had been brokers for various insurance companies. The plaintiff recognised that in consequence of them becoming its Financial Planners, they would experience a loss of commission flows and or fees because they were expected to terminate any agreement that they had with any other financial services provider and were obliged to submit all insurance and investment applications they recruited to the plaintiff.

10.2 The plaintiff then calculated the total amount of money that would represent the loss of commission flows or fees to the defendants and paid the said money to them to neutralize their financial situation and to compensate them for the loss that they would experience when they entered into a Financial Planner Agreements with the plaintiff.

10.3 The defendants’ contention is therefore that Annexure “A” is not an unconditional acknowledgment of indebtedness because indebtedness would only arise in the event of the contractual relationship, of which the plaintiff is the author, not bear fruit, resulting in defendants resigning or the contracts with the plaintiff being terminated for any reason whatsoever. The amount of indebtedness also depended on the time at which the contracts are terminated.

10.4 The defendants contended further that the effect of the offer that was accepted by them was nothing more than an agreement in terms whereof the defendants had to change all their existing clients from the opposition to the plaintiff for payment of the amounts of R600 000-00 and R1300 000-00 respectively in return. They argued that the plaintiff's conduct amounted to piracy, dishonesty and disregard to the duty that the plaintiff and defendants had to each other and to any insured. It also constitutes conflict of interest and unfair competition. The defendants submitted further that the plaintiff acted in direct contravention of the *Financial Advisory and Intermediary Service Act*,[2] and the *General Code of Conduct* promulgated therein. Theycontend that the agreement is therefore illegal and unenforceable.

[10] Le Grange has also referred to operational problems he encountered with the plaintiff's personnel in conducting his business with the plaintiff. These problems related to lack of support as was required in terms of the agreement and he as a result suffered losses. He avers that plaintiff undertook to compensate him for that loss. Since there was no assistance from the plaintiff's side, he was left with no option but to resign in order to mitigate his damages. He contends that he has a counterclaim against the plaintiff in the amount of R1 811 000.00 being the damages he suffered as a result of the plaintiff's conduct. The plaintiff has denied the allegations made by Le Grange and maintains that it did what was required in terms of the agreement and that it was Le Grange who failed to comply with his part of the contract.

[11] Saunderson also alleges that he was unable to perform as required in terms of the agreement due to lack of support by the plaintiff and has as a result suffered damages in the amount of R1000 000-00 which the

[2]Act 37 of 2002

plaintiff is liable to pay. The plaintiff denies these allegations and its liability to Saunderson for any damages.

[12] It is trite that provisional sentence procedure provides a process whereby a creditor who has sufficient documentary proof with a speedy remedy for the recovery of money due without having to go through an expensive, cumbersome and often dilatory machinery of an illiquid action. A creditor who has a liquid document is able to obtain an enforceable provisional judgment speedily without having to wait for the final determination of the dispute between the parties.[3]

[13] A judgment granted in terms of this procedure is founded upon the presumption of indebtedness evidenced by the document which is truly liquid without requiring assistance of extrinsic evidence. The position was stated as follows in *First National Bank Ltd v Avtjoglou*[4];

> *"A liquid document which a party seeking provisional sentence must prove is defined as one which evidences by its own terms, without the need for extrinsic evidence, an unconditional acknowledgment of indebtedness in an ascertained sum of money the payment of which is due. Rich and Others v Lagerwey 1974 (4) SA 748 (A) at 754. The document may make payment by a defendant dependent on the happening of a simple event or the fulfilment of a simple condition. The law, however, distinguishes between indebtedness being subject to the happening of a specified event and the payment being so subject. The latter situation will not affect the liquidity of a document. Union Share Agency & Investment Ltd v Spain 1928 AD 74 at 80-1; Joosub v Edelson 1998 (3) SA 534 (W)."*

[3] Rule 8 of the Rules for the Conduct of the Proceedings in the High Court; Herbestein& Van Winsen: The Civil Practice of the High Courts of South Africa. 5th ed. Juta.Page 1313.
[4] 2000(1) SA 989 (c) at 994 F-H

[14] In Joosub vEdelson[5] the court held that the enquiry when provisional sentence is sought is a two-fold one:

> *"One must first determine whether the debt in question falls within the parameters set in cases such as Union Share Agency & Investment Ltd v Spain [1928]AD 74 at 80-1] and Inglestone v Pereira [1939 WLD 55]. If it does, one then examines the condition to ascertain whether it qualifies as a simple condition. If it is, then one can merely allege in the summon and, if necessary prove, fulfilment thereof. If the claim fails the first tests, however, one does not proceed tothe second phase of the enquiry."*

[15] In order to escape provisional sentence on a liquid document the defendant must satisfy the court on a prepondence of probability that it is unlikely that the plaintiff will succeed in the principal case.[6]

[16] It was persuasively contended on behalf of the defendants that Annexure"A" is not a liquid document. On its wording it states that the amount of money paid to the defendants by the defendant is compensation for loss of commission flows or fees. The quantum of the loss is based on the earning capacity of the defendant over a period preceding the conclusion of the Independent Contractor agreements. Once the amounts of money are paid by the plaintiff, it appears the parties are in equal positions and what is required of the defendants is to work for the plaintiff for a contracted period and be paid for their services. An obligation to pay does not appear *ex facie* the document but depends on the future event. It also depends on the length of the period served by the defendants and what amount should be payable. On consideration of the points taken and examination of the documents the plaintiff is relying on I am not persuaded that the documents the

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[5] 1998(3) SA 534 (W) at 538 C-E.
[6] De Atouquia v Braz 1989 (2) 807 (A); Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd 1991 (3) SA 276 (SE). Van Winsen&Hepstein (supra): p1315; 1395-1402.

plaintiff's claims are based constitute clear and unequivocal acknowledgment of debt.

[17] In addition either party has a right to terminate the agreement for any reason whatsoever which provision may be found to be unconscionable. The defendants have also raised some alleged contraventions of the *Financial Advisory and Intermediary Services Act and the Competition Act* which cannot be ignored. They go to the legality and enforceability of the very agreements that the plaintiff bases its claims for provisional sentence[7]. Furthermore, there is a dispute about the cause ofthe termination of agreements. The defendants are likely to succeed with their counterclaims should they successfully prove at trial that the plaintiff breach the agreement and that they suffered damages as a result. It is interesting to note that should the defendants be unable to complete the contracted period by a few days they would be expected to pay 75% of the amounts they received.

[18] In the case of Le Grange the plaintiff filed an application for amendment of its summons. The purpose of the amendment is to substitute Annexure "A" with another document to be marked Annexure "AA" which was concluded by the parties subsequent to Annexure "A". The purpose of the amendment is to replace the amount of R1 300 000-00 with an amount of R1500 000-00. The defendant has a good point that the amendment is only made in the replying affidavit and when the matter has already been enrolled for hearing without affording him sufficient time and space to oppose the application. However, in light of my finding on the merits of the provisional sentence claims, I am inclined to

[7] Cassimjee v Naidoo ;Cassimjee v Sing and another 1959 (4) SA 139 (N) at 141 B-C. IntergritasOuditeureingelyf v Crous [2002]1 ALL SA 583(T).

accede to the application for amendment. The fact that Annexure “AA” was concludedbetween the plaintiff and Le Grange is common cause and does not materially affect Le Grange’s defence to the provisional sentence claim. It merely increases the plaintiff’s quantum and the duration of the contract between the two parties from 48 months to 60 months. In my view, costs of the provisional sentence proceedings should be costs in the cause of the action.

[19] In the circumstances the following ordersare made:

Case no. 2/12 (Le Grange):

1. **The Application for the amendment of the summons is granted.**
2. **Provisional sentence is refused.**
3. **The summons is to stand as a simple summons and the defendant is deemed to have served a Notice of Intention to defend today (14 September 2012 being the date of this judgment and order). Thereafter the rules of Court are to apply regarding the filing of further pleadings.**
4. **The costs of the provisional sentence proceedings shall be costs in the course of the action.**

Case No: 3/2012 (Saunderson):

1. **Provisional sentence is refused.**

   The summons is to stand as a simple summons and the defendant is deemed to have served a Notice of Intention to defend today (14 September 2012 being the date of this judgment and order).Thereafter the rules of Court are to apply regarding the filing of further pleadings.

2. **The costs of the application for provisional sentence shall be the costs in the course of the action.**

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JUDGE: NORTHERN CAPE HIGH COURT

Appearances:

For the Plaintiff:	Mr Fletcher
Instructed by:	Gerings Attorneys
For the Defendants:	Mr P Visagie
Instructed by:	Theron&Vennote