In the KwaZulu-Natal High Court, Durban

Republic of South Africa

Case No : 11939/11

In the matter between :

Foil Laminators CC	Plaintiff
and	
Pitoo Investments CC	First Defendant
Vinay Nunthkumar	Second Defendant

Judgment

Lopes J

[1] The plaintiff in this matter sues for provisional sentence in the sum of R304 601,33, together with interest thereon calculated at the rate of 15,5% per annum from due date to date of final payment, and costs on the scale as between attorney and client.

[2] The plaintiff's cause of action is an acknowledgment of debt completed by the second defendant, both as duly authorised representative of the first defendant, and in his personal capacity.

[3] The acknowledgment of debt has clearly not been correctly completed. The introduction to the acknowledgment reads :-

'I the undersigned, Mr Vinay Nunthkumar

...

do hereby declare myself in my personal capacity and jointly Pitoo Investments CC to be :

1. Indebted to in the amount of **R572 601,33** ...

3. in the event of any breach of any of the terms hereof, and Foil Laminators C.C. instituting and action for recover in term hereof, I undertake to pay such legal costs as is incurred by Foil Laminators C.C on an Attorney and Client scale.

...

5. all payments shall be made to the said Foil Laminators C.C, **36 Rana Road, Isipingo Rail**.

6. In the event of my failing to make payment promptly on due date, Foil Laminators C.C has my consent to take judgment against myself or the C.C, without notice to either myself or the C.C for the outstanding amount. I further accept that in such circumstances I shall be liable for the payment of all legal fees on the attorney and client scale of costs ...'

(The above is reproduced exactly as it appears in the acknowledgment of debt.)

[4] Annexed to the provisional sentence summons, and referred to in the

body of the summons, is a demand for payment date the 6th August 2009. That demand for payment records that the first defendant has not met its obligations to the plaintiff in respect of a credit application form which was signed on the 8th February 2005 and sets out the amount for which it is indebted to the plaintiff.

[5] The letter of demand contains the threat that unless payment is made within ten business days, the plaintiff would approach the court to enforce the agreement. A similar letter was sent to the second defendant on the same day, but refers in addition to a suretyship agreement signed by the second defendant.

[6] The defendants have opposed the grant of provisional sentence and raise the following defence :-

(a) that a representative of the defendants communicated to the plaintiff a payment plan which was rejected by them. The rejection letter is annexed to the defendants' opposing affidavit marked 'A'. The second defendant submits that the acknowledgment of debt forming the basis of the plaintiff's provisional sentence application was premised on the payment plan, and 'accordingly the acknowledgment of debt is rejected'.

In my view this does not disclose a defence to the plaintiff's action. The demand was made on the 6th August 2009 and the rejection of the defendants' payment plan was made on the 1st September 2009. The fact that a debtor may propose an alternative payment plan of action to a creditor, and the creditor rejects that proposal, does not constitute a defence to the payment of a debt previously incurred. Although the letter of demand does not refer to the acknowledgment of debt, it is clear from the defendant's answering affidavit that it accepts that the same debt is referred to, the acknowledgment of debt clearly having been a form of security taken by the plaintiff;

(b) The acknowledgment of debt is flawed in that :-

(i) it does not state to whom the defendants' are indebted;

(ii) it does not state when the payments are to be made.

[7] On a reasonable interpretation of the acknowledgment of debt, it is clear that the first of these additional defences must fail. Although the wording of paragraph 1 to the acknowledgment of debt – 'indebted to in the amount of **R572 601,33**' clearly omitted to state the identity of the creditor, its identity is obvious from a further reading of the document. This is clearly implied in paragraph 3, and in paragraphs 5 and 6 of the acknowledgment of debt. In all the circumstances I find that this defence has no merit as the creditor is clearly the plaintiff.

[8] With regard to the fact that the acknowledgment of debt does not set out when the payments are to be made, in *Smith v Yeoman* 1945 NPD 402, Selke J considered a claim for provisional sentence where the document relied upon did not stipulate a date by which repayment had to be made. At page 405 he stated:-

'Now here the action is upon a document signed by the defendant, acknowledging that he has received from the plaintiff the loan of a definite amount of money, and it goes on irrevocably to cede certain insurance policies as security for the capital amount of that loan and for the interest thereon. The use of the expression "monies lent" seems to me *prima facie* to import an obligation to repay, and thus an indebtedness pending such repayment. It is true that the document does not specify any date for repayment, but I understood counsel to be agreed that the law is that where a loan is made without any express stipulation as to the date upon which it is to be repaid, it normally becomes repayable after reasonable notice to repay. That I believe to be a correct statement of the law. The summons recites that notice has been given, and as I remarked previously, that fact is not disputed in the defendant's affidavit of opposition.'

[9] In my view the facts of this case are sufficiently on all fours with *Smith*, save that in this case the expression used is 'indebted to', rather than 'monies lent'. This case is in my view an *a fortiori* case.

[10] In *Jammine and another v Emile* 1951 (4) SA 460 (TPD) the plaintiff issued summons for provisional sentence on an acknowledgment of debt signed by the defendant, and no date for repayment was stipulated. It was suggested as a defence that the provisional sentence summons should have contained an allegation that reasonable notice had been given to the defendant calling on him to pay the amount in the acknowledgment of debt. Referring to the dicta of Selke

J in *Smith*, Neser J stated at page 463 D - F:-

'I think it is clear from the reasoning in the judgment that the learned Judge was of opinion that had there been no allegation in the summons that a demand for payment had been made, plaintiff would have been non-suited. With deference to the learned Judge, I do not agree with that opinion. In *Ridley v Marais* 1939 A.D. 5, plaintiff had issued summons against defendant for payment of the sum of £270. In his declaration plaintiff alleged that defendant had admitted liability to him in the sum of £270 which he had not paid notwithstanding the fact that a reasonable time had elapsed since the admission of liability.'

Referring to the reasoning of the judgment of Watermeyer JA who heard the *Ridley* matter, Neser J continued at 364 B - D :-

'... plaintiffs in the present case had a cause of action against defendant even if no demand for payment had been made. Plaintiffs could thus have sued in an illiquid summons without making any prior demand. Had they done so defendant could have tendered payment of the sum claimed within a reasonable time and could successfully have contended that no order for costs should be granted against him. But there would be no doubt that plaintiffs would have been entitled to judgment.'

[11] In *Standard Bank of SA Ltd v Slomowitz* 1957 (3) SA 207 (TPD) de Wet J considered a document signed by the defendant and addressed to the manager of the plaintiff bank, stating that he had examined the statement relevant to his current account and that he certified the balance due to the bank as at a certain

date. The plaintiff bank applied for provisional sentence which was refused because it was held that the document could not be said to imply an undertaking to pay the amounts due on demand. As extrinsic evidence would be necessary to establish the terms of the undertaking to repay, provisional sentence was refused.

[12] In *Standard Bank* the learned judge was of the view that the admitted circumstances which prevailed when the documents sued upon were signed were such that the documents could not be said to imply an undertaking to pay the amount due on demand. The facts in *Standard Bank* appear to be distinguishable from the facts in the present case. This is because extrinsic evidence was required to establish that the debt was due in *Standard Bank*. I do not have to, and have not considered extrinsic evidence here either. However, although both cases envisage that payment will be made in due course, because of the long lapse of time in the present case, it is reasonable to accept that the plaintiff could demand payment.

[13] Accordingly, the second of the further defences, that the acknowledgment of debt does not set out when the payments are to be made, does not render the acknowledgment of debt ineffective. I say this because it is clear from the acknowledgment of debt that a payment plan was contemplated between the parties. It is true that that payment plan is not set out in the document. Instead it appears from annexures attached to the plaintiff's replying affidavit. In view of

the fact that those documents were adduced only in reply, I take no cognisance of them, both for the reason that the plaintiff cannot make out its case in reply and also because the annexures constitute evidence extraneous to the acknowledgment of debt.

[14] What, however, is clear, is that the defendants have breached the undertaking which they made. This is because :-

i) the provisional sentence summons refers to demands having been made for payment by the defendants, which demands are dated the 6th August 2009;

ii) in any event, there is a presumption that the debt would have been repaid within a reasonable period of time. The acknowledgment of debt was signed on the 29th April 2009 and the provisional sentence summons issued on the 27th October 2011. In my view that is a lapse of sufficient time to constitute a reasonable period within which the debt should have been paid; and

iii) in the defendants' opposing affidavit it makes no suggestion either that the amount has been paid, or that the amount was payable at a date later than the institution of the provisional sentence summons, or that the debt is only payable after the date of institution of the provisional sentence summons.

[15] In those circumstances it can hardly lie in the mouths of the defendants to

suggest that the acknowledgment of debt is so defective that it does not constitute a proper cause of action against them.

[16] In addition, it is evident from the provisional sentence summons that a payment was made against the original acknowledgment of debt in the sum of R268 000. This is not denied by the defendants in their opposing affidavit. Clearly the amount had become due, failing which the defendants were unlikely to have paid the outstanding amount.

[17] In all the circumstances I am satisfied that provisional sentence should be granted and I accordingly make the following order :-

> ‘Provisional sentence is granted in favour of the plaintiff against the defendants jointly for :-
>
> (a) payment of the sum of R304 601,33;
>
> (b) interest thereon calculated at the rate of 15.5% per annum from the date of the service of the provisional sentence summons, the 14th November 2011 to date of payment;
>
> (c) costs of suit calculated on the basis as between attorney and client.’

Date of hearing : 7th June 2012

Date of judgment : 12th June 2012

Counsel for the Plaintiff : G Thomas (instructed by Morris Fuller Walden Williams)

Counsel for the Defendant : M Naidoo (instructed by Kushen Sahadaw Attorneys)