

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 11310/2006

In the matter between:-

BENJAMIN PETRI PETHERBRIDGE

First Plaintiff

JANETTE MARY PETHERBRIDGE

Second Plaintiff

and

BRIAN ERROL WESTCOTT

Defendant

JUDGMENT

VAN ZÿL, J.:-

1. The plaintiffs instituted action against the defendant by way of provisional sentence proceedings claiming payment in the sum of R173 000-00, together with interest thereon at the rate of 17,5% per annum with effect from the 1st June 1999 to date of payment and costs.
2. The defendant gave notice of intention to oppose and delivered his opposing affidavit denying liability. The first plaintiff thereafter delivered his answering affidavit, together with an affidavit by one David Truebody. The latter affidavit is relevant only with regard to the date of signature of the Acknowledgment of Debt, being the

instrument of debt upon which the provisional sentence proceedings are based.

3. The plaintiffs tersely alleged in paragraph 2 of their provisional sentence summons that the defendant was indebted to the plaintiffs by virtue of an acknowledgment of debt signed on 4 August 1999 and a copy of which was annexed as annexure “A”. If reference is had to this annexure then it appears that the instrument of debt was in fact signed by both the defendant and his wife Charlotte Westcott and that the couple were therein stated, at the time of signature, to have been married to each other in community of property.
4. Plaintiffs further alleged in paragraph 3 that *“the co-signatory CHARLOTTE WESTCOTT to annexure ‘A’ has acknowledged indebtedness to the Plaintiffs as per annexure ‘B’ hereto.”* With reference to this annexure it appears to be a letter, dated 18 August 2006 and addressed to the plaintiffs, her parents, in response to a letter of demand from the plaintiffs’ attorneys of record. It reads as follows –

“Dear Mom & Dad,

LOAN REPAYMENT

I refer to the letter of demand received from Johnson & Partners dated 7 August 2006.

I confirm that Brian and I remain indebted to you for the full amount of the monies loaned in terms of the acknowledgment of debt signed in August 1999.

I understand that a purchaser has been found for the property and I will endeavour to get an appropriate undertaking that you be repaid from the proceeds of the sale.

Yours sincerely

CHARLOTTE WESTCOTT

5. The allegations contained in the summons conclude in paragraph 4 thereof that “*..no amounts have been paid by the Defendant or CHARLOTTE WESTCOTT in terms of annexure ‘A’.*”.
6. The defendant in his opposing affidavit denied liability on various grounds. Firstly he disputed that the acknowledgment of debt was in fact signed during 1999 and asserted that according to his recollection the document was signed “*approximately 1998*”. Impliedly, however, he admits his signature thereto.
7. The defendant then raised an alleged oral agreement entered into between the plaintiffs, his wife and himself on an unspecified date subsequent to the signature of the acknowledgment. He claimed to be unable to recall the exact date of such oral agreement. However, its terms were to the effect that the plaintiffs would take up residence with the defendant and his wife, who was their daughter, but in a separate flat on their property and in return the defendant and his wife would be released from their obligations to effect repayment to the plaintiffs arising from the acknowledgement of debt (annexure ‘A’).

8. The defendant claimed that this agreement was given effect to and that the plaintiffs moved into the flat and have remained there for a period of approximately nine years.
9. In support of his claim that the debt arising from the acknowledgment of debt had been extinguished and was no longer in existence, the defendant attached (as annexure X.1) a copy of the divorce settlement agreement concluded between himself and his then wife, the said Charlotte Westcott, on 22 May 2006 and pointed out that it contains no reference to any continued indebtedness by the couple to the plaintiffs.
10. Indeed, the defendant stressed that the agreement provided, *inter alia*, for Mrs Westcott after the divorce to purchase the defendant's half share in the property or, failing that, for the property to be sold and the proceeds divided between Mr and Mrs Westcott. It is common cause that the marriage between the defendant and the plaintiffs' daughter was dissolved by a decree of divorce on 22 August 2006 and that Mrs Westcott subsequently passed away on 27 May 2007.
11. The plaintiffs deny the existence of the alleged agreement releasing the defendant and their daughter from their obligations to the plaintiffs arising from the acknowledgment of debt. Contrary to the claims made by the defendant, they aver that there was never any agreement in

terms of which the plaintiffs would reside in the "*granny flat*" free of charge. In particular they assert that there was never any absolution from the acknowledgment of debt, as claimed by the defendant. They also deny that the defendant paid for their water and lights, as he claimed to have done, whilst they resided in the flat.

12. In support of their denials the plaintiffs referred to annexed copies of receipts evidencing, so the plaintiffs said, the fact that they made various payments to their daughter from time to time in respect of electricity, water, washing (presumably a reference to laundry services) and (property) rates and that they also rendered assistance by collecting children and paying for school and ancillary items over the years, without being repaid. They pointed out that, in any event "*.. for at least the last three years of the marriage*" the defendant no longer lived with their daughter and no longer occupied the particular residence, but was residing elsewhere whilst their daughter assumed responsibility for the household expenses, including the bond repayments.
13. The plaintiffs claimed that the reason they never paid any rental for the granny flat which they occupied was because the loan, as evidenced by the acknowledgment of debt, had not been repaid. However, if the loan had been repaid, then they would, so it was suggested, have become obliged to pay rental in an unspecified amount. Elaborating in this regard the plaintiffs said that the flat they

occupied was in fact a converted games room and that the defendant had undertaken to add a bathroom and toilet facility thereto, but never did. As a result they were obliged to use the bathroom and toilet facilities in the main house and added that *"It is because the Defendant never built the bathroom and never repaid the loan that no rental was due to him."*

14. Counsel for the plaintiffs submitted that the versions advanced in opposition by the defendant could not avail him because he was required to show, unlike in the case of summary judgment, that he was likely on a balance of probabilities to succeed in the principal case.
15. However, the defendant in addition raised the defence of prescription. In this regard the defendant pointed out that the acknowledgment of debt provided that repayments would commence immediately at not less than R1 000-00 per month and that the plaintiffs alleged no repayments whatsoever were ever made. Accordingly the running of prescription would have commenced and the obligations arising out of the acknowledgment of debt would have prescribed.
16. Clause 5 of the acknowledgment of debt reads as follows -

"(We) agree that in the event of any instalment not being paid on due date then the full balance then outstanding shall immediately become due and payable without notice to us."

17. There is a conflict between clause 2 of the acknowledgment of debt which provides that the first instalment would become payable on "*the first day of 1 June 1998 and monthly thereafter on the first day of each and every succeeding month until the full capital amount plus interest and costs are paid in full.*" and the apparent date of signature of the acknowledgment of debt on 4 August 1999.
18. In this regard counsel for the defendant suggested that the document had been incorrectly dated and that it was in fact signed prior to 1 June 1998. However, even if one accepts that the acknowledgment of debt was signed on 4 August 1999, then it simply means that the first instalment would at the latest have become due and payable on 1 September 1999.
19. Counsel for the defendant submitted that for prescription to commence running, there had to be a debt immediately due and payable to the creditor and that the debt in respect of the acknowledgment of debt would have become due and prescription would have commenced running as soon as the first instalment had not been paid. In this regard counsel drew attention to the remarks of Van Heerden JA in *Deloitte Haskins & Sells Consultants (Pty) Ltd vs Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (AD) at page 532 H-I.

20. In developing his argument counsel submitted that the acknowledgment of debt relied upon by plaintiffs fell to be considered under s11(d) of the Prescription Act 68 of 1969 and prescribed three years after the debt become due. Since the plaintiffs' summons was only issued on 13 November 2006, the claim had long since prescribed. Upon this approach and assuming, as indicated above, that the debt became due when the first instalment remained unpaid on 1 September 1999, then the claim would have prescribed on or about 31 August 2002.
21. Counsel for the plaintiffs countered that prescription was interrupted and the debt revived by reason of the admission made by the defendant's wife by virtue of the letter of 18 August 2006 and referred to above. Counsel submitted that by reason of the fact that Mr and Mrs Westcott were still legally married in community of property at the time the letter was written (the divorce only being finalised on 22 August 2006), the defendant was bound by her admission and accordingly the debt had not prescribed when the action was instituted.
22. The defendant, in this regard, alleged that Mrs Westcott at that time had no authority to bind him in his personal capacity and questioned her ability to do so.

23. The plaintiffs' affidavit does not indicate when the letter of 18 August 2006 was received by them. In other words, whether it was received and its contents communicated to them prior to or only after the divorce order of 22 August 2006 dissolved the marriage. Arguably, if it was received after the divorce was finalised, then Mrs Westcott was no longer married to the defendant and could in any event no longer lawfully bind their (former) community estate.
24. However, there appears to be a more compelling difficulty facing the plaintiffs in this regard. In the letter of 18 August 2006 Mrs Westcott purports to admit her and the defendant's continued indebtedness to the plaintiffs. In *Benson and Another vs Walters and Others* 1984 (1) SA 73 (AD) at page 86 H Van Heerden JA remarked that "*It should be emphasised that s12(1) of the Prescription Act requires an acknowledgment of liability ('aanspreeklikheid') and not merely an acknowledgment of indebtedness.*" The letter by Mrs Westcott appears to fall into the latter category.
25. Also, at the time the letter was written, *prima facie* the debt had already prescribed and was no longer in existence. Prescription could therefore not have been interrupted by the letter, even if it were shown to have been an acknowledgment of liability and assuming it was delivered and its contents communicated to the plaintiffs prior to the divorce on 22 August 2006.

26. In *ABSA vs De Villiers* 2001 (1) SA 481 (SCA) at page 487 A-C, Howie JA stated that -

" Waar dit duidelik is, sonder meer, dat die verjaringstydperk verstryk het, het die verweerder 'n volkome verweer: die eis is finaal uitgewis. Indien op stuiting van verjaring of uitstel van die voltooiing van verjaring staatgemaak wil word, is die posisie nie net dat die eiser sal moet begin nie. Indien dit op die getuienis van 'n besondere saak onseker is of stuiting, of die gebeure waarna in art 13(1) verwys word, plaasgevind het al dan nie, sal die eis in daardie situasie noodwendig moet faal. Die repliek wat deur so 'n eiser geopper word is dus 'n aparte geskilpunt ten opsigte waarvan daar 'n afsonderlike bewyslas (in die sin van die algehele bewyslas) bestaan: Pillay v Krishna and Another 1946 AD 946 te 953. In die onderhawige saak het appellant dus die bewyslas gedra om uitstel van voltooiing van verjaring ingevolge art 13(1)(g) te bewys."

27. In the present matter I am of the view that the plaintiffs have not discharged the onus resting upon them to prove that prescription was interrupted and that completion of the prescription was delayed. Put differently, I find that the defendant is likely on a balance of probabilities to succeed in the principal case. However, where as here a defence of prescription is upheld, then the proper order is one where provisional sentence is refused, with costs (*Salot v Naidoo* 1981 (3) SA 959 (D), Howard, J. at page 962A).

28. In the circumstances the order I therefore make is, as follows:

The plaintiffs' claim for provisional sentence is refused, with costs.

VAN ZYL , J.

APPEARANCES:

For Plaintiffs	:	Adv G. M. Harrison Instructed by Messrs Johnson & Partners of Durban (Ref.L Lunde/ccb/09P311001)
For Defendant	:	Adv P. Haasbroek Instructed by Messrs Pravda Terblanche & Knowles of Durban (Ref. KS/an/01W540001).
Date argued	:	21 August 2008.
Delivered	:	19 December 2012