



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2023-086644

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES

In the matter between:

GLOBAL MICRO SOLUTIONS PROPRIETARY LIMITED

(Registration number: 1995/005280/07)

Plaintiff

and

AVENG AND LENNINGS RAIL PROPRIETARY LIMITED

(Registration Number: 2018/585611/07)

First Defendant

MATHUPHA CAPITAL PROPRIETARY LIMITED

(Registration Number: 2010/0233850/07)

Second Defendant

Delivered: 14 November 2025 – This judgment is handed down electronically by circulation to the parties' representatives via email and uploading it to CaseLines.

ORDER

1. Provisional sentence is entered against the first and second defendants, jointly and severally, in favour of the plaintiff, in the amount of R653 572.00.
2. The first and second defendants are ordered to pay interest on the amount of R653 572.00 at the rate of 11.75% per annum, calculated from 1 July 2023.
3. Provisional sentence is refused in respect of the balance of the claim and interest thereon.

4. The first and second defendants are permitted to deliver a plea to the balance of the claim and interest thereon within 20 days from judgment.
5. The first and second defendants are liable, jointly and severally, for the costs of the provisional sentence proceedings on the scale as between attorney and client.

JUDGMENT

BESTER AJ:

Introduction

[1] The plaintiff sues for provisional sentence against the first defendant, founding its claim upon a written acknowledgment of debt. It also seeks provisional sentence against the second defendant, as surety and co-principal debtor for the same debt, based upon a suretyship embodied in the same document. The defendants admit that the document was signed on behalf of both the first and second defendants.

[2] Summons was originally issued for payment of R3 880 098.56. Consequent upon a payment, the plaintiff persists with a claim in the amount of R3 693 515.60.

[3] The defendants raise several defences. They contend that various clauses of the acknowledgement of debt are void for vagueness and consequently the entire document is void for vagueness; they deny that it is a liquid document; they contend that certain clauses sought to be enforced constitute penalty stipulations under the Conventional Penalties Act, 15 of 1962 which should be reduced to nil or alternatively are contrary to public policy and not enforceable; and they contend that the document was signed in circumstances that amounted to severe economic duress, rendering the document unenforceable.

Provisional summons

[4] Rule 8 governs the procedure for obtaining provisional sentence in the High Court and has not altered the principles of our common law.¹

[5] The theory behind provisional sentence is that –

“It is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court. The Court is provisionally satisfied that the creditor will succeed in the principal suit. The debt disclosed in the documents must therefore be unconditional and liquid (zuiwer en klaar of liquid).”²

[6] A document is liquid for purposes of provisional sentence –

“If the document in question, upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, is an unconditional acknowledgment of indebtedness in an ascertained amount of money, the payment of which is due to the creditor.”³

[7] The onus is on the plaintiff to prove that the document relied upon is genuine (an issue not in dispute here) and that, on the face of the document, the amount claimed is owing.⁴

[8] Where a defendant relies on a defence which goes beyond the liquid document, it is required to produce sufficient proof of that defence to satisfy the court that the probability of success, in the principal case, is against the plaintiff, before provisional sentence can be refused.⁵

¹ *Twee Jonge Gezellen v Land & Agricultural Development Bank* 2011 (3) SA 1 (CC) at [12].

² *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 728C-D, quoted with approval in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at [26].

³ *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H. Approved in *Joob Joob* above in [26] and *Twee Jonge Gezellen* above in [15].

⁴ *Twee Jonge Gezellen* above in [20].

⁵ *Twee Jonge Gezellen* above in [21]. In *Twee Jonge Gezellen*, the Constitutional Court found that a court has a discretion to refuse provisional sentence in specified circumstances, not relevant here.

The acknowledgment of debt

[9] In clause 1 of the acknowledgment of debt, the first defendant acknowledged to be truly indebted in favour of the plaintiff in the sum of R653 572.00 –

“... as is reflected on the statement attached hereto, indicating the total arrear amount as at date hereof, being the agreed indebtedness due, owing and payable by ourselves to the Creditor in respect of Services rendered up to 30 June 2023 and being in arrears (“total arrears”).”

[10] The attached statement runs from 1 January 2023 to 1 May 2023, and reflects a balance due of R855 318.00. The only match with the amount stipulated in clause 1 of the acknowledgement of debt, namely R653 572.00, is found in the running balance as at 1 April 2023.

[11] In terms of clause 7, the first defendant consented to judgment for *“the outstanding amount at the relevant time”*, together with *“interest at Prime plus 2%”* and costs on the attorney and own client scale.

[12] Clause 8 provides that the first defendant undertook to pay the *“outstanding amount and interest”* in monthly instalments of R113 177.00, commencing on 1 June 2023, *until the total arrear debt with interest and costs have been paid*. The first defendant further undertook to pay *“the current indebtedness through monthly billing in addition to the payment of total arrears”*.

[13] Clause 9 stipulates that, in the event of any instalment on the arrears or current indebtedness not being made, *“the full amount per all agreements (acceleration of the Master Agreement together with the total arrears payment arrangement and any ancillary agreements to the Master Agreement) will become immediately due and payable”*. The clause continues as follows:

“For avoidance of doubt, a schedule of the total current indebtedness is attached hereto (“current indebtedness”). This sets out the total contractual obligation of the Debtor to the Creditor, regardless of the date of cancellation of any service, due to whatsoever reason. The calculations in the schedule exclude the total arrears.”

[14] The attached schedule contains a table listing a number of entries, with descriptions of what appear to be services still to be rendered, totalling R3 226 526.56. This amount, together with the R653 572.00 referred to in clause 1, brings the summons amount to R3 880 098.56.

[15] In terms of clause 10, the amounts due “*per Master and ancillary agreements are influenced by foreign exchange rates and annual escalation (invoiced in August to take effect as of September)*”. It further stipulates that the actual amounts on acceleration may differ from those quoted in the schedule initially.

[16] In terms of clause 11, the second defendant bound itself to the creditor as surety and co-principal debtor *in solidum* for the due and proper performance of all the first defendant’s obligations. The defendants further agreed that the amount owing may be proven by a certificate issued on behalf of the plaintiff.

Is the acknowledgment of debt void for vagueness?

[17] The defendants raise three points in support of their argument that the acknowledgment of debt is void for vagueness. First, they contend that the reference to a ‘schedule’ in clauses 9 and 10 is vague, because it is not clear what is referred to. They argue that it is not clear that the table, which is the second attachment to the acknowledgement of debt, is the schedule. The proposition has no merit. The acknowledgment of debt has two attachments. The one is clearly the statement referred to in clause 1, and the other is the schedule referred to in clauses 9 and 10. There is no ambiguity or uncertainty.

[18] The second challenge is made with reference to ‘monthly billing’, used in clauses 8 and 9. This concept, upon my reading of the acknowledgment of debt, refers to the monthly invoicing of the plaintiff to the first defendant under the various agreements referred to in clauses 9 and 10 (the “*Master and ancillary agreements*”).

[19] Finally, the defendants point out that clause 7 requires interest to be calculated “*at Prime plus 2%*”, but that the document does not define ‘Prime’. The proposition appears to me to be sound. However, I do not agree with the defendants that this renders the contract void for vagueness. In my judgment, the interest rate can easily

be resolved, either with minimal evidence or perhaps even with reference to some of the other contracts referred to in the acknowledgment of debt.

[20] In *Namibian Minerals Corp*⁶ Harms JA, for the majority, remarked:

“Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They then tend to rely on hoke, good spirits, *bona fides* and commercial expediency to make such agreements work. But when they are at loggerheads, it appears to be futile to consider whether they would have been able to do so. Once a Court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties’ initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding...; that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the court should strive to uphold – and not destroy – bargains.”⁷

[21] Our courts have often referred to the judgments in *Hillas & Co.*⁸ Lord Wright remarked:⁹

“Businessmen often record the most important agreements in crude and summary fashion; modes of expressions sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; ...”

⁶ *Namibian Minerals Corp Limited v Benguela Concessions Limited* 1997 (2) SA 548 (A) at 561G-I.

⁷ References omitted.

⁸ *Hillas & Co Limited v Archos Limited* [1932] All ER Rep 494 (HL). See for instance *Namibian Minerals Corp* above at 561J-562J.

⁹ At 503J. This, of course, does not mean that the court will make a contract for the parties. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) in [18]

[22] I conclude that the acknowledgment of debt is not too vague to be enforceable. In the words of Nugent AJA in *De Beer*¹⁰:

“An agreement that is expressed in words that are capable of various meanings when they are viewed in isolation is not for that reason alone too vague to be enforced. The proper meaning of words that might at first sight appear to be ambiguous, or ill-defined, or otherwise vague, might often emerge when the words are seen in their context, or against the background to the transaction, or when they are linked by admissible evidence to the circumstances in which they were intended to apply.”

Is the acknowledgment of debt a liquid document?

[23] The acknowledgement of debt will be liquid if, in its terms, it reflects an unconditional acknowledgment of an indebtedness in an ascertained amount of money. Clause 1 of the acknowledgment of debt contains such an unequivocal acknowledgment of a debt in the amount of R653 572.00. This much was conceded in argument.

[24] Clause 8 further contains an undertaking to pay the current indebtedness, which is defined in clause 9 as the full amount to be paid under the range of contract between the plaintiff and the first defendant. The amount is set out in the schedule, according to clause 9. The schedule stipulates the amount as R3 226 526.56. There is no prohibition on an acknowledgment of a future indebtedness or where the consideration is executory.¹¹

[25] The acknowledgement of debt contains the condition that the whole of the arrear indebtedness and the current indebtedness become due upon a failure to make a timeous payment, as stipulated for each debt. Although the ‘monthly billing’ in respect of the current indebtedness seems to require extrinsic evidence, the failure to timeously pay an instalment on the arrear indebtedness constitutes the fulfilment of a

¹⁰ *De Beer v Keyser* 2002 (1) SA 827 (SCA) at 834 in [13].

¹¹ *Caltex (Africa) Ltd v Trade Fair Motors (Pvt) Ltd* 1963 (1) SA 36 (SR).

simple condition, which does not affect the liquidity of the document.¹² The failure to make the timeous payment is not disputed.

[26] The interest rate is not evident from the acknowledgement of debt, as has been shown above. It is a separate and distinct indebtedness that, on its own, needs to be evident from the document.¹³ The acknowledgement of debt is thus not a liquid document in respect of the interest claim.

[27] The parties agreed that the current indebtedness is subject to foreign exchange rates and an annual escalation (clause 10), which will be evidenced by a certificate. As Mr Hollander, who appeared for the defendants, rightly conceded, since the plaintiff does not rely on such an adjustment, the document remains liquid in respect of the current indebtedness.

[28] In the result, I conclude that the acknowledgment of debt is a liquid document for the principal sum claimed, but not for the interest.

Does clause 9 contain a conventional penalty provision?

[29] Clause 9 provides that, upon a default, the whole of the future claims against the defendants become payable, irrespective of whether services have been or ever will be rendered. This, the defendants contend, constitutes a conventional penalty. They claim that the penalty is disproportional to the plaintiff's prejudice, and should be reduced to nil.

[30] Section 1 of the Conventional Penalties Act, 15 of 1962, stipulates that a conventional penalty is enforceable. Section 3 provides that an excessive penalty may be reduced:

“If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the

¹² *Harrowsmith* above at 729H.

¹³ *Wedge Steel (Pty) Ltd v Wepener 1991 (3) SA 444 (W)* at 446H-J.

court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act of omission in question."

[31] It appears from the schedule that the plaintiff's obligations to render services as counter-performance stretch into the future, some until the end of March 2026. Thus, as at the time of calling for payment under the acceleration clause in July 2023, a substantial portion of the performance still had to be rendered, and may never be rendered. In my view, payment of such amounts constitutes a penalty. Furthermore, given the timeframe and the fact that a substantial proportion of the plaintiff's obligations still lay in the future when the debt was called up, there is ample room to be concerned that the penalty is disproportional to the plaintiff's prejudice.

[32] In these circumstances, the court is obliged to investigate the circumstances¹⁴ and provisional sentence would not be appropriate¹⁵. Therefore, in respect of the claim for the current indebtedness, provisional sentence should not be granted.

Is the defence of duress available to the defendants?

[33] In *Medscheme*¹⁶ Nugent JA, for the court, pointed out that the principle of economic pressure as duress has not been authoritatively accepted in our law. He continued that there seems to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, but that such cases are likely to be rare. This is so because:

"For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AG (in *Van den Berg & Kie Rekenkundige Beamptes*¹⁷ at 795E-796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more – which

¹⁴ *Matthews v Pretorius* 1984 (3) SA 547 (W).

¹⁵ See *Du Plessis v Oribi Motors (Pty) Ltd* 1972 (3) S A 75 (N).

¹⁶ *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA) in [18].

¹⁷ *Van den Berg & Kie Rekenkundige Beamptes v Boonprops* 1028 BK 1999 (1) SA 780 (T).

is absent in this case – would need to be exist for economic bargaining to be illegitimate or unconscionable and thus to constituted duress.”

[34] The deponent to the defendants’ affidavit opposing provisional sentence, Mr Barnard, contends for economic duress, on the basis that, when the first defendant fell into arrears and was unable to pay the plaintiff, the plaintiff refused to give it access to its email accounts (which, apparently, was under the practical control of the plaintiff, who rendered *inter alia* services related thereto to the first defendant), unless the acknowledgement was signed. The first defendant could not conduct its business as a result, according to Mr Barnard. He contends that the first respondent was, as a result, under duress to sign the acknowledgment of debt, which was unconscionable in the circumstances.

[35] The opposing affidavit does not provide any primary facts to show how the first respondent was unable to conduct its business whilst unable to access its email accounts. It is difficult to see that this, without more, would hamper the first defendant’s business to the extent alleged by Mr Barnard.

[36] I am thus not convinced that the defendants produced sufficient proof that this defence will probably succeed in the principal case. In the result, I do not consider the defendants’ reliance on economic duress as a basis to refuse the plaintiff provisional sentence on the amount acknowledged to be owed in clause 1 of the acknowledgement of debt.

Conclusion

[37] I find that the acknowledgement of debt is a liquid document for the capital amounts claimed, but not for the interest thereon. As the interest rate is not set out in the acknowledgment of debt, interest should run at the legal *mora* rate. However, the amount owed as current indebtedness constitutes a penalty under the Conventional Penalties Act, and an enquiry into a possible reduction should be made.

[38] The second defendant bound itself to pay the acknowledged debts and is thus bound by the liquid document.

[39] The plaintiff has been substantially successful, and the costs should follow on the scale agreed upon.

[40] I therefore make the following order:

- a) Provisional sentence is entered against the first and second defendants, jointly and severally, in favour of the plaintiff, in the amount of R653 572.00.
- b) The first and second defendants are ordered to pay interest on the amount of R653 572.00 at the rate of 11.75% per annum, calculated from 1 July 2023.
- c) Provisional sentence is refused in respect of the balance of the claim and interest thereon.
- d) The first and second defendants are permitted to deliver a plea to the balance of the claim and interest thereon within 20 days from judgment.
- e) The first and second defendants are liable, jointly and severally, for the costs of the provisional sentence proceedings on the scale as between attorney and client.



A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard: 3 September 2024
Judgment Date: 14 November 2025

Counsel for the Applicant: A Ngidi, instructed by Werksmans Attorneys.

Counsel for the Respondents: L Hollander, instructed by Swartz Weil Van Der Merwe Greenberg Inc. Attorneys