IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 43909/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: ✓

In the matter of:

SEBENZA SHIPPING & FORWARDING (PTY) LTD Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA SOC LTD Defendant

Coram: WEPENER J

Heard: 21 November 2017

Delivered: 28 November 2017

Summary: Provisional sentence – requirement of the Johannesburg High Court practice manual that original document must be handed up in court not followed. Due weight to be given to evidence in terms of Electronic Communications Act 25 of 2002.

JUDGMENT

WEPENER J:

[1] The plaintiff issued a provisional sentence summons against the defendant for payment of the sum of R6 218 223.86 based on a document issued by the defendant in which it is said:

> 'Capital Balance Owed to Sebenza
>
> We confirm that Passenger Rail Agency of South Africa owes Sebenza Forwarding and Shipping (Pty) Ltd a maximum capital amount of R6 218 223.86.
>
> We confirm that this capital amount wil be settled on or before a target date of 31 October 2016.'

[2] The defendant resists payment on several bases, the first whereof is that the plaintiff failed to hand up to court the original document upon which the claim is based. The argument rests firstly, on the provisions of the Practice Manual[1] of this division, which provides that

> 'The original liquid document upon which provisional sentence is sought must be handed to the court when the provisional sentence is sought.'

[3] The plaintiff was unable to produce the 'original' document due to the fact that the document was sent to it by electronic means and it was perceived that the original remained with the sender. I am, however, of the view that for purposes of provisional sentence the document in the possession of the plaintiff is indeed an original as that is

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[1] In Chapter 10.10 para 2.

what the plaintiff received from the defendant. If I am wrong in this conclusion, I am of the view that the Practice Manual fails to take it into account the modern day practice of electronic communications and left a lacuna by not providing for a situation where documents are electronically transmitted. In this regard, where the Practice Manual purports to narrow the ambit of Rule 8,[2] which does not require an original document to be produced, I am of the view that I should apply the provisions of s 173 of the Constitution.[3]

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[2] '(1) Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in accordance with Form 3 of the First Schedule calling upon such person to pay the amount claimed or, failing such payment, to appear personally or by counsel or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court upon a day named in such summons, not being less than 10 days after the service upon him or her of such summons, to admit or deny his or her liability.
(2) Such summons shall be issued by the registrar and the provisions of subrules (3) and (4) of rule 17 shall mutatis mutandis apply.
(3) Copies of all documents upon which the claim is founded shall be annexed to the summons and served with it.
(4) The plaintiff shall set down the case for hearing before noon on the court day but one preceding the day upon which it is to be heard.
(5) Upon the day named in the summons the defendant may appear personally or by an advocate or by an attorney who, under section 4 (2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court to admit or deny his liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto.
(6) If at the hearing the defendant admits his liability or if he has previously filed with the registrar an admission of liability signed by himself and witnessed by an attorney acting for him and not acting for the opposite party, or, if not so witnessed, verified by affidavit, the court may give final judgment against him.
(7) The court may hear oral evidence as to the authenticity of the defendant's signature, or that of his agent, to the document upon which claim for provisional sentence is founded or as to the authority of the defendant's agent.
(8) Should the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these Rules as to pleading and the further conduct of trial actions shall mutatis mutandis apply.
(9) The plaintiff shall on demand furnish the defendant with security de restituendo to the satisfaction of the registrar, against payment of the amount due under the judgment.
(10) Any person against whom provisional sentence has been granted may enter into the principal case only if he shall have satisfied the amount of the judgment of provisional sentence and taxed costs, or if the plaintiff on demand fails to furnish due security in terms of subrule (9).
(11) A defendant entitled and wishing to enter into the principal case shall, within two months of the grant of provisional sentence, deliver notice of his intention to do so, in which event the summons shall be deemed to be a combined summons and he shall deliver a plea within 10 days thereafter. Failing such notice or such plea the provisional sentence shall ipso facto become a final judgment and the security given by the plaintiff shall lapse.'

[3] 'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop thecommon law, taking into account the interests of justice.'

[4] This court is enjoined to protect and regulate its own process and the Practice Manual rather restricts a process which, in my view, it should not and nor have I been shown any reasoning why a plaintiff's rights should be limited in circumstances such as those prevailing in this matter.

[5] The availability of the only document, which the plaintiff received, should be adequate for purposes of provisional sentence, especially where it in not disputed that the document is indeed the correct document whether seen as a copy or the original as received by the plaintiff. In my view, it is the original document received by the plaintiff.

[6] Counsel for the plaintiff also relied extensively on the provisions of the Electronic Communications Act[4] (ECT Act) and submitted that the provisions the ECT Act far outweigh the provisions of the Practice Manual. The argument has much force.

[7] Section 15 of the ECT Act provides:

> '(1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence-
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> (a) on the mere grounds that it is constituted by a data message; or
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> (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
>
> (2) Information in the form of a data message must be given due evidential weight.
>
> (3) In assessing the evidential weight of a data message, regard must be had to-
>
> (a) the reliability of the manner in which the data message was generated, stored or communicated;
>
> (b) the reliability of the manner in which the integrity of the data message was maintained;
>
> (c) the manner in which its originator was identified; and
>
> (d) any other relevant factor.'

[4] Act 25 of 2002.

[8] The document was transmitted by the defendant's representative to the plaintiff and, if not the original, it is indeed the best evidence that the plaintiff could be reasonably expected to obtain.[5] The document should be given due evidential weight.[6]

[9] If regard is had to the provisions of s 15(3) of the ECT Act and the fact that there is no dispute as the authenticity of the content of the document it is, in my view, admissible in evidence against the defendant who may rebut the facts contained in the document.[7]

[10] Far from rebutting the contents the defendant accepts the contents of the letter but denies its liability by virtue of the failure of the plaintiff to produce the original document. The Practice Manual should, in my view, be amended to delete the requirement that it is obligatory to produce an original document.

[11] I agree with the submission of counsel for the plaintiff that it has sufficiently proved the document upon which it relies for purposes of provisional sentence.

[12] The defendant relied on the judgment of Twala AJ in *Vela v Rainbow Shuttle Services CC and Another*[8] for its insistence that the original document should be produced. Save that I have found that the document produced by the plaintiff is indeed an original, Twala J, in regard to the Practice Manual held,[9]

> 'I am alive to the plaintiff's contention that this court has a discretion to condone the non-production of the original liquid document as required by the practice manual. However, plaintiff needs to take the court into its confidence to enable the court to exercise its discretion judicially and properly. Plaintiff has failed to place evidence before this court as to why it cannot hand up the original liquid document. Plaintiff knew at the time it instituted these proceedings that it did not have the original liquid document but failed to disclose this fact in its papers. Plaintiff has not tendered any explanation why it does not have the original liquid document. Counsel for the plaintiff could only say that her instructions are that the original liquid document is in the possession of the defendants. No explanation is

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[5] Section 15(1)(b).
[6] Section 15(2).
[7] Section 15(4).
[8] (26955/14) [2014] ZAGPJHC 359 (3 December 2014).
[9] At para 14.

tendered as to the reasons why it is in possession of the defendants and not the plaintiff as the person who needed the security for the debt. Therefore, this court has not been placed in a position to exercise its discretion properly and cannot therefore accede to the plaintiff's request.'

In this matter the reason why an original is with the defendant is clear: it having been transmitted electronically and the fact that the defendant refused to furnish an 'original' document to the plaintiff is undisputed. Should the document not be an original, I condone the non-production thereof for the reasons set out herein before.

[13] The furhter issue that arises from the judgment of Twala AJ, is that s 68 of the Bills of Exchange Act[10] prohibits a court from granting provisional sentence if the original bill or note cannot be produced. The learned judge dealt with a matter where it was common cause that the document was a 'promissory note' as defined in that Act.[11] However, in *Salot v Naidoo,*[12] Howard J held that a document such as the one under consideration, is not a note as defined in the Bills of Exchange Act because the undertaking to pay on or before a specified date is not an undertaking to pay at a fixed or determinable future time, thus not falling within the definition of a ' promissory note' under the Bills of Exchange Act. If the document does not qualify as a note under the Bills of Exchange Act the provisions of s 68 cannot find application. This matter is therefore distinguishable from the *Vela* matter, and the production of the original document is not required. This is yet another reason why the Practice Manual is in need of amendment to remove a requirement more onerous than the legislative prescripts – a requirement which is not purely procedural but substantive. The defence of the absence of the original document consequently fails.

[14] It remains to consider the other defences raised during argument before me. The first was that the defendant's general manager acted ultra vires his powers as set out in

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[10] Act 34 of 1964.

[11] '87 Promissory note defined

(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, and engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to a specified person or his order, or to bearer.'

[12] 1981 (3) SA 959 (D).

an internal memorandum in that the general manager bound the defendant to an amount in excess of the powers delegated to him.

[15] The plaintiffs' submission that the defendant is bound by the conduct of the general manager if regard is had to s 20(1) of the Companies Act[13] cannot be sustained. Section 20(1)[14] deals with the limitations imposed by the memorandum of incorporation (MOI) of a company, different to s 20(7)[15] which refers to both a MOI any rules issued by the company. Section 20(1) specifically refers to s 19(1)(b)(ii)[16]. The latter section similarly refers to that which is contained in the MOI. The authority issue of the general manager is not an issue which is circumscribed in the MOI. The authority limitation emanates from a rule issued by the defendant. The fact that there is such a rule is not in dispute.

[16] The plaintiff then proceeded to rely on s 20(7) of the Companies Act for the submission that the plaintiff could presume that the company (defendant) had complied with the formal requirements of the defendant's rules. The essence of this issue is the authority of the general manager and not the power of the defendant company. Section

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[13] Act 71 of 2008.

[14] '(1) If a company's Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, as contemplated in section 19(1)(b)(ii)—
(a) no action of the company is void by reason only that—
(ii) the action was prohibited by that limitation, restriction or qualification;
or
(ii) as a consequence of that limitation, restriction or qualification, the directors had no authority to authorise the action by the company; and
(b) in any legal proceeding, other than proceedings between—
(i) the company and its shareholders, directors or prescribed officers; or
(ii) the shareholders and directors or prescribed officers of the company, no person may rely on such limitation, restriction or qualification to assert that an action contemplated in paragraph (a) is void.'

[15] '(7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.'

[16] '(1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company—
(a) . . .
(b) has all of the legal powers and capacity of an individual, except to the extent that—
(i) . . .
(ii) the company's Memorandum of Incorporation provides otherwise;'

20(8) of the Companies Act [17] retains, in addition to s 20(7), the common law principle, expressed as the Turquand-rule, relating to presumed validity of actions of the company in the exercise of its powers. It will be presumed that the actions were properly executed.[18] The Turquand-rule is explained by Henochsberg on the Companies Act 1971 of 2008[19] as follows[20]:

> 'In terms of the common law the Turquand-rule states that although a bona fide third party who contracts with a company is presumed to be aware of any requirement which in terms of its public documents must be observed "internally" i.e. as between the company and its members in order that the company should be effectively bound to the contract, he is neither presumed to know nor bound for the purpose of holding the company to the contract, to ascertain, whether it has in fact been observed. In this context, the third party is not bona fide if he in fact knows that the requirement has not been observed.'

[17] However, a party cannot hold a company liable when the person acting was not authorised to execute the document.[21] Should this principle be applicable the plaintiff, in order to succeed, will have to prove implied or ostensible authority as it did prove actual authority. The question then arises whether there was indeed ostensible authority and whether the plaintiff succeeded in showing that the general manager had ostensible authority and therefore the defendant should be held liable.

[18] The high water mark of the plaintiff's case is that the general manager had in the past written a letter in which he advised the auditors that a sum in excess of R1 000 000 (the amount which he was authorised to bind the defendant for) to be paid to the plaintiff. That is a far cry from being clothed with authority to bind the defendant for amounts in excess of R 1 000 000. The letter to the auditors that R 9 000 000 may be paid was not an act binding the defendant vis-à-vis the plaintiff. It does not, in my view, find a basis for an argument that the defendant is to be held liable on the basis of ostensible authority.

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[17] 'Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of accompany in the exercise of its powers.'
[18] See *Glofinco v ABSA Bank Limited t/a United Bank* 2002 (6) SA 470 (SCA).
[19] Page 100(3).
[20] At p 98.
[21] See Henochsberg supra at p 99.

[19] It then becomes necessary to properly analyse the statement that the authority delegated to general managers to bind the defendant is limited to R1 000 000 and that the general manager's conduct falls foul of his powers, having regard to the delegation document. This internal document states

> 'Please be advised that PRASA executive committee of the 12th of April 2010 has approved revised delegation of authority for all business units and corporate office. Revised delegations are as follows:
>
> - . . . general manager: R 1m
>
> . . .
>
> Please communicate the revised levels to all managers in your business units. I would like to draw your attention to the following point that need to be included in letters of delegation of authority to managers.
>
> - Managers are expected to follow budget control processes before approving purchase requisitions this requires that purchases are first approved by finance before SCM proceeds with procurement.
> - Managers given delegation of authority understands supply chain policy and procedures for the PRASA Group.
> - Managers are expected to apply their minds before approving purchase requisitions and ensure the supply chain processes ae followed'.

[20] Ordinarily it would suffice for a defendant to place the authority of the signatory in dispute by a bare denial.[22] But here the defendant explained the denial and attached a document that purports to limit the powers of a general manager to bind the defendant in excess of R1 000 000. That document does not have application in this case. The general manager did not bind the defendant in excess of R1 000 000. The defendant was bound by virtue of the underlying agreement, which was common cause. During the course of the agreement the general manager stated what the indebtedness was at a specific date. It is a statement of fact and not the exercise of a delegated power binding the defendant for which he required authority. The defendant's reliance on the proposition that the general manager had no authority to bind it, is consequently

[22] CRC Engineering (Pty) Ltd v J C Dunbar and Sons (Pty) Ltd 1977 (1) SA 710 (W).

misplaced. The document is clear in that it limits the authority of the persons therein mentioned to make purchases up to and including the amounts therein stated. The acknowledgment of debt relied upon by the plaintiff is no such purchase.

[21] The issue of the authority of the general manager is consequently not available to the defendant to ward off the claim and the argument based on the lack of the general manager's authority to bind the defendant can accordingly not be sustained.

[22] The liquidity of the document was disputed on the basis of *Colee Investments (Pty) Ltd v Papageorge*[23] where it was said:

> 'On this basis it was argued that the cheques sued on remained liquid, because the defendant could not be heard to assert that it was not his signature on them. I am unable to agree. Provisional sentence has as its foundation the existence of a liquid document signed by or on behalf of the defendant. As a general rule the need for extrinsic evidence destroys the liquidity. Here, there is inevitably such a need. Ex hypothesi defendant did not sign the cheques. The very facts relied on to establish estoppel, and thus according to the argument, render the document liquid as against defendant, involves a journey outside and beyond the document. In other words, plaintiff is attempting to create a liquid document, signed by the defendant, when it admittedly does not exist. This may not be done, at least not in provisional sentence proceedings. In an ordinary action, whether liquidity of the document is not a prerequisite to success, the position would, of course be different. Here, if the estoppel is proved, defendant would be held liable but this would not be solely on the cheques.'

However, in my view, the document relied upon is indeed a liquid acknowledgement of debt in that it was sent on 31 August 2016 and confirms the defendant to be indebted to the plaintiff in the sum of R6 218 223.86 and wherein the defendant undertakes to pay the plaintiff that amount on or before 31 October 2016, no more than two months later. The heading of the letter is 'Capital Balance Owed to Sebenza'. There is no dispute that it was written on the defendant's letterhead and forwarded to the plaintiff by its general manager. It is indeed an acknowledgment of debt for purposes of Rule 8 and the signature of the signatory is not in dispute. No evidence is required to establish the

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[23] 1995 (3) SA 305 (W) at 308-309.

authenticity of the document. The denial of the authority to sign the document is not a matter which affects its liquidity as would a denial of the defendant's signature.

[23] Finally, it was argued that the defendant had some counterclaims against the plaintiff after a reconciliation of accounts. These claims arose, inter alia, as a result of storage fees incurred by the defendant, which storage was in excess of 60 days, the latter which was contractually agreed. But the plaintiff's case is that if there were storage fees in excess of 60 days such were incurred as a result of the defendant's own laxity by not collecting the goods within the agreed period of 60 days. The defendant's proposed counterclaim as far as this aspect is concerned, is all but clear. A further argument was that the agreement provided for adjustments due to several factors. As an example, the defendant alleges that the amount actually claimed for storage by the subcontractor to the plaintiff was R18,00 per ton whilst the plaintiff's quote was R21,00 per ton. But the quote is irrelevant and the very reconciliation of the defendant belies the statement. Plaintiff charged R18,00 per ton and thus indeed fluctuated the prices. The defendant's purported counterclaim has not been shown to have a proper foundation and is based on incorrect and speculative allegations. It will be free to pursue its claim against the plaintiff, if so advised.

[24] As a final issue, the defendant submitted that there was no acknowledgment of the debt in favour of the plaintiff as the name reflected in the document refers to Sebenza Forwarding and Shipping. The misnomer is of no consequence as it is common cause that it was this plaintiff and this defendant who transacted with each other. The defendant did not allege that there is another entity with which it contracted and who had a slightly different name. There is no merit in the argument.

[25] To its affidavit, the defendant annexed a schedule setting out the payments and invoices pursuant to which payments were made to the plaintiff. The schedule unreservedly supports the plaintiff and records 'outstanding PRASA payment' due to the plaintiff as R6 218 223.86, the precise amount referred to in the acknowledgement of debt.

[26] It is purely a misnomer, and there is no different legal persona with whom the defendant contracted and to whom it issued the acknowledgment of debt, than the plaintiff with whom it contracted. Heher JA said the following on the subject in *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*:[24]

> 'Accepting the incorrect citation as a misnomer accords, in my respectful view, with the need to take cognizance of the substance rather than the form of the process (*Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978(1) SA 463(A) 471B). It also accords with consideration of justice, fairness and reasonableness, while giving due regard to the requirement of good faith between contracting parties and to the policy considerations underlying the justice system. . . Peace-loving and justice-seeking members of the community do not take kindly to what they perceive as technical defences that allow debtors to escape liability and accountability'

[27] I am satisfied that the plaintiff is entitled to provisional sentence and I issue the following order:

1. The Defendant shall make payment to the plaintiff in the sum of R6 218 223.86 (six million two hundred and eighteen thousand two hundred and twenty three Rand and eighty six cents).

2. The sum referred to in para 1 shall bear interest at the rate of 10.5% calculated from 13 December 2016 to date of payment.

3. All amounts shall be paid into: Mthimunye-Hluyo Attorneys Trust Account: Account no: 310865906; Standard Bank Bedford Gardens; Branch Code: 018305.

4. The defendant shall pay the costs of the application.

Wepener J

[24] [2004] 1 All SA 129 (SCA).

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