



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

- (1) REPORTABLE NO  
(2) OF INTEREST TO OTHER JUDGES  
(3) AMENDED on 11 May 2022

11/5/2022  
DATE

SIGNATURE

**CASE NO: 2019/41714**

In the matter between:

**A BNER ENGINEERING AND SUPPLIES (PTY) LTD**

Plaintiff

and

**THAVER, ADRIAN**

Defendant

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**JUDGMENT**

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**MOORCROFT AJ:**

### Summary

*In provisional sentence proceedings a defendant is called upon to admit or deny liability arising out of a liquid document, and to admit or deny its signature on the liquid document.*

*Any defence that may be relied upon in defence to an illiquid claim may be raised in provisional sentence proceedings.*

*The defendant may rely on defences that go behind the liquid document but the provisional judgment will be granted unless the probabilities favour the defendant. If the probabilities favour the defendant judgment will not be granted.*

*If the probabilities are evenly matched judgment will be granted unless the defendant demonstrates an inability to satisfy the judgment debt and a reasonable prospect that oral evidence might tip the balance of success in the defendant's favour.*

### Order

[1] In this application I make the following order:

- 1. The defendant's application for leave to file a supplementary affidavit is dismissed with costs;*
- 2. The plaintiff's provisional sentence application is dismissed and the defendant is ordered to file a plea within 20 days whereafter the matter shall proceed to trial and the provisions of the Uniform Rules as to pleading and the further conduct of trial actions shall mutatis mutandis apply as provided for in Rule 8(8);*
- 3. The costs of the provisional sentence application is reserved for determination by the trial court.*

[2] The reasons for the order follow below.

### Introduction

[3] This is an application for provisional sentence. The plaintiff relies on an acknowledgement of debt signed on 17 February 2019 in terms of which the defendant acknowledged liability to the plaintiff in the amount of R973,400 repayable over four years.<sup>1</sup>

[4] Judgment was granted in favour of the plaintiff on an unopposed basis on 6 May 2020 and subsequently rescinded in an opposed rescission application in which Molahlehi J granted an order on 23 August 2021.

[5] The defendant filed an answering affidavit<sup>2</sup> and sought leave to file a supplementary answering affidavit<sup>3</sup> to introduce a new defence, namely reliance on the judgment of the Constitutional Court in *Twee Jonge Gezellen (Pty) Ltd & Another v Land and Agricultural Development Bank of South Africa t/a the Land Bank & Another*<sup>4</sup> and to make further submissions on the underlying *causa* of the plaintiff's claim.

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1 Provisional sentence summons, annexure "PSS1" (Caselines 001-6).

2 Caselines 001-12.

3 Caselines 001-44 and 001-45.

4 2011 (3) SA 1 (CC), [2011] JOL 26870 (CC), 2011 (5) BCLR 505 (CC).<sup>5</sup>  
Caselines 001-44 to 001-64.

The application for leave to file a further answering affidavit<sup>5</sup>

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[6] In the *Twee Jonge Gezellen* case, the Constitutional Court upheld the constitutionality of the provisional sentence procedure, subject to an important qualification. Brand AJ examined the legal principles in detail and said that:

*"[50] In the light of these considerations, I hold that the provisional sentence procedure constitutes a limitation of a defendant's right to a fair hearing in terms of section 34<sup>5</sup> where:*

- (a) the nature of the defence raised does not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence;*
- (b) the defendant is unable to satisfy the judgment debt; and*
- (c) outside "special circumstances", the court has no discretion to refuse provisional sentence.*

*[51] I must make it clear though that the limitation occurs only where two lines intersect on the defendant's case. The first line is that the nature of the defence raised does not allow the defendant to show a balance in his or her favour without the benefit of oral evidence. The second line is that the defendant is unable to satisfy the judgment debt. Absent either one of these lines the provisional sentence procedure will not limit the defendant's right to present his or her case, and thus the right to a fair hearing, in any way. If the nature of the defence allows a balance in favour of the defendant to be shown on affidavit, inability to pay the judgment debt does not matter, since provisional sentence will be refused. If, on the other hand, the defendant can pay, it does not matter that the defence can be established only with the benefit of oral evidence. The defendant will have that opportunity, after paying, when he or she presents the defence during the principal case. The defendant will be no worse off than the plaintiff whose application for provisional sentence is refused. Though it may give rise to inconvenience, his or her right to a fair hearing will eventually be given effect to in the principal case."*

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5 Section 34 of the Constitution reads as follows: 34 Access to courts Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[7] The defendant attempted to invoke the principle that provisional sentence ought not to be granted where the defendant shows that he is unable to satisfy the debt, that there is even balance of success in the main case on the papers, and that he is unable to show a balance of success in his favour without oral evidence.

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[8] In making this submission the defendant relies on a *nulla bona* return issued by the Sheriff in July 2020. It states that the defendant could not point out movables to satisfy a warrant and that he denied that he owed immovable property. This takes the question of ability to justify a judgment debt nowhere. It does not say what the income or expenditure of the defendant is, what investments he may have, what other movables he might possess, and what other assets and liabilities he may have. It is not evidence or proof that he would be unable to satisfy the debt.

[9] In this second part of the affidavit he submits argument relevant to the underlying *causa* that is already before court and was dealt with in the rescission application.

[10] There is no explanation as to why these issues were not addressed in the affidavit resisting provisional sentence. No case is made out for condonation and the application is refused.

### The merits

[11] The remedy of provisional sentence<sup>6</sup> makes it possible for a creditor armed with a liquid document to obtain a provisional<sup>7</sup> judgment. Final judgment must still to be considered in the principal case. The plaintiff is entitled to payment of the judgment immediately but the defendant may insist on security for repayment pending the final

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outcome.<sup>9</sup>

[12] A liquid document -

*“demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff”<sup>10</sup>*

[13] In the *Twee Jonge Gezellen* case Brand AJ in the Constitutional Court judgment went on to say:

*“[21] But a defendant who relies on a defence which goes beyond the liquid document 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. If there is no balance of probabilities either way with regard to the principal case, the court will grant provisional sentence. It follows that if there is a balance in favour of the plaintiff, provisional sentence will also be granted. There is no closed list of defences on which a defendant can rely. Examples in practice of defences going behind the liquid document are numerous. They include the defence: that the*

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<sup>6</sup> *Handvulling* or *namptissement*.

<sup>7</sup> In other words, the judgment is not yet final.

*plaintiff never advanced the amount claimed; that the liquid document was tainted with illegality; or that the document had been obtained by fraud.”*

[14] The onus is on the defendant to show that the liquid document is tainted with illegality.<sup>11</sup> In *Allied Holdings Ltd v Myerson*,<sup>12</sup> Price J said:

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<sup>9</sup> See Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* RS 17, 2021, D1-97.

<sup>10</sup> *Twee Jonge Gezellen* par 15. Brand AJ referred to *Harrowsmith v Ceres Flats (Pty) Ltd* [1979] 4 All SA 45 (T), 1979 (2) SA 722 (T) 727G, *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] JOL 23348 (SCA), 2009 (5) SA 1 (SCA) 10C – D, *Rich & Others v Lagerwey* [1974] 4 All SA 466 (A), 1974 (4) SA 748 (A) 754H, Menzies *Prefatory Remarks on Provisional Sentence* 1 Menzie (1828) 7-8, Cilliers *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5ed volume 2, 1328-1374, and Malan et al *Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes* (1986) 14-15.

<sup>11</sup> *Joseph v Hein* [1975] 3 All SA 227 (W), 1975 (3) SA 175 (W) 178G – H. <sup>12</sup> 1948 (2) SA 961 (W) 968.

*“It is recognised, of course, that a liquid document which, on the face of it, speaks unequivocally, must have the story of a transaction behind it, and that an investigation into that story may show that the defendant is not liable in terms of the liquid document; but once we go behind the liquid document the onus is on the defendant to show that if evidence were heard the probabilities are that he would succeed.”*

[15] There is no *numerus clausus* of defences available to a defendant in a provisional sentence matter.<sup>8</sup> In *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie*, MT Steyn J said:<sup>9</sup>

*“Defences other than those based upon a challenge either to the validity of the instrument in question or to the larger transaction of which such instrument forms a part may therefore, to my mind, validly be raised to claims for provisional sentence.*

*Such claims are based on agreements, whether unilateral or bilateral, and many, if not most, of the defences available to defendants*

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<sup>8</sup> *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie* 1975 (2) SA 142 (O) 144E.

<sup>9</sup> *Lesotho* case 145G.

*confronted with illiquid claims ex contractu can assuredly also be raised by defendants faced with claims for provisional sentence.”*

[16] A liquid document need not recite a *causa debiti* but when plaintiff alleges a *causa debiti* then it is confined to it.<sup>10</sup> In this matter the plaintiff recited a loan as the *causa debiti* in the acknowledgement of debt but seeks to explain<sup>11</sup> that the plaintiff invested in business schemes proposed by the defendant that would return a profit of between 20% and 30%. When the defendant was unable to repay the investment he became indebted to the plaintiff and this led to the acknowledgement of debt. The acknowledgement of debt was therefore intended as repayment of an investment rather than repayment of a loan. When the defendant was unable to

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repay the investment, the acknowledgement was given and in so doing the defendant became indebted for the “loan.”

[17] The plaintiff in reply specifically denies a loan<sup>12</sup> and in so doing distances itself from its own provisional summons sentence.

[18] One must be careful not to get trapped in semantics. Normally when money is invested, the investor is at risk of making a loss but may make a profit. When the investment turns sour there is nothing to repay, when the venture succeeds the

investor is entitled to his profits and capital.

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<sup>10</sup> *Wustrow v Wustrow* 1980 (2) SA 308 (W).

<sup>11</sup> The plaintiff's case is conveniently summarised in heads of argument, par 11 et seq (Caselines 086-6).

<sup>12</sup> Replying affidavit par 18.2 (Caselines 020-6).



[19] However, when the investment has to be repaid irrespective of the success of the investment, and then with interest, it is really a loan that has to be repaid and the label does not matter. Calling it something else does not take it out of the ambit of applicable legislation. What matters, is the substance. When interest is payable, the loan is subject to the National Credit Act, 34 of 2005: Credit is granted to the debtor and interest is payable in respect of the deferred payment.<sup>13</sup>

[20] The defendant contends that the loan agreement referred to in the acknowledgement of debt was unlawful as the plaintiff was not a registered credit provider in terms of section 40 of the National Credit Act(read with GN 513 in GG 39981 of 11 May 2016), and therefore that the underlying agreements were void in accordance with section 89 of the Act.<sup>14</sup>

[21] It is not disputed that the plaintiff was not registered.

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[22] The evidence annexed to the defendant's answering affidavit provide *prima facie* evidence. The plaintiff sent emails to the defendant reflecting various amounts and interest amounts.<sup>15</sup> In a replying affidavit<sup>16</sup> the plaintiff's deponent says -

22.1 that the underlying agreement was to the effect that the defendant would source business opportunities for the plaintiff, and that

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13 Scholtz *Guide to the National Credit Act* par 4.2, and see section 8(4)(f) of the National Credit Act.

14 Scholtz par 5.2 to 5.6.

15 See an example at Caselines 001-36.

16 Caselines 020-3.

22.2 the parties were not dealing at arms' length, as they were in a business relationship. Parties in a business relationship often if not usually deal at arms' length and this statement by the plaintiff is devoid of meaning.

[23] The plaintiff admits the aforementioned documents annexed to the answering affidavit, say that the defendant never disputed the contents, and claim that the amounts identified as interest were actually the predicted profit share. There is no explanation as to why an amount expected as profit was identified as interest and why the expected amount of the profit was known beforehand.

[24] In the rescission application in this matter, Molahlehi J found<sup>17</sup> that the debt underlying the acknowledgement of debt consisted of a series of loans carrying interest of 20% to 30%. The unlawfulness of the loan agreements extend to the acknowledgement of debt.

[25] The argument that the National Credit Act is not applicable to an acknowledgement of debt that arises out of agreements that themselves are void in terms of the Act can not stand. If it were so, the provisions of the Act could be easily

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circumvented by reflecting the terms of an unlawful agreement in an acknowledgement of debt which would then be enforceable. In the words of Molahlehi J, the mischief sought to be arrested by the Act would continue.

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<sup>17</sup> Paragraphs 37 *et seq* of the judgment, Caselines 000-11. The affidavits in the rescission application can be found at Caselines, item 7 *et seq*.

[26] The defendant's reliance<sup>18</sup> on the parol evidence rule<sup>19</sup> is misplaced. The so-called 'rule' states the obvious, namely that when reading a written agreement then one must interpret the agreement in the form it appears in writing and not as it may have appeared earlier in draft form during negotiations. The 'rule' is subject to more 'exceptions' than there are holes in Swiss cheese. This matter does not turn on an attempted amendment of a contract or an attempt to vary, contradict or add to the terms.

[27] The probabilities favour the defendant and for this reason I make the order in paragraph 1 above.

**J MOORCROFT**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

*Electronically submitted*

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **11 May 2022**

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COUNSEL FOR THE PLAINTIFF:

H VAN DER VYVER

<sup>18</sup> Plaintiff's heads of argument, par 29 *et seq* (Caselines 086-10).

<sup>19</sup> Said to share the distinction of being inaccurate in all three of its constituent parts with the description of the "Holy Roman Empire" that was neither holy, nor Roman, nor an empire.

INSTRUCTED BY: SWANEPOEL VAN ZYL ATTORNEYS

COUNSEL FOR THE DEFENDANT: N PHAMBUKA

INSTRUCTED BY: S P ATTORNEYS

DATE OF THE HEARING: 5 MAY 2022

DATE OF ORDER: 11 MAY 2022

DATE OF JUDGMENT: 11 MAY 2022