IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 028653/2022

DATE: 06-11-2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 6.11.2023
SIGNATURE

In the matter between

MVNX (PTY) LTD Plaintiff

and

NEXT 360 (PTY) LTD First Defendant

JIGNESH DIPAKKUMAR DAVE Second Respondent

J U D G M E N T

CRUTCHFIELD, J:

This is an application for provisional sentence. The plaintiff, MVNX (Pty) Limited, claimed provisional sentence in the sum of R2 393 821.00 based on an acknowledgment of debt. The first defendant, Next 360 (Pty) Limited, and the second defendant, Jignesh Dipakkumar Dave, opposed the application.

The proceedings arose from an acknowledgment of debt in which the first defendant duly represented by the second defendant, acknowledged its indebtedness to the plaintiff in the amount of R2 444 355.00 ("the capital debt"), subject to interest of 7.5% calculated monthly.

The second defendant signed the acknowledgment of debt and bound himself with the first defendant as co-principal debtor to the plaintiff for the repayment of the capital debt, interest and costs abovementioned. The second defendant deposed to the answering affidavit on behalf of the first defendant, and on behalf of himself, *qua* second defendant.

The plaintiff agreed, in terms of the acknowledgment of debt, to reduce the value of the capital debt by R530 000.00 in the event that the first defendant fulfilled its obligations timeously under the acknowledgment of debt, failing which the full amount of the capital debt less any payments made in terms of the acknowledgment of debt, would become due and payable immediately.

The plaintiff alleged that the first defendant breached the acknowledgment of debt in that it failed to pay the monthly instalments as and when they fell, and that the first and second defendants were liable jointly and

severally to the plaintiff for payment of the capital debt less the instalments paid under the acknowledgment of debt, being the sum of R2 393 821.00.

The plaintiff pleads that the National Credit Act 34 of 2005 ("the Act"), does not apply to the acknowledgment of debt in that the underlying agreement concluded between the plaintiff and the first defendant is not subject to the Act. It follows from the fact that the underlying agreement is not subject to the Act that any agreement ancillary thereto, being the acknowledgment of debt, is not subject to the Act.

In addition, the first defendant is a juristic person and upon conclusion of the acknowledgment of debt the first defendant had an annual turnover and/or asset **value** exceeding R1 000 000.00 in terms of s4(1)(a)(i) and / or the acknowledgment of debt constitutes a large agreement in terms of s4(1)(b) of the Act. Thus, the acknowledgment of debt is not subject to the Act.

In respect of the acknowledgment of debt being an ancillary agreement and not subject to the Act as a result, I refer to the matter of *Ratlou v Man Financial Services SA (Pty) Ltd* 2019 (5) SA 117 (SCA).

At the outset of the hearing before me, counsel for the defendants moved an application to postpone the

provisional sentence application based on a substantive application for postponement. The purpose of the postponement was to supplement the defendants' answering affidavit with various defences not raised by the defendants in their answering affidavit in the provisional sentence proceedings. The additional defences that the defendants wished to raise by way of supplementary papers to be delivered pursuant to the requested postponement, were defences based on law and not factual defences. I refer to these additional defences as 'the additional defences.'

The defendants raised and referred to the additional defences in the application for postponement. I agreed to allow the defendants to argue the additional defences fully during the hearing before me, thus eliminating the need for a postponement of the proceedings. The plaintiff did not oppose the defendants arguing the additional defences before me but did oppose the application for a postponement.

In terms of the provisional sentence summons, the plaintiff called upon the first and second defendants to admit or deny liability for the plaintiff's claim but did not call upon the defendants to admit or deny their signature to the acknowledgment of debt. The defendants,

however, admitted in their answering affidavit in the provisional sentence proceedings, to the conclusion of the acknowledgment of debt. It follows, accordingly, that in admitting the conclusion of the acknowledgment of debt, the defendants admitted their signatures, the second defendant on behalf of the first defendant and the second defendant personally, to the acknowledgment of debt.

Accordingly, the defendants defended the matter on the basis that they had concluded the acknowledgment of debt and quibbled with the plaintiff's averments as to payment. The defendants alleged in the answering affidavit and argued before me that the first defendant had made payment in terms of the acknowledgment of debt.

The first defendant concluded the acknowledgment of debt as the principal debtor thereunder. The co-principal debtors were the second defendant and the second defendant referred me to the fact that the acknowledgment of debt made provision for a signature by a second co-principal debtor, one Deepak Loganathan. The latter had not signed the acknowledgment of debt, was not liable under the acknowledgment of debt and was not cited as a party to the proceedings.

Turning to the additional defences raised in the postponement application, the defendants referred to a signature by the second defendant as a co-principal debtor, together with the first defendant as a principal debtor but in the absence of the signature of the aforementioned Deepak Loganathan. The defendants argued that the absence of the signature by Deepak Loganathan to the acknowledgment of debt resulted in the acknowledgment of debt being not binding on the second defendant.

Given that the defendants admitted the conclusion of the acknowledgment of debt and their signatures thereto, including that the second defendant signed as a co-principal debtor, together with the first defendant, the principal debtor, the acknowledgment of debt remains valid and binding on the second defendant, and of course the first defendant, notwithstanding the absence of a signature by Deepak Loganathan to the acknowledgment of the debt.

Furthermore, as to the acknowledgment of debt allegedly not being a liquid document pursuant to the discount clause in terms thereof, and referred to above, the discount arises only in the event that the defendants comply timeously with their obligations under the acknowledgment of debt. The discount clause does

not serve to render the defendants' obligations under the acknowledgment of debt conditional. Those obligations remain clear and easily ascertainable in terms of the acknowledgment of debt. The defendants' obligations are not contingent or uncertain and nor are they rendered either contingent or uncertain as a result of the discount clause.

The defendants had to comply with their obligations under the acknowledgment of debt in order for the discount clause to take effect. Accordingly, the acknowledgment of debt is and remains a liquid document, notwithstanding the existence of the discount clause. Payment by the defendants under the acknowledgment of debt is not made conditional or contingent in any manner as a result of the discount clause.

Returning briefly to the argument raised by the defendants in respect of the absence of a signature by the alleged Deepak Loganathan, the first and the second defendants both signed the acknowledgment of debt as principal debtors, the first defendant as the principal debtor, and the second defendant as a co-principal debtor. As a result, there is no requirement of excussion on the part of the plaintiff. Each defendant is liable to the plaintiff for payment of the

full amount claimed by the plaintiff. Accordingly, there is no merit in the defendants' argument that the acknowledgment of debt is not binding on the second defendant as a result of the absence of a signature by the alleged Deepak Loganathan thereto.

The defendants raised the plaintiff's failure to attend to the notices in terms of s129 of the National Credit Act, prior to commencing the provisional sentence proceedings. The flaw in the defendants' argument is that the acknowledgment of debt is not subject to the Act as set out by me hereinabove.

I reiterate for the sake of completeness that in the light of the underlying principal agreement between the plaintiff and the first defendant not being subject to the Act, the acknowledgment of debt, an ancillary agreement, is not subject to the Act. Accordingly, the argument in respect of s129 of the Act holds no merits. Thus, the plaintiff was not obliged to comply with s129 of the Act prior to implementing the provisional sentence proceedings.

The defendants did not pursue the point raised by them in the postponement application in respect of the absence of the Rule 41(A) noticed. The Rule 41(A) notice was sent by the plaintiff.

Accordingly, the additional defences raised by the

defendants in terms of the postponement application were of no merit and did not serve to assist the defendants in defending the provisional sentence summons.

The defendants' argument in respect of the jurisdiction of this Court was not that this Court did not have jurisdiction to deal with the matter, but that the plaintiff might have proceeded in the Magistrates' Courts as the relevant clause permitted it to do. In the circumstances, the defendants argued that the plaintiff's claim for costs, if successful, should be limited to costs on the Magistrates' Court scale. It follows that the application for postponement, given the absence of merit in the additional defences raised by the first and second defendants, stands to be dismissed with costs.

The defendants' main defence was one of payment of the amounts owed under the acknowledgment of debt and claimed by the plaintiff. The defendants itemised by date and demand, various payments made to the plaintiff from 3 March 2022 to 5 August 2022, in the total sum of R1 940 000. In addition, the defendants allege that they paid R2 808 524.28 to the plaintiff in respect of invoices levied during the period. As a result, the defendants alleged that the first defendant

had made payment under the acknowledgment of debt and had done so in advance of the payment schedule included in terms of the acknowledgment of debt.

The defendants did not itemise the payments made in the total sum of R2 808 524.28 in terms of the invoices levied by the plaintiff. The defendants satisfied themselves with alluding merely to the total sum of R2 808 524.28, without specifying the payments that aggregated to that amount. In fact, notwithstanding the onus falling upon the defendants to prove the defence on a balance of probabilities, no evidence whatsoever, and no documentary proof whatsoever of the alleged payments was provided by the defendants.

The terms of the acknowledgment of debt required that the defendants pay the unpaid accumulated debt incurred by the first defendant as at 31 December 2021, in respect of the period 18 July 2017 to 31 December 2021, in the amount of R2 444 355, referred to as the "historical debt" together with interest thereon. In addition, however, and, in the light of the parties' ongoing commercial relationship at that stage, the defendants were obliged to pay all invoices that fell due for services rendered by the plaintiff to the first defendant from January 2022 and referred to as the

"current debt."

In order to qualify for the discount, the defendants had to pay the historical debt according to a schedule until 7 December 2022, when the last instalment of the historical debt was due, and also pay the current amounts levied from January 2022 according to a specific schedule.

In the event of a default, the plaintiff was entitled to claim the full amount outstanding, both in respect of the historical debt and the current debt. The amount outstanding would be proved by way of a certificate signed on behalf of the plaintiff, and which would be sufficient for the purposes of provisional sentence. The plaintiff alleged that the defendants had failed to comply with their payment obligations under the acknowledgment of debt, and had forfeited the discount as a result, such that the plaintiff sued for the entire unpaid historical debt. The plaintiff did not sue in the proceedings before me for provisional sentence, for the current debt, given that that amount was not liquid.

The plaintiff's representative reconciled the payments referred to by the defendants, together with the additional payments made but not alluded to by the defendants, and demonstrated with reference to a

comprehensive payment schedule, that the payments itemised by the defendants were not made in reduction of the historical debt as alleged by the defendants but were made in respect of the current obligations in terms of the invoices levied by the plaintiff for the current period.

By way of example, the plaintiff referred to its January 2022 invoice, payable by 7 March 2022 in the amount of R657 117.10. The plaintiff received three payments in respect of the January 2022 invoice, R200 000.00 on 3 March 2022, R250 000.00 on 8 March 2022, and R207 117.10 on 11 March 2022, the sum of which totals the exact amount of the January invoice, being R657 117.10.

The defendants, however, in the answering affidavit, refer to the two payments of 3 March and 8 March 2022 respectively and allocate those two payments to payment of the historical debt, in an apparent attempt to stave off provisional sentence proceedings. Accordingly, in the interests of clarity, two of the payments allocated in respect of the January 2022 invoice payable by the first defendant to the plaintiff, were allocated by the defendants to payment of the historical debt.

In the light of the defendants' failure to timeously meet its

historical and its current obligations under the acknowledgment of debt, the January 2022 invoice payments being an example thereof, the defendants forfeited their entitlement to the discount. The defendants did so as early as March of 2022, as a result of their late payment of the January 2022 invoice.

Given that the sum of the three payments aforementioned received by the plaintiff during March of 2022 equate exactly to the precise amount of the January 2022 invoice, it is untenable that any of the three tranches were intended settle the historical debt. This is more so in the light of the fact that failure to maintain the current payments, pursuant to the invoices levied by the plaintiff would result in the termination of the plaintiff's services to the first defendant. This the plaintiff was entitled to do, given the historical debt of the first defendant and the terms of the underlying agreement between the parties.

Similarly, the pattern that arose in respect of the plaintiff's January 2022 invoice repeated itself in respect of the plaintiff's February 2022 invoice. That invoice was levied in the amount of R680 507.56. The defendant paid the invoice in three tranches, two of which the defendants specify as forming payment of the

historical debt in terms of the defendant's answering affidavit.

The plaintiff demonstrated precisely and with reference to the payment schedule that the defendants had adopted the same pattern of accounting for payments made in respect of its current obligations as payment made in terms of the historical debt obligations. This transpired in respect of the plaintiff's February 2022 invoice of R691 600.32 in respect of which two payments of R300 000.00 and R100 000.00 paid on 5 April 2022 and 7 April 2022 respectively, were paid and referred to by the defendants in the compilation of their payment of the historical debt.

Additionally, the February 2022 invoice was paid late by the first defendant, thus entrenching its forfeiture of its entitlement to the discount.

A similar pattern emerged in respect of the plaintiff's March 2022 invoice, April 2022 invoice, May 2022 invoice, and June 2022 invoice, in respect of which a shortfall of R42 686.99 remained to be paid by the first defendant. The plaintiff's reconciliation of the payments made by the first defendant showed that the defendants had selectively chosen specific payments made by the first defendant in order to attempt to show payment of the specific amounts of the tranches

required in respect of payment of the historical debt in terms of the relevant schedule. The plaintiff showed that the defendants' defence of payment was false. As the defendants relied on the first defendant's payment of its current invoices as proof of payment of the historical debt, meaning that the defendants had double-accounted in respect of various of the first defendant's payments. In addition, the plaintiff referred to a series of correspondence between the parties prior to the litigation, in which the defendants effectively admitted their non-payment, that payments were in arrears, and in which the defendants proposed that new payment terms be agreed in respect of the first defendant. Accordingly, the defendants' version of payment, and in advance of the payment schedule in terms of the acknowledgment of debt, was false and an attempt to mislead this Court.

Insofar as the defendants relied on the common law rule that payment by a debtor to a creditor should be allocated to the oldest and most onerous of the debtor's obligations, and that the defendants should be afforded the benefit of that common law rule, the rule applies only in circumstances where there is no express agreement to the contrary. See in this regard

Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd 2008 (4) SA 325 (SCA). In the matter before me, the acknowledgment of debt provided specifically for payments to be made in respect of the historical debt and for payments to be made in respect of the current obligations. Accordingly, the defendants were obliged to make two payments, which it failed to do, as it admitted in terms of the correspondence between the parties that transpired prior to the implementation of the proceedings. Accordingly, the common law rule does not apply to the defendants.

As at 28 July 2022, the first defendant was indebted to the plaintiff in respect of the historical and current debt in an amount of R3 322 548.00. Notwithstanding, the plaintiff does not claim the current debt in these proceedings and does not claim the total amount aforementioned.

The defendants referred in argument to an inability to pay the amount claimed by the plaintiff as a basis for me to refuse provisional sentence, and to exercise my discretion in favour of the defendants. The defendants referred to and relied upon the matter of *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a*

The Land Bank and Another 2011 (3) SA 1 (CC).

The difficulty faced by the defendants in this regard was that they failed to set out any facts whatsoever in support of an inability to pay in terms of such interlocutory order that may follow at this stage in the proceedings, and that may be granted against them. Given the absence of any facts, there is nothing on which I can base an exercise of a judicial discretion in favour of the defendants.

The defendants bore the onus of proof in respect of their defences of payment. The defendants failed to acquit themselves of that onus in these proceedings, it being manifest that the defence of payment was contrived and plainly false. In those circumstances, the probabilities favour the plaintiff and I intend to grant provisional sentence in favour of the plaintiff.

By reason of the aforementioned, the following order is granted;

1. The defendants' postponement application is dismissed with costs.

2. Provisional sentence is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved in the amount of R2 393 821.00.

3. The first and second defendants are called upon

within a period of one (1) month to make payment to the plaintiff of the amount referred to in paragraph 2 immediately above.

4. The first and second defendants are ordered to pay the costs of these proceedings on the High Court scale, jointly and severally, the one paying the other to be absolved.

I hand down the judgment.

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CRUTCHFIELD, J

JUDGE OF THE HIGH COURT

DATE: 6 November 2023