



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 12 July 2023
Signature:

CASE NO 2021/62520

In the matter between:

EDUARD DE LANGE

Plaintiff

And

CHRISTIAAN DE LANGE

Defendant

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] This is an opposed application for summary judgment arising out of an alleged acknowledgement of debt signed by the defendant on the 29 August 2018 for an indebtedness of R799 391.98.
- [2] In terms of the acknowledgment of debt, the defendant was to pay R2,000.00 per month from 31 August 2018.
- [3] It is common cause that an acknowledgement of debt was signed on 29 August 2018 for an amount of R931 529.15. The defendant alleges that this amount has prescribed in a previous action issued by the applicant which is a *lis alibi pendens*.¹
- [4] It is further common cause that amounts of R2000.00 at each instance were paid by the defendant on the 3 and 30 November 2021, 3 and 31 January 2022, 28 February 2022 and 31 March 2022.² However, the defendant states that these amounts were made in payment for the care and wellbeing of the parties' elderly mother and have nothing to do with the acknowledgement of debt as alleged by the applicant.

¹ Defendant's affidavit opposing summary judgment para 7.

² Defendant's affidavit opposing summary judgment para 8. An error was detected reflecting "28 February 31" instead of "28 February 2022".

- [5] In his plea the defendant raises a special plea of jurisdiction, a failure to plead a credit agreement as envisaged in the National Credit Act 24 of 2005 (as amended) and a plea to the particulars of claim. The plaintiff alleges that the defendant has no defence and has filed a plea merely for dilatory purposes.
- [6] It is the plaintiff's contention that the defendant failed to comply with the acknowledgement of debt and repeatedly refrained from paying the monthly instalments timeously, the plaintiff proceeded with the action proceedings based on the acknowledgement of debt.
- [7] Rule 32 states that a plaintiff may after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as only:
- (a) on a liquid document.
 - (b) for a liquidated amount in money.
- [8] The plaintiff submits that the claim against the defendant is premised on a liquid document, alternatively, a liquidated claim against the defendant.
- [9] The amount claimed is as per the acknowledgement of debt and the interest portion can be calculated and easily ascertained, rendering compliance with the Rule.

[10] The plaintiff alleges that the defendant has filed his opposing affidavit out of time and has not made any application for condonation. The defendant has thereafter filed notices in terms of Rules 6 (7) and 30A (2) which have since been opposed by the plaintiff.

[11] At the commencement of the hearing, the parties undertook to deal with the application for summary judgment and the defenses raised by the defendant.

B.THE DEFENDANT'S DEFENCES

[12] The defendant raises the following defenses in opposition to the application for summary judgment:

12.1 Special plea – Jurisdiction: the defendant raises the incorrect citation of this court as being a factor that deprives this court of jurisdiction to hear this application. The applicant alleges that he has since corrected that error by way of a Rule 28 amendment application which was not opposed.

12.2 Special plea - National Credit Act 34 of 2005: defendant alleges that the acknowledgement of debt constitutes a credit agreement. He alleges that the plaintiff should have complied with section 129 of the National Credit Act. The plaintiff denies that the incidental acknowledgement of debt constitutes a credit agreement. The plaintiff submits that he and the defendant are brothers and that this this acknowledgement of debt was not entered into at arm's length³ to the familial relationship. Mr. Prinsloo on behalf of the applicant referred to *Harris v Rossouw*⁴ where in similar fashion the plaintiff alleged that the acknowledgment of debt was not a credit agreement governed by the Act, because it was not entered into at arm's length as envisaged in section 41 of the Act. In the *Harris v Rossouw* matter however, the plaintiff failed to provide particulars in that regard and the court consequently refused default judgment. The plaintiff clearly pleads that the dealings were not at arm's length in that the plaintiff and the defendant are brothers, and the fact that the defendant had been dependent on the plaintiff for financial assistance.

³ "Arm's length" is an expression which is commonly used to refer to transactions in which two or more unrelated and unaffiliated parties agree to do business, acting independently and in their self-interest. – Wex legal dictionary, Cornell Law School website. Section 4 (2) (iii) of the National Credit Act 34 of 2005.

⁴ 2019 ZAWCHC 75 (21 June 2019)

12.3 **Alternatively, the acknowledgement of debt is *contra bonos mores*:** no cogent reason is proffered for this assertion. The Constitutional Court has reaffirmed the currency of the *pacta sunt servanda* principle. It held in *Barkhuizen v Napier*⁵ that: "*Agreements freely and voluntarily concluded must be honoured, the Court found that the pacta sunt servanda is a profoundly moral principal on which the coherence of any society lies, and as such it is a universally recognised legal principle.*"

[13] The defendant then pleads over a defence of *lis pendens*, the defendant alleges that plaintiff had issued summons in the High Court previously under a different case number, and this action was also based on an acknowledgement of debt. He states that the current action from which this application arose is a duplication and has not been withdrawn. However, no document is filed in support of the existence of the said previous action. The defendant also states that he never filed a notice of his intention to defend the alleged previous action. Yet on the same breath, he alleges that the said action has prescribed.

[14] A defence of *lis pendens* depends upon the existence of a pending earlier action.⁶ In *The Richtersveld Community v Alexkor Ltd and another*⁷ Gildenhuys

⁵ 2007 (5) SA 323 (CC).

⁶ Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Ed, 2009 ch10-p311.

⁷ [1999] LCC 151/98 (Land Claims Court).

J dismissed a special plea relating to the defence of *lis pendens* in similar circumstances where there was no multiplicity of actions before him, but similar and not related rights at issue in the separate courts.

[15] In the matter of *Bafokeng Tribe v Impala Platinum Limited and Others*⁸ Friedman JP held that when a court considered *issue estoppel* defences such as *res judicata* and *lis pendens*:

“There is a tension between a multiplicity of actions and the palpable realities of injustice. It must be determined on a case by case foundation without rigidity and the overriding or paramount consideration being overall fairness and equity.”

C.THE LAW ON SUMMARY JUDGMENT

[16] Summary judgment is a procedure used to obtain the swift enforcement of a claim against a defendant who has no real defense to the claim. It may be obtained in the respect of four types of claim only:

- (1) On a liquid document;
- (2) for a liquidated amount in money;
- (3) for delivery of specified movable property; and
- (4) for ejectment; together with any claim for interest and costs in each case.⁹

[17] Rule 32 provides the mechanism through which this procedure is invoked in practice. The remedy should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a *bona*

⁸ 1999 (3) SA 517 (BHC) at 566B-C.

⁹ Civil Procedure – A Practical Guide 2nd Ed – Pete, Hulme et al. – 589 (Glossary).

fide defence. The court then comes to the aid of a plaintiff whose right to relief is being balked by the delaying tactics of a defendant who has no defence.¹⁰

D. DISCUSSION

[18] An analysis of the relevant documents filed in this application as well as the submissions made, it has become clear that the defendant has filed his plea for purposes of delay. His opposition of the plaintiff's application for summary judgment is devoid of any sense and logic. The defendant has embarked on a fishing expedition to piece together all manner of technicalities to avoid responsibility for his earlier acknowledgement of debt. The defendant can accordingly not be granted leave to defend.

[19] In the result, I find that the defendant has no *bona fide* defence. The following order is made:

- a. Summary judgment is granted against the defendant for the payment of R929 529.15. Interest on the said amount at the rate of 7.25% per year calculated from 1 October 2021 to date of payment.
- b. Costs on an attorney and client scale.

¹⁰ Erasmus Superior Court Practice – RS 17, 2021, D1 – 383.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 06 February 2023

Date of Judgment: 12 July 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 12 July 2023.