IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

WILLIAM PATRICK CHARLES BADDELEY ADAMS ..... Appellant

- and -

SOUTH AFRICAN MOTOR INDUSTRY EMPLOYERS ASSOCIATION ..... Respondent.

Coram: Jansen, Corbett, Miller, Joubert JJA et Botha AJA.

Heard: 21 February 1980.

Judgment delivered: 1 October 1980.

REASONS FOR JUDGMENT.

JANSEN JA :-

An order dismissing this appeal with costs has been made. Here follow the reasons :-

On 9 November 1973 E C de V Hoffe, A J Hoffe and D B Hoffe (hereinafter referred to as the Hoffes) sold

their shares and loan accounts in Ballina (Proprietary) Limited to the appellant for R235 000. The written agreement of sale provided inter alia for a deposit of R25 000 (Clause 4 (a) (1)) and that the balance of the purchase price was to be paid in instalments. An accelleration clause (4 (c)) enabled the Hoffes, in the event of a failure to pay any amount on time or failure to provide the security within a reasonable time, to claim "the full balance then outstanding" and interest "without prejudice to any other remedies to which the Sellers might be entitled in terms of the agreement". Appellant was to pledge the shares purchased to the Hoffes as security (Clause 6). In relation to any breach "of any of the provisions of this Agreement" by the appellant, Clause 12 provided :-

> "If the PURCHASER should commit a breach of, or fail to comply with, any of the provisions of this Agreement and should fail to remedy the breach or comply with the Agreement within a period of seven (7) days after the despatch of written notice by the SELLERS to the PURCHASER calling on it to do so, the SELLERS shall be

entitled forthwith to cancel the agreement, in which event the deposit referred to in Clause 4(a)(i) hereof will be forfeited to the SELLERS by way of a penalty for the PURCHASER'S breach. The remedy granted to the SELLERS in this clause is, however, without prejudice to any other remedies to which the SELLERS might be entitled, including the right to claim from the PURCHASER such damages as the SELLERS may have suffered as a consequence of the PURCHASER'S breach."

The appellant fell in arrear with his payments. He then, on 1 April 1974 and by agreement with the Hoffes, signed an "Acknowledgement of Debt" of which the material provisions are as follows :-

" ACKNOWLEDGEMENT OF DEBT.

I, the undersigned .....
do hereby acknowledge myself to be truly and lawfully indebted to - EVATT CHARLES DE VILLIERS HOFFE and ANDRE JOHN HOFFE and DOUGLAS BAM HOFFE (together referred to as 'the Hoffes') in the amount of R138,807 being -

(a) R138,000 being the balance of the purchase price of the shares and loan accounts in BALLINA (PROPRIETARY) LIMITED in terms of a written Agreement of Sale dated 9th November, 1973, as amended by letter dated 12th February, 1974, entered into between me and the Hoffes (hereinafter referred to as 'the Agreement of Sale').

(b) R807 being the balance due under an adjustment account in terms of the ~~aforesaid Agreement~~.

(The amount of R138,807 is hereafter referred to as 'the capital sum').

I do hereby renounce all benefits arising out of such legal exceptions 'non numeratae pecuniae, non causa debiti, errore calculi, revision of accounts, no value received' as may apply, and I acknowledge that I know and understand the true intent and meaning of such renunciation.

I further acknowledge that the following terms and conditions shall apply to this acknowledgment of debt -

1. I hereby bind and oblige myself to pay or cause to be paid to the Hoffes the capital sum in instalments as follows :

   (a) On 1st April, 1974 - R10,000;
   (b) On or before 1st May, 1974 -R40,000;
   (c) On or before 1st October, 1978 - R88,807.

2. .....

3. I record that in terms of the Agreement of Sale the capital sum was to have been paid to the Hoffes on 1st March, 1974. To compensate the Hoffes for the inconvenience and damages that they have suffered as a consequence of my failure to pay the capital sum timeously I undertake to pay the Hoffes an additional sum of R15,000 by way of a penalty, ...

   The penalty payable by me in terms of this clause shall be without prejudice to any right which the Hoffes may have to recover damages from me in lieu of the penalty in the event of there being any breach of the terms of this acknowledgment of Debt .....

4(a)/...

4. (a) In the event of -

(i) my failing to make any payment due in terms of this acknowledgment of debt on or before the due date of payment; or

(ii) ..... or

(iii) there being any breach by me of any other of the terms and conditions of this acknowledgment of debt;

then the full capital sum owing in terms hereof, and the penalty provided for in Clause 3 hereof shall immediately become due and payable in one sum and the Hoffes shall be entitled to enforce the terms of this Acknowledgement of Debt. The rights granted to the Hoffes in terms of this Acknowledgement of Debt shall not in any way constitute a novation of the Agreement of Sale.

.....

.....

6. Acceptance by the Hoffes of any payments made by me after due date shall not be regarded as nor constitute a derogation from or waiver of any of the Hoffes' rights hereunder or under the said Agreement of Sale, and any indulgence or relaxation which the Hoffes may grant me shall be without prejudice to their rights as specified herein and in the Agreement of Sale.

..... "

On 19 December 1974, the Hoffes "ceded and assigned" to the respondent, in writing, inter alia all their claims against

the appellant in terms of the Acknowledgement of Debt "for value received". Thereafter the respondent, as cessionary, issued summons against the appellant in the Witwatersrand Local Division. He alleged inter alia that the appellant had "in breach of his obligations under the Acknowledgement of Debt wrongfully failed to make payments thereunder", and he claimed the sum of R102 017 20 (allowance having been made for certain credits due to the appellant). The appellant raised a main and an alternative plea. The main defence was based on an allegation that the Acknowledgement of Debt was based on a void causa, as the agreement of sale to which it related was entered into in contravention of sec 38(1) of the Companies Act 1973; the alternative defence was based on an allegation that the purported cession of rights was of no force and effect, as it amounted to a partial cession of the rights of the Hoffes without the appellant's consent. The respondent excepted to both defences as being bad in law and disclosing no defence. The exceptions were upheld by the Court a quo (per VERLOOTEN J). The appellant

appeals only against the Court's order in respect of the alternative plea.

Before us both counsel argued, in effect, on the basis that the Acknowledgement of Debt created a new cause of action to pay the balance of the purchase price and that thereafter, at least up to the time of the cession, this obligation co-existed with the original obligation under the deed of sale to pay such balance. As will be seen, this assumption was fully justified.

There is ample authority to the effect that an acknowledgement of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor; and it does not matter whether the acknowledgement is by way of an admission of the correctness of an account or otherwise. (Cf Divine Gates & Co. Ltd. v Beinkinstadt & Co., 1932 AD 256; Somah Sachs (Wholesale) Ltd. v Muller & Phipps SA (Pty.) Ltd., 1945 TPD 284; Mahomed Adam (Edms.) Bpk. v Raubenheimer, 1966 (3) SA 646 (T)). In Christou v Christoudoulou

(1959 (1) SA 586 (T)) there are dicta to the effect that an admission in respect of an existing debt cannot "found an independant cause of action" unless it amounts to a novation (at p 587 G - 588 A). This, with respect, appears to rest on a misapprehension. There can be no objection in principle to a second obligation arising in respect of an existing debt, and this appears to have been recognized by this Court (Smit v Rondalia Versekeringskor= porasie Beperk, 1964(3) SA 338(A), at p 346 G). The decisive question is whether the acknowledgement contains an express or implied undertaking to pay, a matter which relates to the intention of the parties. It may well be that an acknowledgement of debt usually implies an undertaking to pay, but this is an aspect upon which it is unnecessary to express any opinion now. (For a discussion of question in the American Law, cf. 127 ALR 650).

In regard to the effect of an acknowledgement of debt in our law, some reference has been made in the past to the "account stated" of the English law (cf. Divine Gates & Co. Ltd. v Beinkinstadt & Co. Ltd., supra, at

262-3, 276 et seq.) No doubt an acknowledgement of debt with an express or implied undertaking to pay, in our law bears some resemblance to one or more of the types of "account stated" known to the English law (cf Halsbury's Laws of England, 4th ed., Vol 9, Contract, SS 698; Chitty on Contracts, 24th ed., Vol 1, SS 1899 - 1900; Odger's on Pleadings, 20th ed., pp 187-189), but continued reference to these concepts of the English law can only lead to confusion. We are not encumbered by the tech= nicalities of the doctrine of consideration and in our law a novation is not presumed: the intention of the parties is the decisive factor (cf Smit v Rondalia Verseke rings= korporasie van SA Beperk, supra, at p 346 H). Moreover, in our law the remedy of provisional sentence has its own peculiarities. A simple acknowledgement of debt (i e with no undertaking to pay either express or implied), e g, could possibly be sufficient, so it seems, for obtaining such relief (Barclays Bank v McCall, 1927 TPD 512, at p 517 (in fine).

In the present case the Acknowledgement of Debt

contains / .....

contains an express undertaking to pay, and there can be little doubt that the parties intended to create a new obligation in respect of the payment of the purchase price due under the deed of sale. The express words used, the addition inter alia of a clause waiving the various exceptiones, the creation of a "penalty" which did not exist before, all speak of this intention. The express disavowal of any intention to novate (Clause 4(a)) cannot derogate from this. There can be little doubt that a new obligation arose in accordance with the intention of the parties. And it is equally plain that they intended the rights under the deed of sale to remain alive and thus the original obligation to pay the purchase price. Once it is accepted that there is no legal obstacle to two obligations co-existing in respect of the same performance or common debt, it follows that in this respect also effect must be given to the intention of the parties.

Counsel were in agreement as to the co-existence of the two obligations up to the time of the cession, but

were at variance as to the effect of the cession. On behalf of the respondent it was contended that when the Hoffes ceded their rights under the Acknowledgement of Debt to the appellant, their rights under the deed of sale "ceased to exist"; while the contention on behalf of the appellant was that each of the two obligations would remain unimpaired if a cession were effected and that the appellant, therefore, was in jeopardy of being sued twice - by the Hoffes and by the respondent. This last contention formed the basis of the further argument that as such a cession would impose a greater burden upon the appellant than that to which he would otherwise have been subjected and would be tantamount to a partial cession of the combined rights held by the Hoffes under the Acknowledgement of Debt and the deed of sale, it could not have been done effectively without the consent of the appellant - which was never given. It is obvious that this argument involves an inquiry into the relationship between the two co-existing obligations.

This a matter not free from difficulty. Prof. E M Meyers, in discussing the concept of "een cumulatie van verbintenissen" says: "Van de verhouding dezer beide verbintenissen kan dan echter getuigd worden, hetgeen alreeds de Franse jurist Jacques de Révigny voor zyn tijd heeft opgemerkt: pauci intellexerunt" (Algemene Leer van het Burgerlijk Recht, Deel I, 2d ed. p 119). However, in our law the matter may be clarified by reference to the position where a negotiable instrument such as a promissory note is given in respect of an existing debt. There can be little doubt that - unless a novation is intended, which is not presumed - two obligations then exist: the original obligation and the obligation arising from the note. They are interdependent. The original obligation may, in a sense, be said to be the causa of the new obligation (Saambou-Nasionale Bouvereniging v Friedman, 1979(3) SA 978 (A), at p 992 A) and defences in respect of the original obligation may be raised in respect of the new obligation; performance of either discharges the other. Fortified by

two obligations in respect of the same performance, the ~~creditor has, however, no free election to enforce the~~ original obligation. Our cases have followed the English law that upon acceptance by the creditor of the negotiable instrument, the right to enforce the original obligation is suspended until maturity of the instrument, and when the creditor claims payment of the original obligation he must account for the negotiable instrument (Moss & Page Trading Co. (Pty.) Ltd. v Spancraft Furniture Manufacturers & Shopfitters (Pty.) Ltd. & Others, 1972 (1) SA 211 (D & C), at p 214 H - 216 H). It follows that if the creditor were to cede (or negotiate) the negotiable instrument, the debtor is safeguarded against being sued by both the holder (on the instrument) and by the creditor (on the original obligation). In accordance with the nemo plus juris rule it follows that if the creditor were to cede the original obligation to a third party and retain the instrument, the third party would be subject to the same restrictions in relation to the old obligation to which the creditor was

before / .....

before the cession. There would, therefore, be no reason to preclude the creditor from enforcing the new obligation. In this respect I am in respectful dis= agreement with the conclusion to which the court arrived in the Moss & Page Trading Co. case (supra, at p 217 E - 218 D).

Counsel for the appellant sought to distinguish the position relating the negotiable instruments, and contended that an acknowledgement of debt does not suspend the remedy based on the original obligation. However, in my view, the same rules of inter-dependency regulating the position of an original obligation and a new obligation arising from a negotiable instrument in conjunction with it, should apply where an existing obligation is reinforced by a new obligation arising from an acknowledgement of debt.

It follows that the appellants' alternative plea, in attacking the validity of the purported cession, was

unfounded in law and the court was justified in upholding the exception.

For these reasons the appeal was dismissed with costs (with leave to amend the alternative plea).

E.L. JANSEN JA.

CORBETT JA.)
MILLER JA.) Concurs.
JOUBERT JA.)
BOTHA AJA.)