

SOUTH AFRICA / JUDGMENT

Liberty Group Limited v CFS Solutions (PTY) Ltd and Another (1395/2022) [2023] ZAFSHC 15 (23 January 2023) [2023] ZAFSHC 15

COURT

Free State High Court, Bloemfontein

BEFORE

S Naidoo

CASE / FILE NUMBER

1395/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. 1395/2022

In the matter between

LIBERTY GROUP LIMITED

Plaintiff

versus

CFS SOLUTIONS (PTY) LTD

First Defendant

ISHMAEL THAMI LINDA

Second Defendant

JUDGMENT

CORAM:

NAIDOO J

HEARD ON:

21 JULY 2022

DELIVERED ON: 23 JANUARY 2023

- [1] The plaintiff (Liberty) issued Provisional Sentence Summons against the first and second defendants (CFS and Mr Linda, respectively) for payment of the amount of One Million Seven Hundred and Ninety Three Thousand Nine Hundred and Seventy Two Rand and Ninety Eight Cents (R1 793 972.98), which it alleges is owed to it in terms of an Acknowledgment of Debt (AOD) signed by CFS. Mr Linda's liability is alleged to arise out of a Deed of Suretyship in terms of which he bound himself to pay the debts of CFS. The defendants entered an appearance to defend and filed an affidavit, proffering the defence that the amount claimed has been paid. Adv (Mr) LCM Morland represented the plaintiff and Adv (Mr) NM Bahlekazi represented the defendants.
- [2] According to the averments in the opposing affidavit, on 16 January 2018, Liberty and CFS entered into a Liberty Broker Franchise agreement, in terms of which CFS was required to provide inter alia broker consultant services and services in the long and short-term insurance industry. The defendants allege that from 2018 to March 2020, business was conducted without any problems. When the Covid 19 pandemic hit South Africa and the country went into lockdown in March 2020, CFS struggled to keep its business afloat. It was granted financial assistance by Liberty for four months from March to June 2020 to enable it to meet its running expenses. However, it was not receiving any income as it was not able to do business and applied for further financial assistance from Liberty, which was refused. In order not to lose the contract with Liberty, CFS signed an AOD in favour of Liberty, in the amount claimed.
- [3] The defendants alleges that since the AOD was signed, CFS continued to submit work to Liberty and that whatever commission it earned, was used to reduce its debt arising from the AOD. It further alleges that the work it submitted to Liberty from 15 December 2020 to 16 July 2021 was not taken into account. CFS alleges that a commission statement, which was marked "E" and handed up as an exhibit, received in July 2021 reflects a debt of R1 730 177 as at March 2021, but that the following month, in April 2021, CFS is reflected as having a positive balance. Therefore, it does not owe Liberty the amount claimed.
- [4] Liberty filed a Replying Affidavit in which it disputed the version tendered by the defendants, giving an explanation as to why the defendants' version is incorrect and alleging that the defendants have acted male fide in advancing such a defence. I pause to mention that the name of the deponent to the Replying Affidavit was not included therein and Mr Morland indicated that a supplementary affidavit would be filed to correct that omission, but that does not appear to have been done. Mr Bahlekazi did not take issue with the omission of the deponent's name. Liberty explained that CFS is a franchised branch of Liberty and as such is remunerated by a management fee referred to as an "overrider fee". This fee is calculated according to the mathematical formula set out in the Broker Franchise Agreement that the parties entered into. The defendants have not disputed the methodology employed in such calculation.

- [5] Liberty alleged that the figure of 1 730 177 referred to by the defendants is not the Rand value of fees payable to CFS. The volume of written policies accepted by Liberty from brokers serviced by CFS is referred to as Production Credits (PCR's), which is a mathematical metric used in the calculation of the override fee. It

is this "metric" on annexure E that the defendant refers to, and is not a reflection of the fee paid by Liberty to CFS. Liberty explains further that the override statement is accompanied by a monthly commission statement which not only serves as a tax invoice, but reflects the net financial position of the broker after deductions or allowances have been taken into account. Liberty attached copies of a commission statement for October 2021, which reflected the financial position for September 2021. From that statement it appears that CFS owed a net amount of R2 158 824.76 to Liberty. This statement was not disclosed by CFS.

- [6] Another statement that Liberty attached was an "override fee account", which reflected CFS's nett financial position after deduction of override fees previously paid, from the override fees actually earned. Liberty then attached a reconciliation statement which it referred to as a "settlement account" and alleges that when the override fee and settlement accounts are reconciled, two amounts were owing to it by CFS on 4 February 2021,

namely, R59 990.99 and R1 195 981.99, although there was a typographical error in citing the latter amount in para 25 of the Replying Affidavit. Reference to the settlement account reflects the correct amount. The total of these two amounts, namely R1 793 972.98, is what CFS acknowledged itself to be liable for in the AOD, which was signed in December 2021

- [7] Liberty explained that the vehicle of the AOD was employed to assist CFS, as it would not be permitted by its electronic systems from putting through such a large amount as a serviceable debt in ordinary business operations. The AOD was intended to assist CFS as the latter would be permitted to maintain cash flow whilst it repaid the debt in terms of the AOD. Liberty therefore alleges that CFS acted male fides in not disclosing to the court all the relevant documentation and its true indebtedness to Liberty.

- [8] The relevant portions of Uniform Rule 8 provide as follows:

- (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 No. 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.

- (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.

- [9] It is trite that provisional sentence is a summary and interlocutory remedy. It has been accepted as such for over eight decades through our case law. The learned author Erasmus in the work Superior Court Practice at RS 17, 2021, D1-98 succinctly summarises the position in our law as follows:

“Provisional sentence.....is an extraordinary, summary and interlocutory remedy designed to enable a creditor who has liquid proof of his claim to obtain a speedy judgment therefor without resorting to the more expensive and dilatory machinery of an illiquid action. Provisional sentence precludes a defendant with no valid defence from ‘playing for time’. Apart from the fact that provisional sentence is only available to a plaintiff who is armed with a liquid document, two further inherent characteristics of provisional sentence have always rendered it distinguishable from other remedies. The one is that it only leads to a provisional or interlocutory order. Final judgment is still to be considered in the principal case. In the final instance, the claim against the defendant can still be dismissed. The other is that, while on the one hand it entitles the plaintiff to payment of the judgment

immediately, that is, before entering into the principal case, on the other hand it affords the defendant to insist on security for repayment pending the final outcome.

- [10] The defendants, in their Heads of Argument, referred to and relied on the case of Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank 2011(3) SA 1 (CC), where the court made the following order:

“3. The procedure for provisional sentence is declared to be inconsistent with the Constitution and invalid, to the extent that it does not give to courts a discretion to refuse provisional sentence 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.”

“4. The common law is developed, so that courts will in future have a discretion to refuse provisional sentence, only in circumstances

where the defendant demonstrates:

- (a) An inability to satisfy the judgment debt;
- (b) an even balance of prospects of success in the main case on the papers; and
- (c) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.”

Following the Twee Jonge Gezellen judgment and order, it appears that the Rules Board for Courts of Law intends to amend rule 8(10) to read:

“(10) Any person against whom provisional sentence has been granted may enter in to [sic] the principal case if:

- (a) he or she shall have satisfied the amount of the judgment for provisional sentence and taxed costs, or
- (b) the plaintiff on demand fails to furnish due security in terms of sub-rule (9); or
- (c) leave has been granted by the court.”

[11] The court in Twee Jonge Gezellen remarked at paras 21, 22 and 23 as follows:

“[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....

[22] It has been said that the balance of probability which the defendant must raise must be substantial before the court will refuse

provisional sentence. However, as was pointed out in *Rich and Others v Lagerwey*, our law knows only two standards of proof, namely, proof beyond reasonable doubt which applies in criminal cases, and the civil standard of proof on a preponderance of probability. In order to escape provisional sentence, the defendant must therefore satisfy the court on a preponderance of probability that the plaintiff is unlikely to succeed in the principal case.

- [23] This onus, moreover, can only be discharged upon facts raised on affidavit. The court has no inherent discretion to hear oral evidence on issues other than the authenticity of the defendant's signature on the document, where the plaintiff, in any event, bears the onus....”
- [12] In the present matter the defendants make the allegation that they have paid the debt that they owed to Liberty. They do not allege that they are unable to pay the debt. Implicit in that assertion is the concession that they were indebted to Liberty. Where the defendants raise a defence beyond the AOD, the onus is on them to satisfy the court, on a balance of probabilities, that they will succeed in the main case, or put differently, that the plaintiff will not succeed with its claim. The only financial record that the defendants attached to the Answering Affidavit is Annexure E which I referred to above. Based on the detailed explanation given by Liberty, which I have set out above, regarding the financial relationship and payment procedures between it and CFS, together with the supporting documents I have referred to, it is clear that the defendants have not played open cards with the court and have deliberately withheld the full set of documentation relevant to this matter. When regard is had to annexure E, it is clear *ex facie* the document, that the figures relied on by the defendants, fall into a column that does not have a monetary or Rand value as the last two columns on that document do. The explanation given by Liberty with regard to the meaning of PCR (Production Credits) is rational, reasonable and credible, and accords with the rest of its version as well as the rest of the documentation furnished by Liberty.
- [13] The defendants have not indicated how the the defence they raised does not allow them to show a balance of success in their favour, without the benefit of oral evidence. The so-called dispute they have raised is contrived and does not appear to be *bona fide*. In any event, as pointed out in *Twee Jonge Gezellen*, this court does not have inherent jurisdiction to hear oral evidence on any issue except a dispute as to the authenticity of the defendant's signature on the AOD. It does not assist the defendants to put up a “bare-bones” type of defence and expect this court to come to their assistance, where it seems very probable that they have deliberately withheld important documentation from this court, which would not support their version.
- [14] I am not satisfied that the defendants have discharged the onus on them to show on a balance of probabilities

that the plaintiff, Liberty, will not succeed in the main action. The second defendant, Mr Linda, has put forward no defence at all, other than to stand by CFS's assertion that the debt was paid in full. In this regard, the dicta of the court in Twee Jonge Gezellen do not assist them. The defendants in this case have not met the requirements set out in the Twee Jonge Gezellen case, to enable them to escape Provisional Sentence.

[15] In the circumstances the following order is made against the first and second defendants jointly and severally, the one paying the other to be absolved:

15.1 Provisional Sentence is granted against the first and second defendants in the amount of One Million Seven Hundred and Ninety Three Thousand Nine Hundred and Seventy Two Rand and Ninety Eight Cents (R1 793 972.98);

15.2 The first and second defendants are ordered to pay interest on the aforesaid amount at the rate of 7% per annum, and

15.3 The first and second defendants are ordered to pay the plaintiff's costs of the action

S NAIDOO J

On behalf of the Applicants:

Adv LCM Morland

Instructed by:

Gerings Attorneys

Johannesburg

c/o Hendre Conradie Inc

(t/a Roussouws Attorneys)

119 President Reitz Avenue

Westdene

Bloemfontein

(Ref: GER29/0049)

On behalf of the Respondent: Adv NM Bahlekazi

Instructed by:

Makubalo Attorneys

Suite 115-118 Sunday School Building

154 Charlotte Maxeke Street

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