IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No. 83/2015
Date Heard: 7/5/15
Date Delivered: 14/5/15
Not Reportable

In the matter between:

IAN HILLHOUSE **APPLICANT**

And

ANDREW DOUGLAS KRUUSE **RESPONDENT**

JUDGMENT

PLASKET, J

[1] This is an opposed application for summary judgment for R2 975 284, interest on that amount and costs.

[2] In his particulars of claim the applicant, as plaintiff, averred that on or about 31 July 2014 and at East London he and the respondent, the defendant in the action, entered into a written agreement in the form of an acknowledgment of debt in terms of which the defendant acknowledged his indebtedness to the plaintiff in the amount of R2 975 284 and agreed that

interest at the legal rate would accrue on his indebtedness from 31 July 2014 to date of payment. The plaintiff avers that the defendant has failed to make any payment in respect of the sum owed to him despite demand.

[3] In his affidavit opposing the summary judgment application the defendant sets out at considerable length events and circumstances prior to and leading up to his signing of the acknowledgment of debt. As correctly submitted by Ms Beard who appeared for the plaintiff, they are for the most part inadmissible because they are contrary to the parol evidence to the extent that they seek to contradict, add to or modify the written agreement with evidence extrinsic to it in order to redefine its terms.[1]

[4] The main body of the acknowledgment of debt reads as follows:

'**ACKNOWLEDGEMENT OF DEBT**

I, the undersigned,

ANDREW DOUGLAS KRUUSE

(Identity Number: 7…….)

(hereinafter referred to as "the Debtor")

Acknowledge that I am indebted to:

IAN HILLHOUSE

(hereinafter referred to as "the Creditor")

In the sum of **R2 975 284.00** (Two Million Nine Hundred and Seventy Five Thousand Two Hundred and Eighty Four Rand)

in respect of money due owing and payable by me to the creditor arising out of:

1. The lease of cattle - R572 021.10 (VAT Incl.);
2. Monies lent and advanced - R1 007 903.14;
3. Sale of 144 cattle @ R8 500 each - R1 395 360.00 (VAT Incl.)

(hereinafter referred to as "the Principal Debt")

And furthermore declare that I am bound by the conditions set out in the Annexure hereto, which document I have initialled for purposes of identification.'

[1] *Johnston v Leal* 1980 (3) SA 927 (A) at 943B. See too *Union Government v Vianini Ferro Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC & another* 2013 (3) SA 426 (SCA) para 20.

[5] In the annexure to the acknowledgment of debt the defendant undertook to make payment directly to plaintiff and, in paragraph 6, expressly renounced various defences including *errore calculi*, *non numerate pecuniae* and *non causa debiti*.

[6] In his affidavit, the defendant explained how the acknowledgement of debt came to be signed by him. He stated:

'On the 31st July 2014, I was asked to meet at the offices of Drake Flemmer and Orsmond (E.L.) Inc where I was requested to sign an Acknowledgment of Debt on the 31st July 2014. I stupidly signed the Acknowledgement of Debt, acknowledging the indebtedness for arrear rental in respect of the lease of the cattle, the amount lent and advanced to the farming operation and for the sale of one hundred and forty-four (144) cattle. I did so because I was fully aware that the farming operation had benefitted from the one hundred and forty-four cows and capital contributed to the farming operation, and that the Applicant wanted some form of reassurance and confirmation of this investment and the amounts. I considered that the signing of the document would give the Applicant the confirmation he required and did not believe or realise that I was assuming personal liability to repay the debt on demand or at all.'

[7] He proceeded to say that he was 'stupid in signing this document as I was not personally liable for the lease of the cows, nor the money advanced, and nor was there in fact any sale relating to the cattle leased by the Applicant to the business venture, to me' and that the plaintiff was aware of the defendant's inability 'to personally repay the amounts invested by the Applicant in the farming business'. He claimed to have a defence, it being that 'the liability reflected in the Acknowledgement of Debt is not my personal liability'.

[8] The first defence that the defendant raises is thus that he is not bound by the acknowledgement of debt because his agreement to its terms was the result of a mistake on his part. The second defence that he raises is that the entire agreement is invalid because clause 6 of the annexure is in conflict with regulation 32 of the regulations made in terms of the National Credit Act 34 of 2005. This regulation reads:

'The following common law rights or remedies that are available to a consumer may not be waived in a credit agreement:
(a) *Exceptio errore calculi;*
(b) *Exceptio non numerate pecuniae;*
(c) *Exceptio non causa debiti*.'

[9] A third defence, namely that as the plaintiff was not registered as a credit provider in terms of the National Credit Act, he could not enforce the acknowledgement of debt, was wisely abandoned, presumably in the light of the decision in *Friend v Sendal*.[2]

[10] The immediate problem confronting the defendant is that the acknowledgment of debt is an unconditional acknowledgment of his indebtedness personally to the plaintiff – he states that 'I . . . acknowledge that I am indebted to **IAN HILLHOUSE**' in respect of 'money due, owing and payable by me to the creditor'. In construing the agreement the inevitable point of departure is the language of the document itself. It is not ambiguous in any way. Its terms are crystal clear. It is not capable of bearing any meaning other than that the defendant assumed personal liability for the debt.

[11] To the extent that the history of the matter as given by the defendant may be relevant and admissible, it does not assist him: it is to the effect that he had planned to create entities to conduct his farming business – a trust and a private company – but that these entities were never formed. The defendant's averment that he signed the document because the plaintiff wanted some form of reassurance and that he stupidly did not believe that he was assuming personal liability for the debt only has to be stated to be rejected. As the entities referred to above did not exist, he was the only person who could have acknowledged the debt and who could have been liable for its repayment.

[12] It cannot, in my view, be accepted that the defendant could have laboured under any misapprehension as to the consequences of signing the

[2] *Friend v Sendal* 2015 (1) SA 395 (GNP).

acknowledgment of debt. Even were this totally improbable scenario to have been the case, he has not asserted that his misconception was induced by the plaintiff or anyone else. As was submitted by Ms Beard, it is trite that contracting parties are bound by their written agreements not wrongfully induced by another, and the *caveat subscriptor* rule binds a party to a contractual document which he or she has signed, whether he or she read it or not.[3]

[13] The first defence raised by the defendant must therefore fail.

[14] I turn now to the second defence raised. Mr Cole, who appeared for the defendant, argued that the entire agreement had to fall because of the conflict between clause 6 and regulation 32. I cannot see why that is so. Clause 6 is clearly severable from the rest of the agreement[4] and the defendant does not rely on any of the three defences that, according to regulation 32, cannot be waived. The defendant's second defence also fails.

[15] The plaintiff is accordingly entitled to summary judgment. I make the following order.

Summary judgment is granted against the defendant and in favour of the plaintiff for:

(a) payment of R2 975 284;

(b) payment of interest on the above amount at the legal rate prevailing from time to time, reckoned from 31 July 2014 to date of final payment; and

(c) costs of suit, including the costs of the application for summary judgment.

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[3] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G-H; *Burger v Central South African Railways* 1903 TS 571 at 578.

[4] See *Bal v Van Staden* 1903 TS 70 at 82.

Judge of the High Court

APPEARANCES

For the plaintiff: M Beard instructed by Netteltons

For the defendant: S Cole instructed by Wheeldon Rushmere and Cole