FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1740/2013

In the matter between:-

RINICK CONSULTANTS CC Plaintiff
(Reg. no. 1991/024268/23)

and

NARILE-ANEL SMITH Defendant

HEARD ON: 8 AUGUST 2013

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 27 SEPTEMBER 2013

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[1] These are provisional sentence proceedings. The plaintiff provisionally claims an amount of R721 866.51, interest theron at a rate of 15.5% per annum *a tempore morae* from the 1st January 2010 as well as the costs on the special scale as between attorney and client. The defendant defends the matter.

[2] In its summons the plaintiff alleged that the defendant was indebted to the plaintiff in terms of a written agreement which the defendant signed at Bethlehem on 15th December 2011 – *vide* annexure 1. The agreement was an acknowledgement of debt, pure and simple. The plaintiff was, at all times material

to the dispute, the lawful holder of the acknowledgement of debt. The original debt was R745 000.00 as on 15th December 2011. The total sum of the three payments the defendant made in reduction of the capital was R83 300.00 as on 31st January 2013. Ever since the third payment the defendant remained in default until the plaintiff initiated this proceedings on 6th May 2013 to recover the outstanding balance.

[3] In her answering affidavit, duly filed on 24th May 2013, the defendant denied that she was truly and lawfully indebted to the plaintiff in the alleged amount or any portion thereof. The thrust of her defence was that she was not bound by the document (annexure 1) on which the plaintiff's action was grounded. The edifice of her case was that, although she signed the acknowledgement of debt in favour of the plaintiff at Bethlehem on 15th December 2011, she did not sign such document on her own free accord. She alleged that she involuntarily signed the document under duress. She maintained that the unbearable fear which induced her to append her signature to the document was improperly created by the plaintiff's powerful representatives – *vide* par 6 answering affidavit.

[4] Besides her aforesaid substantive defence the defendant also raised a point *in limine*. The preliminary point revolved around the contention that the acknowledgement of debt constituted a credit agreement in terms of section 8(4)(f) of the National Credit Act 34 of 2005. I shall revert to the preliminary point later.

[5] In the replying affidavit the plaintiff denied, through its deponent, that its member, Mr G.J. van Niekerk or its labour consultant, Mr F.J. Botes, or its attorney, Mr J.F. de Beer, or any other person individually or collaboratively, ever instilled fear in the defendant or her parents, which fear improperly induced her to act in a manner detrimental to her own interest. The plaintiff emphatically denied that it improperly threatened to have the defendant arrested and criminally prosecuted unless she signed the acknowledgement of debt. Similarly the plaintiff denied that it unduly threatened to have the defendant arrested and criminally prosecuted unless her parents signed suretyship agreement in favour of the plaintiff as co-principal debtors. The plaintiff replied that the defendant freely and voluntarily signed the acknowledgement of debt as the principal debtor.

[6] The defendant's parents, so asserted the plaintiff, further also freely and voluntarily signed the suretyship agreement as sureties and co-principal debtors. Moreover, her parents also authorised the plaintiff's attorney to register their residential bond as the real security for the repayment of the money their daughter owes to the plaintiff on account of her theft.

[7] There were several undisputed facts in this matter. The plaintiff is a close corporation. Its deponent is Mr Gert Jacobus van Niekerk. He is its sole member. He is an accountant by profession. The defendant has been in the employ of the plaintiff for a period of approximately nine years

immediately preceding the termination of her contract of employment. She was appointed as a receptionist and administrative clerk. The scope of her duties included, among others, the following:

- to receive cash and other forms of payment;
- to issue receipts for money received;
- to pay over money received from clients to South African Revenue Service and others;
- to file proof of payments and receipts; and
- to deposit money received in the plaintiff's bank account.

[8] The defendant stole money from the plaintiff over a period of ± four years. She repeatedly falsified documents and defrauded the plaintiff of various sums of money during the period stretching from December 2007 until October 2011 when her rampant thieving was discovered. Mr F.J. Botes first informed her on 1 November 2011 about the financial irregularities. She admitted to him that she had indeed stolen cash from the plaintiff. At first she falsely indicated that she started with the thieving in the year 2011, but later on revoked that initial response. She subsequently informed Mr Botes that she started stealing from her employer way back in 2008. Both statements turned out to be untrue. It became common cause that she started stealing in the year 2007.

[9] On 1 November 2011 the defendant was served with a written notice of disciplinary hearing which was scheduled for 8 November 2011. There were two charges levelled against her.

The first charge was dishonesty. It was alleged that she took the sum of R75 713.20 from her employer between 20 October 2011 and 27 October 2011 without the employer's consent. The second charge was also one of dishonesty. It was alleged that during September 2011 she received an amount of R2 100.00 from Tishas Deliveries, her employer's client, but issued no receipt and took the money for herself.

[10] On 2 November 2011 the defendant, after going through the cash receipt book, was unable to work through the cash receipts books in order to identify all the amounts she had misappropriated. She resigned from the plaintiff's employment on the same day. The parties signed an agreement whereby the contract of employment was mutually terminated – *vide* annexure "rk3" - replying affidavit. The parties agreed that the proposed disciplinary hearing be abandoned; that she had stolen from the plaintiff and that the precise magnitude of her thieving had not yet been accurately ascertained at the time of termination of the contract of employment.

[11] Twelve days later, on 14 November 2011, the defendant's parents Mr Lawrence Frank Meyer and Ms Stefanie Meyer met with the plaintiff's representatives, namely: Mr Van Niekerk and Mr Botes at the latter's offices. With the aide of the defendant, the magnitude of the multiple acts of her dishonesty was ascertained, verified and documented on 15 November 2011. They were briefed about the defendant's misconduct and the extent of her theft. They signed a separate document as sureties in favour of the plaintiff. Moreover they also agreed to

sign a special power of attorney to authorise the plaintiff to have a mortgage bond registered against their fixed property as security in favour of the plaintiff. The defendant's parents provided additional security, because the plaintiff had rejected the defendant's offer of R2 000.00 per month – *vide* annexure "rk5(a) and (b)".

[12] On 15 November 2011 the defendant and the plaintiff's representatives met at Mr Botes' offices. The three individuals namely: Ms Smith, Mr Van Niekerk and Mr Botes together worked through the cash receipt books and related financial documents and jointly compiled a list of the stolen money – *vide* annexure "rk4(a)" – "rk4(v)". It then came to light that the defendant had not only misappropriated money from the plaintiff, but also from the plaintiff's clients, which money the plaintiff was supposed to have paid over to SARS on behalf of its clients concerned. The clients' component of the theft added up to R64 415.77 – *vide* annexure "rk4(t)" and annexure "rk4(v)".

[13] On the strength of annexure "rk4" as a whole, the defendant acknowledged under her signature that she owed the sum of R680 462.66 to the plaintiff alone quite apart from the aforesaid sum of clients' money.

[14] On the strength of annexure "rk4" as a whole and annexure "1" – the acknowledgement of debt was drafted at Bethlehem on 15 November 2011 by Mr J.F. de Beer. The document was signed by Ms N.A. Smith as the debtor and Mr G.J. van

Niekerk as the creditor's authorised representative. The defendant, Ms Narile-Anel Smith, acknowledged that she was indebted to the plaintiff, Rinick Konsultante CC, in the sum of approximately R745 000.00. That total consisted of two distinct components: *viz* R680 462.66 being the plaintiff's money and R64 415.77 being money belonging to clients.

[15] Subsequent to the signing of the acknowledgement of debt, as well as the suretyship agreement, three payments totalling R83 300.00 were made by and on behalf of the defendant in reduction of the capital. The amount represented the total sum paid prior to the institution of these provisional sentence proceedings.

[16] The dispute in the matter primarily revolves around the crisp question: whether the defendant was threatened to sign an inflated acknowledgement of debt, which, but for the intimidation and the resultant fear, she would not otherwise have signed.

[17] Mr De Bruin submitted that the defendant's defence of *metus* or duress was devoid of any substantive merits. Accordingly counsel urged me to dismiss the defendant's defence and to grant provisional sentence in favour of the plaintiff.

[18] On the contrary, Mr Cilliers submitted that the acknowledgement of debt on which the plaintiff's claim was grounded, was improperly induced by the serious threat of criminal prosecution. He argued that the defendant was

unlawfully intimidated to acknowledge an excessive debt in favour of the plaintiff, which debt she did not truly and lawfully owe to the plaintiff. Accordingly counsel urged me: to uphold the defendant's defence of *metus;* to dismiss the provisional sentence sought by the plaintiff; and to allow the defendant to enter the main arena without any procedural impediment which the grant of the provisional sentence would create.

[19] The peculiar character of the remedy termed provisional sentence were once again profiled in **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), where the constitutionality of the provisional sentence procedure was unsuccessfully challenged. The very instructive judgment encapsulates, among others, the elementary principles applicable to actions for the remedy of provisional sentence.

[20] In adjudicating this action I was reminded by the **Gezellen** decision firstly, that the primary element of the remedy called provisional sentence, is that it is a remedy that is only available to a plaintiff who is armed with a liquid document – *vide* par 15; secondly, that the remedy of provisional sentence affords a plaintiff with a liquid document only a provisional relief and not a final judgment; thirdly, that the remedy entitles the successful plaintiff to an immediate payment of the provisional judgment debt before the principal case is entered into; and fourthly, that it entitles the defendant, pending the final outcome of the adjudication process, to insistently demand security for the

repayment of the amount paid as provisional judgment debt – *vide* par 16. These then are the elementary characteristics that define the unique remedy.

[21] The underlying purpose of the provisional sentence procedure was articulated as follows by Brand JA in the **Gezellen** case, *supra*, at par [18]:

> "Conventional wisdom maintains that the purpose of provisional sentence has always been to enable a creditor, who has liquid proof of his or her claim, to obtain a speedy remedy without recourse to the expensive, time-consuming and often dilatory processes that accompany action proceedings following upon an illiquid summons. Conversely, the procedure precludes a defendant with no valid defence from 'playing for time'."

[22] The provisional sentence procedure is governed by rule 8(1) which requires that such procedure be initiated in accordance with a specially designed form of a summons. The plaintiff's cause of action has to be materially particularised in the provisional sentence summons. Moreover, the liquid summons relied upon in support of the provisional sentence must be attached to the special summons. The summons must afford the defendant a reasonable opportunity of preparing the required response.

[23] The defendant who denies liability is not required to deliver a plea to the summons as is the case in ordinary action proceedings. In proceedings by way of provisional sentence, the defendant is called upon to set out the grounds for the

denial of liability in an answering affidavit. Such defendant is allowed to canvass defence(s), including defences beyond the parameters of the liquid document in order to show why he or she should not be held bound by the terms and conditions of a liquid document which *ex facie* the document itself the defendant's unconditional acknowledgement of indebtedness in a fixed or readily ascertainable amount of money due to the plaintiff is obviously demonstrated.

[24] The defendant must after the filing of the answering affidavit, afford the plaintiff an adequate opportunity of responding. The plaintiff has to respond by way of a replying affidavit. In the replying affidavit the plaintiff is required to deal with the defendant's defence grounded on factual allegations even if such allegations are external to the liquid document by virtue of which the plaintiff has invoked the provisional sentence proceedings.

[25] Although the rule makes provision for the exchange of the answering affidavit and the replying affidavit only, the courts have judiciously assumed upon themselves a discretion in terms of rule 27(3) to allow a further affidavit on good cause shown – **Gezellen**, *supra*, par [19].

> "The theoretical justification traditionally advanced for the institution of provisional sentence is that a liquid document gives rise to a rebuttable presumption of indebtedness. The plaintiff must therefore allege in his or her summons that the document (a copy of which is required by rule 8(3) to be annexed to the summons) is genuine and that, on the face of the document, the amount claimed is owing. If the defendant disputes these

> allegations, the onus is on the plaintiff to prove that they are true. That includes, for example, the authenticity of the defendant's signature, the authority of the defendant's agent, or the fulfilment of a 'simple condition'."

[26] Where the defendant relies on a defence which goes beyond the four corners of the liquid document, she is required to produce sufficient proof of such a defence in order to satisfy the court that the probability of success in the principal case is against the plaintiff, before provisional sentence can be refused – **Gezellen**, *supra*, par [21].

> "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."

[27] In order to escape the forceful attack launched by a plaintiff mightily armed with provisional sentence artillery a defendant must, therefore, satisfy the court on a preponderance of probabilities that the plaintiff is unlikely to ultimately succeed in the principal case. Such is the onerous nature of the onus a defendant has to discharge in order to provisionally repel the mighty provisional attack. Moreover the onus that rests upon the respondent 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. As regards the authenticity of the defendant's signature, the plaintiff bears the onus.

[28] The discretion of a court to refuse provisional sentence is a recognised elementary feature of the provisional sentence procedure. However the troublesome question in any given case is always to determine appropriate circumstances in which a court is justified to refuse the relief. According to the traditional approach the discretion of the court to refuse provisional sentence was restricted to rare instances where there were special circumstances. The traditional approach dictated that such a discretion to refuse be exercised on the basis: that prospects of success in the main case were evenly balanced; that the balance of probabilities was equal on both sides and that it was just and fair to exercise the discretion in favour of the defendant to prevent an injustice – **Gezellen**, *supra*, par [48].

[29] The aforesaid discretionary rule was analogous to the rule of boxing. A challenger for a boxing title has to fight to win the contest. A draw is never good enough to wrestle the crown away from the champ. In the case of a draw the champ remains the champ.

[30] The modern approach to the exercise of the discretion can be readily gleaned from the headnote and the summary in the **Gezellen**, *supra*, p1 – p2 and p22 – p23 respectively. The exercise of a discretion in favour of the defendant is no longer rigidly confined to a narrow set of predetermined conditions, in other words, special circumstances. The underlying consideration of the new approach is to adequately protect

worthy challengers of the provisional sentence from the unjustifiable limitation to their fair hearing rights.

[31] In the exercise of the discretion entrusted to me in this matter, I am mindful that I have to perform a delicate balancing act between two legitimate interests. At the one extreme of the pendulum is the right of the plaintiff, a litigant armed with a liquid document, to obtain speedy relief which entitles him or her to obtain a speedy relief. At the other extreme of the pendulum is the defendant's right to a fair hearing. The gist of the guidelines as proposed in the **Gezellen** decision is that the exercise of a discretion is a two way process. In the first place a defendant has to show that in the parculiar circumstances of this particular case the provisional sentence constitutes a limitation of his/her right. In the second place, the plaintiff has to show that in the particular case justification exists for the limitation of the defendant's right.

[32] It was once held that a balance of probability which the defendant must raise in provisional sentence proceedings must be substantial before the court will refuse provisional sentence. See **Inter- Union Finance Ltd v Franskraal Strand (Edms) Bpk and Others** 1965 (4) SA 180 (W). That view did not find support in **Syfret's Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd** 1991 (3) SA 276 (SE) at 286C-E. The **Franskraal** decision was overruled in **Rich and Others v Lagerwey** 1974 (4) SA 748 (A) at 754H almost two decades before the **Syfret's** decision. Although the defendant has a mountain to climb in order to persuade the court to

refuse provisional sentence the law imposes no such substantially burdensome onus on him before the court will refuse provisional sentence. The yardshick remains the same, viz proof on a preponderance of probabilities. See **Rich** *supra* and **Gezellen**, *supra*, para [22].

[33] The provisional sentence is an important commercial instrument. However its adverse features were identified and highlighted in the **Gezellen**, *supra*, at para [34] – [43]. Brand AJ considered whether the provisional sentence limits the defendant's right of an access to courts under section 34 of the Constitution. After a very instructive examination of the law the learned judge came to the conclusion that

> "And a procedure that condemns a defendant inevitably, and without discretion to final judgment, with no proper opportunity to present his or her case, is simply unfair. The question is thus whether there is a discretion."

[34] The learned judge went on to say:

> [66] …It seems to me that the procedure would be rendered constitutionally consistent if the common law were developed in accordance with the behest of the Constitution, in a manner that gives the court a discretion to refuse provisional sentence only where the defendant can demonstrate the following circumstances:
>
> (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 all evidence may tip the balance of prospective success in his or her favour."

[35] All things been equal the provisional sentence procedure will, not without more, constitute an unfair limitation of a defendant's right to a fair hearing. In the nature of things, however, provisional sentence procedure has an inherent potential to constitute a limitation to a defendant's right. Whether it actually does depends on the peculiar circumstances of a particular matter.

[36] The provisional sentence procedure would be found to constitute an offensive limitation to the defendant's right to a fair hearing in instances where:

- the nature of the defence raised does not allow the defendant to show, without the benefit of oral evidence, a balance of success in his or her favour;
- the defendant is financially unable to immediately satisfy the judgment debt in order to enter the final arena should provisional sentence be granted; and
- outside the ambit of the narrowly pre-determined 'special circumstances', the court has no discretion to refuse provisional sentence – **Gezellen**, *supra*, [50].

[37] The limitation of the defendant's right occurs only where the two offensive lines of infringement intersect on the defendant's case. The first is that the nature of the defence raised does not allow the defendant to show the balance of success in his or her favour, without the benefit of oral evidence. The second

line is that the defendant is unable to satisfy the judgment debt. The core finding of the court as regards the exercise of a discretion in favour of the defendant is that it must be established that both of those cardinal requirements are present, before it can be concluded that the defendant's rights will be infringed by the grant of the provisional sentence. The defendant bears the onus of showing that both elements of infringements are present – **Gazellen**, *supra*, [51] read with [50] as conveniently summed up in [70](a).

[38] In the instant matter, the defendant admitted, not only that she signed the acknowledgement of debt but also that she indeed stole the money from the plaintiff, albeit a lesser sum than the sum specified in the liquid document. Clause 6 annexure "1", in other words the agreement, reads:

> "6.
>
> Die ooreenkoms is nie 'n novasie van enige bestaande ander skuld of vonnis of eisoorsaak nie en die Skuldeiser het die keuse om die Skuldenaar op grond van hierdie ooreenkoms aanspreeklik te hou of enige ander vonnis, skuld of eisoorsaak. Die Skuldeiser is bewus van sy reg om kriminele stappe in te stel, en het geen stappe ingestel nie omrede hy op versoek van die Skuldenaar haar 'n kans wil gee om die skuld af te betaal. Te alle tye en veral by verstek van tydige betaling sal die Skuldenaar die reg behou om die saak by die SAPD aan te meld."

[39] In her answering affidavit the defendant, supported by her parents, heavily rely on the aforegoing clause, which they regarded as threats and duress to have her arrested unless

she acknowledged that she stole the sum of about R745 000,00 which obscenely inflated sum she, in truth and in fact, did not steal. About such duress the defendant said the following at para 12.6 of her answering affidavit:

> "12.6 Mnr **van Niekerk** het teenoor my vader bevestig dat hul bereid sal wees om nie strafregtelik vervolging teen my in te stel nie mits ek 'n skulderkenning onderteken, waarvoor my ouers hul as borge sal verbind."

[40] According to the defendant's version it was obvious that the plaintiff's agents allegedly threatened her on 14 December 2011; that they informed her father about the misconduct on the same day; that they told her parents on the same day about the specific conditional deal they were prepared to make with her in order to suspend the plaintiff's right to have her criminally charged and prosecuted; that the defendant did not, at the first available opportunity, tell her parents that she felt unduly intimidated; that she did not tell her parents that although she stole the money, she did not steal that much.

[41] The plaintiff's agents would probably have first confronted the defendant alone, seriously intimidated her, deprived her of an opportunity to seek legal advice and immediately caused her to sign an acknowledgement of debt on the same day, 14th December 2011, before she could have had any opportunity of discussing the matter with anyone. That the agents did not do. Instead they allowed her to go away with her parents on the 14 December 2011 before she signed any agreement. She and her parents were politely asked to return the next day to sign

the agreement(s). The next day, 15 December 2011 she, on her own accord, went back to the plaintiff's agents where she signed the agreement. It must be kept in mind that her husband was a senior police officer. Her conduct, in my view, strongly militated against her case. The conduct of the plaintiff's agents on the contrary was consistent with those of people who did not harbour any revengeful intent or to over-reach the defendant.

[42] The facts of this matter show a remarkable resemblance to those in the case of **Jans Rautenbach Produksies (Edms) Bpk v Wijma; Emil Nofal Filmproduksies (Edms) Bpk v Wijma** 1970 (4) SA 31 (T). At 33A-B the learned judge, Trengove J, commented:

> "Die vraag ontstaan dus of die verweerder hom met welslae op die *exception quod metus causa* kan beroep. Die verweerder moet op oorwig van waarskynlikhede bewys dat hy deur 'n dreigement van wederregtelike optrede beweeg was om die prokurasie te onderteken. Na my mening het hy nie daarin geslaag om gegewens voor die Hof te plaas wat op 'n oorwig van waarskynlikhede aandui dat die beweerde dreigement wel gemaak is nie. Maar selfs al sou ek in hierdie opsig fouteer, dan kan die verweerder se beroep op metus nietemin nie slaag nie, omdat hy nie bewys het dat die dreigement contra bonos mores is nie."

I share those sentiments.

[43] The learned judge continued:

> "'n Dreigement is 'n aanduiding of waarskuwing van 'n voorneme om teen iemand op te tree as hy nie aan sekere eise of voorwaardes voldoen nie. So 'n dreigement sal, na my mening, as *contra bonos mores* beskou word as die voorgenome optrede wederregtelik is, of as die voorwaardes of eise wat gestel word regtens ongeoorloof is. Wat was die dreigement, na bewering, in die onderhawige geval, en watter voorwaardes of eise is aan die verweerder gestel? Volgens die verweerder kom dit eintlik hierop neer. Rautenbach en Nofal sou aan die verweerder gesê het dat hy 'n dokument moet teken waarin hy erken dat hy die geld wederregtelik toegeëien het en waarin hy aan Liebenberg 'n volmag gee om sy bates te vervreem en sy skulde te vereffen. Hulle sou verder aan hom gesê het dat as hy so 'n dokument teken, hulle nie strafregtelike stappe teen hom sou neem nie, maar as hy weier om te erken, die saak by die polisie aanhangig gemaak sou word en hy dan op 'n aanklag van diefstal gearresteer en aangehou sou word.
>
> Volgens die gegewens voor die Hof kan die voorgenome optrede, na my mening, nie as onbehoorlik wederregtelik beskou word nie. Die aanduidings is dat die verweerder die geld wederregtelik toegeëien het."

(vide par 33B-E)

[44] The learned judge finally remarked as follows about the conduct of the defendant *vis-à-vis* that of the plaintiffs:

> "Die verweerder was dus nie net sivielregtelik aanspreeklik teenoor die eisers vir die terugbetaling van die geld nie, hy was ook strafregtelik aanspreeklik vir sy dade. Die eisers het dus die volste reg gehad om die saak by die polisie aanhangig te maak. Die eis of voorwaarde wat Nofal en Rautenbach sou gestel het was opsigself ook nie onbehoorlik of ongeoorloof nie. Die verweerder was teenoor hulle aanspreeklik en die eisers was geregtig op 'n skriftelike erkenning en 'n onderneming om die skuld

> te delg. Die ooreenkoms dat die eisers nie stafregtelike stappe teen die verweerder sou neem nie as hy die prokurasie teken was opsigself ook nie onwettig nie."

(vide 33E-G)

See also **Du Plooy N.O. v National Corporation Ltd** 1961 (3) SA 741 (W) at 475.

[45] The **Emil Nofal** decision was once questioned in **Arend v Another v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (K). The basis of the doubt expressed by Corbett J, as he then was, and two of his colleagues do not have an adverse impact on the **Nofal** principle as regards the facts of the present matter. I have no reservation about the soundness of the principle. Compare **Shoprite Checkers (Pty) Ltd v Jardim** 2004 (1) SA 502 (O).

[46] Consider the following hypothetical scenarios of facts. Z steals R1,0 m from X and later the same amount from Y. Both of the victims confront him. He admits that he stole from them. He undertakes to make good his wrongs. He offers to repay each of them by way of specified and equal monthly instalments. X accepts the offer but warns Z that he would have him arrested and criminally prosecuted should he breach the undertaking – cf **Nofal** *supra*. However, Y's reaction is completely different. He rejects the offer made by the thief, Z. He insists that Z must pay him back immediately. The penniless Z cannot afford to do so. Thereupon Y warns Z that unless he, by hooks

or crooks finds the money, even if he does so by robbing a bank, he would have him arrested and criminally prosecuted.

[47] What emerges from the two factual scenarios is that the two demands by X and Y are both lawful. In my view there is nothing morally repulsive or legally wrong with their respective warnings, call them threats if you will, that they would press for the criminal charges against Z unless he pays them back. But Y went rather too far. He induced Z to commit another crime (bank robbery) in order to repay him. This is precisely what makes his demand contrary to good public morals – and this is fundamentally unlawful. Considerations of public policy would dictate that Y, but certainly not X, be criminally prosecuted for encouraging a thief to commit another crime.

[48] The test to determine whether an acknowledgement of debt signed under threat of prosecution is *contra bonos mores,* it is whether the creditor exacted something to which he was otherwise not legally entitled – vide **Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd, Machanick Steel & Fencing (Pty) Ltd v Transvaal Coldroling (Pty) Ltd** 1979 (1) SA 265 (W). Mr De Bruyn submitted that the probabilities clearly showed that the defendant misappropriated money to the tune of at least the amount in the agreement and that the plaintiff was legally entitled not only to recover the amount in civil proceedings but also to press criminal charges against the defendant. In my view the submission is a correct proposition of law. See Christie, **The Law of Contracts in South Africa**, 8th Edition, page 541 and further.

[49] As regards the correctness or otherwise of the amount in dispute in this matter, it must be borne in mind that a document was attached to the provisional sentence summons. The defendant appended her signature to such a document. Under her signature she unreservedly admits liability for the payment of the sum of money stated in the document and subject to the terms and conditions embodied therein. This then is the starting point of the inquiry. The mere authenticity, liquidity and the certainty of the documents are crucial aspects which bolster the merits of the plaintiff's claim.

[50] The defendant's answering affidavit is more important for what it does not say than what is does. She does not aver that she blindly signed the document or that she did not really read the document before she signed it. She did not put up a defence that she was misled as to the contents thereof, in particular the amount of the money she stole.

[51] As I understand her defence, she agreed to pay the amount stated in the agreement whilst she thought she did not really steal more than R180 000,00. Her case is that she knowingly agreed to pay the amount more than four times the approximate amount she reckoned she stole because she was intimidated to do so. Her alleged fear of languishing in jail could not logically be attributed to the plaintiff's agents. The truth of the matter was that she had been constantly and increasingly living in fear of arrest and criminal prosecution ever since she stole from her employer for the very first time

on 6 December 2007. Therefore she was entirely to blame for anguish. The chicken have now come home to roast. It will be readily appreciated, in these circumstances that there was nothing new in the alleged threat to have her arrested and criminally prosecuted. She knew all along that her criminal activity would end this way. On those facts, she is *prima facie* bound by the agreement. Her allegation that she stole no more than R180 000,00 is neither here nor there.

[52] It will be recalled that when she was initially confronted about her stealing, she stated that she started in 2011, the same year in which her stealing spree was detected. However, she was soon made to realise that she was wrong.

[53] She then changed her initial response. Again she gave an untrue explanation. Eventually she was made to admit that she actually started stealing in 2007 and not 2008. It can therefore, be seen just how she hopelessly tried to deceive her employer by drastically shortening the length of her long criminal activity. Now she is deceitfully trying, on oath for that matter – this time to substantively play down the amount she has embezzled. I could find no factual basis for her claim. She subsequently admitted that the period of her stealing was four times longer than she had previously claimed. That is one indication that her assertion as to the amount must be sceptically considered.

[54] The second factor which is also telling against her assertion is that she was invited to calculate or ascertain the precise

amount of the money she stole. She dismally failed to do so after perusing the receipt books, she then gave up. At that stage she hardly mentioned that she has been able to establish that she stole no more than R180 000,00. Perhaps the magnitude of the figures shocked her. This is typically a case where the magnitude of the theft occurs over a lengthy period of time and the perpetrator does not keep track of the amounts sporadically but frequently misappropriated. After a lengthy period of time, as in this case, one often finds that, at the end of it all, a perpetrator gets utterly surprised at the magnitude of his or her crime.

[55] Annexed to the answering affidavit deposed to by the defendant are three payment options. According to annexure "A1" the amount payable is shown as R675 000,00. It must also be remembered that in addition to that payment of R70 000,00 and two further monthly payments were made by and on behalf of the defendant without any protest. None of those payments was made without prejudice or without admission of liability or with full reservation of the defendant's rights. All of them were made over an extended period of time during which neither the defendant nor her parents or even her husband cried a foul play. To crown it all, the defendant took no pro-active legal steps to have the agreement, allegedly tainted by unlawfulness, nullified and the extortionists criminally prosecuted. Just as she ultimately admitted that she stole over a long period of four years, one day she will perhaps confess that she stole over four times the amount she now claims she stole.

[56] Obviously the defendant perhaps conveniently so, forgot that she agreed to the contents of annexure “RK4A” – “RK4V” which were annexed to the plaintiff’s replying affidavit. It is significant to note that on 15 November 2011 before she signed the agreement the defendant appended her signature below the following words:

> “**Ek verklaar vrywillig,**
> Hiermee bevestig ek dat ek die
> bedrag van R680 462,66 aan
> Van Niekerk Rekenmeesters
> verskuldig is.”

[57] I hasten to remark that the defendant makes no mention of annexure “RK4A” to “RK4V” in her answering affidavit. Her deadly omission collectively considered together with those annexures exhibited by the plaintiff, by way of the replying affidavit, completely destroyed the defendant’s fanciful defence as to the amount she untruthfully claimed she had misappropriated. Her failure to deal or to mention those annexures in her answering affidavit justified the drawing of an adverse inference against her. In my view the defendant has totally failed to prove, on the preponderance of probabilities, that the plaintiff will fail in the main action. This is not a case where the amount claimed is marginally bigger than the actual amount due. It is inconceivable that the lady, the defendant, assisted by her parents both of whom are teachers and her husband, a captain in the South African Police Service would

sign an agreement for the payment of an amount virtually more than four times the amount she admits she owes.

[58] In balancing the affidavits as I am required in terms of the **Gezellen** decision, *supra*, there is nothing before me to refute the allegation made in the replying affidavit. The defendant did not seek an opportunity to introduce further evidence to refute the plaintiff's averments as contained in the replying affidavit. Implicit in her failure is a conclusion that she knew she had no good cause to show. The attitude she displayed suggested that she has resigned herself to the outcome of the matter. In my view she thereby tacitly acknowledged that she can do nothing further to refute the formidable case presented by the plaintiff.

[59] On the facts and for the reasons enumerated above there is simply no room in this matter for the exercise of a discretion in favour of the defendant. Although the defendant has demonstrated an inability to satisfy the judgment debt, she has failed on the papers before me to demonstrate an even balance of prospects of success in the principal case. She has also failed to demonstrate, on the papers before me, a reasonable prospect that oral evidence may tip the balance of prospective success in her favour. Her mere inability to provisionally satisfy the provisional sentence alone is therefore insufficient to trigger my discretion to refuse the relief – **Gezellen**, *supra*, par [67]. I would therefore grant provisional sentence against the defendant in terms of prayers 1, 2(a) and 3 of the provisional sentence summons.

[60] In that event the parties agreed in terms of clause 4.2 of the agreement, that the plaintiff would be entitled to costs on the attorney and client scale.

[61] Now I turn to the defendant's point *in limine* as fully set out in paragraphs 3, 4 and 5 of the defendant's answering affidavit. The defendant's contention was that the agreement (annexure "1") had all the elementary hallmarks of an agreement as envisaged in section 8(4)(f) of National Credit Act 34 of 2005. That being the case, so contended the defendant, the plaintiff was obliged to first comply with the provisions of section 129 and section 130 of the statute in question before initiating these proceedings to enforce the acknowledgement of debt. Seeing that the plaintiff had not averred, in the provisional sentence summons that those provisions had been complied with, the plaintiff's claim was legally premature and unenforceable. So went the preliminary argument.

[62] The aforesaid argument was not new, particularly in this division.

> "Ek het na my mening gefundeerde redes verskaf, ook met verwysing na tersaaklike regspraak, oor waarom die interpretasie wat Mnr Zietsman aanvoer (en Mnr Reinders ook aangevoer het), nie korrek kan wees nie. Mnr Zietsman se steun op en argumente met betrekking tot Artikel 4 van die Nasionale Kredietwet, maak na my mening geen verskil aan die feit dat die Wet steeds in totaliteit beoordeel moet word en ooreenkomstig die bepalings van Artikel

> 2 geïnterpreteer moet word aan die hand van die doel van die Wet en dus die bedoeling van die wetgewer nie."

Hattingh v Hattingh (4210/2010) [2011] ZAFSHC 108 (30.06.2011) [7] per Van Zyl J. I am in respectful agreement.

[63] My sister, Van Zyl J, went further to say:

> "Ek meen dat die uitspraak waarmee ek in paragraaf 24 van my uitspraak gehandel het, synde **VOLTEX v CHENLEZA 2010 (5) SA 267 (KZP)** 'n baie duidelike aanduiding is dat die blote feit dat 'n bepaalde ooreenkoms binne die definisies van die Wet val (en nie spesifiek by wyse van Artikel 4 uitgesluit word nie), nie noodwendig tot gevolg het dat dit deur die bepalings van die Wet getref word nie, omdat daar eerstens uiting gegee moet word aan die doel van die Wet soos vervat in Artikel 3 daarvan en tweedens omdat in sodanige vasstelling, daar ook gelet moet word op die "nature, the subject matter, substance, purpose and the function of a particular agreement, as well as the intention of the parties gathered from their conduct". Wanneer dit gedoen word, soos ek in die uitspraak uiteengesit het, kan ek steeds nie tot 'n ander gevolgtrekking kom (en meen ek ook nie dat `n ander hof redelikerwys tot `n ander gevolgtrekking sal kom nie) as dat hierdie kontrak op geen wyse getref kan word deur die doelstellings van die Wet en die wyse waarop hierdie doelstellings bereik moet word soos bepaal in Artikel 3 van die Wet nie. `n Ander bevinding sal, vir die redes reeds in my uitspraak vermeld, tot `n absurditeit lei en `n gevolg hê wat nie die bedoeling van die wetgewer kon wees nie."

I could not agree more.

[64] That **Hattingh** decision, *supra*, and the **Voltex** decision, *supra*, provide, in my view, a complete answer to the defendant's point raised *in limine*. To hold otherwise, would boil down to a complete disregard of the purpose of the statute. The law will not countenance such subversion of the purpose for which the statute was enacted. See also **Grainco (Pty) Ltd v Broodryk NO en Andere** 2012 (4) SA 517 (FB) per Cillié J.

[65] The decision in **Carter Trading (Pty) Ltd v Blignaut** 2010 (2) SA 46 (ECP) was distinguishable on clear grounds. Reliance on that decision does not take the defendant's case any further.

[66] In the light of the aforegoing reasoning, I am inclined to conclude that the point *in limine* was not well taken.

[67] Accordingly, I make the following order:

67.1 The defendant's point *in limine* is dismissed with costs.

67.2 The defendant is hereby called upon to provisionally pay the amount of R721 866.51 immediately to the plaintiff.

67.3 The defendant is further directed to pay interest on the aforesaid capital claim of R721 866.51 which interest must be calculated at the rate of prime rate minus 0.5% per annum which interest must be calculated on a compounded daily balance from 1 January 2013. As on 1 January 2013 the prevailing prime interest rate was

8.5% per annum. Accordingly the plaintiff is entitled to claim interest at the rate of 8% per annum calculated on a compounded daily balance.

67.4 The defendant is directed to pay the plaintiff's costs of these proceedings on the special scale as between attorney and client, in other words, clause 4.2 of the agreement (annexure "1").

M. H. RAMPAI, J

On behalf of plaintiff:	Adv J.P. de Bruin SC Instructed by: Symington & De Kok BLOEMFONTEIN
On behalf of defendant:	Adv H.J. Cilliers Instructed by: Phatshoane Henney Attorneys BLOEMFONTEIN

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