Reportable:	**YES** / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

"IN THE HIGH COURT OF SOUTH AFRICA"

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 212/17

In the matter between:-

AECI LIMITED PLAINTIFF

And

MARTHINUS JOHANNES LAUFS DEFENDANT

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] This is an opposed summary judgment wherein plaintiff claims payment in the amount of R1 900 000.00, alternatively R1 994 895.40 together with interest on the aforesaid amount at the rate of 9% per annum *tempore morae* and costs.

BACKGROUND FACTS

[2] During September 2014, plaintiff launched sequestration proceedings under case number M373/2014 against defendant who opposed the said application. The sequestration application was dismissed by the court on the basis that plaintiff's attorney was not properly qualified to sign the notice of motion. Plaintiff consequently appealed the judgment and the full bench of this Court, on 1 December 2016, upheld the appeal and directed that the application for sequestration should be remitted to the court *a quo* to be dealt with further.

[3] Plaintiff issued summons against defendant wherein plaintiff claimed payment in the amount of R1900 000.00 arising from breach of an acknowledgment of debt concluded between plaintiff and defendant on the 2 May 2014 and in the alternative claimed payment of R1 994 895.40 arising from breach of a written purchase and sale agreement of agricultural products concluded between plaintiff and defendant.

C. ***POINT IN LIMINE – LIS ALIBI PENDENS***

[4] Defendant raised a point *in limine* of *lis pendens* and alleged that the sequestration application which is still pending in this court is between the same parties or their successors, is based on the same cause of action and is

in respect of the same subject matter as this case. In amplification thereof, defendant submitted that the sequestration application and the matter both rely upon the same written sale agreement for its cause of action.

[5] The requirements for a successful defence of *lis alibi pendens* are the following:

5.1 pending litigation;
5.2 between the same parties or their privies;
5.3 based on the same cause of action; and
5.4 in respect of the same subject matter.

[6] A court may stay an action on the grounds that there is already an action pending between the same parties or their successors in title, based on the same cause of action, and in respect of the same subject matter.

[7] The cause of action and the relief sought for the enforcement of a debt based on a written agreement and a winding-up or sequestration application are in my view not the same. The cause of action relied upon in the sequestration application is based on the provisions of the Insolvency Act, 24 of 1936. The Insolvency Act provides two bases upon which a sequestration order may be granted, namely, the commission of an act of insolvency or if the individual is factually insolvent. Under case M373/2014, plaintiff alleges that the defendant committed an act of insolvency. In the action plaintiff claimed damages resulting from the breach of the agreement. Hence plaintiff bore the *onus* to prove, the agreement, the breach and damages suffered as a result of the breach. The fact that the written agreement is relied upon in both the sequestration application and the action for breach does not detract from the fact that the cause of action differs. Whether plaintiff succeeds or not with

summary judgment against defendant, plaintiff will still be entitled to proceed with the sequestration application against defendant. If the sequestration application is successful against defendant, plaintiff can still prove its claim in defendant's insolvent estate. However, if the claim is not admitted, plaintiff will be entitled to proceed with the action, but will have to replace defendant with the duly appointed trustee.

[8] Accordingly there is no merit in the defence of *lis alibi pendens* and the point *in limine* is dismissed.

D. **ACKNOWLEDGMENT OF DEBT**

[9] As stated *supra*, plaintiff's main claim is for breach of a written acknowledgment of debt concluded between plaintiff and defendant personally on the 2 May 2014. In terms of the acknowledgment of debt defendant was obliged to make three equal payments to plaintiff at the end of June 2014, July 2014 and August 2014. Defendant failed to effect any payments to plaintiff.

[10] In defendants' affidavit opposing summary judgment, defendant attached his answering affidavit filed in the sequestration application and asked the court to read the defences raised therein as if incorporated in his affidavit opposing summary judgment. Defendant said the following regarding the acknowledgment of debt:

> "7.4 I honestly cannot remember having signed the Acknowledgment of Debt (Annexure "FA3") and I am unable to positively identify my signature on the document

7.5 Furthermore, if I had signed the Acknowledgment of Debt (which I deny for the aforesaid reasons), same was signed due to common mistake between the parties, namely that I had to pay for the purchase within 30 days of the statement, whilst it only became payable once AECI has issued an "Aanvaarding van Bestelling".

7.6 The Acknowledgement of Debt is in the premises void

7.7 The conversations and correspondence exchange subsequent to the Acknowledgement of Debt and referred to in the founding affidavit must be seen in light of the common mistake between the parties regarding the correct terms of payment".

[11] Defendant's defence is thus two fold. Firstly, defendant does not remember signing the acknowledgment of debt and secondly if he had in fact signed the acknowledgement of debt, it was signed due to a common mistake between the parties regarding the correct terms of payment. The defendant's understanding was that any purchase made only became payable once plaintiff issued an "aanvaarding van bestelling".

[12] Plaintiff in the founding affidavit in the sequestration application alleged *inter alia* that:

"8.5 The applicant regularly sent invoices and statements to the respondent. A copy of the latest statement sent to the respondent is annexed hereto marked annexure "FA2".

8.6 The respondent was unable to pay the debt owed to the applicant timeously and requested the applicant for an extension to pay.

8.7 As a result of the respondent's request for an extension to pay, he signed, on the 2nd day of May 2014, an acknowledgment of debt for the amount due by him in the amount of R1 900 000.00".

[13] Plaintiff further submitted the following:

> "2.6.3 There is a document which is on face value a written acknowledgement of debt signed by the defendant. This acknowledgement was signed long after the deliveries were made to the defendant and after the defendant asked for an extension to pay. One would not expect a defendant, who disputes delivery, to sign an acknowledgement of debt;
>
> 2.6.4 The signing of an acknowledgement of debt in the amount of R1.9 million is not an insignificant event. A person will know whether or not he has signed such an important document. One would consequently expect either an outright denial of this or a detailed explanation why it was in fact signed by the defendant".

[14] In terms of Rule 32(1)(b) of the Uniform Rule of Court, the defendant opposing summary judgment must satisfy the court that he has a *bona fide* defence to the action, and must "disclose fully the nature and grounds of the defence and the material facts relied upon therefore"[1]. Rule 32(1)(b) is couched in peremptory terms.

[15] The defendant need not deal extensively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based, with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence[2], which if proved at trial, would constitute a good defence to the action. There must be a sufficiently full disclosure[3].

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[1] PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA) at 73B-C

[2] Arend & Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 304-5; Shepstone v Shepstone 1974 (2) SA 462 (N)

[3] First National Bank of South Africa Ltd v Myburgh & Another 2002 (4) SA 176 (C) at 180 A-B; Maharaj v Barclays National Bank Ltd supra; Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T)

[16] If the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to find that the requirement of bona fides is lacking[4]

[17] The defence raised by defendant that payment was only due after an "aanvaarding van bestelling" was issued, is not a common mistake but a unilateral mistake as defendant alleges that he concluded the Acknowledgment of Debt by mistake as he believed that the money was due and payable when it was not. Defendant did not alleged that both plaintiff and defendant were mistaken.

[18] A unilateral mistake caused by the other party entitles the mistaken party to rescind the contract if his mistake is sufficiently material, provided the mistaken party can show that he would not have entered into the contract if he had known the truth. It is not necessary to prove that the party causing the mistake also knew of its existence[5].

[19] Defendant relies on clause 5.1 of the terms and conditions of sale to allege that payment was only due after he received the "Aanvaardig van Bestelling". Clause 5.1 of the agreement reads"

"Tensy die betrokke Bestelling gekanselleer word, is betaling vir die goedere verskuldig en betaalbaar wanneer die Masstskappy die Aanvaardig van Bestelling uitreik, en betaling vir Dienste gelewer is verskuldig en betaalbaar by voltooing daarvan, in kontant".

[4] Friedman v Standard bank of SA Ltd 1999(4) SA 928 (SCA) at 938 D – H; Muller v Botswana Development Corporation Ltd 2003(1) SA 651 SCA at 656 C – 657 G

[5] The Law of Contract, 4th Edition, RH Chirstie page 371, Lexisnexis, Butterworths

[20] Clause 5.1 expressly deals with the situation where products have been ordered, but subsequently cancelled. This is not applicable to defendant. Furthermore it is common cause that clause 5.1 applies to cash transactions while plaintiff sold the goods to defendant on credit. Hence defendants' reliance on clause 5.1 that he was never issued nor furnished with any "aanvaardig van bestelling" and that the purchase price is accordingly not due and payable and plaintiff is not entitled to claim payment is misplaced. Accordingly there was no mistake when defendant signed the acknowledgment of debt.

[21] The terms of the acknowledgement of debt are clear and are not challenged. The acknowledgement of debt is a fresh agreement concluded between the parties after defendant requested extensions to pay. There were also references to discussions with defendant regarding defendant's obligation to make payment in terms of the acknowledgment of debt. These allegations were ignored by defendant in the answering affidavit in the sequestration application. Defendant was not mistaken when he concluded the acknowledgement of debt with a new repayment schedule, namely three equal payments to plaintiff at the end of June, July and August 2014.

[22] Defendant's defence that he cannot remember signing the acknowledgment of debt is improbable when considering that defendant requested extensions for payment which ultimately resulted in the parties concluding the acknowledgment of debt. Further the amount of R1 900 000.00 is not an insignificant amount for a person to allege that he cannot remember signing the acknowledgment of debt. Defendant does not deny his signature on the acknowledgment of debt but in an ambiguous manner

alleges that he cannot positively identify his signature. The fact that he does not dispute his signature on the acknowledgment of debt or the date when he concluded the agreement is telling and proves not only that he does not have a *bona fide* defence but also that defendant is not acting in good faith.

[23] Defendant failed to disclose fully the nature and grounds of his defences and the material facts relied upon and failed to profide sufficient detail regarding his defence. Defendant's defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy and it is evident that the requirement of *bona fides* is lacking.

[24] In defendant's heads of argument, it was submitted that plaintiff failed to comply with the provisions of the National Credit Act 34 of 2005 (NCA) in respect of the acknowledgment of debt. The NCA is not applicable to the acknowledgment of debt as plaintiff did not impose a fee, or a charge or interest to the deferred payment. Hence there is no merit in this defence.

[25] In the circumstances, it is not necessary to consider plaintiff's alternative claim of R1994 895.40, save to state that further evidence of defendants' lack of *bona fides* is found in the contradictory allegations made by defendant in his affidavit opposing summary judgment and his affidavit opposing sequestration namely:

25.1 In paragraph 7.1 of the answering affidavit in the sequestration application defendant alleged the following:

"7.1 I admit that:

7.1.1 AECI is a company that manufactures and sells among others agricultural products;

7.1.2 a copy of the written sale agreement ("the contract") between the parties dated 21 January 2014 is annexed to the founding affidavit (annexure "FA1");

7.1.3 I have purchased various agricultural products from AECI since;

7.1.4 these agricultural products were purchased in terms of the terms and conditions of the contract pertaining to case sales (as alleged by AECI's attorneys in the email dated 12 August 2014 (annexure "FA5")'.

25.2 However, in paragraph 9.1 and 9.6 of the opposing affidavit set out hereinbelow, defendant denies concluding a written sale agreement which is contradictory to his answering affidavit in the sequestration application.

"9.1 I deny that a written sale agreement has been concluded between the plaintiff, as duly represented by certain Mr Mynhardt Smuts, and myself on 21 January 2014, as pleaded by the plaintiff.

9.2 I consequently deny that a written sale agreement exists between the plaintiff and myself, and as such the plaintiff's action, and hence the application for summary judgment, should fail based on the fact that the plaintiff did not prove its cause of action, namely that a written sale agreement exists".

25.3 Further in the answering affidavit in the sequestration application defendant did not dispute that he had received the goods. Defendant acknowledged plaintiff as a creditor and did not dispute his indebtedness to plaintiff. While in the affidavit opposing summary judgment defendant alleged that, because the plaintiff did not annex

the necessary proof of delivery, he is "put the plaintiff to the proof that goods were delivered".

[26] In the circumstances I am of the view that the defendant failed to set out a *bona fide* defence to the application for summary judgment on the acknowledgement of debt.

[27] In the result, summary judgment is granted against the defendant for:

27.1 Payment in the amount of R1 900 000.00;

27.2 Interest on the aforesaid amount at the rate of 9% per annum a *tempore morae*; and

27.3 Cost of suit.

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N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	: 24 AUGUST 2017
DATE OF JUDGMENT	: 31 AUGUST 2017
ADVOCATE FOR PLAINTIFF	: ADV D SMIT
ADVOCATE FOR DEFENDANT	: ADV ZWIEGELAAR
ATTORNEYS FOR APPLICANT	: MAREE & MAREE ATTORNEYS (Instructed by: Thom Attorneys)
ATTORNEYS FOR RESPONDENT	: SMIT STANTON INCORPORATED (Instructed by: Schoeman & Associates