



**IN THE HIGH COURT OF SWAZILAND**

HELD AT  
MBABANE

CIVIL CASE NO.  
1367/2008

In the matter between:

TOTAL SWAZILAND (PTY) LTD

PLAINTIFF

AND

PHANGOTHI INVESTMENTS  
(PTY) LTD T/A SWAZILAND  
INDEPENDENT OIL  
INVESTMENTS

DEFENDANT

CORA  
M:

ANNANDAL  
E J

FOR THE  
PLAINTIFF: FOR  
THE DEFENDANT:

ADV. M.VD.  
WALT MR.  
MAGAGULA

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[1] Based on an acknowledgement of debt which was only partially complied with, the Plaintiff issued a provisional sentence summons in which an amount of E 152, 960.00 together with interest and costs is claimed. Instead of paying over the claimed amount, the Defendant exercised its right to contest the claim.

[2] This was done by way of an affidavit in which the Defendant's liability is denied, as well as raising points of law, both which are detailed below. In turn, the Plaintiff filed a replying affidavit which deals with the issues raised and at the time of hearing of the matter, yet a further legal point was brought to the fore in order to avoid provisional sentence.

[3] Provisional sentence, like summary judgment, is a radical but expedient manner of litigation by way of which protracted actions can be avoided but because of its drastic character, it has limited application. A main characteristic of the provisional sentence procedure is that the claim

has to be founded on a liquid document and secondly, that it does not automatically result in finality, hence the term "provisional sentence". See *Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249 H and *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie* 1975 (2) SA 142 (O) at 144G for more detailed expositions.

[4] Provisional sentence is a well established procedure in our common law system. Van der Linden stated in *Koopmans Handboek* 3.1.2.12 that "*provision*" (*namptissement* or *handvulling*) / provisional sentence shall not be granted "unless the Plaintiff obtained liquid proof of his claim, such as an acknowledged signature of the defendant, of an obligation or other acknowledgement of debt, or a merchantman's register, when purchase and sale is not denied and that mere declarations and other sorts of illiquid manners of proof thereof are insufficient" (own free translation from Dutch).

[5] The Dutch term "*handvulling*" is particularly descriptive. Literally, it means "*to fill the hand*", which in this context denotes that the hand of a creditor is filled in a summarily but provisional legal process, based upon a liquid document. That it is provisional distinguishes it from summary judgment or judgment obtained in an action. Once provisional sentence has been ordered, the defendant who has satisfied the amount of the judgment and taxed costs may enter the principal case on notice of his intention to do so, in which event the summons shall be deemed to be a combined summons and then to file his plea. Importantly, the provisionality of this procedure is reflected in the fact that 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.

[6] The effectiveness of this remedy is thus that a creditor who has a liquid document in which the indebtedness is recorded, may have his "*hand filled*" quickly and expediently, without a long and

protracted action. On the other hand, a debtor who might have a genuine defence to the claim but who has been ordered to pay the indebted amount can readily obtain security from the creditor and then have the matter fully ventilated and pronounced upon by the courts in due course. As example, creditor A might hold a cheque from debtor B, which was returned by the bank due to insufficient funds or with payment having been stopped. A may readily obtain provisional sentence while B may thereafter raise various defences available to him if he was not actually and truly indebted to A, even though the liquid document, a returned cheque, *prima facie* indicated otherwise. In this manner, unnecessary litigation is nipped in the bud but without jeopardizing the blameless defendant.

[7] Provisional sentence is therefore "*...granted on the presumption of the genuineness and the legal validity of the documents produced to the court. The court is provisionally satisfied (emphasis added,) that the creditor will succeed in the*

*principal suit. The debt disclosed in the document must therefore be unconditional and liquid ..."(Harrowsmith v Ceres Flats (Pty) Ltd 1979 (2) SA 722 (T) at 728 - C).*

[8] The liquid document on which provisional sentence may be granted must "... *on a proper construction thereof, evidenced by its terms, and without resort to evidence extrinsic thereto, ... (be) an unconditional acknowledgement of indebtedness in an ascertained amount of money, the payment of which is due to the creditor". (Rich v Lagerwey 1974 (4) SA 748 (A) at 754H).*

[9] The Defendant herein relies upon this same decision in order to contend that the document upon which the Plaintiff relies is not a liquid document.

[10] Mr. Magagula argues that the *essentialia* of a liquid document are that it must be a written instrument, signed by the defendant or his agent, with the signature providing

acknowledgement by the defendant either personally or by his authorized agent.

[11] That these aspects must exist bears no argument, but they are neither exhaustive nor fully articulated. The "acknowledgment" does not primarily focus on the signature but on a specific indebtedness. The aspect of the signature is one exception in provisional sentence proceedings where oral evidence as to the authenticity of the defendant's signature, or that of his agent, to the document upon which the claim for provisional sentence is founded, may be heard (Rule 8 (7)).

[12] Secondly, the acknowledgement of indebtedness must be entirely unconditional. A second exception comes to the fore when payment of the debt is subject to a simple and readily ascertainable event or condition. It must be inherently capable of being determined through speedy proof by means of affidavit evidence, such as giving of notice, failure to pay interest on due date, consent to cession, etcetera.

[13] Thirdly, the acknowledgement of indebtedness must be for an ascertained amount of money. Without an ascertained sum of money, the instrument cannot have the character of a liquid document, such as when a certificate of balance is required to determine and quantify the amount.

[14] Mr. Magagula argues that the identity of the debtor is in dispute, that the Defendant lacks *locus standi* and that provisional sentence therefore cannot be ordered. He contends that the averred liquid document (annexure "SDI") on which the Plaintiff relies is unclear as to who the indebted entity actually is, namely "Phangothi Investments (Pty) Ltd" or "Swaziland Independent Oil Investments." Since each of the two entities is a separate legal *persona*, being registered companies, they are separately and individually capable of being sued and not as is presently the case, that they are jointly sued as a single defendant, the one being a trading name of the other. He says that it creates confusion as to who is who and that benefit of



the doubt should fall in favour of the defendant,  
resulting in dismissal of the matter.

The Defendant filed two copies of certificates of incorporation under the Swaziland Companies Act of 1912. *Ex facie* these, Phangothi Investments (Propriety) Limited was incorporated in May 1997 and Swaziland Independent Oil Investment (Propriety) Limited was incorporated in November 2005.

[16] It is thus correct to state that Phangothi and Independent Oil are two separate and individual legal *personae*, as argued. But is that the end of the matter?

[17] Annexure "SDI" on which the Plaintiff relies provides the source of the answer central to the matter. It is headed "Acknowledgement of Debt " and then recites the parties thereto as follows:

"I/we the undersigned

|    |                          |           |
|----|--------------------------|-----------|
| 1. | Full names:              | Phangothi |
|    | Investment (Pty) Ltd of  | Reg.      |
|    | 264/97 <u>Trading as</u> |           |

2. (Physical address): Swaziland

Independent

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[18] The particulars of the debtor are written in long hand and initialled by four people, as is also done at all other handwritten entries and fully signed at the foot of the document.

[19] The document then details that the debtor is represented by Musa Magongo, in this capacity as Director/Member of the Company, he being duly authorized thereto by virtue of a resolution

passed at a meeting of the Board of Directors/  
Members.

[20] There is then recorded an "acknowledgement of true and lawful indebtedness to total Swaziland (Pty) Ltd ("Total") in the sum of E 352 440.00 being the purchase price of goods sold and delivered to Swaziland Independent Oil Investment".

[21] Page 2 of the document sets out the rate of interest as 15% + 2% and schedules dates and amounts to be paid in settlement, on or before the final payment in December 2004.

[22] Paragraph 3 has it that in the event of failing to pay any instalment on the due date, Total will be entitled to apply for judgment. The usual list of renouncements of legal exceptions is also recorded.

[23] Paragraph 5 reads: "*//we hereby specially agree that a certificate under the hand of the Company Secretary, Credit Manager, Legal Adviser or any director of Total, setting out the*

*amount of my/our indebtedness to Total under this acknowledgement of debt shall be prima facie proof of the amount of my/our indebtedness hereunder and shall be sufficient for and entitle Total to obtain provisional sentence or summary judgment for the amount of my/our indebtedness under this acknowledgement of debt".*

[24] Finally, the instrument records the date thereof as the 25<sup>th</sup> June 2003, witnessed by two people and signed on behalf of Total and the debtor.

[25] The signature of Mr. Magongo is endorsed above a rubberstamp which reads: "Swaziland Independent Oil Investments" together with an address and fax/telephone number.

[26] *Ex facie* the acknowledgement of debt, it thus seems to me that one Musa Magongo, duly authorised, acknowledged the indebtedness to Total and agreed to settle it in instalments. He also agreed to summary judgment or provisional sentence in the case of default to make

payments, the amount to be certified by a stated person.

[27] The identity of the debtor is on par with the citation of the defendant in addition of the company registration number.

[28] Importantly, "Swaziland Independent Oil Investment" is referred to as a trading name of "Phangothi Investment (Pty) Ltd ". This position was confirmed and accepted by the duly authorized person, Musa Magongo, who represented the debtor and who signed on its behalf.

[29] The question then arises whether the debtor should not be estopped from now arguing otherwise as a point of law, by saying that the citation of the Defendant as it appears on both the summons and the acknowledgement of debt, does not confer *locus standi in iudicio* upon it.

[30] Advocate van der Walt took issue with the fact that the Defendant seeks to argue that a wrong

entity was sued, based on two certificates filed as annexures to a notice to raise points of law. Had the defendant been serious to rely on this issue, it should have been incorporated in its affidavit resisting provisional sentence. If that was done, the plaintiff would then have been able to plead *estoppel* as it relied upon the representation made to it by the defendant in the acknowledgement of debt.

[31] In the affidavit denying liability, Musa Magongo, the authorized director of Phangothi Investments (Pty) Ltd, took no issue at all about the citation of the Defendant. The issue he raises *in limine* is concerned with the question of whether the acknowledgement of debt is in indeed a liquid document, an aspect reverted to below.

[32] What he does say is that the defendant denies any indebtedness at all, but he does acknowledge that "*the defendant*" indeed at one point in time, acknowledged the debt to the plaintiff. He also does not deny that the director

of "*the defendant*" signed the acknowledgement of debt. It is the very same director who deposed to the affidavit, who also signed the acknowledgement of debt on behalf of "Phangothi Investments (Pty) Ltd, trading as Swaziland Independent Oil Investments" and affixing a rubberstamp of the latter over his signature.

[33] The stamp is devoid of the words "Propriety Limited", or its abbreviations, to indicate it as a separate legal entity. Likewise, the acknowledgement of debt reads that the goods were sold and delivered to "Swaziland Independent Oil Investment".

[34] I am therefore inclined to agree with the submission that the overall impression recorded in the acknowledgement of debt document is that Phangothi Investment (Pty) Ltd is the principal debtor which traded under the name of Swaziland Independent Oil Investment, which in the course of its business operations became indebted to Total Swaziland (Pty) Ltd, the



Plaintiff. The Defendant unequivocally acknowledged its debt to Total in a specific amount and agreed that provisional sentence or summary judgment could be taken against it if it defaulted in making specifically scheduled repayments.

The Defendant cannot now except to its citation, raised as a point of law, to escape the consequences of non performance. As stated above, if it desires to do so, or raise a defence of non-liability due to compliance of its obligations, it may well do so once the sentence has been complied with and furthermore, it may demand appropriate security from the Plaintiff.

The Defendant's liability appears *ex facie* the acknowledgement of debt which its duly authorized director signed on its behalf. It is also so reflected in the summons. No recourse to extrinsic evidence is required to determine who in fact is indebted in the Plaintiff. The difference which the defendant relies upon to avoid provisional sentence is not of such extent that it is anymore than slight. There is indeed a sufficient link to grant provisional sentence. See *FJ*

*Mitre (Pty) Ltd v Silver Hardware & Timber Co. 1975 (4) SA 913 (D) at 914 F and 915A-E and Morgenster Development and Finance v Metelerkamp 1986 (2) SA 453 (C) at 456A-E.*

[37] It is thus my considered opinion that provisional sentence should not be refused on this particular ground.

[38] The other legal point raised by the Defendant is that the acknowledgement of debt on which the Plaintiff relies, cannot be regarded as a liquid document, one of the essentials in proceedings like the present. Mr. Magagula quotes *Herbstein and van Winsen, Civil Practice of the Supreme Court of SA* at p.95 for the definition of a liquid document:

*"A liquid document may be defined as a document in which the debtor acknowledges over his signature, or that of a duly authorised agent, who is in law regarded as having acknowledged without his signature being actually afforded to the*

*document. His indebtedness in a fixed and determinate sum of money (sic)".*

[39] The quotation was not accurately copied and presented but the essence of Mr. Magagula's argument is that it is necessary to have the indebtedness quantified in a fixed and determinate sum of money, which is quite correct. However, his attack on the acknowledgement of debt is misplaced when considering his contention that it is not a liquid document because *"it is difficult to ascertain a fixed and determined sum of money alleged to be owed by the defendant"*.

[40] The view I take of the matter is that from the face of the document itself, it unequivocally and unambiguously states the acknowledged indebtedness at precisely E 352 440. There is no uncertainty as to the amount.

[41] Interest is equally succinctly stated as *"15% + 2% per annum compounded, reckoned from the 25<sup>th</sup> July 2003 and calculated monthly in*

*advance on the balance owing at the commencement of each month, until such time as the full amount of capital and interest shall have been fully paid as follows:..."*

A precisely stated schedule of amounts to be paid on specific future dates then follows.

It seems to me that the confusion arises from the fact that the

Plaintiff claims a lesser amount than that which is stated in the

acknowledgement of debt namely E 152 960 instead of E 352

440. This is articulated as follows:

*"If one looks closely at Annexure "SDI" the Defendant's director acknowledged to be indebted in the sum of E352,440.00 and after the parties signed this agreement it is the Defendant's contention that this amount was liquidated hence even in its own Particulars of Claim the Plaintiff is no longer claiming the fixed and determined amount as reflected in "SDI" but it is now claiming another amount in the sum of E152,960.00 which is not fixed and determined and which has never been acknowledged by the Defendant to be owing. The claim of this*

*unsupported figure now removes this matter from the realm of a fixed and determined sum of money. It therefore requires the*

*Plaintiff to substantiate with independent documents its claim for the E152, 960.00."*

*"The Plaintiff has also failed to state with clarity the amounts which it alleges were paid by the Defendant. The mere omission to take the Court into its confidence by disclosing the exact amounts (sic). This may not be remedied with Provisional Sentence Summons."*

*Erasmus et al, Superior Court Practice at pages B1-68 and 69 (Service 6,1996) refers to African Credit and Investment Corporation Ltd v Hyde 1930 WLD 146 at 149-50 and Western Bank Ltd v Packery 1977 (3) SA (T) at 138 C-H, to state that:*

*"It commonly happens that in an action for provisional sentence founded upon a mortgage bond, the plaintiff claims less than the amount of the bond. This he can do without explaining whether the mortgagor has made payments in reduction of the capital amount of the bond or whether there is some other*

*reason for claiming less than the bond warrants. The difference between the full amount of the bond and the amount claimed need not be abandoned".*

[44] The same authorities equally apply to claims for provisional sentence based on any other liquid document, over and above mortgage bonds. The principle remains that reasons for claiming less than the acknowledgement of debt need not be pleaded in the summons, contrary to what the defendant wishes it to be.

[45] In response to the Defendant's affidavit in which it is averred that its indebtedness has been erased and in which it questions the claimed amount, the plaintiff *ex abundanti cautela* annexed a calculation table as to how the claimed amount came about.

[46] Under the heading of "Swazi Independent Oil - account No. 1309256", the table refers to document types, document number, document dates and amount. It commences with an

amount of E352 440 (the acknowledged amount of indebtedness) as at the 29<sup>th</sup> September 2003 (the document was signed on the 25<sup>th</sup> June 2003). It then lists some thirteen reductions or credits, mainly amounting to 15 000 each but also 19 580, 4 900, and 30 000, between the 1<sup>st</sup> August 2003 and the 12<sup>th</sup> December 2005. The balance is recorded as 152 960, the same as the claimed amount. Obviously, the monetary unit of "E" for Emalangeneni should be read into it.

[47] As stated, this exposition as to how the claimed amount came to be less than the acknowledged debt is not a requirement resting on the Plaintiff. The Plaintiff did state in the summons that certain payments were made in respect of the acknowledgement of debt and that it claimed only the stated remaining balance. That in itself was already sufficient, but as provided for in the liquid document, it in addition also filed a certificate of balance. As stated above, if an acknowledgement of debt requires further evidence to determine the amount of

indebtedness, if loses the character of being a liquid document. However, that is not the present position. The indebtedness is clear from the document itself and it is not dependant upon extrinsic evidence to quantify it. The mere fact that the Plaintiff has filed such a certificate does not detract anything from the character of the liquid document.

The summons also incorporated the essential requirement of calling upon the defendant to admit or deny the signature of its duly authorised agent or representative to the written document (see *Gordon N.O. v Mc Donald 1958 (1) SA 713 (N)* and Rule 8 (1)). The defendant says that it "*does not deny that its director signed the acknowledgement of debt,*" by necessary implication being an admission of the fact. What it relies upon to contest provisional sentence is that the claimed amount differs from the acknowledged indebtedness, in that a smaller amount is claimed. This also does not rescue it from having provisional sentence entered against it.



In the event, the points of law raised against the summons fall to be dismissed, as is the denial of liability as stated in its affidavit. Accordingly, provisional sentence is ordered to be entered against the Defendant, as per prayer one of the summons. Costs are ordered in favour of the Plaintiff.

**J P ANNANDALE**  
**JUDGE OF THE HIGH COURT**