

In the matter of

BARCLAYS BANK PLC

v

MR. THABANG NYEOE
MR. PAUL KEW KU TABIRITH
MR. THABO LOUIS MAKHEKHE

J U D G M E N T .

Delivered by the HOn. Mr Justice J L. Kheola
on the 10th day of April, 1986

This is an action for provisional sentence in the sum of R32,367-51 based on a suretyship (guarantee) agreement entered into by the defendant and the plaintiff on the 3rd day of June, 1985

A provisional sentence can be granted if the document upon which the claim is based is liquid. A liquid document may be defined as one which per se, and without the aid of extrinsic evidence, discloses on actual indebtedness. In Inter-Union Finance Ltd v. Franskraalstand, Bpk, 1965 (4) S.A. 180 at p 181 a liquid document was defined as a document wherein the debtor acknowledges over his signature, or that of a duly authorized agent, or is in law regarded as having acknowledged without his signature being actually affixed thereto, his indebtedness in a fixed and determinate sum of money. To constitute a liquid document the acknowledgment of debt must be clear and certain on the face of the document itself i.e. there must be unequivocal or unconditional admission or acknowledgment of indebtedness. The document must speak for itself, if it does not and extrinsic evidence is necessary to prove the defendant's indebtedness, the document is not liquid (Pepler v Hirschberg 1920 C P.D. 438).

In the case of Harrowsmith v Ceres Flats (PTY) Ltd 1979 (2) S A. 722 the suretyship was found to be not a liquid document. The defendant

and his co-sureties had bound themselves for the payment by the debtor, Margil, to the plaintiff -

"of all such sum or sums of money which are or may at any time be or become owing by or claimable from the debtor to the creditor in respect of the purchase by the debtor from the creditor of erf 2840 provided that our joint and several liability shall be limited to the sum of R165,000 "

The Court held that on a proper construction of the deed the defendant and his co-sureties did not unequivocally acknowledge an indebtedness for a certain and determinate sum of money. They acknowledged an indebtedness for an unspecified sum namely such sum or sums of money which were or might at any time have become owing by or claimable from the debtor to the creditor. Extrinsic evidence was necessary to show the exact amount of money owed by the debtor at any particular point of time.

The case of Wollach v. Barclays National Bank Ltd. 1983 (2) S.A 543 involved a deed of hypothecation for an indeterminate amount of money subject to a maximum of R80,000. It was agreed that the exact amount of the debtor's liability any given moment could be proved by a document such as a certificate. The Court held that because the exact indebtedness could only be ascertained by extrinsic evidence, the document was not liquid.

In a recent case of this Court, namely Barclays Bank PLC v. Khoboe CIV/T/586/85 (unreported) Levy, J., held that a mortgage bond couched in the same words as in Harrowsmith's case, supra, was not a liquid document on which a provisional sentence could be obtained. Although this case involved a mortgage bond it seems to me that the principle is the same. The document must refer to a fixed and determinate sum of money in order to be regarded as a liquid document upon which a provisional sentence can be sought (HVD Investments (Pty) Ltd v. Neffke, 1984 (2) S.A 368)

I now turn to the suretyship in the instant case. It reads as follows

"I/We, the undersigned, do hereby bind myself/ourselves unto and in your favour as surety/ies in solidum for and co-principal debtor/s jointly and severally with TAB CONSULT (PTY) Ltd (hereinafter referred to as the said Debtor) for the due payment by the said Debtor of all or any monies which the said Debtor may now or from time to time hereafter owe to you from whatever cause and howsoever arising, as well as for the due and punctual performance and discharge by the said Debtor of any contract or agreement entered into by the said Debtor with you, provided that the amount recoverable hereunder shall be limited to-thirty-five thousand three hundred and ten maloti plus such further sum or sums for interest on that amount, charges and costs....."

"I/We hereby agree and declare that the amount due, owing and payable (hereinafter referred to as "the indebtedness") by the debtor and by me/us hereunder to the Bank at any time (including interest and the rate of interest) shall be determined and proved by a certificate signed by any manager or accountant of the Bank. It shall not be necessary to prove the appointment of the person signing any such certificate, and such certificate stating the amount of the indebtedness of the debtor and of myself/ourselves hereunder shall be binding on me/us and shall be conclusive proof that the amount of my/our indebtedness hereunder is due, owing and payable at the date of signature thereof, which certificate shall be valid as a liquid document against me/us in any competent court for the purposes of obtaining provisional sentence or summary judgement against me/us thereon."

There is no doubt that on a proper construction of the deed of suretyship the defendant acknowledged indebtedness to the plaintiff in an uncertain and indeterminate sum of money. Ex facie the suretyship does not show how much money is owed by the debtor. In order to ascertain the sum of money owed by the debtor resort must be made to a certificate by the manager of the plaintiff. That certificate is extrinsic evidence and cannot make an illiquid document liquid. The document in the present case is almost couched in identical words as in Harrowsmith's case, supra.

I have come to the conclusion that the suretyship is not a liquid document upon which a provision sentence can be based.

Provisional sentence is refused with costs.

J.L. Kheola
J.L. KHEOLA
J U D G E .

10th April, 1986.

For Plaintiff - Mr Harley
For Defendant -- Mr Addy