

**IN THE HIGH COURT OF NAMIBIA
PLAINTIFF**

In the matter between

**F & T INTERNATIONAL (PTY) LTD
DEFENDANT**

versus **D J**

STRAUSS

CORAM: SILUNGWE, A.J.

Heard on: 1996.09.02

Delivered on: 1996.09.12

JUDGMENT

SILUNGWE, A.J.: This is a claim for provisional sentence in the sum of N\$90 310, with interest thereon at the rate of 20% per annum from 10th September, 1995 to the date of payment.

The plaintiff is a limited company duly registered in the Republic of Namibia and the defendant is an adult Namibian citizen.

In the plaintiff's pleadings and averments, it is alleged that sometime in June/July, 1995, the plaintiff, acting through a Mr Eric Biwa, its director and representative, was approached in Windhoek by a Mr George Padayachee of View Park Investments C.C., Durban, South Africa, at the defendant's request "as they were interested in the exportation of goats and sheep from the Republic of Namibia to the Republic of South Africa." After the

plaintiff and Mr Padayachee had had further discussions, the matter was then discussed between the plaintiff and the defendant during which the latter indicated that he and Mr Padayachee were partners and already doing business in Angola and Mozambique. The defendant allegedly stated that he would personally guarantee and accept responsibility for the payment of the purchase price of any livestock that would be exported to the Republic of South Africa at his and/or Mr Padayachee's request.

It is claimed that the price of sheep and goats was agreed to be free-on-board (f.o.b.) Windhoek and that the despatch date would be on or about 30th August, 1995. It is said that during negotiations, faxes were sent by the plaintiff to the defendant as well as to Mr Padayachee and/or to View Park Investments C.C. in respect of which the defendant had indicated he had a 50% shareholding and in which both he and Mr Padayachee were partners/shareholders/members. Documentary evidence of all this is reflected in the plaintiff's Annexures BW1 (proforma sales invoice dated 21st August, 1995) ; BW2 (an undated proforma sales invoice) ; BW3 (an undated proforma offer for goats and sheep) ; and BW6 (a proposed business joint venture made on View Park Investments C.C. letterhead which depicts both Mr Padayachee and the defendant as members of the closed corporation.) It is not in dispute that, with the exception of the last sentence, Annexure BW6 was completed by the defendant.

On or about 26th August, 1995, both the defendant and Mr

It is trite law that:

"Where a creditor possesses a liquid document, i.e. a document wherein the debtor has acknowledged, or is in law deemed to have acknowledged, his indebtedness to the creditor in a fixed and determinate sum of money, a rebuttable presumption of indebtedness arises. In such circumstances the court will normally grant the creditor a judgment by means of which he can obtain payment at once."

(See Herbstein and Van Winsen p. 541 2nd para.).

I am satisfied that the cheque, Exhibit "A", meets all the elements of a liquid document (vide Herbstein and Van Winsen, supra, p. 543, 4th para.).

It is trite law that, where the plaintiff sues on a liquid document, then, insofar as the merits of the action are concerned, the Court will ordinarily grant provisional sentence unless the defendant produces such counter-proof as would satisfy the Court that the probability of success in the principal case is against the plaintiff. The balance of probabilities which the defendant is required to raise must be substantial before the Court will refuse provisional sentence. Mere conjecture or slight probability will thus not suffice; the probability must be of sufficient force to raise a reasonable presumption in favour of the defendant

(vide Herbstein and Van Winsen, supra, p. 551, 1st and 2nd paras.) . Although it is said that the defendant can discharge this onus only by raising a "substantial" probability that he will succeed in the principal case, this is by no means an attempt to raise the civil standard of proof beyond a

balance of probabilities. The civil standard of proof on a balance of probabilities thus remains intact.

(See Rich v Lagerwav, 1974(4) SA 748 (A) at 760 G; and Svfrets Mortgage Nominees (Pty) Ltd v Cape St Francis Hotels (Pty) Ltd, 1991(3) SA 276 (SE) at 286 D) . In my opinion, the terminology "substantial probability" in the context simply serves to underline the fact that the probability must be sufficiently weighty to raise a reasonable presumption in favour of the defendant.

In my view, the defendant has failed to discharge his onus of proof in that he has not been able to demonstrate that the balance of probabilities is that he will succeed in the principal case.

In any event, even where the probabilities in the principal case favour neither party (which is not the case here), provisional sentence can nevertheless be granted to the plaintiff. (See Burger v Heydenrych, 1957(4) SA 416 (SWA); and Fisher v Levin. 1971(1) SA250 (W)).

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SILUNGWE, ACTING JUDGE

I am satisfied that the plaintiff is entitled to provisional sentence. Accordingly, provisional sentence is hereby granted in the sum of N\$90 310, with interest thereon at the rate of 20% per annum from 10th September, 1995, to the date of payment. The plaintiff is entitled to costs.

ON BEHALF OF THE PLAINTIFF:

ADV L C BOTES

Instructed by:

Weder, Kruger &
Hartmann

ON BEHALF OF THE DEFENDANT:

ADV J A N STRYDOM

Instructed by:

Van Wyk, Maritz &
Partners