



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 6 February 2024

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Lindsey and Others v Conteh (774/2022) [2024] ZASCA 13 (6 February 2024)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal against the decision of the Gauteng Division of the High Court, Johannesburg (the high court), with costs, including the costs of two counsel.

The facts of the matter were as follows. African Wireless Incorporated (AWI) was a corporation registered in terms of the laws of the State of Delaware in the United States of America and was cited as the sixth appellant. The first to fifth appellants were the shareholders of AWI, and in terms of the Laws of Delaware and the State of California were acting derivatively on behalf of AWI. The respondent was a businessman and citizen of the United States of America, Alieu Badara Mohamed Conteh (Mr Conteh), who now resided in Bryanston, Johannesburg. On 12 August 2014, the appellants, in the Superior Court of California, County of Orange (the Californian Superior Court), filed a complaint against Mr Conteh. The lawsuit was categorised as a shareholder derivative suit, similar to a derivative action in terms of s 165 of the Companies Act 71 of 2008 in our South African law. The basis of the complaint was that Mr Conteh allegedly transferred shares of companies without the requisite permission from AWI. Incidentally, the transfers of those shares were to companies wholly owned by Mr Conteh. The appellants obtained an order of judgment by default on 13 May 2016. On 29 August 2016, the appellants returned to the Californian Superior Court and obtained an order against Mr Conteh, which instructed him, forthwith to turn over the shares to the appellants. Thereafter, a writ of possession was converted to a writ of execution on 28 February 2017 with the judgment value assigned as US\$93 million.

The central issue in this appeal was whether a series of orders and two writs, one of possession and another of execution, granted by the Superior Court of California in the State of California, United States of America, cumulatively, constituted a liquid document and could be enforced by way of provisional sentence in South Africa. The high court, after analysing these documents, dismissed the appellants' application for provisional sentence. The high court concluded that, the judgment did not constitute prima facie proof of a debt enforceable by provisional sentence, as it did not comprise a liquid document. It was with the leave of the high court that the appeal came before this Court.

The appellants' contended that the foreign default judgment together with the post judgment enforcement orders, read cumulatively, constituted a final and binding money judgment. They further contended that, by operation of law, the judgment was enforceable in the same manner as a money Judgment for the value of the Shares, as it was converted into a liquid and executable money judgment under the laws of California. And therefore, the writ of execution issued to enforce the judgment constituted a court order and as such the non-payment thereof enabled the appellants to seek provisional sentence. Mr Conteh's case on the other hand, was simply that the foreign judgment, whether individually or collectively comprised, did not constitute a money judgment and therefore, was not a liquid document. What was before the courts was merely a judgment for the delivery of shares.

The SCA held that the high court was correct to refuse provisional sentence. However, it reached that conclusion for different reasons. According to the SCA, the judgment debt contained in the California Court Orders was for the possession of property. It did not order Mr Conteh to pay an amount of money, rather, it required Mr Conteh to deliver up specified shares. The Court further held that although, the California Court Orders for the possession of property may be enforced in the same manner as a money judgment for the value of the property, which value the California Court had determined. Their

enforcement, however, was only made possible, once the return of the property could not be obtained, as if they were a money judgment. Thus, by operation of law, if the property could not be obtained, a means of enforcement was secured to execute upon the value of the property. But, if the shares could have been obtained under writ, there could have been no election to enforce the California Court Orders as a money judgment. This, held the SCA, demonstrated that the California Court Orders did not constitute a money judgment, even though they were capable of enforcement as such, under specified conditions.

The question that then arose was this: even if the California Court Orders were not a money judgment, was there any reason why the enforcement of those orders as a money judgment in terms of the law of California could not be recognised and enforced by a South African court? The SCA found that South African courts would not generally apply foreign rules of procedure in the exercise of its own adjudicative functions. The process of the California Court did not run through the territory of South Africa. How such process could have been given effect to was regulated under statute in terms of s 40 of the Superior Courts Act 10 of 2013. The section set out the basis upon which letters of request in connection with any civil proceedings received from any state, territory or court outside of South Africa could have been given effect to. It thus, suffices that, for the purposes of deciding this appeal, the summons sought provisional sentence based upon a foreign judgment that was not a money judgment. Once that was so, provisional sentence could not be granted, on the cause of action set out in the summons. The California Court Orders did not constitute a liquid document evidencing an unconditional acknowledgement of indebtedness, in a fixed sum of money. Therefore, the appeal must accordingly fail.

~~~~ends~~~~