



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 100/2003
REPORTABLE

BULELWA NDAMASE

APPELLANT

and

FUNCTIONS 4 ALL

RESPONDENT

Before: Mpati DP, Scott, Mthiyane, Heher JJA and Southwood AJA

Heard: 17 March 2004

Delivered: 31 March 2004

In terms of the Magistrates' Courts Act, 32 of 1944, magistrates courts have jurisdiction in respect of claims for provisional sentence – Rule 14A of Magistrates' Courts Rules of Court not *ultra vires* Magistrates' Courts Act – claims for provisional sentence permissible in magistrates' courts.

JUDGMENT

SOUTHWOOD AJA

[1] The issue in this appeal is whether Rule 14A of the Magistrates' Courts Rules of Court is *ultra vires* the Magistrates' Courts Act, 32 of 1944 ('the Act') and accordingly whether magistrates' courts have no jurisdiction in respect of claims for provisional sentence.

[2] The respondent (the plaintiff in the court of first instance) instituted an action against the appellant (the defendant in the court of first instance) in the Durban magistrates' court in which it claimed provisional sentence on two dishonoured cheques, each for R5 000. The appellant opposed the relief sought *inter alia* on the ground that Rule 14A, in terms of which the action was brought, is *ultra vires* the Act, and accordingly that the court had no jurisdiction. The appellant's defence on the merits was based on duress. The magistrate found that Rule 14A was not *ultra vires* the Act, that the appellant had not shown that the probabilities of success in the principal case were against the respondent and granted provisional sentence. The appellant appealed unsuccessfully to the Pietermaritzburg High Court against the magistrate's decision that the magistrates' court has jurisdiction in actions for provisional sentence. This appeal is with the leave of the court below.

[3] In view of the judgment of this court in *Avtjoglou v First National Bank of Southern Africa* (Case No 17/2003) delivered on 19 September

2003 which confirmed the finding in *Scott-King (Pty) Ltd v Cohen* 1999 (1) SA 806 (W) at 825C-G that, generally, an order granting provisional sentence is not appealable, the parties were requested to address the appealability of the decision that the magistrates' court has jurisdiction to hear actions for provisional sentence. During argument the respondent's counsel correctly conceded that the issue of whether Rule 14A is *ultra vires* the Act is, in effect, a special plea to jurisdiction, and is appealable. See *Steytler NO v Fitzgerald* 1911 AD 295 at 305 (per De Villiers CJ), 313 (per Innes JA) and 327 (per Laurence JA); *Du Toit v Ackerman* 1962 (2) SA 581 (A) at 587D-E and *Maize Board v Tiger Oats Ltd and Others* 2002 (5) SA 365 (SCA) paras 9 and 14.

[4] In terms of s1 of the Act 'the rules' means the rules referred to in s6 of the Rules Board for Courts of Law Act, 107 of 1985. That section provides that the Board may, with a view to the efficient, expeditious and uniform administration of justice in the lower courts make rules for the lower courts regulating –

'(a) the practice and procedure in connection with litigation'.

The Rules Board introduced Rule 14A into the Magistrates' Courts Rules with effect from 11 April 1994. (It is for all practical purposes the same as Rule 8 of the Uniform Rules of the High Court).

[5] It is well-established that the magistrates' court has no jurisdiction

and powers beyond those granted by the Act (compare *Riversdale Divisional Council v Pienaar* (1885) 3 SC 252 at 256; *Stork v Stork* (1903) 20 SC 138 at 139; *Gqalana and others v Knoesen and another* 1980 (4) SA 119 (E) at 120; *Mason Motors (Edms) Bpk v Van Niekerk* 1983 (4) SA 406 (T) at 409E-F; *Venter v Standard Bank of South Africa* [1999] 3 All SA 278 (W) at 280i-j) and that in this context, jurisdiction means ‘the power vested in a court by law to adjudicate upon, determine and dispose of a matter’ (see *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256G-H; *Graaff-Reinet Municipality v Van Ryneveld’s Pass Irrigation Board* 1950 (2) SA 420 (A) at 424; *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551C). It is also well-established that powers may be conferred expressly or by implication. Where the Act is silent on a matter the general rule is that by expressly conferring on the magistrates’ courts jurisdiction in respect of a particular matter, the Act confers by implication the ancillary powers necessary to give effect to that jurisdiction. In regard to matters specifically provided for in the Act the Act will govern that situation (compare *Reuters v Clarke* 1922 EDL 303 at 305; *Van der Merwe v De Villiers and another* 1953 (4) SA 670 (T) at 672F-673C; *Hatfield Town Management Board v Mynfred Poultry Farm (Pvt) Ltd* 1963 (1) SA 737 (SR) at 739E-F). The primary question to be answered therefore is whether the Act expressly or by implication

confers on a magistrates' court jurisdiction to grant provisional sentence.

[6] In arguing that the Act did not do so the appellant's counsel contended that the Act does not expressly make provision for the grant of a provisional sentence judgment or the execution of such a judgment. The absence of provision for the immediate execution of a provisional sentence judgment is of crucial significance, so it was argued, as such execution is an integral part of the procedure. He also argued that execution is of itself appealable in terms of s83(b) of the Act which, in relation to provisional sentence is inconsistent with the absence of appealability (referred to in para 3). He further argued that provisional sentence is a 'right of action' in itself and not simply a procedural step by a plaintiff armed with a liquid document and that the statutory powers conferred on the Rules Board do not empower the Rules Board to exceed the limits of jurisdiction granted to a magistrates' court.

[7] In general, the civil jurisdiction of the magistrates' court is determined by reference to its area of jurisdiction (s26), the persons in respect of whom the court has jurisdiction (s28) and the causes of action in respect of which it has jurisdiction (s29). The Act provides expressly that the magistrates' court shall have no jurisdiction in respect of certain specified matters, all of which relate to causes of action (s46).

The relevant part of s29 reads as follows –

‘(1) Subject to the provisions of this Act, the court, in respect of causes of action, shall have jurisdiction in –

. . .

(d) actions on or arising out of a liquid document ... where the claim ... does not exceed the amount determined by the Minister from time to time by notice in the *Gazette*’ (presently R100 000).

While s29(1)(d) does not expressly provide that the magistrates’ court shall have jurisdiction in actions for provisional sentence, s46 does not expressly provide that the court shall not have such jurisdiction. With regard to jurisdiction the Act therefore differs in two important respects from its predecessor, the Magistrates’ Courts Act 32 of 1917. In the corresponding provisions of that Act no provision was made for the court to have jurisdiction in ‘actions on or arising out of a liquid document’ and it was expressly provided that *namptissement* / *handvulling* (ie provisional sentence) was excluded from the jurisdiction of the magistrates’ court.

[8] The question is what is meant by the word ‘actions on or arising out of a liquid document’. The term ‘liquid document’ is well known and has a clear meaning in relation to a claim for provisional sentence. Subject to minor qualification, not presently relevant, it is a document in which a person unconditionally acknowledges, over his signature or that

of his agent, his indebtedness to the creditor in an ascertained amount of money, the payment of which is due to the creditor. It is of the essence of a liquid document that, standing on its own, it establishes the indebtedness of the debtor without the necessity for any evidence extrinsic thereto. (*Union Share Agency and Investment Ltd v Spain* 1928 AD 74 at 79-80; *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754G-H; *Wollach v Barclays National Bank Ltd* 1983 (2) SA 543 (A) at 552A-D; *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 743F-H).

[9] Actions on liquid documents were well known in the Roman-Dutch law as it was applied in Holland and later at the Cape. The characteristics of such actions, briefly summarised, were the following. A creditor who was in possession of a liquid document was entitled to institute an action against the debtor who had acknowledged his indebtedness to the creditor in the document, for payment of the indebtedness reflected therein. This was the ordinary procedure whereby a creditor could obtain a final order for payment of the acknowledged indebtedness. However, the creditor had an additional remedy: the interlocutory procedure of provisional sentence. To obviate the delay and expense of bringing the principal case to finality and to enable the creditor to obtain prompt payment of the amount acknowledged to be owing, pending finalisation of the principal case, the

creditor was entitled to seek a provisional judgment based on the liquid document. The creditor was entitled to do so at any stage of the proceedings. The court would grant provisional sentence on the presumption of the authenticity and legal validity of the document produced to the court – the court being provisionally satisfied that the creditor would succeed in the principal case. The debtor was then obliged to pay the debt evidenced by the document against security *de restituendo* furnished by the creditor. If the creditor was unable to provide security the debtor was obliged to pay the amount of the claim into court pending the outcome of the principal case. (See 1 Menzies 1-6 Prefatory Remarks on Provisional Sentence; *Colonial Treasurer v Smit* 1907 TS 747 at 750-751; *Sonfred (Pty) Ltd v Papert* 1962 (2) SA 140 (W) at 142E-143E; *CGE Rhooide Construction Co. (Pty) Ltd v Provincial Administration Cape, and another* 1976 (4) SA 925 (C) at 927A-928A; Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed. 960-962; Malan *et al*, *Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes* (1986) at 1-15).

[10] Provisional sentence procedure and the granting of the interlocutory relief of provisional sentence has remained a part of South African law. At the Cape, rules governing the procedure were introduced in the High Court and it became the practice to seek provisional

sentence at the inception of the principal case by means of a special form of summons. This summons served a dual purpose. It instituted the principal case in which definitive relief was claimed and it instituted the proceedings for the interlocutory relief of provisional sentence. That interlocutory relief was, as was the position in Roman-Dutch Law, payment against security *de restituendo*. (See 1 Menzies 1-2; *Sonfred (Pty) Ltd v Papert* supra at 143B-C; *CGE Rhoode Construction Co. (Pty) Ltd v Provincial Administration Cape, and another* supra at 928A-D; Herbstein and Van Winsen supra at 960-962 and Malan *et al* at 1-15). In the High Court the procedure is now governed by Rule 8 of the Uniform Rules which incorporates the characteristics already described.

[11] The interlocutory procedure of provisional sentence (described as the ‘extraordinary, summary and interlocutory procedure of provisional sentence’ in *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 641B) is therefore an essential ancillary component of an action based on or arising out of a liquid document (see *Colonial Treasurer v Smit* supra at 750). Accordingly, there is no reason why the ordinary meaning of the words ‘actions on or arising out of a liquid document’ should not be understood to include this interlocutory procedure. The appellant’s counsel nevertheless persisted with his argument that the Act does not expressly make provision for an interlocutory judgment of provisional sentence or for the execution of

such judgment.

[12] In support of the first argument the appellant's counsel relied heavily on s48 of the Act which, he argued, provides for the judgments which a magistrates' court may grant and does not include interlocutory judgments of provisional sentence. In my view reliance on the provisions of s48 is misplaced. The section clearly applies to judgments which a magistrates' court may grant 'as a result of the trial of an action' and is not applicable to provisional sentence proceedings (compare *Scott-King (Pty) Ltd v Cohen* supra at 827H-J). Furthermore, it is clearly not the source of power for a magistrates' court to grant interlocutory relief. The existence of such a power has not been questioned before us and is clearly recognised in s36(1)(d), s49 and s83(b) of the Act. Compare also *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A). In any event, the power to grant the interlocutory relief of provisional sentence is, by implication, conferred when the magistrates' court is given jurisdiction to entertain actions based on or arising out of liquid documents.

[13] Regarding the second argument, the Act provides in two sections for the execution of judgments. Section 62(1) provides that any court which has jurisdiction to try an action has jurisdiction 'to issue against any party thereto any form of process in execution of its judgment in

such action'. Section 66 provides that whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments and that judgment is not complied with, the judgment shall be enforceable by execution against the property (first movable and then immovable) of the person against whom the judgment was given. It is clear from these provisions of the Act that the judgment to be executed upon need not be a judgment in terms of s48 and can be an interlocutory order. 'Judgment' is defined in s1 to include, in a civil case, a decree, a rule and an order. Interlocutory relief clearly falls within that definition. Finally, it must be pointed out that the suggestion of the appellant's counsel that there must be an order for execution before execution process may issue and that such an order is in terms of s83(b) subject to appeal is not correct. Sections 62 and 66 do not require an order for execution to be made before process may issue. The person in whose favour judgment has been given has the right to issue a warrant of execution immediately and the issue of the warrant of execution is not subject to appeal.

[14] A magistrates' court therefore has jurisdiction in respect of claims for provisional sentence and has all the ancillary powers necessary to give effect to that jurisdiction. When the Rules Board enacted Rule 14A it was not extending the jurisdiction of the magistrates' court but was merely regulating the practice and procedure of provisional sentence in

the magistrates' court as it was entitled to do.

[15] In the result the appeal is dismissed with costs.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

CONCUR:

MPATI DP

SCOTT JA

MTHIYANE JA

HEHER JA