



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT

Case No: 896/10

No Precedential Significance

In the matter between:

**Counter Point Furnishers CC**  
(Registration No. 1992/019084/23)

Applicant

and

**S M Fraser t/a Salica**

Respondent

**Neutral citation:** *Counter Point Furnishers CC v S M Fraser t/a Salica*  
(896/10) [2012] ZASCA 7 (2 March 2012)

**Coram:** BRAND, SNYDERS, BOSIELO, LEACH AND WALLIS JJA

**Heard:** 02 March 2012

**Delivered:** 02 March 2012

**Summary:** Appealability - provisional sentence

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ORDER

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**Leave to appeal from:** South Gauteng High Court, Johannesburg  
(Mokgoathheng J sitting as court of first instance).

The application for leave to appeal is dismissed with costs.

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JUDGMENT

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SNYDERS JA (Brand, Bosielo, Leach and Wallis JJA concurring)

[1] This is an application for leave to appeal referred for argument in court in terms of s 21(3)(c) of the Supreme Court Act 59 of 1959. Leave to appeal was sought from this court after Mokgoathheng J in the court below granted provisional sentence and refused leave to appeal. After the matter was heard the application for leave to appeal was dismissed for the reasons that follow.

[2] The relevant facts in the matter are common cause. The respondent sold an immovable property to the applicant in terms of a written agreement of sale. Clause 17.1 of the agreement reads:

‘Should any party to this contract cause any delay in the Registration of transfer he/she shall from the day of the notification of his default, pay to the aggrieved party interest calculated on the purchase price at the rate charged by any financial institution on first home loan mortgages, until the date on which the defaulting party ceases to be in default.’

[3] The respondent issued a provisional sentence summons against the applicant and relied on the written agreement of sale, particularly the quoted

clause 17.1 for a claim of interest in the amount of R215 087 calculated on the purchase price at the rate of 11 per cent per annum for the period 8 May 2009 until 3 September 2009. The respondent made the following allegations in the summons:

'The defendant caused a delay in the registration of transfer by failing to furnish the guarantee which it was obliged to furnish in terms of clause 4.1 of the agreement. The defendant was notified of such default on the 8<sup>th</sup> May 2009. the defendant remedied that default on the 3<sup>rd</sup> September 2009.

The rate of interest charged by ABSA Bank, being a financial institution of the sort contemplated in the agreement is 11%.'

[4] The applicant resisted the provisional sentence summons in an answering affidavit in which he confines his attack to the liquidity of the written agreement of sale. He raises the interest rate applied, the identity of the bank, the date of alleged default, the date of notification of default, the date that the default was remedied and the due date as aspects that require evidence and that destroy the liquidity of clause 17.1. In addition he states:

'The Defendant's liability in terms of this agreement is conditional upon a finding that it was the cause for the delay in the registration of the transfer. This is no simple act or event which is capable of proof by means of affidavit evidence.'

[5] The applicant's argument does not challenge the correctness of the decision of this Court in *Avtjoglou v First National Bank of Southern Africa Ltd* 2004 (2) SA 453 (SCA). What the applicant did contend was that the order granting provisional sentence in this case should be regarded as appealable because it was based on a document that was clearly not liquid, which not only has an unjust effect, but constitutes exceptional circumstances of the kind referred to by Southwood AJA in *Smit v Scania South Arica (Pty) Ltd* 2004 (3) SA 628 (SCA) para 7:

'It is possible that in an exceptional case the application of these requirements to a provisional sentence judgment will show that that provisional sentence judgment is appealable.'

[6] *Smit* does nothing more than acknowledge a theoretic possibility that an unforeseen set of facts may arise in future that satisfies the requirements of *Zweni*. The applicant was however, unable to illustrate why this case is so different from other cases that it should be regarded as constituting exceptional circumstances.

[7] For these reasons the application for leave to appeal was dismissed with costs.

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S SNYDERS  
Judge of Appeal

APPEARANCES:

For the Appellant:

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Instructed by:

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Bezuidenhouts Inc, Bloemfontein

For the Respondent:

P Kennedy SC

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