THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO. 17/2003

In the matter between

A AVTJOGLOU **Appellant**

and

FIRST NATIONAL BANK OF SOUTHERN AFRICA **Respondent**

CORAM: ZULMAN, NAVSA and BRAND JJA

HEARD: 28 AUGUST 2003

DELIVERED: 19 SEPTEMBER 2003

The grant of provisional sentence is not appealable

JUDGMENT

ZULMAN JA

[1] The appellant appeals with the leave of this court against the grant of provisional sentence for R310 000,00 and ancillary relief against him by the court of first instance and the dismissal of an appeal against the order by the court *a quo*. The judgment of the court of first instance is reported.[1].

[2.1] The respondent in its summons sought provisional sentence on a copy of a document, signed by the appellant and annexed to the summons (Annexure "A") wherein the following appears:

> "AGIS, by virtue of his personal indebtedness and the aforesaid suretyship acknowledges himself to be indebted to the Bank in the sum of R310 000,00."

(It is clear from the heading of the document that the reference to "*AGIS*" is to the appellant and the reference to "*the Bank*" is to the respondent.)

1 2000 (1) SA 989 (C)

[2.2] Annexure "A" goes on to record that payment of the aforesaid amount would be made by way of a single payment of R40 000,00 and monthly installments of R2 000,00. Clause 7 of the document provides:

> "Should any installment of R2 000,00 due from AGIS not be paid strictly on due date the Bank shall be entitled, but not obliged to claim and recover the full outstanding balance of AGIS' indebtedness to the Bank."

[2.3] The summons avers in substance that:

[2.3.1] The appellant signed the original of Annexure "A" and thereafter transmitted a copy of it to the respondent's Johannesburg attorney this copy being Annexure "A".

[2.3.2] The appellant has failed to make any payment whatsoever in terms of Annexure "A".

[2.4] In his answering affidavit the appellant does not deny any of these averments. The appellant however attacks the liquidity of Annexure "A" and denies that it is binding. The appellant relies upon a variation agreement excusing him for his admitted non-payment and which exempts him for liability.

[3] The issues as formulated in the respondent's practice note and elaborated upon by counsel for the respondent in his heads of argument are:

[3.1] Whether or not the document upon which provisional sentence was granted is liquid.

[3.2] Whether or not, apart form the issue of liquidity of the document, the grant of provisional sentence is appealable; and

[3.3] On the assumption that the order is appealable, whether or not the appellant has discharged the onus resting upon him to demonstrate that the respondent is unlikely to succeed in the principal case in proving that the document relied upon is enforceable.

[4] During the course of argument counsel for the respondent, wisely in my view, conceded that the approach adopted in the practice note and heads of argument was incorrect. More particularly even if it could be said that the court *a quo* erred in concluding that the document upon which it granted provisional sentence was liquid this would still not render the provisional sentence appealable. The argument before this court centered essentially upon the latter question.

[5] At the outset it is important to stress the word "provisional" in the remedy of provisional sentence. The matter was put in these terms by Centlivres CJ in *Oliff v Minnie.*[2]

> "Proceedings for provisional sentence are, as the word 'provisional' indicates, interlocutory in their nature and have always been so regarded by South African Courts. If provisional sentence is granted, the defendant can, subject to paying the debt due to the plaintiff and obtaining from the plaintiff security *de restituendo*, go into the principle case and obtain a reversal of the order for provisional sentence. Similarly as Menzies, Vol 1 in his notes on provisional sentence, para 8 says: "Where provision [Provisional Sentence] has been refused, the summons will stand as the summons in the action, and the proceedings take place as if provisional sentence had never been claimed."

Van Zyl in his *Judicial Practice*[3]. puts the matter thus:

> "But whether provisional sentences has been refused or granted, the disappointed party can always go into the principal case provided the refusal of provisional sentence is not owing to a bad or defective summons; (*Hol Cons* vol 2,Con 137) and the summons used in the provisional case will, if good, stand as the summons for the principal case; and the proceedings may take place as if provisional sentence had never been claimed."

See also *Jones v Krok*[4]

[6] In *Scott-King (Pty) Limited v Cohen*[5]. Stegmann J, after a careful review of the authorities in the course of dealing with an appeal from a provisional sentence in the Magistrate's Court, made the following succinct comments regarding the appealability of a provisional sentence judgment in the Supreme Court:

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2 1952 (4) SA 369 (A) at 374 G – 375 C
3 Fourth ed 163//64
4 1995 (1) SA 677 (A) at 686 E – J
5 1999 (1) 806 (W) at 825 C - E

"There is no single rule governing the appealability of decisions on provisional sentence summonses in the Supreme Court. There are distinctions to be made between the following categories at least: decisions granting provisional sentence; decisions refusing provisional sentence on a ground which shows the provisional summons to have been invalid; and decisions refusing provisional sentenced on a ground which does not undermine the validity of the provisional sentence summons but leaves it to stand as a valid summons in the principal case."

The learned judge then goes on to deal specifically with the case where provisional sentence is granted and states the following[6]:

"When a provisional sentence has been granted in the Supreme Court, the common law does not provide the defendant with any right of appeal but classifies a provisional sentence as a pure (or simple) interlocketery order against which no appeal lay. The statutory right of appeal which defendants enjoyed until 1982 under s 20 (a) and s 20 (b) by Act 59 of 1959, if leave to appeal could be obtained was removed by the Appeals Amendment Act 105 of 1982. Under s 20 of Act 59 of 1959 as amended by Act 105 of 1982, only a "judgment or order" is appealable."

Generally speaking the characteristics by which a "judgment or order" is to be identified were laid down by this court in *Zweni v Minister of Law and Order*[7] in these terms:

"A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

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6 At 825 F – G. See also Harms – *Civil Procedure in the Supreme Court B50.6 359/360; Erasmus –Superior Court Practice A1 – 44 A para 12;* Herbstein and Van Winsen – *The Civil Practice on the Supreme Court of South Africa* (Fourth Edition) para 5 p 838 *sed contra* Malan et al – *Provisional Sentence on Bills of Exhange, Cheques and Promissory Notes* 202

7 1993 (1) SA 523 (A) at 532 I – J per Harms J

As Stegman J, correctly pointed out in *Scott-King*[8] a provisional sentence does not have any of these characteristics. First the decision to grant provisional sentence is not final in effect and is indeed susceptible of alteration by the court hearing the principal case even as to the question of whether the document relied upon was not liquid. In this latter respect I believe that the approach initially adopted by the respondent's counsel in contending that the question of the liquidity of the document relied upon by the appellant in the court of first instance was appealable, whereas the other questions which arose in the matter were not appealable, was erroneous as a matter of law. Second provisional sentence is by no means definitive of the rights of the parties. The rights of the parties being, in the case of the respondent, to obtain a final judgment for the amount which it claims is owing to it and in the case of the appellant successfully resisting such claim. Third a provisional sentence does not have the effect of disposing of any of the relief claimed in the main proceedings. To state the obvious such relief is the respondent's claim for the amount it avers is due and owing to it. Put differently the essential issue between the parties, shorn of any procedural matter, is whether or not the appellant owes the money

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8 Supra at 825 H

claimed. This issue has clearly not been determined finally by the provisional sentence.

[7] It is of course important to bear in mind that is determining the nature and effect of a judicial pronouncement not merely the form of the order must be considered, but also, and predominantly its effect.[9] The effect of the provisional sentence in *casu* is not final but merely provisional in nature and not dispotive of the relief claimed in the main proceedings.

[8] It might at first blush seem to be unduly harsh upon an impecunious defendant who is required to pay the amount of the provisional sentence before being entitled to enter the principal case, to deprive him of a right of appeal at the provisional sentence stage. On the other hand one should not loose sight of the fact that a plaintiff armed with what is *prima facie* a liquid document is entitled to the long established expeditious remedy of provisional sentence.

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[9] South African Motor industry Employer's Association v South African Bank of Athens Ltd 1980 (3) SA 91 (A) at 96 H / 97 I; Zweni (supra at 532 I). Trakman NO v Livshitz and Others 1995 (1) SA 282 (A) at 289 E, Jones v Krok (supra) at 684 B – C; Wellington Court Shareblock v Johannesburg City Council 1995 (3) SA 827 (A) at 834 and Erasmus (supra) at A1 - 44A

[9] Having concluded that the provisional sentence granted is not appealable it would be inappropriate to comment upon the validity of the attack on the liquidity of Annexure "A" or indeed on the appellant's defence on the merits of the respondent's claim. I accordingly expressly decline to do so.

[10] It is apparent from the judgment of the court of first instance granting leave to appeal to the court *a quo* that the court was probably influenced by the argument which was raised by the respondent in its heads of argument before this court but not persisted in this court and to which I have already referred, to the effect that that part of the judgment dealing with the liquidity of the document relied upon was indeed appealable. No suggestion was made by the respondent that the entire grant of provisional sentence was not appealable. Would it be appropriate in these circumstances to deprive the respondent of some or all of its costs in the event of it being held that the whole of the provisional sentence granted by the court *a quo* is in fact not appealable? I believe not. The simple reason for this is that the respondent was obliged at least in regard to the other arguments advanced by the appellant on the merits to defend the provisional sentence which it obtained.

[11] In all the circumstances the appeal is struck off the roll with costs as opposed to being dismissed[10] with costs.

R H ZULMAN
JUDGE OF APPEAL

NAVSA JA)
BRAND JA) CONCUR

[10] cf Wellington Court Shareblock v Johannesburg City Council (supra) at 835 F - I