

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 912/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

06 MARCH 2020
DATE

J. Mahallu
SIGNATURE

In the matter between:

BSI STEEL LIMITED

Plaintiff

and

WALTER HUGO HUPERTZ

1st Defendant

ETTIENE GERRIT HOLDER

2nd Defendant

J U D G M E N T

MAHALELO, J:

INTRODUCTION

[1] This is an application for leave to appeal against the whole of the judgment and order delivered by this court on 13 November 2019 in terms of which the court granted provisional sentence against the 1st and 2nd defendants jointly and severally for payment of the sum of R 1 181 644.33 plus interest and costs. The parties in this application are for convenience, referred to as cited in the main application.

[2] The plaintiff in its summons sought provisional sentence on an acknowledgement of debt (AOD) signed by both defendants and annexed as "PS1" wherein the following appears:

"We the undersigned Walter Hugo Hupertz and Ettlene Gerrit Holder do hereby acknowledge ourselves to be truly and lawfully indebted to BSI Steel Limited (herein after referred to as "the creditor") jointly and severally the one paying the other to be absolved in the sum of R 1 393 785.55, (herein after referred to as the "capital")."

[3] Annexure "PS1" goes on to record that payment of the said capital amount together with costs, interest and collection commission would be

made by way of monthly instalments of R 100 000.00. The AOD further provides that should any one payment not be made on the due date the plaintiff reserves the right to proceed with whatever action it deems fit for the recovery of the full balance then outstanding.

[4] The defendants failed to make any payments in terms of "PS1". They do not deny any of these averments. They however attacked the validity of the AOD and deny that it is binding. The defendants raised the following defences:

"The plaintiff sued on an AOD which is a credit agreement as defined by section 81 read with 84 (f) of the National Credit Act 34 of 2005 ("the NCA"). The provisions of the NCA are thus applicable to the AOD. In terms of the NCA the plaintiff was required to be registered as a credit provider failing which the AOD would be unlawful. The plaintiff was required to conduct a financial assessment prior to entering into the AOD with the defendants failing which the AOD in terms of section 81 of the NCA would be reckless."

[5] The issues formulated by the defendants in their heads of argument are:

1. The merits of the issue regarding the question of whether or not the NCA is applicable and

2. Whether or not the granting of provisional sentence is appealable.

[6] Counsel for the plaintiff argued that there are no prospects of success on the merits and further emphasised that provisional sentence judgment is not appealable.

APPEALABILITY OF THE COURT ORDER

[7] It is trite that court orders that are interlocutory in nature having no final effect are not appealable. Generally speaking the characteristics by which a "judgment or order" is to be identified were laid down in *Zweni v Minister of Law and Order*¹ as follows;

"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 to alteration by the court of the 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."

[8] Counsel for the defendants submitted that the order and judgment granted by this court is deemed as a final judgment because it calls for payment of a sum of money together with interest and costs and does not

¹ 1993 (1) SA 523 (A)

therefore entitle the defendants to enter the main case by paying provisional sentence amount against the furnishing of security. I disagree with the submissions made as the defendants' interpretation of the order is clearly incorrect. The judgment is to be interpreted as a provisional sentence because that is what it is.

[9] The defendants have also argued that they are unable to pay the judgment debt and do not wish to enter the principal case, that they do not in any event wish to lead oral evidence or conduct a trial and that under the circumstances the provisional sentence becomes a final judgment. In short the defendants submitted that the court's judgment is final in effect and the dispute between the parties will be resolved on appeal by finally determining whether or not, on the facts of the case, the NCA is applicable to the AOD. The defendants therefore argued that circumstances of this matter are such that the provisional sentence judgment is final and therefore appealable.

[10] Provisional sentence is available to a plaintiff who is armed with a liquid document. The following two inherent characteristics of provisional sentence distinguish it from other remedies:

1. It only leads to a provisional or interlocutory order. Final judgment is still to be considered in the main or principal case where the claim against the defendant can still be dismissed.

2. It entitles the plaintiff to payment of the judgment debt immediately that is before entering into the principal case. It affords the defendant the right to insist on security for payment pending the final outcome.

[11] Provisional sentence is by no means definitive of the rights of the parties. The rights of the parties being in the case of the plaintiff to obtain a final judgment for the amount which it claims is owing to it and in the case of the defendants successfully resisting such claim.

[12] The question of appealability of an order made in judicial proceedings which had not yet been finalised was discussed in two recent decisions of the Supreme Court of Appeal, *Health Professional Council of South Africa and Another v Emergency Medical Suppliers and Training CC t/a EMS*² and *Government of the Republic of South Africa and Others v Von Abo*³ where the court held:

"It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice."

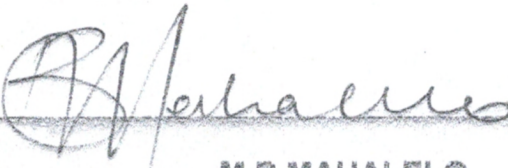
² 2010 (8) SA 489 (SCA).

³ 2011 (5) SA 262 (SCA).

[13] There is direct authority that a provisional sentence order is not appealable. It does not avail the defendants to contend that they cannot pay the judgment debt. Based on all the legal principles set out above I am persuaded that in the circumstances of the present matter, the order of this Court is not susceptible to appeal. Leave to appeal stands to fail.

[14] As a result I make the following order:

1. Application for leave to appeal is dismissed with costs.


M B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

For the plaintiff: Adv RJ Bouwer

Instructed by: Macartney Attorneys

For both defendants: Adv R Wilson

Instructed by: Martin Hennig Attorneys

Date of hearing: 21 February 2020

Date of judgment: 06 March 2020