REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 9967/2003

In the matter between:

TIMOTHY JORDAAN **Applicant**

and

ARNOLDUS HOEGEN DIJKHOF **Respondent**

JUDGMENT DELIVERED ON 26 OCTOBER 2004

H.J. ERASMUS, J:

This is an application for leave to appeal against the judgment I handed down on 13th September 2004.

In that judgment, I granted provisional sentence on three judgments handed down against the applicant by the Courts of the Principality of Monaco.

At the hearing of the application, Mr Dickerson SC, who appeared on behalf of the respondent, submitted that the applicant has no right of appeal against the grant of provisional sentence against him. He relied on the judgment of the Supreme Court of Appeal in *Avtjoglou v First National Bank of Southern Africa Ltd* 2004 (2) SA 453 (SCA).

Mr Gess, on behalf of the applicant, sought to distinguish the judgment of the Supreme Court of Appeal as not being applicable to provisional sentence granted on a foreign judgment.

At the outset, it is necessary to stress, as Stegmann J did in *Scott-King (Pty) Ltd v Cohen* 1999 (1) SA 806 (W) at 825G that the –

> … statutory right of appeal which defendants enjoyed until 1982 under s 20(1)(a) and s 20(2)(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.

(See also *Jones v Krok* 1995 (1) SA 677 (A) at 684A—B and 687I. In what follows I shall refer to this decision as *Jones v Krok 1995*).

The characteristics of a 'judgment or order' were described as follows in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (a) at 523I—J:

> 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.

In *Scott-King (Pty) Ltd v Cohen, supra,* at 835I it was held that a

provisional sentence does not have any of these characteristics. This view was endorsed by Zulman JA in *Avtjoglou v First National Bank of Southern Africa Ltd, supra,* at 457H —458D:

> 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. … Secondly, 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 it claims to be owing to it and in the case of the appellant successfully resisting such claim. Thirdly, 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 claimed. This issue has clearly not been determined finally by the provisional sentence.

In both *Scott-King (Pty) Ltd v Cohen, supra,* and in *Avtjoglou v First National Bank of Southern Africa Ltd, supra,* it is recognised that there is no single rule governing the appealability of decisions on provisional sentence. In *Avtjoglou v First National Bank of Southern Africa Ltd, supra,* at 458E Zulman JA states:

> It is of course important to bear in mind that in 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. The effect of the provisional sentence *in casu* is not final but merely provisional in nature and not dispositive of the relief claimed in the main proceedings.

In *Scott-King (Pty) Ltd v Cohen, supra,* at 825D Stegmann J states:

> 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** (my emphasis): decisions granting provisional sentence; decisions refusing provisional sentence on a ground which shows the provisional summons to have been invalid; and decisions refusing provisional sentence 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.

Thus the dismissal of an action for provisional sentence on a ground which shows the provisional summons to have been invalid, for example, an action for provisional sentence on an illiquid document, brings the proceedings to an end (*Barclays National Bank Ltd v Wollach* 1986 (1) SA 355 (C) at 359C—F). If the provisional sentence proceedings are at an end, the judgment or order dismissing the action is final in effect and not susceptible of alteration by the Court of first instance. The other requirements for a 'judgment or order', namely, that it be definitive of the rights of the parties and have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings, are also satisfied (*Jones v Krok 1995* at 688H—J).

The grant of provisional sentence may, in the circumstances of a particular case, be final in effect. In *Maketha v Limbada* 1998 (4) SA 143 (W) the defendant denied that it was his signature that appeared on the cheque on which provisional sentence was sought against him. Affidavits were filed and the issue of the authenticity of the signature was decided in

favour of the plaintiff. Provisional sentence was accordingly granted against the defendant. On appeal, the question was raised whether the provisional sentence so decreed was a 'judgment or order' within the meaning of s 20 of the Supreme Court Act 59 of 1959. Eloff JP (Flemming DJP and Wunsh J concurring) held that the court of first instance had –

> … disposed of the issue of authenticity of the appellant's signature in a manner which renders it pointless to go into the principal case. The provisional sentence order was in the circumstances of the matter final in effect. The order is accordingly appealable.

Mr Gess in support of his contention that the grant of provisional sentence in this case is appealable, relies on the following *dictum* in *Jones v Krok* 1996 (2) SA 71 (T) at 73E—F:

> Normally the grant of provisional sentence is not appealable, but the effect of the grant of provisional sentence, in the particular circumstances of this case, is that there is nothing, in my view, that the defendant can do procedurally to further his case in the Transvaal Provincial Division. In particular, the invocation of Rule 8 cannot and will not assist him. For practical purposes, indeed for all purposes, the effect of order Nos 1 and 2 granted by the Court is that they amount to a 'judgment or order' as contemplated by s 20(1). I emphasise that the orders under consideration differ from a normal provisional sentence judgment, where the grant of such a judgment is not the end of the matter for the defendant in the Court of first instance.

In this case, to which I shall henceforth refer as *Jones v Krok 1996,* the applicant sought leave to appeal against the grant of provisional sentence

on a foreign judgment. In *Jones v Krok 1995* the applicant sought leave to appeal against the refusal of provisional sentence on a foreign judgment. In both cases, leave to appeal was granted.

A foreign judgment is usually enforced in our Courts by way of provisional sentence (*Jones v Krok 1995*, at 685F—H and the authorities cited there). Although a foreign judgment does not comply with the definition of a liquid document, the practice of granting provisional sentence on such a judgment has evolved on the basis that the judgment of a court is *prima facie* the clearest possible proof of a debt due by the party condemned and that the latter must be taken in law to have acknowledged his indebtedness in the amount of the judgment (*Jones v Krok 1995*, at 686A—B). The foreign judgment relied upon must be final and conclusive in its effect and must not have become superannuated (*Jones v Krok 1995*, at 689B —C; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa*, 4th ed by Van Winsen *et al* (1997) 998 fn 350). In the recognition and acceptance of the foreign judgment, the Court will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law (*Jones v Krok 1995*, at 685E, 696G).

A foreign judgment which is final and conclusive in its effect will be recognised and enforced if (i) the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts; (ii) the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iii) the judgment was not obtained by

fraudulent means and (iv) the judgment does not involve the enforcement of a penal or revenue law of the foreign State (*Jones v Krok 1995*, at 685B—D).

In *Jones v Krok 1995* provisional sentence was refused by the court of first instance on the ground that the foreign judgment in question was not final. In other words, provisional sentence was refused on a ground which shows the provisional summons to have been invalid. The dismissal of the action for provisional sentence on the foreign judgment satisfied the requirements of a 'judgment or order' set out in *Zweni v Minister of Law and Order*, *supra*, at 523I—J. The order of the court of first instance refusing the grant of provisional sentence was accordingly held to be appealable (*Jones v Krok 1995* at 688H—J, 689A).

The crucial question in the present case is whether or not the grant of provisional sentence in the particular circumstances of the case satisfies the requirements of a 'judgment or order' as set out in *Zweni v Minister of Law and Order, supra,* at 523I—J. It is not in dispute that all the requirements for the recognition and enforcement of a foreign judgment have been satisfied. In particular, it is not disputed that the three judgments handed down against the applicant by the Courts of the Principality of Monaco are of final and conclusive effect. The merits of those judgments cannot be adjudicated upon by this Court.

In *Avtjoglou v First National Bank of Southern Africa Ltd, supra,* at 457H—458D (cited above) it was held that the grant of provisional sentence on a liquid document is not final because the essential issue between the

parties, whether or not the defendant owes the money claimed, has not been determined finally by the provisional sentence. In this case, that issue has been finally determined. Invocation of Rule of Court 8(8) or 8(10) cannot and will not assist the applicant.

The only remaining issue between the parties, and the issue which is the subject of the proposed appeal, pertains to the jurisdiction of this Court to have granted the provisional sentence. I have found that, in the particular circumstances of this case, this Court had jurisdiction to adjudicate the claim for provisional sentence. That is not a matter which can be further canvassed under the rules relating to provisional sentence.

The following conclusion reached by Kirk-Cohen J in *Jones v Krok 1996,* at 73H is, in my view, also applicable to the circumstances of this case:

> To contemplate any further proceedings in terms of the Rules relating to provisional sentence, having regard to the nature of the dispute in question, would not only be pointless, it would be a waste of time and money.

The judgment I gave has the finality necessary to qualify as a judgment or order. The other requirements laid down in *Zweni v Minister of Law and Order, supra,* at 523I—J, namely, that it be definitive of the rights of the parties and have the effect of disposing of at least a substantial portion of the relief claim in the proceedings, are also satisfied.

I am accordingly of the view that my judgment is appealable, provided that the necessary leave is granted.

The next question is whether the applicant should be granted leave to appeal.

The principal contention raised by Mr Gess was that the respondent had

not discharged the *onus* of showing that the applicant, who has two residences, one in Monaco and one in the Western Cape, was resident within the jurisdiction of this Court when the summons was served on him on 28th November 2003. Upon a conspectus of all the evidence, I came to the conclusion that he was so resident at the time and that this Court had jurisdiction to entertain the plaintiff's action.

In my view, there is no reasonable prospect that another court will come to a different conclusion on this issue.

In the result, I make the following order:

The application for leave to appeal is dismissed with costs.

HJ ERASMUS, J