IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 11050/04

In the matter between:

MICHAEL JOSEPH RICHMAN Plaintiff

and

GERSHON BEN-TOVIM Defendant

JUDGMENT: 23 SEPTEMBER 2005

VAN ZYL J:

Introduction

[1] The plaintiff seeks provisional sentence against the defendant on a foreign judgment in the amount of £57,882.17, granted on 17 December 2003 by the Queen's Bench Division of the High Court of Justice (Supreme Court of England and Wales). His claim is for payment of such amount or its Rand equivalent, together with interest thereon at the rate of 8% *per annum a tempore morae*, and costs of suit.

[2] The provisional sentence summons, which was issued by this court on 21 December 2004, was served on the defendant on 5 January 2005. According to the deputy sheriff's return of service, the defendant was temporarily absent and service was effected on one Mrs Binneman (described as a "buyer"), a responsible employee not less than sixteen years of age, and in control of the defendant's place of business in Cape Town.

[3] The defendant opposed the claim for provisional sentence on various grounds set forth in the opposing affidavit of his attorney, Mr Cyril B Prisman. At the time he was in

Sierra Leone and was hence not able to depose to the affidavit personally. He did, however, file a supporting affidavit confirming the content of Mr Prisman's affidavit on his behalf. The plaintiff, in turn, filed a replying affidavit in which he refuted the defences raised by the defendant. In this regard he furnished a detailed factual background to what he averred was the basis of the defendant's liability to him.

[4] Mr J G Dickerson SC appeared for the plaintiff and Mr M Steenkamp for the defendant. The court expresses its appreciation to both counsel for their full heads of argument and their respective presentations on behalf of the parties.

The Defendant's Defences

[5] In his answering affidavit the defendant raised five main defences. The *first* was that the English court did not have jurisdiction over him in that he was, at all relevant times, resident and domiciled in South Africa and had at no stage submitted to such court's jurisdiction. The *second* was that the foreign judgment was not yet final, so that provisional sentence on it was not competent. The *third* was that, inasmuch as the English proceedings and judgment related to matters provided for in section 1(3) of the *Protection of Businesses Act* 99 of 1978 (“the Protection Act”), the plaintiff had failed to allege that he had leave to pursue judgment against the defendant in this court. The *fourth* was that service on Mrs Binneman (see par [2] above) was defective in that she did not have the authority required by rule 4(1)(a)(iii) of the rules of this court. The *fifth* was that the plaintiff's claim was fraudulent in that the draft acknowledgement of debt had not been signed by the defendant and in fact related to a debt owing by a company, Gal Marine (Pty) Ltd ("Gal Marine"), to its solicitors in Jersey, Mallinicks Incorporated Jersey ("Mallinicks"). This, the defendant averred, was supported by certain correspondence, including a letter dated 29 February 2000 in which the plaintiff had confirmed that there was "no recorded obligation for Gershon [the defendant] directly".

[6] In addition to these defences the defendant alleged that he had been misled by the

nature of the document served on him in the English proceedings. He had furthermore relied on what he had believed to be an undertaking by the plaintiff not to institute or conduct proceedings against him in an English court. In this regard he denied having assumed personal liability as a surety for payment of Gal Marine's debts to the plaintiff. In any event the principal creditor was Mallinicks and there had been no cession or transfer of its rights to the plaintiff. For these reasons he did not enter appearance to defend the English proceedings. The plaintiff then fraudulently took default judgment against him by misleading the court as to the true facts. This, the defendant averred, offended against public policy and the principle of *audi alteram partem*.

[7] Likewise in conflict with public policy, the defendant averred, was the fact that the plaintiff had not established that he was a duly admitted attorney in South Africa or a qualified solicitor in the United Kingdom. He was hence not entitled to levy the attorney and client fees he claimed from the defendant in the present matter. The enforcement of the English judgment was hence incompetent and contrary to public policy.

[8] In the course of his argument Mr Steenkamp indicated that the defendant was no longer relying on the second, fourth and fifth defences set forth above, namely that the judgment was not final, service had been defective and that the claim had been fraudulent. He persisted, however, with the first and third defences, namely that the English court did not have jurisdiction over the defendant and that the judgment was precluded by the provisions of the Protection Act. Furthermore, although he no longer relied on the allegation that the plaintiff had, in conflict with public policy, failed to apply the maxim *audi alteram partem*, he persisted with the argument that the plaintiff had not been a qualified attorney or solicitor and had hence acted contrary to public policy by charging the fees claimed by him from the defendant. In the event, Mr Steenkamp submitted, there remained only three issues, namely the international jurisdiction or competence of the court which had granted the foreign judgment, the applicability of the Protection Act, and the applicability of public policy regarding the plaintiff’s entitlement

to levy the fees in question.

The Plaintiff's Reply

[9] In his replying affidavit the plaintiff stated at the outset that, although he was an attorney of this court, he had at all relevant times been in practice as a commercial and foreign law consultant in London. He confirmed that his claim had been for services rendered and disbursements incurred by him on behalf of the defendant. At all times he had acted in accordance with the mandate and on the instructions of the defendant, who had accepted liability and on more than one occasion had undertaken to effect payment to the plaintiff in London. He hence denied that he had not been entitled to levy the fees claimed by him against the defendant.

[10] The plaintiff rejected the further defences raised by the defendant who, at the time the proceedings were instituted against him, had been resident in London. At no stage had he questioned the jurisdiction of the English court or attempted to have the default judgment set aside, thereby rendering it final and suitable for purposes of obtaining a provisional sentence in South Africa. Although he had attempted, unsuccessfully, to persuade the plaintiff to have the judgment rescinded, he himself had taken no steps to do so. By his conduct he must hence be regarded as having submitted to the jurisdiction of the English court.

[11] The plaintiff pointed out further that the proceedings in England were not subject to the provisions of Act 99 of 1978. His services and disbursements had related primarily to conducting negotiations on behalf of the defendant, furnishing him with advice and drafting agreements between him and companies in the De Beers group. At no stage had the plaintiff been involved in any activities falling under section 1 of the said Act.

[12] The plaintiff emphatically rejected the defendant's suggestion that he (the plaintiff) had been involved in fraudulent dealings and had misled the court in seeking default judgment. He elaborated extensively on the background to his relationship with the defendant. In this regard he explained the role played by companies such as Gal Marine (see par [5] above) and its affiliate, Quarterdeck Prospecting and Mining (Pty) Ltd ("Quarterdeck"), which had, at the request of the defendant, been used as vehicles or conduits for certain transactions and payments. He made it clear, however, that the claim in respect of which the judgment was given was for services personally rendered and disbursements personally incurred by him on behalf of the defendant. His previous firm, Mallinicks, had been involved in the early stages but, as from April 1999, the plaintiff

had acted in his own name as a consultant and all fees from that time, including those incurred by the defendant, accrued to him.

[13] The plaintiff described the defence of allegedly defective service of the provisional sentence summons on Mrs Binneman as "disingenuous and contrived". It could not be disputed that she had been in the employ of the defendant's company, Gemfarm Investments (Pty) Ltd ("Gemfarm"), as appears from an offer of employment dated 9 June 2004 made to her by the general manager of Gemfarm. It could likewise not be disputed that the place of service, namely Dunkley House, 32 Barnet Street, Cape Town, was the defendant's place of business. Service had thus been duly effected in terms of rule 4(1)(a)(ii). In any event he had indeed received the summons and opted to oppose the granting of provisional sentence. Clearly he had not been prejudiced by any irregularity in the service, if such there was.

[14] In regard to the non-payment of the plaintiff's fees by the defendant, the plaintiff stated that the defendant had informed him that he did not have the resources available to meet the plaintiff's costs. He had given the plaintiff to understand, however, that he would use Gal Marine to fund his expenses in the sense that such expenses would be debited to his loan account with Gal Marine. The plaintiff accepted this arrangement and sent invoices to Gal Marine on the understanding that the company would simply be a vehicle through which the defendant would be paying his debt to the plaintiff.

[15] According to the plaintiff the defendant ran up a bill in the amount of £51,165.25 during the period April to December 1999. The expenses arose mainly from the defendant's proposed litigation against De Beers, but also related to meetings, discussions and negotiations held by the plaintiff on the defendant's behalf. The plaintiff drew up an acknowledgement of debt in this regard, but the defendant failed to sign it. He did, however, append his signature to a letter dated 6 May 2000 and sent to him by facsimile. On the basis thereof the plaintiff undertook to render further services to the defendant regarding his dispute with De Beers.

[16] The subsequent settlement between the defendant and De Beers gave rise to two agreements, in one of which a large amount (US$2,000,000) was to be provided to the defendant in respect of the expenses he had funded out of his own resources. In order to facilitate payment of the moneys owing to the plaintiff, it was agreed that Quarterdeck would pay the money to the plaintiff on the defendant's behalf and that an adjustment

would later be effected between Quarterdeck and the defendant.

[17] On 31 March 2001 the plaintiff sent the defendant an invoice for services rendered and disbursements made on the defendant's behalf over the period 1 December 1999 to 30 November 2000. When no payment had been received by October 2001, the plaintiff made enquiries and was requested by the defendant to send him copies of the relevant invoices. The plaintiff did so. The defendant, however, failed to make any payment, despite his promising from time to time that he would do so.

[18] This was still the situation two years later, when, in October 2003, the defendant asked the plaintiff to act for him in respect of a mining transaction in Sierra Leone. The plaintiff was prepared to assist, provided the defendant honoured his debt to him. The defendant was unable to make full payment at that stage, but agreed to discuss payment on his next visit to London during November 2003. This prompted the plaintiff to issue proceedings against him on 29 October 2003. The process was served on him personally on 22 November 2003 when the plaintiff met him at his London hotel. Once again the defendant indicated that he would pay, but was unable to do so at that time. The plaintiff hence sent him an e-mail on 25 November 2003 requiring him to make an acceptable proposal for payment by no later than the end of that week, failing which he would be compelled to apply for judgment against him.

[19] On 4 December 2003, during a meeting between the parties at the defendant's London hotel, the defendant undertook to pay the plaintiff the amount of his claim, namely £56,806.02, together with court fees and solicitor's costs, as well as interest at the rate of 8% *per annum* as from 1 December 2003, in instalments of £10,000 per month. The first payment was to be made on 15 December 2003 and further payments on or before the fifteenth day of every succeeding month. The defendant thereupon requested that the plaintiff issue one or more invoices to his company, Gemfarm (see par [13] above), for the amount of his indebtedness to the plaintiff. The plaintiff was prepared to do so, provided the defendant made "lawful arrangements" with Gemfarm to effect payment of the debt and provided he remained personally liable for the full amount of the debt, notwithstanding any payments made by Gemfarm on the strength of such invoices.

[20] On the same day the plaintiff sent the defendant an e-mail requesting him to record his unequivocal acceptance of these terms on or before 9 December 2003. The

defendant undertook to do so orally during a telephone discussion with the plaintiff on 8 December 2003. Nothing eventuated, however, and the plaintiff proceeded to take judgment against him.

[21] At the request of the plaintiff's solicitors in the English proceedings, one Yash Kulkarni, an English barrister practising commercial law and international trade in London, deposed to an affidavit, dated 15 April 2005, containing his expert opinion on, *inter alia*, the jurisdiction of the English court in the present matter. At the outset he gave the assurance that the contents of his affidavit constituted "an impartial and neutral exposition of the relevant law", emanating from his own knowledge and expertise and representing his "true and honest opinion". In the present matter he was satisfied that the English court had jurisdiction when the defendant was served with the relevant claim form at his hotel in London during his temporary presence in England. At that stage the English court was the appropriate forum (*forum conveniens*) for purposes of considering the dispute between the parties. This accorded with the fact that the plaintiff's consultancy business was based in London while the services rendered and expenses disbursed by him had arisen from the instructions provided to him in London. Most of the work done for the defendant had been carried out in England and payments made by the defendant in respect thereof had been by way of deposits into the plaintiff's English bank account. At no stage had the defendant challenged the English court's jurisdiction or applied for the proceedings to be stayed or set aside.

Provisional Sentence in respect of Foreign Judgments

[22] Provisional sentence proceedings have long since been recognised in our courts as

the ordinary, and customary, procedure for purposes of enforcing a foreign judgment. See *Joffe v Salmon* 1904 TS 317 at 318 and *Coluflandres Ltd v Scandia Industrial Products Ltd* 1969 (3) SA 551 (R) at 553G. More recently, in the Namibian case of *Westdeutsche Landesbank Girozentrale (Landesbausparkasse) v Horsch* 1993 (2) SA 342 (Nm) at 343J-344C, Levy J made the following observations:

> The exigencies of international trade and commerce require that final foreign judgments be recognised as far as is reasonably possible in our Courts, and that effect be given thereto. To assist a judgment creditor who has obtained such a foreign judgment, our Courts grant such judgment creditor the right to invoke the extraordinary remedy of provisional sentence, that is he has the right to obtain a provisional judgment speedily, and without resorting to the more expensive and dilatory machinery of an illiquid action.

This *dictum* was cited with approval by Malan J in *Blanchard, Krasner & French v Evans* 2004 (4) SA 427 (W) at 431F-G. See also *Corona v Zimbabwe Iron & Steel Co Ltd* 1985 (2) SA 423 (Tk) at 425E-G and *Jones v Krok* 1995 (1) SA 677 (A) at 685E-H.

[23] In the *Jones v Krok* matter, Corbett CJ set forth the relevant principles relating to provisional sentence on a foreign judgment in the following terms:

> … [T]he present position in South Africa is that a foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided (i) that 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 (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended … Apart from this, our Courts 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 …

In the present matter only the proviso's contained in paragraphs (i), (iii) and (vi) are relevant as pertaining to defences raised by the defendant.

The International Jurisdiction or Competence of the English Court

[24] For present purposes it may be accepted that the English court, which granted judgment against the defendant on 17 December 2003, had the required power or jurisdiction, in terms of the applicable English law, to do so. This is not, however, conclusive, in that the question of jurisdiction must be considered and determined in accordance with our own law on the jurisdiction of foreign courts. See *De Naamloze Vennootschap Alintex v Von Gerlach* 1958 (1) SA 13 (T) at 15G; *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 (3) SA 1020 (T) at 1038A-E; *Reiss Engineering Co Ltd v Insamcor (Pty) Ltd* 1983 (1) SA 1033 (W) at 1037H; *Argos Fishing Co Ltd v Friopesca SA* 1991 (3) SA 255 (Nm) at 260B-D; *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C) at 820C-D; *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA) par [11] at 450C; *Supercat Incorporated v Two Oceans Marine CC* 2001 (4) SA 27 (C) at 30B.

[25] In the *Coluflandres* case (par [22] above) Greenfield J opined (at 561H) that a challenge to the foreign court's jurisdiction could be "equated with a challenge to the signature on an acknowledgement of debt". In such a case, the learned judge stated (at 562F), the plaintiff would bear the *onus* of establishing that the foreign court had jurisdiction. Van Dijkhorst J approved of this approach in the *Reiss Engineering* case (par [24] above at 1036E), stating unequivocally (at 1037C) that "when the fact of jurisdiction is disputed, the *onus* to prove it … falls squarely on the plaintiff who produces the foreign judgment as proof of liability". See also *Zwyssig v Zwyssig* 1997 (2) SA 467 (W) at 472D-F; *Erskine v Chinatex Oriental Trading Co* (par [24] above) at 820E-I. In *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 76F-G Van Reenen J added that such *onus* had to be discharged on a balance of probabilities.

[26] With reference to W Pollak *The South African Law of Jurisdiction* (1937) 219, Van Dijkhorst J accepted, in the *Reiss Engineering* case (par [24] above at 1037H-1038A), that a foreign court would have jurisdiction under the following circumstances:

1. If at the time of the commencement of the action, the defendant is physically present within the state to which the court belongs;
2. If at the time of the commencement of the action the defendant, although not physically present within such state, is either (*a*) domiciled, or (*b*) resident within such state;
3. If the defendant has submitted to the jurisdiction of the court.

This approach was approved and applied in the *Chinatex* case (par [25] above at 820J-821B) and in *Blanchard, Krasner & French v Evans* 2001 (4) SA 86 (W) at 89G.

[27] Some confusion arose when, in the second edition of *Pollak on Jurisdiction* (1993) at 162-164, Mr D Pistorius, the editor of such edition, omitted the first ground, ostensibly on the basis that there had been authority for its inclusion in the original edition. He suggested (at 164) that the “weight of authority of other writers” was against it. In this regard he referred to C F Forsyth *Private International Law* (2nd ed) 343 n 69

and to P S G Leon “Roma non locuta est: The Recognition and Enforcement of Foreign Judgments in South Africa” in *CILSA* 16 (1983) 325 at 337-338.

[28] I find this explanation somewhat strange in that Van Dijkhorst J, in citing Pollak's first edition with apparent approval, took cognisance (at 1038A-B) of the fact that there had been no authority on whether or not mere physical presence would suffice. The learned judge then went on, however, to apply such ground to the facts in the case before him in holding (at 1038C) that it was common cause that the defendant company had not been "domiciled, resident or physically present" in England at any relevant time. I regard this, with respect, as persuasive judicial authority for the existence of all three grounds of jurisdiction as set forth in the citation from the original edition of Pollak.

[29] Somewhat against the general expectation, the Supreme Court of Appeal, in its judgment in the *Purser* matter (par [24] above, in par [12] at 450J-451B), appears simply to have accepted the academic viewpoint expressed by Pistorius in his second edition of Pollak, and by Professor A B Edwards in his discussion of “Conflict of Laws” in Joubert (ed) *The Law of South Africa* vol 2 (1st reissue) par 478, without reference to the judgments in *Reiss Engineering*, *Chinatex* or *Blanchard* (par [24], [25] and [26] above). In the said par 478 Professor Edwards observed:

There has been no decision on the question whether the mere temporary physical presence of a person who is neither a resident nor a domiciliary will suffice.

[30] This court is, of course, bound by the *Purser* decision. It follows that the defendant's mere physical presence in England at the time the English proceedings against him were instituted and the relevant documents were served on him personally, does not avail the plaintiff in seeking to establish the jurisdiction of the English court. He was clearly not domiciled or resident in England at the relevant time in that he was there

for business reasons, making his presence there temporary, if not transient (see *Mayne v Main* 2001 (2) SA 1239 (SCA) par [6] at 1243I-1244A). He can hence rely only on the ground that the defendant submitted to the jurisdiction of the English court.

[31] In this regard the question arises whether submitting to the jurisdiction of a foreign court may be effected expressly, be it orally or in writing, or tacitly, by conduct. In *Borough of Finsbury Permanent Investment Building Society v Vogel* (1910) 31 NLR 402 at 406, Dove-Wilson JP expressed the view that submitting to jurisdiction should be express and could not be implied. In *Standard Bank Ltd v Butlin* 1981 (4) SA 158 (D) at 161D, however, Didcott J observed that the learned Judge President had been expressing an *obiter* view which had "echoed English beliefs". As such it was not binding on him. He thereupon set forth his own views on the subject in the following terms (at 161E-H):

> I am quite satisfied that the English rule has no counterpart in South Africa. It has a formalism, an artificiality, a fussiness one may fairly say, which is out of keeping with the broad principles we tend to prefer. When it comes to undertakings, decisions, commitments and the like which have legal force, contractual or otherwise, our law does not ordinarily differentiate between those made expressly and others reached impliedly or tacitly. There are exceptions, of course. A statute's insistence on formality may disqualify the tacit from recognition in particular instances, and the implied too, once at any rate the material goes beyond the language used on the occasion in question. In general, however, the intention of the person concerned is what counts, whether such be gleaned from his words, inferred from his conduct, or gathered from both. Mere details these are. They furnish the evidence of his intention. But their significance goes no deeper. Sometimes, according to the rules of evidence, the words employed, if any, are all that may be taken into account. But that does not affect the principle now under discussion. As far as such goes, I can se no reason why submissions to jurisdiction should be put into a compartment of their own. Usually, to be sure, they have important consequences. So, however, do numerous consents given impliedly or tacitly, yet altogether effectively.

[32] That submission to the jurisdiction of a foreign court could be express or implied appears unequivocally from *Otto v Schurink and Another* 1911 TPD 367 at 373, where Wessels J, with reference to Vinnius in his treatise on jurisdiction (chapter II section 5 and 7), stated that a person could submit to jurisdiction "either expressly or tacitly, either by agreement or by conduct". This approach was accepted without comment by Van Dijkhorst J in the *Reiss Engineering* case (par [24] above at 1038E). With reference to

Didcott J's judgment in the *Butlin* matter (par [31] above), however, he added that the submission, be it express or implied, should be clear.

[33] A similar approach may be found in *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 333E, which was cited with approval by Van Schalkwyk J in the *Zwyssig* case (par [25] above at 474C-F). There it was suggested that a person may submit himself to the jurisdiction of a foreign court "by positive act or negatively by not objecting to the judgment of that court". See also the *Purser* case (par [24] above at 451C-E.

[34] In the *Supercat* case (par [24] above) Conradie J referred with approval to the following comment of C F Forsyth *Private International Law* (3rd ed, 1996) 369 (appearing without amendment in the 4th edition (2003) at 397):

> There are no reported cases in which submission by conduct has been accepted (or indeed rejected) as a means of conferring international competence upon a foreign court which otherwise lacks such competence. It is submitted that the courts should (and do) exercise appropriate caution and not find that there has been submission unless the parties have clearly accepted the foreign court's jurisdiction.

The learned judge then gave consideration to the facts in the case before him, namely that the defendant had entered appearance in the foreign court, expressly denying the plaintiff's allegation that such court had jurisdiction. Thereafter, however, its pleadings were struck out by virtue of its having failed to persist with its defence. On these facts Conradie J was not prepared to hold that the defendant had submitted to the jurisdiction of the foreign court. A similar approach was followed by Van Reenen J in the *Maschinen Frommer* case (par [25] above, at 81E-82B).

[35] It is clear from these considerations that submission to the jurisdiction of a foreign court may be inferred from the conduct of the defendant. It must be clear, however, that he has accepted such jurisdiction unconditionally in the sense that he has acquiesced therein. By the same token, although acquiescence in the court's jurisdiction does not constitute waiver, it does bear comparison with it in the sense that it may be regarded as precluding his right to challenge such jurisdiction. See in this regard the lucid exposition of Vieyra AJ in *Du Preez v Philip-King* 1963 (1) SA 801 (W) at 803B-F:

> The difficulty is, of course, to determine in each case whether the conduct of the defendant is tantamount to a submission to jurisdiction. It seems to me that although a submission of this sort is a unilateral act only and therefore does not have to fulfil all the requirements of a waiver, nevertheless just as in waiver at least all the elements of an

acquiescence must be present.
To constitute acquiescence the conduct which is the subject matter of the enquiry must be of such a nature that the Court must be able to say that it is consistent only with acquiescence …

[36] Turning to the facts in the present matter, I am inclined to agree with Mr Dickerson's submission that the defendant on a number of occasions unequivocally accepted personal liability for the plaintiff's account relating to services rendered and disbursements effected by him. Gal Marine and Quarterdeck were no more than vehicles which he proposed to use for purposes of honouring his debt to the plaintiff. At no stage was it suggested that he had assigned or transferred any of his rights and obligations to these companies. It was abundantly clear, however, that the defendant, by means of any number of machinations and manipulations, went to extreme lengths to avoid making payment, ostensibly on the ground of having a temporary cash-flow problem which he described as a lack of resources. His frequent promises to make payment came to naught, only to be supplanted by further promises as soon as he felt the pressure mounting from the plaintiff's side. It is quite remarkable that the plaintiff afforded him so much leeway by holding back legal action for such a lengthy period of time.

[37] When at last the plaintiff decided to institute proceedings in England, he had clearly reached the end of his tether and was not prepared to indulge the defendant any longer. He waited until the defendant was once again in London before serving the court papers on him on 22 November 2003. Once again the defendant gave undertakings to pay and once again he failed to honour them. It is common cause that he did not make any effort to defend the claim, but simply attempted to persuade the plaintiff to have the subsequently granted order rescinded. He did not question the jurisdiction of the court and likewise did not attempt to have the order set aside. It was only when the South African provisional sentence proceedings were served on him that he employed an attorney to vigorously oppose the application on his behalf.
[38] This brings us to the question whether or not the defendant, by virtue of the aforesaid facts, should be held to have submitted to the jurisdiction of the English court which granted judgment against him. It is clear that he did not submit to such jurisdiction expressly, in terms of any written or oral agreement or undertaking. It is hence only his

conduct on which reliance may be placed for purposes of establishing whether he submitted thereto tacitly, by necessary implication or by clear inference. This means, of course, that his conduct must clearly indicate, and be consistent only with, his unqualified acceptance of, and acquiescence in, such jurisdiction.

[39] However strong the case on the merits may be against the defendant, it is his intention, as evidenced by his conduct during the relevant period, which this court is required to assess. The fact that he appears, on a number of occasions, to have accepted, and hence admitted, liability for his debt to the plaintiff, does not mean that he accepted, and submitted to, the jurisdiction of the English court for purposes of enforcement of such debt. On the contrary, except for his signature on the letter dated 6 May 2000 (par [15] above), he studiously avoided giving any written assurance that he would make payment. For the same reason he did not enter appearance to defend and did not file opposing papers in the English litigation. It can hence not be suggested that he at any time submitted to the jurisdiction of the English court.

[40] It follows that the international jurisdiction or competence of the English court has not been established. For this reason it is not necessary to deal with the remaining defences raised by the defendant.

Conclusion

[41] In the event the application for provisional sentence is dismissed with costs.

D H VAN ZYL

Judge of the High Court