Reportable

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

CASE NO: 14918/2008

In the matter between:

BRIAN ROBERT MAHON	Applicant
and	
IOLA MAHON	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE SHERIFF FOR THE MAGISTERIAL DISTRICT OF CAPE TOWN	Third Respondent
THE REGSITRAR OF THE HIGH COURT OF THE CAPE OF GOOD HOPE	Fourth Respondent

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JUDGMENT DELIVERED ON 29 JULY 2009

HJ ERASMUS, J:

Introduction

[1] On 15 September 2008 the applicant launched an application in which the following orders are sought in the Notice of Motion:

1. a declaration that Rule 8 of the Uniform Rules of the High Court is inconsistent with the Constitution of the Republic of South Africa and invalid to the extent:

    1.1 that it permits a plaintiff who has been granted provisional sentence automatically, by operation of law, to execute the provisional sentence judgment in circumstances in which there is potentiality of irreparable harm or prejudice being sustained by the defendant without the intervention or protection of judicial oversight to limit such irreparable harm or prejudice; and

    1.2 that it requires in all cases for a defendant to have satisfied the amount of the judgment of provisional sentence and taxed costs before being entitled to enter into the principal case;

2. a declaration that the writ of execution issued by the Fourth Respondent on 20 August 2008 in Case Number 11457/08 is unlawful, inconsistent with the Constitution and invalid;

3. a review and setting aside of the decision of the Fourth Respondent on 20 August 2008 to issue a writ of execution in Case Number 11457/08;

4. an order that the First Respondent and any other Respondent who opposes the application pay the costs hereof.

[2] The First Respondent filed a Notice of Intention to Oppose on 23 September 2008. The Second Respondent filed its Notice of Intention to Oppose on 25 September 2008. On 29 September 2008, the Second

Respondent, filed a Notice of Withdrawal of Notice to Oppose and a Notice of Intention to Abide.

[3] On 15 October 2008, an answering affidavit on behalf of the First Respondent was filed. On 29 October 2008, the Applicant filed his replying affidavit. On 17 February 2009, an answering affidavit was filed on behalf of Second Respondent. The Applicant contends that this answering affidavit was filed out of sequence, out of time and without any application for condonation. Moreover, although the Second Respondent gave notice of his intention to abide the decision of this Court, the answering affidavit concludes with a prayer that the Applicant's application be dismissed. In the Heads of Argument filed on behalf of the Second Respondent it is, however, made clear that the Second Respondent does not oppose the application and will abide the decision of the Court.

The background

[4] After a trial before the Family Division of the High Court of Justice in the United Kingdom, the First Respondent obtained a judgment sounding in money against the Applicant. The Applicant thereafter exhausted his remedies in the United Kingdom in seeking to appeal the judgment, without success.

[5] On 16 July 2008, the First Respondent, relying on the judgment of the Family Division of the High Court of Justice in the United Kingdom, issued a summons for provisional sentence against the Applicant in this Court. The Applicant opposed the grant of provisional sentence. He did not (and does not) contest the correctness of the judgment of the English court. Instead, on 31 July 2008, he deposed to an affidavit placing the

jurisdiction of the South African court in issue on the ground that he was neither resident nor domiciled in the country and had, to the knowledge of the First Respondent, not been so resident or domiciled since "early 2007".[1] On Friday, 15 August 2008, the First Respondent filed a replying affidavit in which she contended that Applicant is an *incola*. On Monday, 18 August 2008, at the hearing of the provisional sentence proceedings, the Applicant brought an application for a postponement, which was dismissed and provisional sentence was granted against him by this Court on that day.[2]

[6] On Wednesday, 20 August 2008, the First Respondent pursuant to the provisional sentence obtained from the Fourth Respondent a writ of execution over the Applicant's movable property, and pursuant to the writ attached certain movable property.

[7] On 15 September 2008, this application and an application for leave to appeal against the provisional sentence to the Supreme Court of Appeal, were launched. The application for leave to appeal was dismissed in a judgment delivered on 11 May 2009.

[8] The Applicant has not availed himself of the opportunity afforded by Rule 8(10) and (11) to enter into the principal case.

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[1] In a confirmatory affidavit in these proceedings, the Applicant states that he has been permanently resident and domiciled in Mauritius "from early July 2008". I dealt with the Applicant's various, contradictory averments as to his domicile and residence in my reasons for judgment in the provisional sentence proceedings and also in my judgment in the Applicant's application for leave to appeal against the grant of provisional sentence against him.

[2] Reasons for the order were delivered on 29 August 2008.

The Applicant's case

[9] The Applicant's case turns on Rules 8(9) to 8(11) of the Uniform Rules of Court. These sub-rules provide as follows:[3]

> (9) The plaintiff shall on demand furnish the defendant with security *de restituendo* to the satisfaction of the registrar, against payment of the amount due under the judgment.
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> (10) Any person against whom provisional sentence has been granted may enter into the principal case only if he shall have satisfied the amount of the judgment of provisional sentence and taxed costs, or if the plaintiff on demand fails to furnish due security in terms of subrule (9).
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> (11) A defendant entitled and wishing to enter into the principal case shall, within two months of the grant of provisional sentence, deliver notice of his intention to do so, in which event the summons shall be deemed to be a combined summons and he shall deliver a plea within 10 days thereafter. Failing such notice or such plea the provisional sentence shall *ipso facto* become a final judgment and the security given by the plaintiff shall lapse.

[10] The essence of the Applicant's case is stated as follows in the Heads of Argument filed on his behalf:

> In summary, the Applicant contends that the Uniform Rules, properly interpreted, and for that matter the common law, do not authorise the execution of a provisional sentence until it has become a final judgment.

[11] In the Heads of Argument it is further said that "the key question" in this application is at what point during provisional sentence proceedings a plaintiff becomes entitled to obtain a writ of execution

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[3] Rules 14A(9) to 14A(11) of the Magistrates' Courts Rules are, but for minor differences, in similar terms.

against a defendant? The Applicant's case is that the first moment at which a plaintiff may obtain a writ of execution is when the provisional sentence becomes a final judgment, and not before. It is further contended that Rules 8(9) to 8(11), on a plain reading in their proper context, do not permit a plaintiff to obtain a writ of execution immediately upon obtaining provisional sentence. All that Rule 8 contemplates, so it is contended, is to give the defendant a grace period of two months, during which the plaintiff may not execute and during which the defendant may decide whether or not to satisfy the amount of the provisional sentence and taxed costs and to enter into the main case. If the defendant does not take any steps during the period of two months to enter into the principal case, the provisional sentence shall *ipso facto* become a final judgment. The plaintiff has to wait for the provisional to become a final judgment at the end of the period of two months; then and only then may he execute.

[12] The Applicant accordingly submits that the writ of execution issued by the Fourth Respondent on 20 August 2008 was issued unlawfully as there are no rules of Court or other provisions which authorised the issue of the writ at the time; that is, prior to the lapse of the period of two months.

[13] The Applicant further submits that if this Court were to accept that the issue of the writ of execution was unlawful, then, consistent with the principles of avoidance[4] and reading down,[5] the Court should not proceed to consider the constitutionality of Rule 8. If, on the other hand, the Court were to find that the issue of the writ of execution was lawful and that the

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[4] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at 895E (par [59]): *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at 19A (par [21]).

[5] *Investigating Directorate Serious Economic Offences and Others v Hyaundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at 560A (par [26]).

Uniform Rules permit the execution of provisional sentence prior to it becoming a final judgment, then, in the alternative, the Applicant submits that Rule 8 is inconsistent with the Constitution and invalid to the extent that it unjustifiably violates a defendant's right to a fair hearing in terms of sec 34 of the Constitution. The Applicant accordingly, in the alternative, seeks an order, as set out in his Heads of Argument, in terms of section 172(a)(1) of the Constitution that the writ of execution issued by the Fourth Respondent on 20 August 2009 in favour of the First Respondent is inconsistent with the Constitution and invalid.

[14] It needs to be observed that in oral argument at the hearing of the application, and in their Heads of Argument, Applicant's counsel confined themselves to the issue of the validity of the writ of execution issued by the Fourth Respondent on 20 August 2009 in favour of the First Respondent. The wider relief envisaged in paragraph 1.2 of the Notice of Motion was not canvassed in any detail.

The issue of a writ of execution

[15] The Applicant's case that a plaintiff is not entitled under Rule 8, nor for that matter under the common law, to obtain payment forthwith of the amount of the provisional sentence or to have a writ of execution executed until such time as the provisional sentence has become a final judgment, flies in the face of the very essence of the theory, history and practice of provisional sentence.

[16] Provisional sentence for the payment of money under security *de restituendo* came down to us through the Roman-Dutch law.[6] The theory behind provisional sentence is that –

> ..... it is granted on the presumption of the genuineness and the legal validity of the documents produced to the Court. The Court is provisionally satisfied that the creditor will succeed in the principal suit.[7]

The debtor, who is sued on his own signature or a public document, must acknowledge or deny his signature, or the execution of the document, so that, if he cannot deny his signature –

> ..... he is condemned by provision, that is preliminarily to pay the money due by the document, and thus make provisional payment to the plaintiff under security of restoring the money if afterwards by a definite and final judgment, that is in the principal case, it should be decided that the money was not owing.[8]

In *Harrowsmith v Ceres Flats (Pty) Ltd*[9] it is pointed out that –

> ..... the acknowledgement of the writing and the presumption of debt which springs from it are the foundations for laying on the duty of payment under security.

[17] In *CGE Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape and Another*[10] Grosskopf J points out that[11] –

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[6] The history of provisional sentence is dealt with in detail by Boshoff AJP in *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 727C—730C; see also *CGE Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape and Another* 1976 (4) SA 925 (C) at 927C—928C; *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) at 607C—608A

[7] *Harrowsmith v Ceres Flats (Pty) Ltd, supra,* at 728C.

[8] *Harrowsmith v Ceres Flats (Pty) Ltd, supra,* at 728H.

[9] *Supra,* at 729G.

[10] 1976 (4) SA 925 (C).

[11] At 927A—B.

> [t]he system of granting judgment on the production of such strong *prima facie* proof of debt as is afforded by a clear written acknowledgement of debt, or written undertaking of payment, was in practice in Holland towards the close of the sixteenth century.....
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> It was one of a number of interlocutory proceedings whereby interim relief could be obtained pending final determination of an action.....

The learned Judge further points out[12] that while in the earlier law provisional sentence was satisfied by payment into Court pending the outcome of the proceedings, in 1579 the law was changed in Holland so as to provide that payment could be made to the plaintiff subject to the provision of security *de restituendo*. The reason given by Van der Keessel[13] for the change was that, without the money, the plaintiff lost much of the benefit of the provisional judgment in his favour. Van der Keessel also emphasises that provisional sentence was of particular value to merchants, whose transactions are dependent upon prompt payment.

In the light of the foregoing, Grosskopf J says[14] that –

> ..... it is important to note that historically the furnishing of security *de restituendo* was introduced as part of an indulgence granted to a plaintiff whereby he was enabled to use the money claimed by him even although he had not yet proved his entitlement thereto. It was not a limitation imposed on the recovery of something to which he was considered entitled.
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> .....

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[12] At 927E—F.

[13] *Praelectiones ad Gr* 3.5.7.

[14] At 927G—928A.

> The position under Roman-Dutch law was accordingly clear. If a plaintiff was unable to provide security .... he was at most entitled to have the amount of his provisional claim paid into Court to await the outcome of the proceedings.

In the Roman-Dutch law a plaintiff was therefore entitled to obtain payment forthwith of the amount of the provisional sentence upon provision of security *de restituendo*; the plaintiff need not await the final outcome of the action.

[18] Coming to South African law, Grosskopf J points out[15] –

> The institution of provisional sentence remained a part of South African law with few, and for present purposes, immaterial, changes. Provisional sentence is no longer claimed at any stage other than the inception of the proceedings, and it is done by way of a special form of summons.[16] This may have masked the essential nature of provisional sentence as a form of interim relief, but has not changed it. In essence a provisional sentence summons is a composite document which serves a twofold purpose. It serves to institute an action for a definitive judgment (i.e., it initiates the principal case) and at the same time it serves to institute proceedings for interim relief. (It is interesting to note in passing that in this respect the usual procedure in Holland was much the same - *vide* Van der Linden, *Judicieel Practijk*, vol. 1, p. 207).
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> The interim relief obtainable in our law, as in Roman-Dutch law, is *solutio fiduciaria*, payment under security. This has been recognised since the earliest reported decisions in South Africa up to recent times. Vide "Prefatory Remarks on Provisional Sentence" in 1 Menzies 5 *et seq*., and particularly

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[15] At 928A—D: see also *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) at 607C—608A where the Supreme Court of Appeal in effect endorses the exposition of Grosskopf J.

[16] Rule XII of the Rules of the Cape Supreme Court, promulgated immediately after the First Charter of Justice of 1828, makes provision for a special form of summons. The Rule provides as follows:

> In all cases, where, by law, any person may be summoned to hear claim made for obtaining *provisional* sentence, or condemnation, for payment, under security, a copy of such instruments or documents upon which the claim for provisional sentence is grounded, shall be served on the person summoned, together with a copy of the said summons: and the said summons shall be, as near as is material, in the form following, that is to say –

paras. 1 - 5 (pp. 5 - 7) and para. 8 (pp. 8 - 9); *Junius v Alberts, supra*[17], *and Kent v Transvaalsche Bank*, 1907 T.S. 765. In *Denham v Debond*, 1957 (3) SA 142 (N) at p. 146, Broome, J.P., said of provisional sentence:

> One of its basic principles is that plaintiff claims payment of the debt under security *de restituendo*.

In *Ndamase v Functions 4 All*[18] Southwood AJA points out that the procedure is now governed by Rule 8 of the Uniform Rules of Court "which incorporates the characteristics already described".

[19] The Applicant's contention that a plaintiff is not entitled under Rule 8(9) to obtain payment forthwith of the amount of the provisional sentence against the provision of adequate security is not borne out by current practice in South Africa. This is apparent, for example, from the facts of *CGE Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape and Another,*[19] a judgment on which the Applicant relies for the history of provisional sentence. In that case, a summons was issued for provisional sentence on an architect's certificate. In response, the defendant's attorney wrote as follows:

> The Administration *[defendant]* does not intend opposing the action for provisional sentence. In the event of the Court granting provisional sentence, the Administration will tender payment of the judgment and costs as against the furnishing of security to the satisfaction of the Registrar. I assume that the Registrar will insist on a bank-guaranteed cheque from your client.
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> The Administration furthermore intends entering into the principal case.

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[17] The full reference is 1906 TH 16.

[18] 2004 (5) SA 602 (SCA) at 608A.

[19] 1976 (4) SA 925 (C).

The plaintiff (as applicant) then applied for an order that the defendant (respondent) is not entitled to insist on security *de restituendo* in respect of the money paid pursuant to the provisional sentence judgment and that the Registrar is not entitled to insist on security being furnished in terms of Rule 8(9). The application was dismissed, the Court holding in conclusion that[20] –

> The provisional sentence judgment of 11 February 1976 entitled applicant to payment of the amount thereof only if applicant was able to "furnish the defendant with security *de restituendo* to the satisfaction of the Registrar" (Rule 8(9)). Applicant's right to payment is a qualified one, and this qualification does not fall away merely because applicant finds it difficult or impossible to find acceptable security..... If applicant cannot find acceptable security, it is not entitled to provisional relief, and must wait for its money until (and if) it can obtain a final judgment in the principal case.
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> In conclusion I should state that we are not here concerned with a defendant who is acting in bad faith, or who is abusing the process of the Court to obtain some improper advantage. If that were the position the Court would have been entitled to make some appropriate order. However, in the present case the position is that the defendant (first respondent) is prepared to comply with the provisional sentence judgment and requires applicant to do the same. Its purpose is a perfectly proper one, namely to contest the principal case on grounds which are clearly not frivolous or spurious. In these circumstances I can see no basis upon which this Court can grant an order which will in effect change the basic nature of the judgment for provisional sentence. *[my emphasis]*

[20] Rule 8(11) in fact envisages the possibility of security *de restituendo* being furnished before the defendant takes the necessary steps to enter into the principal case. The sub-rule provides that if a defendant

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[20] At 929A—E.

fails to deliver notice of his intention to enter into the principal case and his plea within the prescribed time limits, the provisional sentence shall *ipso facto* become a final judgment and the security given by the plaintiff shall lapse. The question arises, what security when given? It can only be security furnished by the plaintiff under Rule 8(9) upon payment of the amount of the provisional judgment by the defendant.

[21] The principle of payment under security, *solutio fiduciaria*, as embodied in Rule 8(9), does not mean that a defendant is not entitled to security before he had paid the amount due under the judgment. In *Van der Merwe v Bonaero Park (Edms) Bpk*[21] and in *Osmans Spice Works CC v Corporate International (Pty) Ltd*[22] it was held that the payment of the amount required and the delivery of the security shall take place *simul ac semel*.[23]

[22] Counsel for the Applicant submitted that modern authors such as Erasmus, Malan and Herbstein and Van Winsen[24] all rely on a single authority for the proposition that a plaintiff is entitled to a writ of execution at the provisional sentence stage; namely, *Kent v Transvaalsche Bank*[25] where Innes CJ said:

> The object of granting provisional sentence was to afford a summary remedy to plaintiffs who were prepared with liquid proof of the defendant's liability.

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[21] 2000 (4) SA 329 (SCA) at 334D—F (par [8]).

[22] 2005 (6) SA 494 (W).

[23] See also *Aarwater (Edms) Bpk v Venter* 1982 (3) SA 974 (T) at 976F and *Antares (Pty) Ltd v Chenille Corporation of SA (Pty) Ltd* 1976 (4) SA 140 (W) at 141C—F.

[24] Erasmus *et al Superior Court Practice* B1—83; Malan *et al Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes* (1983) at 197; Herbstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed (2009) at 1410.

[25] 1907 TS 765 at 768. The passage is cited with approval in *Osmans Spice Works CC v Corporate International (Pty) Ltd* 2005 (6) SA 494 (W), a decision of a Full Bench of the Witwatersrand Local Division.

> and to enable them to obtain payment of their claims at once on giving security *de restituendo*. And if a defendant could, by entering appearance, without satisfying the provisional judgment, prevent the issue of a writ, the whole object of the procedure would be defeated. I am satisfied that the practice under the Roman-Dutch law was that when a provisional sentence had been given the defendant could not defend unless he satisfied the judgment – obtaining, of course, from the plaintiff the due security which the law required.

Innes CJ says that the principle, embodied in the applicable Rule of the Transvaal Supreme Court at the time, that a defendant may only enter appearance to defend the action "after the judgment has satisfied, either by payment or by levy",[26] "simply embodies the common law practice and principle upon this point".

[23] The statement of Innes CJ in fact reflects long-standing practice in South Africa. This is apparent from the well-known *Prefatory Remarks on Provisional Sentence* in Volume 1 of the Menzies Reports 1—10[27] which reflects the practice of the Cape Supreme Court immediately after the establishment of that Court by the First Charter of Justice of 1828.[28] In the §2 of the Prefatory Remarks it is stated –

> Founded, however, entirely on the presumption of the genuineness of the documents produced to the Court, and of their legal validity, provided only that this validity appear *ex facie*, this decree is not definitive; and by the judgment of the Court, provision is made that the plaintiff shall not be entitled

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[26] Innes CJ points out that within the context of the Rule in question, "levy" means "a levy sufficient to satisfy the exigencies of the writ".

[27] The *Prefatory Remarks* are referred to in *Van der Merwe v Bonaero Park (Edms) Bpk* 2000 (4) SA 329 (SCA) at 335B (par [11]); *CGE Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape and Another* 1976 (4) SA 925 (C) at 928C and in *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) at 607G.

[28] The Menzies Reports, which cover the years 1829—49, are based on the notes of Menzies J, edited from his manuscripts by Buchanan J and first published in 1870, after the death of Menzies J.

> to payment or execution, unless he give adequate security, that, if it should appear on the merits, or, to use the technical language of our law, in the principal case, that the debt on account of which provisional sentence was claimed was not legally due, restitution in full should be made to the defendant of the amount of the judgment and costs.

Reference may also be made to *Junius v Alberts*[29] where the following is stated within the context of the question whether security must be given before payment can be demanded:

> Though in one or two cases the expression is used that security must be given before payment or execution *[my emphasis]*, it is, I think, clear that the practice which has been adopted by this Court and by the Cape is in conformity with the law of Holland. *Voet* 42.1.3 states distinctly that in Holland the defendant had to pay the money directly to the plaintiff upon his giving proper security, and that other wise the money was to be deposited in Court until security had been given.

[24] Counsel for the Applicant laid great stress on the fact that provisional sentence affords interim relief only and submitted that a writ of execution cannot issue in respect of a judgment which is not final. In this regard, the Applicant relied on the judgment of the Supreme Court of Appeal in *Avtjoglou v First National Bank of Southern Africa Ltd*[30] where it was held that provisional sentence does not have any of the characteristics of a "judgment or order" as set out in *Zweni v Minister of Law and Order*[31]. Generally, therefore, the grant of provisional sentence is not appealable,[32] save possibly in exceptional circumstances.[33] The

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[29] 1906 TH 16 at 19.

[30] 2004 (2) SA 453 (SCA) at 457H.

[31] 1993 (1) SA 523 (A) at 532I—J.

[32] *Avtjoglou v First National Bank of Southern Africa Ltd* 2004 (2) SA 453 (SCA) at 457H—458E (par [6])).

[33] *Smit v Scania South Africa (Pty) Ltd* 2004 (3) SA 628 (SCA) at 629H (par [7]).

Applicant submitted that it is, accordingly, not open to a plaintiff armed with a provisional sentence to rely on the notion "judgment of the court" as contemplated by Rule 45 when seeking the issue of a writ of execution.

[25] Counsel for the First Respondent submitted, rightly in my view, that the right of a plaintiff to levy execution on a provisional sentence derives, not from any rule of Court, but from the common law. Rule 45 provides that any party in whose favour a judgment has been pronounced may at his own risk sue out of the office of the Registrar one or more writs of execution. There is nothing in the Rule to suggest that a pronouncement of provisional sentence is excluded from the operation of Rule 45. Counsel further submitted that the reliance on the decision in *Zweni v Minister of Law and Order*[34] overlooks the fact that, that decision was given within the context of an analysis of which judgments are appealable and which are not. The fact that a provisional sentence judgment is not appealable at the provisional sentence stage, does not affect the essential feature of provisional sentence; namely, the right to payment of the amount of the judgment, and *a fortiori* the right to enforce such payment by the levying of execution. This is apparent from the following remark of Zulman JA in *Avtjoglou v First National Bank of Southern Africa Ltd*[35]:

> 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 lose sight of the fact that a plaintiff armed with what is *prima facie* a liquid

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[34] 1993 (1) SA 523 (A).

[35] 2004 (2) SA 453 (SCA) at 458F (par [8])).

> document is entitled to the long-established expeditious remedy of provisional sentence.

[26] Payment and execution at the provisional sentence stage is subject to the provision of adequate security, *solutio fiduciaria.* The defendant is in terms of Rule 8(9) entitled to demand such security and the plaintiff, if unable to provide security to the satisfaction of the Registrar, would not be entitled to payment or execution.

[27] The First Respondent (as plaintiff) was entitled to obtain payment forthwith of the amount of the provisional sentence and to have a writ of execution executed. The writ of execution issued by the Fourth Respondent on 20 August 2008 was accordingly lawfully issued.

The Constitutional challenge

[28] As indicated above, the Applicant relies on an alternative submission in the event of this Court finding that the issue of the writ of execution by the Fourth Respondent on 20 August 2008 was lawful and that the Uniform Rules permit the execution of provisional sentence prior to it becoming a final judgment. The Applicant sets out the gist of his alternative submission in the following terms in the Heads of Argument filed on his behalf:

> In the alternative, if this Court were to find that the Rules do authorise the execution of provisional sentence before it becomes a final judgment. then it is submitted that those provisions are unconstitutional and invalid to the extent that they prevent defendants who cannot satisfy the provisional sentence and taxed costs from entering into the principal case or, at the very least. to the extent that such provisions could result in a defendant who would be able to satisfy the provisional sentence plus taxed costs, but is prevented from so doing in consequence of the attachment. and possible sale in execution of assets which he or she could employ. i.e. to procure finance in order to put him

> or her in a position to satisfy the provisional sentence and taxed costs, and then to enter into the principal case.

[29] Section 34 of the Constitution provides as follows:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The Applicant submits that it is a violation of the rights entrenched in section 34 to allow for execution of any interlocutory order, such as provisional sentence prior to that order becoming a final judgment: all that provisional sentence does is place a burden on the defendant in regard to his ability to enter into the principal case. In this way, the Applicant says, a defendant's dispute with the plaintiff, which has not yet been resolved, would effectively be determined and resolved by the plaintiff's conduct in obtaining a writ of execution. The Applicant further submits that it is in any event unfair to require a defendant to satisfy provisional sentence before he can enter into the principal case. He may have a solid defence to the principal case but because of an inability to satisfy the provisional sentence and taxed costs, he is precluded from even entering into the principal case. This is patently unfair and may work hardship on many defendants. That is an infringement of sec 34 of the Constitution.

[30] In what follows, I deal *seriatim* with the Applicant's submissions. At the outset, it should be kept in mind that provisional sentence is an extraordinary remedy which finds application in limited and prescribed circumstances. This has often been stressed. By way of example, the words of Tebbutt J in *Ashersons v Panache World (Pty) Ltd*[36] may be

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[36] 1992 (4) SA 611 (C) at 612J—613C: see also Herbstein and van Winsen *The Civil Practice of the High Courts of South Africa* 5th ed at 1313 and the authorities cited there.

cited as encapsulating the essence of provisional sentence (in the citation, I omit references to authority):

> It is, of course, trite, that the essence of provisional sentence proceedings is that it provides a creditor who is armed with the necessary documentary proof, usually in the form of a liquid document, with a speedy remedy for the recovery of money due to him. It is a well-recognised, long-standing and often used mode of obtaining speedy relief where the plaintiff is armed with a liquid document ..... It is based upon "the strong *prima facie* proof of debt as is afforded by a clear written acknowledgement of debt or written undertaking of payment" ..... Where a creditor possesses a liquid document, ie a document wherein the debtor acknowledges, or is in law deemed to have acknowledged, his indebtedness to the creditor in a fixed and determined sum of money, a rebuttable presumption of indebtedness arises on which the creditor can obtain provisional sentence .....

While the plaintiff must at the provisional stage discharge his *onus* on a preponderance of probabilities,[37] the defendant need only satisfy the Court that, having regard to the incidence of *onus* in the principal case, the probabilities of success in the principal case are against the plaintiff.[38] A defendant with a "solid defence" (to use the Applicant's phrase) to the plaintiff's claim has no insurmountable barrier to overcome and will in the normal course be able to avert the grant of provisional sentence.

[31] The position of the defendant after the grant of provisional sentence is protected by the provisions regarding the furnishing of security. A plaintiff who fails to provide security *de restituendo*, is not entitled to payment of the amount of the provisional sentence or to levy

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[37] *Inglestone v Pereira* 1939 WLD 55 at 71; *Rich v Lagerwey* 1974 (4) SA 748 (A) at 760F—H; *Scalia Café v Rand Advance (Pty) Ltd* 1975 (1) SA 28 (N) at 31H—32A.

[38] *Froman v Robertson* 1971 (1) SA 115 (A) at 120B—C; *Barclays National Bank Ltd v HJ de Vos Boerdery Ondernemings (Edms) Bpk* 1980 (4) SA 475 (A) at 484D—E; *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd* [2000] 1 All SA 1 (C) at 5a.

execution on the provisional judgment. The interests of both the plaintiff and the defendant are further protected by the requirement that the making of payment and the furnishing of security must take place *simul ac semel*, together and at the same time

[32] The Applicant says that particular sets of circumstances may work hardship upon a defendant faced with execution immediately upon grant of provisional sentence. Such hardship can be avoided (1) by the provisions relating to the provision of security, and (2) by taking recourse to existing and readily available remedies. Rule 45A affords such a remedy: in the situation postulated by the Applicant, the affected defendant may seek an order suspending the execution of the provisional sentence for such period and on such terms as the Court may deem fit.

[33] The Applicant further says that a defendant with a good defence but who is unable to show the probabilities of success at the provisional stage and who lacks the means to satisfy the provisional sentence and enter into the principal case, will be precluded from having his defence adjudicated by a Court. Counsel for the First respondent submitted that the potential infringement of the rights of this (limited) class of defendant can be accommodated by having resort to sec 173 of the Constitution. By virtue of its inherent power to protect and regulate its own process, and to develop the common law, the Court provisional sentence may regulate and develop provisional sentence by permitting those defendants whose rights are potentially infringed in this way to approach the Court to obtain leave to enter into the principal case notwithstanding that the provisional sentence had not been satisfied.

[34] The Applicant is not such a defendant: he has not endeavoured to enter into the principal case; he has assiduously avoided revealing the

nature of his defence, if any, to the substance of the claim against him, and he has not said (and all indications are that he cannot say) that he is unable to pursue his defence to the action by reason of the requirement of payment of the amount of the provisional sentence against the provision of adequate security.

[35] Doubts have before been raised about certain features of provisional sentence procedure. Thus Malan *et al*[39] submit that the fact that a Court in the provisional proceedings has no inherent jurisdiction to hear oral evidence on issues other than the authenticity of the defendant's signature, may violate a defendant's basic right to present his case. In Herbstein and Van Winsen[40] it is submitted that in the light of the decisions in *Mthetwa v Diedricks*[41] and *Shepherd v O'Neill*,[42] and the reasoning in *Shepstone & Wylie v Geyser NO*,[43] there must be "serious doubts about the validity of this rule" The grounds of possible invalidity raised by these authors were neither raised nor canvassed in the proceedings before me.

[36] Even before the days of our Constitutional dispensation, doubts were expressed about provisional sentence. There is the well-known observation by Tindall AJP in *Rood v Van Rooyen*[44]:

> If I could refuse provisional sentence, I should like to do so, because I am not enamoured of the procedure of provisional sentence. I should like to see the

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[39] *Provisonal Sentence on Bills of Exchange, Cheques and Promissory Notes* (1986) at 243.

[40] *The Civil Practice of the High Courts of South Africa* 5th ed (2009) at 1411.

[41] 1996 (4) SA 381 (N); 1996 (7) BCLR 1012 (N).

[42] 2000 (2) SA 1066 (N).

[43] 1998 (3) SA 1036 (SCA).

[44] 1934 TPD 110 at 111.

> procedure abolished and to see it superseded by new Rules of Court providing a simplified and speedy procedure for hearing actions founded on liquid documents.

What is significant about this observation is that Tindall AJP recognises the need for "a simplified and speedy procedure for hearing actions founded on liquid documents", and proposes an orderly process involving the promulgation of new rules.

[37] If the potential infringement of the rights of certain defendants can be accommodated without jettisoning the undoubted benefits of provisional sentence, the Court should follow that route. The shortcomings of provisional sentence are not to be dealt with by setting aside as unconstitutional a single or subsidiary feature of the process, leaving on the face of it the rest of the edifice untouched, but in fact emasculating the entire process. This is what will happen if applications of the kind made in this matter were to be granted: it would be an order "which will in effect change the nature of the judgment for provisional sentence".[45] If changes are to be made, the route envisaged by Tindall AJP ought to be followed.

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[45] In the words of Grosskopf J, cited more fully and within context in par [19] above.

[38] In the result, I make the following order:

The application is dismissed. The Applicant must pay the costs of the First Respondent, such costs to include the costs occasioned by the employment of two counsel.

HJ ERASMUS,J