Reportable

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

CASE NO: 11457/08

In the matter between:

IOLA MAHON	Plaintiff
and	
BRIAN ROBERT MAHON	Defendant

JUDGMENT DELIVERED ON 11 MAY 2009

H.J. ERASMUS, J:

[1] On 18 August 2008 I granted provisional sentence against the defendant. Reasons for my judgment were delivered on 29 August 2008. The defendant applies for leave to appeal against that judgment. In essence, three grounds of appeal are raised. It is contended that the Court erred and misdirected itself –

1. by not granting the defendant a postponement on 18 August 2008;

2. by finding that the foreign judgment relied upon by the plaintiff was final; and

3. by failing to accept the defendant's version that this Court does not have jurisdiction to grant provisional sentence because the defendant is not domiciled or resident within the area of jurisdiction of the Court.

[2] Generally, the grant of provisional sentence is not appealable,[1] save possibly in exceptional circumstances.[2] In this matter, the issues raised in the application for leave to appeal do not pertain to the question whether or not the defendant owes the money claimed, but to the jurisdiction of the Court to entertain the claim for provisional sentence, and to lack of proof of the finality of the foreign judgment relied upon. For purposes of this judgment, I shall assume, without deciding, that these constitute exceptional circumstances in that the validity and fairness of the provisional sentence proceedings are placed in issue.

Postponement

[3] The defendant contends that the Court erred and misdirected itself by not granting a postponement on 18 August 2008 on three grounds:

1. The defendant made out a proper case for postponement; the plaintiff filed no affidavit in opposition to the application for a postponement, with the result that a miscarriage of justice occurred and a violation of the defendant's rights.[3]

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[1] *Avtjoglou v First National Bank of Southern Africa Ltd* 2004 (2) SA 453 (SCA).

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

[3] In the Application for Leave to Appeal it is erroneously said that there was a violation of the plaintiff's rights.

2. Having refused a postponement, the Court accepted the plaintiff's version and rejected the defendant's version.

3. The third ground is that the Court erred and misdirected itself –

> ..... by not granting a postponement when the Plaintiff filed and served a notice of set down on 13 August 2008 and thereafter on 15 August 2008, one court day before the hearing, filed substantive replying affidavits

A further ground of appeal which may be considered under this head is that the Court erred in finding that the defendant was resident in South Africa on 17 July 2008 "on the basis of that set forth in the Sheriff's return of service, when such return does not demonstrate that at all".

[4] The provisional sentence summons was taken out on 16 July 2008 and served on 17 July 2008. The summons accords in full with the provisions of Rule 8(1) and Form 3. In paragraph 2 of the summons, the defendant is called upon to appear before this Court, personally or by a legal representative, "on Monday the 18th day of August 2008 at 10h00 ..... to admit or deny his liability" for the claim made in the summons. The defendant was, therefore, from the outset made aware of the fact that the matter would be heard on 18 August 2008. In paragraph 4 of the summons, the defendant is enjoined to file, not later that 14 August 2008, an affidavit in which he sets forth "the grounds of his defence" to the claim made in the summons.

[5] The defendant complied with the injunction in paragraph 4 of the summons by filing in good time his "Affidavit in Response to Provisional Sentence Summons". The affidavit was deposed to on 31 July 2008. The only defence raised in the affidavit is the lack of jurisdiction of this Court on the ground of the defendant's alleged residence in Mauritius. The plaintiff filed a replying affidavit in accordance with the provisions of Rule 8(5).

[6] The application for postponement was brought on 18 August 2008, the appointed day of hearing. In the supporting affidavit deposed to by Mr M Phillips, the defendant's Cape Town attorney, the reason for the request of a postponement is encapsulated in the following paragraph:

> Defendant then informed me that as he has previously indicated, he wished to defend the provisional proceedings instituted by plaintiff against him on the basis that the High Court of South Africa, Cape of Good Hope Provincial Division does not have jurisdiction over him. Defendant also enquired as to his rights with regard to the replying affidavit delivered by Plaintiff inasmuch as he wished to deal with Plaintiff's flawed contentions with regard to his residence, read with the plaintiff's malicious imputations of dishonourable conduct against him forming part of her replying affidavit.

[7] The essential ground for the defendant's request for a postponement is that he is to be given the opportunity to respond to the allegations made in regard to his residence in the plaintiff's replying affidavit. It is true that in the penultimate paragraph of his affidavit, Mr Phillips says that the defendant will be prejudiced "if he is not afforded a proper opportunity of obtaining proper legal advice herein both in a general sense and, more particularly, in relation to the pending provisional sentence proceedings." However, the defendant had ample

time to consider his position and on 31 July 2008 decided to raise only one defence in his opposing affidavit, that of lack of jurisdiction. In that affidavit, he gives no inkling of his need for "a proper opportunity of obtaining proper legal advice". That need clearly only arose when the plaintiff's affidavit came to his notice.

[8] In my judgment, I dealt fully with the discretion of a Court to allow a defendant in provisional sentence proceedings to file a further affidavit. I need not reiterate or refurbish the grounds on which, in the exercise of my discretion, I refused to grant a postponement in order to enable the defendant to consider his position in regard to the filing of a further affidavit. Perhaps I should only reiterate that in his affidavit in response to the provisional sentence summons, the defendant categorically states:

> It took only a few months after leaving the United Kingdom during 2006 for me to decide that I will not remain in South Africa permanently as a resident and that I will in fact settle in Mauritius. I left South Africa early in 2007.

More than a year after he had allegedly left South Africa, in May 2008, the defendant sought to appeal against the judgment of the English Court which founds the provisional sentence proceedings in this Court. In his notice of appeal, completed by the defendant in his own handwriting and dated 12 May 2008, he gives his address as 7 Strathmore Lane, Camps Bay; that is, the address where the summons in this matter was served on 17 July 2008. In the section headed "Evidence in support" he states: "I am 50 and live in South Africa".

[9] These glaringly contradictory statements were made deliberately to suit the convenience of the moment. In June 2006, the plaintiff sought to disavow the jurisdiction of the English courts in the divorce proceedings the plaintiff had instituted in England on the ground, set out under oath in an affidavit, that he is resident in South Africa. In that affidavit, he sets out in considerable detail why "we are and remain a quintessentially South African Family". In his notice of appeal of 12 May 2008 he reiterates the fact that he is resident in South Africa. In the provisional sentence proceedings before this Court, the defendant seeks to disavow the jurisdiction of this Court on the ground, set out under oath in an affidavit, that he has been resident in Mauritius since early 2007. In the circumstances, I refused the application for a postponement in order to enable the defendant "to deal with Plaintiff's flawed contentions with regard to his residence".

[10] It is within this context that the Sheriff's return of service is important. While it may not by itself demonstrate that the defendant was resident in South Africa on 17 June 2008, if seen within the context of all the relevant facts, of which those set out in the previous paragraphs form part, the Sheriff's return affords support for the view that the plaintiff was on 17 June 2000 in fact resident in South Africa.

[11] In my view, there is no reasonable prospect that another Court will come to the conclusion that I had not properly exercised my discretion in refusing to grant a postponement.

Final judgment

[12] In his application for leave to appeal, the defendant states that the Court misdirected itself –

> ..... by impermissibly finding that the foreign judgment relied upon by the plaintiff was final on the basis of the inadmissible opinion provided by a Barrister of one year's standing at the Bar of England and Wales in conflict with the principle set out in *Westdeutsche Landesbank Girozentrale v Horsch* 1993 (2) SA 342 (NmSC) at 344B—D.

In *Westdeutsche Landesbank Girozentrale v Horsch*[4] Levy J stated:

> Foreign law must be proved by evidence. In the present case, such evidence must be given by affidavit by some person qualified to give such evidence.

[13] The objection that the barrister's opinion is not admissible and that the Court was not entitled to find that the judgment relied on by the plaintiff is final, was not raised at the hearing of the provisional sentence proceedings. It is therefore necessary to deal with the objection in some detail in this judgment.

[14] Annexed to the provisional sentence summons are (i) a certified and authenticated copy of the Order of 19 March 2008 of the Family Division of the High Court of Justice in the United Kingdom on which provisional sentence is sought; (ii) a certified and authenticated copy of the Order of the same Court on 23 April 2008 by which the aforesaid

[4] 1993 (2) SA 342 (NmSC) at 344C.

Order was perfected and the defendant's application for permission to appeal was refused; and (iii) a certified and authenticated copy of the Order of the Court of Appeal on 24 June 2008 refusing permission to appeal and a stay of execution. It is of importance to note that the Order of the Appeal Court was made after hearing counsel on behalf of the parties.

[15] Also annexed to the provisional sentence summons is the opinion of Mr Edward Cumming. In a certificate annexed to the opinion, a notary public certifies that Mr Cumming, being duly qualified, is entitled to practise as a barrister, and that he signed the opinion in her presence and that she accordingly certifies the genuineness of the signature appended at the foot of the opinion. Mr Cumming concludes that the Orders are final and not capable of further appeal by the defendant.

[16] The defendant says that the opinion of Mr Cumming is inadmissible because it is not on oath. For purposes of this judgment, I shall accept that in the present case, such evidence must be given by affidavit. In passing, I should say that I fail to understand the relevance of the defendant's statement, and counsel's reference thereto in argument, that Mr Cumming is a barrister of one year's standing. In issue, after all, is an elementary matter of civil procedure, not a complex question of law.

[17] Section 1(1) of the Law of Evidence Amendment Act 45 of 1988[5] provides, *inter alia*, that --

> Any court may take judicial notice of the law of a foreign state .... in so far as such law can be ascertained readily and with sufficient certainty.

Under the section, the courts have taken judicial notice of an aspect of German law in *Holz v Harksen*[6], and of the Scottish Family Law Act, 1985 in *Hassan v Hassan*[7]. In both these cases, counsel for the parties provided the Court with the necessary material on which to base its finding. In *Harnischfeger Corporation and Another v Appleton and Another*[8] Fleming DJP held that he could not take judicial notice of aspects of the copyright law applicable in Milwaukee in 1966 to 1969 which was, by reason of deficient library facilities, not "readily" ascertainable "with sufficient certainty".

[18] Zeffert, Paizes and Skeen[9] point out that the application of the section must necessarily take cognisance of the fact that the law of some foreign jurisdictions have always been regarded as being known, or at least readily accessible to South African lawyers, the obvious example being the law of England.

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[5] The comments of Prof Ellison Kahn on the amending Act in 1988 *Annual Survey* 493—496 are instructive.

[6] 1995 (3) SA 521 (C).

[7] 1998 (2) SA 589 (D).

[8] 1993 (4) SA 479 (W).

[9] *The South African Law of Evidence* (2003) at 728, with reference to *C Hoare and Co v Runewitsch and Another* 1997 (1) SA 338 (W); see also the comments of Prof Ellison Kahn referred to in footnote 5 above, and *G & P v Commissioner of Taxes* 1960 (4) SA 183 (SR) at168H—169B.

[19] Can the Court in this matter take judicial notice of the English law of civil procedure which governs the finality, or otherwise, of the judgment on which the plaintiff relied in her quest for the grant of provisional sentence? The Court has before it certified and authenticated copies of the Order of the Family Division of the High Court of Justice of 23 April 2008 by which the Order of the same Court of 19 March 2008 was perfected and the defendant's application for permission to appeal was refused, and of the Order of the Court of Appeal on 24 June 2008 by which permission to appeal and a stay of execution were refused.

[20] Readily available and accessible to this Court are the applicable English statutory provisions. Rule 52.3 (3) and (4) of the English Civil Procedure Rules provide as follows:

> 52.3 (3) Where the lower court refuses an application for permission to appeal, a further application for permission to appeal may be made to the appeal court.
>
> 52.3 (4) Where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.

In this case there was a hearing in the Court of Appeal. Two further provisions are accordingly applicable. The first is section 54 of the Access to Justice Act, 1999 which deals with "Permission to appeal". Subsection (1) provides that rules of court may provide that any right of appeal to a county court, the High Court or the Court of Appeal may be exercised only with permission. Subsection (4) provides –

> (4) No appeal may be made against a decision of a court under this section to give or refuse permission (but this subsection does not affect any right under rules of court to make a further application for permission to the same or other court).

The second is a Practice Direction[10] which deals explicitly with the situation where there has been a hearing in the appeal court:

> There is no appeal from a decision of the appeal court, made at an oral hearing, to allow or refuse permission to appeal to that court. See section 54(3) of the Access to Justice Act, 1999 and rule 52.3(3) and (4).

[21] In my view, there is sufficient material readily available to ascertain with sufficient certainty that the judgment on which the plaintiff relies is final and conclusive.

[22] In conclusion, reference should be made to the general principles and rules which apply in regard to proceedings for the enforcement of a foreign judgment which is subject to appeal. In *Jones v Krok*[11], Corbett CJ stated those general principles and rules as follows –

> (1) The fact that the judgment is subject to appeal or even that an appeal is pending in the foreign jurisdiction does not affect the finality of the judgment, provided that in all other respects it is final and conclusive.
>
> (2) Where, however, it is shown that the judgment is subject to such an appeal or that such an appeal is pending, the Court in this country which is asked to enforce the judgment enjoys a discretion and in the exercise thereof

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[10] Practice Direction 52PD6 4.8 (White Book (2002) vol I, 1206).

[11] 1995 (1) SA 677 (A) at 692B—G.

> may, instead of giving judgment in favour of the plaintiff, stay the proceedings pending the final determination of the appeal or appeals in the foreign jurisdiction.
>
> (3) Although the *onus* of proving that a foreign judgment is final and conclusive rests upon the party seeking to enforce it ..., it seems to me that, where this *onus* has been discharged, it is up to the defendant place before the Court the facts relating to the impending appeal and such other relevant facts as may persuade the Court to exercise its discretion in favour of the granting a stay of proceedings.
>
> (4) In exercising this discretion the Court may take into account all relevant circumstances, including (but no confined to) whether an appeal is actually pending, the consequences to the defendant if judgment be given in favour of plaintiff and thereafter (possibly after the judgment has been satisfied) the appeal succeeds in the foreign jurisdiction and whether the defendant is pursuing the right of appeal genuinely and with due diligence. As a rule, however, the Court will refuse to assess merits and demerits of the appeal and its prospects of success in the foreign Court.

The defendant has not placed any facts before the Court relating to any impending, or intended, appeal and no other relevant facts as might have persuaded the Court to exercise its discretion in favour of the granting a stay of proceedings. At the hearing of the application for leave to appeal, counsel for the defendant, in reply, by way of afterthought, submitted that the possibility of an appeal to the European Court has not been excluded. Nothing was placed before the Court, by way of argument or otherwise, to elucidate the bare submission. In fact, nothing was placed before the Court at any stage, including the hearing of the application for leave to appeal, to indicate that the defendant is pursuing, or intends to pursue, genuinely and with due diligence, any right of appeal which he may have.

[23] In *Jones v Krok*[12] Corbett CJ said that –

> ..... a party armed with an otherwise final and conclusive foreign judgmen should be entitled, *prima facie*, to relief in our Courts.

In my view, the plaintiff was, and is, so armed and so entitled.

Residence

[24] The defendant contends that the Court erred and misdirected itself by failing to accept the defendant's version that this Court does not have jurisdiction to grant provisional sentence because the defendant is not domiciled or resident with the jurisdiction of the Court.

[25] In my view, there is no reasonable prospect that another Court will come to the conclusion, in the light of the totality of the evidence, that the defendant's version set out in his opposing affidavit should have been accepted.

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[12] 1995 (1) SA 677 (A) at 692I.

[26] In view of the foregoing, I make the following order:

The application for leave to appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

HJ ERASMUS, J