IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. **2404/2011**

In the matter between:

ROBERT DOERNER **Plaintiff**

and

BIANCA GUBALKE **Defendant**

JUDGMENT DELIVERED: 20 March 2012

GANGEN, A J:

[1] In February 2011 Plaintiff sought provisional sentence against Defendant in respect of a default judgment obtained by Plaintiff on 14 April 1997 in a civil action against Defendant in the local court of Dusseldorf, Federal Republic of Germany. In terms of the judgment, Defendant was ordered to pay-

(a) damages in the sum of DM 29 309.80,

(b) legal costs determined at DM 3 493.93 and

(c) 4% interest on the legal costs from 4 April 1997.

[2] The judgment debt was in respect of arrear rental and damages in respect of an Agreement of Lease for premises situated at 15 Luegallee, Dusseldorf let by Plaintiff to Defendant for a period of five years from 1 January 1991 to 1 January 1996.

[3] Defendant denies liability in terms of the judgment and contends that she took up permanent residence in South Africa in July 1995 having left Germany for South Africa on 29 June 1995 and having informed the letting agents that the lease would be taken over by her husband and that Plaintiff was aware by February 1996 (having met her husband about the sale of the property) that she was no longer resident in Germany. Defendant avers further that her husband via his attorney Dr Michael Roggen requested the Plaintiff to direct all further communication to him.

[4] As evidence, Defendant submitted a copy of an *aval* which is dated 16 June 1995 which indicates that the original *aval* for the deposit in terms of the lease was transferred into her husband's name. She also submitted a letter from a German attorney, Dr Michael Roggen, to Defendant's attorney of record, confirming that he had previously acted on behalf of Defendant's husband in a matter regarding Plaintiff, represented by attorney Fritz, relating to an apartment situated at 15 Luegallee, Dusseldorf, leased from Plaintiff in the period 1995/1996. The Plaintiff denied that this was so.

[5] There are four main grounds on which Defendant contests the claim for provisional sentence-

(1) Plaintiff's papers are not in order
(2) the German Court lacked jurisdiction
(3) the judgment was not final and
(4) it would be contrary to public policy as there has been a failure of natural justice.

[6] A copy of a duly authenticated Court Order was annexed to the summons. On 31 August 2011 the matter was set down and Defendant took the point that Plaintiff had failed to produce "the original judgment". After hearing argument, Mantame A J granted an order postponing the matter to 6 December 2011 and granted Plaintiff leave to amend his summons-

(1) by obtaining a certified translation of the *apostille* that appeared at page 15 of the record and
(2) by obtaining the original judgment of the German court which appeared at pages 11A and 11B of the record.

[7] Plaintiff duly amended his summons by filing a certified translation of the apostille but, instead of filing the originals of the copies of the judgment attached to the summons, handed in an original microfiche version of the judgment. No explanation was submitted by Plaintiff as to why the originals of the documents attached to the summons were not furnished.

[8] Defendant contends that Plaintiff's amendments are defective as Plaintiff was granted leave to file the original of the copy of the judgment attached to the summons but failed to do so and that there were various differences between

the copy of the judgment annexed to the summons and the microfiche version.

[9] Plaintiff submits that the practice of handing up the original document is based on evidentiary efficacy in establishing the liquidity of Plaintiff's claim and that the differences in the documents are technical and that it is undesirable that the Courts should readily allow highly technical objections thereto. Plaintiff also submits that the judgment is prima facie proof of indebtedness and that the microfiche judgment reflected the essence of Plaintiff's claim which was based on the judgment and not on the paper.

[10] Whilst I am inclined to the view that the differences between the documents are of a technical nature and not material, both documents attached to the summons and the subsequently amended documents are indicative of the judgment, granted by the German court, on which Plaintiff's claim is based. However, the order of 31 August was specific. Plaintiff was granted leave to amend his summons (1) by obtaining a certified translation of the *apostille* that appeared at page 15 of the record and (2) by obtaining the original judgment of the German court which appeared at pages 11A and 11B of the record. In the absence of an explanation as to why the originals of the documents attached to the summons could not be obtained or an application for amendment, it cannot be said that the Plaintiff's papers are in order.

[11] It is trite that in order for a foreign judgment to be recognised and enforced, it must, inter alia, be pronounced by a Court having international competence,

the judgment must be final and the enforcement by our courts should not be contrary to public policy. Each of these three elements for recognition is contested by Defendant.

[12] Plaintiff submits that the judgment is final and executable and as proof thereof attaches an affidavit by a German attorney who acted for Plaintiff at the time of the German proceedings which indicates that "the judgment given was provisionally executable for a period of two weeks during which time defendant could lodge an appeal" and that, as no appeal was lodged, the judgement was final.

[13] Defendant submits that a foreign judgment will be liquid for the purposes of provisional sentence if the judgment appears *ex facie* the record to be final and that she disputes the finality of the judgment on the grounds that the foreign judgment states that it was granted provisionally enforceable. Defendant further contends that the attorney Frits alleges "personal knowledge" that no appeal was lodged but fails to indicate how he came to have this personal kn owledge.

[14] Although it is evident that Defendant was not aware of the judgment and therefore was not in a position to appeal, the Court notes that it appears ex facie the translation of the judgment that "The judgment is declared provisionally enforceable". The affidavit of the German attorney does not discharge Plaintiff's onus to satisfy this Court that the judgment was final in

that there is no information as to the facts or law placed before this Court to show that the provisional enforceability was relative to the appeal period.

[15] Defendant alleges that the enforcement of the foreign judgment in this instance will be contrary to public policy as the proceedings against Defendant during 1996 were not served on her personally, she did not have any knowledge thereof until February 2010 and that as she had no knowledge of the proceedings she was not given an opportunity to raise a defence thereto. Defendant further alleges that by seeking to enforce the judgment nearly 14 years after it was granted, Plaintiff has prejudiced Defendant's ability to lodge and execute an appeal against the foreign judgment or to raise a defence thereto at this stage.

[16] Plaintiff's response is that this argument is unsustainable as the *audi* principle does not apply in default proceedings and that personal service is impossible in circumstances where Defendant has absconded. Plaintiff further submits that as the procedure to obtain default judgment were those of German law, the judgment cannot be attacked on the grounds of non-compliance with the rules of natural justice.

[17] Forsyth 'Private International Law'4th ed at 431states that:

'Natural justice here bears its normal meaning; it requires that the hearing should take place before an impartial tribunal, that the defendant should have due notice of the proceedings against him and that he has an opportunity to present his case.'

[18] Even though the Plaintiff's counsel submits that judgment was *duly* obtained and that 'duly' means following proper procedure, it is clear that judgment was granted by default. Default judgments have been recognised but in those cases the Defendant was aware of the claim against him/her.

[19] However, in circumstances where Defendant's whereabouts were unknown to Plaintiff at the time of the issue of the proceedings and Plaintiff was aware that Defendant was no longer at the last known address, that address being the address of the leased premises, I am of the view that Plaintiff ought to have placed more information before this Court as to the steps taken to trace Defendant at the time of the institution of the proceedings, other than to make enquiries at the Dusseldorf Resident's Registration office and to accept a certificate of residency relating to the vacated premises when the Plaintiff was aware that Defendant had vacated the premises. It is clear that Defendant was not given an opportunity to enable her to answer the case of Plaintiff. Defendant was thus not afforded an opportunity to present her case to the German Court.

[20] With regard to the issue of international competence in relation to residency, Plaintiff claimed that the foreign court was a court of competent jurisdiction as the whole cause of action arose within its area of jurisdiction and that Defendant was resident within the jurisdiction of the German Court at the time the process was issued. Plaintiff relies on a statement of residency by the Dusseldorf Resident's Registration Office dated 4 December 1996 that Defendant was registered as a resident at 15 Luegallee. Defendant contends

that the certificate indicates that she was registered as a resident and not that she was resident as is submitted by Plaintiff. Defendant alleges that she took up permanent residence in South Africa in July 1995 having left Germany for South Africa on 29 June 1995 and submits an Exchange Control Concession Form signed in Fish Hoek, Western Cape on 10 July 1995 to confirm her residency in South Africa.

[21] It is noted that the Statement of Residency on which Plaintiff relies indicates that Defendant is registered as a resident at Luegallee 15, Dusseldorf which is the address of the leased premises. The Statement of Residency further indicates that "I have today instructed our field staff to ascertain her actual whereabouts."

[22] The translation of the default Judgment also indicates that Defendant last resided at Luegallee 15 and that her current address was unknown.

[23] It is accordingly apparent that Plaintiff was aware that Defendant was not resident at 15 Luegallee and has not placed any information before this Court to satisfy this Court that Defendant was resident within the jurisdiction of the German Court at the time the process was issued.

[24] Plaintiff has accordingly failed to satisfy the requirement of international jurisdiction and competence.

[25] There is also the issue of the wasted costs for 28 February 2011 in respect of which the Plaintiff's attorneys were required to file an affidavit as to why the matter was not set down. Defendant has submitted that the wasted costs for 28 February 2011 should be awarded on an attorney and client scale. Plaintiff's then attorneys of record explained that the matter was not set down due to an administrative oversight. In the circumstances, Defendant is entitled to payment of the wasted costs of 28 February 2010 on an attorney and client scale.

[26] The claim for provisional sentence is accordingly refused with costs. Plaintiff is also ordered to pay the wasted costs of 28 February 2011 on an attorney and client scale.

GANGEN A J