

SOUTH AFRICA / JUDGMENT

Osman's Spice Works CC v Corporate International (Pty) Ltd (A5036/04) [2005]

ZAGPHC 1; 2005 (6) SA 494 (W) (19 May 2005)

[2005] ZAGPHC 1

COURT

High Courts - Gauteng

BEFORE

M.B. Labe, C.J. Claassen, R.R. Rosenberg

CASE / FILE NUMBER

A5036/04

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IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION) Case No:
A5036/2004 Osman's Spice Works CC

Appellant/Plaintiff a quo vs Corporate International (Pty) Ltd Respondent/Defendant a quo

JUDGMENT Labe J: A INTRODUCTION [1] This is an appeal by the appellant against the decision of a single judge in this division in an application brought by the appellant as applicant against the respondent (the application) about which I give further details below. The appellant is represented by Adv O.A. Moosa SC and the respondent by Adv P. Strathern. On 19 May 2005 we upheld the appeal and granted ancillary and consequential relief. We said that our reasons for doing so would follow. These are the reasons.

B THE BACKGROUND TO THE APPLICATION [2] 1. On 18 June 2003 provisional sentence was granted in favour of the appellant against the respondent for: "CLAIM A: 1. Payment of the sum of R795,000.00. 2. Interest on R795,000.00 to date of payment at the rate of 15.50 per centum per year from 1 October 2002. CLAIM B: 1. Payment of the sum of R1 200 000.00. 2. Interest on R1 200 000.00 to date of payment at the rate of 15.50 per centum per year from 1 October 2002. CLAIM C: 1. Payment of the sum of R1 200 000.00. 2. Interest on R1 200 000.00 to date of payment at the rate of 15.50 per centum per year from 1 October 2002. 3. Costs of suit including the costs occasioned by the employment of 2 Counsel." 2. On 25 June 2003 in a letter served on the appellant at 12:09 p.m. on that day, the respondent demanded that security de restituendo be furnished by the appellant by not later than 10 a.m. on 26 June 2003. On the same day at 2:46 p.m. and before the period granted for the putting up of the security had elapsed, a letter was delivered by the respondent to the appellant advising the appellant that the respondent was entering into the principal case. 3. On 26 June 2003 the appellant furnished security by way of the document bearing that date. 4. The registrar ruled on 3 July 2003 that the document did not constitute security. 5. The appellant then furnished the respondent with a letter of undertaking from Nedbank dated 11 July 2003 which the registrar ruled on 17 July 2003 constituted security in terms of Rule 8(9) of the rules. 6. The respondent nonetheless refused to make payment of the

principal sum, interest and costs contending that because the appellant had not furnished security to the satisfaction of the registrar pursuant to its request therefor dated 25 June 2003, it was entitled to enter upon the principal case.

C THE APPLICATION[3] By notice of motion dated 1 August 2003 the appellant claimed an order in the following terms: “1. The citation of the Defendant in this entire matter, including in respect of the Provisional Sentence Judgement delivered in Plaintiff’s favour on the 18th of June 2003, be and is hereby amended to Sir Trading (Pty) Ltd t/a Corporate International, and the Registrar is directed to furnish Plaintiff with the Provisional Sentence Judgment aforesaid reflecting the Defendant’s citation as amended aforesaid; 2. That it be and is hereby declared that the Defendant/Respondent is not entitled to enter into the principal case in case No. 24614/2002 in this Honourable Court in terms of Rule 8(11); 3. That the Defendant/Respondent’s notice of intention to enter into the principal case in Case No. 24614/2002 and its Plea in the same matter be set aside in terms of Rule 30 as irregular proceedings; 4. That it be and is hereby declared that the provisional sentence judgement granted in Case No. 24614/2002 by Madam Justice Mailula on Wednesday the 18th June 2003 has become a final judgement; 5. That it be and is hereby declared that the Plaintiff/Applicant is entitled to levy execution in terms of the Uniform Rules of Court in respect of the said provisional sentence judgment granted under Case No. 24614/2002; 6. That the Respondent pay the costs of this application including those occasioned by the employment of two Counsel; 7. Such further or alternate relief as this Honourable Court may deem meet.”

D THE DECISION OF THE COURT [4] The court a quo granted the application to amend and dismissed the remaining prayers.

E THE APPEAL [5] Leave to appeal having been granted an appeal was noted to this court. The grounds of appeal are set out below: “2. The Court erred in not holding that the Plaintiff had sixty (60) days from the 18th of June 2003 within which to furnish Defendant with security to the satisfaction of the Registrar. 3. Alternatively, the Court erred in not holding, following on its acceptance that the import of Rule 8(10) of the Uniform Rules of Court is that a person should be afforded a reasonable opportunity to furnish security following on demand, that the Plaintiff, as a logical consequence thereof, must be afforded more than one opportunity to furnish security provided that this is done within a reasonable time. 4. Further alternatively, the Court erred in not holding, following on its acceptance that the import of Rule 8(10) of the Uniform Rules of Court is that a person should be afforded a reasonable opportunity to furnish security following on demand, that the demand made by the Defendant on 25 June 2003 that security should be furnished by 10h00 on 26 June 2003 did not afford Plaintiff reasonable time within which to furnish security. 5. Further alternatively, the Court erred in not holding that the Defendant purported to enter into the principal case on 25 June 2003, that is even before its own deadline for the furnishing of security had expired, and that such purported act was accordingly premature and invalid, with the consequence that the Defendant has never entered the principal case.”

F THE APPEALABILITY OF THE DECISION OF THE COURT [6] When we first read the papers, we were of the opinion that it was debatable whether the decision of the court a quo was appealable and we asked the parties to include argument in regard thereto in their heads of argument. [7] In *Zweni v Minister of Law and Order* 1993(1) SA 523 (A) where Harms AJA, as he then was, said this at 531I - 532A: “1. For different reasons it was felt down the ages that decisions of a ‘preparatory or procedural character’ ought not to be appealable (per Schreiner JA in the Pretoria

Garrison Institutescasesupraat 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (SA Eagle Versekeringsmaatskappy Bpk v Harford[1992] ZASCA 42;1992 (2) SA 786(A) at 791B – D). The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution (Priday t/a Pride Paving v Rubin1992 (3) SA 542(C) at 548H – I).”See alsoPriday t/a Pride Paving v Rubin1992 (3) SA 542(C) Conradie J, as he then was, said this at 547D – G:“The Courta quonow has a large measure of control over appeals and is able to assess whether or not an interlocutory order, whether final in effect or not, could fruitfully be taken on appeal. This assessment includes not only a consideration of the prospects of success on appeal. It includes deciding whether the result of the appeal would contribute to resolving one or more of the disputes between the parties in an efficient and cost effective way and generally the efficacy of leave to appeal in curtailing the overall duration of litigation between parties.There is therefore no longer any practical distinction between an interlocutory order with final effect and a simple interlocutory order. In the case of an interlocutory order with final effect the Court would, as before, determine whether it disposed of any issue or any portion of an issue in the main case; in the case of a simple interlocutory order, the question would be whether the decision of the Courta quo, if reversed or altered on appeal, would dispose of any issue or portion of an issue in the main case. One no longer looks, as was the case formerly, only at the effect of the decision of the Courta quoon the proceedings in the Courta quo. In each case the critical consideration would be whether a judgment on appeal before the matter proceeded any further would best serve the interests of both parties.Van StreepenGerms (supraat 585E – I.)”InVan Streepen& Germs (Pty) Ltd vTransvaalProvincial Administration1987 (4) SA 569(A) Corbett JA, as he then was, said at 585E – I:“It is clear from the line of casesto which I have thus far referred that the main reason for this Court having given what Centlivres CJ described as a ‘restricted meaning’ to the words ‘judgment or order’ has been a reluctance to allow the piecemeal decision of cases, ie numerous subsidiary appeals during the course of a single legal proceeding, with all the expense and inconvenience attached thereto. (See the remarks ofInnesACJinDickinson’scasesupraat 428.) This is undoubtedly a very cogent consideration, particularly where the decision in question relates, for instance, to a procedural matter or to the admissibility of evidence and it may in the end not have a decisive effect upon the outcome of the case. Where, however, the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed, then a somewhat different position arises, and indeed in that event the advantages of expense and convenience may favour a final determination of the question on appeal, even though the proceedings in the Courta quomay not have been concluded. The advantages of having such a question of law or fact determined by the Court of first instance as a separate, preliminary issue are recognised by the provisions of Rule 33(4) (see the remarks of Holmes JA inBotha v AA Mutual Insurance Association Ltd and Another1968 (4) SA 485(A) at 489A – E); and under the present system of appeal, which requires leave to appeal in all cases falling under ss 20 and 21 of the Act, there is much to be said for the application of a more flexible approach (of which there was some evidence inShacklock’scasesupra) to the question of the appealability of

such decisions taken by the Court of first instance.” See also: *Oliff v Minnie* 1952(4) SA 369 (A) at 375G – 376A and *Palmerv Goldblatt* 1961(3) SA 692 (N) at 700A. If we hear the appeal and the appellant succeeds therein the litigation will be brought to an expeditious and cost-effective conclusion in that its effect will be that the provisional judgment will have become final and the parties will not have to go into the drawn out and expensive procedure of a trial in order to determine whether the appellant is entitled to a final judgment against the respondent. G THE MERITS OF THE APPEAL [8] Rules 8(8), 8(9), 8(10) and 8(11) read: “(8) Should the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these rules as to pleading and the further conduct of trial actions shall *mutatis mutandis* apply. (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. (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 sub-rule (9). (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.” [9] The object of provisional sentence is to afford plaintiffs armed with liquid documents a speedy remedy and the entitlement to immediate payment against the furnishing of security *de restituendo*. See *Kent v Transvaalsche Bank* 1907 TS 765 at 768 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, 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.” [10] The essence of this case is whether the plaintiff on demand failed to furnish due security in terms of sub-rule (9). The phrase “on demand” has been interpreted to mean within a reasonable time of the demand, taking the surrounding circumstances into account. See *ANZ Banking Group (NZ) Ltd v Gibson* [1981] 2 NZLR 513 at 526 where the following was said: “What is meant by ‘payable on demand’ in the debentures? It was submitted that ‘upon demand’ cannot in the context mean instantaneously upon service of a demand without regard to the surrounding circumstances but must mean within a reasonable period of service of the demand having regard to all the surrounding circumstances.” See also *Havenga v Lotter* 1912 TPD 395 at 398 [11] The facts on which this appeal falls to be decided are not in dispute. [12] As I have said, the respondent has not paid the principal debt and yet has purported to enter into the principal case. [13] As I have also said the respondent achieved this position by demanding on 25 June 2003 that security be furnished by the appellant by 10 a.m. on 26 June 2003 and on 25 June 2003 announcing that it was entering upon the principal case. [14] I think that the purported entering into the principal case by the respondent was bad in law and for two reasons: firstly because the period in which the appellant was required to put up security was not a reasonable one because it was too short in the circumstances

namely that the security had to be put up by a financial institution, the amount to be secured was over R3 000 000.00, and less than a business day had been given to put up the security (see the judgment delivered in this division by Levin AJ which is unreported in the related matter of *Osmans Spice Works CC v Maslex* under case number 24615/2002 dated 5 February 2004 which is at page 108 et seq of the record and particularly page 110). Secondly the respondent gave notice of its intention to enter into the principal case before the time for the provision of security in terms of its demand had lapsed. In fact on 3 July the registrar rejected the security put up by the appellant.[15] Was that to be the end of the road for the appellant? I think not. As was held by the court a quo the giving of security is often a matter of negotiation. If that is so, and it is so, why should a security bond which at first does not satisfy the registrar not be timeously amended, as happened in this case, so as to satisfy the registrar? See: *C.G.E. Rhooe Construction Co (Pty) Ltd v Provincial Administration, Cape, and Another* 1976(4) SA 925 (C) at 926 D.[16] I am not suggesting that the appellant had an unlimited time to furnish security. However, in my opinion, unless the appellant failed to deliver security timeously to enable the respondent to make payment within the period allowed by rule 8(11), that is within two months of the date of the provisional order which was made on 18 June 2003, it cannot be said to have “failed” to deliver security in terms of rule 8(10). That this is so, is borne out by the fact that payment of the amount required and the delivery of the security shall take place *semel ac semel*. See: *Van der Merwe v Bonaero Park (Edms) Bpk* 2000(4) SA 329 (SCA) at 334 C – H. See also *Antares (Pty) Ltd v Chenille Corporation of South Africa (Pty) Ltd* 1976(4) SA 140 (W) at 141 A – F.[17] The position would be different if the appellant refused to furnish security. But in *casu* it did not do so. It in fact furnished security to the satisfaction of the registrar in July 2003. This fact, I think, is probably decisive of the appeal. The effect of the ruling of the registrar is that the security furnished by the appellant is in complete compliance with that contemplated in Rule 8(9). While the decision of the registrar stands, the respondent is precluded from contending that the appellant failed to furnish security in terms of sub-rule (9). It cannot simply ignore the ruling. This gave the appellant ample time to pay the principal debt against that security. It refused to do so, contending that the appellant had failed to deliver proper security. Furthermore all the objections made by the respondent to the security furnished, which was found satisfactory by the registrar, were laid at rest by Nedbank in a letter. H THE ORDER[18] In all the circumstances the following order was made: 1. The appeal of the appellant is upheld with costs, excluding the costs occasioned by the inclusion in the record of pages 123 – 426 inclusive. 2. It is declared that the respondent is not entitled to enter into the principal case under case number 24614/2002 in the Witwatersrand Local Division. 3. It is hereby declared that the provisional sentence judgment granted in case number 24614/2002 in this court on 16 June 2003 became a final judgment by no later than 18 August 2003. 4. It is hereby declared that the document purporting to give notice of the respondent’s intention to enter into the principal case dated 25 June 2003 is a nullity. 5. The respondent is ordered to pay the costs of the application in the court a quo. THESE REASONS WERE SIGNED ON THE ____ DAY OF ____ 2005 AT JOHANNESBURG. THESE REASONS WERE HANDED DOWN ON THE ____ DAY OF ____ 2005 AT JOHANNESBURG ____ M. B. LABE JUDGE OF THE HIGH COURT I agree ____ C.J. CLAASSEN JUDGE OF THE HIGH COURT I agree ____ R.R. ROSENBERG ACTING JUDGE OF THE HIGH COURT Counsel for Appellant:

Counsel for Respondent:AdvO.A.MoosaSCAdvP.StrathernAttorney for Appellant:

Attorney for Respondent:Naidoo Maharaj

IncAlanE.WarrenerRef:R.MoodleyRef:MrA.E.WarrenerArgument was heard on19 May 2005

IN THE HIGH COURT OF

SOUTH AFRICA

(

WITWATERSRAND

LOCAL DIVISION)

Case No: A5036/2004

Osmans Spice Works CC

Appellant/Plaintiff a quovsCorporate International (Pty) Ltd Respondent/Defendant a quo

JUDGMENT

LabeJ:

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INTRODUCTION

[1] This is an appeal by the appellant against the decision of a single judge in this division in an application brought by the appellant as applicant against the respondent (the application) about which I give further details below. The appellant is represented byAdvO.A.MoosaSC and the respondent byAdvP.Strathern. On19 May 2005we upheld the appeal and granted ancillaryand consequential relief. We said that our reasons for doing so would follow. These are the reasons.

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B THE BACKGROUND TO THE APPLICATION

[2] 1. On 18 June 2003 provisional sentence was granted in favour of

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Payment of the sum of R795,000.00

2.

Interest on R795,000.00 to date of payment at the rate of 15.50 per centum per year from 1 October 2002.

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CLAIM B:1.

CLAIM B:

Payment of the sum of R1 200 000.00

Interest on R1 200 000.00 to date of payment at the rate of 15.50 per centum per year from 1 October 2002.

Interest on R1 200 000.00 to date of payment at the rate of 15.50 per centum per year from CLAIM C:1.

CLAIM C:

3.

Costs of suit including the costs occasioned by the employment of 2 Counsel.”

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On 25 June 2003 in a letter served on the appellant at 12:09 p.m. on that day, the respondent demanded that security de restituendo be furnished by the appellant by not later than 10 a.m. on 26 June 2003. On the same day at 2:46 p.m. and before the period granted for the putting up of the security had elapsed, a letter was delivered by the respondent to the appellant advising the appellant that the respondent was entering into the principal case.

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The respondent nonetheless refused to make payment of the principal sum, interest and costs contending that because the appellant had not furnished security to the satisfaction of the registrar pursuant to its request therefor dated 25 June 2003, it was entitled to enter upon the principal case.

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C THE APPLICATION

[3] By notice of motion dated 1 August 2003 the appellant claimed an order in the following terms:

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“1. The citation of the Defendant in this entire matter, including in respect of the Provisional Sentence Judgment delivered in Plaintiff’s favour on the 18th of June 2003, be and is hereby amended to Sir Trading (Pty) Ltd t/a Corporate International, and the Registrar is directed to furnish Plaintiff with the Provisional Sentence Judgment aforesaid reflecting the Defendant’s citation as amended aforesaid;

2. That it be and is hereby declared that the Defendant/Respondent is not entitled to enter into the principal case in case No. 24614/2002 in this Honourable Court in terms of Rule 8(11);

2. That it be

and is

hereby declared that the Defendant/Respondent is not entitled to enter into the principal case in case No. 24614/2002 in this Honourable Court in terms of Rule 8(11);

That the Defendant/Respondent’s notice of intention to enter into the principal case in Case No. 24614/2002 and its Plea in the same matter be set aside in terms of Rule 30 as irregular proceedings;

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intention to enter into the principal case in Case No. 24614/2002 and its Plea in the same matter be set aside in terms of Rule 30 as irregular proceedings;

That it be and is hereby declared that the provisional sentence judgement granted in Case No. 24614/2002 by Madam Justice Mailula on Wednesday the 18th June 2003 has become a final judgement;

That it be and is hereby declared that the Plaintiff/Applicant is entitled to levy execution in terms of the Uniform Rules of Court in respect of the said provisional sentence judgment granted under Case No. 24614/2002;

That the Respondent pay the costs of this application including those occasioned by the employment of two Counsel;

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Such further or alternate relief as this Honourable Court may deem meet.”

D THE DECISION OF THE COURT A QUO

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[4] The court a quo granted the application to amend and dismissed the remaining prayers.

E THE APPEAL

[5] Leave to appeal having been granted an appeal was noted to this court. The grounds of appeal are set out below:

“2.

The Court erred in not holding that the Plaintiff had sixty (60) days from the 18th of June 2003 within which to furnish Defendant with security to the satisfaction of the Registrar.

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of June 2003

within which to furnish Defendant with security to the satisfaction of the Registrar.

Alternatively, the Court erred in not holding, following on its acceptance that the import of Rule 8(10) of the Uniform Rules of Court is that a person should be afforded a reasonable opportunity to furnish security following on demand, that the Plaintiff, as a logical consequence thereof, must be afforded more than one opportunity to furnish security provided that this is done within a reasonable time.

Further alternatively, the Court erred in not holding, following on its acceptance that the import of Rule 8(10) of the Uniform Rules of Court is that a person should be afforded a reasonable opportunity to furnish security following on demand, that the demand made by the Defendant on 25 June 2003 that security should be furnished by 10h00 on 26 June 2003 did not afford Plaintiff reasonable time within which to furnish security.

Further alternatively, the Court erred in not holding that the Defendant purported to enter into the principal case on 25 June 2003, that is even before its own deadline for the furnishing of security had expired, and that such purported act was accordingly premature and invalid, with the consequence that the Defendant has never entered the principal case.”

Further alternatively, the Court erred in not holding that the Defendant purported to enter into the principal case on

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There is therefore no longer any practical distinction between an interlocutory order with final effect and a simple interlocutory order. In the case of an interlocutory order with final effect the Court would, as before, determine whether it disposed of any issue or any portion of an issue in the main case; in the case of a simple interlocutory order, the question would be whether the decision of the Courta quo, if reversed or altered on appeal, would dispose of any issue or portion of an issue in the main case. One no longer looks, as was the case formerly, only at the effect of the decision of the Courta quoon the proceedings in the Courta quo. In each case the critical consideration would be whether a judgment on appeal before the matter proceeded any further would best serve the interests of both parties. Van StreepenGerms (supraat 585E – I.)”

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1987 (4) SA 569(A) Corbett JA, as he then was, said at 585E – I:

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“It is clear from the line of cases to which I have thus far referred that the main reason for this Court having given what Centlivres CJ described as a ‘restricted meaning’ to the words ‘judgment or order’ has been a reluctance to allow the piecemeal decision of cases, ie numerous subsidiary appeals during the course of a single legal proceeding, with all the expense and inconvenience attached thereto. (See the remarks of Innes ACJ in Dickinson’s cases supra at 428.) This is undoubtedly a very cogent consideration, particularly where the decision in question relates, for instance, to a procedural matter or to the admissibility of evidence and it may in the end not have a decisive effect upon the outcome of the case. Where, however, the decision relates to a question of law or fact, which if decided in a particular way would be decisive of the case as a whole or of a substantial portion of the relief claimed, then a somewhat different position arises, and indeed in that event the advantages of expense and convenience may favour a final determination of the question on appeal, even though the proceedings in the Court a quo may not have been concluded. The advantages of having such a question of law or fact determined by the Court of first instance as a separate, preliminary issue are recognised by the provisions of Rule 33(4) (see the remarks of Holmes JA in Botha v AA Mutual Insurance Association Ltd and Another 1968 (4) SA 485(A) at 489A – E); and under the present system of appeal, which requires leave to appeal in all cases falling under ss 20 and 21 of the Act, there is much to be said for the application of a more flexible approach (of which there was some evidence in Shacklock’s cases supra) to the question of the appealability of such decisions taken by the Court of first instance.”

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See also: Oliff v Minnie 1952(4) SA 369 (A) at 375G – 376A and Palmerv Goldblatt 1961(3) SA 692 (N) at 700A

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Oliff v

Minnie

1952(4) SA 369 (A) at

375G – 376A and

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1961(3) SA 692 (N) at 700A

If we hear the appeal and the appellant succeeds therein the litigation will be brought to an expeditious and cost-effective conclusion in that its effect will be that the provisional judgment will have become final and the parties will not have to go into the drawn out and expensive procedure of a trial in order to determine whether the appellant is entitled to a final judgment against the respondent.

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G THE MERITS OF THE APPEAL

[8] Rules 8(8), 8(9), 8(10) and 8(11) read:

“(8) Should the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these rules as to pleading and the further conduct of trial actions shall mutatis mutandis apply. (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. (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 sub-rule (9).”

“(8) Should the court refuse provisional sentence it may order the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these rules as to pleading and the further conduct of trial actions shall

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apply. (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. (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 sub-rule (9).”

(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.”

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become a final judgment and the security given by the plaintiff shall lapse.”

- [9] The object of provisional sentence is to afford plaintiffs armed with liquid documents a speedy remedy and the entitlement to immediate payment against the furnishing of security de restituendo. See *Kent v Transvaalsche Bank* 1907 TS 765 at 768 where Innes CJ said:

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“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, 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.”

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. 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.”

- [10] The essence of this case is whether the plaintiff on demand failed to furnish due security in terms of sub-rule (9).

The phrase “on demand” has been interpreted to mean within a reasonable time of the demand, taking the surrounding circumstances into account.

See *ANZ Banking Group (NZ) Ltd v Gibson* [1981] 2 NZLR 513 at 526 where the following was said:

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ANZ Banking Group (NZ) Ltd v

Gibson

[1981] 2 NZLR 513 at 526

[1981] 2 NZLR 513

where

the following was said:

“What is meant by ‘payable on demand’ in the debentures? It was submitted that ‘upon demand’ cannot in the context mean instantaneously upon service of a demand without regard to the surrounding circumstances but must mean within a reasonable period of service of the demand having regard to all the surrounding circumstances.”

See also *Havenga v Lotter* 1912 TPD 395 at 398 [11] The facts on which this appeal falls to be decided are not in dispute. [12] As I have said, the respondent has not paid the principal debt and yet has purported to enter into the principal case. [13] As I have also said the respondent achieved this position by demanding on 25 June 2003 that security be furnished by the appellant by 10 a.m. on 26 June 2003 and on 25 June 2003 announcing that it was entering upon the principal case. [14] I think that the purported entering into the principal case by the respondent was bad in law and for two reasons: firstly because the period in which the appellant was required to put up security was not a reasonable one because it was too short in the circumstances namely that the security had to be put up by a financial institution, the amount to be secured was over R3 000 000.00, and less than a business day had been given to put up the security (see the judgment delivered in this division by Levin AJ which is unreported in the related matter of *Osmans Spice Works CC v Maslex* under case number 24615/2002 dated 5 February 2004 which is at page 108 et seq of the record and particularly page 110). Secondly the respondent gave notice of its intention to enter into the principal case before the time for the provision of security in terms of its demand had lapsed. In fact on 3 July the registrar rejected the security put up by the appellant. [15] Was that to be the end of the road for the appellant? I think not. As was held by the court a quo the giving of security is often a matter of negotiation. If that is so, and it is so, why should a security bond which at first does not satisfy the registrar not be timeously amended, as happened in this case, so as to satisfy the registrar? See: *C.G.E. Rhooide Construction Co (Pty) Ltd v Provincial Administration, Cape, and Another* 1976(4) SA 925 (C) at 926 D. [16] I am not suggesting that the appellant had an unlimited time to furnish security. However, in my opinion, unless the appellant failed to deliver security timeously to enable the respondent to make payment within the period allowed by rule 8(11), that is within two months of the date of the provisional order which was made on 18 June 2003, it cannot be said to have “failed” to deliver security in terms of rule 8(10). That this is so, is borne out by the fact that payment of the amount required and the delivery of the security shall take place *semel ac semel*. See: *Van der Merwe v Bonaero Park (Edms) Bpk* 2000(4) SA 329 (SCA) at 334 C – H. See also *Antares (Pty) Ltd v Chenille Corporation of South Africa (Pty) Ltd* 1976(4) SA 140 (W) at

141A – F[17] The position would be different if the appellant refused to furnish security. But in casu it did not do so. It in fact furnished security to the satisfaction of the registrar in July 2003. This fact, I think, is probably decisive of the appeal. The effect of the ruling of the registrar is that the security furnished by the appellant is in complete compliance with that contemplated in Rule 8(9). While the decision of the registrar stands, the respondent is precluded from contending that the appellant failed to furnish security in terms of sub-rule (9). It cannot simply ignore the ruling. This gave the appellant ample time to pay the principal debt against that security. It refused to do so, contending that the appellant had failed to deliver proper security. Furthermore all the objections made by the respondent to the security furnished, which was found satisfactory by the registrar, were laid at rest by Nedbank in a letter.

Havenga v Lotter

1912 TPD

395

at 398

[11]

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This gave the appellant ample time to pay the principal debt against that security. It refused to do so,

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H THE ORDER

[18] In all the circumstances the following order was made:

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1. The appeal of the appellant is upheld with costs, excluding the costs occasioned by the inclusion in the record of pages 123 – 426 inclusive.

The appeal of the appellant is upheld with costs, excluding the costs occasioned by the inclusion in the record of pages 123 – 426 inclusive.

2. It is declared that the respondent is not entitled to enter into the principal case under case number 24614/2002 in the Witwatersrand Local Division.

It is declared that the respondent is not entitled to enter into the principal case under case number 24614/2002 in the Witwatersrand Local Division.

3. It is hereby declared that the provisional sentence judgment granted in case number 24614/2002 in this court on 16 June 2003 became a final judgment by no later than 18 August 2003.

It is hereby declared that the provisional sentence judgment granted in case number 24614/2002 in this court on

16 June 2003

became a final judgment by no later than

18 August 2003

4. It is hereby declared that the document purporting to give notice of the respondent's intention to enter into the principal case dated 25 June 2003 is a nullity.

It is hereby declared that the document purporting to give notice of the respondent's intention to enter into the principal case dated

is a nullity.

5.The respondent is ordered to pay the costs of the application in the court a quo.

The respondent is ordered to pay the costs of the application in the court a quo.

THESE REASONS WERE SIGNED ON THE ____ DAY OF ____ 2005 AT JOHANNESBURG

THESE REASONS WERE SIGNED ON THE ____ DAY OF ____ 2005 AT

JOHANNESBURG

THESE REASONS WERE HANDED DOWN ON THE ____ DAY OF ____ 2005 AT JOHANNESBURG

THESE REASONS WERE HANDED DOWN ON THE ____ DAY OF ____ 2005 AT

____ M. B. LABE JUDGE OF THE HIGH COURT I agree ____ C. J. CLAASSEN JUDGE OF THE HIGH COURT I agree ____ R. R. ROSENBERG ACTING JUDGE OF THE HIGH COURT

M. B. LABE JUDGE OF THE HIGH COURT I agree ____ C.

J.

CLAASSEN

JUDGE OF THE HIGH COURT I agree ____

R.

ROSENBERG

ACTING JUDGE OF THE HIGH COURT

Counsel for Appellant:

Counsel for Respondent: Adv O. A. Moosa SC Adv P. Strathern Attorney for Appellant:

Attorney for Respondent: Naidoo Maharaj Inc Alan E. Warrener Ref: R. Moodley Ref: Mr A. E. Warrener

Counsel for Appellant:

Counsel for Respondent:

SC

Attorney for Appellant:

Attorney for Respondent: Naidoo Maharaj Inc

Alan

E.

Warrener

Ref:

Moodley

Mr

Argument was heard on 19 May 2005

Argument was heard on

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Prepared on 11 October 2026 · Esheria