IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-03-23

Case Number: A881/07

Case No Court A Quo 1590/2007

In the matter between:

GARY BRIAN CHATER	First Appellant
CHATER TECHNOLOGIES CC	Second Appellant
ERF 25 BROMHOF CC	Third Appellant

and

JOHANNES FREDERICK MEYER	Respondent

JUDGMENT

SOUTHWOOD J

[1] In November 2006 the respondent instituted provisional sentence proceedings against the appellants in which the respondent claimed payment of R1 million and interest based on a written agreement ('the agreement') signed by the parties. The appellants gave notice of their

intention to oppose the respondent's provisional sentence action and filed an answering affidavit in which they objected to provisional sentence being granted on the agreement which, they contended, was not a liquid document. They did not set out a defence to the respondent's claim for payment of R1 million. On 13 December 2006 the court (Patel J) found that the agreement was a liquid document, dismissed the appellants' objection and granted provisional sentence. The appellants immediately (on 13 December 2006) delivered a notice of application for leave to appeal against the provisional sentence judgment. The only ground for the application was that the court erred in finding that the agreement is a liquid document. Notwithstanding the delivery of the notice of application for leave to appeal, on 15 December 2006 the respondent caused a warrant of execution to be issued to give effect to the provisional sentence judgment. On the same day the respondent's attorney addressed a letter to the appellants' attorney in which the respondent's attorney pointed out that the provisional sentence judgment is not appealable, that the notice of application for leave to appeal is irregular and that Rule 49(11) does not apply. The respondent's attorney also informed the appellants' attorney that he was giving instructions to the sheriff to execute the warrant of execution. On 19 December 2006, consequent upon the warrant of execution, the sheriff attached the appellants' right, title and interest in Chater Developments (Pty) Ltd, including the first appellant's 100 shares in the company. On 18 January 2007 the appellants launched an application in the court *a quo* seeking orders setting aside

the warrant of execution and the attachment made pursuant thereto. On 2 February 2007 the respondent launched a counter-application seeking an order that the appellants' notice of application for leave to appeal is void and unsustainable in law, alternatively, a declarator that the provisional sentence order made by Patel on 13 December 2006 is not appealable and an order that the respondent's warrant of execution dated 15 December 2006 and the attachment made pursuant thereto are valid and enforceable. On 11 May 2007 the court *a quo* (Visser AJ) heard the application and counter-application and dismissed the appellants' application with costs and granted an order declaring that the provisional sentence judgment of 13 December 2006 is not appealable. The court *a quo* also ordered the appellants to pay the costs of the counter-application. The appellants did not enter into the principal case within two months of the grant of provisional sentence and, in accordance with Rule 8(10) and 8(11) the provisional sentence judgment *ipso facto* became a final judgment. With the leave of the court *a quo* the appellants and the respondent appeal against all the orders made in the application and counter-application.

[2] The appellants seek condonation for their failure to comply with Rule 49(7) (i.e. filing with the registrar copies of the record at the same time as the application for a date for the hearing of the appeal). The appellants applied for a date for the hearing of the appeal on 8 December 2007 but delivered the copies of the record on 12 November 2008, almost one year late. The respondent opposes the application

for condonation on the grounds that the appellants have not furnished a reasonable and acceptable explanation for their failure timeously to comply with Rule 49(7) and that there is no reasonable prospect of success in the appeal. While acknowledging that the appellants' explanation is unsatisfactory the appellants' counsel contend that condonation should be granted because the appellants' prospects of success on the merits are very strong. Accordingly, it will be convenient to consider the merits of the appeal before deciding the application for condonation.

[3] The following issues arise for decision in the appeal:

(1) Whether the provisional sentence judgment granted by Patel J on 13 December 2006 is appealable: i.e. whether that judgment was a 'judgment or order' for the purposes of section 20(1) of the Supreme Court Act 59 of 1959 ('the Act'). This is the primary issue. If the judgment was appealable then the provisions of Rule 49(11) were applicable and the application should have been granted and the counter-application dismissed;

(2) Even if the provisional sentence judgment is not appealable –

(i) whether the delivery of the notice of application for leave to appeal in terms of Rule 49(11) suspended the

operation and execution of the provisional sentence judgment pending the decision on the application;

(ii) whether the respondent was obliged to set aside the application for leave to appeal before executing upon the judgment;

(iii) whether the court which must hear the application for leave to appeal is the only court which may decide whether the provisional sentence judgment is appealable or not.

These questions will be considered in turn.

Was the provisional sentence judgment appealable?

[4] Patel J granted provisional sentence against the appellants after deciding the only issue raised by them: whether the agreement sued on was a liquid document. This was not a final judgment. The appellants' counsel point out that the provisional sentence judgment only became a final order in accordance with Rule 8(10) and 8(11) after the appellants failed to enter into the main case. Nevertheless, they argue that the provisional sentence judgment was final because the court found that the agreement was a liquid document and it would therefore serve no purpose ('be pointless') to enter into the main case

on that issue. In support of this argument they refer to ***Avtjoglou v First National Bank of Southern Africa Ltd*** **2004 (2) SA 453 (SCA)** paras 5 and 6**;** ***Smit v Scania South Africa (Pty) Ltd*** **2004 (3) SA 628 (SCA)** para 7; ***Scott-King (Pty) Ltd v Cohen*** **1999 (1) SA 806 (W)** at 825C-E**;** ***Maketha v Limbada*** **1998 (4) SA 143 (W)** at 145B-146C; ***Osmans Spice Works CC v Corporate International (Pty) Ltd*** **2005 (6) SA 494 (WLD)** paras 6 and 7 and ***Jones v Krok*** **1996 (2) SA 71 (T)** at 73D-E. With reference to ***Jones v Krok*** **1995 (1) SA 677 (A)** at 684A-B; 687I and 688E-F they submit that it would be artificial to regard the summons based upon a non-liquid document as not capable of supporting the principal case but deny the defendant the right to appeal against an order finding the document to be a liquid document.

[5] As pointed out in the passage from ***Scott-King (Pty) Ltd v Cohen*** which is quoted with approval in ***Avtjoglou v First National Bank of Southern Africa Ltd supra***, to determine appealability in provisional sentence proceedings a distinction must be drawn between decisions granting provisional sentence; decisions refusing provisional sentence on a ground which shows the provisional sentence summons to have been invalid; and decisions refusing provisional sentence on a ground which does not undermine the validity of the provisional sentence summons but leaves it to stand as a valid summons in the principal case. In ***Smit v Scania South Africa (Pty) Ltd supra*** (para 6) the court pointed out that in ***Avtjoglou*** the court had decided that, generally, the grant of provisional sentence is not appealable and that

to determine whether a provisional sentence judgment is appealable the requirements for appealability laid down in ***Zweni v Minister of Law and Order*** **1993 (1) SA 523 (A)** at 532I-J must be applied. In ***Smit v Scania South Africa (Pty) Ltd supra*** (para 7) the court also pointed out that in an exceptional case the application of these requirements to a provisional sentence judgment will show that that provisional sentence judgment is appealable. Accordingly, these requirements must be applied to the provisional sentence judgment granted by Patel J to determine whether or not that judgment is appealable.

[6] The appellants' counsels' principal argument is that the principles governing appealability laid down in ***Zweni's*** case emphasise the effect of the judgment in question: i.e. it must be final in effect and not susceptible of alteration by the court of first instance and it must be definitive of the rights of parties: and that this applies to the finding of the court of first instance. That court found that the agreement was a liquid document and this finding is not susceptible of alteration by the court of first instance and is definitive of the rights of the parties. This argument flies in the face of Rule 8(10) and 8(11) (which expressly provide that the grant of provisional sentence will become final only if the defendant fails to enter into the principal case) the judgment in ***Avtjoglou*** (which states expressly in paragraph 6 that a provisional sentence judgment does not have any of the attributes necessary for it to be appealable and that even the question of whether the document

sued upon is liquid is susceptible of alteration by the Court hearing the principal case) and the nature of provisional sentence described in cases such as ***Oliff v Minnie* 1952 (4) SA 369 (A)** at 374G-375C; ***Avtjoglou's*** case in para 5 and ***Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA)** paras 9-11 and the authorities there cited.

[7] The reliance of the appellants' counsel on the other cases referred to is misplaced:

(1) They rely heavily on ***Maketha v Limbada* 1998 (4) SA 143 (W)** which they contend is closely analogous to the present case. In that case the full court held that the provisional sentence judgment granted by the court of first instance was appealable where that court had decided that the defendant had signed the cheque in question. The only defence raised by the defendant was that the signature on his cheque had been forged and the court of first instance had found, on the affidavits, that the probabilities were overwhelmingly against that defence and that the plaintiff had discharged the onus of proving that the defendant had signed the cheque. This was a straightforward case and the application of the ***Zweni*** principles should have resulted in a finding that the provisional sentence judgment was not appealable. In my view the decision on the issue of appealability was clearly wrong. Rule 8(7) provides that the Court may hear oral evidence as to the authenticity of the

defendant's signature to the document upon which the claim for provisional sentence is founded. If the court of first instance had done so I would have agreed that the issue had been finally decided and that the judgment was appealable. By deciding the issue on the affidavits the judgment remained provisional and the defendant could have entered into the main case and shown by means of *viva voce* evidence that his signature had been forged. I therefore do not agree with the statement at 146B that the court of first instance 'disposed of the issue of authenticity in a manner which renders it pointless to go into the principal case'. In my view the opposite is true. I therefore do not consider the judgment in ***Maketha v Limbada*** to be binding or even persuasive on the issue.

(2) The appellants' counsel also contend that ***Osmans Spiceworks CC v Corporate International (Pty) Ltd*** **2005 (6) SA 494 (W)** is analogous to the present case. The decision sought to be appealed against in that case was the dismissal of an application for an order that the defendant was precluded from entering into the principal case after provisional sentence had been granted. The full court found that it was but did not explain how it reached that conclusion by applying the ***Zweni*** principles. Even if it is accepted that the decision on appealability is correct it is not relevant to the question of appealability in the present

case: i.e. whether a provisional sentence judgment is appealable.

(3) The appellant's counsel also refer to ***Jones v Krok*** **1996 (2) SA 71 (T)** in support of their contention that the provisional sentence granted was final in its effect. They seem to suggest that the provisional sentence judgment in that case is analogous to the judgment in the present case. This is the only reported judgment in which a court has properly found that the provisional sentence granted had the three attributes referred to in ***Zweni's*** case and was therefore appealable. But the circumstances of the case were clearly exceptional as the judgment granting provisional sentence was obviously final in effect. The plaintiff instituted provisional sentence proceedings in South Africa based on a judgment of the Californian Superior Court which awarded the plaintiff the amount of $13 670 987 as compensatory damages and $12 000 000 as 'punitive or exemplary damages'. The defendants in that case appealed against the judgment and when the matter was first heard in the Transvaal Provincial Division (and also in the Appellate Division) the appeal was still pending before the Californian Court of Appeal. The defendant objected to the provisional sentence proceedings because the judgment of the Californian Superior Court was not final. The court of first instance accepted this argument and dismissed the provisional sentence action on that

and other grounds. On appeal the Appellate Division found that this judgment was, on the application of the ***Zweni*** principles, appealable (683H-689A) and upheld the appeal and replaced the order of the court of first instance with an order staying the plaintiff's action for provisional sentence pending the final determination of the pending appeal to the Californian Court of Appeal and the exhaustion of any further right of appeal by either party to the litigation in the Californian courts (697E-G). After the Californian Court of Appeal had dismissed the appeal and the defendant had exhausted all further rights of appeal the provisional sentence proceedings resumed in the Transvaal Provincial Division. The defendant then raised only three defences, all legal:

(i) the enforcement of the judgment is precluded by the provisions of the Protection of Business Act 99 of 1978;

(ii) the enforcement of the judgment would be contrary to the principles of natural justice and public policy; and

(iii) the award of punitive damages would not be enforced in South Africa (***Jones v Krok*** **1996 (1) SA 504 (T)**).

During argument in the Transvaal Provincial Division the defendant's counsel conceded that Rule 8(8) would not assist

the defendant if the court found against the defendant on the legal defences raised. The court found against the defendant on the first two defences and granted provisional sentence for the compensatory damages. It found for the defendant on the third issue and refused provisional sentence for the punitive or exemplary damages. In granting leave to appeal against the judgment granting provisional sentence (***Jones v Krok* 1996 (2) SA 71 (T)**) the court referred to this concession which demonstrated that the provisional sentence judgment was final in effect and therefore appealable (73E-74H). Clearly this was correct. There were no factual defences and the defences raised were questions of law which had been decided against the defendant. ***Jones v Krok*** therefore does not assist the appellants. Ultimately in the Transvaal Provincial Division the issues were whether the foreign judgment would be enforced in South Africa, not whether the foreign judgment was a liquid document for the purpose of provisional sentence.

(4) The appellants' counsel rely on ***Jones v Krok* 1995 (1) SA 677 (A)** in support of a contention that it would be artificial to regard the summons based upon a non-liquid document as not capable of supporting the principal case but deny the defendant the right to appeal against an order finding the document to be a liquid document. This contention simply ignores the established categories of decisions in provisional sentence proceedings

which are appealable and the logic is therefore questionable. The appeal court was dealing with a decision dismissing a claim for provisional sentence on the ground that the document sued on was not a liquid document: in that case it was a judgment of a foreign court which was still subject to appeal. On the question of appealability the court concluded at 688F-I –

'… It seems to me that where a plaintiff seeks provisional sentence on a document (annexed to his summons – see Uniform Rule 8(3)) which lacks liquidity, then the summons is "bad or defective" in the sense referred to in ***Oliff's*** case and where provisional sentence is refused on this ground, the provisional sentence summons will not stand as summons in the principal case and the proceedings are at an end. In my opinion, it makes no difference whether such lack of liquidity appears *ex facie* the document sued on or whether it is demonstrated by evidence in the affidavits. (Compare ***Sirioupoulos v Tzerefos*** **1979 (3) SA 1197 (O)** at 1200H.)

I revert to the facts of the case under consideration. Roux J refused provisional sentence primarily on the ground that the judgment of the US Court was not final. At this stage I do not enter into the merits of that decision. If a foreign judgment lacks the finality required in order for it to be enforced by our Courts, then, in my view, it is not a liquid document; and, where provisional sentence is refused on this ground of lack of a liquidity, then, in accordance with what I have stated above, the summons must be regarded as bad and the proceedings at an end. If the provisional proceedings are at an end, then the judgment

> or order dismissing the action must be regarded as having the finality necessary to qualify as a judgment or order, as opposed to a ruling. The other requirements, *viz* that it be definitive of the rights of the parties and have the effect of disposing of at least a substantial portion of the relief claimed in the proceedings, are clearly satisfied.'

This is clearly different from the situation in the present case (i.e. the grant of provisional sentence after finding that the document sued on is liquid) and is the second category of decisions referred to in ***Scott-King (Pty) Ltd v Cohen supra*** at 825D-E which is clearly appealable (826A-D). The decision in ***Jones v Krok* 1995 (1) SA 677 (A)** therefore does not assist the appellants.

[8] The application of the ***Zweni*** requirements shows that the provisional sentence judgment granted by Patel J on 13 December 2006 was not a 'judgment or order' and the court *a quo* correctly found that the judgment was not appealable.

Effect of a notice of application for leave to appeal where the judgment or order concerned is not appealable

[9] The next two issues involve a consideration of the standing of a notice of application for leave to appeal where the judgment or order concerned is not appealable. In the present case the respondent

ignored the notice of application for leave to appeal and proceeded to execute on the provisional sentence judgment without first setting aside the notice. The appellants' counsel contend that the respondent was not entitled to do this.

[10] Rule 49(11) provides:

> 'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.'

[11] This rule is consistent with the common law rule of procedure that, generally, the execution of a judgment is automatically suspended upon the noting of an appeal with the result, that pending the appeal, the judgment cannot be carried out and no effect can be given thereto except with the leave of the Court which granted the judgment. The purpose of the rule is to prevent irreparable harm being done to the intending appellant, either by levy under writ of execution or by execution of the judgment in any other manner – see ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*** **1977 (3) SA 534 (AD)** at 544H-545C. However, it is clear that an order in terms of Rule 49(11) putting into operation the order appealed against is a purely interlocutory order (i.e. it does not dispose of any issue or any portion of the issue in the main suit: nor does it

irreparably anticipate or preclude any of the relief which might be given at the hearing: it leaves the Appeal Court free to make whatever decision it deems fit in the main action) and is not appealable – see ***South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd supra*** at 551G-552H; ***South African Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (T)** at 878D-880G. In the latter case the full court held that the notice of appeal filed was a nullity and set it aside as an irregular step in terms of Rule 30. In my view this is the standing of any notice of appeal filed in respect of any judgment or order that is not appealable. See e.g. ***Van Leggelo v Transvaal Cellocrete (Pty) Ltd and Another* 1953 (2) SA 287 (T)** at 288H-289D. Such notice does not have the effect of suspending the operation of the order appealed against and may be ignored – see ***Lourenco and Others v Ferela (Pty) Ltd and Others No 2* 1998 (3) SA 302 (T)** at 309E-310D and 311D-E; ***Van Leggelo v Transvaal Cellocrete (Pty) Ltd and Another supra*** at 289C-D.

[12] The filing of the notice of application for leave to appeal therefore was a nullity which did not suspend the operation of the provisional sentence judgment and the respondent was free to disregard it. Obviously if a dispute arose as to the effect of the filing of the notice this could be decided by the court at any time: either by way of an application in terms of Rule 30 to set aside the notice, as was done in the ***South African Druggists*** case (880H-881H), or by way of a declaratory order in terms of section 19(1)(a)(iii) of the Act, as was

done in this case – see ***Ex parte Nell* 1963 (1) SA 754 (A)**. The appellants' counsel contend that the notice of application for leave to appeal cannot simply be ignored and must be set aside before the respondent proceeds to execute on the provisional sentence judgment. They submit that the situation is analogous to the situation where the defendant delivers a notice of intention to defend late where the courts have held that the plaintiff cannot ignore the notice but must first apply to set it aside before applying for judgment by default – see ***Theron v Coetzee* 1970 (4) SA 37 (T)** and ***Oostelike Transvaalse Koöperasie Beperk v Aurora Boerdery en Andere* 1979 (1) SA 521 (T).** In my view the late filing of a notice of intention to defend is not analogous to filing a notice of application for leave to appeal against a judgment or order which is not appealable. The late filing of the notice of intention to defend is not a nullity. It is an irregular step but still serves its purpose and can be condoned on good cause shown. A notice of application for leave to appeal against a judgment or order which is not appealable is a nullity and does not serve any purpose.

Is the court hearing the application for leave to appeal the only court which may decide the question of appealability

[13] With regard to this issue the appellants' counsel have not referred to any authority in support of the contention that only the court hearing the application for leave to appeal can decide whether the provisional sentence order is appealable or not and that until the court hears the

application for leave to appeal the notice of application for leave to appeal stands as a valid and regular document, it cannot be set aside as an irregular proceeding and suspend the operation of the provisional sentence and writ of execution. As already demonstrated these contentions are contrary to authority. In my view they are also contrary to common sense. Where the issue of appealability arises in a context different from the application for leave to appeal the court is obviously free to decide it to regulate its own process and to ensure that justice is done between the parties.

[14] The appellants' appeal therefore cannot succeed and condonation will be refused.

[15] As far as the respondent's cross-appeal is concerned, this relates only to the order granted. In my view the authorities referred to in this judgment show that the notice of application for leave to appeal was a nullity and did not have the effect of suspending the operation of the provisional sentence judgment. It follows that the respondent's warrant of execution and the attachment made pursuant thereto were valid and enforceable. The court *a quo* therefore erred in not granting declarators to that effect.

Order

[16] I The appellants' application for condonation is dismissed and the appellants' appeal is struck off the roll;

II The respondent's cross-appeal is upheld and paragraph 2 of the order of the court *a quo* is replaced with the following order:

'1. It is declared that the applicants' notice of appeal dated 13 December 2006 is void *ab initio* and unsustainable in law;

2. It is declared that the first respondent's writ of execution dated 15 December 2006 and the attachment made in pursuance thereof are valid and enforceable.'

III The appellants are ordered to pay the costs of the appeal and the cross-appeal.

-

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

A.P. LEDWABA
JUDGE OF THE HIGH COURT

I agree

A.A. LOUW
JUDGE OF THE HIGH COURT

CASE NO: A881/07

HEARD ON: 10 February 2010

FOR THE APPELLANTS: ADV. A. SUBEL SC
ADV. L. FRIEDMAN

INSTRUCTED BY: Gavin Hartog Attorneys

FOR THE DEFENDANT: ADV. D.E. VAN LOGGERENBERG SC

INSTRUCTED BY: Beyers & Day Inc.

DATE OF JUDGMENT: 23 March 2010