IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 45091/09

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
..... DATE	..... SIGNATURE

In the matter between:

HARBINDER SINGH <u>sethi</u> Plaintiff

and

ABALEGANI SUPPLIES (PTY) LTD First Defendant

ZUNAID ABBAS MOTI Second Defendant

JUDGMENT

WILLIS J:

[1] The plaintiff claims provisional sentence. He relies upon a cheque made payable to himself "or bearer" in an amount of R5 million drawn by the second defendant on behalf of the first defendant. The cheque is dated 3 October, 2009. The cheque was duly presented for payment. It was returned to the plaintiff, unpaid by the bank upon which it had been drawn, with the advice "payment stopped"[1]. In other words, there had been a countermand of payment[2].

[2] It is open to a defendant in provisional sentence proceedings to contest the underlying *causa* for the claim.[3] As Goldstone J (as he

[1] This is the standard advice where there has been a "countermand of payment". I refer, immodestly, to my own book, Willis, N. 1981 *Banking in South African Law,* Cape Town: Juta's.

[2] Section 73 (b) of the Bills of Exchange Act No. 34 of 1964, as amended, provides that a bank's duty to pay a cheque drawn on it by its customer is terminated by receipt of a "countermand of payment".

[3] See *Froman v Robertson* 1971 (1) SA 115 (A) at 120F-121E and *Barclays National Bank v Serfontein* 1981 (3) SA 244 (W) at 249HE-F. See, also: *Radus & Mindel v Plaza Outfitters* 1945 TPD 350; *Schweizer Reneke Garage v Meyer* 1963 (1) SA (1) SA 391 (T); *Slabbert, Verster & Malherbe (Bloemfontein) Bp*k 1963 (1) SA 835(O) at 840 and Malan F.R. and others, 2009, *Bills of Exchange, Cheques and Promissory*

then was) pointed out, if a defendant successfully places the underlying *causa* for a claim based on a cheque in dispute, the claim then becomes illiquid, even though the cheque itself remains, of course, liquid.[4] Once the claim becomes illiquid, provisional sentence must be refused.[5] The defendants, in their affidavit disputing their liability, have indeed placed the underlying *causa* in dispute. It is therefore necessary to consider the facts in contention.

[3] On 5th August, 2008 Rakhee Investments CC ("Rakhee") sold to Villa Via Developments Limited (previously known as Zambrotti Investments 38 (Pty) Limited) a "property" described as "32 sectional title units in the sectional scheme SS Villa Via, Scheme 43/1995". This property or "properties" are situated in Sandown. The transaction was recorded in a written agreement. In the agreement the purchase price has been recorded as being R65 million. The agreement further records, *inter alia*, that "the seller hereby irrevocably transfers, cedes and assigns all and/or any benefit licence, title and interest *in the hotel* and/or bed and breakfast licence and or authority vested in it and/or the property, to the purchaser" (my emphasis) and, as a so-called warranty, that "the property has the zoning rights suitable to operate a *hotel* and/or bed and breakfast business" (my emphasis). The dispute turns, essentially, on the meaning to be attributed to the word "hotel".

[4] Rakhee was, at all material times, duly represented by the plaintiff. He has described himself as "the beneficial owner of each of the sellers" and has been described by the defendants as "the controlling mind" of the seller. Although, on the defendants' version, the date has not been made clear, it seems that on 5th August 2008 four cheques totalling R16 million were signed by the second defendant, the natural

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Notes, Durban: LexisNexis, p75.

[4] *Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249G.

[5] *Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249H-250F.

person duly authorised to act on behalf of the first defendant as the drawer and physically handed over to the plaintiff as the named payee. In regard to the cheques, the first respondent, an associated company of the purchaser, at all material times acted for and on behalf of the purchaser. All the cheques were left payable to the named payee "or bearer". Three of these cheques were for R5 million each and another for R1 million. The cheque which has given rise to the claim for provisional sentence was one of the three cheques for R5 million each. The cheques in question were post-dated. According to the plaintiff, the cheques were drawn in this manner and handed over to him at his request. "As I was the beneficial owner of each of the sellers, it made sense to have the cheques made out to me personally". The defendants dispute that the name of the plaintiff had been filled in on the cheques at the time when they were handed over and contends that they were left blank. Nothing turns on this as, *prima facie*, the bearer of an inchoate cheque has the authority and the right to fill in details left blank.[6]

[5] On 22nd August 2008, the seller and the purchaser agreed upon a so-called "Addendum 1 to the Sale of Immovable Property and Hotel Business Agreement". In the addendum, the purchase price is recorded as being R64 500 000 (i.e. R500 000 less than previously) and it is recorded that the seller had received a payment of R15 million "by way of cheque", "as a partial reduction of the purchase price".

[6] On 14th October, 2008 the seller and the purchaser entered into a so-called "Addendum 2 to the Sale of Immovable Property and Hotel Business". "Addendum 2" is recorded in a written instrument. In the second addendum "the property" is described as the 32 sectional

[6] See section 18 of the Bills of Exchange Act, No. 34 of 1964, as amended and *Ramsukh v Diesel-Electric (Natal) (Pty) Ltd* 1997 (4) SA 242 (SCA) at 249G-250A and the authorities therein cited.

units aforesaid but the following words are added "and includes the hotel business operated in regard thereto and/or thereon". The purchase price remains recorded as being R64 500 000 (i.e. the amount reflected in "Addendum 1"). The deposit is recorded as being R5 545 626,56 which includes the cheque for R1 million referred to previously. This addendum also records that the purchase price of R64 500 000 includes:

> An amount of R15 000 000 (fifteen million rands), by way of cheque, which cheques the seller hereby acknowledges receipt of payment, as a partial reduction of the purchase price, which cheques the Seller (being Rakhee Investments) hereby acknowledge as being in respect of the hotel business, furniture and accessories required to operate the hotel business as at date of occupation

Furthermore, the addendum records a warranty and a "material representation" that the seller "is in possession of all applicable and valid licences and/or authorities enabling it to conduct and/or operate its hotel and/or bed and breakfast business from the property". The transfer of the properties took place on 20th March, 2009, the "purchase consideration" in respect thereof being recorded as R49 500 000.

[7] On 27th August 2009 the Executive Director: Development Planning and Urban Management of the City of Johannesburg wrote to Hugo Olivier & Associates, the attorneys then acting for the purchaser in respect of the zoning of the hotel to advise that Portion 2 of Erf 43 Sandown could not be used for an hotel by reason of its zoning. On 28th August 2009, Knowles Husain Lindsay, the attorneys acting for the purchaser in its dealings with the seller, wrote a letter to the seller to advise that the hotel had been sold as a going concern for R15 million, that the three post-dated cheques (of which one has given

rise to this claim for provisional sentence) had been given for the acquisition of the hotel, that in view of the difficulties in regard to zoning, the purchaser had elected to cancel the agreement in respect of the hotel and tendered the return of it ("the hotel") against the return of the post-dated cheques. In that letter, Knowles Husain Lindsay advise that their client, the purchaser, would instruct its bankers to stop payment on the cheques (which would have included, obviously, the one which has given rise to the claim for provisional sentence).

[8] In summary, therefore, the defendants version of events is that the seller purchased an hotel as a going concern for R15 million, that the cheque in question was handed over in part payment of this "purchase consideration", that the seller had not and could not deliver to the purchaser the hotel as a going concern and that, accordingly, the purchaser had validly cancelled the agreement and stopped payment of the cheque.

[9] *Ex facie* the affidavits filed on behalf of the defendants, they have successfully challenged the underlying *causa* for payment by way of the cheque. The dispute which has arisen certainly cannot, merely upon reading the defendants set of affidavits, be found to be so far-fetched or untenable that the court can reject the defendants' version. Moreover, it is clear that the plaintiff, before he issued provisional sentence summons, was aware of the defendants' version of events.

[10] It is trite that the general rule set out in Johannes Van Der Linden's *Verhandeling over de Judicieele Practijcq of Vorm van Procedeeren*,[7] first published in 1794, still holds good: extrinsic evidence, beyond the document itself, is not permissible to establish a claim for provisional sentence.[8] The plaintiff could not therefore, in the provisional sentence summons, file a founding affidavit. He did,

[7] Vol 1, Book 2, Chapter 6, section 13.

however, file a replying affidavit, as he was entitled to do, in terms of Rule 8 (5). In this affidavit, the plaintiff alleges that, by the time the second addendum had been signed, the purchaser had already been conducting the so-called Villa Via business. According to the plaintiff, this "Villa Via business" had always been understood, between the parties, as the "hotel business". The plaintiff goes on to say that, nevertheless, the properties upon which this "hotel business" operates have not ever been an hotel in the sense recognised by the City of Johannesburg. The "hotel" has always consisted of luxury suites typically having two bedrooms, two bathrooms (one of which is *en suite*) and an open plan kitchen/lounge/dining-room. These suites are fully furnished. The suites are and, at all material times, have been let out as such. No provision of food or drink has ever been made by the business to these units. These facts have, at all material times, been well known to the defendants. This business, according to the plaintiff, has been operating for several years without objection by the City of Johannesburg. The suites in respect of which this business is conducted are "sandwiched between major Sandton hotels including the fairly recently developed Radisson Hotel, the Hilton Hotel, The Courtyard, Hotel, the Don Apartments, the Balla Laika Hotel and the Holiday Inn Hotel". The defendants always knew that these properties were not and would not be licensed by the City as "an hotel". Addendum 2 was recorded as it was so that certain of the units would be sold as a going concern (which they were), and would accordingly be "zero-rated for purposes of registration of transfer". The deal in the second addendum was structured so that a portion of the purchase price was for the purchase of an "hotel" as a going concern which would, furthermore, have saved the defendants a considerable amount of VAT (Value Added Tax). The second addendum had been agreed to by the plaintiff to assist the purchaser in saving money. Moreover, the sale of the hotel business could not, as a matter of fact and law, be

[8] See, for example, *Union Share Agency and Investment Ltd v Spain* 1928 AD 74 at 79 and *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 755H.

severable from the sale of the units upon which the "Villa Via business was conducted": once the units were transferred to the purchaser, the purchaser, *ipso facto*, acquired "the hotel business." There is nothing further that the seller could deliver other than what has been transferred on 20th March, 2009 and the purchaser, at all material times, has been fully aware of this. According to the plaintiff, there has been no misrepresentation or breach of contract by the seller whatsoever: the purchaser has, at all material times, known exactly what this "Villa Via business" entailed. There is, furthermore, no need for the purchaser to obtain any licence for the "Villa Via business" to continue as it always has, a fact of which the defendants were at all times fully aware. Finally, the plaintiff submits that, as matter of law, in terms of the Businesses Act, No 71 of 1991, an application for rezoning can only be made by the owner of that business. Now that transfer has taken place, it is beyond the power of the seller to secure a rezoning: this can only be done by the purchaser. The version of the plaintiff, in his replying affidavit, certainly places the defendants' version in a very different perspective. The defendants at one stage applied to file a further, supplementary affidavit in answer to the plaintiff's replying affidavit but, before I could even consider the matter, they withdrew this application.

[11] In *Barclays National Bank Ltd v Serfontein*[9] Goldstone J referred with approval to the judgment of Erasmus J in *De Bruin v Munro* (1)[10] to hold that a plaintiff in provisional sentence proceedings is obliged to establish his cause of action in the summons, and may not do so in his replying affidavit.

[12] Perhaps aware of his difficulties, Mr *Watt-Pringle,* who together with *Ms Lundström* appeared for the plaintiff, relied very heavily on the following:

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[9] Supra at 249B.

[10] 1971 (4) SA 624 (O) at 628B-E.

(i) the *dictum* in *Froman v Robertson*[11] by Corbett JA (as he then was) that the *onus* rests on the defendant to establish any of his special defences (such as a lack of *causa*) on a balance of probabilities; and

(ii) the plaintiff was, he submitted, a holder in due course, and accordingly entitled to the special protection afforded by the Bills of Exchange Act, No. 34 of 1964, as amended ("the Bills of Exchange Act") provides.

I shall deal with the question of *onus* more fully later on but I accept that it informs or "colours" Mr *Watt-Pringle's* submissions in connection with the plaintiff being the holder in due course.

[13] There can be no question that the payee of a bearer cheque (such as the one in question) may qualify as a holder in due course.[12] The question in this case is: does this particular plaintiff enjoy the special protections provided for in the Bills of Exchange Act? It is important to remember that the law of bills of exchange (which includes cheques[13]) derives from the law merchant and that our Bills of Exchange Act is, in effect, a codification of the law merchant in regard to these instruments. The same position obtains in many other countries around the world. It is easy to forget that the law merchant preceded not only the electronic transfer of funds which nowadays dominates our commercial exchange but also the motor vehicle and the steam engine. The law merchant is closely linked to aspects of chivalry, with its love of ritual (residually apparent, for example, in "presenting" a cheque for payment), codes of honour (a cheque should be "as good as gold", for example) and so on. It would have often taken many hours, if not days and weeks to ride, clip-clop on horseback to present cheques and other similar instruments for payment. The

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[11] 1971 (1) SA 115 (A) at 120B.

[12] See *Ramsukh v Diesel Electric (Natal) (Pty) Ltd* 1997 (4) SA 242 (SCA) at 249A.

[13] The Bills of Exchange Act defines a cheque as a bill of exchange drawn on a bank payable on demand.

difficulties in presenting cheques for payment had the result that, generally, cheques would change hands many, many more times than they do so now. Despite its somewhat arid appearance, the Bills of Exchange Act represents a drama, vivid in colour and character. It might not have the literary quality of Geoffrey Chaucer's *Canterbury Tales* but, behind that formidable exterior, lurk tales that are no less arresting of our attention. One may delight in the seemingly dry sense of humour of Holmes JA when he said in regard to certain features of the law relating to cheques that "one is dealing with an evolved mystique of hieroglyphs".[14] Nevertheless, implicit in his observations may be detected a sense that, as objects of law, cheques can be regarded with a sentiment that approaches affection once one has some understanding of their history. The "hieroglyphs" were part of "the code" – the code of honour. The point of this *discursus* is to explain that the special protection for the holder in due course arose precisely because a cheque or bill of exchange could have changed hands many times over such that the ultimate holder was quite oblivious of its history. If a cheque was to be "as good as gold", honour required, in such circumstances, that it should be paid.

[14] Section 27(1) of the Bills of Exchange Act provides that:

> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following circumstances, namely –
>
> (a) he must have become the holder of it before it was overdue, and if it had previously been dishonoured, without notice thereof; and
> (b) he must have taken the bill in good faith and for value, and at the time the bill was negotiated to him, he must have had no notice of any defect in the title of the person who negotiated it.

[14] In *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A) at 501H.

Mr *Watt-Pringle* submitted that the probabilities were overwhelming, especially as the defendants carefully avoided mentioning the date on which the plaintiff took the cheque, that this occurred on 5th August, 2008, the date upon which the first written agreement between the purchaser and the seller was signed. Mr *Watt-Pringle* submitted that, whatever might appear in the second addendum to this agreement, it has been quite clear that on the date when the plaintiff took the cheque, the plaintiff, *at that time* (i.e. on 5th August, 2008), was in good faith and took it for value. Accordingly, so the argument went, the plaintiff was entitled to payment on the cheque.

[15] Section 36 (b) of the Bills of Exchange Act provides that a holder in due course

> …holds the bill free from any defect in the title of prior parties as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill

The reference to "prior parties" in this section links up with what I have said about the *ratio* for the special protection for a holder in due course: a bill may have changed hands several times over such that the ultimate holder is unaware of the underlying *causa*. In this case, on the plaintiff's own version of events, there was no payee prior to him. Indeed he was the first person and only person to have taken it as holder. Accordingly, he cannot, in terms of section 36 (b), hold the cheque free from the defence available to the defendants of there being no underlying *causa* once the cheque was presented for payment. I am fortified in this view by reference to the well-known case of *Moti and Co v Cassim's Trustee.*[15]Although the court had to deal with a different issue from the one before me, Innes CJ said[16]:

[15] 1924 AD 720.

[16] At 732.

> Moreover, as was pointed out in *Herdman v Wheeler* (1902 1 KB 361), the issue of a note by delivery to the payee is a very different thing from its transfer thereafter from hand to hand. In the one case the parties are simply bound by their own contract; in the other the transferee may acquire w a better title than the transferor possessed; and that is the result of negotiation, not issue.

In *Karabus Motors (1959) Ltd v Van Eck*,[17] Watermeyer J (as he then was), after referring to *Moti v Cassim's Trustee* and the fact that "plaintiff and defendant are immediate parties" said: "That being so defendant may set up against the defendant any defence which would have been available to him had the action been brought on an ordinary written contract".[18] In *Viljoen v SIK Investment Corporation (Pty) Ltd*[19]the court adopted a similar opposition and specificall referred to *Karabus v Van Eck* with approval.[20] Both *Karabus v Van Eck* and *Viljoen v SIK Investment Corporation* were approved in the Supreme Court of Appeal as having been consistently applied in the South African courts and as having "the weighty support of the House of Lords" in the *Ramsukh v Diesel-Electric* case.[21]

[16] From the above, more particularly Goldstone J's judgment in *Barcalys v Serfontein*, the law appears to be clear that a plaintiff in provisional sentence proceedings cannot rely on his replying affidavit to establish a cause of action. In any event, even if one were to have regard thereto, one must not lose sight of the observation, made by Grosskopf J (as he then was) in *C.G.E. Construction Co v Administration, Cape and Another*[22] that the granting of provisional

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[17] 1962 (1) SA 451 (C).

[18] At 453B-C.

[19] 1969 (3) SA 582 (T).

[20] At 585A-G.

[21] 1997 (4) SA 242 (SCA) at 248C-D.

[22] 1976 (4) SA 925 (C) at 927A.

sentence required "the production of strong *prima facie* proof of debt". On the other hand, there seems to be little point in having a replying affidavit in such proceedings if it is simply to be disregarded, more especially as the plaintiff, save in certain exceptional circumstances not relevant to this case, may not rely on evidence extrinsic to the document itself in order to succeed: no founding affidavit would have been permissible.

[17] In summary, the court has the following conundrum before it:

(i) the plaintiff is the named payee of a bearer cheque;

(ii) in their affidavit, disputing liability on the cheque, the defendants have established, on the probabilities, that the plaintiff is not entitled to the special protection of a holder in due course and have established a defence on the merits of the plaintiff's claim for payment;

(iii) the replying affidavit of the plaintiff casts considerable doubts on the probabilities of the defendants' success and, considering the claim for provisional sentence as a whole, may be said to shift the probabilities in the plaintiff's favour considerably;

(iv) the plaintiff may not, however, rely on a replying affidavit to establish his cause of action;

(v) it is in the nature of provisional sentence that a plaintiff does not rely on a founding affidavit but upon a liquid document upon which the liability of the defendant appears to be self-evident;

(vi) ordinarily, the only way in which a defendant can escape provisional sentence is by way of affidavit;

(vii) it is not clear whether the onus of the defendant referred in *Froman v Robertson* is one to be discharged solely in the affidavit to be filed in terms of Rule 8 (5) of the High Court Rules or whether it is to be discharged in some

"overall" way, by regard being had to all the affidavits (in *Froman v Robertson* Corbett JA certainly referred to the replying affidavit,[23] although the defendant's case appears to have foundered, in the end, on its own deficiencies);

(viii) if the defendants are required to discharge the *onus* regard being had to their affidavit only in this particular case, they will have succeeded but this, as will be apparent, may visit injustice upon the plaintiff;

(ix) if the *onus* is to be discharged by the defendants in an overall way (by looking at the complete set of all the affidavits before the court) the probabilities are almost so evenly balanced that it is hard indeed to make a decision as to where they lie;

(x) It is difficult indeed to decide "the probabilities" where, as here, neither version in the respective sets of affidavits is inherently improbable – these versions need to be subject to cross-examination, whereupon the criteria set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*,[24] can come into operation;

(xi) Obviously, if the probabilities were exactly even then the defendants would have failed to discharge the *onus* and provisional sentence should be granted[25];

(xii) In any event, a finding that the defendants have failed to discharge the *onus* (after looking at the complete set of all the affidavits before the court) would, at best, be made with such a marginal degree of certainty as to where the probabilities lie that, to grant provisional sentence, may visit injustice upon the defendants and, moreover, would

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[23] At 123B

[24] 2003 (1) SA 11 (SCA) at para [5]

[25] See, for example, *Strachan & Company v Murray* 1939 WLD 93 at 100; *Allied Holdings Ltd v Myerson* 1948(2) SA 961 (W) at 966; *Fisher v Levin* 1971 (1) SA 250 (W) at 253D.

have the result of allowing the plaintiff to establish his claim by way of his replying affidavit.

[18] In *Rich and Others v Lagerwey*,[26] Wessels JA, delivering the unanimous decision of the then Appellate Division referred the judgment of De Wet JP in *Extension Investments (Pty) Ltd v Ampro Holdings (Pty) Ltd*[27] and observed as follows in respect of the learned Judge President's judgment: "After surveying the relevant authorities and considering the practice of the Courts, he concluded that a Court has no such inherent power (to hear *viva voce* evidence in provisional sentence cases). I am in respectful agreement with this conclusion".[28] Wessels JA went on to say that, other than where the verity of the defendant's signature (or that of his agent) was in dispute, "I would observe that, having regard to the nature and purpose of provisional sentence proceedings, a Court would exercise such a power only in very exceptional circumstances".[29]

[19] Since the cases of *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[30] and *Plascon-Evans Paints Ltd v Van Riebeeck Paints*,[31] decision-making by the courts when a final order is sought in motion proceedings and there are disputes of fact on affidavits has generally been hugely facilitated. Where provisional orders are sought, the position is not quite as straightforward. That the question of deciding probabilities where a dispute falls to be decided by affidavit is not always an easy one as was recognized by the then Appellate Division when it decided the well known case of *Kalil v Decotex (Pty) Ltd and Another*.[32] In *Kalil v Decotex* Corbett JA (as he then was)

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[26] 1974 (4) SA 748 (A)

[27] 1961 (3) SA 429 (W)

[28] At 756D

[29] At 756F-G

[30] 1957 (4) SA 234 (C).

[31] 1984 (3) SA 623 (A).

[32] 1988 (1) SA 943 (A).

referred to some of the difficulties that may arise for a court in deciding whether either provisional or final orders for the winding-up of a company should be made. Corbett JA, delivering the unanimous judgment of the court in that case, pointed out that a refusal of a provisional order of winding-up represents a final decision against the applicant and, if such a decision is always to be made purely on the affidavits, injustice may be done to an applicant.[33] The Learned Judge said that where there is a dispute on the affidavits in a situation such that the probabilities cannot be decided by reference to all the affidavits,[34] the court should retain a discretion to refer the matter to oral evidence.[35] Later, I shall give my reasons why I do not consider that the refusal of provisional sentence necessarily entails the making of a final order. The "*Kalil v Decotex* solution" of referring the dispute to oral evidence is problematic, however, because, as I have mentioned before, the position is clear that it is only in exceptional circumstances that a dispute relating to the grant of provisional sentence should be referred to oral evidence. In any event, Rule 8 (7) may envisage that oral evidence is to be heard only as to the authenticity of the defendant's signature (or that of his agent) and the agent's authority.

[20] In deciding how to deal with this matter, I am mindful of the fact that the effect of granting provisional sentence is quite drastic: the defendant must pay the amount claimed together with taxed costs, although he may require the plaintiff to provide security *de restituendo* (see Rule 8 (10), read with Rule 8(9)). I accept, however, as Mr *Watt-Pringle* has submitted, that provisional sentence is not as drastic a remedy as summary judgment and that, of course, different criteria must apply in deciding whether or not to refuse or grant provisional sentence from those that apply in summary judgment

[33] At 979F-H.

[34] See 978E.

[35] See 979F-G.

applications. Indeed, Mr *Watt-Pringle*, on more than one occasion, submitted that I could not treat the defendants' set of affidavits in the same way as would be the case if the defendants were resisting an application for summary judgment. This submission gave me cause for reflection. Mr *Watt-Pringle* is correct that there must be a difference in approach to the two procedures. First, the consequences of granting the orders sought are respectively different in provisional sentence and summary judgment proceedings. Secondly, the question arises as to why different proceedings would exist, if they were to be determined in the same way?

[21] Referring to various other cases Grosskopf J, in *Koornklip Beleggings Bpk v Allied Minerals Ltd*[36] said that "Affidavits in summary judgment matters are customarily treated with a certain degree of indulgence". In broad terms, Grosskopf J's judgment appears to have been endorsed by the Supreme Court of Appeal in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd.*[37] I think it is true to say that here in the South Gauteng High Court, in Johannesburg, the case of *Breitenbach v Fiat*[38] is generally taken as a cautionary note that a court should be careful not to be too indulgent in summary judgment proceedings. *Breitenbach v Fiat* has been described in the *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* case as "the classic exposition".[39] In *Breitenbach v Fiat* Colman J, delivering the judgment of the Full Court, said that:

> What I have set out in that regard (referring to the suggestion of the creator of Pooh-Baah (a member of the English Bar, as well as a satirist) that 'corroborative detail'

[36] 1970 (1) SA 674 (C) at 678E.

[37] 2004 (6) SA 9 (SCA) at para [9]. The SCA also referred, with approval, the judgment of Corbett J (as he then was) in *Stassen v Stoffberg* 1973 (3) SA 725 (C) which, in turn, also broadly endorsed the *Koornklip Beleggings* case.

[38] 1976 (2) SA 226 (T).

[39] At paragraph [24].

> could 'give artistic verisimilitude to an otherwise bald and unconvincing narrative') is not a demand for, or an encouragement to present, lengthy and prolix affidavits in summary judgment cases. All that is required is that the defendant's defence be not set out so baldly, vaguely or laconically that the Court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.

In *Maharaj v Barclays National Bank Ltd* [40] Corbett JA, delivering the unanimous judgment of the court, said in regard to the requirement that a defendant in summary judgment proceedings should disclose fully the nature and grounds of his defence and the material facts upon which it is founded that

> … while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a *bona fide* defence… At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading.

If one bears in mind the decisions referred to in this paragraph, it seems that the difference between the approach of a court to a defendant's affidavit in provisional sentence proceedings and summary judgment proceedings is that a greater degree of precision and exhaustiveness is to be expected in the former than the latter.

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[40] 1976 (1) SA 418 (A) at 426C-E.

[22] In the present matter, the defendants have indeed set out their defence with a high degree of precision and exhaustiveness. Although the defendants' version invites a few questions, it has been put before the court with clarity, amplified by not inconsiderable supporting documentation. What is in dispute is the veracity of this version. As their version reads, the defendants' set of affidavits resisting provisional sentence establishes the probabilities in their favour. As I have already said, their version cannot be found to be so far-fetched or untenable that the court can reject it as it stands. On the other hand, as I have also already said, the plaintiff's replying affidavit casts doubt on these probabilities to a considerable extent. The plaintiff's version may perhaps raise questions as to whether or not the plaintiff was a party to a tax fraud. On the other hand, parties may lawfully structure their commercial arrangements in a way that one or both of them, by tax avoidance, minimises tax. If the plaintiff's version is true and the transaction was lawful, then the plaintiff should succeed in obtaining judgment in his favour.

[23] As I have mentioned earlier, the defendants at one stage applied to file further supplementary affidavit in answer to the plaintiff's replying affidavit but then thought better of it. In this case, it does not matter how many sets of affidavits are filed. The matter, ultimately, will have to be decided largely on findings as to credibility. Thus one goes round in circles. The only practical solution, it seems to me, is to refer the matter to trial.

[24] To add to the difficulties in adjudicating the matter, it seems that some confusion may have arisen as to whether or not a judgment refusing provisional sentence precludes the plaintiff from proceeding by way of an illiquid summons.[41] Provisional sentence (or *namptissiment* or *handvulling*), although of French origin, is part of

[41] See *Barclays National Bank Ltd v Wollach* 1986 (1) SA 355 (C) at 359G-G.

our inheritance from Roman-Dutch common law.[42] Although Rule 8 (6) refers to a court giving "final judgment" in provisional sentence proceedings, it seems, however, to have been clear enough that a judgment granting provisional sentence has, as its very name implies, been regarded in the old authorities as being provisional only.[43] Particularly in view of the fact that the former Appellate Division has decided that proceedings for provisional sentence are interlocutory in nature,[44] I prefer the view of the learned author Malan[45] that provisional sentence is a form of interim relief. Consequently, it seems to follow that, ordinarily, a plaintiff in respect of whom provisional sentence has been refused should not necessarily face a bar to proceeding by way of ordinary trial action. On the other hand, there may be situations where it would be appropriate in provisional sentence proceedings to dismiss the plaintiff's claim entirely: for example, where a defendant presents an apparently watertight defence to which the plaintiff does not reply.

[25] In my view, it would not only be practical but also obvious that, in order to do justice in this particular case, the matter should proceed to trial. By adopting this approach, one can make sense of allowing replying affidavits in provisional sentence proceedings. Moreover, an expeditious referral to trial, in appropriate circumstances, will also reconcile the tension that may seem to exist in our law at present as to the process which a court should follow where a good defence has

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[42] See the judgment of Grosskopf J(as he then was) in *C.G.E Rhoode Construction Co v Provincial Administration, Cape and Another* 1976 (4) SA 925 (C) at 927A-928D and the judgment of Goldstone J in *Barclays National Bank v Serfontein* 1981 (3) SA 244 (W) at 249H. See, also: Dendy, M. *Step-by-Step Provisional Sentence Proceedings*. 2003 (June) *De Rebus* 29.

[43] *Ibid*.

[44] *Oliff v Minnie* 1952 (4) SA 369 (A) at 374 G.

[45] Malan, F.R. and others. 1986. *Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes,* Durban: LexisNexis, p196. See also De Vos, W. 1986 *The Course of Proceedings Upon the Refusal of Provisional Sentence,* TSAR 233-5.

been put forward but has been matched by a reply that, in turn, casts a different light on the matter. Thus:

(a) the plaintiff cannot rely on a replying affidavit to establish his cause of action; but

(b) the replying affidavit can avoid the action being dismissed in its entirety.

[26] Precedent for referring provisional sentence proceedings to trial is to be found in *Cohen v Louis Blumberg (Pty) Ltd and Another*[46] and also *Fichardt's Estate v Mitchell and Others*,[47] *Roberts v Willet*,[48] *Ottico Meccania Italiana v Photogrammetic Engineering (Pty) Ltd*,[49] *Cronje v Cronje*,[50] and *Lesotho Diamond Works (1973) (Pty) Ltd v Lurie*.[51]

[27] Nevertheless, in all these cases, other than the *Cohen v Louis Blumberg* matter, the approach of the court has been either to postpone or suspend the provisional sentence proceedings, pending the outcome of the trial. I prefer the approach of Ramsbottom J in the *Cohen v Louis Blumberg* case. Should the plaintiff's claim be good, "converting" the provisional sentence proceedings into a trial action will minimise the prejudice which the plaintiff will suffer in being deprived of the speedy relief of provisional sentence. That was the objective of Friedman J (as he then was) in the *Ottico Meccania* case.[52] Besides, unless the decision to "convert" provisional sentence proceedings into a trial action (in contradistinction to postponing or suspending the provisional sentence proceedings) is a purely discretionary matter, I am bound to follow Ramsbottom J's decision

[46] 1949 (2) SA 849 (W) at 853.

[47] 1921 OPD 152.

[48] 1928 CPD 529.

[49] 1965 (2) SA 276 (D).

[50] 1968 (1) SA 134 (O).

[51] 1975 (2) SA 142 (O).

[52] See at 290D.

unless I am convinced that it was wrong, the reason being that Ramsbottom J's decision was delivered in this division and the other decisions elsewhere.[53] The format of Ramsbottom J's order in the *Cohen v Louis Blumberg* case also has the advantage of singular clarity. The parties could not complain that they were confused as to the steps that should be followed. Accordingly, I shall broadly and respectfully follow the format of Ramsbottom J's order in *Cohen v Louis Blumberg*.

[21] In the result, the following order is made:

(a) Provisional sentence is refused;
(b) The provisional sentence summons is to stand as the summons in the principal case;
(c) The defendants' set of affidavits resisting provisional sentence is to serve as an appearance to defend;

[53] In *Ex parte Hansmann* 1938 WLD 89 at 93, Schreiner J (as he then was) said: "I am bound to follow a Transvaal decision in preference to the decisions of other provinces, at all events unless I am completely satisfied of the incorrectness of the Transvaal decision". The Appellate Division disagreed with this decision but on a different issue (the extraterritorial jurisdiction of courts functioning within South Africa) in the case of *Estate Agent's Board v Lek* 1979 (3) SA 1048(A) at 1068-1069C. The *stare decisis* point in *Ex parte Hansmann* was expressly followed in *Klaassen v Benjamin* 1941 TPD 80 at 93, *Feun v Pretoria City Council* 1949 (1) SA 331 (T) at 354, *Mockford and Others v Gordon and Abe Gordon (Pty) Ltd* 1949 (3) SA 1173 (W) at 1174, *Simpson v Simpson* 1951 (3) SA 828 (W) at 830A, *Sebastian and Others v Malelane Irrigation Board* 1953 (2) SA 55 (T) at 59G, *R v Philips Dairy (Pty) Ltd* 1955 (4) SA 120 (T) at 122D, *S. A. Clay Industries ltd v Katzenellenbogen* 1957 (1) SA 220 (W) at 224H and *R v Mnguni* 1958 (4) SA 320 (T) at 322F. The reason for *Ex parte Hansmann* having disappeared from view in recent years seems to have to do with a somewhat misleading reference in the noter-up as "not approved" in the of *Estate Agent's Board v Lek* case. It is instructive to read, in general terms, the affirmation of the principle of *stare decisis* in *Collett v Priest* 1931 AD 290 at 301, *Bloemfontein Town Council v Richter* 1938 AD 195 at 232, *R v Nxumalo* 1939 AD 580 at 586 and *Commissioner for Inland Revenue v Estate Crew and Another* 1943 AD 656 at 680, culminating in the landmark case of *Harris & Others v Minister of the Interior & Another* 1952 (2) SA 428 (A) at 452.

(d) The plaintiff is to file a declaration within 15 days of this order;

(e) After the filing of the declaration, the ordinary Rules of the High Court as to the filing of further pleadings are to apply;

(f) The question of the costs of these proceedings is reserved for determination at the trial.

DATED AT JOHANNESBURG THIS 18th DAY OF FEBRUARY, 2010

N.P. WILLIS

JUDGE OF THE HIGH COURT

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Date of hearing: 4th February, 2010

Date of judgment: 18th February, 2010