

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case NO: 0022649/2017

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES:
YES
(3) REVISED: NO

9 May 2022

DATE

SIGNATURE

In the matter between:

JAMES R LINDSEY

First Plaintiff

THE LINDSEY FAMILY TRUST

Second Plaintiff

WILLIAM BUCK JOHNS

Third Plaintiff

MARC VAN ANTRO

Fourth Plaintiff

WYMONT SERVICES LIMITED

Fifth Plaintiff

all acting derivatively on behalf of:

AFRICAN WIRELESS INC

Sixth Plaintiff

and

CONTEH, ALIEU BADARA MOHAMED
(substituted by: **BRIGITTE VAN GEESBERGEN**
CONTEH in her capacity as *curatrix bonis*)

Defendant

JUDGMENT

SIWENDU J

Introduction

- [1] This Court is asked to enforce a foreign judgment obtained by default before the Superior Court of California, Orange County (California Court) in what was described as a case involving “*high stakes derivative litigation*”. The enforcement of the judgment is by means of a provisional sentence summons (proceedings) in terms of Rule 8 of the Uniform Rules of Court.
- [2] The plaintiffs claim a sum of USD 95 360 08.84, plus interest of USD25 559.74, accruing daily at the rate of 10% per annum against the defendant reckoned from 1 March 2017 to the date of payment. The claim follows a derivative action brought against the defendant before the California Court.
- [3] The case was allocated for hearing as a Special Motion following a directive by the Deputy Judge President. The implications of the proceedings for the defendant is that if the plaintiffs succeed, he will be required to satisfy the judgment claimed as well as taxed costs, failing which, furnish security¹ in order to enter the main case.
- [4] The first, third and fourth plaintiff, i.e. Messrs James R Lindsey, William Buck Johns and Marc Van Antro, are international businessmen based in the United State of America, California and Belgium, Brussels respectively. Together with the fifth plaintiff, Wymont Services Limited, they are shareholders of African Wireless Incorporated (AWI), a company registered in the State of Delaware, United States of America. Wymont Services Limited is registered in the Isle of Man.

¹ Rule 8(9) and (10).

- [5] The defendant, Mr Conteh Alieu Badara Mohamed is an international businessman born in Gambia. He resides at 37 Homestead Avenue, Bryanston, Johannesburg, South Africa. The defendant is a co-shareholder of AWI with the first, third, fourth and fifth plaintiff. At the time of the proceedings, he was a Director at Kanuma Resources (Pty) Ltd, a business trading from 9th Floor, 15 Alice Lane, Sandton. He was considered a resident of Orange County by virtue of a property he owns at 1941 Fairburn Avenue, Los Angeles, Orange County. Before taking up residence in South Africa, the defendant lived in the Democratic Republic of Congo (DRC) and maintained business interests there.
- [6] Progress in the case has been subject to shifting sands. After the defendant opposed the proceedings on 13 July 2017, the parties entered into an Agreement of Settlement and Mutual General Release on 18 July 2017, which provided, *inter alia*, for a stay of the proceedings. The agreement lapsed on 18 November 2017. The plaintiffs enrolled the case for hearing on 5 December 2017, but they allege that because the defendant filed a substantial and lengthy opposing affidavit, on 1 December 2017, the case was removed from the roll to allow the plaintiffs adequate time to reply.
- [7] In tandem with the proceedings, between 2017 and 2019, a number of applications ensued before the Superior Court of California to (1) set aside a Writ of Possession issued; (2) stay a Writ of Execution; and (3) appeal the judgment before the Supreme Court of Appeal. The appeal failed and the Supreme Court of Appeal issued a "remittance of remittitur" on 19 April 2019 which signalled that the judgment was final.
- [8] While the proceedings as well as the matters above were in motion, Advocate Karin Meyer was appointed *Curatrix ad Litem* to the defendant. She had submitted a report on 26 February 2019 which conveyed opinions of a medical doctor and a psychologist that the defendant was afflicted with "moderate to severe Alzheimer's disease" and is unable to manage his financial affairs.
- [9] On 5 March 2019, this Honourable Court, granted an Order declaring the defendant of unsound mind and incapable of managing his affairs. His wife,

Mrs Brigitte Van Geebergen Conteh was appointed *Curatrix bonis* to the estate of Mr Conteh. She has duly substituted the defendant in these proceedings.

[10] On 28 August 2019, after the dismissal of the appeal by the Supreme Court of Appeal, Mrs Brigitte Van Geebergen Conteh filed what she refers to as a “*substituting answering affidavit*” requesting this Court to strike the defendant's original answering affidavit with the exception of paragraph 6.

[11] Only two sets of affidavits are permissible in these proceedings. Nevertheless, the Court has a discretion, in a proper case, to admit further affidavits, subject to the discretion being exercised judicially upon a consideration of the facts of the case. It is a question of fairness to both sides.² The plaintiffs delivered their replying affidavit by Mr Sandler on 13 September 2019, in terms of Uniform Rule 8(5), followed by their heads of argument on 1 October 2019. As will be evident in the judgment, the manner in which I arrive at the decision makes it unnecessary to consider the “*substituting affidavit*”.

[12] A background to the protracted litigation is necessary to give context to the genesis of the proceedings and the judgment sought to be enforced.

Background

[13] While a resident of the DRC, the defendant registered AWI in the State of Delaware. AWI first traded as African Cable Company Inc. The first to fourth plaintiffs subscribed for 26% of the shares in AWI. The balance of the 74% of the shares were allotted to the defendant and AWI's legal counsel each holding 69% and 5% of the shares respectively.

[14] In 1997, the defendant incorporated a second company in the DRC, known as Congolese Wireless Network SPRL (CWN) with two shareholders, namely AWI and Resotel SPRL (Resotel). As a result, AWI held 60% of the issued shares in CWN, while Resotel held the remaining 40% of the shares. The defendant alleges that Resotel (also incorporated in the DRC) had close ties with the

² Milne, *NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N).

Kabila family. Soon after its incorporation, CWN was awarded a license to operate the cellular telephone network in the DRC.

[15] On or about October 2001, armed with the lucrative DRC telecommunications license, CWN entered into a joint venture agreement with Vodacom International Limited to form a new entity trading as Vodacom Congo SPRL. Vodacom International owned 51% of Vodacom Congo SPRL while CWN owned the balance of the 49% shares. As the holding company of CWN, AWI, (the company in which the plaintiffs and the defendant are shareholders) became the owner of valuable telecommunications assets in Vodacom Congo SPRL. AWI is a significant and profitable enterprise.

[16] The legal wrangle leading to the derivative action before the California Court germinates from allegations that: unbeknown to the plaintiffs, as his co-shareholders, the defendant unlawfully diverted and transferred 51 shares diluted by Resotel in AWI to Odessa Capital Inc, an entity solely controlled by him. It was also alleged that he had simultaneously transferred 2 shares in CWN to two other companies, OOA One, LLC and OOA Two, LLC respectively. The papers filed before me show that the registered address of the companies is 1941 Fairburn Ave. Los Angeles, CA 90025, the residential address of a property owned by the defendant.

[17] Before the derivative action, the defendant faced criminal charges before the DRC courts on allegations of fraud and forgery of documents in respect of the transfer of the Resotel shares. I understand that the charges against him would have resulted in a year of his imprisonment. It is alleged that the defendant fled from the DRC to South Africa instead and has not returned to that country since.

[18] The plaintiffs instituted the derivative action primarily to recover the Resotel shares which they alleged were unlawfully transferred. The progression of the case before the California Court leading to the judgment is pertinent to the decision in these proceedings.

US Court Proceedings and the Default Judgment

- [19] The derivative action instituted before the California Court was mired by delays. Judge Connor, served as a discovery referee to resolve the impasse. The discovery referee had issued certain discovery orders and the defendant failed to comply. As a result, a monetary sanction of USD100 000.00 followed, ultimately leading to the defendant's defence being struck out under the procedures of the laws of the State of California.
- [20] The defendant was represented during the proceedings, but on 11 December 2015 when the discovery process terminated, his attorneys withdrew with the leave of the California Court. The absence of legal representation during the default judgment proceedings was amongst the conspectus of defences raised. The defendant alleged that plaintiffs had carefully timed the default proceedings to coincide with the period when he was unrepresented and could not participate. His new legal representative came on brief in the proceedings in February 2016.
- [21] On 10 June 2016, the California Court held "*default prove up*" proceedings. It determined the value of the 51 shares of Resotel at USD84 963 329.00 and the 2 shares in CWN at US\$8 329 738. It arrived at this value based on evidence by the plaintiffs' forensic accountants Paul Zimmer, Jonathan Bruce Sandier, and Mare Van Antro. There is no dispute that the value determined was for the purposes of "*the bond only*".
- [22] On 29 August 2016, the case served before Judge Deborah Servino. She first ordered a creation of a constructive trust to house the shares on behalf of AWI. I understand from the judgment that under the laws of the state of California, that Court has broad powers to modify its judgement to serve the ends of justice to avoid a delay and or the expense of a new trial or an appeal. Exercising these powers, on 29 August 2016 Judge Deborah Servino amended the ruling, ordering that the defendant to turn over the 51 Resotel shares and the 2 CWN shares.
- [23] On 15 September 2016, the case served *ex parte* before the same Judge, for a request to "*convert the amended judgment to a money judgment*" and for an

injunction to prevent any corporate action which would undermine the August 2016 judgment to turn over the shares.

[24] Mr Dillion (who filed an affidavit in the proceedings before me) and Ms Whyte appeared for the plaintiffs. The defendant had not turned over the shares as ordered by the court. The exchange between counsel and the presiding judge leading to this order is significant. I return to this aspect later in the judgment, but for now, I note that it is not contested that the court determined that:

“the 29 August 2016 Ruling and Order sufficed as a Supplemental Order for the value of the Shares, being the amounts specified in the order.”

[25] On 11 October 2016, the Clerk of the Court issued a Writ for the Possession of the shares in terms of the amended order on 29 August 2016 to “*turn them over*” stating their value as described in the Supplemental Order. The Sheriff’s return indicates that he made numerous attempts to execute the writ of possession. It records that even though he saw vehicles and heard people inside the defendant’s home, the occupants refused to open the front door. The Sheriff concluded that defendant was evading service. The Sheriff’s Return reflects that the custody of the property could not be obtained.

[26] Soon thereafter, on 2 November 2016, the defendant filed an application to “*quash*” the writ of possession. The application once more served before Judge Servino. On 16 December 2016, she dismissed that application stating as follows:

“The writ properly reflected the intentions of this Court with the valuation being provided in a Supplemental Order and further clarification at the hearing on an ex parte application.

... .

Accordingly, the motion to quash the writ of possession issued on 11 October 2016 is denied.”

[27] On 28 February 2017, the Clerk of the Court issued a Writ of Execution for a money judgment directing the Sheriff to enforce the judgment in the sum of

USD93 536 067.00 together with accrued interest of USD4 242 916.84 and further interest at a daily rate of USD25 559 74.00 and costs. The writ records that it is issued on a “*sister state judgment*” based on the judgment of 29 August 2016. It is not discernible what transpired after the Writ of Execution in the USA. The issues migrated to this Court because in June 2017, the plaintiffs applied for these proceedings to enforce the judgment.

[28] On 29 January 2018, the defendant filed a second petition requesting for an immediate stay of execution (known as the writ of *supersedeas*) before the Court of Appeal of the State of California which is an equivalent of a Full Court in our law. On 23 February 2018, the Appeal Court granted a temporary stay pending the resolution of the appeal and invited a further briefing, which the parties have provided. I return to the opinions expressed in the judgment of the Appeal Court later. But for now, it is sufficient to confirm that the defendant failed in his appeal.

[29] Undeterred and dissatisfied with the dismissal, On 26 February 2019, the defendant petitioned the Supreme Court of Appeal for a review. As already alluded to above, on 17 April 2019, that Court dismissed the petition. In addition, the Supreme Court of Appeal declined to take Judicial Notice of the additional evidence relating to the defendant’s mental capacity.

[30] Against this backdrop, the plaintiffs claim that the judgment against the defendant obtained according to California Law is enforceable by this court. They contend that it constitutes a liquid document and contains a clearly delineated and readily calculable amounts due. They also contend that the Writ of Execution issued by the Clerk of Court to enforce the judgment has the effect of an Order of Court.

Summary of the Defence

[31] The finality of the judgment is no longer at issue. At the hearing, Mr Peter SC (for the defendant) confirmed that the “last trumpet” sounded on the judgment bringing an end to that facet once the Supreme Court of Appeal dismissed the

appeal. He did not press the defendant's complaint about the lack of legal representation when the default judgment was taken. That defence was considered and dismissed by the Supreme Court of Appeal.

[32] The defendant had also contended that the plaintiffs failed to disclose that the case for payment pivots on a transaction for the transfer of certain shares which has been reversed by the DRC Court. He claimed that AWI never suffered any loss because the shares in Resotel and CWI were not taken away from AWI as the plaintiffs allege.

[33] As Mr Bham SC (for the plaintiffs) correctly argued, it is not open to this Court to rehash the merits of the case given the judgment.³ Fittingly, Mr Peter did not press on this aspect of the defence.

[34] The defendant also claimed that the enforcement of the "*money payment judgment*" would be repugnant to South African public policy principles. He is not in a position to put up the amount claimed to enable him to enter the principal case. As a consequence, his right of access to the Courts, in terms of South African law, will be fundamentally violated.

[35] I note that the judgment of 18 January 2019 by the Supreme Court of Appeal traverses the defendant's failure to represent himself and or communicate with the referee fully, and determines that there was no error in the imposition of monetary sanctions. It made definitive factual findings, pertaining to his failure to avail himself and engage with the referee and dismissed the complaint made definitive factual findings. The question of the absence of legal representation is no longer alive in these proceedings

[36] What remained hotly contested was whether the document (s) on which the plaintiffs rely, individually or collectively, constitute a "*liquid document*" for the purposes of Uniform Rule 8. (liquidity challenge).

³ Jones v Krok (Jones) 1995 (1) SA 677 (A) at 685 D – E.

[37] The second issue was the effect of the defendant's mental capacity following a diagnosis of a major neurocognitive disorder due to Alzheimer's disease on the conduct of the US Court proceedings. It was argued the defendant may have lacked mental capacity for a considerable period of time, tainting the US Court proceedings. He could not give proper instructions and this ultimately led to the defendant's defence being "struck out" in the US Court. Its contended medical evidence indicates that the plaintiffs had acknowledged that he appeared confused during a deposition before the US Court.

[38] In any event, Mr Peter agreed that a determination of whether the judgment is enforceable on public policy considerations, which would trigger the *Twee Jonge Gezellen (Pty) Ltd vs Land and Agricultural Development Bank of South Africa t/a the Land Bank*⁴ test, would be determined last after a consideration of all the defences. I start with the liquidity dispute.

Is the foreign Judgment a liquid document and enforceable?

[39] An enforcement of a foreign default judgment is a common practice in our law. As Mr Bham contended, a foreign judgment constitutes a *prima facie* proof of a debt as long as the debt has not become superannuated. That principle was confirmed in *Coluflandres Ltd vs Scandia Industrial Products*,⁵ where the court, referring to the decision in *National Milling Co Ltd vs Mohammed*⁶ stated as follows:

"It appears that the ordinary procedure when relief is sought in respect of foreign judgments has been to apply for provisional sentence. (See Herbstein and van Winsen, *Civil Practice*, pp 452 to 453. A judgment in default of appearance may be obtained where the plaintiff's claim is for a debt or liquidated demand only. It is therefore necessary to decide whether a foreign judgment constitutes a debt)"

[40] While both counsel accepted the principle in *Jones*⁷ that our courts will not go into the merits of a case already adjudicated upon by a foreign court and will

⁴ 2011 (3) SA 1 (CC) at 22H - J.

⁵ 1969 (3) SA 551 (R) at 553 D - G.

⁶ 1966 (3) SA 22 (R) at 23 D - E.

⁷ Jones above n3 at 685 D - E.

not attempt to review or set aside its findings of fact or law, they part ways on whether the current judgment is a liquid document for the purpose of provisional sentence.

[41] Mr Bham contended that the judgment of the California Court is *prima facie*, the clearest possible proof of a debt and its liquidity is indisputable.⁸ The default judgment as well as the documents evidencing it comprises of:

- (a) Minute Order dated 29 August 2016;
- (b) Amended Judgment dated 29 August 2016;
- (c) Reporter's transcript dated 15 September 2016;
- (d) Writ of Possession dated October 2016; and
- (e) Writ of Execution issued by that court on 28 February 2017.

I am advised that a series of the above documents collectively comprise the foreign judgment. It is said under the laws of the State of California, County of Orange, Code of Civil Procedure ("CCCP") Subdivisions 714.010 —714.030, read cumulatively, constitute a final and binding Judgment upon the defendant.

[42] Mr Bham contended as the court did in *Golub v Rachaelson*⁹ that the only way the Court will refuse provisional sentence on a liquid document and for the defendant to dislodge it is; if the defendant produces counter proofs of such importance that the probability of success in the principal case is against the plaintiffs.

[43] At the hearing, Mr Peter developed a different angle to challenge the liquidity of the judgment. He contended for the first time that the order by the California Court was an *order ad factum praestandum* for a delivery of shares. The judgment was not a money judgment (*ad pecuniam solvendam*). He cited the court's decision in *Society of Llyoyd's v Price; Society of Llyoyd's v Lee* 2006 (5) SA 393 (SCA) at para 10 that:

⁸ Coluflandres above n5.

⁹ 1925 WLD 188.

“According to the principles of South African private international law, matters of procedure are governed by the domestic law of the country in which the relevant proceedings are instituted (the *lex fori*). Matters of substance, however, are governed by the law which applies to the underlying transaction or occurrence (the proper law or *lex causae*).”

[44] The consequence of *Society of Lloyds v Price* is that this court will look to the laws of the California Court (*lex causae*) to determine whether there is a judgment in a substantive sense. However, how the judgment is to be enforced is a matter for South African domestic law (the *lex fori*).

[45] Mr Peter contends that the relief sought in these proceedings is not the relief granted in the judgment. In this case, the conversion of the judgment to a claim sounding in money and the consequent right to claim monetary compensation flows not from the judgment itself but from a procedure peculiar to the laws of California. In other words, Mr Peter countered that I may only enforce an order for the delivery of the shares and not a judgment sounding in money.

[46] Mr Bham disputed this line of argument on account that it separates the judgment from its enforcement and its practical effects in order to undermine the judgment. He contended that the test for enforcement of a foreign judgment is one set by Corbett CJ in *Jones v Krok*¹⁰ where the court stated that:

'(A) foreign judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided: (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended.... Apart from this, our Courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its finding of fact or law."

[47] Secondly, he argues that in this case, the Writ of Execution which flows from the judgment by the foreign court was issued by the court.

¹⁰ 1995 (I) SA 677 (A) at 685A - E

[48] The sharp point of departure about liquidity remained whether a judgment for the possession of the property ordered in the amended judgement can be enforced in the same manner as a money judgment.

[49] There were three court proceedings after the judgment was handed down, namely; on 15 September 2016, 16 December 2016 and the Appeal Court 23 February 2018. On the papers before me, there is ambiguity on whether the judgment itself created the debt claimed in these proceedings. There is an inconsistency in the interpretation of the mechanism by which:

(a) the amended Court Order of 29 August 2016 for the turn-over of the shares in the derivative action; and

(b) the Supplemental Order of September 2016 determining of the value for the shares for the purposes of “*the bond only*” was converted into a liquid and executable money judgment under the laws of California, rendering the judgment liquid and enforceable before me.

[50] Even though the challenge to liquidity is inherent from the pleadings, (1) the reformulation of foundation to the challenge, (2) the sequence of the events leading to the issue of the Warrant of Execution, (3) the transcript of the record of the various proceedings and the judgment Superior Appeal Court, drove me to invite further submission from both parties as the court had not been addressed on the import of the various transcript and judgments.

[51] The difference in the procedure is evident because under South African law once a court grants judgment in favour of the creditor and the debtor fails to pay as ordered, such a creditor can apply for a warrant of execution authorising the sheriff of the court to attach property of the debtor, realise it, and raise sufficient amount to satisfy the judgment debt. However, where a judgment debtor fails or refuses to comply with an order *ad factum praestandum*, a possible remedy is one of contempt.

[52] An affidavit by Mr Dillion the US Attorney who represented the plaintiffs was placed before me to clarify the enforcement procedures followed. Mr Dillion had dealt with aspects of the appointment of the Receiver to execute the order for the possessions of the shares and an injunction to prevent a transfer or some other nefarious corporate activity on the shares. He stated that:

“15.3 On September 15, 2016 the Court issued a further 2016 Order, to the August 29, 2016 Order, that the August 29, 2016 Order sufficed as a **Supplemental Order for the value of the Shares**, being the amounts specified in 15.1 above. A copy of that Order is attached to the Summons "C" (the 'September 15, 2016 Supplemental Order').

[53] In the further submissions, Mr Bham submits that the proceedings before the court on 16 December 2016 resulted in a further confirmation of the value of the shares attached to the supplemental order. Therefore, the values attributed to the shares were no longer for *"bond purposes"* only, but intended for purposes to enable the plaintiff to execute for value where return of the shares were not forthcoming.

[54] A perusal of the record reveals that on 15 September 2016, Ms Whyte who represented the plaintiffs sought to persuaded the court to convert the *"turn-over"* order to a money judgment. As I understand it, she sought a mandatory award for the value of the shares determined in the *"default prove-up"* proceedings and an award of punitive damages. The transcript reveals that the court referred to certain deficiencies, making the following remarks:

“Prior to entering default, the court noted potential issues with proceeding by default judgment. The court also noted that Plaintiffs could correct the deficiency in their First Amended Complaint by seeking leave to file and serve an amended complaint.

... .

The court gave Plaintiffs the option to either seek leave to file an amended complaint or to proceed by default prove-up hearing.”

[55] The above transcript reveals further that the court pointed to the derivative nature of the suit and that the value was “*just for bond purposes*” and that its order was a “*turn over order.*” The court also wrestled with jurisdictional questions and the mechanism to enforce its order “*to turn over*” the shares and to ensure its judgment was enforceable. AWI was registered in Delaware, it held shares in a DRC registered company and the proceedings were brought in California. In my view, the legal thread remained about the recovery of the shares. Intimations of a possible need to travel to the Congo to recover the shares were made.

[56] Mr Dillion is recorded to have ultimately stated that:

“Mr Dillion: I agree I don’t know what other option we have. If we make legitimate efforts beyond just agreeing and accepting that we will never see that stock because Mr Conteh will hide that, destroy it, do whatever he has to do to make sure we don’t have it, in which case we’ll executive on the monetary judgment. We don’t have the right to do it yet. Once we have gone through the procedures, we can come back and ask for appointment of the collection receiver”. [emphasis added].

[57] In the further exchange the following appears:

The Court: Okay, I guess my question regarding the - I will tell you, I'm kind of inclined - I think it's very important to make sure we cross the T's, Dot the I's. This is a messy, a procedurally messy case all right. I don't want to make it any messier, I am inclined - because certainly it's just as much in the courts interest that its orders and judgments be respected and followed by all the parties, it makes sense to impose some type of stay to avoid any type of you know, mischievous conduct for those stock shares and I am going to try and find that order. I think it's usually for when you've got attachments. There's language there that I am sure I can borrow to the impose some type of stay over AWI from taking corporate actions that would adversely impact the transfer or turnover of the stock shares. I mean may be that's good enough right there, I don't know. I might need just a minute to think about that. I don't know if you have any suggestions

on that. That's where I am willing to go right now without prejudice. Too if you kind of go through the procedural safeguards, the enforcement of judgment law provides we can revisit the issue of converting, et cetera. to a monetary judgment or appointment of receiver, I want to make it clear right now, even if I am denying it, it's not with prejudice. But I certainly do want to safeguard the court's judgment. At the very least, it would be until a notice of appeal can be filed or expiration of the notice of appeal but I don't necessarily want to force your hand in filing a notice of appeal. The reason why I did that is because that's kind of the outside edge of when the court potentially loses jurisdiction”

[58] As I understand it, the value determined in the Supplemental Order after the *ex parte* application remained as recorded earlier to be “*for the bond only*”. Moreover, the Supplemental Order and valuation was for the purpose of executing the attachment and not for the conversion to a money judgment.

[59] In the further submissions, Mr Bham argued that the procedure relied on, which he submitted is not disputed is that:

“According to the laws of California - 714,020(b): If the property specified in the writ of possession cannot be taken into custody, the levying officer shall make a demand upon the judgment debtor for the property if the judgment debtor can be located. If custody of the property is not obtained, the levying officer shall so state in the return. **Thereafter the judgment for the possession of the property may be enforced in the same manner as a money judgment for the value of the property as specified in the judgment or a supplemental order. Thereupon, as aforesaid by operation of the law the Judgments became enforceable in the same manner as a money Judgment for the value of the Shares as specified together with interest thereon from the date of the Judgment at the rate on 10% per annum according to CCCP 3289(b).**”

[60] I have difficulty with the proposition. On the facts, the proceedings of 16 December 2016 he relies were launched by the defendant to “*quash*” the Writ of Possession, after the judgment sought to be enforced. There is no indication

that the court dealt with the conversion contended for or the procedural step intimated by Mr Dillion to the court in September 2016.

[61] What is more is that, when the defendant petitioned the Superior Appeal Court (, the equivalent to a Full Court in our law, as already stated) for a writ of *supersedeas* and requested an immediate stay of execution pending his appeal, the Superior Appeal Court judgment of 23 February 2018 demonstrates that the plaintiffs had made representations about their right to enforce a money judgment. In rejecting the plaintiffs' submissions, the court stated that:

“We reject the notion that it is unfair to respondents to be precluded, pending an appeal, from enforcing a \$93 million money judgment equivalent (under fj 714.020, subd, (b)) that does not actually represent an accurate valuation of the shares awarded in the judgment. As found by the trial court, respondents were not entitled to an actual money judgment in the default judgment proceedings. Respondents declined an opportunity to amend their pleading and put the case back at issue.” The petition for writ of *supersedeas* is granted. Judgment enforcement proceedings are stayed pending the resolution of this appeal....”[emphasis added]

[62] Mr Peter's further submissions point to a distinction made by the Court of Appeal in respect of the nature of the judgment and the judgment being distinct from the enforcement remedy, a matter which was overlooked by the plaintiff in its summons and by both parties in oral argument before this court. He submits that the procedural remedy in subdivision 714.020 (b) now relied on does not create a payment obligation on the part of the judgment debtor. I need not determine the veracity of this submission.

[63] What is clear is that an acceptance the judgment is a liquid document is linked inextricably with an acceptance by this court of the enforcement procedures between the sheriff of the foreign court and that court's registrar. What is more is that to accept the monetary enforcement of the judgment translates to a sanctioning by this court of the plaintiffs' proffered interpretation of those procedures. The conflicting interpretations fortify the view that extrinsic

evidence on California law is required to show that there was a conversion of the turn over order to a debt in monetary terms.

Conclusion

[64] It is trite that provisional sentence is an extraordinary remedy, and the Court is strict about the compliance with its. I find that the judgment does not constitute a *prima facie* proof of a debt enforceable by provisional sentence. The Superior Court of Appeal of the foreign court rejected the plaintiffs' right to a monetary enforcement.

[65] It is not for this court to pronounce on a matter of procedures of a foreign court after the fact of the judgment. The case affirms the rationale in *Society of Llyoyd's* that a South African court should not apply foreign rules of procedure in a matter to be adjudicated upon by it.¹¹ I am bound by the decision. Furthermore, the Code of Civil Procedure applicable to the California Court is unknown in South African law. The inescapable conclusion is that the action for provisional sentence falls to be dismissed.

[66] It is necessary to say something about the costs in these proceedings. Ordinarily, costs follow the result, subject to the discretion of the court. The defendant succeeds primarily because of the reformulation of the liquidity challenge. Even though it was inherent from the defendant's papers, and is good in law, the belated articulation required further submissions burdening the court. Accordingly, the defendant is not entitled to the costs associated with the further submissions. The defendant is also not entitled to the costs associated with the "*substitution affidavit*."

[67] Accordingly, I make the following order

- a. The provisional sentence is dismissed;
- b. The plaintiffs are ordered to pay the costs of the defendant, including the costs of two counsel jointly and severally;

¹¹ *Society of Llyoyd's v Price; Society of Llyoyd's v Lee* 2006 (5) SA 393 (SCA).

- c. The order for costs excludes the costs of the “*substituting affidavit*” and the costs associated with the preparation of further submissions requested by the court.

T SIWENDU J

Judge of the High Court

Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 9 May 2022.

Heard on: 17 February 2022
Further Submissions: 8 April and 12 April 2022
Delivered On: 9 May 2022
Plaintiff's Counsel: A Bham SC, with him N Alli
Defendant's Counsel: J Peter SC, with him R Stevenson