IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

PATRICIA ELIZABETH JONES Appellant

and

SOLOMON KROK Respondent

CORAM: CORBETT CJ, VAN HEERDEN, KUMLEBEN, NIENABER JJA et OLIVIER AJA

DATE OF HEARING: 16 May 1994

DATE OF JUDGMENT: 29 November 1994

J U D G M E N T

/ CORBETT CJ:.....

CORBETT CJ:

In the Court a quo, the Transvaal Provincial Division, the appellant sought provisional sentence against the respondent on a foreign judgment. The action was opposed and opposing and replying affidavits were filed. The case was heard by Roux J, who dismissed the action with costs and refused leave to appeal. An application for leave to appeal in terms of sec 21(3) of the Supreme Court Act 59 of 1959 was referred to this Court for argument. Counsel were directed to present full argument on the merits, as well as argument on the application for leave to appeal, so as to enable this Court, if leave were granted, to determine the appeal. This was done.

The judgment on which provisional sentence was claimed was delivered by the Superior Court of the State of California for the County of Los Angeles ("the US Court") in favour of the appellant. In terms of it (a) the respondent, Arlene Krok and Sharon Feuer were ordered to pay to the appellant "compensatory damages" in the sum of

US$13 670 987 and (b) each of them was ordered to pay to the appellant, in addition, "punitive or exemplary" damages in differing amounts. In respondent's case the amount was US$12 000 000. All these awards carried interest at the rate of ten per cent per annum from the date of the "verdict" to the date of payment. A (duly authenticated copy of the order of the US Court was annexed to the provisional sentence summons.

The basic facts, as they appear from the summons and the affidavits, are hardly in dispute and may be summed up as follows. The respondent is a wealthy South African businessman and part-owner of a large pharmaceutical company, known as Twins Pharmaceutical. Arlene Krok and Sharon Feuer are his; daughters. According to the appellant, she first met Arlene Krok and her father in 1980. This meeting led to the establishment of a company in California known as A-Plus Products Inc ("A-Plus"), which was incorporated with the object of marketing and distributing certain

products for children and infants. The appellant obtained a 20% interest in A-Plus, the other 80% being held by Arlene Krok and Sharon Feuer. Nevertheless, A-Plus was, so appellant alleged, under respondent's sole direction and control.

It was further alleged by appellant that in 1987 she was invited by respondent to participate in a joint venture with himself and his daughters to market and distribute certain feminine personal care products in the United States. This was to be done through the medium of a new company, Epilady USA Inc ("Epilady"), which would utilize A-Plus's employees, offices, warehouse, telephone, credit and bank account. Appellant would be expected to market and sell Epilady's products to the "mass merchandisers". In return appellant would be entitled to a 20% share in the profits of Epilady.

Appellant claimed that she accepted this offer and that a joint venture along these lines came into being. She permitted Epilady to utilize A-Plus's aforementioned facilities; and she made

numerous sales trips on Epilady's behalf and represented Epilady's interests at a number of trade shows in 1987 and 1988. In 1989 and after the business run by Epilady had generated "enormous profits" respondent denied that there was a joint venture or that appellant was entitled to a share of Epilady's profits.

Appellant thereafter instituted action in the US Court against the respondent and his daughters based upon an alleged breach by them of the joint venture agreement. The action was defended by respondent and Arlene Krok and Sharon Feuer. Epilady had also been cited as a defendant, but at the time of the trial was "in bankruptcy" and did not take an active part therein. The main defence of the defendants was that no joint venture such as that alleged by appellant was ever entered into and that there was no basis upon which appellant could be entitled to a share of the profits of Epilady. In addition, certain legal points were raised.

The case was tried before a judge and jury. The trial ran

for some 22 days and culminated in the jury finding for the appellant and awarding compensatory damages in the: sum decreed by the judgment of the Court, to which reference has already been made. In addition to seeking compensatory damages, appellant also claimed punitive damages against the defendants on the ground of alleged fraud and conversion of Epilady's assets. This issue was tried separately, after the finding that the defendants had breached the joint venture agreement and were liable in compensatory damages had been made by the jury. In this connection reference was made in one of the affidavits, filed on behalf of the appellant in the provisional sentence proceedings, to sec 3294 of the California Civil Code which provides, under the heading "Exemplary Damages", inter alia, as follows:

> "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual

> damages, may recover damages for the sake of example and by way of punishing the defendant."

At the end of this second phase of the trial the jury awarded amounts of punitive or exemplary damages against the three defendants individually. The jury award was, it seems, subsequently reduced with plaintiffs consent and the final figure in respondent's case was US$12 000 000.

The written judgment or order of the US Court is dated 31 July 1991. In pursuance of an appeal as of right, respondent, his daughters and Epilady on 12 August 1991 lodged appeals to the Court of Appeal of the State of California, Second Appellate District("the US Court of Appeal") against the "entirety" of the judgments and orders granted against them. At the time when the action for provisional sentence was dealt with by Roux J (viz 10 April 1992) this appeal was pending. This was still the position when this Court heard the matter.

In his judgment Roux J, after expressing reservations as

to whether provisional sentence was "the proper vehicle" for enforcing foreign judgments, proceeded to consider whether the judgment which appellant sought to enforce was a final one. After referring to certain expert evidence on the law of California, placed before the Court on affidavit, the learned Judge came to the conclusion that while the appeal was pending the judgment of the US Court was not a final one. This was sufficient to dispose of the action, but the Judge a quo proceeded to consider certain other aspects of the case. He held that the award of punitive damages was not only not part of our law, but also offended against public policy and that a foreign order for such damages would not be enforced by our Courts. He further held that even the award of what was termed "compensatory damages" in the order of the US Court rested "upon the same foundations" as those which supported the assessment and award of punitive damages and that it would be contrary to public policy to encumber a person, subject to the jurisdiction of the Court a quo, with liability for such an

award. Finally, he emphasized the "potentially Gilbertian situation" which would arise if the Court were to grant judgment on claims which, translated into the currency of this country, would total about R77 million, and thereafter the appeal to the US Court of Appeal were to succeed. This potential situation weighed, together with other considerations, against the granting of provisional sentence. The learned Judge refused to postpone the action to await the conclusion of the appeal in California, as was suggested by appellant's counsel, saying:

> "In my view the Plaintiff, when she issued this summons, either had or did not have a cause of action and on that basis I must consider the matter."

Prior to the hearing of the application/appeal by this Court counsel were asked to deal in argument with the question as to whether, in the light of the decisions in Zweni v Minister of law and Order 1993 (1) SA 523 (A) and Trope and Other v South African

Reserve Bank 1993 (3) SA 264 (A), it was competent for leave to appeal to be granted against an order refusing provisional sentence. This was done and the first question to be determined is whether any appeal can lie in this case and accordingly, whether it is competent for leave to be granted.

In Zweni's case, supra this Court undertook a comprehensive review of the question as to whether a decision of a court is an appealable "judgment or order" in terms of sec 20(1) of the Supreme Court Act 59 of 1959 and the principles to be applied in resolving this question in individual cases. On pages 531 H - 533 F of the report of the case Harms AJA (who delivered the judgment of the Court) summed up the position in nine numbered paragraphs. For the purposes of this case I would emphasize and quote the following portions of this summary:

> "5. Section 20(1) of the Act no longer draws a distinction between 'judgments or orders' on the one hand and

interlocutory orders on the other. The distinction now is between Judgments or orders' (which are appealable with leave) and decisions which are not 'judgments or orders' (Van Streepen & Germs (Pty)Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A)).

7. In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order must be considered but also, and predominantly, its effect' (South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980(3) SA 91 (A) at 96H).

8. A 'judgment or order' is a decision which, as a general principle, has three attributes, first the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd case supra at 586 I - 587 B; Marsay v Dilley 1992 (3) SA 944 (A) at 962 C-F). The second is the same as me oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty)

Ltd v Receiver of Revenue and Another 1992 (4) SA 202 (A)at214D-G)."

Later in his judgment Harms AJA elaborated on the distinction between an appealable judgment or order and a decision which is not appealable (termed for convenience "a ruling"). He stated (at 535 G - 536 C):

> "How then have our Courts determined whether a given decision amounts to a ruling? A few criteria have crystallised over the years. The first is the lack of finality: unless 21 decision is res judicata between the parties and the Court of first instance is thus not entitled to reconsider it, it is a ruling. It was immaterial that it was unlikely that that Court would ever change its view or its decision, provided that it was open to it to do so (see Union Government(Minister of the Interior) Registar of Asiatics v Naidoo AD 50; Hutton & Pearson NNO v Hitzeroth and Others 1967 (1) SA 111 (E) at 114 D - 115 B; Pfizer Inc v South African Druggists Ltd (supra at 263); Constantia Insurance Co Ltd v Nohamba (supra at 36H-F); Government Mining Engineer and Another case supra at 698 A-701 E).

Another relevant consideration was whether the appeal might turn out to be of no practical consequence because the Court could, in the final result, find in favour of the would-be appellant. See the Dickinson and Another case supra at 428 in fine; Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A) at 41. Stated somewhat differently, a decision is a ruling if it does not affect the relief sought in the main action - Nxaba v Nxaba (supra); Heyman v Yorkshire Insurance Co Ltd 1964 (1) SA 487 (A) at 490 H-491 C; Holland v Deysel 1970 (1) SA 90 (A) at 93 A-C - or because no relief was granted on that claim. (Union Government (Minister of the Interior) and Registrar of Asiatics (supra at 50-51)). See also Levco Investments (Pty) Ltd v Standard Bank of SA Ltd 1983 (4) SA 921 (A) at 928.

In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

I turn now to an application of these principles to the facts

of the present case. Here the decision in respect of which the appellant seeks leave to appeal is, as I have indicated, the dismissal of an action for provisional sentence claimed on a foreign judgment.

As is explained in 2 LAWSA (first reissue) par 476, the present position in South Africa is 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 judment 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 Business Act 99 of 1978, as amended. (See generally 2 LAWSA (first reissue) paras 477 and 478; Forsyth, Private International law, 2 ed, pp 336 et seq and the authorities cited.) Apart from tills, 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 findings of fact or law (Joffe v Salmon 1904 TS 317, 319; 2 LAWSA (first reissue) par 476).

One of the recognised procedures for the enforcement in our courts of a foreign judgment is provisional sentence. The Judge a quo did not elaborate on his reasons for questioning the appropriateness of provisional sentence as a vehicle for enforcing a foreign judgment, save to remark later in his judgment that it was not clear to him what the principal action or case was when provisional sentence was sought on a foreign judgment. Be that as it may, there are many reported cases, commencing with Hollard v Taylor (1885)

2 SAR68 and Lipman and Herman v Kohler (1888)5 SC 420 and culminating with Reiss Enigeering Co Ltd v Insamcor (Pty)Ltd 1983 (1) SA 1033 (W) in which it has been accepted that provisional sentence is a competent procedure. Indeed, as early as 1904 Innes CJ stated that provisional sentence was "the ordinary procedure" when relief was sought "in this country" in respect of foreign judgments (Joffe v Salmon at 318; see also the remarks of Bale CJ as to the practice in Natal, in Russell v King (1909) 30 NLR 209, at 210). Provisional sentence was moreover the procedure adopted in recent cases involving the enforcement of foreign judgments in Transkei (Corona v Zimbabwe Iron & Beef Co Ltd 1985 (2) SA 423 (Tk AD) and Namibia (Westdeutsche Landesbank Girozentrale (Landesbausparkasse)v Horsch 1993 (2) SA 342 (Nm HC).

It is true that provisional sentence requires a liquid document upon which the action is founded; and a liquid document may be generally defined as a written instrument signed by the

defendant or his agent evidencing an unconditional acknowledgement of indebtedness in a fixed sum of money (Harms, Civil Procedure in the Supreme Court, at 217; see also Rich and Others v lagerwey 1974(4) SA 748 (A), at 754 C-H; Wollach v Barclay National Bank Ltd 1983 (2) SA 543 (A)). A foreign judgment does not comply with this definition, but it would appear that the practice of granting provisional sentence on such a judgment evolved on the basis that the judgment of a court is prima facie the clearest possible proof of a debt due by the party condemned and that the latter must be taken in law to have acknowledged his indebtedness in the amount of the judgment (see Inter-Union Finance Ltd v Franskraalstrand (Edms) Bpk and Others 1965 (4) SA 180 (W), at 181 F-H and the cases there cited, particularly Morris and Berman v Cowan (l) 1940 WLD 1, at 9-10). As I have said, the Judge a quo dismissed the action for provisional sentence, primarily on the ground that the foreign judgment relied upon by the appellant was not a final one; and the critical

question is whether this decision is to be regarded as an appealable judgment or order or as a mere ruling. The first criterion for

!

distinguishing the one from the other stated in Zweni's case, supra, is whether the decision is -

> "... final in effect and not susceptible of alteration by the Court of first instance" (at 532 J).

Conversely, a characteristic of a ruling is lack of finality so that -

> "..... unless a decision is res judicata between the parties and the Court of first instance is thus not entitled to reconsider it, it is a ruling" (at 535 G).

In support of his submission that the decision of the Court a quo refusing provisional sentence was a non-appealable ruling, respondent's counsel referred to the case of Oliff v Minnie 1952 (4) SA 369 (A). The question which arose in that case was whether a decision refusing provisional sentence on a second mortgage bond was an interlocutory order, in which event, as the law then stood, leave

was required before this Court could entertain an appeal in the matter. This Court came to the conclusion that the order refusing provisional sentence was interlocutory. Centlivres CJ said (at 374 G - 375 C):

> "Proceedings for provisional sentence are, as the word 'provisional' indicates, interlocutory in their nature and have always been so regarded by South African Courts. If provisional sentence is granted, the defendant can, subject to paying the debt due to the plaintiff and obtaining from the plaintiff security de restituendo, go into the principal case and obtain a reversal of the order for provisional sentence. Similarly as Menzies, vol. 1 in his notes on Provisional Sentence, para. 8, says:
>
> > 'Where provision (sic) has been refused, the summons will stand as the summons in the action, and the proceedings take place as if provisional sentence had never been claimed.'
>
> This statement of the law was approved by BUCHANAN, A.C.J., in the Cape Court of Appeal in Reed v Reed, 3 Buch. AC. 261 at p. 264.
>
> Van Zyl in his Judicial Practice (2nd ed., p. 96) says:
>
> > 'Whether provisional sentence has been refused or granted, the disappointed party can always go into the principal case, provided that the refusal of the provisional sentence is not owing to a bad or defective summons; and the summons will, if

> good, stand as the summons for the principal case and the proceedings may take place as if provisional sentence had never been claimed.'

In my view Van Zyl correctly stated the; law . . . . It seems to me that the correct view is, as suggested by Van Zyl, that the provisional sentence summons is discharged only if the Court has found that the provisional sentence summons is bad or defective. It seems to be obvious that a bad or defective summons cannot stand as a summons in the principal cause."

Turning to the facts of the case before the Court (which

had been heard at first instance by Brink J), Centlivres (Cf proceeded (at 375 G - 376 B):

> "Before BRINK, J., there was no dispute as to the facts and the decision turned entirely on a question of law. It was contended on behalf of the plaintiff that to suggest that she might have gone into the principal case involves the suggestion that she was obliged, before she could seek further remedy to submit the case again to the same tribunal, even to the same Judge, and go through the farce of endeavouring to procure a reversal of the judgment.

There is no substance in this contention. The plaintiff could have applied for leave to appeal and, if she had done so, I have no doubt that in the circumstances of this case, BRINK, J., would have granted leave to appeal, or she could have gone into the principal case. If she had done this, the provisional sentence proceedings having been interlocutory, the judgment in those proceedings would not have been res judicata. Even if the same Judge heard the principal case as heard the provisional

sentence proceedings it would have been free to him to depart from his previous decision. See Blaaubosch Diamonds Ltd. v. Union Government supra. There is no doubt, however, that in a case such as this, where the sole issue is a legal issue, further proceedings by way of appeal are preferable to proceedings by way of the principal case but, as leave to appeal has not been granted, this Court has no jurisdiction to entertain the appeal.

Tills matter must, therefore, stand over to enable the plaintiff to apply within twenty-one days of this judgment to the Court a quo for leave to appeal."

It will immediately be apparent from these extracts from the judgment of Centlivres CJ

that in that case the Court was dealing

with a situation very different from that obtaining in the present case. There the issue was whether the refusal of provisional sentence amounted to an interlocutory order, with me result that if it did leave to appeal was required. It is evident that, since there was no dispute as to the facts and the decision turned entirely on a question of law, the Court favoured the idea of an appeal in preference to proceedings by way of the principal case. Moreover, the Court rejected the argument that it would be a farce to have to proceed with the principal case, on the ground that the plaintiff in that case could have applied for leave to appeal, which would doubtless have been granted by the trial Judge.

Here the position is entirely different. This is an application for leave to appeal; and the issue is whether, even with leave, the appellant can come on appeal. Here the argument based on practical considerations, viz the farce of having to proceed with the principal case on a point of law, cannot be answered in the way it was

in Oliff's case. This reveals an unsatisfactory state of affairs and may require a reappraisal of the whole approach in Oliff's case.

In this connection there are two other points to be made. Firstly, in Oliff's case, supra, the antithesis was between decisions which could be appealed as of right and those which amounted to interlocutory orders, which required leave to appeal. Today, in view of the fact that leave to appeal is required in all civil cases, the antithesis is, as pointed out by Harms AJA in Zweni's case (see par 5 quoted above) between judgments or orders which are appealable with leave and decisions which are not judgments or orders, viz rulings, which are not appealable at all.

Secondly, I draw attention to the decision in Barclays National Bank Ltd 1986 (1) SA 355 (C). In this case Herman J (Tebbutt J concurring) referred to the provisions of Rule 8(8) of the Uniform Rules of Court which read as follows:

"Should the court refuse provisional sentence it may order

> the defendant to file a plea within a stated time and may make such order as to the costs of the proceedings as to it may seem just. Thereafter the provisions of these rules as to pleading and the further conduct of trial actions shall mutatis mutandis apply."

Berman J, having noted that no such provision existed when Oliff's case was decided and having analysed this sub-rule, came to the conclusion (at 358 I) that -

> ". . . where provisional sentence is refused and no order is made in terms of which the defendant is permitted to file a plea, the provisional sentence summons is dismissed and the proceedings are at an end."

He proceeded (at 359 C-F):

> "But even if the Court has a discretion to order a plaintiff to file a declaration where it has refused provisional sentence (which is to be doubted) it will only do so where provisional sentence proceedings are appropriate, viz where as subrule 1 provides - '... by law any person may be summoned to answer a claim

> made for provisional sentence. . .; where, that is, a creditor has liquid proof of his claim against his debtor, or - put another way - the claim is founded on a liquid document.
> .... Put simply, provisional sentence is intended for the limited purpose of providing a creditor with speedy relief in certain circumscribed and well-defined circumstances, i e where he is armed with a liquid document. Where he sues for provisional sentence upon an illiquid document and his action is dismissed, it is finally dismissed."

Only the passage quoted from page 359 is relevant for present purposes, I am inclined to agree with what was stated therein, but in any event 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. (Cf Sirioupoulos v Tzere 1979 (3) SA 1197 (O), at 1200 H).

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 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.

For these reasons, I hold that the order of Roux J is appealable, provided that the necessary leave is granted.

I now proceed to the merits of the application/appeal. As I have already stated, the Judge a quo non-suited the appellant on the ground that, inasmuch as the judgment of the US Court was on appeal to the US Court of Appeal, the judgment was not a final one and, therefore, could not be enforced by our courts.

It is unquestionably correct, as I have indicated, that it is a legal requirement of any action to enforce a foreign judgment in a South African court that the judgment be final and conclusive (see Joffe v Salmon, supra, at 318; Ismail v Stradling 1911 TPD 428, at 431; Greathead v 1946 TPD 404, at 407-8). In Greathead's case Ramsbottom J, when considering the meaning of the words "final and conclusive" in this context, referred to the following

remarks of Lord Herschell and Lord Watson in the English case of Nouvion v freeman and another (1890) 15 App Cas 1 (HL):

> "My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt."

(Per Lord Herschell at 9.)

> ". . . no decision has been cited to the effect that an

> English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it... In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it: and (if appealable the English Court will only enforce it, subject to condition which will save the interests of those who have the right of appeal."

(Per Lord Watson, at 13. The words emphasized by me were not quoted by Ramsbottom J, but are included because of their relevance in this case.)

Ramsbottom J accepted these dicta as correct statements of our law. They are certainly authoritative as far as English law is concerned. (See Halsbury's Law of England, 4 ed, vol 8, par 734; Dicey and Morris The Conflict of laws, 11 ed, pp 426, 428-9; Cheshire and North's Private International law, 12 ed, pp 365-7.)

In English law it is accepted that the requirement of

finality means that the judgment must be final in the particular court which pronounced it. Such finality is not affected by the fact that the judgment is liable to be reversed on appeal or even by the fact that there is an appeal pending, unless a stay of execution has been granted in the foreign country pending the hearing of the appeal. (See Halsbury, op cit, par 734; Dicey and Morris, op cit pp 429-30; Cheshire and North, op cit, p 367; Colt Industries, Inc v Sarlie (No 2) [1966] 3 All ER 85 (CA) at 86 F - 87 C, 88 E-H; Berliner Industriebank Aktiengesellschaft v Jost [1971] 2 All ER 1513 (CA), at 1518 c-h.) Where, however, the foreign judgment is subject to appeal then it would seem that an English court will in general only enforce it subject to conditions which will save the interests of those who have the right of appeal (see (dictum of Lord Watson in Nouvion v Freeman and Another, supra, quoted and emphasized above) and may order a stay of the English proceedings pending an appeal. (See authorities just quoted and Scoff v Pilkington (1862) 121 ER 978, at

989.) The English rule is that the onus of proof that the judgment is final and conclusive lies on the party asserting it (Halsbury, op cit, par 734, note 1; cf Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Other (No 2) [1966] 2 All ER 536 (H), 560 I, 587 D-E). Commonwealth countries practising the common law appear to have adopted the same principles. For instance, Castel, Canadian Conflict of Laws, 2 ed, at par 163, sums up the Canadian position as follows:

> "The judgment must be final in the particular court in which it was pronounced. A judgment otherwise final is not the less so because it may be the subject of an appeal to a higher court, or because an appeal is actually pending, unless a stay of execution has been granted in the foreign legal unit pending the hearing of the appeal. Where no such stay has been granted, the judgment may be enforced in Canada, but in a proper case the Canadian court may order a stay of the local proceedings pending an appeal."

And Sykes and Pyles, Australian Private International Law 2ed, at

110-11, state:

> "A foreign judgment can be final and conclusive even though it is subject to an appeal and even though an appeal is actually pending. However enforcement in the forum can be stayed pending the outcome of an appeal."

(See also Nygh, Conflict of Laws in Australia, 3 ed, at 86, who states that the court lias, a discretionary power to stay proceedings.)

In the United States of America the question of the recognition and enforcement of foreign judgments arises both in regard to (i) sister State and Federal judgments and (ii) in regard to the judgments of foreign nations. Many of the principles regulating recognition and enforcement apply equally to both (i) and (ii). (See American Restatement of the Conflict of Laws 2d, introduction to sec 92, p 272.) One such principle is that -

> "A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the

local law of the state of rendition."

(Restatment, sec 107, p 320.)

The position where an appeal lies; is enunciated in the Restatement,

sec 107, p 321, as follows:

> "When appeal taken. It is for the local law of the state of rendition to determine whether a judgment is final even though it is subject to appeal or has been appealed. If an appeal is taken which, by the local law of the state of rendition, vacates the judgment, no action can be maintained on the judgment in another state. If, by the local law of the state of rendition, the appeal does not vacate the judgment, action will lie on the judgment in another state. Usually, however, the courts of the state in which enforcement of the judgment is sought will either stay their judgment, or stay execution thereof, pending the determination of the appeal."

(See also 47 American Jurisprudence 2d, sec 1269, pp 260-1; 50 Corpus Juris Secundum, secs

904, 906). The term "vacate" in this context means to annul or set aside (Black's Law

Dictionary sv

"vacate").

The position in Scots Law, which in general has a greater affinity for the Civil Law than the Common Law, is set out by Anton Private International Law, at 586-7. The principles appear to accord with English Law, both as to the need for finality and the effect of a pending appeal.

As I have indicated, our courts have adopted the principle that in order to be enforced here a foreign judgment must be final and conclusive; but there is a dearth of authority on what the position is when there is an appeal pending against the foreign judgment. In the case of Rosenstrauch v Korbf 1931 GWL 102 the point was mentioned. This was an application to set aside an attachment which had been granted to found jurisdiction to enable A to sue B on a judgment given by the Tribunal of Commerce in Antwerp in favour of A. One of the points taken was that an appeal was being prosecuted against the judgment of the tribunal. In concluding that A

nevertheless had a prima facie cause of action, Blaine AJ stated:

> "If the judgment was final in the Tribunal of Commerce, and there is nothing before me to suggest that it was not, then it is none the less so because it is subject to appeal. Dicey in his Conflict of Laws (3rd ed., p. 448) says: . . . a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it is given'. And Halsbury's Laws of England (vol. VI. par. 418), is to the same effect."

The problem which may arise where a foreign judgment is under appeal was referred to obliquely in Dale v Dale 1948 (4) SA 741 (C), at 744. There the actual point taken (by the defendant) was that an order of the High Court of Justice in England relating to the payment of maintenance was not a final judgment, that proceedings had been instituted to have it set aside and that accordingly it could not be enforced here. It was held that the point was well taken. De Villiers AJP (with whom Newton Thompson J concurred) stated (at p

744):

> "The fact that a judgment given in England may be under appeal in England would not necessarily prevent this; Court from enforcing such a judgment. Cf Pollak Jurisdiction, p 224, and the cases there cited. It is conceded that this Court has a discretion in (the matter, and I imagine that that discretion must well be exercised in favour of a person who pleads as the defendant has done here; because from a practical point of view a most anomalous situation might arise. This Court may have enforced that judgment which, in turn, might subsequently have been upset by the English Courts, with the result that the original liability has been discharged in England and yet remains of full force and effect here by virtue of this Court's enforcement of that order at what might be described as an intermediate stage in the English litigation."

It is thus evident that what the attitude of our courts should be when a person seeks to enforce a foreign judgment which is final in form but is subject to a pending appeal is still a fairly open

question. It has been argued in academic writings that a foreign judgment should not be regarded as final and conclusive until it is unassailable ("rechtskräftig") by ordinary remedies, including appeal and review; and in this connection reference has been made to the position under German law. (See Hahlo, The South Africa Law of Husband and Wife, 4 ed, at 662 (appendix by Ellison Kahn); article by H R Hahlo in (1969) 86 SALJ 354-5; Spiro in (1968) 1 CILSA 487; and see also Martin Wolff, Private International Law, 2 ed, par 242 (6).) The rule in German law is embodied in section 328 of the Code of Civil Procedure. Wolff adds that the French courts mostly share the view of the German courts, "though the question is not firmly settled". In my limited researches I have not been able to confirm this.

I have carefully considered the question. It seems to me that for reasons to be stated the general principles and rules which our courts should apply in regard to proceedings for the enforcement of a

foreign judgment which is subject to appeal are as follows:

9. The fact that the judgment is subject to appeal or even that an appeal is pending in the foreign jurisdiction does not affect the finality of the judgment, provided that in all other respects it is final and conclusive.

10. Where, however, it is shown that the judgment is subject to such an appeal or that such an appeal is pending, the court in this country which is asked to enforce the judgment enjoys a discretion and in the exercise thereof may, instead of giving judgment in favour of the plaintiff, stay the proceedings pending the final determination of the appeal or appeals in the foreign jurisdiction.

11. Although the onus of proving that a foreign judgment is final and conclusive rests upon the party seeking to enforce it (see 2 LAWSA (first reissue), par 477, and the authorities there cited; Estate H v Estate H 1952 (4) SA 168 (C), at 173 D; cf Reiss

Engineering Co Ltd v Insamcor (Pty) Ltd, supra, at 1035 A - 1036 H; Halsbury, op cit, per 734, n.1), it seems to me that, where this onus has been discharged, it is up to the defendant to place before the court the facts relating to me impending appeal and such other relevant facts as may persuade the court to exercise its discretion in favour of granting a stay of proceedings. (4) In exercising this discretion the court may take into account all relevant circumstances, including (but not confined to) whether an appeal is actually pending, the consequences to the defendant if judgment be given in favour of plaintiff and thereafter (possibly after the judgment has been satisfied) the appeal succeeds in the foreign jurisdiction and whether the defendant is pursuing the right of appeal genuinely and with due diligence. As a rule, however, the court will refuse to assess the merits and dements of the appeal and its prospects of success in the

foreign court.

The main reason for adopting these rules is that they conform broadly to such authority as there is in our law and to the legal position in the vast majority of the foreign jurisdictions to which I have referred. As to the latter it seems to me that there is merit in our legal system falling into line, both from a practical point of view and in the general interests of comity. While the German approach has a certain logical appeal, it seems to me that there could be practical difficulties in implementing it and particularly in determining when a foreign judgment has become unassailable by ordinary remedies. Moreover, in my view, a party armed with an otherwise final and conclusive foreign judgment should be entitled, prima facie, to relief in our courts. On the other hand, the disadvantages and inequity of a defendant being ordered to pay a sum of money in terms of a foreign judgment, which later is expunged or altered on appeal are manifest. For that reason the court should enjoy the discretion to stay

the proceedings which I have outlined above. Certain of the foreign authorities to which I have referred speak of a stay of execution of the judgment of the court in which the foreign judgment is enforced, as an alternative to the stay of the proceedings for enforcement. In my view, a stay of proceedings is preferable. The court should remain in control of the situation and the court should decide when the foreign appellate procedure lias been exhausted and when, in the exercise of its discretion, the stay of proceedings should be terminated. There may, for example, be disputes of fact as to whether the appellate procedure has been exhausted or as to what the effect of the appeal has been. The appeal may be allowed in part and the amount of the plaintiffs claim reduced. There may be disputes about the precise effect of the appellate court's judgment.

I turn again to the facts of the present case. The papers before the Court include affidavits by a number of experts on Califonian law, some filed on behalf of the appellant, some on behalf

of the respondent. They all appear to be well-qualified and experienced lawyers and entitled to be regarded as experts. It is not necessary to assess their relative merits since their testimony does not reveal any material areas of dispute. From their evidence the legal position under Californian law in regard to the judgment given by the US Court appears to be as follows:-

12. Where a judgment is for money or directs the payment of money (as is the position here), the fact that an appeal has been lodged and is pending does not cause the effect of the judgment to be suspended or stayed unless and until a security bond or undertaking is posted. The undertaking has to be for double the amount of the judgment or order, unless given by "an admitted surety insurer", in which event it must be one and one-half times the amount of the judgment or order (sec 917.1 of the Californian Code of Civil Procedure).

13. It is common cause that in this case no such bond or

undertaking has been furnished. Consequently the judgment of the US Court is not suspended or stayed. The result of this is that even pending the appeal the appellant could seek to enforce it and by a certain procedure create a lien on any real property owned by the judgment debtor.

14. The judgment of the US Court is final, unalterable and conclusive in that Court. That Court cannot recall, modify or alter the judgment. The judgment can be reversed, modified or altered only by the US Court of Appeal on appeal to it. Moreover, pending the appeal, all proceedings in the trial court are stayed pending the decision of the US Court of Appeal.

15. Although the judgment is thus conclusive of the rights and duties of the parties pending the appeal, it is technically not regarded by Califonian law as having the effect of res judicata.

Nevertheless, according to one of appellant's experts (Mr Kaufman) -

> "... there is no real reason it should be, because the appellant is not entitled to relitigate the issues of the case in any California court pending the appeal. Any attempt to do so would be met with a demurrer on the grounds of another action pending (California Code of Civil Procedure, section 430.10(c) and the new action would either be dismissed or stayed during the pending appeal. (Childs v Eltinge (1973) 29 Cal. App. 3rd 843, 848.) Thus a money judgment is conclusive of the parties' rights and duties during the appeal period even though technically not entitled at that point to res judicata effect."

There does not appear to be any dispute about this.

(5) There is no further automatic right of appeal from the decision of the US Court of Appeal to the California Supreme Court. The latter Court has a discretion as to whether to hear such an appeal. There are a limited number of grounds upon which it exercises its discretion in favour of hearing the appeal.

In certain of the affidavits filed on behalf of the respondent the experts concerned have stated that in terms of

Califonian law the judgment of the US Court is not considered, pending appeal, to be "final". I have carefully studied these affidavits in the light of the other expert evidence and it seems to me that what they in fact say is that the judgment is not "final" for the purposes of the principle of res judicata; and that is common cause. Mr Kaufman has pointed out, however, that Califonian law uses the term "final judgment" in several different senses and a judgment may be final for one purpose but not for another. Thus the judgment in question is "final" for the purposes of enforcement and for an appeal to lie (since only a final judgment may be appealed), but does not give rise to res judicata.

This being the effect of the judgment of the US Court according to the law of California, the question is whether such a judgment should be regarded in our law as final and conclusive in the context of the enforcement of foreign judgments. As I have already indicated, the fact that, when the action for enforcement was heard by

the Court a quo and when the appeal was heard by this Court, the judgment of the US Court was under appeal to the US Court of Appeal, does in itself not prevent the judgment being final and conclusive in our law, though it may entitle the respondent to certain equitable relief. In so far, therefore, as the Judge a quo may have based his decision that the judgment was not final and conclusive simply on the fact that such an appeal was pending, this was an incorrect approach.

It is possible, however, that the learned Judge's decision was based rather on the fact that, according to Califonian law, the judgment of the US Court was not final in the sense that it did not give rise to res judicata in California. And this is indeed one of the arguments advanced by respondent's counsel before us for denying the judgment finality.

It is true that in Nouvion v freeman, supra, Lord Herschell (in the passage from his speech quoted above) did say that

for a foreign judgment to be final and conclusive it must conclusively, finally and for ever have established the existence of the debt so as to make it res judicata between the parties. It is to be rioted, however, that this is the only reference to judicata in the speech of Lord Herschell; and that in none of the other three speeches (by Lords Watson, Bramwell and Ashbourne) is there any mention of res judicata. Moreover, in the paragraph of his speech immediately following the passage quoted above Lord Herschell said (at 9-10):

> "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher a higher tribunal. In such a case it may well be said that giving credit to the Courts of another country we are prepared to take the fact that

> such adjudication has been made as establishing the existence of the debt or obligation. But where, as in the present case, the adjudication is consistent with the non-existence of the debt or obligation which it is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails." (My emphasis.)

Furthermore, it seems to me that Lord Herschell's reference to res judicata was not in a general sense, but with reference to further proceedings between the same persons on the same issues in the same court as gave the original judgment; and that the real thrust of the decision in Nouvion's case is that a judgment is not final and conclusive unless it is final and unalterable in the court which pronounced it (see particularly Lord Watson in the passage quoted earlier in this judgment).

If that be a correct interpretation of Nouvion v freeman,

then, in my view, it would follow that where a foreign judgment has dealt fully with the merits of the dispute between the parties and it cannot be set aside or in any way varied by the court which pronounced it, it is Anal and conclusive for the purposes of enforcement by the law of the forum; and that those are the only relevant criteria. If, however, I am incorrect in this view, then in my opinion this is the approach which this Court should adopt and to that extent it should decline to follow the persuasive authority of Nouvion v Freeman. If this approach be adopted, then the fact that, unlike the position in many countries (including our own, see 9 LAWSA par 346), such a foreign judgment does not give rise to res judicata by the law of that foreign country, should not prevent it being regarded as final and conclusive for the purposes of enforcement.

The only authority on this point that I have been able to rind is the Canadian case of Four Embarcadero Center Venture et alof v Mr Greenjeans Corp. et al 64 OR (23d) 746, a decision of the High

Court of Ontario. The facts in that case bear a remarkable resemblance to those in the present case. It was also an action to enforce (in the High Court of Ontario) a money judgment given in California which was under appeal. Similar expert evidence as to Califonian law had been given, including the rule that, pending the appeal, the judgment, though unalterable by the Court which pronounced it, did not give rise to res judicata. The Court carefully analysed Nouvion v Freeman and relevant Canadian judgments following Nouvion's case and came to the conclusion that the absence of res judicata by Califonian law did not prevent the judgment being held to be final and conclusive for the purposes of enforcement in Ontario.

To sum up the position: the foreign judgment in the present case dealt finally with the dispute between the parties; having once given judgment, the US Court had no power, pending the appeal, to set aside, alter or reconsider its judgment; and pending the appeal,

no security bond or undertaking having been posted, the judgment could be enforced in California. In the circumstances, the foreign judgment was, in my opinion, final and conclusive in terms of our law. For the reasons given this conclusion is not affected by the fact that according to Califonian law the judgment (did not bring about res judicata. And in this connection it may be pointed out that, even though technically res judicata did not arise, a rule similar to Lis alibi pendens would have prevented the issues of the case being re-litigated while the appeal was pending. Finally, the fact that no bond or undertaking has been posted renders it unnecessary to consider what the position would have been had the judgment been stayed or suspended by the provision of such a bond or undertaking (see Berliner case, supra, at 1518 d-f; Cheshire and North op cit, at 366).

In view of this conclusion, the Court a quo erred in holding that the foreign judgment was not final and conclusive.

The other ground upon which the appellant was non-suited

in the Court below was, as I have indicated, that the award of punitive or exemplary damages is by our law contrary to public policy. This was held by Roux J to preclude the appellant from recovering either of the amounts of damages awarded by the US Court. The amount of US$12 000 000 clearly was awarded as punitive damages; but the amount of US$13 670 987 was described in the judgment of the US Court as "compensatory damages" and was evidently awarded in order to recompense the appellant for breach of the joint venture agreement. Nevertheless, Roux J held that the award of this latter amount -

> ". . . rested upon the same foundations as those which support the assessment and award of punitive damages".

He continued:

> "If I consider the ends to which our Courts go to determine damages for breach of contract the apparently arbitrary approach of the Califonian Court is quite unacceptable. So unacceptable is it that it will be contrary to public policy to lumber a person, subject to

this Court's jurisdiction, with liability in terms of such an award."

In my view, there was no valid basis on the papers for these findings by the Court a quo; and, in any event, they seem to involve entering into the merits of the case adjudicated upon by the US Court, which as I have pointed out is not permissible. Accordingly, public policy afforded no ground for denying the; appellant relief in respect of the amount of US$13 670 987.

The award of US$12 000 000 does pertinently raise the question whether or not our courts will enforce an award of punitive damages made by a foreign court, but in all the circumstances I prefer not to deal with this question at this stage. It does not affect the order which this Court must make. The appeal (together with the application for leave to appeal) must be allowed at least in respect of the amount of US$13 670 987 and, as I shall show, it is appropriate that the order of the Court a quo be set aside and an order staying the

proceedings be substituted. Moreover, it is premature, pending the; appeal, to decide the public policy issue. The decision of the US Court of Appeal may render this unnecessary. Finally, in such further proceedings as there may be once the stay has terminated the parties may wish to place additional evidence before the Court upon this issue in respect of both the amounts awarded.

The next question is what order should be substituted for that of the Court o quo. As I have held, in circumstances such as these the court has a discretion, which this Court must now exercise, to stay the proceedings pending the appeal. It seems to me that in this case the immensity of the sums of money involved is by itself sufficient to justify a stay. In addition, however, there is the factor, alluded to above, viz the attack upon the awards of damages as being contrary to public policy. There should be the opportunity for this to be fully canvassed before any substantive order is made on appellant's claims.

The period of the stay requires some consideration. It seems unlikely (on the expert evidence) that in the event of the appeal to the US Court of Appeal being unsuccessful or only partially successful, there will be a further appeal to the California Supreme (Court, but this possibility should not be ignored and should be taken into account in the formulation of the stay order.

As to costs, the appellant has achieved substantial success in this Court and is entitled to the costs of appeal. The costs of the proceedings in the Court a quo, however, should in my view stand over for determination by the Court which finally decides this action.

It is accordingly ordered as follows:

16. The order of the Court a quo refusing leave to appeal is set aside with costs and the application for leave to appeal is granted with costs, including in each instance the costs of two counsel.

17. The appeal is allowed with costs, such costs to include

the costs of two counsel.

3. The order of the Court a quo is set aside and there is substituted therefor the following:

"(a) Plaintiffs action for provisional sentence is stayed pending the final determination of the pending appeal to the Court of Appeal of the State of California, Second Appellate District, and the exhaustion of any further right of appeal by either party to the litigation in the courts of California, United States of America.

(b) The costs of the action for provisional sentence are to stand over for determination by the court which finally hears the action after the termination of the stay."

M M CORBETT

VAN HEERDEN JA) KUMLEBEN JA) CONCUR
NIENABER JA) OLIVIER AJA)