THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 621/02

THINUS SMIT **APPELLANT**

and

SCANIA SOUTH AFRICA (PTY) LTD **RESPONDENT**

Before: Marais, Cloete JJA and Southwood AJA

Heard: 27 February 2004

Delivered: 27 February 2004

Grant of provisional sentence generally not appealable. May be appealable in exceptional cases where the requirements for appealability in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) satisfied. Costs of abortive appeal.

JUDGMENT

SOUTHWOOD AJA

[1] On 27 February 2004 the court made the following orders and

indicated that reasons for the orders would be furnished in due course:

(1) The appeal is struck off the roll. No order is made as to the costs of the appeal.

(2) The appellant is ordered to pay the costs of the application for leave to appeal.

[2] On 23 August 2002 the High Court granted provisional sentence against the appellant for payment of R239,400 and ancillary relief. The appellant appealed against that order with the leave of the court a quo.

[3] The appeal was enrolled for 27 February 2004. Both parties filed heads of argument. The only issue was whether the appellant had incurred personal liability on the cheque on which the action was based. Neither party addressed the other defence raised.

[4] On 13 February 2004 the appellant's attorneys gave notice that they were withdrawing as the appellant's attorneys of record and on 25 February 2004 another attorney notified the registrar that the appellant would not attend court to prosecute the appeal and that on 20 February 2004 the appellant had given notice of his intention to surrender his estate.

[5] The appellant did not appear on 27 February 2004. The

respondent was represented by Mr S van Niewenhuizen SC and Mr W H J van Reenen. Mr van Niewenhuizen correctly did not ask that the appeal be dismissed for non-prosecution.

[6] On 19 September 2003 in *A Avtjoglou v First National Bank of Southern Africa* case no 17/2003 this court decided that, generally, the grant of provisional sentence is not appealable. The court confirmed the finding to that effect in *Scott-King (Pty) Ltd v Cohen* 1999 (1) SA 806 (W) at 825C-E and 825F-G and held that to determine whether a provisional sentence judgment is appealable the requirements for appealability laid down in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-J must be applied. It found in that case that they were not satisfied.

[7] It is possible that in an exceptional case the application of these requirements to a provisional sentence judgment will show that that provisional sentence judgment is appealable. But that is clearly not so in the present case and the court a quo should not have granted leave to appeal. Accordingly this matter must be struck off the roll rather than dismissed for non-prosecution.

[8] Mr van Niewenhuizen asked for the costs of the appeal including the costs of two counsel. While conceding that the provisional sentence granted *in casu* is not appealable and that the

court a quo should not have granted leave to appeal, he submitted that in exercising its discretion on the question of costs this court should take into account that the court a quo had indicated at the hearing of the application for leave to appeal that leave to appeal should be granted. The court a quo was apparently of the view that the issue raised should be considered by the Supreme Court of Appeal. This had influenced the respondent's counsel.

[9] I do not agree with these submissions. The respondent should have disputed the appealability of the provisional sentence both at the application for leave to appeal and in its heads of argument. Had it done so it is very unlikely that this matter would have reached this stage. The respondent contributed as much as the appellant did to the arrival of this abortive appeal in this court and there is no good reason why it should have its costs of appeal paid by the appellant. It would be fairer if each party paid its own costs of appeal.

[10] The costs of the application for leave to appeal stand on a different footing. The respondent was obliged to attend court to oppose the application for leave to appeal. The fact that it opposed the grant of leave on the merits of the case and not on the unappealability of the judgment cannot detract from that fact. The appellant should not have succeeded in his application. The

respondent is therefore entitled to the costs of that application.

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B R SOUTHWOOD

ACTING JUDGE OF APPEAL

CONCUR:

MARAIS JA

CLOETE JA