C. OF A. (CIV) 14/92

IN THE LESOTHO COURT OF APPEAL

In the matter between:

THEKO MASOBENG	APPELLANT
AND	
MOTHAE THAANE	RESPONDENT

HELD AT:

MASERU

CORAM:

STEYN, JA
BROWDE, JA
KOTZÉ, JA

JUDGMENT

BROWDE J.A.

On 12th February, 1992 the respondent brought two actions in the High Court for provisional sentence against the applicant. The first was based on an acknowledgement of debt in the sum of M1000 and the second on two cheques allegedly drawn by the applicant in favour of the respondent as payee

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each cheque being for the sum of R2500.

To each of the summonses the applicant filed a document headed "Notice of Objection" in terms of which the applicant indicated that he intended raising the defence that the High Court had no jurisdiction to hear the matters.

The "objection" in each case was based on the following argument:

(i) By virtue of the provisions of Section 17 of the Subordinate Courts Order No.9 of 1988 Plaintiff's claim falls within the jurisdiction of a Subordinate Court.

(ii) By virtue of the provisions of Section 6 of the High Court Act No. 5 of 1978 Plaintiff's action should therefore have been instituted in a subordinate court having jurisdiction over the defendant's person.

Section 6 of the High Court Act reads that,

"6. No civil cause or action within the jurisdiction of a subordinate court (which expression includes a local or central court)

shall be instituted in or removed into the High Court, save

(a) by a Judge of the High Court acting of his own motion or

(b) with the leave of a Judge upon application made to him in Chambers and after notice to the other parties."

The question at issue before the Court *a quo* - and I should add the only issue that was argued - was, crisply put, whether or not an action for provisional sentence was an action within the jurisdiction of a Subordinate Court. The learned Judge *a quo* found that it was not and granted provisional sentence for the amounts prayed in the summonses together with interest at the rate of 25% per annum and a collection commission of 10%. In coming to this conclusion the learned Judge referred to Section 29(f) of the Subordinate Courts Order, 1988 which expressly excludes provisional sentence from the jurisdiction of the Subordinate Courts. Mr. Sello, who appeared before us, in applying for leave to appeal, submitted that because the amounts in question in the summonses fell within the jurisdiction of a subordinate court it was open to the respondent to have sought summary judgment there which, he submitted, was equivalent to the procedure of provisional

sentence in the High Court. I cannot agree with that submission. Provisional sentence is a procedure designed to afford a speedy remedy for a plaintiff armed with a liquid document in which the defendant has appended his signature to an acknowledgment that a debt in a stated amount is due and owing to the plaintiff. If the defendant wishes to raise a defence on the merits of the matter, such as payment, then he must file an affidavit to that effect and bear the onus of providing the defence on the balance of probabilities. If provisional sentence is granted the defendant, before he can go into the principal case, must pay the amount of the debt as reflected in the document against security being furnished by the plaintiff *de restituendo* should the defendant succeed in that case. It will readily be seen that summary judgment in the subordinate court is far from being the same remedy. Therefore, if a plaintiff wishes to obtain provisional sentence he is constrained to approach the High Court and in this regard it is significant in my view that Section 2(1)(a) of the High Court, 1978 provides that,

> "2(1) The High Court of Lesotho shall continue to exist and shall as heretofore, be a superior court of record and shall have
>
> (a) unlimited jurisdiction to hear and determine <u>any civil or criminal proceedings</u> under any law in force in Lesotho." (my underlining)

It seems to me that there can be no doubt that the High Court has jurisdiction to hear provisional sentence matters in which any amount is claimed and that if that jurisdiction was intended to be removed or diminished by the Subordinate Courts Order it would have had to be clearly stated. There is in my view no indication that that was the intention of the legislature. The further point that has been raised before us is that the appellant was not given an opportunity in the Court *a quo* to file affidavits dealing with the merits of the matters. Mr. Sello has submitted that the failure of the "objection" did not entitle the Court to grant provisional sentence without affording the defendant an opportunity to place his defence to the claims before the Court. The objection, so the argument went, was equivalent to an exception and that it was not necessary, therefore, for the defendant to "plead over". I cannot agree with that submission. In an ordinary action in the High Court, if a defendant objects to the jurisdiction of the Court, a special plea would have to be filed to that effect. But if the defendant has a defence to the claim on the merits it would be necessary for that defence to be pleaded at the same time as the special plea so that it can be dealt with by the Court in the event of the special plea being dismissed. I cannot see any reason for distinguishing a provisional sentence action in this regard from any other action. That conclusion does not, however, dispose of the matter.

In the case of MOSKOVITZ V METEOR RECORDS (Pty) Ltd. 1978(3) SA 996 (C) Friedman J. (as he then was) in dealing with a provisional sentence action, presumably because affidavits are filed in answer to the summons, approached the matter as if it were an application. In deciding whether or not to permit the filing of supplementary affidavits the learned Judge said,

> "Generally speaking a respondent in motion proceedings should file his affidavits on the merits and should not merely take a preliminary point in the expectation that, should the point fail, he will be given leave to file opposing affidavits (see BADER AND ANOTHER VS. WESTON AND ANOTHER 1967(1) SA 134 (C) at 136). There is no good reason why similar considerations should not apply where a defendant wishes to oppose the granting of provisional sentence."

Friedman J. did, however,indicate that if "exceptional circumstances" existed, which warranted the granting of leave to file further affidavits the defendant should then be given such leave. I agree with that approach since to deprive a defendant of such a right in every case, irrespective of the reasons advanced for the failure to file affidavits dealing with the merits of the matter, could lead to a grave

miscarriage of justice in an individual case.

I then turn to the present matter. In appellant's application for leave to appeal it is stated under oath that the defendant was advised by his attorneys that it was not necessary to file affidavits and that if the objections were dismissed,the Court would give him an opportunity to file affidavits and to have the merits argued before granting provisional sentence. He also states that the attorney in addressing the Court asked for such opportunity. In the event, however, probably because the Court was faced with several cases in which the same point regarding jurisdiction had been raised, the learned Judge dealt only with that point and granted provisional sentence without in any way adverting to the question of the filing of affidavits. Indeed the judgment of the Court *a quo* makes no mention of the merits of the matters. I think that had the learned judge not been completely absorbed by the problem of jurisdiction he would have addressed the question of the merits. In this regard I need only point to the grant of orders for interest at the rate of 25% and collection charges of 10% neither of which appear to me to be on the face of the liquid documents relied upon for provisional sentence.

It therefore seems to me that there are exceptional circumstances which justify an order permitting the defendant

to file affidavits on the merits. At the same time I should point out that this judgment must not be seen as in any way detracting from the effectiveness of provisional sentence as a speedy remedy. It is certainly undesirable that defendants be permitted, in the ordinary course, to hold matters up by taking objection and then, only if that be unsuccessful, to put up a defence on the merits. As I have said I am of the view that in this particular case there are exceptional circumstances warranting the relief sought by the appellant.

In the papers before us only leave to appeal was asked for but Counsel on both sides argued the matter fully and have very properly agreed that we deal simultaneously with the application for leave and the merits of the appeal.

In the result I would grant an order giving the applicant leave to appeal and would uphold the appeal. The applicant's defence on the merits has of course been filed but he may wish to supplement that and consequently I would grant him one week from the date hereof to file any further affidavits on the merits as he may wish and the respondent may, within a week thereafter file any replying affidavit which he may wish to do. The matter may then be set down for hearing.

I was initially of the view that because this is an exceptional case that costs should be costs in the cause. On

reflection however it seems to me that when it was clear that the learned Judge had omitted to deal with the question of the merits the respondent should, at latest when the leave to appeal application was lodged, have abandoned the judgment for provisional sentence. As he did not do this and therefore compelled the appellant to prosecute his application and appeal, the respondent should pay the costs. The appeal, therefore succeeds and the respondent must pay the costs of the appeal.

The costs of the proceedings in the Court below, however, are a different matter. The learned Judge, correctly in my view, dismissed the "objection" and the appellant failed to plead over, which led to the omission regarding the merits. Consequently I am of the view that the appellant should pay the costs incurred in the proceedings in the High Court.

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J. BROWDE
JUDGE OF APPEAL

I agree .....
J.H. STEYN
JUDGE OF APPEAL

I agree .....
G.P. KOTZÉ
JUDGE OF APPEAL

Delivered at Maseru This 22nd Day of January... 1994.