CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 68/10
[2011] ZACC 2

In the matter between:

TWEE JONGE GEZELLEN (PTY) LTD — First Applicant

NICOLAS CHARLES KRONE — Second Applicant

and

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA t/a THE LAND BANK — First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

Heard on : 18 November 2010

Decided on : 22 February 2011

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JUDGMENT

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BRAND AJ:

*Introduction*

[1] This is an application for leave to appeal against the judgment and order of the Western Cape High Court (High Court), Cape Town on 24 November 2009.[1]

[2] What the applicants unsuccessfully sought in the High Court was an order declaring the common law remedy of provisional sentence and rule 8 of the Uniform Rules of the High Court (the Rules) inconsistent, and therefore invalid, with the right to a fair hearing,[2] the right to equality before the law and to equal protection and benefit of the law[3] and therefore invalid.[4] Their application to appeal to the Supreme Court of Appeal was likewise unsuccessful.[5] The order the applicants now seek in this Court is substantially narrower, yet still comes down to a constitutional challenge to the provisional sentence procedure. The precise nature of this challenge will be better understood against the background facts and the common law principles pertaining to provisional sentence. I therefore propose to deal with each of these matters in turn. But before that, it is necessary to consider whether leave to appeal should be granted.

*Should leave to appeal be granted?*

[1] *Land and Agricultural Development Bank of South Africa t/a The Land Bank v Twee Jonge Gezellen (Pty) Ltd and Another* Case No 19694/2008, 24 November 2009, unreported.

[2] Section 34 of the Constitution of the Republic of South Africa, 1996. The full text appears in [24] below.

[3] Section 9(1) of the Constitution. The full text appears in [24] below.

[4] In their supplementary answering affidavit to the rule 16A(1) of the Rules notice in the High Court, the applicants also sought an order "refusing provisional sentence and allowing the matter to proceed to trial in due course."

[5] It was refused, first, by the High Court per Desai J on 25 March 2010 and subsequently by the Supreme Court of Appeal, per Ponnan JA and Pillay AJA on 24 June 2010.

[3] Leave to appeal to this Court will be granted only if two preconditions are satisfied. The first, which relates to the jurisdiction of this Court,[6] is that the case must raise a constitutional matter or an issue connected with a constitutional matter. The second is that it must be in the interests of justice to grant leave.[7]

[4] As to the first requirement, the question squarely raised is whether provisional sentence is consistent with the rights to equality and fair hearing protected by the Constitution. That, in my view, is a constitutional issue. As to the interests of justice, it cannot be gainsaid that provisional sentence is an important part of our civil procedure. It comes before our courts every day. Its constitutionality is therefore of considerable import in everyday legal practice. In my view, these considerations warrant the granting of the application for leave to appeal without further consideration of the applicants' prospects of success.

*Background*

[5] The first applicant is Twee Jonge Gezellen (Pty) Ltd. It conducts wine farming operations near Tulbagh in the Western Cape. The second applicant, Nicolas Krone, is a director of the first applicant. The first respondent is the Land and Agricultural

[6] Section 167(3)(b) of the Constitution provides that this Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

[7] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 20 and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) at para 24.

Development Bank of South Africa trading as the Land Bank (Land Bank).[8] The second respondent is the Minister for Justice and Constitutional Development (Minister).

[6] On 6 June 2005, Mr Krone signed an acknowledgement of debt in his personal capacity and on behalf of the first applicant, in favour of the Land Bank. In terms of the acknowledgement of debt, the applicants admitted their liability to the Land Bank, jointly and severally, for the sum of R39 714 027,01 as well as for the costs incurred by the Land Bank in earlier litigation against the applicants. The only other provisions of the acknowledgement of debt relevant in the present proceedings are: (a) an undertaking by the applicants to pay the principal debt by way of agreed instalments and (b) a recordal of the applicants' consent that their failure to pay any instalment on the due date would render the balance of the admitted debt on that date outstanding immediately due and payable.

*Proceedings before the High Court*

[7] On 26 November 2008, the Land Bank issued a provisional sentence summons, based on the acknowledgement of debt, for the sum of R37 914 027,01 out of the High Court. One of the allegations in the summons was that, instead of the aggregate instalments in excess of R20 million that the applicants were supposed to have paid by that time to comply with their undertaking, they had only paid R1,8 million. In

[8] Incorporated in terms of the Land and Agricultural Development Bank Act 15 of 2002.

consequence, the Land Bank contended, the sum claimed, which represented the balance of the admitted debt then outstanding, became due and payable.

[8] Answering and replying affidavits were filed but these were not included in the record before this Court. We can nevertheless glean from the papers before us and the judgment of the High Court that the defence on the merits was two-fold:

(a) that the total amount of the Land Bank's claim in terms of the acknowledgement of debt had been reduced in terms of an oral agreement between the parties to an amount of R20 million; and

(b) that the Land Bank had undertaken to afford the applicants an extension of time within which to pay the agreed debt of R20 million. By virtue of this undertaking, the R20 million could not be claimed without reasonable notice to them. Given the considerable amount involved, reasonable notice would call for a period of at least three months. Since no notice had been given, the institution of proceedings was premature.

[9] The Land Bank denied the factual allegations upon which the applicants sought to rely for their two defences. Moreover, the Land Bank pointed out that the original debt, which gave rise to the acknowledgement of debt on which it now claimed, was the subject of earlier legal proceedings. In those proceedings, so the Land Bank alleged, the applicants relied on defences essentially similar to those they now raise. But prior to the date of the hearing, these defences were abandoned by the applicants. In consequence the

applicants signed the acknowledgement of debt for the full amount of the Land Bank's claim together with the costs it incurred in those earlier proceedings.

[10] Some months after the replying affidavit had been filed, the applicants sought and obtained the leave of the High Court to file additional papers in order to raise the constitutional issues which eventually gave rise to this application. In the process, it also joined the Minister pursuant to the provisions of rule 10A of the Rules.[9]

[11] The High Court decided against the applicants on both the merits and their constitutional arguments. To the latter I shall presently return. As to the former, the court found that the two defences raised by the applicants were against the probabilities, even on the applicants' version of the facts.

*Provisional sentence*

[12] This brings me to the common law principles pertaining to the institution of provisional sentence. The procedure for obtaining this form of remedy in the High Court is governed by rule 8. I will come back to some provisions of the rule in more detail.

[9] At the time, rule 10A provided:

> "If in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law in the proceedings."

(See for example *Road Accident Fund v Mdeyide (Minister of Transport Intervening)* [2007] ZACC 7; 2008 (1) SA 535 (CC); 2007 (7) BCLR 805 (CC) at para 27).

By way of subsequent amendment of the rule by Government Gazette 32941 GN R86, 12 February 2010, the rule now further requires that the party "in the case of a challenge to a rule made in terms of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), cause a notice to be served on the Rules Board for Courts of Law, informing the Rules Board for Courts of Law thereof."

Pertinent at this stage, however, is that rule 8 is merely procedural and has not altered the principles of our common law.[10]

[13] Until recently, provisional sentence was available only in the High Court. In 1994, however, it was introduced into the Magistrates' courts[11] through rule 14A of the rules pertaining to those courts.[12] Save for differences relating to time periods, rule 14A reflects the provisions of High Court rule 8 in all respects. It therefore requires no special consideration.

[14] The institution of provisional sentence has its origin in early French law. From there it was received in Holland during the 16th century, where it became known as *handvulling* or *namptissement*.[13] As part of the law of Holland, it made its way to the Cape. Since then, provisional sentence, as an institution, has remained part of South African law. The remedy afforded by the institution has, on occasion, been described as

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[10] See for example *C.G.E. Rhoode Construction Co (Pty) Ltd v Provincial Administration, Cape, and Another* 1976 (4) SA 925 (C) at 928-9 and *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed vol 2 (Cilliers et al) (Juta, Cape Town 2009) at 1314.

[11] By Government Gazette 15567 GN R498, 11 March 1994 (as corrected by Government Gazette 15603 GN R625, 28 March 1994 and Government Gazette 15634 GN R710, 12 April 1994).

[12] A challenge to rule 14A, on the basis that it was *ultra vires* the provisions of the Magistrates' Court Act 32 of 1944, was dismissed by the Supreme Court of Appeal in *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA).

[13] Menzies "Prefatory Remarks on Provisional Sentence" 1 Menzie (1828) 5-10. At 6 he explains the terminology as follows:

> "Hence is derived the term *'Handvulling,'* by which provisional payment is often designated in Dutch jurisprudence; while the yet more common expression, *'Provisie van Namptissement,'* points equally to the French origin of the practice,—*'namptissement'* signifying payment under security, or rather the security itself (*pignus*), into which the plaintiff is compelled to enter, in order to ensure repayment to the defendant, should the final sentence so adjudge."

See also Malan et al *Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes* (Butterworths, Durban 1986) at 4.

extraordinary.[14] That it is, in the sense that there is no other remedy like it. But, in the light of its long history and frequent use, it can hardly be described as uncommon.

[15] The primary element of provisional sentence, which was inherent to the institution from the start, is that it is only available to a plaintiff who is armed with a liquid document.[15] Over the centuries, the issue whether a particular document can be described as "liquid" for purposes of provisional sentence has given rise to much debate in litigation.[16] In principle, however, a document is liquid if it demonstrates, by its terms, an unconditional acknowledgement of indebtedness in a fixed or ascertainable amount of money due to the plaintiff.[17] Many different sorts of documents have been found to qualify as "liquid" in terms of this definition and therefore sufficient to found provisional sentence. They include acknowledgments of debt, mortgage bonds, covering bonds, negotiable instruments, foreign court orders and architects' progress certificates.[18]

[16] Two further inherent characteristics of provisional sentence have always rendered it distinguishable from other remedies. The one is that it only leads to a provisional or interlocutory order. Final judgment is still to be considered in the principal case. In the

[14] See *Erasmus Superior Court Practice* (Farlam and Van Loggerenberg) (Juta, Cape Town 2010) at B1-62 n 1 and the cases there cited.

[15] See for example *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T) at 727G.

[16] See for example Menzies above n 13 at 7-8. See also Malan above n 13 at 14-15; *Herbstein & Van Winsen* above n 10 at 1328-74; and *Erasmus* above n 14 at B1-63 n 1.

[17] See for example *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 10C-D and *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754H.

[18] See for example *Herbstein & Van Winsen* above n 10 at 1328-74 and *Erasmus* above n 14 at B1-65.

final instance, the claim against the defendant can still be dismissed. The other is that, while on the one hand it entitles the plaintiff to payment of the judgment debt immediately, that is, before entering into the principal case, on the other hand it affords the defendant the right to insist on security for repayment pending the final outcome. As pointed out by Grosskopf J in *C.G.E. Rhoode Construction Co (Pty.) Ltd.*,[19] earlier law required provisional sentence to be satisfied by payment into court, pending the outcome of the proceedings. Towards the end of the 16th century, however, the law was changed in Holland to provide that payment should be made to the plaintiff. The reason for the change appears to be fairly obvious: without the use of the money, provisional sentence would be of little benefit to the plaintiff. But, in exchange for that indulgence, the defendant is entitled to insist on security for repayment and the court has no discretion to dispense with that requirement.

[17] More recently it has been held that security has to be provided against payment, that is, simultaneous with payment.[20] The plaintiff is not thus entitled to demand payment first and put up security later, which means in practice that the plaintiff cannot use the defendant's money to obtain security for repayment. A defendant who has paid the judgment debt is therefore properly secured to receive repayment if the claim is dismissed in the principal case.

[19] Above n 10 at 927E with reference to Van der Keessel *Praelectiones* in *Gonin's trans.* vol 4 at 179.

[20] *Van der Merwe v Bonaero Park (Edms) Bpk* 2000 (4) SA 329 (SCA) at para 8.

[18] Conventional wisdom maintains that the purpose of provisional sentence has always been to enable a creditor who has liquid proof of his or her claim to obtain a speedy remedy without recourse to the expensive, time-consuming and often dilatory processes that accompany action proceedings following upon an illiquid summons.[21] Conversely, the procedure precludes a defendant with no valid defence from "playing for time". Or, as Huber explained some centuries ago:[22]

> "This usage of provisional payment . . . has been . . . introduced as a matter of good practice, since people are wont to bring up any sort of excuse against even clear debts, in order to have the case referred for evidence and so to gain time."

[19] Rule 8(1) requires provisional sentence to be initiated by a summons in the prescribed form.[23] A defendant who denies liability is required to set out the grounds for that denial in an answering affidavit. In this event, the plaintiff is afforded a reasonable opportunity to file a replying affidavit.[24] Though the rule provides for two affidavits

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[21] See for example *Barclays National Bank Ltd v Serfontein* 1981 (3) SA 244 (W) at 249H and *Ashersons v Panache World (Pty) Ltd* 1992 (4) SA 611 at 613A.

[22] Ulric Huber *Heedensdaegse Rechtsgeleertheyt* 5.30.14, referred to by *Herbstein & Van Winsen* above n 10 at 1313 n 4.

[23] Which provides in relevant part:

> "(1) Where by law any person may be summoned to answer a claim made for provisional sentence, proceedings shall be instituted by way of a summons as near as may be in accordance with Form 3 of the First Schedule calling upon such person to pay the amount claimed or, failing such payment, to appear personally or by counsel . . . upon a day named in such summons . . . to admit or deny his or her liability."

[24] This is in terms of rule 8(5) which provides:

> "Upon the day named in the summons the defendant may appear personally or by an advocate . . . to admit or deny his or her liability and may, not later than noon of the court day but one preceding the day upon which he or she is called upon to appear in court, deliver an affidavit setting forth the grounds upon which he or she disputes liability in which event the plaintiff shall be afforded a reasonable opportunity of replying thereto."

only, the courts have assumed a discretion in terms of rule 27(3),[25] to allow a further affidavit on good cause shown.[26]

[20] The theoretical justification traditionally advanced for the institution of provisional sentence is that a liquid document gives rise to a rebuttable presumption of indebtedness. The plaintiff must therefore allege in his or her summons that the document (a copy of which is required by rule 8(3) to be annexed to the summons) is genuine and that, on the face of the document, the amount claimed is owing. If the defendant disputes these allegations, the onus is on the plaintiff to prove that they are true. That includes, for example, the authenticity of the defendant's signature, the authority of the defendant's agent, or the fulfilment of a "simple condition".[27]

[21] But a defendant who relies on a defence[28] which goes beyond the liquid document is required to produce sufficient proof of that defence to satisfy the court that the probability of success in the principal case is against the plaintiff before provisional sentence can be refused.[29] If there is no balance of probabilities either way with regard to the principal case, the court will grant provisional sentence. It follows that if there is a

[25] Rule 27(3) provides "[t]he court may, on good cause shown, condone any non-compliance with these rules."

[26] See for example *Dickinson v South African General Electric Co. (Pty.) Ltd.* 1973 (2) SA 620 (A) at 628F-G.

[27] See for example *Harrowsmith* above n 15 at 731B and *Sonfred (Pty.) Ltd. v Papert* 1962 (2) SA 140 (W) at 143C. See also *Erasmus* above n 14 at B1-80 n 6.

[28] Or a counterclaim – see for example *C.G.E. Rhoode Construction* above n 10 at 928F-H and *Erasmus* above n 14 at B1-81-2 and the cases there cited.

[29] See for example *Froman v Robertson* 1971 (1) SA 115 (A) at 120B.

balance in favour of the plaintiff, provisional sentence will also be granted. There is no closed list of defences on which a defendant can rely. Examples in practice of defences going behind the liquid document are numerous. They include the defence: that the plaintiff never advanced the amount claimed;[30] that the liquid document was tainted with illegality;[31] or that the document had been obtained by fraud.[32]

[22] It has been said that the balance of probability which the defendant must raise must be substantial before the court will refuse provisional sentence.[33] However, as was pointed out in *Rich and Others v Lagerwey*,[34] our law knows only two standards of proof, namely, proof beyond reasonable doubt which applies in criminal cases and the civil standard of proof on a preponderance of probability. In order to escape provisional sentence, the defendant must therefore satisfy the court on a preponderance of probability that the plaintiff is unlikely to succeed in the principal case.

[23] This onus, moreover, can only be discharged upon facts raised on affidavit. The court has no inherent discretion to hear oral evidence on issues other than the authenticity of the defendant's signature on the document, where the plaintiff, in any event, bears the

[30] See for example *Trust Bank van Suid-Afrika Beperk v Eastview Chalet Estates (Pty.) Ltd.* 1971 (3) SA 928 (D) at 933D-F.

[31] *Joseph v Hein* 1975 (3) SA 175 (W) at 178G-H.

[32] *Abraham v Du Plessis* 1962 (3) SA 162 (T) at 169F-H.

[33] See *Inter-Union Finance (Ltd) v Franskraalstrand (Edms) Bpk. and Others* 1965 (4) SA 180 (W) at 192F and *Herbstein & Van Winsen* above n 10 at 1396 and the cases there cited.

[34] Above n 17 at 760G-H. See also *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE) at 286C-E.

onus. This was the position in Holland[35] and is still the position in our law today.[36] The reason why this is so, is directly linked to the nature of provisional sentence as a speedy remedy. The calling of witnesses will effectively take one back to trial proceedings.

*The constitutional challenge*

[24] As I have already indicated, the order sought by the applicants in the High Court was essentially that the common law institution of provisional sentence be declared unconstitutional with the concomitant setting aside of rule 8. As the basis for their constitutional challenge they relied on sections 9(1) and 34 of the Constitution. Section 9(1) provides:

> "Equality
> Everyone is equal before the law and has the right to equal protection and benefit of the law."

And section 34 provides:

> "Access to courts
> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[35] See Menzies above n 13 at 5.

[36] See for example *Rich and Others* above n 17 at 756A-G and *Extension Investments (Pty.) Ltd. v Ampro Holdings (Pty.) Ltd. and Others* 1961 (3) 429 (W) at 431A-G.

[25] In this Court, with reference to section 9(1), the applicants argued that the principles of provisional sentence differentiate between those who can pay and those who cannot pay in determining who is allowed to defend an action on the merits. Therefore, what could potentially occur is that a defendant who can pay succeeds with the exact same defence as the one who cannot pay and who is thus prevented from putting his defence before the court. This, so the argument concluded, is in conflict with the guarantee of equal protection and benefit of the law in section 9(1).

[26] Broadly, the applicants' argument, relying on section 34, was that a defendant against whom provisional sentence had been granted and who cannot pay, is conclusively and unconditionally barred from entering into the principal case. Consequently, so the argument went, a defendant with a bona fide defence, which could not be established on affidavit and without the assistance of pre-trial discovery, the leading of oral evidence and the cross-examination of the plaintiff's witnesses, is precluded from invoking these aids in presenting his or her defence. This argument concluded that this is inimical to the right to a fair hearing in section 34.

[27] In setting down the present application, this Court issued directions which limited written argument to the following issue:

> "Whether the common law remedy of provisional sentence, requiring a party against whom provisional sentence has been granted to enter the principal case only if the amount of the judgment and taxed costs have been satisfied, is unconstitutional."

[28] What the directions thus point to is the sting of the provisional sentence procedure. If the defendant can pay the judgment debt, no irreparable harm can occur, even if provisional sentence was wrongly given. The case proceeds in the normal way and the defendant will be vindicated in the end. Moreover, the plaintiff's ability to repay is ensured by the provision of security. It is only where the defendant cannot pay the judgment debt that he or she is precluded from entering into the principal case and thus deprived of the advantages of a trial procedure.

[29] In response to these directions, the applicants made it clear that they no longer sought the abolition of provisional sentence and rule 8 in their entirety. This followed upon their concession from the outset that provisional sentence serves a commercial purpose of great import in preventing defences without merit being raised as a means of delay. They also conceded that, for the most part, the application of the provisional sentence procedure does not result in any injustice and thus accords with both the fair hearing requirement in section 34 as well as the equality guarantee in section 9(1).

[30] In so far as the remedy is concerned, so the applicants further contended in their heads of argument, it is not necessary to do away with provisional sentence completely. All that is needed is to afford the court a discretion at two levels:

- first, to refuse provisional sentence even where the defendant fails to show that the probabilities of success in the principal case are in his or her favour; and
- second, once provisional sentence has been granted, whether to require the defendant to pay the debt before being allowed to enter into the principal case.

[31] During oral argument before us, the applicants further conceded that the payment discretion, at the second stage of their proposed formula, is unsustainable. I agree with this concession. The payment discretion presupposes that the court can give a provisional sentence which does not compel provisional payment. But, as I see it, a provisional sentence judgment without an obligation to pay is the equivalent of no provisional sentence at all. In fact, that much had already been stated in *Kent v Transvaalsche Bank* slightly more than a hundred years ago.[37] As it turned out, the applicants therefore contended for the introduction of one discretion only: that the judge, who would otherwise be obliged to grant provisional sentence because the balance of success does not favour the defendant, should have a discretion to refuse the order so as to avoid an injustice which would otherwise occur.

[37] 1907 TS 765 at 758:

> "The object of granting provisional sentence was to afford a summary remedy to plaintiffs who were prepared with liquid proof of the defendant's liability, and to enable them to obtain payment of their claims at once on giving security *de restituendo*. And if a defendant could, by entering appearance, without satisfying the provisional judgment . . . [enter into the principal case] . . . the whole object of the procedure will be defeated."

[32] A discretion as to whether or not provisional sentence should be followed by payment would require an amendment to rule 8(10).[38] But the provisions of the rule have no bearing on the court's decision whether or not provisional sentence should be granted. The introduction of the discretion at that stage would therefore have no impact on the provisions of the rule at all. Once it was accepted that the proposed payment discretion would eviscerate provisional sentence, the applicants abandoned their attack on the constitutional validity of rule 8.

*The respondents' answer*

[33] The respondents' answer to the original broad challenge was in essence that provisional sentence does not limit the defendant's rights in terms of either section 9(1) or section 34 of the Constitution. Alternatively that a limitation of these rights would in any event be reasonable and justifiable having regard to, amongst other factors, the important role that provisional sentence plays in our civil procedure. In response to the challenge as narrowed during oral argument in this Court, that to afford the courts a discretion whether to grant provisional sentence was unnecessary and will effectively mean the end of an important and useful remedy, I propose to deal first with the question

[38] Rule 8(10) provides:

> "Any person against whom provisional sentence has been granted may enter into the principal case only if he shall have satisfied the amount of the judgment of provisional sentence and taxed costs, or if the plaintiff on demand fails to furnish due security in terms of subrule (9)."

whether the provisional sentence procedure constitutes a limitation of a defendant's right to a fair hearing before a court in terms of section 34 of the Constitution.

*Does provisional sentence limit the right of access to courts under section 34?*

[34] Having regard to the way the argument developed in the course of oral argument before this Court, and in particular the concessions on the part of the applicants, the sole question for determination is thus whether the absence of a discretion to permit a defendant who cannot pay the sum claimed to enter the principal case, where the probabilities are evenly balanced, renders the provisional sentence procedure unconstitutional. Before deciding this issue, it remains necessary to consider the respondents' contention that the entire provisional sentence procedure is constitutionally sound.

[35] In defending the existing procedure, the respondents argued that even on its narrowed basis, the applicants' challenge loses sight of the fact that the procedure is subject to judicial supervision. This, so the respondents argued, renders provisional sentence distinguishable from the self-help provisions impugned in *Chief Lesapo v North West Agricultural Bank and Another*,[39] which concerned the seizure and sale of a defaulting debtor's property without recourse to a court of law. This argument is clearly well-founded to the extent that provisional sentence is available only by court order.

[39] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

[36] The respondents' further argument was that the provisional sentence requires both parties to satisfy the respective burdens imposed upon them and that the burden imposed upon a plaintiff is in fact substantial. That is plainly so. In fact, I believe it is true as a general statement that in most cases the procedure will not be unfair to the defendant. This is ensured by two measures built into the provisional sentence procedure. First of all the plaintiff must establish on a balance of probabilities that the defendant has unconditionally acknowledged liability for the amount claimed. Failure to do so entails that provisional sentence is refused.

[37] In the second place, the defendant gets an opportunity to set out his or her defence on affidavit. Once the plaintiff has filed a replying affidavit, the defendant can seek a further opportunity to file a response which will be granted in exceptional circumstances. The court is thus able to weigh up the two opposing versions as far as the papers allow. If the outcome is dependent on issues of law or, say, the interpretation of a contract which does not involve a dispute of fact, the defendant will usually not be prejudiced at all.

[38] The right embodied in section 34 is a right to a fair public hearing, not a right to a trial. Many procedures that are the daily stuff of court business are decided on affidavit, and never go to trial. These include summary judgment where, unless the defendant on affidavit sets out a bona fide defence, final judgment may follow.

[39] Even where the outcome is dependent on resolving a dispute of fact, defendants in provisional sentence proceedings will often be able to prove a balance of eventual success in their favour through documentary evidence. So, for example, if the defence is one of payment, the defendant will usually be able to prove payment on balance, despite a denial by the plaintiff, through producing a receipt or by way of an entry into bank statements. In this light I agree with the sentiment expressed by Didcott J in *Barclays Western Bank Ltd v Pretorius*,[40] that the criticism against provisional sentence procedure (relied upon by the applicants) may well have been overstated by Tindall J in *Rood v Van Rooyen* when he said:[41]

> "If I could refuse provisional sentence, I should like to do so, because I am not enamoured of the procedure of provisional sentence. I should like to see the procedure abolished and to see it superseded by new Rules of Court providing a simplified and speedy procedure for hearing actions founded on liquid documents. But the procedure is an old and well-established one, and I do not think that I should be justified in modifying it to an extent which is not covered by any previous case that I am aware of."

[40] But perhaps equally over-broad at the other end, I believe, may be the statement from *Mahon v Mahon and Others* (on which the first respondent relied) that:

[40] 1979 (3) SA 637 (N) at 653B-C.

[41] 1934 TPD 110 at 111.

> "A defendant with a 'solid defence' . . . to the plaintiff's claim has no insurmountable barrier to overcome and will in the normal course be able to avert the grant of provisional sentence."[42]

[41] That might indeed be so in the normal course, but the unfortunate reality is that it is indeed possible for a defendant, with a solid defence, to find the barrier created by the provisional sentence procedure insurmountable. It may happen when, having regard to the evidence available and the nature of the defence, the defendant is unable to establish that defence on balance by way of affidavit, without the assistance of oral evidence or cross-examination of the plaintiff's witnesses, or both. Say, for example, the defence is that the cheque sued upon was acquired by fraud[43] or that the bill drawn on the defendant constituted the contract price for a counter-obligation that the plaintiff had failed to perform.[44] As some cases illustrate, where there are mutually contradictory versions, it will be virtually impossible to predict which will be accepted at the trial after cross-examination of the witnesses on both sides. So, the prospects of success will be regarded as evenly balanced and provisional sentence will follow.

[42] Once provisional sentence is granted, the defendant must pay the full amount of the judgment to enter into the principal case. And if he or she is unable to do so, the judgment becomes final. This, despite the fact that the defendant never had the

[42] [2009] ZAWCHC 106, Case No 14918/2008, 29 July 2009, as yet unreported, at para 30.

[43] See for example *Abraham* above n 32.

[44] See for example *Ottico Meccanica Italiana v Photogrammetric Engineering (Pty) Ltd* 1965 (2) SA 276 (D).

opportunity properly to present a defence, which the court predicted to have an even chance of succeeding. The effect is that, although the defendant had an equal chance of winning, provisional sentence procedure deprives him or her of that chance.

[43] I find it self-evident that in these narrowly described circumstances, the provisional sentence procedure constitutes a limitation of the defendant's right to a fair hearing before a court in terms of section 34. It is true that provisional sentence is granted by a court, but there is a second element to the section 34 guarantee. The hearing before the court must be fair. And a procedure that condemns a defendant inevitably and without discretion to final judgment with no proper opportunity to present his or her case is simply unfair. The question is thus whether there is a discretion.

*Do the courts have a discretion to refuse provisional sentence?*

[44] I find a convenient starting point for the enquiry in the following statements by *Herbstein and Van Winsen*:[45]

> "In every case, therefore, . . . if the probabilities favour the defendant, provisional sentence will be refused; if they do not favour the defendant, provisional sentence will be granted except in the special circumstances discussed immediately below. . . . The special circumstances that have been recognized by our courts arise when the probabilities of success favour neither the plaintiff nor the defendant and the provisional sentence claim is part of a larger transaction which is in dispute between the parties." (Footnote omitted.)

[45] Above n 10 at 1397.

[45] The "special circumstances" exception referred to by the learned authors has its origin in *Fichardt's Estates v Mitchell and Others*.[46] Since then it has been followed in numerous cases.[47] The origin of the court's authority to refuse provisional sentence in these "special circumstances" was not always considered. Where it was, it was ascribed to a judicial discretion, though the term was used on occasion in a somewhat loose and wide sense.[48] Some cases went further to tell us about the nature of this discretion. An example is *Levy v Fairclough et Uxor* where it was said:[49]

> "A study of all the decided cases shows that . . . if substantially the same issues are to be investigated [in the main action] as those raised in the provisional sentence case, then the court has a discretion to postpone the claim for provisional sentence pending the trial of the larger issues . . . . *This is surely equitable*. Provisional sentence provides an extraordinary and swift remedy in favour of a party armed with a liquid document, but if that document is merely part of a larger transaction, then it would be *grossly unfair* to grant provisional sentence while the larger dispute remains outstanding . . . . The defendant is a man of very slender means and there is every possibility that if provisional sentence is given against him, he will not be in a position to continue the main action. . . . In the present case, if it should transpire that the defendant has been defrauded, he may be entitled to damages far in excess of the amount now claimed. By applying the swift and extraordinary remedy of provisional sentence in this case therefore, the result may be to *work a grave and perhaps irremediable injustice*." (Emphasis added.)

[46] 1921 OPD 152.

[47] For a convenient summary of these cases see *Ottico Meccanica* above n 44 at 282C-287B and *Mao-Cheia v Neto* 1981 (3) SA 829 (C) at 833B-834G.

[48] See for example *Strachan & Company v Murray* 1939 WLD 93 at 101; *Ottico Meccanica* above n 44 at 288F-G; and *Mao-Cheia* above n 47 at 836F-H.

[49] 1950 (2) SA 240 (W) at 245-6.

[46] And in *Mao-Cheia v Neto,*[50] the court refused provisional sentence on the basis that "this is a matter in which justice would be better done between the parties if I should exercise my discretion in favour of [the defendant]". The considerations underlying the exercise of a discretion in favour of the defendant in "special circumstances" are therefore fairness and the prevention of injustice.

[47] Finally, some of the older cases held out the promise that the operation of this discretion, to do justice between the parties, could be extended beyond the strict confines of "special circumstances". So it was said in *Estate Late Morton Greene v Spies,*[51] that "[t]he special circumstances which have so far been recognised by the Courts . . . may of course be extended from time to time as the law develops. . . ."[52]

[48] But despite this promise of expansion, the discretion was never applied outside the narrow ambit of the special circumstances recognised in *Fichardt's.* Stated somewhat differently: the parties referred to no authority, nor am I aware of any, where a court has applied its discretion to refuse provisional sentence outside the bounds of "special circumstances". What I therefore distil from all this is that:

[50] Above n 47 at 836G-H.

[51] 1933 NPD 328 at 331-2.

[52] And then followed the description of the *Fichardt's*-type special circumstances.

- the courts have on occasion exercised a discretion to refuse provisional sentence, even where the prospects of success in the main case are evenly balanced;
- they have indicated that this discretion should be exercised on the basis of what is just and fair;
- but, until now, special circumstances have been confined to where the balance of probabilities is equal and the provisional sentence claim is part of a larger dispute between the parties.

*Conclusions on limitation*

[49] I therefore conclude that the courts have over the years confined their discretion to refuse provisional sentence to strictly circumscribed "special circumstances". Though on occasion, the courts seem to have recognised a discretion outside the ambit of "special circumstances" as presently recognised to refuse provisional sentence where it would give rise to unfairness and injustice, they have never refused provisional sentence outside that narrow ambit.

[50] In the light of these considerations, I hold that the provisional sentence procedure constitutes a limitation of a defendant's right to a fair hearing in terms of section 34 where:

(a) the nature of the defence raised does not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence;

(b) the defendant is unable to satisfy the judgment debt; and

(c) outside "special circumstances", the court has no discretion to refuse provisional sentence.

[51] I must make it clear though that the limitation occurs only where two lines intersect on the defendant's case. The first line is that the nature of the defence raised does not allow the defendant to show a balance in his or her favour without the benefit of oral evidence. The second line is that the defendant is unable to satisfy the judgment debt. Absent either one of these lines the provisional sentence procedure will not limit the defendant's right to present his or her case, and thus the right to a fair hearing, in any way. If the nature of the defence allows a balance in favour of the defendant to be shown on affidavit, inability to pay the judgment debt does not matter, since provisional sentence will be refused. If, on the other hand, the defendant can pay, it does not matter that the defence can be established only with the benefit of oral evidence. The defendant will have that opportunity, after paying, when he or she presents the defence during the principal case. The defendant will be no worse off than the plaintiff whose application for provisional sentence is refused. Though it may give rise to inconvenience, his or her right to a fair hearing will eventually be given effect to in the principal case.

[52] This conclusion renders it unnecessary to enquire whether provisional sentence procedure also limits a defendant's right under section 9(1) of the Constitution. The question that remains is whether the limitation of the defendant's right under section 34 is justifiable in terms of section 36 of the Constitution.

*Justification*

[53] Section 36(1) provides:

> "Limitation of rights
> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[54] What the application of section 36(1) calls for, this Court explained, is the following:[53]

> "In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list."

And:

[53] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) (Madala J, Sachs J, Yacoob J) at para 32.

> "The approach to limitation is, therefore, to determine the proportionality between the extent of the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose."[54]

[55] I now proceed to this balancing exercise.

*The importance of the section 34 right*

[56] There can be no doubt about the importance of the fundamental right which is guaranteed by section 34. As stated by this Court in *De Beer NO v North-Central Local Council and South-Central Local Council and Others*:[55]

> "This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order." (Footnote omitted.)

*The importance of the purpose of the limitation*

[57] It cannot be gainsaid that provisional sentence is an important instrument, particularly in the sphere of commerce. We all know that the pace at which the wheels of civil justice are turning is unacceptably slow. Some of the contributing causes can be

[54] Id (O'Regan J and Cameron AJ, dissenting) at para 66. See also *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 33-5.

[55] *(Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11.

eliminated; others not. Achievement of the former is the subject of ongoing effort and debate. Pertinent for present purposes, however, is that in these circumstances we can ill-afford to forgo one of the few procedural instruments that enables a creditor to obtain speedy relief.

[58] Apart from the interest of the individual plaintiff, exclusion of unmeritorious defences also serves the interests of the administration of justice itself. It renders scarce resources available for the resolution of real disputes or, as was said in *Beinash and Another v Ernst & Young and Others*,[56] with reference to the prevention of vexatious litigation:

> " . . a restriction of access in the case of a vexatious litigant is in fact indispensible to protect and secure the right of access for those with meritorious disputes. . . . The vexatious litigant is one who manipulates the functioning of the courts so as to achieve a purpose other than that for which the courts are designed."

The same, in my view, can be said of a defendant who opposes a claim with the sole purpose of delaying payment of a debt which is due.

[59] But in the light of the narrowed challenge, the focus of the enquiry into the purpose of the limitation must likewise be narrowed down to the confinement of the court's discretion to refuse provisional sentence under special circumstances only.

[56] [1998] ZACC 19; 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC) at para 17.

[60] A discretion on the part of the courts always gives rise to a measure of uncertainty in the outcome of litigation. In the case of provisional sentence, certainty in the outcome is of particular importance to the plaintiff because the refusal of the application will, from the plaintiff's perspective, inevitably result in an even further waste of time and legal costs. The apprehension that unacceptable uncertainty may be the death knell of provisional sentence probably underlies the reluctance of our courts thus far to extend the application of their discretion beyond the confines of special circumstances. Conversely, the confinement of the court's discretion also serves the purpose of dissuading defenceless debtors to proceed with litigation in the vain hope that the court may be persuaded to exercise its discretion in their favour.

*The nature and extent of the limitation*

[61] As to the factor in section 36(1)(c), that is the nature and extent of the limitation, the respondents referred to the fact that the provisional sentence procedure imposes a limitation on a defendant's section 34 right only in exceptional circumstances. That much is true. But in those cases it effectively exposes the defendant with a potentially good defence to final judgment without allowing him or her to put up that defence. In these narrowly described circumstances the limitation is therefore a drastic one.

*Comparison with other procedures*

[62] A further argument relied on by the respondents under this rubric rested on a comparison between provisional sentence and other procedures that were held to pass constitutional muster or that were at least not as yet subjected to constitutional challenge. In this regard they referred to the "pay now, argue later" remedy found in tax legislation,[57] orders for security for costs[58] and, finally, summary judgment procedure.[59]

[63] The argument based on these comparisons was aimed at showing that the limitation to a defendant's right to a fair hearing imposed by these other procedures are in principle indistinguishable from provisional sentence and that, what is good for the one must be good for the other. My conclusion is, however, that these comparisons are not helpful. The constitutionality of each procedure relied upon in the comparison must be considered separately if and when it is necessary. The only question we need to answer concerns the constitutionality of the provisional sentence procedure.

*The relationship between the limitation and the purpose*

[64] The next question is whether there is an appropriate relationship between the limitation and its purpose. The limitation imposed by provisional sentence certainly achieves its purpose. It does enable the plaintiff armed with a liquid document to obtain a speedy remedy. Conversely, it precludes a defendant from delaying payment of a debt

[57] Considered in *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC).

[58] Considered in *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC).

[59] See for example *Joob Joob Investments* above n 17 at paras 31-2.

due by raising a bogus defence. Moreover, the restriction of the court's discretion to "special circumstances" would contribute to these purposes. But, while provisional sentence is an important remedy, the restriction of the court's discretion to special circumstances goes too far. Without affording the court a discretion to refuse provisional sentence where the result may be patently unfair to the defendant, the remedy goes further than is necessary to protect any concomitant interests of the plaintiff. The limitation is out of balance with its purpose.

[65] Having now undertaken the balancing exercise, I conclude that there is no appropriate justification for the limitation to the right of access to courts that the absence of discretion as described earlier entails.

*Remedy*

[66] The defect lies in the absence of a discretion in the limited circumstances described. The question is, what remedy should be afforded. One answer would be to leave it to the courts to refuse provisional sentence whenever they regard it as just and fair. But that is too wide in the light of the narrow limitation I have found. It seems to me that the procedure would be rendered constitutionally consistent if the common law were developed in accordance with the behest of the Constitution in a manner that gives the court a discretion to refuse provisional sentence only where the defendant can demonstrate the following circumstances:

(a) an inability to satisfy the judgment debt;

(b) an even balance of prospects of success in the main case on the papers; and

(c) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.

[67] It goes without saying that "inability to satisfy the judgment debt" in the present context is not the same as inconvenience or even hardship to the defendant. A defendant who is unable to pay because he or she does not want to sell or encumber a particular asset or who would rather not disturb the cash flow of his or her business, is not entitled to seek what amounts to an indulgence from the court. As I see it, inability to pay in this context must require the defendant to show that the judgment debt is unlikely to be satisfied by the attachment and sale in execution of his or her property. For a defendant simply to state, as the applicants did in this case, that he or she is unable to pay the judgment debt will therefore be insufficient to trigger the court's discretion to refuse.

[68] Lest I be misunderstood: I do not suggest that the court's discretion should again be absolutely confined to predetermined conditions. The underlying consideration remains to protect the defendant from an unjustifiable limitation to his or her fair hearing right. What I am saying is that in the overwhelming majority of cases a discretion exercised in accordance with the guidelines I propose will render the limitation to the defendant's fair hearing right justifiable.

[69] And in the exercise of its discretion the court must bear in mind that it is performing the balancing act between two legitimate interests, which section 36(1) of the Constitution requires. On one side of the scale is the right of a plaintiff, armed with a liquid document, to obtain speedy relief. On the other side there is the defendant's right to a fair hearing in terms of section 34 of the Constitution.

*Summary*

[70] What this amounts to in sum is:

(a) Provisional sentence procedure constitutes a limitation of the defendant's right to a fair trial in terms of section 34 of the Constitution in cases where:

(i) the nature of the defence raised does not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence;

(ii) the defendant is unable to satisfy the judgment debt; and

(iii) the court has no discretion, in the absence of narrowly defined "special circumstances", to refuse provisional sentence.

(b) Justification of the limitation requires the development of the common law so that courts will in future have a discretion to refuse provisional sentence in the following circumstances:

(i) an inability to satisfy the judgment debt;

(ii) an even balance of success in the main case on the papers; and

(iii) a reasonable prospect that oral evidence may tip the balance of success in the defendant's favour.

[71] The next question is what effect, if any, the new approach to the court's discretion proposed in this judgment will have on the outcome of this case.

*Effects on this case*

[72] Ordinarily the development of the common law by this Court in a particular case will require that the case be referred back to the High Court for reconsideration in the light of the development. That, however, cannot be the position when it is apparent that the variation in the common law brought about by the development can have no influence on the outcome of the case.

[73] The question is thus: can the amendment of the common law that I propose lead the High Court to a different result in this case? The answer, I believe, is "no". What the High Court found on the facts is that the uncontroverted correspondence between the parties favours the Land Bank's version of the disputed facts and that "on the probabilities . . . an agreement to that effect [on which the applicants relied for their defence] does not exist."

[74] It is true that the affidavits which formed the basis of these findings were not included in the record before us. But the applicants took no issue with these findings.

On the contrary, in their application for leave to appeal to this Court it was pertinently stated that "the Applicants do not seek leave to appeal against the Court *a quo*'s findings on the merits".

[75] What this means, in short, is that this is not a case in which the probabilities are evenly balanced on the papers. This is a case where the probability of eventual success in the principal case actually favours the plaintiff. That being so, the case falls outside the ambit of the circumstances where, in the light of this judgment, the court would now have a discretion to refuse provisional sentence. As I have indicated, a prerequisite for that discretion is that there must be an even balance of prospects of success in the main case on the papers.

[76] What is more, it appears that this matter has its origin in a summons which was issued by the Land Bank in 2003. Though they defended the action, the applicants subsequently withdrew their defences and signed an acknowledgement of debt for the full amount of the claim together with costs. That acknowledgement of debt in turn gave rise to the present proceedings. In effect the applicants have thus succeeded in avoiding payment for more than seven years in a case where the prospects of success had been found to favour the Land Bank. In these circumstances the applicants should not, in my view, be afforded a further opportunity to frustrate the Land Bank's legitimate claim.

*Costs*

[77] As to the issue of costs in this Court, it appears to me that the litigation between the applicants and the Land Bank arose from a commercial dispute. In that dispute the Land Bank was substantially successful in vindicating its rights. It follows, in my view, that the applicants must pay the Land Bank's costs. The position of the Minister, on the other hand, is somewhat analogous to that of an *amicus curiae*. The purpose of his intervention was to assist this Court. In the circumstances I do not believe that a costs order in his favour would be warranted.

*Order*

[78] The following order is accordingly made:

1. The application for leave to appeal is granted.
2. The appeal is upheld to the extent described in this order.
3. The procedure for provisional sentence is declared to be inconsistent with the Constitution and invalid to the extent that it does not give to courts a discretion to refuse provisional sentence where:
    (a) the nature of the defence raised does not allow the defendant to show a balance of success in his or her favour without the benefit of oral evidence;
    (b) the defendant is unable to satisfy the judgment debt; and
    (c) outside "special circumstances", the court has no discretion to refuse provisional sentence.

4. The common law is developed so that courts will in future have a discretion to refuse provisional sentence only in circumstances where the defendant demonstrates:

   (a) an inability to satisfy the judgment debt;

   (b) an even balance of prospects of success in the main case on the papers; and

   (c) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.

5. The declaration of invalidity in paragraph 3 of this order will not affect any claim for provisional sentence that has been finally determined as at the date of this order by judgment at first instance or by settlement.

6. The first applicant, Twee Jonge Gezellen (Pty) Ltd, and the second applicant, Nicolas Charles Krone, are ordered to pay the costs of the first respondent, the Land and Agricultural Development Bank of South Africa trading as the Land Bank, including the costs of two counsel, jointly and severally.

7. There is no order as to the costs of the second respondent, the Minister for Justice and Constitutional Development.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concur in the judgment of Brand AJ.

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| For the Applicants: | Advocate GM Budlender SC and Advocate PS van Zyl instructed by Herold Gie. |
| For the First Respondent: | Advocate DJ Jacobs SC and Advocate F Jakoet instructed by Cliffe Dekker Hoffmeyr Inc. |
| For the Second Respondent: | Advocate LT Sibeko SC and Advocate G Ngcangisa instructed by the State Attorney, Cape Town. |