



CONSTITUTIONAL COURT OF SOUTH AFRICA

**TWEE JONGE GEZELLEN (PTY) LTD AND ANOTHER
v
THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA t/a THE
LAND BANK AND ANOTHER**

CCT 68/10

Date of Judgment: 22 February 2011

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 18 November 2010, the Constitutional Court heard an application for leave to appeal by Twee Jonge Gezellen and its director, Mr Krone (applicants), against the Land Bank and the Minister for Justice and Constitutional Development. The application concerned the constitutionality of the provisional sentence procedure. The High Court in Cape Town (High Court) granted judgment against the applicants in an amount of approximately R37 million under the provisional sentence procedure. The High Court ruled that the applicants had not established that, if the case went to full trial, they would probably succeed in the defences they raised.

Provisional sentence is available to a creditor in possession of a document which is an unconditional acknowledgement of indebtedness by the debtor, for example, a written acknowledgement of debt or a cheque. It is a simple way for holders of documents like cheques to get quick payment.

To avoid provisional sentence, the defendant must make out a case on affidavit that the plaintiff will probably fail if the full case comes before the court. At this provisional stage, oral evidence is allowed only if the signature on the document is disputed. If provisional sentence is granted, the defendant must first pay the amount claimed before he or she is entitled to defend the case on its merits. At the same time, the defendant can insist that the applicant provide security for repayment of the amount.

In June 2005, the applicants signed an acknowledgement of debt in favour of the Land Bank for approximately R39 million. Since the applicants had failed to pay the instalments due, the Land Bank claimed provisional sentence for the outstanding sum of approximately R37 million. The High Court dismissed the applicants' defence on both the merits and on the constitutional issues they raised.

In the Constitutional Court, the applicants argued that, although they have a valid defence against the claim, they are precluded from entering into the principal case by the rules regulating provisional sentence as they cannot lead oral evidence before the provisional sentence judgment has been granted against them. Further, because they are unable to pay the debt, they will not be able to enter the main case. They therefore alleged the procedure was unconstitutional because it limited their right of access to courts as guaranteed by the Bill of Rights.

The Constitutional Court found that the procedure for provisional sentence to a certain extent unjustifiably limited the right of access to courts granted in the Constitution. It was therefore declared inconsistent to the extent that it does not give a court the power to refuse provisional sentence where the defence raised requires oral evidence and where the defendant is unable to pay the judgment debt to enter into the main case. The common law was thus developed to provide courts with a discretion to refuse provisional sentence where the defendant could show on affidavit that he or she was unable to satisfy the judgment debt, an even balance of prospects of success in the main case and a reasonable prospect that oral evidence at the main trial may tip the balance of prospective success in the defendant's favour.

Despite this outcome on the constitutional point, the Constitutional Court dismissed the applicants' appeal against the judgment the High Court granted against them. The Constitutional Court ruled that the way the common law had been developed, would not detract from the applicants' liability to pay. This was because the High Court found that, on the papers, the prospects of success in the main case were not evenly balanced, but actually favoured the Land Bank. Even under the common law, as developed to conform with the Bill of Rights, the High Court would therefore still have no discretion to refuse provisional sentence. The appeal therefore had to fail.