

# A Californian Judgment fails the Provisional Sentence test in South African Courts

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## Introduction

South Africa is one of the most developed countries on the African continent and a key country in the Southern African Development Community (SADC) and the BRICS (Brazil, Russia, India, China, and South Africa) economic bloc. Its status in private international law on the African continent is evinced as the country on the African continent where two vital instruments of private international law were adopted: the Convention on International Interests in Mobile Equipment (Cape Town Convention) and the Mining, Agricultural and Construction Protocol (MAC Protocol). It is also a member of the Hague Conference of Private International Law. Thus, development in its private international is likely to significantly impact the neighboring countries in the SADC region and the continent.

In the recent case of *Lindsey and Others v Conteh* (774/2022) 2024 (3) SA 68 (SCA), the South African Supreme Court of Appeal dismissed an appeal for the recognition and enforcement of a Californian judgment. The South African Supreme Court of Appeal held that “The California Court Orders do not constitute a liquid document evidencing an unconditional acknowledgment of indebtedness, in a fixed sum of money. The appeal must accordingly fail” (para 35).

This case is significant because the case addresses the recognition and enforcement of foreign judgment in South Africa and matters concerning provisional sentence. It is, therefore, a case that other SADC countries and common law jurisdictions would find helpful when recognizing and enforcing foreign judgments, especially under the common law regime.

## **Facts**

The case outlined below concerns the recognition and enforcement of a Californian foreign judgment in South Africa. The brief facts of the case is as follows: The sixth appellant, African Wireless Incorporated (AWI), is a corporation registered in terms of the laws of the State of Delaware in the United States of America; and the first to fifth appellants are the shareholders of AWI. The respondent is a businessman and citizen of the United States of America and now resides in South Africa. The appellants filed a suit against Mr Conteh, the respondent. The basis of the suit was that the respondent had transferred some shares of AWI to companies belonging to him without the requisite permission of AWI.

Consequently, the appellants obtained a judgment by default. Further, the Californian Superior Court ordered the respondent to turn over the shares to the appellants. The court also placed a value upon the shares 'for bond purposes only'. The appellants then brought an *ex parte* application, which *inter alia* sought to convert the earlier court order to a monetary judgment. However, the application was dismissed.

## **The case before the High Court**

The appellants argued that the foreign default judgment and the post-judgment enforcement orders collectively constituted a final and binding money judgment. They further argued that, by operation of law, the judgment was enforceable in the same manner as a "money judgment for the value of the shares". This is because it had been converted into a liquid and executable money judgment under California law. Therefore, its nonpayment entitled them to seek a provisional sentence. However, the respondent contended that the foreign judgment was not a money judgment; hence, it was not a liquid document. He averred that what was before the courts was merely a judgment for the delivery of shares.

## **The ruling of the High Court**

According to the High Court, 'the judgment does not constitute prima facie proof of a debt enforceable by provisional sentence', as it did not comprise a liquid document. The court determined that extrinsic evidence on Californian law was necessary to prove that the order to turn over the shares had been converted into a debt in monetary terms, thus constituting a money judgment. The court concluded that the need to resort to such extrinsic evidence was inconsistent with South African courts' usual strict adherence to the requirements for granting a provisional sentence. Dissatisfied with this ruling, the plaintiffs appealed to the Supreme Court of Appeal.

## **Summary of the Judgment of the Supreme Court of Appeal**

The Supreme Court of Appeal extolled the importance of recognizing and enforcing foreign judgment 'in a world of ever greater international commerce' (para 26). It reechoed its previous statement in *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA), where it stated that "it is now well established that the exigencies of international trade and commerce require '. . . that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto'" (para 25). The court stated that a court judgment serves as prima facie evidence of a debt owed and constitutes an acknowledgment of the indebtedness for the amount specified in the judgment.

The central issue in this case was whether a series of orders and two writs, granted by the Superior Court of California in the State of California, United States of America, cumulatively constituted a liquid document that can be enforced through provisional sentence in South Africa. Thus, the Supreme Court of Appeal was invited to determine the true nature of the Californian court orders in relation to the granting of a provisional sentence.

The appellants argued that the foreign judgment, when read cumulatively, constitutes a liquid document despite the initial judgment being for the turnover of shares. According to them, because a monetary value was ascribed to the shares and a writ of execution for the monetary value of the shares was issued, it is sufficient to enable them to secure a provisional sentence.

The court referred to the seminal case of *Jones v Krok* 1995 (1) SA 677 (A) to set out the conditions to be met for the recognition and enforcement of a foreign judgment, namely: '(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 judgment 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 Businesses Act 99 of 1978, as amended...'. In this case, the parties did not seek to qualify these requirements (para 27).

According to the court, a provisional sentence is a "summary remedy" that allows a judgment creditor with a liquid document to obtain relief quickly without initiating a trial action (para 19). The liquid document relied upon by the judgment creditor "must be a written instrument signed by the defendant acknowledging indebtedness unconditionally for a fixed amount of money," and the judgment debt "must be fixed, definitive, sounding in money," which is "evident on the face of the document" (para 21). Thus, the judgment creditor must satisfy the court that the foreign judgment satisfies these conditions in order to succeed under the proceedings for a provisional sentence. Under the proceedings for provisional sentence, the need for extrinsic evidence nullifies the liquidity requirement. However, over time, there has been a shift away from the strict application of the principle of "the document must speak for itself" towards the need for "greater flexibility as to what evidence extrinsic to the foreign judgment itself may be permissible" (para 22).

The Supreme Court of Appeal stated that the judgment debt contained in the California Court Orders was for the possession of property. That is, the respondent should turn over the shares to AWI. Although the California court determined the value of those shares, it did not order Mr Conteh to pay an amount; it only required the respondent to deliver up specified shares. On this issue, the Court of Appeal of the State of California had already held that the appellants 'were not entitled to an actual money judgment in the default judgment proceedings' (para 11).

The SCA further made two observations on the relevant provisions of California law. First, court orders for the possession of property cannot be immediately enforced as a money judgment upon issuance. Some steps need to be followed: “The levying officer must have failed to take custody of the property; made demand of the judgment debtor, if the debtor can be located; the levying officer must then make a return that the property cannot be obtained” (para 31). It is only when these steps have been followed that the judgment for the possession of property will be enforced ‘in the same manner’ (para 31) as a money judgment. Secondly, the Supreme Court of Appeal emphasized that although the relevant provisions of Californian law allow for the enforcement of the Californian Court Orders ‘in the same manner’ as a money judgment, it does not render the court orders to be a money judgment (para 31).

On why a court order that can be enforced as a money judgment under Californian laws should not be recognised and enforced by a South African court, the Supreme Court of Appeal stated that it “is a matter of sovereignty” (para 33). South African courts are not simply instruments for enforcing California court orders. In addition, the summons by the appellants was for a provisional sentence and did not request a South African court to implement the enforcement procedures of Californian law (para 34).

Most crucially, the court stated that because the cause of action set out in the summons was based on a foreign judgment that is not a money judgment, the provisional sentence cannot be granted (para 35). Also, the California courts did not constitute a liquid document for a fixed sum of money. Thus, the Supreme Court of Appeal dismissed the case, but on a ground different from that of the high court. The Supreme Court of Appeal reasoned that it was not the recourse of the appellants to extrinsic evidence that rendered provisional sentence unavailable to them. Instead, the foreign judgment they relied upon is not a money judgment, hence not a liquid document (para 36). Consequently, the appeal was dismissed.

## **Comment**

This is a case where the judgment creditors sought the assistance of the South African courts to recognize and enforce the California court orders. It was a

typical case of recognition and enforcement of foreign judgments. However, the foreign judgment fell short of the requirements to be satisfied when recognizing and enforcing judgment sounding in money. One of the recognized procedures for recognizing and enforcing foreign judgment in South Africa is by way of provisional sentence. When making this application for a provisional sentence, the judgment creditor should be armed with a liquid document. As a requirement, the judgment in question needs to be a money judgment. However, in this instant case, according to the Supreme Court of Appeal, the California Court Orders do not constitute a liquid document: the judgment obtained in the Californian courts was not a money judgment. Consequently, according to both the High Court and the Supreme Court of Appeal, because this 'necessary' requirement has not been met, the foreign judgment cannot be enforced by way of a provisional sentence.

In most common law legal systems, when recognizing and enforcing a foreign judgment, one of the requirements is that the judgment should be a fixed sum of money. Although it is not stated clearly in SADC countries, it is implicit in the procedure for enforcing foreign judgments through provisional sentence summons, which are summons on liquid documents (para 21). In this case, the South African court upheld this requirement and did not recognize the Californian court orders, which did not constitute a liquid document. Although a monetary value had been placed on the shares the respondent had to transfer, it was not deemed a money judgment. Thus, the fact that a foreign court order can be converted into a monetary value does not change the nature of the judgment into a monetary value. For a judgment to qualify as a fixed sum of money, it needs to be shown clearly in the foreign judgment that the judgment debtor is required to pay a specific sum of money. In the words of the court, the debt must be "fixed, definitive, sounding in money and evident on the face of the document relied upon" (para 21). Without that, it does not qualify as a monetary judgment and cannot be recognized and enforced. The California judgment was not a money judgment. Thus, it was not recognized and enforced by way of provisional sentence. It is submitted that the Supreme Court of Appeal was right to dismiss the appeal on this ground. This decision by the Supreme Court of Appeal will be of great importance to Southern African courts, which are influenced by the jurisprudence of South African courts (*Standic BV v Petroholland Holding (Pty) Ltd* (A 289-2012) [2020] NAHCMD 197).

This judgment also shows the clinging of South Africa's court to the common law theory of obligation (para 18). Per the theory of obligation, a foreign judgment can be recognized and enforced by initiating a new action for the judgment debt. The rationale is that the foreign judgment imposes an obligation on the individual against whom the judgment was rendered to pay the judgment debt. The claim to pay the judgment debt is separate from the original cause of action that led to the judgment in the foreign jurisdiction. The judgment obtained in this new suit, not the original foreign court judgment, is enforceable as a judgment in the domestic courts. However, one should not be quick to pin this theoretical basis on South Africa's legal regime. This is because, in other cases of recognition and enforcement of foreign judgment that have come before the South African courts, such as *Richman v Ben-Tovim* (para 4) and the *Government of Zimbabwe v Fick* 2013 (5) SA 325 (CC) (para 56-57), other bases such as comity and reciprocity have been mentioned to be the basis for enforcing a foreign judgment. One should thus be guided by the counsel of Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) SA 509 (D), where she observed rightly that trying to search for a theoretical basis was "a most interesting and somewhat frustrating exercise to attempt to pin it down" (*Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) SA 509 (D) 513). The court thus observed that the concern should be on the applicable legal regime (that is, whether common law regime or the statutory regime) and the stipulated conditions for the recognition and enforcement of foreign judgment (*Laconian Maritime Enterprises Ltd v Agromar Lineas* 1986 (3) 509 (D) 516).

Another aspect of this case concerns recognizing and enforcing non-monetary foreign judgments. It is submitted that the practice where only judgments sounding in money are recognized and enforced is problematic and does not reflect recent developments in the field of recognition and enforcement of foreign judgment. A foreign judgment, beyond the requirement for the payment of a specific sum of money, might also require that the judgment debtor perform an act that includes the transfer of shares (like in this instant case) or delivery of property. There is a need for development in South Africa's legal regime to enable it to recognize and enforce non-monetary foreign judgments.

Current legislative developments in the arena of recognition and enforcement of foreign judgments allow for the recognition and enforcement of non-monetary

judgments. For instance, the 2019 Hague Judgments Convention allows for recognizing and enforcing non-monetary judgments. According to the Garcimartín-Saumier Report, recognition and enforcement of foreign judgment “includes money and non-money judgments, judgments given by default.. and judgments in collective actions” (para 95). Further, the Report adds that “Judgments that order the debtor to perform or refrain from performing a specific act, such as an injunction or an order for specific performance of a contract (final non-monetary or non-money judgments) fall within the scope of the Convention”. Also, the Commonwealth Model Law on Recognition and Enforcement of Foreign Judgment of 2018 allows for the recognition and enforcement of non-monetary judgments (Art 2). Even before these legislative innovations, the Supreme Court of Canada, in the case of *Pro Swing Inc v Elta Golf Inc* ((2007) 273 DLR (4th) 663), had already held that the traditional common law rule that limits enforcement to fixed sum judgments should be revised to allow for the enforcement on non-monetary judgments. Also, common law countries such as Australia and New Zealand have all, by legislation, done away with the fixed sum of money restriction (Australia: Section 5(6) of Foreign Judgments Act 1991; New Zealand: Section 3B of Reciprocal Enforcement of Judgments Act 1934).

These represent current developments in the law, and thus, the courts in South Africa, as part of their responsibility to develop the common law (section 8(3) of South Africa’s 1996 constitution), should incorporate this innovation in order to develop the common law in this regard the next time they are seised with a case which requires them to recognize and enforce a non-monetary foreign judgment.

Suppose South Africa’s legal regime recognizes and enforces non-monetary foreign judgments; the court might have reached a different conclusion rather than outright dismissing the case and the appeal. In that situation, the California court order, which required the respondent to transfer shares to AWI, would have been capable of being recognized and enforced by the South African court. After the recognition and possible enforcement of the order to transfer the shares, the court would subsequently be invited to determine how to handle the monetary value placed on the shares to be transferred. However, such an opportunity was missed because South African courts do not recognize and enforce non-monetary judgments.