

IN THE HIGH COURT OF LESOTHO

In the matter of :

DIAMOGEN(PROPRIETARY) LIMITED Plaintiff

v

G. FLORIO Defendant

R U L I N G

Delivered by the Hon. Chief Justice, Mr. Justice
T.S. Cotran on the 2nd day of March 1983

This is a summons for provisional sentence on six promissory notes to the total value of M150,000 drawn by the defendant in favour of Stability Diamond Cutting Works(Pty)Ltd (Stability) which notes plaintiff claims to be the legal holder thereof. The notes (part of 10 notes to the total value of R250,000 the last four of which were not due for payment at the time of the issue of the summons) are all dated the 18th January 1982 and were made payable to Stability by defendant on various dates commencing on 10th April 1982 and ending on 10th June 1982. They were all dishonoured or payment stopped. The notes are endorsed at the back thereof by Stability in two places except that it is said that stamps affixed on two of the notes do not clearly show this. The documents are liquid and defendant does not deny his signature.

The defendant opposed the granting of provisional sentence and in his founding affidavit gave reasons which were supported by a director of Stability Mr. Gary Berman. The defendant and Berman described the circumstances under which the promissory notes were executed and both denied that value was received for the notes.

The plaintiff replied by an affidavit sworn by Mr. Demetre J Kondopolos. He was authorised by the plaintiff to do so. He gave a different version of the circumstances under which the notes were executed and produced evidence of seven payments to Stability between 25th January 1982 and 7th

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April 1982 (before the first note was due for payment) in a total sum of R220,000 all of which payments consist of round figures (ranging from 15,000 to R75,000) and one payment of R9,000 on 3rd June 1982. Kondopolos alleged that the balance (21,000) represented the amount Stability agreed to pay for his discounting charges or profit on the transaction.

The three persons involved in the drama are Kondopolos Berman and the defendant (Florio). All three however agree:

1. that Kondopolos was to advance the money (R250,000) at some future date (the date or dates and whether the money was to be in one lump sum or instalments are matters of dispute) not to Florio but to Stability who would in turn pass it to Florio.
2. that Stability and plaintiff or Kondopolos had previous dealings as also Stability and Florio but not plaintiff or Kondopolos and Florio.

Counsel for the defendant is now applying for leave to file another affidavit from Mr. Berman of Stability in reply to Kondopolos details of payments as aforesaid made to Stability. Counsel for the plaintiff objects to this.

Counsels for plaintiff and defendant agree that the general rule in provisional sentence proceedings in South Africa is not to grant leave except in special cases and I proceed to give my ruling on the assumption that in Lesotho the Court does have the power to grant such leave. I do not find it necessary therefore to analyse the cases cited by Mr. Kuny (Western Bank Ltd v Packery 1977(3) SA 135 at 141 and 142; Sadler v Nebraska(Pty)Ltd and another 1980(4) SA 718 at 721; Janirae(Pty)Ltd v Stretch 1978(4) SA 920 at 922; Dickinson v SA General Electric Co(Pty)Ltd 1973(2) SA 620 at 628; Mookery v Mookery and another 1974(3) SA 681; Schoeman v Demezieres 1981(4) SA 401 at 402; Oceana Leasing Services v BG Motors 1980(3) SA 275 or the cases cited by Mr. Ettlinger (Joseph and Jeans v Spitz and others 1931 WLD 48 at 50 and New York Shipping Co. Ltd v E.M.M.I Equipment 1968(1) SA 355 at 358 and 360) because the principles seem clear to me and the difficulty lies in their application which must necessarily vary from case to case.

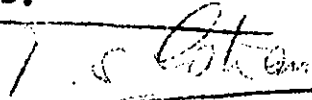
Mr. Kuny submits that the defendant had been taken by surprise when Kondopolos detailed the payments made to Stability

in furtherance of the transaction subject matter of the notes. The defendant does not know the situation and only Berman does. The Court should allow Berman (so went the argument) to file another affidavit to show that the payments received were in respect of other dealings between Stability and the plaintiff or Kondopolos. Mr. Ettlinger submits that this should not have come as a surprise, that Berman has referred to the subject of his dealings in his former supporting affidavit and in essence he is canvassing the same point.

My view is that to allow another affidavit from Berman will inevitably result in an application by Kondopolos for leave to reply, indeed Mr. Ettlinger indicated he would do precisely that. The Court would not be in a position to refuse such an application and Mr. Kuny would hardly be able to argue otherwise. The Court may thus end up with more sets of affidavits that would involve digging up numerous accounts of transactions between Stability and perhaps every director or officer (including auditors and accountants) of that company on the one hand and the plaintiff and every director or officer of that company (including auditors and accountants) on the other. This is a kind of trade or profession that does not always lend itself to accuracy in figures or in relating figures to the commodity exchanged, or to long drawn written contracts, or to agreed minutes of negotiations. The case before me is an example.

I think that the object of provisional sentence proceedings is to solve a problem expeditiously within the law and the rules between the parties primarily concerned, viz, plaintiff and defendant. In this particular instance, if further affidavits are allowed the case will degenerate into my having to decide who is lying, Kondopolos or Berman or indeed Berman and defendant acting in concert against Kondopolos. Very few Judges can say with certainty whose typewriter is lying. Nothing can be achieved by admitting further affidavits and the application must accordingly be refused.

Counsel will argue on the merits on the affidavits as filed on a date to be agreed after consultation with the Registrar. The defendant to pay the costs.


CHIEF JUSTICE
2nd March 1983

For Plaintiff: Mr. Ettlinger (instructed
by Du Preez, Liebetrau & Co.)

For Defendant: Mr. Kuny (instructed by Mohaleroe, Sello & Co.)