CIV/T/317/82

IN THE HIGH COURT OF LESOTHO

In the matter of :

DIAMOGEN(PROPRIETARY) LIMITED Plaintiff

v

G. FLORIO Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 30th day of June, 1983

This is a summons for provisional sentence on six promisory notes to the total value of R150,000 made by the defendant in favour of Stability Diamond Cutting Work(Pty)Ltd (Stability)and endorsed by the latter in blank. The notes were executed in Johannesburg in the Republic of South Africa and in terms of s.71 of the Bills of Exchange Proclamation (No.13 of 1912 Vol. I Laws of Lesotho p.811) the Bills of Exchange Act of South African (Act 34 of 1964) is applicable. The plaintiff derives title to the notes from one Kondopulos a director of the plaintiff and it is common cause that if Kondopulos is not a holder in due course for value the plaintiff cannot be. The statutes of the two countries are at par but whereas Mr. Ettlinger for plaintiff relies on s.28(1) Mr. Kuny for the defendant relies on s.28(2) of the Proclamation.

For reasons given on the 2nd March 1983 the summons for provisional sentence has to be decided on the affidavits before me not on imaginary affidavits that I held could not be admitted in evidence.

/Kondopulos

Kondopulos avers that he gave value for the notes made by the defendant by way of discounting them to Stability. The defendant says he did not receive value, but the short point of the matter is that, on the face of the documents, value had been advanced to Stability. Kondopulos avers that he did so on diverse dates between 25th January 1982 and 3rd June 1982 to the total sum of R229,000. He produced 8 documents (4 cheques and 4 receipts) as evidence of the payments (annexures DJK2 to DJK9 of Kondopulos' replying affidavit pp 51-59) the balance (R21,000) being his discounting commission.

Stability, in the shape of Mr. Berman, aver that whilst it did receive the above sums from Kondopulos on the dates stated these were not on account of the "transaction" that had been entered into by him, Kondopulos, and the defendant but on some other account or accounts unconnected with the defendant. It was common cause that Kondopulos and Stability had financial dealings before.

Kondopulos avers that the precise dealings between Stability and the defendant were not spelt out to him. He did not know the defendant before the 16th (or 17th) January 1982 and did not know what arrangements had been made between Stability and defendant but he himself had advanced the funds to Stability.

The law on the subject is not in issue between counsels of the parties, nor does it seem to me to be in doubt, viz, that provisional sentence cannot be refused unless the defendant produces such counter proof as would satisfy the Court that the probability of success in the principal case is against the plaintiff. Where no balance of probabilities can be discerned the Court must grant provisional sentence unless special circumstances exist. The law is discussed at some length in Herbstein and Van Winsen 3rd Edition p.541 et seq (2nd Edition p.484 et seq) wherein all relevant authorities are cited.

/Counsel

Counsel then outlined the points in issue each claiming that the balance favours one or the other of the parties. It has been submitted that as far as the defendant is concerned he has no choice but to rely on what Mr.Berman of Stability avers, that he (Berman) received no value or funds from Kondopulos and could not therefore advance funds to the defendant.

Neither counsel specifically used the word fraud or misrepresentation but each submitted that the indications were that either Kondopulos or Berman, as the case may be, was the "guilty party". I regret it is not possible to say who is the "guilty party". It must ultimately depend on viva voce evidence. The legal principles applicable where the defence of fraud (or misrepresentation) is raised incidentally seem to be no different from any other defence raised.

The only point that caused me some anxiety was whether, when one fact is agreed to by the triamvarate, viz, that value was to be given at a date subsequent to the execution of the instruments (not apparently uncommon in mercantile or commercial practice) and then a dispute arises whether that undertaking had or had not been honoured (which matter may be difficult to conclusively resolve on affidavits) that that would constitute a special circumstance against the granting of provisional sentence. The authorities (outlined in Herbstein and Van Winsen 3rd Edition 552-554) do not point to this situation being a recognised special circumstance. (Allied Holdings Ltd v Myerson 1948(2) SA 961; North Coast Plastic Packaging Industry v Haynes Industries 1981(1) SA 913; and Ladybrand Koop Landbowmaaskapy v Thulo 1980(1) LLR 99). It has been said (Becks Theory and Principles of Pleadings in Civil Actions - Isaacs 1982 Edition) that where the defence raised is one extrinsic to the document itself such as fraud failure of consideration and such like that the defendant must show on a balance of probabilities that he would succeed in the principal case if the matter went to trial (paragraph 165 p. 310 footnotes 17), whilst

/Herbstein

Herbstein and Van Winsen supra (paragraph B(1) page 551 footnotes 36 and 37) write of "substantial" probabilities.

What is striking here is that according to Berman and the defendant the advance from Kondopulos was to be made within days rather than weeks (see paragraph 6 p.27 of Berman's affidavit and paragraph 4(c) p.15 of defendant's affidavit), whilst Kondopulos says it was to be over a period. If what Berman and defendant say is the correct version, three months elapsed, from 18th January 1982 (the date of execution) to 21st April 1982 (when the defendant wrote to his Bank not to honour payments - annexure B to defendant's affidavit - p.32, two of which payments (bills E and D dated 10th and 20th April respectively, one presented and referred to drawer) had already become due (allegedly for no value received) and given merely "as security" (which words I must confess I find difficult to understand) so that six bills were at large in the commercial market. No application or action at law or otherwise, not even a simple letter of protest to Kondopulos at the inordinate delay in making the advances appears. As late as the 3rd of September 1982, almost nine months after the event, Berman swears to an affidavit (annexure DSK10 of Kondopulos' relying affidavit p.59) in which he seems to conceal, but nevertheless seeks to convey the impression, that he was no more than an observer to a "transaction" which was not materially of his concern, only to make a change of stance when the crunch came before a Court of law some two months later. Mr. Kuny invites me to gloss over this as a layman's imprecise way of expression. It is difficult to accept that contention on affidavit type of evidence.

I am not persuaded by the arguments

(1) that the R9000 allegedly paid to Stability on 3rd June could not have been on account of the transaction because Kondopulos must have got wind of the dishonour in April and passing the bills to plaintiff was in bad faith,

(2) that a sum of R21,000 was too disproportionate

/an

an amount to have been levied by way of discount on an advance of R250,000

(3) that the transaction agreed to was more likely to have been of the nature described by the defendant and Berman rather than that described by Kondopulos; and that these factors, individually or in combination, cast so much doubt on the purpose of the previous payment made to Stability between the 25th January 1982 and the 7th April 1982, to tilt the balance of probabilities, if the action is defended, in favour of the defendant.

I see no evidence of Kondopulos passing title after notice of dishonour, nor am I able to make such an adverse inference. I find nothing more probable in what Berman and defendant say, than what Kondopulos says, in fact the probabilities are the other way, for the introduction to Kondopulos was not, and has never been alleged to be, with the object of making him a "partner" to the trade dealings of the defendant and Stability, but to "finance" a project between the defendant and Stability. (See defendant's affidavit para 3 p.14 and Bermans's affidavit para 4 p.26). There is certainly a possibility that Kondopulos may have agreed to jump on the "bandwagon", if I may use the word, but there is also a possibility that he may well have had the excellent prospect of exacting a good price for whatever project Stability and defendant were contemplating without his having to get involved. I can think of some other possibilities, but all these cannot, in my view, be converted into probabilities. There is no balance in defendant's favour let alone a substantial balance.

Finally there was Mr. Kuny's submission about the prejudice his client will experience if he is eventually successful. Prejudice there may be when a Court decides on papers but the intention behind this extraordinary interim remedy, and it is no more than interim, is to provide a speedy and effective resolution of commercial disputes

/involving

involving liquid documents. Prejudice per se has not been a ground for refusing provisional sentences (Hicks v Dobriskey 1976(2) SA 792).

Provisional sentence must accordingly be entered in favour of the plaintiff (with interest) and costs as prayed, with the proviso that if the defendant enters into his defence costs will be costs in the cause.

Mr. Kuny, on my invitation, addressed me on the requirement that the plaintiff must furnish security de restituendo. He tried to minimise the point by saying that that matter depends on the satisfaction of the Registrar. The comments that follow are outside the ambit of my above Judgment but it seems to me that the Registrar must afford both parties a hearing on what the defendant demands and on what plaintiff is able or willing to provide. Any decision arrived at by the Registrar is subject to review in the normal way. In case of a limited private company incorporated in a foreign country with no assets in Lesotho whose fate, be it natural or contrived, no one can foretell, whose directors and officers, unamenable to and not within the jurisdiction, that such security, as against an incola, must be real and realisable for no plaintiff can insist on satisfaction (CGE Rhoode Construction Co. v. Provincial Administration, Cape, 1976(4) SA 925 et seq) if a successful defendant is left to chase an illusory security.

T. S. Potter

CHIEF JUSTICE
30th June 1983

For Plaintiff : Mr. Ettlinger
For Defendant : Mr. Kuny