

IN THE HIGH COURT OF LESOTHO

In the matter of :

AMERICAN HAIR PRODUCTS (Pty) Ltd

Plaintiff

V

MALBEFA MAPHELEBA t/a DYNASTY
HAIR DRESSING SALOON

Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 2nd day of March, 1989.

On page 7 of the record is reflected a photostat copy of a cheque, Annexure "A" marked "A" the original of which was shown to me for inspection and returned to plaintiff's attorney for safekeeping. I am satisfied that this is a liquid document.

Plaintiff proceeding by way of provisional sentence summons sues defendant on this liquid document. Defendant opposes the suit.

It is a peculiar feature of defendant's opposing affidavit that it contains no averment to the effect that the signature borne on annexure "A" does not belong to her or to her authorised agent. This is a feature that sits defendant or her agent rather loosely in view of the fact that in paragraph 4 (See p. 3 of record) of plaintiff's case defendant is required to set forth in an affidavit

"the grounds of her defence to the claim, and in particular, state whether she admits or denies her signature on the said cheque."

In fact it was admitted from the bar on defendant's behalf by her counsel that the signature reflected is that of defendant. The reason advanced for defendant's refusal

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to pay the amount reflected i.e. M4938.61 being that she never received the goods purchased hence she instructed the Bank to stop payment of that cheque.

Since the signature on the cheque is not denied and since there can be no doubt that the signature appearing above the word "deponent" on defendant's opposing affidavit is hers, it is a matter of curious coincidence that the signature appearing on annexure "AA" the delivery note should bear such striking similarity to the signatures referred to above. Another striking feature is that the cheque was due for payment on 22nd January 1987 which date is reflected also at the bottom of annexure "AA". The amount of the cheque also corresponds with that reflected on annexure "AA" after some set of goods were returned for credit.

There is strong probability that defendant received the goods she denies receipt of. Otherwise it is difficult to account for her signature on a document that shows the goods were in fact taken delivery of by the signatory.

While dealing with this aspect of the matter it is worth bearing in mind De Villiers J's remarks in Ternant vs Lamb 1947(2) SA. at 660 that

"where a plaintiff is armed with a written admission of liability by the defendant, as he is when he has liquid proof, he is armed with a weighty piece of evidence, and before the scale can be tipped against him, and in favour of the defendant, the defendant must produce weighty evidence."

I may just extract a quotation that earned the approval of this court in CIV/T/553/86 Joubert Drankwinkels (Pty) Ltd vs B.E. Koma (unreported) at 12 where it was stated that

"the burden of proof is, of course, on the defendant to show that he is not liable on a document which shows, prima facie, a liability in him on the face of it."

Needless to state

"..... non-performance by the other party would

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be a matter for defence, but would not affect the liquidity of the document."

See Inter-Union Finance Ltd vs. Frankraalsrand B.P.K. 1965(4) SA. at 182 letter "C".

It is important to bear in mind that in provisional sentence proceedings defendant is required to show that on a balance of probabilities he has prospects of success in the principal trial. Such degree of probability would more readily incline the court to defendant's favour if it can emerge in defendant's own case than if it is sought to be founded on inferences pertaining to what are pointed at as weaknesses in plaintiff's case. Therefore as was stated in Lesotho Foto Laboratories and Lighting Distributor (Pty) Ltd vs. Nkuebe 1980(2) LL.R 459 one of the requisites to satisfy in provisional sentence proceedings is that

"defendant is unable to adduce such counter proof as will satisfy the Court that in the principal case the probabilities of success would be against plaintiff."

I am inclined to take the view that because defendant has not, in affidavit filed in opposition to the provisional sentence summons, admitted or denied her signature on the instrument sued upon she has breached provisions of Rule 9(5).

On page 9 of Koma above this Court was persuaded by the submission that

"it is not proper for defendant to come to Court to attack plaintiff's case on inferences without relying on affidavits seeking to substantiate and justify the attack."

I most heartily endorse the view expressed at page 4 para 12 of plaintiff's heads that

"At the hearing of a provisional sentence application, plaintiff surrenders the original document on which the action is based and moves for judgment on it. Thereupon the defendant argues his case and plaintiff replies."

In a good number of cases this procedure is breached,

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just as it was breached in the instant case.

Defendant has failed to satisfy me that on a balance of probabilities she stands a good chance of success in the main trial. I therefore deem it appropriate to grant provisional sentence as prayed.



J U D G E.

2nd March, 1989.

For Plaintiff : Mr. Harley
For Defendant : Miss Tau.