

IN THE HIGH COURT OF LESOTHO

In the matter of :

JOUBERT DRANKWINKELS (PTY) LTD. Plaintiff

V

B.E. KOMA Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 30th day of January, 1989.

Plaintiff sues defendant by way of a provisional sentence based on a cheque dated 20-5-1986 drawn on Lesotho Bank Mokhotlong and signed by defendant in favour of plaintiff in the amount of M49,160.92. Plaintiff also claims from defendant an interest on the above amount at 11% per annum calculated from 20th May 1986.

Plaintiff alleges on papers that the amount is owed to it by defendant on the basis of this cheque of which plaintiff is a legal holder yet when presented to the aforesaid banker for payment it was dishonoured by non-payment.

The defendant has opposed the provisional sentence summons. In his affidavit he has set out that on or about 20th May 1986 he placed an order for the supply of liquor with plaintiff's employee called Jeff.

Defendant has further averred that he gave the said Jeff a cheque i.e. annexure "A" even before defendant could receive the purported supply of liquor.

Annexure "A" reflects a amount of R49,160.95 payable to Jouberts Bottle Store. This cheque is signed

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on two different places by signatories whose names as far as I can decipher appear to be C.M. Koma and B.E. Kome.

Defendant stated further that he waited for either the said Jeff or plaintiff or both to deliver to him the anticipated supply of liquor. But neither did. Consequently in June 1986 defendant instructed his bankers not to honour payment of the sum reflected on the cheque until he had received the supply ordered.

Defendant had apparently relied on Jeff's word that he would deliver the supply of liquor to him at Mokhotlong as soon as Jeff had arrived at Petermaritzburg in RSA where he had given defendant to believe that he was at the time proceeding to.

Because defendant has to date not received the liquor he had ordered from plaintiff through Jeff he accordingly denies liability to either of them and prays for the dismissal of these proceedings.

Jeffrey Wayne Hibbert plaintiff's director in a sworn affidavit stout-heartedly denies that the facts deposed by defendant are correct. See page 00011 paragraph one of the deponent's answering affidavit.

He denies defendant's averments in paragraph two and draws court's attention to the fact that the orders were placed telephonically by Defendant on the evening of 15th April 1986. In response to the order Jeffrey Hibbert says he made out Cash on Delivery invoices marked 7556 through 8 marked "A" "B" and "C". These invoices are before Court; and the total amount represented by them is R51,904.27. Bearing in mind that plaintiff seeks judgment only in the sum of R49,160.92 it is explained to me that the reason for the difference is that defendant after making the original order which footed up to R49,160.92 made a further order that pushed the total further up to R51,904.27. This I am told accounts for the fact that for the first order defendant gave plaintiff Annexure "A" to the summons in the amount of R49,160.92.

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I have observed that the orders reflected on Annexure "A" "B" and "C" were made to Cindi Restuarant and Bottle Store. The deponent explains that this was done in deference to defendant's advice that not only defendant would be responsible for payment but a certain Mpaka, and another Fats as well. It seems defendant's role would be designed at making arrangements for the payment.

Furthermore this deponent says he was advised to have the liquor railed to Bethlehem in R.S.A. whereupon he presumed that the only reason for this was that the persons named above were taking liquor into Lesotho illegally.

It was when Jeffrey Hibbert and his co-director one Mr. Willie Joubert travelled to Mokhotlong to get payment from defendant that the latter handed Annexure "A" to deponent Hibbert in payment of the first order which defendant had placed.

Hibbert explains that on account of a long business relationship between defendant and plaintiff the former was given 30 days to pay. This accounts for the fact that Annexure "A" was postdated to 20th May 1986, he explains. Hence the cheque was only deposited with plaintiff's bank on 29th May 1986. I have noted that Hibbert said earlier that he had prepared the invoices on 17th April 1986 and shortly after making the orders "A" "B" and "C" he travelled to Mokhotlong. This deponent denies defendant's allegation that he supplied plaintiff with Annexure "A" to the summons even before the liquor was sent to him. Indeed Annexures "C 1" "D" and "E" attached to the papers being the South African railway delivery notes show that a consignment of whisky, Vodka, gin, Brandy wine and Beer was delivered in favour of Cindi Rest & Bottle Mokhotlong to Bethlehem on 28th April 1986 by van der Merwe and Jourbert.

On the face of it Annexure "A" appears to have been with the Trust Bank Pietermaritzburg on 29-5-1986.

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This tends to lend support to Hibbert's assertion that it is not true for defendant to say that he paid before he received the goods, if his means of effecting payment was through Annexure "A" to the provisional summons. If on the other hand defendant paid by some other means or even cheque the onus is on him to show which cheque if any he used to effect the payment.

On the papers as they stand a further discrepancy is discerned in defendant's averment saying he instructed his bank to stop payment whereas the cheque i.e. Annexure "A" clearly shows that it is marked "Refer to Drawer" which is not the same thing as "stop payment" or "Payment stopped" which is the language usually employed by banks on receipt of and in compliance with a drawer's instructions to them not to honour payments. It would seem therefore that plaintiff's assertion that payment was not voluntarily withheld by defendant but rather that funds were not available to meet the cheque is not without foundation.

Regarding a letter Annexure "F" addressed to JEFF dated 27-5-86 on defendant's company's letterheads Jeffrey Hibberts sets great store by the undertaking made by the writer thereof that further cheques would be sent to plaintiff to meet amounts due to it. The deponent says this letter was addressed to him by defendant. It appears to me though that it was signed by one Bafan. Coincidentally it refers Jeff to a phone number 92247 Mokhotlong and my perusal of the 1986 telephone directory reveals that this phone number belongs to Salang Restaurant P.O. Box 22 Mokhotlong.

Coincidentally again below the writers' signature are two sets of figures i.e. 33,777.74 and an encircled figure 18,129.53 the sum of which equals 51,907.27.

Jeffrey Hibberts further explains that defendant explained to him that it would be easier for smaller cheques to be met by the bank and that he would obtain payment of his partner's (sic) share in this deal so that the burden would not be solely on him. He further

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lays great store by the fact that nowhere in annexure "F" has defendant raised any complaint that he had not received the liquor.

According to the railways delivery notes "C" "D" and "E" it appears that the delivery of the consignment was taken by one E. Koma whose signature appears on the reverse side of these delivery notes. The delivery was taken on 28th April, 1986. Annexure "F" was written just about a month later i.e. on 27th May, 1986. Hence the point raised by deponent that no complaint was raised in "F" is not without foundation provided defendant received the liquor or was aware it was received on his behalf and that he wrote or was aware of the writing of "F" on his behalf.

This deponent has referred the court to annexure "G" "H" and "I" being cheques drawn by defendant while "J" "K" and "L" are said to have been drawn by defendant's brother, Fats. Deponent avers that some of these cheques were marked "Refer to Drawer" while others bore the phrase "payment stopped" the upshot of each of which is that they all were not honoured even though they had been drawn in favour of plaintiff.

It is emphatically denied on behalf of plaintiff that defendant never received the liquor in question and prayed that defendant should not be freed from liability to plaintiff because

- (i) defendant's affidavit filed in opposition to the Provisional Sentence Summons does not comply with Rule 9(5) requiring specifically that defendant should admit or deny his signature on the instrument sued upon;
- (ii) defendant is trying to mislead the Court by saying he instructed his bank not to honour payment reflected on the instrument drawn in favour of plaintiff despite that Annexure "A" is clearly marked "Refer to Drawer" suggesting therefor that the bank had no funds to meet this cheque. It may be asked how in the light of this clear proof that defendant's purported instructions to the bank to stop payment are belied or at its lightest are not substantiated can defendant hope to have his averment credited with any weight.

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I am satisfied on the facts that the affidavits of Motlatsi Mpobole and Stefan Carl Buys lend the necessary support to plaintiff's case. I need not analyse them nor do I feel inclined to go into details regarding Gabriel Isaac Kotze's averments save that in paragraph two of his affidavit he has helped solve the mystery of who this Bafaan Koma is by explaining that he is the defendant herein trading at Mokhotlong under the name Salang. Apart from this I find that Kotze's affidavit is in many parts bedevilled by hearsay statements.

It was argued for defendant that the cheques are not signed by one person. Further that signatures in "J" "K" and "L" are different from those in "G" "H" and "I"; and that at page 0021 the signature differs from that on Annexure "A" which in turn differs from the signature at 0023.

However it seems to me that the signature at 0021 is similar to that at 0023. The only difference being that the one at 0023 appears to have being made against a background of regular roughness while the other at 0021 appears to have been made against a smooth background hence the absence in that signature of a serrated appearance that typifies the signature at page 0021.

It was questioned on defendant's behalf why the liquor was not sent to Mokhotlong in view of the fact that plaintiff knew that Cindi Bottle Store belonged not to defendant but to one Mpaka. Further that invoices were made out to Cindi Bottle Store and not to defendant, and that on the documents relating to the transaction the plaintiff Drankwinkels (Pty) Ltd seems to be a different person from the sender A. BREWERIES Ltd. appearing on page 0022. That the latter have no connection with plaintiff nor is there indication that they acted on plaintiff's behalf.

It was further drawn to my attention that plaintiff was aware that the contract was unlawful. Assuming for the moment that plaintiff was licenced to sell liquor in the Republic of South Africa I see no reason why, if a buyer from Lesotho where it is unlawful to import liquor

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from outside, plaintiff should be restrained from selling liquor to such a buyer. The contract of sale of liquor in the premises is not unlawful. The unlawfulness would only arise when the buyer tries to import the liquor into Lesotho. That later stage has nothing to do with the plaintiff. If I am licenced to sell poison, it has nothing to do with me if the buyer of that poison puts it to illegal use.

It was further contended for defendant that the R49,160-92 seems to be part of a larger contract involving R51,904-27. See page 0011 paragraph 3. ad para 2. It was pointed out that though indeed the cheque Annexure "A" to the summons is a liquid document it nonetheless fails the test whether "it speaks for itself." Consequently it was urged on me that in order to determine whether defendant is liable the court would have to go further and rely on extrinsic evidence, as on paper not enough exists to make such a determination possible. Reliance for this submission was reposed on page 545 of The Civil Practice of the Superior Courts in South Africa by Van Winsen and Eksteen and Cilliers where it is said

"The document must speak for itself; if it does not and extrinsic evidence is necessary to prove the defendant's indebtedness, the document is not liquid."

I am of the opinion that the liquidity of this document is not impaired by reference to a greater sum of R51,904-27 outlined in the plaintiff's 1st deponent's affidavit because Mpobole in paragraph 2 of his affidavit refers to the summons which he served on defendant at Mokhotlong on 7th August 1986. According to the Registrar's date stamp mark which is imprinted on the provisional sentence summons there can be no doubt that Mpobole was referring to the instant summons and it bears the claim M49,160-92 as owing by defendant to plaintiff. Hence reference to the R51,904-27 does not import any "uncertainty into the amount in respect of which the debtor has acknowledged his indebtedness."

It was submitted that there are material disputes

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in this proceeding and therefore the court was urged to be tardy before granting the provisional sentence without seeking alternative means of resolving this problem by ordering defendant to file plea within reasonable period and eventually resolving through evidence issues which cannot be resolved on paper.

It was urged that it would not be proper to grant provisional sentence against defendant on the basis that he signed the liquid document when it is not established to whom the second signature appearing thereon belongs.

It was argued that invoices in respect of which cheques were issued are in different names from those of defendant. Further that it is alleged that the names objected to by defendant were supplied by him to plaintiff. This is said to put defendant in an awkward position because it is alleged at a stage of plaintiff's reply when defendant cannot remedy the position.

Finally it was submitted that Lesotho cases are not on all fours with the instant case for in those cases the signatory was always one person and not more.

In reply Mr. Buys referred me to page 583 of Van Winsen and submitted that it is not for defendant to come to Court to show that he has a prima facie or bona fide defence. This is to show that on a balance of probabilities he has prospects of success in the main trial.

Referring to Lesotho Foto Laboratories and Lighting Distributor (Pty) Ltd vs Nkuebe 1980(2) LL.R at 459 he submitted that one of the requisites to satisfy in a provisional sentence summons apart from the fact that it is based on a liquid document such as a cheque Annexure "A" is that "defendant is unable to adduce such counterproof as will satisfy the Court that in the principal case the probabilities of success would be against the plaintiff".

He argued that this cannot be met in view of defendant's own admitted averment that he placed an order

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and gave a cheque which he instructed his man to stop payment of.

Referring to page 552 of Van Winsen plaintiff's attorney submitted that

"A person armed with a liquid document is ordinarily entitled to provisional sentence thereon."

He submitted 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.

Thus, if defendant goes behind the document the onus is on him, consequently he cannot use plaintiff's documentation as a basis for bombarding the other's case.

Proceeding on the liquid document Mr. Buys demurred at the suggestion that the document is regarded as failing to live up to the description "liquid document" only because there are two signatures and because there are invoices and railway documents. He submitted that a liquid document is one which on the face of it is shown or reflected an undertaking to pay.

Emphasis was laid on the fact that in his affidavit defendant does not deny that he ordered the goods and sent a cheque to meet their purchase value.

Indeed rule 9(5) has relevance here. In defendant's affidavit there is no denial that the signature is his. I don't see what could have prevented him from saying the signature is not his or that his co-signatory had no authority to sign. I am in fact struck by the similarity of defendant's signature on his affidavit to one of the signatures on Annexure "A" to the provisional sentence summons.

It was argued on defendant's behalf that in the light of the fact that Annexure "A" bears two different signatures provisional sentence summons is defective and should not be granted because it does not attach the liability jointly and severally to the signatories. I think this is no valid defence. A plaintiff is at

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large to choose whom among signatories or even defendants to proceed against. The phrase "jointly and severally" only helps him to shift from defendant to defendant at random in order to have his claim met. His omission of this phrase in the event that he has proceeded against a wrong party is a risk that he runs and that should be interpreted against him. Not so if he has proceeded against the right party. If either of the parties proceeded against is aggrieved then he himself can proceed against his co-party in order for the latter to have his fair share of the burden.

Defendant in his affidavit contented himself with revealing his name as the undersigned B.E. Koma without outlining in full what the initials stand for. It is therefore not unreasonable to incline to the submission, that, as Annexure "F" shows, he is known as Bafaan. Consequently probabilities would favour the view that he signed Annexure "F" despite the submissions made on his behalf to the contrary.

I am satisfied that the invoices were made before delivery of the goods and also before payment. It cannot be true therefore that payment was effected before "delivery" that according to defendant was never effected.

It was argued for defendant that there might have been several transactions involved in this matter. But even so at page 553 Van Winsen and his co-authors say

"..... provisional sentence will not be refused where the bill sued upon is one of several or a number of similar transactions between the parties, merely because the defence raised could also be invoked as a defence to the other bills or where the issues are severable, or where the larger transaction is not between the same parties, or where the subject matter of the other transaction between the parties does not comprise the same subject matter as the provisional sentence proceedings."

The learned writers proceed further down as follows:-

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"It is submitted that, even where the validity of the instrument is in issue and forms part of a larger transaction, if the balance of probabilities is in favour of the plaintiff, there is no room for the judicial discretion adopted in Fichardt's case and the court should grant provisional sentence."

See Estate Fichardt vs Mitchell 1921 O.P.D. at 152 for comparison and contrast.

I am in no doubt as to the purpose of provisional sentence being to afford plaintiff quick relief without stripping defendant of the opportunity to pursue his case. This is ensured by the operation of payment of security by plaintiff de restituendo.

It seems to me that in the light of the fact that defendant admitted issuing the cheque then the question of signature on that cheque is of hardly any importance so far as the liability adheres to him personally in terms of the salutary benefits envisaged by provisional sentence.

The question of Mpaka's involvement is too little to the point to ponder about for nothing relating to it can be gathered from the face of the liquid document. As properly stated on behalf of plaintiff Mpaka's involvement only appears in papers filed by plaintiff. Another matter of hardly any importance at all focuses on the argument that different names appear in the rail notes. I don't find that this affects the liquidity of the document before me at all. In any case if any importance were to attach to this submission then it should have been foreshadowed by defendant's affidavit spelling out whatever weight he urges the court to attach to it.

I am of the view that the illegality of the transaction has no relevance to the liquid document.

The purpose of provisional sentence proceedings has been well set out in Van Winsen's book referred to above at 541 namely a speedy remedy for recovery of plaintiff's money.

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As illustrated at page 66 of the Uniform Rules of Court by Nathan, Barnett and Brink plaintiff proceeded to sue for provisional sentence on the dishonour of one cheque out of many which were presented for payment. See Interlease Ltd. vs Georgilakadis 1980(1) SA, 376.

In Janos Csaplar vs. Lefalatsa and Another 1971-3 LLR. at 300 Jacobs C.J. as he then was held in this court that the general rule in provisional sentence cases was that the court must decide the matter on the documentary evidence before it. Oral evidence could only be called with leave of the court. This case is also authority for the view that the defendant must prove his case on a balance of probabilities.

Ternant vs. Lamb 1947(2) SA. at 660 bears some similarity with the instant case in so far as, if the defendant is to be believed in the instant one, in that case

"..... The defendant resists the order for provisional sentence on the ground that he is not liable on the cheque for the reason that it was given in respect of certain plumbing work which plaintiff had done on certain properties of his, and the cheque was given before the work was completed."

But even so the principle was adhered to in the above case 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."

See Morris and Berman vs. Convan 1940 W.L.D. at 33 where it was laid down that when provisional sentence is sought on a liquid document, the defendant must show that the probability of success in the principal case is against the plaintiff.

De Villiers J. in Ternant says at 660

"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

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must produce weighty evidence."

Unlike in an ordinary civil case where, if there is balance in the respective disputants' claims the defendant is freed from liability, it is the peculiar nature of the provisional sentence proceeding that, as stated in the head note of Allied Holding, Ltd vs Myerson 1948(2) SA.;

"In a provisional sentence case if the court considers there is no balance of probabilities in favour of either party in any principal case that may eventuate, then the court must grant provisional sentence in plaintiff's favour."

In Davis vs Saxe 1953(3) SA. at 121 Van Winsen J. re-echoed the words of Greenberg J.P. in Morris & Berman vs Corvan (11) 1940 W.L.D. at 37 which enjoyed the approval of the Full Bench in that court in the case of Wander Properties Pty Ltd vs. Gutslein 1952(4) SA. at 269 that

"the defendant has not raised substantial probability that he will succeed in the principal case and that being so I cannot refuse provisional sentence."

Suffice it then to say in the words of Cotran C.J. in Lesotho Foto Laboratories & Lighting Distributor so important is the need for defendant to raise substantial balance of probabilities that

"mere conjecture or slight probability will not suffice and further that the question of probability must be based on facts raised in the affidavit itself."

At page 182 of Inter-Union Finance Ltd vs. Frankraallstrand B.P.K. 1965(4) Boshof J. said at letter "C"

"..... non-performance by the other party would be a matter for defence, but would not affect the liquidity of the document."

With regard to the argument that the plaintiff was aware that the contract was unlawful I think reference to Lesotho Diamond Works (1973) (Pty) Ltd vs. Lurie 1975(2)

SA. at 146 would be of some help where Steyn J said

".... The answer to this contention lies in the fundamental principle of our law that a person is presumed to be a law abiding citizen and to be innocent of wrongdoing unless and until the contrary is proved. Likewise where a contract is relied upon by a party either as plaintiff or defendant it is unnecessary for him to allege that such a transaction is lawful."

Having considered the facts in this matter and pondered on what law is applicable to them I have no hesitation in concluding that it is proper to grant provisional sentence on the liquid document Annexure "A" to the provisional sentence summons with costs. It is so ordered.



J U D G E.

30th January, 1989.

For Plaintiff : Mr. Buys
For Defendant : Mr. Pheko.