

CIV/T/149/91

IN THE HIGH COURT OF LESOTHO

In the matter of

TEK APPLIANCES (PTY) LTD Plaintiff

vs

DAVID NTLHASINYE Respondent

Before the Honourable Chief Justice Mr Justice B P. Cullinan
on the 16th day of December 1991

For the Plaintiff Mr. T. Mahlakeng

For the Defendant Mr S Phafane

JUDGMENT

Cases referred to

- (1) Von Siegler & Anor v Superior Furniture Manufacturers Ltd (1962) 35A 399,
- (2) Steelmets Ltd v Truck and Farm Equipt Ltd and Anor (1961) 2 SA 372,
- (3) Dickinson v South African General Electric Co. (Pty) Ltd (1973) 2 SA 620 (A),

(4) Plascon Evans Points (Tvl) Ltd v Ming and Another
(1980) 3 SA 378

This is an application for provisional sentence. The defendant is a director of Modern Kitchen and Cupboards (Pty) Ltd. On 11th September, 1990 he signed a cheque made out to the plaintiff company in the amount of M17,766 00. The cheque was dishonoured. The defendant deposes that he signed the cheque on behalf of the former company. There is nothing on the face of the cheque to indicate that such is the case.

I have considered a number of authorities, in particular that of Von Siegler & Anor v Superior Furniture Manufacturers Ltd (1) per Trollip J. There is no doubt that on all the authorities the defendant is *prima facie* liable on the cheque, that is, *ex facie* the cheque.

There is however the question of rectification. The defendant, by inference, raises such defence in paragraphs 5 and 8 of his affidavit. There are two points in his favour. He deposes that the account number on the cheque is that of the company and not his. There is no evidence indeed that the defendant had an account at the particular bank or branch thereof see Steelmets Ltd v Truck and Farm Equipt Ltd and Anor (2) at p 375 at F per Trollip J.

Again, it emerges that the plaintiff has previously filed an action in the matter against the company Modern Kitchens and Cupboards (Pty) Ltd, which points to a common understanding that the cheque was a company cheque - see Dickinson v South African General Electric Co. (Pty) Ltd (3) at p 629 at H per Jansen J. A. and see Plascon Evans Points (Tvl) Ltd v Ming and Another (4) at p 386 at F per Melamet J

The facts of the present case are not as strongly in favour of the defendant as those of the Steelmets (2) and the Plascon (4) cases. Nonetheless, it seems to me that on the probabilities he might succeed in a defence of rectification on the basis of error.

Provisional sentence is a drastic remedy. I consider it is safer to allow the matter to go to trial. Provisional sentence is accordingly refused Costs shall be those in the main cause.

Delivered at Maseru This 16th Day of December, 1991.



B P. CULLINAN

CHIEF JUSTICE