CIV\T\625\92

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO BLOCK & PAVING MANUFACTURERS Plaintiff

and

W.L. MOSIANE Defendant

J U D G M E N T

Delivered by the Honourablee Chief Justice Mr Justice J.L. Kheola on the 6th day of January, 1995

This is an application for provisional sentence based on a cheque. It seems that the plaintiff and the defendant had been having some business transactions for some time. The defendant bought certain goods from the plaintiff on credit. On the 2nd December, 1991 a cheque ex facie drawn by the defendant in the amount of M80,261.00 in favour of the plaintiff, was presented for payment at the Maseru Branch of the Standard Chartered Bank. It was not paid but stamped "Refer to Drawer", which in simple terms means that there were no funds to meet the cheque.

The defendant acknowledges the signature on the cheque. He alleges that he signed the cheque in blank but does not know who

stamped the name of the plaintiff on the cheque. He does not know who wrote the amount in words and in figures. The defendant further alleges that because he signed the cheque in blank it cannot be said that he drew the cheque.

The problem which the defendant is facing is that he does not explain to the Court how he parted with his cheque and how it reached the hands of the plaintiff. He does not allege that the cheque was lost nor that it was stolen from him. He admits that he often went to the offices of the plaintiff in order to negotiate the manner in which he could pay his debt to the plaintiff.

The plaintiff admits that the rubber stamp used to insert its name on the cheque is kept in its office for the convenience of the clients of the company who do not want to go to the trouble of writing out the whole name of the company. It is a fairly long name. It is also admitted by the plaintiff that the amount in words and figured might not have been written by the defendant. The plaintiff alleges that what is important is the fact that the defendant has acknowledged the signature on the cheque as his own.The defendant also acknowledges his indebtedness to the plaintiff but not to the tune of the amount claimed in the summons. He does not say to what tune his indebtedness to the plaintiff is. I am of the view that the onus

is on the defendant to prove on a balance of probabilities what his indebtedness to the plaintiff is because the latter is in possession of a cheque which was drawn in its favour but which was dishonoured.

On the other hand the plaintiff's Annexures A1 - A13 (inclusive) are orders which show what goods were sold and delivered to the defendant. It is a very long list. All such goods were received by the defendant. In paragraph 5 of his replying affidavit the defendant admits that Annexure "A1 to A13" are orders by his company. He also admits his status in the company and his signature on those orders. He however brings it to the attention of the Court that,

(a) Other than Annexure "A" the rest of the annexrues bear neither a unit price nor the amount due for the total items allegedly ordered.

(b) Annexure "A12" is dated the 28th March, 1992 i.e. three months after the cheque had allegedly been drawn in favour of plaintiff.

It seems to me that with regard to (a) above the objection has no substance because the prices of goods can be easily

established from the price-list which every trader has. It does not mean that by not inserting the prices on the orders the plaintiff did not know them. When the cheque was made out, or to be more exact, when the words and the figures of the amount on the cheque were inserted, the plaintiff must have established the prices of the goods on Annexure "A1 to A12" by looking at the price-list. I do not think that the defendant is of the view that the goods sold and delivered to him should not be paid for because their prices do not appear on his orders.

Regarding (b) above I am of the view that it was erroneously annexed because on the 2nd December, 1991 when the cheque was drawn Annexure "A12" was not yet in existence; it was only made on the 28th March, 1992 i.e. about three months after the cheque was made and dishonoured. It is quite clear that the amount reflected on the cheque does not include the amount for crushed stones in Annexure "A12".

In Randcon (Natal) (Pty) Ltd v. Florida Twin Estates (Pty) Ltd 1973 (4) S.A. 181(D) at p.190 Van Heerden, J. said:

> "The plaintiff has come to Court with, what this Court has found to be, liquid documents which it asks for provisional sentence. Defendant is contesting the claim on the

basis that in terms of a subsequent oral agreement an extension of time was granted for the payment of the amounts due under these documents and that the event to which payment was made conditional was the completion of the building in question. This latter agreement, defendant submits, destroys the liquidity of the documents. It should be noted, however, that the indebtedness under the certificates in question was never made subject to the happening of an event; it is the payment thereof in respect which an extension was granted. The legal position seems to be that where a person is armed with a liquid document he is ordinarily entitled to provisional sentence thereon. If the defendant sets up a defence which goes behind the liquid documents the onus is on him to establish that in that defence the probabilities in the principal case lie with him. **Inglestone v. Pereira** supra at p.71; **Allied Holdings Ltd v. Myreson, 1948 (2) S.A. 961 (W); Froman v. Robertson,** 1971 (1) S.A. 115 (A.D.) at p.120; **Dickinson v.**

S.A. General Electric Co. (Pty) Ltd., 1973 (2) S.A. 620 (A.D.) at p. 630. The cases relied on by defendant in support of the above submission are distinguishable for what destroyed the liquidity in those cases was something in or omitted from the documents themselves. Natal Building Society (Permanent) v. Bresler, 1960 (3) S.A. 534 (C), is one. There the condition to complete the building was contained in the liquid document (mortgage bond) itself and the Court held that it was not such a simple condition or event which could merely be mentioned in the summons as having been complied with or has happened; that accordingly the document was not liquid within the principle as laid down in Pepler v. Hirschberg, 1920 C.P.D. 438, as confirmed in Union Share Agency & Investment Ltd v. Spain, 1928 A.D.74."

In the present case the probabilities do not seem to lie with the defendant. He alleges that he is indebted to the plaintiff but not to the tune claimed in the summons. However he does not tell the Court his exact indebtedness to the

plaintiff. I am of the view that the defendant has failed to show that the probabilities are in his favour in the principal action.

In the result provisional sentence is granted as prayed.

J.L. KHEOLA
CHIEF JUSTICE

6th January, 1995.

For Plaintiff - Mr. Buys
For Defendant - Mr Ntlhoki