

IN THE HIGH COURT OF LESOTHO

In the matter of :

LADYBRAND KOOPERATIEWE LANDBOUMAATSKAPPY
BEPERK Plaintiff

v

E. MOTHOOSELE THULO Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng on
the 29th day of April, 1980

This is an action for provisional sentence on cheques for a total amount of R2,616-36 (Two Thousand Six Hundred and Sixteen Rand and Thirty-six Cents) drawn by the defendant in favour of the plaintiff. Plaintiff further claims interest on the said amount at the rate of 6 (six) per cent per annum from 24th October, 1979 to date of payment and also asks for costs of the suit. The evidence shows that the said cheques were signed and delivered on the 29th January, 1979; 14th February, 1979 and 15th February, 1979 respectively. The said cheques are on the face of them regular. The defendant does not deny his signature on them. In its summons the plaintiff further avers that it is the lawful holder of the said cheques, that they were duly presented at the stipulated places and that they were dishonoured.

The defendant resists the order for provisional sentence on the ground that he is not liable on the said cheques for two reasons:

- (i) non-performance of the contract on the part of the plaintiff (Paragraph 3(a) of the defendant's opposing affidavit);
- (ii) Fraud (Paragraph 6(b) of the defendant's opposing affidavit).

The plaintiff says simply that the claim is based on the following grounds:

"during or about the period June, 1978 to March 1979, the plaintiff sold and delivered to the defendant at the instance and request certain goods in the sum of R2,999-09 (Two Thousand Nine Hundred and Ninety-nine Rand and Nine cents)"

This is further amplified in Paragraph 3 Re (a) of plaintiff's replying affidavit as follows :

/"Ad.....

3.
"Ad paragraph 3(a)(b)(c) thereof

Re(a)..... The Defendant has since during or about the period April of 1978 to September of 1979 run an account with plaintiff..... The relationship during this period between the Plaintiff and the Defendant has been a normal customer relationship, that is to say the Plaintiff granted certain credit facilities to the Defendant from time to time(See Annexure "A" 1, 2 and 3) the Defendant's account remained in debit for most of the time. Finally when the account was closed, remained in debit in the amount of R2,999-09c. In short therefore, the account was a running account from day to day and payable within a time period of not exceeding thirty days". (My underlining).

and in respect of the allegation of non-delivery or performance of its part of the contract, the plaintiff replies as follows :

" 3.

Re (c) I categorically deny further that any particular meal order was delivered on the 18th January, 1979. I specifically state that every single entry of goods purchased by the Defendant which appears on the ledger cards attached to these papers marked 'a' has been delivered. I attach hereto marked 'B' 1 to 23. I further submit that the ledger cards attached hereto is an accurate synopsis of all transactions which took place between the Plaintiff and the Defendant. It will further be noted that every invoice attached hereto marked 'B' has been signed by the Defendant, bar one, which is reflected hereto as Annexure 'B' 19, delivery note or invoice No. 1658. The position in respect of this single invoice is that the goods were ordered by one M. Ratsotsinyane of Quthing. The purchaser of this particular order could not be traced and the Defendant agreed to take over the order. However, in any event this order was paid for by the Defendant and I respectfully refer this Honourable Court to Annexures 'C' 1 and 'C' 2 attached hereto. The invoices numbers 3754 and 3703 appearing thereon in fact refer to M. Ratsotsinyane as having paid the amount, actually the amount was paid by the Defendant in cash, and I again reiterate that this amount is not in dispute. In the result then it is respectfully submitted that the annexures 'A' to 'C' above constitute an entire record of all transactions by and between the Plaintiff and the Defendant, and that further proof of delivery has been shown in every single case."

The allegation of fraud is vehemently denied.

There is no dispute that the cheques before me are liquid documents. A liquid document, as defined by the learned authors Herbstein and Van Winsen: The Civil Practice of the Superior Courts

in South Africa, 3rd Edition p. 543, is

"a document wherein the debtor acknowledges over his signature, or that of a duly authorized agent, or is in law regarded as having acknowledged, without his signature being actually affixed thereto,²⁹ his indebtedness in a fixed and determinate sum of money.³⁰ Examples of documents whereto the debtor or his agent has affixed his signatures are cheques, promissory notes, mortgage bonds, acknowledgements of debt, and a deed of sale.³¹"

The ordinary rule as to when a Court will grant provisional sentence has been neatly put by the learned authors in their invaluable work(supra) at page 551 :

"Where the plaintiff sues on a liquid document then, in so far as the merits of the action are concerned, the court will ordinarily grant provisional sentence unless the defendant produces such counterproof as would satisfy the court that the probability of success in the principal case is against the plaintiff.³² It follows from this rule that if the court considers that there is no balance of probabilities in favour of either party in any principal case that may eventuate, the court must grant provisional sentence,³³ unless special circumstances exist.³⁴"

(My underlining).

(In quoting the above passages I have included the numbers of the footnotes in each of which there is a citation of one or more cases decided in various South African Courts).

However, provisional sentence will be refused if the defendant has succeeded in proving on a balance of probabilities that his defence will succeed in the main case. The question of the amount of proof necessary to entitle the Court to refuse provisional sentence claimed on a liquid document was considered by GREENBERG, JP in Morris and Berman v. Cowan(11), 1940 W.L.D. 33 and came to the conclusion that the rule in provisional sentence cases is the same as laid down in ordinary civil cases. At page 36 of the report the learned Judge expressed himself as follows :

"There was considerable discussion during the argument as to whether it is sufficient for the defendant to raise a slight probability of success in the principal case or whether the balance of probabilities must substantially be in his favour. In my opinion the rule in provisional sentence cases is the same as was laid down with regard to the ordinary civil cases in the Appellate Division cases that I have quoted. The idea of probabilities being evenly balanced or so slightly different that a small consideration on one side can weigh the balance down on that side is one that is derived from using a figure of speech which imports physical characteristics into a question that

"is psychological. In weighing concrete objects, provided one's apparatus is sufficiently accurate, minute differences of weight can be measured. But no such delicate mechanism is available, at any rate in the case of the ordinary person, in weighing one set of probabilities against another and in my opinion this circumstance lies at the root of the rule laid down in the Appellate Division cases. The Court therefore requires a preponderance which is more definite and has accordingly adopted the rule that I have quoted in relation to civil cases and I see no reason for not applying the rule to questions of provisional sentence as well".

and at page 37 :

"I think, therefore, that the law to be applied is that the defendant must raise a substantial probability that he will succeed in the principal case before he is entitled to have provisional sentence refused on a liquid document".

As the defences in this action are not based on the documents which are sued on, namely the cheques, the defendant has to discharge an onus, i.e. to satisfy the Court that the probabilities are that he will succeed in the principal or main case. (Israelsohn v. Newman and Sons, Ltd., 1949(4) S.A 300 at 304(C); Janos Csplar v. Thomas S. Lefalatsa and M.T. Mohale, (1971-1973) L.L.R. 300 at 302).

The cheques were dishonoured by non-payment. They were all endorsed, on presentation "refer to drawer". Payment had not been stopped by the defendant as one might have expected if the plaintiff had not fulfilled its part of the contract. On presentation of the cheques they were dishonoured because the defendant had no funds to meet them. The cheques comply with essence of provisional sentence which is that the acknowledgement of debt or the undertaking to pay should be clear and certain on the face of the document itself and that no extrinsic evidence should be required to establish the indebtedness. (Union Share Agency and Investment Ltd. v. Spain, 1928 A.D. 74 at 79). The plaintiff has put in receipts and documents to establish his customer relationship with the defendant since April 1978 to September 1979. There is only one delivery note which has not been signed by the defendant. However, an explanation has been given. Barring this one delivery note, all the goods have been received. Indeed, there is no dispute about this as the signatures on the delivery notes (except one) have been admitted. The onus is thus on the defendant to show probabilities of success in the principal case. In other words the defendant must produce counter-proof as would satisfy the Court that the probabilities of success in the principal case is against the plaintiff. On the papers before me, the defendant has not anywhere come near discharging that onus.

/The

The defendant raises another defence, viz, fraud. He alleges that as a result of the plaintiff's representative's misrepresentation he parted with sums of R100 and R1603-88 respectively. (Para 5(b) of defendant's opposing affidavit). The plaintiff fully admits receipts of these amounts and clearly shows that they were receipted and credited to the defendant's account. A detailed explanation is given by the plaintiff of these transactions. (See Para 5 Re (b) of the plaintiff's replying affidavit). Where the defence of fraud is raised in actions of this nature, the learned authors Herbstein and Van Winsen (supra) at page 552 say:

"..... that, generally where the defence raised is one of fraud or misrepresentation, provisional sentence will be refused.⁴⁶ But a defence of fraud or misrepresentation is no different from any other defence raised, and even where fraud is alleged it is the duty of the Court to consider the probabilities.⁴⁷ In serious charges such as fraud, it has been stated, 'the Court requires more convincing evidence, not because there is in law a greater onus but because of the greater improbability of the commission of such serious offences.⁴⁸ The Court will require convincing evidence of fraud and in considering the probabilities will not readily accept allegations of fraud which are denied.⁴⁹ In every case, therefore, whether fraud is involved or not, if the probabilities favour the defendant, provisional sentence will be refused; if they do not favour the defendant, provisional sentence will be granted except in special circumstances.⁵⁰ "

and as again neatly put by Van Zyl, J. in the matter of Divine Gates & Co. v. Clarke, 1929 C.P.D. 343 at 344 :

"This is a defence which raises very serious matters indeed. This Court always regards fraud as one of the most serious allegations that can be made against any person brought into this Court, and, when any person is brought into Court on allegations of fraud, the Court requires the clearest possible evidence".

As stated earlier in this Judgment, the plaintiff vehemently denies this allegation of fraud on its part. In the papers before me there is no iota of evidence showing any fraud on the part of the plaintiff. In any event, the defendant, in my view, has failed to discharge the onus on him that on the probabilities he would succeed on the principal case. I have come to this conclusion solely on the papers before me.

There will be provisional sentence in favour of plaintiff as prayed, with costs.

J U D G E

29th April, 1980

For Plaintiff: Mr. Harley
For Defendant: Mr. Kolisang