



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1362/95

In the matter between:

EMPIRE STATE MAIL ORDER (PTY) LIMITED

Plaintiff

and

SANTA FAE (PTY) LIMITED

Defendant

CORAM:

S.W. Sapire A.J.

FOR PLAINTIFF

Mr. Dunseith

FOR DEFENDANT

Mr. Mlangeni

Judgment

(8/12/95)

The plaintiff seeks provisional sentence on three cheques each in an amount of E5000.00

The cheques are drawn by the defendant and the payee of each, is one L.C. Katzenellenbogen or bearer. As the words "or bearer" appearing in the printed form of the cheque have not been deleted, the plaintiff as bearer is by definition the holder. The cheques are dated the 6th June, 6th July and 6th August 1994 respectively. It is common cause that these cheques are part of the series issued by the defendant in part payment of the purchase price of a business bought by the defendant from the Man's Shop (Pty) Limited.

Mr. Dunseith who appeared for the plaintiff handed in the cheques on behalf of the plaintiff and moved for provisional sentence.

Although the original cheques are each crossed, they do not appear to bear the words "Not Negotiable" or any words restricting their negotiability and their negotiability therefore is unaffected. It follows that the plaintiff is the holder of the cheques as alleged being the bearer thereof.

In terms of Section 12 of the Bills of Exchange Act 1902 the antedating or postdating of a cheque does not affect its validity.

In terms of Section 29 (2) every holder of a bill is prima facie deemed to be a holder in due course provided that if in an action on a bill it is admitted or proved that the acceptance issue or subsequent negotiation of the bill is affected with fraud or illegality, the burden of proof is shifted unless and until the holder proves that subsequent to the alleged fraud or illegality, the value has been given in good faith for the bill.

The defendant in opposing provisional sentence has admitted that the cheques were drawn by the defendant. The defendant however denies liability on the said cheques on the ground that the plaintiff is not a holder in due course within the meaning of Section 28 of the Bill and Exchange Act No. 11 of 1902 as amended, and that the plaintiff's claim is subject to the defence the defendant alleges it has against the original payee.

In support of this allegation, the defendant asserts that the plaintiff did not receive the cheques in good faith. To support this allegation the defendant asserts that the present directors of the plaintiff who were the directors at the time when the cheques were negotiated are members of the payee's family. This allegation is supported by a report prepared by John and Kernick which is Annexure A to the affidavit and from which it would appear that it has been prepared by a firm of Patent Attorneys and Trade Mark Agents with offices in Pretoria. How the contents of the company search can be anything other than a hearsay statement is not apparent. Although the defendant has admitted that Maud Katzenellenbogen is the payee's mother and Jeniffer Bernadette Knight is the payee's sister; the fact if such it be that they are directors of the plaintiff's company is

not proved by the report of John and Kernick. The plaintiff's denial that Moosa Ahmed Denatt is not the father of the payee seems on the probabilities to be correct.

The defendant's argument is that because members of Katzenellenbogen's family are directors of the plaintiff, the plaintiff must have known of the alleged defect in title existing when the plaintiff took the instruments. The defendant goes on to say that the payee L.G. Katzenellenbogen was at all times material hereto a Director and a controlling member of a company known as The Man's Shop (Pty) Limited which was incorporated and does business in Swaziland. It is admitted by the plaintiff that Katzenellenbogen was a director of the company and he further admits that an agreement was entered into between the Men's Shop (Pty) Limited and the defendant in terms of which the Men's Shop sold a business to the defendant. It was also admitted that the cheques which form the subject matter of the present proceedings were issued as part payment of the purchase price as reflected in the agreement of sale, a copy of which is attached to the replying affidavit.

That they were made payable to Katzenellenbogen or bearer and not to the Man's Shop is not a circumstance affecting the issue of the cheques with fraud or illegality for there is nothing wrong in making a cheque payable to someone other than the seller. Certainly it is not fraud or illegality as contemplated in Section 29 (2).

The defendant then relates that subsequent to the conclusion of the sale and the issue of the postdated cheques, it transpired that the Men's Shop owed the Income Tax Department an amount of E66,846.48 in unpaid tax. This the defendant says was a breach of a warranty given by the Men's Shop in terms of clauses 7 and 10 of the sale agreement.

In clause 7 of the agreement the seller warranted that no person or company has any claim legal, equitable or otherwise over the boutique's business or whatsoever. It is difficult to see how the claim of the Revenue Department even if the same were to be substantiated would constitute any claim over the boutique's business assets.

In Clause 10 the seller, it was recorded was to remain responsible and shall pay, satisfy and discharge all the debts and liabilities in respect of the said boutique business subsisting on and prior to the date of the sale. The seller undertook to fully indemnify the purchaser from all demands, claims and actions thereof. It does not appear that this fact alone would give rise to a claim by the defendant against the Man's Shop without there being some allegation that the defendant was somehow advised to pay the amount of E66,846.48.

The only allegation in this connection is that the Commissioner of Taxes in exercise of authority in terms of Section 49 of the Income Tax Order 1975 as amended declared that the defendant was its agent for the purpose of collecting the outstanding tax. The defendant has annexed a copy of a letter addressed by the Commissioner of Taxes to the public officer of the defendant in terms of which the defendant is appointed agent for the collection of income tax. The notice itself would appear to be bad as it does not state the grounds or circumstances mentioned in section 48 a, b and c of the Order which are applicable in the present case. Moreover the defendant is required to make payment of the alleged outstanding taxes within fifteen days of receipt of the notice or within fifteen days of the date on which such money becomes due to, or available for or on account of such person. What these words mean in the present case, is not apparent. There is also a third alternative demand on the defendant in rather obscure terms in which he is required to "deduct once" whatever that may be. One does not know from what it is supposed to be deducted. Obviously the notice can only require the addressee thereof to pay to the receiver, from the taxpayer's monies or other assets in the addressee's possession. In this way it resembles a garnishee, and was intended to refer to the balance of the purchase price of the business.

In the absence of an affidavit from the receiver revenue to establish the amount allegedly owing by the Man's Shop in respect of taxes, the letter itself is hearsay. Furthermore the defendant by issuing the cheques has already made payment of any amounts owing by it in respect of the purchase and does not appear to be in any position to collect

any outstanding taxes allegedly owing by the Man's Shop on behalf of the receiver. As far as the plaintiff is concerned there is nothing to show that the plaintiff received the cheques subsequent to the alleged claim arising and with knowledge thereof. There is accordingly no evidence to show that the subsequent negotiation of the cheque from the payee to the plaintiff was in any way affected with fraud or illegality.

In the foregoing circumstance the presumption in Section 29(2) of the Bills of Exchange Act remains undisturbed. The onus is on the defendant to show that the plaintiff is not a holder and that its alleged claim which the defendant describes as having arisen from a breach of a contract is available against the plaintiff as a holder in due course.

Section 28 of the South African Bills of Exchange Act with which Section 29 of the Swaziland legislation corresponds has been authoritatively interpreted in a number of cases see: Rutenberg vs Issroff 1938 EDL 275 at 283; Joffe vs Goldstein 1942 WLD 183 at 187; Geysdorp Trading Company vs Nathaym (Pty) Ltd 1954 (2) SA 575 T. at 577 and Jaffer vs Neil 1958 (3) SA 497 (C).

The effect of the section is as follows:

- i) There is presumption that every holder is a holder in due course, but the presumption does not come into operation until the plaintiff has established that he is a holder. In this case we have seen that the plaintiff is a holder.
- ii) Secondly the presumption may be rebutted by proof on a balance of probability that anyone requirement for holding in due course is absent. In the present case there is no evidence whatsoever to show that any of these requirements are absent.
- iii) As the Act specifically provides that the presumption may be rebutted by an admission or proof that fraud or illegality affected the issue, acceptance, making, or subsequent negotiation of the instrument. One would look for proof of fraud or illegality. In this case we have seen that there is no fraud or

illegality affecting the issue or negotiation of the instrument.

Although there is evidence as to how the cheque came to be issued, there is nothing to point to the circumstances in which it was negotiated to the plaintiff more especially there is no evidence to show that the issue or negotiation took place after the receiver's claim became known and that negotiation took place in order to defeat this claim.

There are two other considerations arising out of the section which I need not deal with here.

Without considering the validity of the offender's alleged claim against the seller of the business, I find that as the plaintiff is a holder in due course such a claim would not constitute a defence against the plaintiff's claim on the cheques. I accordingly grant provisional sentence with costs as prayed.

S.W. SAPTE
ACTING JUDGE

