

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 123/96

In the matter between:

GONZALO SANCHEZ FRANCO                      Plaintiff

and

MOSHAV PROPERTIES                              Defendant

CORAM:                                              S.W. Sapire A.C.J.

FOR PLAINTIFF                                      Mr. L. Mamba

FOR THE DEFENDANT                              Mr. L. Howe

Judgment

(29/3/96)

The plaintiff has sued the defendant claiming payment of an amount of E110 000.00 (One hundred and ten thousand Emalangen) together with interest at 9%.

The basis of the plaintiff's claim is a series of eleven cheques of various dates commencing on the 3rd March 1995 and the last cheque being dated the 30th December 1995. Each cheque was in an amount of E10 000.00.

The cheques were drawn by the defendant in favour of the plaintiff on the Mbabane Branch of Stanbic Bank Swaziland Limited. Each of the cheques was presented on the dates on which they fell due and all the cheques were dishonoured by non-payment as there were insufficient funds to meet the cheques. Notice of dishonour is dispensed with in terms of Section 47 of Act No.11/1902.

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The defendant gave notice of intention to defend the action and the plaintiff's response to this was to apply for summary judgment. Notice of this application was given on the 29th February and was accompanied by an affidavit in the customary form complying with the rules. The defendant filed an affidavit attested to by one Geoffrey Ramogadi.

Ramogadi describes himself as an adult Swazi male businessman and Director of the defendant. He claims to have personal knowledge of the facts stated in his affidavit.

He also claims to be authorised to make the affidavit and attaches a resolution of the directors of the defendant dated the 22nd February 1996. I have on many occasions observed that nobody requires to be authorised to make an affidavit and this allegation is both misleading and unnecessary.

Ramogadi claims that defendant has not entered an appearance to defend solely for the purposes of delay and respectfully submits that the applicant has a bona fide defence to plaintiff's course of action which he proceeds to elaborate on in the succeeding paragraphs.

The defence proffered by the defendant is that on or about August 1994 Ramogadi's wife was

approached by a certain Mrs. Melmans. Melmans advised her that the plaintiff was selling the business known as Pharmarama (Pty) Limited. It is not clear whether the business itself was for sale or the shares in the company.

It appears that a meeting took place at which the plaintiff Mrs. Melmans and the deponent were present. At this meeting it was agreed that the deponent Geoffrey Ramogadi purchased the shares in the company which carried on the pharmacy business. It is also alleged by the defendant that the plaintiff agreed to give whatever assistance the deponent and Mrs. Melmans required to run the business. It is said that the reason for the purchase by the deponent was solely Mrs. Melmans who was a mutual friend of the plaintiff and the deponent.

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The deponent goes on to allege that he entered into agreement of sale with the plaintiff to purchase the shares in the company.

Deponent did not have a copy of the deed of sale but in his affidavit sought leave to file a copy thereon at a later date. When exactly the deed was to have been filed is not clear but it was not in evidence at the hearing. What is certain is that the deponent failed to make payment of his obligation in terms thereof timeously, and as a result was in breach of the agreement.

The deponent further alleges that the plaintiff then insisted that the deponent give postdated cheques to the value of the balance of the purchase price, but maintains that it was agreed that these cheques were not to be deposited. This proposition I find contradictory and extraordinary beyond belief. The issue of the cheques could have no purpose other than to create an obligation on the part of the drawer to assume an enforceable obligation to the payee.

The deponent, so he says, offered the plaintiff cheques from Pharmarama (Pty) Limited being the company whose shares were purchased by the deponent but the plaintiff refused the same and insisted that the cheques be drawn by some other person. The plaintiff's reasons for refusal to accept cheques drawn by the company, even if not stated by the defendant, are obvious. For one thing it would have been illegal for the company to pay for its own shares, and cheques drawn for this purpose would have been unenforceable against the drawer. Other reasons also come to mind.

The deponent goes on to say that he gave the plaintiff cheques from the defendant's account purely to acknowledge that the deponent was indebted to the plaintiff not to acknowledge indebtedness by the defendant. The deponent maintains that the cheques were not to be deposited by the plaintiff as agreed between the parties as the plaintiff was not the party of the sale (sic). It was also agreed so the deponent says that he was to redeem the cheques every month from the plaintiff for the cash value of the instrument. The defendant does not say what was to happen if the cheques were not released.

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The deponent further relates how on four occasions he did in fact collect the cheques from the plaintiff and redeemed them with a cash value thereof. Subsequently however Mrs. Melmans left the company and the deponent did not have the knowledge or required skill to run the company. As a result of her leaving the company's turnover dropped and the company could not pay the plaintiff the monthly instalments.

The defendant's defence is then stated and it is to this effect. It is maintained that the defendant did not at any stage and or time have dealings with the plaintiff, or benefit from the sale of Pharmarama (Pty) Limited. This allegation contradicts what had been said earlier to the effect that the defendant

did in fact bind its credit by issuing the cheques required by the plaintiff in respect of the balance of the purchase price. I find that there was sufficient just cause for the issue of the cheques and that the facts set out by the deponent do not constitute a defence, bona fide or otherwise, to the plaintiff's claim.

Accordingly there will be summary judgment against the defendant in favour of the plaintiff for one payment of the sum of E110 000.00 to the interest to the said sum calculated on each instalment of E10 000.00 from the date upon which the cheque relative thereto was due for payment and was dishonoured. Such interest is to run at 9% per annum. The defendant is to pay the plaintiff's costs of the action.

S.W. SAPIRE

ACTING CHIEF JUSTICE