

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO: 1380/98

IN THE MATTER BETWEEN:

VIVA INC. (PTY) LTD

APPLICANT

AND

FRENJA (PTY) LTD

RESPONDENT

CORAM

: MATSEBULA J

FOR THE APPLICANT

FOR THE RESPONDENT

JUDGEMENT

12/03/99

In the above matter the Applicant moved a notice of motion asking for a relief on the following terms:-

1. That Respondent be and is hereby ordered to return forthwith to the Applicant the sum of E60,800.00 or alternatively;
2. That judgement in the sum of E60,800,00 be granted against Respondent in favour of the Applicant;
3. That the Respondent pays costs of this application.

Accompanying the application was an affidavit filed in support thereof of one Andrew Vivian.

1

According to Andrew Vivian he is the Director of Applicant and during 1997 he had some engagement as an engineering consultant on a contract in Ethiopia. He would be away for more than a year. He asked Andrew Begg to manage the affairs of Applicant in his absence.

There were certain arrangements in connection with the signatories of the cheques of the Applicant put in place in his absence. The signatories would be Cynthia Bezuidenhout, Andrew Begg and Zoe Vivian.

The deponent further states that certain rules would apply with regards to the issuing and signing of the cheques and these are stated in paragraph 7 of this affidavit and they are:-

7.1 No blank cheques should be signed by any of the signatories that is a completed cheque should be signed..

7.2 None of the signatories on a cheque should be the beneficiary. Purchases of a personal nature should not be made on a cheque signed by the beneficiary but rather only by the other two authorised signatories.

During the month of March 1998 Respondent returned from Ethiopia for medical treatment and went through the accounts and more particularly the cheque book and noticed two last cheque stubs which were uncompleted. He asked Andrew Begg for an explanation and he was given the explanation as set out in paragraph 10 and this is:

"The explanation eventually given to me by Andrew Begg was that he had got Zoe Vivian to sign some blank cheques. Of the uncompleted stubs in the cheque book, one cheque was made for payment of a restaurant meal on his birthday, which was approximately E600.00 and the second was for E60,800.00 which he alleged I owed him and he had taken it without asking because he thought I

would not give it to him."

On further investigations he discovered that payments have been made out to an entity called Freyja and according to him this entity never had any dealings with Applicant. He then ascertained that Andrew Begg had paid these amounts to Freyja.

2

According to Andrew Vivian the funds Applicant is claiming payment of were unlawfully taken from Applicant's possession and paid to the entity called Freyja. Andrew Vivian refers to a letter of demand being made and marked "AB3". However, going through the pleading I did not find such a letter filed.

Respondent filed a notice of intention to oppose and also filed an answering affidavit in support of the said opposition. The deponent is one Mr. Michael Collinson he states in his affidavit that he is a Managing Director of the Respondent and authorised to depose to the affidavit. In his paragraph 4 Respondent raises a point in limine and states that there is a real dispute of fact and that Applicant ought to have foreseen that such a dispute would arise and should have chosen proper procedure. He states that the dispute is whether Mr. Begg unlawfully took the funds from the Applicant and paid them to the Respondent.

Mr. Begg has also deposed to a supporting affidavit and he does not make any attempt to refute or dispute the allegations contained in Mr. Vivian's affidavit. So that whatever financial obligations he might have had towards Mr. Collinson he had no business to pay him with the money belonging to the Applicant.

As regards to merits there is evidence that an amount of E60,800.00 was paid to Respondent (see annexure AV2) with the Applicant's cheque. No lawful explanation why Applicant's money was paid to the Respondent. Mr. Begg also admits that he made out this cheque payable to the Respondent. He does not deny that Respondent was not owed by Applicant.

Mr. Collinson admits that a letter of demand was received by Respondent and handed to its attorneys (see paragraph 13.1 of Respondent's address)

3

The question whether Mr. Begg owed Mr. Collinson is for the present proceedings irrelevant. What is relevant is whether Applicant was indebted to Respondent in the amount paid to it and I would answer this in the negative.

In the result, the court grants judgement against Respondent in terms of the following prayers, prayer (2) and (3) of the notice of notion.

J. M. MATSEBULA

JUDGE

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