

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 315/97

In the matter between

PHILEMON DLAMINI

PLAINTIFF

Vs ESTER FUNANI NKAMBULE –

EXECUTRIX

ESTATE LATE ALBERT MSUTFU NKAMBULE

E445/95

1st DEFENDANT

THE MASTER OF THE HIGH COURT

2ND DEFENDANT

Coram

SB. MAPHALALA- J

For Plaintiff

MR. L. MAZIYA

For Defendant

MS N. GWIJI

JUDGEMENT

(21/05/99)

Maphalala J:

This is an application for summary judgement.

The basis of the application is that on the 1st July 1995 plaintiff purchased from the deceased Albert Msutfu Nkambule building material for an amount of E16,000, viz four thousand blocks, eight loads of crushed stone. The plaintiff alleges in his particulars of claim that it was an express and/or implied term of the sale that the deceased would effect delivery of the said material to the plaintiff during the course of business. The deceased issued plaintiff an acknowledgement for the receipt of E16,000. The purported acknowledgement of debt is annexed marked "A". The deceased failed to effect delivery of the said material to the plaintiff as agreed as he died soon thereafter. In the circumstances the deceased estate is indebted to plaintiff in the amount of E16,000 or alternatively his estate has been wrongfully and/or unjustly enriched in the amount of E16,000. Plaintiff duly lodged his claim against the deceased estate with the Master of the High Court for a refund of E16,000 despite

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demand the executrix refuses and/or neglects to refund plaintiff. The sum of E16,000 and/or refuses to admit and reflect plaintiffs claim against the said estate.

The plaintiff filed an affidavit in support of the application for summary judgement.

The 1st respondent filed her notice of intention to oppose the summary judgement. She further filed an opposing affidavit where she avers that she has a bona fide defence to the claim and that she denies that she has entered an appearance to defend solely for purposes of delaying the action. She avers that plaintiff's claim is neither based on a liquid document or on a liquidated amount of money. The plaintiff has not set up concisely how he arrives at the figure of E16,000 and therefore he is obliged to prove the alleged amount claimed. Defendant further avers that she denies that the deceased or herself issued plaintiff an acknowledgement for the receipt of E16,000, or any sum at all. She annexes a sample of a business receipt which were issued by the deceased in the course of business and not what plaintiff purports to be an acknowledgement of debt.

The matter came for arguments on the contested roll of the 23rd April 1999. Mr. Maziya submitted that the plaintiff has proved a case for a grant of summary judgement on the basis of the

acknowledgement of debt annexed marked "A". He referred the court to paragraph 5 of plaintiff's replying affidavit. He argued that the defendant is challenging the signature of the deceased on the acknowledgement of debt that it is not authentic. He argued that defendant should have submitted evidence in terms of Section 39 of The Civil Evidence Act No. 16 of 1902 which reads as follows:

" Evidence of disputed writings

39, comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writing and the evidence of witnesses respecting it may be submitted to the court in any case as evidence of the genuineness or otherwise of the writing in dispute".

Ms. Gwiji on the other hand contends that the application does not comply with Rule 42 (1) of the amended rules of this court. There are serious disputes of fact. The purported acknowledgement of debt which forms the basis of the plaintiff's case is not a liquid document. Oral evidence is the only solution to dispel this uncertainty. To support this proposition she directed the court's attention to the case of Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T) which is regarded as the locus classicus on this aspect where there is material question of fact. Ms Gwiji urged the court to dismiss this application and order that the matter goes to trial.

These are the facts before me.

The nub of the matter is whether annexure "A" is a liquid document to enable the plaintiff to be granted summary judgement. In the case of W. Mentz & Seuns (EDMS) BPK vs Katzake 1969 (3) S.A. 306 (I). The court accepted that a liquid document was one in which the debtor acknowledges in writing over his signature, or that of his authorized agent, his indebtedness in a fixed and certain sum. In the case in casu with respect annexure "A" falls far short of the foregoing description. It is a

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bare document and does not say that defendant was acknowledging that he was indebted to the plaintiff.

Further, in the case of Wise & Co (Africa) Ltd vs Gin 1946 C. P. D. 538, Fagan J, after referring to the case of Maisel vs Strut and others 1937 C. P. D. 128 and the case of Roscoe vs Stewart 1937 C. P. D. 138 stated (at page 126) that in those decisions the principle was accepted:

"That the court can only grant summary judgment if on the papers before it, it has no reasonable doubt that the plaintiff is entitled to judgment and feels able to say that the defendant has not got a defence which may possibly succeed, even though the court may not think he is likely to succeed".

In the result, I rule that the application for summary judgement ought to fail and the matter is to go for trial

Costs to be costs in the course.

S. B MAPHALALA

JUDGE