

HIGH COURT OF SWAZILAND

CASE NO.243/97

In the matter between:

SWAZILAND FLUID PRECISION

PLAINTIFF

AND

FIRST NATIONAL BANK OF SWAZILAND

DEFENDANT

CORAM

MATSEBULA J

FOR THE PLAINTIFF

MR. MDLADLA

FOR THE DEFENDANT

ADV. FLYNN

JUDGMENT

29th OCTOBER 2003

The plaintiff issued summons against the defendant for the following relief:

1. Payment of a sum of E176,000.00;
2. Interest thereon at the rate of 9% a tempore morae;
3. Costs of suit;
4. Further and/or alternative relief.

The cause of action arises out of the making of a cheque made payable to the plaintiff in the amount of E176,000.00. The cheque was duly banked with the defendant. The cheque was in respect of certain parts of some machinery as per quotation annexure "D" which reflects the total amount as being E192,096.00 less 8% bringing it to E176,728.00. It would seem the total amount, as reflected in annexure "D" is incorrect. However, that is the figure reflected by the officer of the plaintiff. The

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court will deal with this figure further in my judgment. For the present, I should mention that this figure was to be reduced further per telephone conversation between the Managing Director of plaintiff and the maker of the cheque whose name is Koos van Vryk according to annexure "D". The figure was reduced to E176,000.00.

According to Bheki Gamedze he had not consented to the said Koos van Vryk to effect the payment by a cheque. In his absence Mr. van Vryk came and left the cheque in the amount of E176,000.00 instead of the amount reflected on annexure "D". Confronted with this anomaly Mr. Gamedze told this court that it did not matter that Koos paid a lesser amount than the amount reflected in the quotation. This arrangement was reached between the parties per telephone.

After the cheque had been deposited and according to Mr. Gamedze he had been informed that the cheque had been cleared, he allowed the man Koos to collect the items as per quotation. That was the last that he heard or seen Mr. Koos. Mr. Koos disappeared into thin air to this date. So too the cheque. In regard to the cheque it subsequently emerged that the leaf of this cheque came from a stolen cheque book in the Republic of South Africa. There are other strange behaviour on the part of Mr. Bheki

Gamedze the plaintiff's representative. Mr. Gamedze failed to explain the clear discrepancy in dates appearing on the cheque, "A" i.e. 6th December 1996 and "D" the quotation issued to Koos van Vryk dated 17th December 1996. In other words the cheque was deposited before the quotation was made. The question is how the maker of the cheque would have known about the figure of E 176,728.00 appearing on "D" if the cheque was banked on 6th December 1996. This is apart from the discrepancies in figures as well. The invoice at page 18 also differ from the quotation at page 19. Mr. Gamedze first went to the bank on 4th January 1997 and on 6th January 1997 he was told that the money had been paid out over the counter.

Mr. Gamedze does not have the original invoice made out to Mr. Koos van Vryk. He does not have a delivery note. No proof that goods were infact delivered. It is plaintiff who bears the onus on a balance of preponderance. The question is, has the plaintiff discharged this onus?

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Mr. Mdladla argued that the plaintiff suffered damage when he was informed that he cheque had been cleared. It was on the strength of this information that he dispatched the goods. The clearance referred to is the one on the print-out. Presenting the print out to a lay client by the defendant constituted negligence on defendant's part, so argued Mr. Mdladla.

This Court was not favourably impressed by the manner Mr. Gamedze went about enquiring about what exactly happened to the cheque banked by Koos. The court gained the impression that Mr. Gamedze was not very anxious in finding out about the cheque "A". He left everything to his erstwhile attorneys after he had failed to see the bank officer Mr. Cornelius Dlamini.

The evidence of Mr. Wright of what the print out means is to me very credible. There can be no reason why I should not accept it.

From what Mr. Mdladla said, if I understood his argument correctly is that defendant is liable and its liability based on its negligence in that plaintiff's representative Mr. Gamedze would have been told that the cheque had been cleared. It was on the basis of this information that he released the goods to Koos. It subsequently turned out that infact the cheque had not been cleared.

According to Mr. Gamedze he was also furnished with a print out which also indicated that the cheque had been credited. Mr. Gamedze's evidence on this point centres around very shaky and unsteady grounds. Shaky and unsteady because defendant has explained the true position of the print out and Mr. Gamedze was unable to bring a witness to support what he alleges was passed on by the bank junior officials to him. That in my view is the negligence on which Mr. Gamedze relies.

As I have indicated earlier in my judgment the behaviour and attitude of Mr. Gamedze from day one of the transaction is not that of a businessman dealing with a purchase of above half a million worth of goods.

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I can find no basis for a finding that defendant was vicariously liable. It is not denied that the cheque book from which the cheque was made out was stolen. I am not prepared to speculate how Koos obtained the stolen cheque. The defendant has denied that Cornelius Dlamini would have told Gamedze that the cheque had been cleared. Even though the defendant was unable to call Mr. Dlamini, in the final analysis, it cannot be said the bank was in anyway negligent. In the result, I find that the plaintiff has not succeeded in discharging the onus that rests on it. It follows the action is dismissed with costs, costs to include those of counsel.

J.M. MATSEBULA

Judge