

THE HIGH COURT OF SWAZILAND

MBABANE MOTORS (PTY) LTD T/A

SWAZI DELTA Plaintiff

And

LOFANA MASILELA Defendant

Civil Case No. 1967/2004

Coram S.B. MAPHALALA – J

For the Plaintiff MR. B. MAGAGULA

For the Defendant MR. M. MABILA

JUDGMENT (12/11/2004)

[1] The Plaintiff has issued summons in terms of Rule 8 (1) of the High Court Rules for provisional sentence against the Defendant in the amount of E35, 000-00 together with interest thereon at the rate of 9% per annum from date of summons to date of final payment as well as costs.

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[2] The plaintiff's claim is based on a cheque annexed to the plaintiff's summons marked "MMA". The Plaintiff avers in its summon that on or about the 9th March 2004, Defendant paid a sum of E8, 518-42 towards this debt. It appears on the face of the cheque that payment was stopped and thus the present action, but it is not clear on the summons what is the basis of the Defendant's liability,

[3] The Defendant has filed an affidavit reflecting its opposition to the provisional sentence summons.

[4] When the matter came for arguments a number of submissions were made on behalf of the Defendant. The first argument advanced was in the present case the summons do not describe the instrument sued upon as to show on the face of the summons the ground of Defendant's liability to Plaintiff and where this is absent provisional sentence will be refused. In this regard the Court was referred to the legal authority in *Herbstein and Van Winsen*, *The Civil Practice of the Supreme Court of South Africa*, 4th ed at page 1009.

[5] It appears to me that the plaintiff's summons do not conform to the cardinal principle in provisional sentence cases that there should be a liability by the Defendant to the Plaintiff apparent from the face of the summons and the document upon which the claim is founded, (see *Joseph Bond & Jeans Ltd vs National Implement Co. (Pty) Ltd* 1949 (2) S.A. 659).

[6] In the South African case of *Malmesbury Board of Executors vs Van Der Riet* 1939 (2) P.H. F133 (C) provisional sentence on a mortgage bond was refused where the summons failed to allege why the capital had become due and payable.

[7] In the present case no allegations have been made on the summons to satisfy the above-mentioned legal requirement and therefore the provisional sentence in casu should be refused.

[8] I was further persuaded by the arguments advanced by Mr. Mabila for the Defendant that where there is a probability that Defendant will be successful in the principal case provisional sentence should be refused. On the basis of the facts