

THE HIGH COURT OF SWAZILAND

CHRISTOS NIKOLAS LORANDOS

Plaintiff

And

THAMSANQA H. LUKHELE

Defendant

Civil Case No. 1358/2003

Coram

S.B. MAPHALALA – J

For the Plaintiff

MR. P. DUNSEITH

For the Defendant

MR. D. MAZIBUKO

JUDGMENT (04/02/2004)

Before court is an opposed application for summary judgment where the Plaintiff is suing for payment of the sum of E403, 000-00; interest at tempore morae at 9% per annum; and costs.

The Plaintiff sues upon a liquid document, namely an acknowledgment of debt signed by the Defendant on the 2nd June 2003.

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The Defendant does not deny that he signed the acknowledgement of debt confirming that he owed the Plaintiff the sum of E403, 000-00 in respect of the outstanding balance of the purchase price in respect of the sale of a bottle store business.

In his affidavit opposing summary judgment, the Defendant raised a number a defences. Firstly, he contends that the parties have entered into certain agreement to reschedule payment of the purchase price in terms of annexure "B" being an agreement to the following effect:

"I T. Lukhele have made a cash payment of sixty-eight thousand emalangeneni (E68, 000-00) in respect of the purchase of the business (Esiyalwini Bottle Store). Further information to be placed in new agreement to be made in respect of the above-mentioned business ..."

Secondly, that the Plaintiff sold the book debt of the business to the Defendant but he has not yet ceded such book debts to the Defendant. Lastly, that the Plaintiff has failed to transfer the licence of the business to the Defendant.

When the matter came for arguments Mr. Dunseith addressed all three issues outlined above. On the issue of the inchoate agreement the argument advanced on behalf of the Plaintiff is that annexure "B" merely refers to an "agreement to be agreed". This does not constitute an agreement, and that the terms of annexure "A" still apply. The amount owing has been acknowledged by the Defendant to be E403, 030-00 and this amount is due and payable in terms of annexure "A".

On the issue of the cession of book debts it is contended for the Plaintiff that in terms of annexure "A" the seller "hereby cedes, assigns and makes over to the purchaser" with effect from the effective date all his rights in the book debts of the business. The argument in this connection is that this agreement constitutes the cession, and nothing more remains to be done by the Plaintiff.

On the issue that the Plaintiff has failed to transfer the licence of the business to the Defendant it is contended for the Plaintiff that he has tendered transfer of the licence to the Defendant against payment of the purchase price. In terms of the deed of sale annexure "A", the Defendant was supposed to deliver a bank guarantee for payment

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of the full purchase price 30 days (i.e. by the 19th June 2002), and to pay the price by 30th June 2003. The Defendant has never delivered the guarantee cheque and he acknowledged the balance of the price owing to be E403, 030-00.

Clause 10 of annexure "A" provides for restitution if the licence is not transferred to the Defendant, but neither party wishes to exercise their rights in terms of this clause and they have tacitly agreed to extend the date for transfer of the licence indefinitely.

Finally, it is contended for the Plaintiff that the Plaintiff has tendered transfer of the licence against payment of the purchase price. In view of such tender, the court may enter judgment for the Plaintiff as prayed.

The legal arguments in opposition are three fold. First, it is contended that the agreement between the Plaintiff and the Defendant was made subject to a future uncertain event i.e. transfer of trading licence (relating to the business that was being sold) by Plaintiff into the name of the purchaser. The deadline for such transfer was 30th June 2002, Failure to transfer rendered the agreement between Plaintiff and Defendant null and void i.e. of no further force or effect. A specific performance cannot be granted on an agreement which is null and void. The agreement between Plaintiff and Defendant forms the basis of the acknowledgement of debt. To this effect the court was referred to the cases of *Gulf Steel vs Rack Rite Bop & another* 1998 (1) S.A. 674 and the textbook by Van Niekerk, Geyer and Mundell: *Summary Judgement; A Practical Guide* (1998) P.11 - 28,

Secondly, it is contended for the Defendant that the agreement between the parties depends on a decision of a third party being the Liquor Licensing Board which condition may or may not occur. A party to a conditional contract cannot enforce compliance on the other party (Defendant) in the absence of the fulfilment of the condition.

The third point advanced is that summary judgment cannot be granted on a suit where there is a material dispute of fact or where the Defendant has pleaded a counterclaim. For this proposition the court was referred to the provisions of Rule 32 of the High Court Rules and the textbooks by Herbstein and Van Winsen, *The Civil Practice of*

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the Supreme Court of South Africa (1997) at pages 442 - 445, Gibson: *South African Merchantile and Company Law* (1997) at page 97; and Van Niekerk et al (supra).

It would appear to me that Mr. Mazibuko is correct in his submissions on the facts that the court cannot grant summary judgment. There is a material dispute of fact in this case and the Defendant has raised a counterclaim. The averments in paragraph 4.1, 4.2, 4.3,4.4,4.5, 4.6, 4.7 and 5 of Defendant's affidavit resisting summary judgement clearly illustrate this state of affairs. On the authority of *Herbstein et A1* (supra) I cannot grant summary judgment on the facts of this case. The learned authors state at page 445:

" ...The court retains a discretion to refuse summary judgment even if the requirements of paragraphs (a) and (b) of sub-rule (3) are not met by the Defendant. It has been said that while it is not clear in accordance with what criteria this discretion will be exercised, an important factor weighing with the court is the extraordinary and stringent nature of the remedy accorded a Plaintiff by Rule 32, and that is only when there is no reasonable doubt about the plaintiff's claim that the application should be accended to".

I rule that the matter proceeds to trial and the application for summary judgment is dismissed with costs.

S.B. MAPHALALA

JUDGE