

THE HIGH COURT OF SWAZILAND

KHANYISA TRADING (PTY) LTD

Plaintiff

And

KEITH B. SIGWANE

Defendant

Civil Case No. 2666/2004

Coram: S.B. MAPHALALA - J

For the Plaintiff: ADVOCATE J.M. VAN DER WALT (Instructed by Currie & Sibandze)

For the Defendant: MR. B. MAGAGULA

JUDGMENT

(11/03/2005)

[1] The Plaintiff filed a provisional sentence summons in terms of Rule 8 (1) of the High Court Rules for the payment of the sum of E60, 840-00 together with interest thereon at the rate of 9% per annum calculated from the 29th March 2004, being the date of presentation of the cheque drawn by Defendant on Swazi Bank, Mbabane branch, Swaziland and when duly presented for payment was returned marked "payment stopped".

[2] The cause of action arose in this way. The Defendant purchased a certain fixed property at an auction sale of immovable property. The Defendant paid the deposit by cheque, being the cheque upon which provisional sentence is now applied for, but subsequently stopped payment thereof.

[3] According to the Plaintiff in its replying affidavit the property was then resold for E240, 000-00 and the difference between this and the auction price, resulted in a loss of E260, 000-00 as a result of the Defendant's default, and it is this amount (which is less than the cheque) that is now claimed by the Plaintiff by virtue of Clause 6.

[4] The material terms of the conditions of sale of immovable property contract included the following:

"The purchase price of the relevant property is E600, 000-00 Clause 5: The purchaser shall pay a deposit of 10% of the purchase price on the day of sale, the balance to be paid on registration of the property into the purchaser's name.

Clause 6: If the purchaser fails to carry out his obligations under the contract, the sale may be cancelled summarily and the property may again be put up for sale, and the purchaser shall be responsible for any loss sustained by reason of his default."

[5] The Defendant does not deny his signature on the cheque, but avers that he had mistakenly bid for the wrong fixed property called up by the auctioneer which was another property with a house on it. The Defendant is relying on a unilateral mistake. This defence is found in the affidavit in terms of Rule 8 (4) thereof.

[6] It is a 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. Where the liability of the Defendant is not so apparent, or where the title whereby the Plaintiff sues can be ascertained only

by evidence extrinsic to the record, provisional sentence will be refused. It is, therefore, necessary that the summons should contain allegations enabling the court to determine whether or not the Plaintiff has any title or right to sue. (see Herbstein and Van iVinsen, The Civil Practice of the Supreme Court of South Africa, 4 Ed at page 1010 and the cases cited thereat).

[7] In the present case the amount sought in the summons is the amount of E60, 840-00 and the cheque upon which the claim is founded is for a similar amount and is attached to the said summons marked "A". The amount of E260, 000-00 now being sought by the Plaintiff only appears in the Plaintiffs replying affidavit.

[8] In this regard I agree in toto with the submissions made by Mr. Magagula for the Defendant that the claim referred to in the summons must correspond to the indebtedness reflected in this liquid document. Further, that in an action for provisional sentence, the Plaintiff should establish the cause of action in the summons, not in his replying affidavit (see Herbstein et al at page 1011). This is because the Defendant does not, in the absence of a special order of court, have an opportunity of responding to the replying affidavit.

[9] In casu the Plaintiff has sought to increase the amount claimed in the summons to E260, 000-00 to the prejudice of the Defendant. This has removed the nature of the claim from the rubric of liquid claims. There is now a dispute with regard to the correct amount of the claim, which can only be resolved through trial proceedings. There are other disputes of fact as to whether when he bought the property his mistake was reasonable. In my respectful opinion, these questions cannot be addressed in provisional sentence summons as they belong in a full-fledged trial.

[10] In the result, for the afore-going reasons provisional sentence is refused with costs. I further order that the matter should follow the procedures for trial.

SB MAPHALALA

JUDGE