

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CIVIL CASE NO. 253/04

PC 2000 (PTY) LTD

PLAINTIFF

AND

COMPUTER PROFESSIONAL CONSULTANT (PTY) LTD

DEFENDANT

CORAM: K.P. NKAMBULE -J

FOR PLAINTIFF: MR. WARING

FOR DEFENDANT: MR. MKHWANAZI

RULING ON POINTS IN LIMINE

3 February 2005

In this matter plaintiff issued summons against the defendant for provisional sentence on a cheque.

According to the cheque defendant was drawer and the plaintiff the payee. The First National Bank, Matsapa was the drawee. The cheque was duly presented at First National Bank, Matsapa where it was payable and was dishonoured. Mr. Mkhwanazi for the defendant took a point in limine on which he seeks to resist plaintiff claim. He alleges that the plaintiff has not established a cause of action. He states that in an action for provisional sentence the plaintiff should establish a cause of action in the summons and not in his replying affidavit.

In response Mr. Waring for plaintiff states that they have disclosed a cause of action by attaching the dishonoured instrument and also disclosing that the plaintiff is the holder for value of the above instrument.

The Law:

Provisional sentence, as it is stated by the author's of Nathan, Barnett and Brink Uniform Rules of

Court 2nd ed at page 66:

"Provisional sentence is an extra ordinary remedy designed to enable a creditor who has liquid proof of his claim to obtain a speed judgement therefore without resorting to the more expensive and dilatory machinery of an illiquid action."

The point in limine raised by defendant deals with procedure. It is trite that the summons in a provisional sentence must contain a proper cause of action set out with sufficient particularity and clarity. Authorities have it that it is not necessary to describe the nature -of the liquid document since a

copy has to be attached to the summons.

Nathan et al in Uniform Rules of Court supra states that a summons on a bill of exchange or promissory note must allege, and it must appear therefore, that the plaintiff is the lawful holder, otherwise provisional sentence will be refused. Hebstern et al, The civil practice of the supreme courts in S.A., 4th ed page 960, states that where a creditor, possess a liquid document, which is a document in which the debtor has acknowledged or is in law deemed to have acknowledged his indebtedness to the creditor in a fixed and determinable sum of money, a rebuttable presumption of indebtedness arises. The authors continue to state that the plaintiffs cause of action is really the obligation evidenced by the document signed by the defendant.

Another important aspect that the summons must contain is that the plaintiff is a holder for value. This means he is the payee of the instrument or endorsee who is in possession of it or the bearer thereof.

From the foregoing it is clear that the plaintiff has disclose-i a cause of action by attaching the instrument which is evidence of defendant's obligation to plaintiff. In the summons plaintiff has described itself as holder for value of the instrument in question. See the definition attached to Section 26 of the Bills of Exchange Act No. 11/ 1902.

Under circumstances and bearing in mind that ex facie, the cheque in question appears to indicate that plaintiff is the holder, the point in limine fails

K.P. NKAMBULE

JUDGE