

**THE HIGH COURT OF
SWAZILAND C.S. ELECTRICAL
(PTY) LTD**

Plaintiff

And

MTHUNZI CONSTRUCTION (PTY) Ltd

Defendant

Civil Case No. 379/2006

Coram	S.B. MAPHALALA - J
For the Plaintiff	MR. O. NZIMA
For the Defendant	MR. M.E. SIMELANE

JUDGMENT

27th June 2006

[1] Before court is an application for summary judgment based on a cheque which was issued by the Defendant to Plaintiff, and which cheque was not honoured by the bank. The cheque was for the sum of E15, 000-00 which it is alleged by the Plaintiff to be the claim against the Defendant.

[2] Defendant opposes the granting of the summary judgment and has filed an affidavit resisting summary judgment where Defendant has raised three points *in limine* and also answered on the merits of the application. The first point *in limine* raised is that the nature of the goods sold and delivered is not explained. Secondly, that the declaration falls foul of Rule 18 (6) of the High Court Rules and thirdly, that the lapse of time has not been explained.

[3] According to the Plaintiff the Defendant has not denied that the cheque belongs to the company. That Defendant has not denied the signature on the cheque, because the signature thereto is that of the director, Mr. Musa Magongo. Moreover, the Defendant has not even suggested that the cheque might have been forged and/or tempered with in what so ever way. Therefore so the argument goes, it follows that the Defendant issued the cheque of E15, 000-00 to the Plaintiff and stands liable to pay, as the cheque was not honoured on presentation by the bank. The issue of goods sold and delivered does not form part of this claim and should not be considered at all.

[4] In argument before me I put it to Counsel for the Plaintiff that it appears from the facts that Plaintiff should have proceeded by way of provisional sentence summons and not by application for summary judgment. The answer to the court by Counsel for the Plaintiff on this query was that Plaintiff had a choice between the two types of procedures and in instant case Plaintiff has chosen to proceed by way of summary judgment. I disagree with this submission by Counsel for the Plaintiff.

The claim by the Plaintiff should have proceeded by way of provisional sentence summons and not summary judgment. The essence of provisional sentence summons is that it provides a creditor who is armed with sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of money due to him without his having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid action (see *Herbstein & Von Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 960 and the cases cited thereat). However, in respect of summary judgment applications a Plaintiff whose claim falls within certain categories can obtain judgment without the necessity of going to trial, in spite of the fact that the Defendant has intimated, by delivering Notice of Intention to defend, that he intends raising a defence. This procedure has a limited objective to enable a Plaintiff with a clear case to obtain enforcement of his claim against a Defendant who has no real defence to that claim (see *Herbstein (supra)* at page 434 and the cases cited thereat).

[5] It appeared to me when the matter was argued and also after reading the Plaintiffs Heads of Arguments that Plaintiff was seeking provisional summons under the guise of an application for summary judgment. Therefore for these reasons I would refuse to grant the said application. Further, I am of the considered view that the Defendant would have advanced a *bona fide* defence in an application for summary judgment.

[6] In the result, for the afore-going reasons the application dismissed with costs.

S.B. MAPHALALA

JUDGE