

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 130/2008 131/2008

HOSSAIN INTERNATIONAL INVESTMENTS

Plaintiff

And

YUNUS M. PATEL AND ANOTHER

Defendants

Coram: S.B. MAPHALALA – J

For the Plaintiff: MR. T. NDLOVU

For the Defendant: MR. S. MAGONGO

JUDGMENT

13th June 2008

[1] In this matter the Plaintiff in Case Number 130/2008 and 131/2008 sued out provisional sentence summons for the recovery of the sum of E27, 000-00 and E50, 00000 respectively.

[2] The cheque numbers are marked "A" in both cases. Under Case number 130/2008 the cheque in question is for the sum of E27, 000-00 and in cheque no. 744 and under Case number 131/2008 is for the sum of E50, 000-00 and is cheque number 749. The two cheques are dated 15th December 2007, and 8th January 2008 respectively.

[3] Plaintiff and 2nd Defendant are both companies, duly registered to the Laws of Swaziland and both having their principal places of business at Manzini. 1st Defendant is a Director in the 2nd Defendant.

[4] It is common cause that when the cheques mentioned above in paragraph [2] of this judgment were presented for payment by the Plaintiff, both of them were referred to the drawer. However, it is not clear from the provisional sentence summons why the cheque was referred to drawer. It is not clear whether it was referred to drawer on account that there were insufficient funds to meet them or the account was closed or on the ground that they were stopped. Pursuant to the dishonoured cheques, Plaintiff then instituted both actions against Defendant and for the recovery of the sum of E77, 000-00.

[5] The provisional sentence summons were served upon Defendant requiring him to appear in person or through Counsel on the 8th February 2008, to deny or admit liability in respect of sums reflected on the cheques.

[6] Two points *in limine* were raised by the Defendants which were abandoned by the Defendant after an agreement of the parties. Therefore, no further mention will be made on them herein.

[7] The position of the law is that a liquid document must be unconditional and once the document is conditional then there is no liquidity since extrinsic evidence is required to prove the fulfillment of the condition.

[8] In the present case, the Defendant's case is stated in sub paragraphs 4.4, 4.5, 4.6, 4.7 and 4.8.

The said paragraphs read *ippsisima verba* as follows:

"44. After the initial agreement was concluded, the director of the Plaintiff then approached me with a view of establishing whether the second Defendant is interested in buying the stock for the sum of One Hundred and Thirty Five Thousand Emalangenzi (E135, 000-00).

45. A verbal agreement was thereafter reached to the effect that the stock would be purchased on condition that it was good and worthy and furthermore, an agreement was reached that if the second Defendant is interested on the stock, it would duly advise the Plaintiff's director through the mobile phone.

46. Pursuant to the above the Plaintiff's director then requested me to issue five blank cheques for intended settlement of the sum of E135, 000-00 should the response be positive. I only endorsed my signature on all five cheques without writing the amount to be paid and the date of payment. It was further agreed that should the second Defendant be interested on the stock, the first payment would be made on or before the 15th February 2008.

47. I then called the Plaintiff's director and informed him that the second Defendant is not interested in the stock and this was on the 5th December, 2007, 10th December 2007 and the Plaintiff's director refused to come and collect its stock.

48. Unbeknown to me and the second Defendant, the Plaintiff's director decided to make the payments of E27, 000-00 and E50, 000-00 respectively without my knowledge and approval. To the best of my knowledge, the Plaintiff's directors' conduct amounted to fraud and has unnecessarily tarnished the name of the second Defendant and its account is about to be closed in respect of these two (2) dishonoured cheques."

[9] In my assessment of the averments of the parties in this case I have come to the considered view that the Plaintiff cannot be successful in his application for provisional sentences in that the Deed of Sale has not stipulated in a fixed and definite manner the amount of money nor outlined how the alleged debt is to be paid. In this regard I find the *dictum* in the South African case of *Leyland SA (Pty) Ltd vs Rooyen's Clark Motors (Pty) Ltd 1984 (3) S.A. 480* apposite. In this case, the court refused provisional sentence on the ground that the document did not stipulate the amount of the instalments to be paid.

[10] Furthermore, all copies of the documents which Plaintiffs claim is based must be annexed on the provisional sentence summons as provided by Rule 8 (1) of the Rules of this court which provides that "**copies of all documents upon which the claim is founded shall be annexed to the summons and served with it**". The position of the law is that Plaintiff should establish the cause of action in the summons and not to do so in the replying affidavit, (see *Barclays National Bank Ltd vs Serfontein 1981 (3) S.A. 244*)

[11] In the result, for the afore-going, it is clear that there has been no compliance with the Rules of this court and no Deed of Sale attached on the sum has a fixed and definite sum of money and that the document relied upon is not a liquid document, therefore the provisional sentence summons is dismissed with costs.

S.B. MAPHALALA

JUDGE