IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO.2700/01

In the matter between:

SHOPRITE CHECKERS t/a MEGASAVE PLAINTIFF

and

MARCO PAULO ENTERPRISES AND 1st DEFENDANT

STANDARD BANK SWAZILAND 2ND DEFENDANT

CORAM : Q.M. MABUZA –J

FOR THE APPLICANT : Advocate J.M. Van der Walt instructed by R.J.S. Perry

FOR THE RESPONDENT : Mr. S. Dlamini of Magagula, Hlophe attorneys.

JUDGMENT 16/8/07

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[1] The Plaintiff herein has sued the 1st Defendant for payment of the sum of E171,790.02 (One hundred and seventy one thousand, seven hundred and ninety Emalangeni and two cents). The amount claimed in the summons was amended since summons were issued from E165,560.16 to E196,076.08 to E171,790.02.

[2] The cause of action between the Plaintiff and the 1st Defendant is based on a written membership agreement in terms whereof the 1st Defendant became a member to the Plaintiff's scheme which entitled members inter alia to purchase goods from Plaintiff's suppliers at more competitive prices. **The Plaintiff acted as the middle man.**

[3] The membership agreement provided as follows that:

"**2.1 The member shall place orders for stock directly with the Plaintiff's suppliers**

2.2 **The member shall pay all statements rendered by the Plaintiff in full by nett due date, in full and without deduction for any reason whatsoever, and**

2.3 **Queries and claims shall be settled directly between the member and the supplier, copies of all documents relating to any claim or queries to be furnished to the Plaintiff forthwith and if claims are not properly lodged within 60 days from date of the Plaintiff's statement, such claims shall lapse and the member shall be deemed to acknowledge the correctness of the statement and accept liability for payment to the Plaintiff in accordance therewith;**

2.4 **No variation or amplification of the agreement shall be binding unless recorded in writing and duly signed by the parties."**

[4] In terms of the membership agreement the 1st Defendant purchased goods from the Plaintiff's suppliers during the period June 1999 to May 2001. The Plaintiff paid for these goods and when it sent statements for payment to the 1st Defendant, the latter failed to pay.

[5] The Plaintiff also claimed payment of interest on this outstanding amount at the rate of 2.3% per moth as

from the 1st May 2001 to date of payment.

[6] The Plaintiff also claimed attorney and client costs, collection commission and further and or alternative relief.

[7] In its plea the 1st Defendant admitted the membership agreement and the terms thereof and that demand for payment was made.

[8] The 1st Defendant denied any indebtedness to the Plaintiff and pleaded that it had in fact overpaid the Plaintiff in the amount of E26,521.05. This amount was amended to E76,521.05

[9] The 1st Defendant also denied that it was obliged to pay the interest claimed (2.3%) as well as collection commission. It did not deny the circumstances under which attorney client costs could be claimed.

[10] The Plaintiff's cause of action against the 2nd Defendant is based on a bank guarantee signed by the 2nd Defendant on the 12th August 1999. In terms

thereof the 2nd Defendant bound itself as surety for payment on demand to the sum of E300,000.00 as may from time to time be due by the 1st Defendant to the Plaintiff for the purchase of stock. Requests for payment would be accompanied by current invoices.

[11] In its plea the 2nd Defendant admitted the existence of the written agreement between the Plaintiff and the 1st Defendant and its terms. It also admitted that the 2nd Defendant had bound itself by way of a guarantee. It denied any knowledge of 1st Respondents indebtedness to the Plaintiff nor that the Plaintiff had submitted claims to it supported by current invoices. 2nd Defendant pleaded that the submission of current invoices in support of claims was a condition precedent to payment and as this had not been done it was not liable to pay the Plaintiff.

[12] At the beginning of the trial and by consent of the parties I entered judgment in favour of the Plaintiff in the amount of E89,485.00 (Eighty nine thousand, four hundred and eighty five Emalangeni only). The trial proceeded in respect of the balance of E82,304.46

(Eighty two thousand, three hundred and four Emalangeni and forty six cents).

[13] The Plaintiff called two witnesses and the defence also called two witnesses.

[14] Mr. Barnard was the Plaintiff's first witness. He is the Plaintiff's Legal and Credit Manager. He advised the Court as to how the members written agreement worked namely that the 1st Defendant would place an order with the Plaintiff's suppliers who would in turn cause deliveries to be made to the 1st Defendant. The deliveries would be accompanied by the relevant proof of delivery and or invoices (and or upliftment notice and or a signed claim form and or signed credit note). The Plaintiff who acts as the middle man between the 1st Defendant and the supplier would then consolidate all of these transaction invoices between the two parties in a form of a monthly statement which it would send to the 1st Defendant. These statements would be sent to the 1st Defendant every month.

[15] If goods had not been delivered the 1st Defendant would file a **claim** on a prescribed claim form which

would be sent to the supplier and the 1st Defendant would be credited with the amount of the goods. An **upliftment** notice meant that goods delivered to the 1st Defendant had been uplifted by the supplier and taken back for some reason or the other on the complaint of the 1st Defendant. A credit note would be given to the 1st Defendant which would mean that it has to be credited with the amounts of the uplifted goods. These credits would appear in the statements prepared by the Plaintiff and sent to the 1st Defendant.

[16] Mr. Barnard in his evidence in chief outlined four disputed invoices which made up the outstanding balance of E82,304.46. These were:

- Federal Marine : E 5,540.16

Proctor Gamble : E42,372.92
Nulaid : E25,200.00

- Elida Ponds : E 9,191.38
- **Total : E82,304.46**

[17] Documentary evidence which had been discovered was produced to support the above figures. These were in File E of the bundle and appeared as follows:

- E39 reflected Federal Marine. The monthly statement is found in G3 entry No. 5 dated 31/10/99.

- E73 reflected Proctor Gamble. The 1st Defendant initially indicated that it would raise a claim herein in respect of goods returned. In anticipation thereof the Plaintiff credited the amount but as time went on and no claim was raised the Plaintiff debited it.

- E80 reflected Nulaid. This was an invoice for eggs that were delivered to the 1st Defendant on the 26th September 1999 for the sum of E25,200.00. The 1st Defendant disputed delivery but failed to raise a claim form therefore. The Plaintiff was debited with this amount by the supplier.

- E111 reflected Elida Ponds – The goods with respect to this item were received by the 1st Defendant together with proof of delivery. However the amount of E9191.38 therefore remained outstanding in the Plaintiff's books. No claim was raised therefore by the 1st Defendant with the supplier in terms of the membership agreement.

[18] Mr. Barnard also gave evidence in regard to the interest claimed in the amount of 25%. Initially in terms of clause 4.7.3 of the membership agreement members would be liable to interest of 27% for balances of 60 days and over. However this amount was reduced to 25% p.a. after a meeting of the Board of Directors. According to Mr. Barnard's testimony interest that was charged on the 1st Defendant's statements was never challenged or placed under dispute. Hence the Plaintiff's claim of interest from the 1st May 2001.

[19] Mr. Barnard further gave evidence to the fact that the Plaintiff's attorneys in South Africa sent on Plaintiff's instructions documentation pertaining to this matter to Plaintiff's attorneys in Swaziland Messrs SJ Perry who in turn corresponded with Mr. Magagula of Currie Millin who were 2nd Defendant's attorney's then. The documentation was sent to the 2nd Defendant who had them sent back to Mr. Magagula because they could not reconcile the statement against the amount claimed. On the 24/5/02 Mr. Magagula returned the bundle of statements and invoices to Messrs S.J. Perry together with a letter from the 2nd Defendant confirming that they were unable to reconcile the statement with the

amount claimed.

[20] The aforementioned documents were again made available when further particulars were requested on the 16/8/2002. Attempts to hold meetings in order to try and resolve the matter followed thereafter but these failed.

[21] Mr. Barnard was cross-examined at length by Mr. Dlamini. The witness did not flounder and was impressive. Mr. Dlamini cross-examined on a wide range of issues.

- The issues I found to be pertinent were the issue of authenticity of invoices. Mr. Dlamini wished to know where originals of invoices were. Mr. Barnard responded that these were with the 1st Defendant. He revealed that invoices were done in triplicate and the original was always sent to the member or 1st Defendant herein and the Plaintiff would remain with a copy.

- It was put to Mr. Barnard that invoices and delivery notes and general proofs of delivery (POD's) would invariably

bear the signature and business stamp of the 1st Defendant and that evidence would be led in this regard. However Mr. Barnard was able to identify in the bundle of documents ones that either did not have a signature but had a stamp or had no stamp but had a signature. Delivery notes would be done in triplicate and the original remained with the member and a copy would be sent to the supplier and another copy to the Plaintiff.

- It was also put to Mr. Barnard that the Plaintiff had an obligation to verify delivery of goods to members before paying the supplier and or demanding payment from the member. Mr. Barnard was able to explain that the Plaintiff had no such obligation. The only obligation Plaintiff had was to consolidate members invoices and send the member monthly statements for payment.

- He was also cross-examined with regard to the amounts that had to be amended three times. The witness maintained the amendments were occasioned due to new information but basically did not change the cause of action.

- He was cross-examined with regard to the interest and was able to explain that initially interest was charged at

27% and that it was later reduced to 25% per Board directive.

- He also revealed that there existed incentive schemes for members who paid their accounts within 30 days with suppliers such as Federal Marine, Proctor & Gamble and Nulaid and within 15 days with Elida Ponds.

[22] Mrs Koller was the Plaintiff's second witness. She was employed by the Plaintiff as a Debtor's Assistant since 1985 and she had access to all documents pertaining thereto. She also dealt with the 1st Defendant's account. She informed the court that upon receipt of a statement from a supplier she would prepare a reconciliation statement and a remittance to Plaintiff's bankers and the amounts would be debited against Plaintiff's account and transmitted and or credited to the suppliers account. The amount debited would appear in the Plaintiff's bank statement the following month.

[23] She was able to take the court through the documentation that related to the payments made in respect of the 4 invoices referred to in Mr. Barnard's evidence and the fact that there was no corresponding

payments from the 1st Defendant. She was cross-examined by Mr. Dlamini but nothing much turns on his cross-examination. The Plaintiff thereafter closed its case.

[24] The first defence witness was Mr. Cardoza, a former Floor Manager of the 1st Defendant from 1995 to 2003. As Floor Manager he reported to the Manager and General Manager. He identified the Manager as a Mr. Le Grange and the General Manager as Mr. de Caires. Mr. Cardoza informed the court that one of his duties was to receive stock. In doing so he had to sign an invoice which was in triplicate. One was for the supplier, one for the transport company (who delivered the goods) and one for the 1st Defendant. He signed the invoice and stamped it. It was not possible to receive the goods without signing for them as the transport company used to be very strict as it belonged to a separate company and not to the supplier nor the 1st Defendant.

[25] He further informed the court that he could not recall receiving a statement from Federal Marine. He was shown a claim form from Proctor and Gamble (B1) but

he failed to recognise it. The third document he was shown pertained to Nulaid. He recalled that Nulaid used to supply the 1st Defendant with eggs. He particularly recalled that this company had trouble at the border and had telephoned the 1st Defendant to advance it with E1,000.00 to enable it to pay a fine which had been imposed on them. He recalled that this company did not deliver any goods on that particular day. He was unable to name the date.

[26] He also revealed that since summons were issued during 2001 he did not see any documents relating to this matter and that the 1st Defendant's attorneys did not receive any documents. He only saw documents for the first time on the 20/3/06 which was the 1st day scheduled for the trial. He informed the court that on the 20/3/06 the parties met and the Plaintiff was able to produce invoices that were stamped and signed by this witness. The 1st Defendant was able to pay these immediately. He stated that the invoices that were not signed were in respect of non delivered goods.

[27] Mr. Cardoza was cross-examined by Ms Van der Walt. When he was asked how come he had told the Court

that he had first seen the documents pertaining to this case on the 20/3/06 yet he had signed and stamped them in 2001 he gave an unsatisfactory answer. When he gave evidence in chief he informed the court that he personally signed every invoice or proof of delivery but when cross-examined on this issue he admitted that he did not sign all of them sometimes Mr. Le Grange or Mr. da Caires signed them. He was asked if on the days he was away it was possible for someone else to receive the goods and not sign for them, he agreed. All in all Mr. Cardoza did not impress me as a witness. He did however concede that some documents relating to the business in general did not have a signature but had a stamp and were paid. Some had a stamp only and no signature and were paid. He did not know anything about raising claims. He revealed that Mr. Le Grange was responsible for receiving and processing monthly statements.

[28] The second witness for the defence was Mr. Ngwenya, a loss control officer employed by the 2nd Defendant. He testified that he recalled some bulky bundle of copies of invoices which had been sent by the 2nd Defendant's attorneys to the 2nd Defendant.

Apparently the aforesaid attorneys were unable to make sense of these documents and requested the 2nd Defendant's assistance who in turn sent them back to their attorneys with the admission that they could not reconcile them as the claim differed from the invoices.

[29] He confirmed that the 2nd Defendant had a guarantee in favour of the 1st Defendant to secure payments of its debts with the Plaintiff. He revealed that the latter had not been previously paid because the 1st Defendant had advised them against paying the Plaintiff as 1st Defendant disputed the claims.

[30] Ms. Van der Walt cross-examined him. He was shown an application by the 1st Defendant requesting guarantee facilities (J1) as well as the actual guarantee that followed the application (J2). He admitted both documents. He disclosed that his understanding of a portion of "J2" was that the Plaintiff had to submit "current" invoices and that "current" meant "original" invoices. The relevant portion of J2 reads as follows:

"Any claims arising from this guarantee are to be supported by current invoices".

As the Plaintiff had not filed “current” invoices, the 2nd Defendant was unable to make any payment.
The defence closed its case thereafter.

The issues in dispute

[31] Mr. Barnard set out the claim in respect of the four disputed invoices mentioned hereinabove. The issues raised by the Defendants in regard thereto were:

- Proof of delivery of goods.

  The defendants maintain that there was no delivery of the goods the subject matter of the invoices and as such the Plaintiff had no business paying therefore.

[32] I have difficulty with this submission for the fact that the Defendants did not plead this submission. Secondly the Plaintiffs cause of action as I understand is not based on the delivery or non-delivery of goods. It is based on the membership agreement mentioned earlier. Thirdly it became clear during the course of the trial that issues of non-delivery were to be dealt with between the 1st Defendant and the supplier. The Plaintiff who acted as middle man often helped in tracing queries but was not obliged to. Fourthly it also

became clear during the trial that if there was no delivery the 1st Defendant could always lodge a claim with the supplier. Other than a claim lodged with regard to Proctor and Gamble no other claims were lodged. Even the one in respect of Proctor and Gamble was withdrawn for being erroneous.

Mr. Cardoza was unable to assist the Court in the above respect. Consequently, Mr. Barnard's evidence stands uncontroverted and I must accept it and reject that of Mr. Cardoza.

- No purchases shown to have been made by 1st Defendant.

[33] The submission above leads to the conclusion that because there were no deliveries therefore there were no purchases made by the 1st Defendant. Conversely that the Plaintiff has not shown that the 1st Defendant made the said purchases and has therefore not discharged the onus of proof in regard thereto. Once again this submission was not pleaded nor was an amendment sought by the 1st Defendant to incorporate this submission in its plea. This submission

in my view is one which should have been raised by the 1st Defendant with the supplier. The Plaintiff produced a statement which showed that it had paid the supplier for goods purchased by the 1st Defendant. That in my view is the extent of the Plaintiff's obligation in terms of the membership agreement. Furthermore the 1st Defendant pleaded that it had overpaid the Plaintiff. Presumably this overpayment was inclusive of the amount claimed by the Plaintiff and this places the evidentiary burden on the 1st Defendant as to whether this overpayment relates to all four disputed invoices or not.

- Whether statements were rendered.

[34] The 1st Defendant has submitted that there was no allegation in the Plaintiff's particulars of claim that any statements were sent to the 1st Defendant and any reliance on Article 4.7.3 of Annexure A (P. 16 of the Book of Pleadings) would be ill-conceived. My view herein is that the 1st Defendant did not raise this issue in its pleadings therefore there was no onus on the Plaintiff to prove the statements. The 1st Defendant

pleaded that it had paid in full and even overpaid the Plaintiff. The Plaintiff therefore legitimately expected the 1st Defendant to prove its allegation of full payment and or overpayment.

[35] I agree with Ms. Van der Walt's submission at paragraph 18.3 and 18.4 of the Plaintiff's Heads which reads:

18.3 "Rule 22 (3) requires a Defendant if any explanation or qualification of any denial is necessary to state same in its plea. The 1***st Defendant did not plead that it was not liable in terms of the scheme on the basis of not having received any statement giving rise to an outstanding balance but instead pleaded and restricted itself to a defence that the Plaintiff had been paid in full and in fact had been overpaid, i.e. that indebtedness had arisen in terms of the agreement (which could have only been the bases of statements set to it) but was fully paid up".***

18.4 ***The alleged overpayment of E76 521.05 pleaded corresponds with the First Defendant's own reconciliation and the First Defendant's letter containing its reconciliation refers to the***

"account" with the Plaintiff. The First Defendant would not have paid its account with the Plaintiff except in terms of the statements (nor was such a possibility put to any of the Plaintiff's witnesses) and there is not even a suggestion in the pleadings that no statements were received. It is therefore not surprising that the First Defendant did not state non-receipt of statements issue to be a material fact upon which it relies, as is required by Rule 19 (2). It was never expressly put to the Plaintiff's witnesses that statements were never furnished".

Consequently there was no need for the Plaintiff's officers who had sent the statements to give evidence nor to give evidence on how the statements were sent.

- Hearsay evidence

[36] The 1st Defendant did not argue that in compiling the statements that inadmissible evidence of the suppliers was being relied upon. There is no need for me to make a ruling on this point although had it been raised I would agree with Ms. Van der Walt with her exposition of the law with regard hearsay evidence and its application ***in casu.***

- Production of original documents

[37] During the trial Mr. Dlamini for the Defendants did seem to suggest that the Plaintiff was precluded from relying on non-original documents. He seems to have abandoned this point however and has not alluded to it in his submissions. However, due to the fact that essential original documents were usually kept or sent to the 1st Defendant and copies to the Plaintiff and supplier, this is a proper case for allowing secondary evidence.

- Issue of overpayment by 1st Defendant

[38] The 1st Defendant did not lead any evidence with regard to this defence nor was it put to any of the Plaintiff's witnesses. In the event the 1st Defendant has failed to prove its sole defence.

- The claim against the 2nd Defendant

[39] Mr. Ngwenya did not dispute receipt of the relevant invoices. He advised the court that "current invoices" referred to in the guarantee meant "original invoices".

[40] Mr. Ngwenya was clearly mistaken with regard to the

meaning of current invoices. Furthermore he was not the author of both document "J1" and the guarantee. His evidence in regard to these two documents is clearly hearsay and inadmissible. I have no doubt in my mind that the authors of those documents meant "current" in its ordinary meaning of "the present time". Mr. Adams who co-authored the above documents was not called to give evidence even though Mr. Ngwenya gave the court an assurance that he was still in the employ of the 2nd Defendant.

[41] Turning back to the invoices. Mr. Ngwenya did not dispute that they were received. He gave evidence that they were returned to the Plaintiff's attorneys because the 2nd Defendant's accountants and attorneys could not reconcile them and that the invoices could not be reconciled against the amount claimed. I have difficulty in accepting Mr. Ngwenya's evidence as neither the 2nd Defendant's accountants nor its attorney were called to give evidence to explain what their difficulty was. Mr. Ngwenya's evidence is hearsay and inadmissible.

[42] On another note Mr. Ngwenya says that the 2nd

Defendant could not pay because the 1st Defendant gave instructions for it not to pay as 1st Defendant was disputing the claim.

[43] It seems to me that if the latter is correct then it is the more likely explanation as to why the 2nd Defendant failed to pay and not because it did not receive current invoices. The failure of the 2nd Defendant's accountants to reconcile the invoices does not excuse the 2nd Defendant from paying in view of exhibit "J1". The relevant portion in "J1" reads as follows:

paragraph 3 "**I/We hereby authorise the Bank without further reference to me/us to pay, comply with or otherwise discharge any claim which may be made against the Bank by the creditor under the guarantee, against production of the documents, if any, called for therein, without any obligation on the part of the Bank to ascertain the correctness or otherwise of any amount claimed or the validity of the grounds on which any such claim is based, and I/we acknowledge and agree that I/we shall not**

be entitled to interdict the Bank from so doing, nor to require the Bank to dispute or defend any such claim".

paragraph 5 **"I/We shall have no claim against the Bank should any payment be made by the Bank under the guarantee even if the payment is or was not claimable from me/us by the guaranteed party or should not have been made by the Bank for any other reason".**

[44] Mr. Dlamini has objected to the admissibility of this document on the grounds of privilege. The claim for privilege should have been made at the discovery stage assuming that the 1st Defendant would have been able to claim privilege for its contents on any ground. However, the document was discovered by the 2nd Defendant's attorneys. In other words the horse has bolted out of the stables and its too late to recall it now.

[45] In terms of Exhibit "J1" the 2nd Defendant can pay without any further reference to the 1st Defendant. There was no obligation on the 2nd Defendant to

ascertain the correctness of any claim and the 1st Defendant was not entitled to require the 2nd Defendant to dispute or defend such claim.

[46] Mr. Ngwenya further testified that the 2nd Defendant was instructed by the 1st Defendant not to make payment because the 1st Defendant was disputing the claim. Such an instruction was clearly wrong in view of Exhibit "J1" and did not absolve the 2nd Defendant of its obligation to pay the Plaintiff.

[47] The 2nd Defendant pleaded that it was a condition precedent for payment by it that in terms of the guarantee the Plaintiff was to lodge a claim supported by recent invoices. This plea must fall away because Mr. Ngwenya admitted that the invoices were submitted albeit not to him, he was told of this by someone else. He was told by someone else that they were sent back to the Plaintiff's attorneys. Mr. Ngwenya's evidence does not assist the 2nd Defendant in that it is all hearsay evidence. Mr. Barnard's evidence pertaining to the 2nd Defendant stands alone and remains

uncontroverted.

[48] Clearly there was no obligation on the 2nd Defendant to first ascertain the validity of the claim prior to payment and its inability to reconcile the documentation does not constitute a defence for not paying as the guarantee only requires current invoices.

[49] In the circumstances the 1st and 2nd Defendants defence is hereby dismissed. Judgment is entered for on behalf of the Plaintiff in the sum of E82,304.46 (Eighty two thousand, three hundred and four Emalangeni fourty six cents).

Q.M. MABUZA -J