



## THE HIGH COURT OF SWAZILAND

### RULING

Case No. 3762/10

In the matter between:

**CHUAN YI PAPER (PTY) LTD**

**Plaintiff**

**And**

**NATIONAL WASTE RECYCLING (PTY) LTD**

**1<sup>ST</sup> Defendant**

**PRIME TRUCKING AND LOGISTICS (PTY) LTD**

**2<sup>ND</sup> Defendant**

**Neutral citation:** Chuan Yi Paper (Pty) Ltd v National Waste Recycling (Pty) Ltd and Prime Trucking and Another 3762/10 [2012] SZHC .....(28<sup>th</sup> March 2012)

**CORAM:** M. Dlamini

**Heard:** 20<sup>th</sup> March 2012

**Delivered:** 28<sup>th</sup> March 2012

**For the Plaintiff:** M. Dlamini

**For the Defendant:** T. Mlangeni

**liquid claim – bill of exchange – contract – justa causa debendi - cession**

## Summary

Before court is an application for summary judgment. The plaintiff issued a simple summons followed by a declaration for a sum of E49,030.20 in respect of goods sold and delivered to 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant failed to discharge its obligation of payment when the debt fell due. Later, 2<sup>nd</sup> defendant issued two cheques of various amounts for the total of E49, 030.20 to the plaintiff as payment for the 1<sup>st</sup> defendant's debt. Before the two cheques could be cleared by the bank, 2<sup>nd</sup> defendant instructed its bank not to honour the cheques.

- [1] When the matter came for arguments, 1<sup>st</sup> defendant conceded that it had an obligation in terms of the written contract which I will cite it later, to pay the plaintiff. 2<sup>nd</sup> defendant however, resisted the application for summary judgment.
- [2] 2<sup>nd</sup> defendant informed the court that he was not liable on the basis that there was never any contract between it and the plaintiff. It could not be penalized for being a good Samaritan as it were.
- [3] Plaintiff on the other hand submitted that when 2<sup>nd</sup> defendant offered payment, it became liable under the contract in the same vein as 1<sup>st</sup> defendant.
- [4] This court is called upon to determine whether 2<sup>nd</sup> defendant's conduct of drawing and issuing the two cheques could be interpreted as binding itself to the contract and thereby equally liable as 1<sup>st</sup> defendant.

[5] The general definition of contract is as defined by Ellison Kahn, **Contract and Mercantile Law” Volume 1 1988, Juta & Co. Ltd, Cape Town** at page 1:

*“...An agreement by which two parties reciprocally promise and engage or one of them singly promises and engages to the other to give some particular thing or to do or abstain from doing some particular act.”*

[6] It is further the general understanding in a contract that there should be the meeting of the mind – *consensus ad idem*. However, the determination on the meeting of the mind is objective. Willie and Millin’s in **Mercantile Law of South Africa, 1975 Hortors Stationery, Johannesburg** at page 2 point:

*“where there is an identity of expression used by the parties and the wording is logically interpreted in accordance with the understanding of one party, who was not in fault, and the other party induced that understanding by conduct amounting his being in fault, a valid contract emerges.”*

[7] In similar wording Wessels JA in **South African Railways and Harbours v National Bank of SA Ltd 1924 AD 704** at 715-16 held:

*“The law does not concern itself with the working of the minds of parties to a contract, but with external manifestation of their minds. Even therefore if from a philosophical standpoint the minds fo the parties do not meet, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts can determine the terms of a contract.”*

[8] In support of the above objective theory, Davis J in **Irvin & Johnson SA Ltd v Kaplan 1940 C.P.D. 647** at 651 states as a rationale for such a position is that it would be:

*“difficult to see how commerce could proceed at all. All kinds of mental reservations, of careless unilateral mistakes, of unexpressed conditions and the like, would become relevant and no party to any contract would be safe: the door would be opened wide to uncertainty and even to fraud”.*

[9] Having said the above, it is however important to enquire in every agreement whether essential elements are present before one can say it is a binding contract. It is well established in our law that for an agreement to be enforceable at law, the basis is not that it was made freely, voluntary and with full offer and acceptance but rather in addition thereto three elements must be present. These are discussed by Willie *op. cit.* at page 29 as:

*“(1) That the agreement be founded on some reasonable cause or ground;*

*(2) That the performance of the agreement be possible both legally and physically;*

*(3) That any solemnities or formalities required by law in any particular case be observed by the parties”.*

[10] It is worth noting that a cheque which has been properly drawn and issued constitutes, like any other bill of exchange, a contract in writing. It therefore enjoys characteristics of a negotiable instrument. However, it is trite law that such a cheque drawn and issued should be founded upon *justa causa debendi*. This is denined in simpler terms on reasonable cause in order to be

valid and enforceable. *De Villiers A.J.A. Conradie v Rossouw 1919 A. D. 279* (as he then was) in stated in relation *justa causa*

*“the particular transaction of which obligation is said to arise, be it sale, hire, donation or any other contract or handling”*

[11] In adopting the same requirement, the court in *de Jager v Grunder 1964 (1) S.A. 446 AD at 463* held:

*“in determining whether a promise is founded upon justa causa or reasonable cause, the ground or reason for the promise should be examined”.*

[12] I now turn to determine whether in *casu* there is *justa caua*. It is clear from the circumstances of this case that a written contract exist between plaintiff and 1<sup>st</sup> defendant as evident by annexure EH1 attached to the declaration which reads:

**“AGREEMENT**

**MADE AND ENTERED INTO BETWEEN**

**NATIONAL WASTE RECYLING (PTY) LTD**

**and**

**CHUAN YI PAPER CO (PTY) LTD**

**IT IS THEREFORE AGREED AS FOLLOWS:-**

- 1. That payment for waste paper purchased in the month of July 2010 to the value of E49.030.20 (Forty Nine Thousand Emalangeni and Thirty Emalangeni twenty cents) would be made upon receipt of payment from Mondi.**

2. That the said payment from Mondi is envisaged to be received by the 10<sup>th</sup> September, 2010.

Thus done and signed at Matsapha on this 9<sup>th</sup> day of August, 2010.

For: National Waste Recycling (Pty) Ltd

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For: Chuan Yi Paper Co. (Pty) Ltd.

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[13] Can we then say that by virtue of 2<sup>nd</sup> defendant drawing and issuing the cheques to plaintiff, a contractual obligation arose in respect of 2<sup>nd</sup> defendant. Put differently, can we view the drawing and issuing of the cheques (offer) together with the acceptance of the same by 2<sup>nd</sup> defendant and plaintiff respectively as constituting a contract between the plaintiff and 2<sup>nd</sup> defendant.

[14] The position of our law is clear that the drawing and issuing of a cheque cannot on its own create a contract. There must be an underlying transaction to the drawing and issuing of the bill of exchange. In brief, the cheque cannot be viewed in isolation. This position was discussed in *Mindel v Plaza Outfitters 1945 T.P.D. 350*. The rationale for this position is based on the fact that it is the underlying transaction that creates a relationship - *nexus* - between the parties.

[15] On the above premises, the contention therefore that 2<sup>nd</sup> defendant is liable should be rejected for want of *justa causa debendi* of the two cheques, an essential element of a lawfully enforceable contract.

[16] Suppose one agrees for a second that there was cession in that the creditor (plaintiff) consented to the debtor (1<sup>st</sup> defendant) substituting himself for the 2<sup>nd</sup> defendant by virtue of the creditor accepting the offer of settlement by means of the two cheques from the 2<sup>nd</sup> defendant (cessionary) thereby creating a tacit contract. This proposition would fall *viz.* firstly that this delegation requires consensus of all three parties. Secondly, for the same reason that there is no *justa causa* in the first place in respect of the cession. Thirdly, that plaintiff himself, by his own demonstration and correctly so, sued 1<sup>st</sup> defendant for the same debt indicating lack of termination of obligation in respect of 1<sup>st</sup> defendant and fourthly, on trite law that only rights and not obligations are generally ceded and therefore to cede an obligation is a misnomer as held in **Hersch v Nel, 1948(3) S.A689** at p. 698.

[17) In the foregoing, the following orders are made.

1. Prayers 1, 2, and 3 of the sample summons are granted against 1<sup>st</sup> defendant
2. Plaintiff's cause of action is dismissed with costs in respect of 2<sup>nd</sup> defendant.

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**M. DLAMINI**

**JUDGE**

