IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 1172/2015

In the matter between:

Swazi Truck & Bus (Pty) Ltd **Plaintiff**

And

Reginald Magagula **Defendant**

Neutral citation **:** *Swazi Truck & Bus (Pty) Ltd v Reginald Magagula (1172/2015) [2018] SZHC 272 (27 November 2018)*

Coram **:** **T. L. Dlamini J**

For Plaintiff **:** Mr B. Dube

For Defendant **:** Ms Z. Mkhonta

Delivered **:** 27 November 2018

Summary: *Plaintiff sued out a provisional sentence summons against the defendant for **E180, 000.00**. A cheque drawn in favour of the plaintiff was dishonoured by the defendant's bank and was marked "**REFER TO DRAWER".** The defendant contended that he is not personally liable for the amount claimed as the loan was made on behalf of a company called Gcisa Investments (Pty) Ltd. Defendant pleaded that the company ought to have been joined in the proceedings, and that he is not personally liable for the claimed amount but Gcisa Investments is liable.*

Held: *That the defendant's defence is so improbable that the likelihood of succeeding in the main case is very remove. Provisional sentence is accordingly granted in favour of the plaintiff, together with interest plus costs of suits.*

JUDGMENT

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[1] The plaintiff is the holder of a cheque for the amount of **E180, 000.00** which was drawn in its favour by the defendant. Upon presentation at the bank, the cheque was dishonoured and marked on its face **"REFER TO DRAWER"** by the defendant's bank. The plaintiff thereafter issued a provisional sentence summons in respect of the cheque. The defendant was called upon in the provisional sentence summons to appear before this court personally or by counsel to admit or deny liability for the claim.

[2] The defendant filed an affidavit resisting judgment on the provisional sentence summons. The defendant pleaded that he is not indebted to the plaintiff. He contended that the cheque was left in the custody of the plaintiff as part of a finance deal on behalf of a company called **Gcisa Investments (Pty) Ltd** which has not been cited in the proceedings.

[3] In simple terms, the defendant contends that he is not personally liable for payment of the amount claimed but it is Gcisa Investments (Pty) Ltd that is liable. He also contended that in terms of the agreement, he left the cheque undated with the plaintiff pending finalisation of financial deals which involved the sale of a truck to **Gcisa Investments (Pty) Ltd**. It is common cause that the agreement between the parties was verbal.

[4] In its reply to the affidavit resisting provisional sentence judgment, the plaintiff insisted that the agreement was between the plaintiff and the defendant personally. It also stated that it was agreed that the plaintiff would insert a date on the cheque and present it for payment within a couple of weeks.

[5] The plaintiff further stated in its reply that the defendant has not furnished any proof that he acted as a representative of **Gcisa Investments (Pty Ltd**. He ought to have furnished, submitted the plaintiff, a board resolution giving him the alleged authority to act as a representative of the company.

[6] *Ex facie* the cheque, the defendant paid using a personal cheque and not the company's cheque.

[7] The essence of suing by provisional sentence summons, according to **Herbstein and Van Winsen, *"The Civil Practice of the High Courts of South Africa"*, 5th edition, 2009 at p.1313**, is that the procedure provides the creditor who is armed with sufficient documentary proof (a liquid document) with a speedy remedy for the recovery of money due without having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid document. A signed cheque for a fixed and determinate sum of money is one such liquid document.

[8] During arguments, the court enquired about the time when the company, **Gcisa Investments**, came into the picture in connection with the loan agreement. The plaintiff's attorney informed the court that it came into the picture after the provisional sentence summons had been issued against the defendant. The court also enquired form the defendant's attorney about the relationship between the defendant and **Gcisa Investments**. He responded by submitting that the defendant is a director of **Gcisa Investments**.

[9] The court further enquired from the defendant's attorney about why the relationship between the defendant and **Gcisa Investments** was not disclosed. The attorney did not furnish any direct answer save to inform the court that the company did not have a bank account when the loan agreement was concluded.

[10] A plethora of decisions supports the position that a person who acts on behalf of a company is to furnish a resolution of the directors of the company which grants him the authority to act where such authority is challenged. The defendant failed to produce the company's resolution

despite the plaintiff's insistence that the loan agreement was concluded with him personally and not as a representative of **Gcisa Investments (Pty) Ltd**. I concur with the plaintiff and accordingly find in his favour on this issue.

[11] The defendant's attorney referred this court to the contents of paragraph 7 of the affidavit resisting provisional sentence judgment. The paragraph states as quoted below:

> *"7. The sum of **E180, 000.00** is due to the Plaintiff from Gcisa Investments and not from me. The agreement with the Plaintiff was that I will leave the cheque undated pending finalisation of the financial deals involving the sale of a truck to Gcisa Investments (Pty) Ltd."*

[12] The attorney submitted that the above quoted paragraph implies that there was a condition to be fulfilled by the plaintiff.

[13] I find it apposite to highlight that the affidavit resisting provisional sentence judgment was deposed to and signed before a commissioner of oaths on the 04 September 2015. An email marked *"SWA 192"* found at page 21 of the Book of Pleadings was sent by the defendant's attorney M.P Simelane Attorneys, to the plaintiff's attorney on Wednesday 27 May 2015. The text of the email is reproduced below:

> *"I have met with my client and he has undertaken to transfer some money into your clients account before Friday. Apparently that cheque ought not to have been banked. Client had an arrangement with yours and he was surprised that the cheque had been banked. We assume that this matter will be settled without the need for legal action.* (own emphasis)

[14] Despite the undertaking made via the email on Wednesday 27 May 2015 to pay by Friday, the defendant never honoured the undertaking. As of 31 July 2015 when the provisional sentence summons were issued, the same amount of the dishonoured cheque was still owing.

[15] The email message, in my considered view, dispells the defendant's defence that the amount was payable upon the fulfillment of certain conditions. What worsens the defendant's position is that those conditions upon which payment was to be based have not been spelt out for the court.

[16] The defendant also contended, as his defence, that the plaintiff failed to set out the cause of the debt in the provisional sentence summons yet that is a material aspect of the summons. It was submitted, to substantiate the point, that the reason why the cheque was drawn in the plaintiff's favour has not been stated.

[17] The authors **Stephen Pete et al, "Civil Procedure: A Practical Guide", 3rd edition, at page 33**, state that where, for example, you sell someone a motor car and he pays you by cheque, and you bank the cheque but a few days later the cheque is returned to you marked 'refer to drawer', it means that the cheque has 'bounced'. In this case, you may choose whether you wish to base your claim on *breach of the contract of sale* or on the *liquid document*

(i.e. the bounced cheque). These constitute two *separate causes of action*. (own emphasis)

[18] There is therefore no hesitation that the dishonoured cheque constitutes a complete cause of action on its own for purposes of the provisional sentence procedure. The defendant's proffered defence that the plaintiff failed to set out the cause of the debt in the provisional sentence summons cannot, in my view, succeed.

[19] The defendant has not denied, nor disputed that the signature on the dishonoured cheque is his. The amount of **E180, 000.00** reflected on the dishonoured cheque has not been denied as the amount owing in terms of the loan agreement. *Ex Facie* the cheque, it is not a company cheque but a personal cheque of the respondent himself. Nothing connects this cheque with the company **Gcisa Investments (Pty) Ltd**.

[20] It is my finding that the cheque was drawn and signed by the defendant. The plaintiff was the legal holder of the cheque. The cheque was presented for payment but it was dishonoured by the bank and marked *"REFER TO DRAWER"*. Notice of the dishonor was given to the defendant hence the email correspondence between the attorneys of the parties marked *"SWA 192"* at page 21 of the Book of pleadings.

[21] The defence proffered by the defendant that he acted on behalf of **Gcisa Investments (Pty)** Ltd is so improbable that the prospects of succeeding in the main case are very remote.

[22] It is my finding that the defendant has failed to discharge the onus which rests on it. Accordingly, I grant provision sentence judgment in favour of the plaintiff for the sum of **E180,000.00** (One hundred and eighty thousand emalangeni only), interest thereon at the rate of 9% per annum calculated from the date of service of summons to date of final payment, plus costs of suits at the ordinary scale.

T.L. DLAMINI J

JUDGE OF THE HIGH COURT