

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIV. CASE No.1284/97

IN THE MATTER BETWEEN

CITY COUNCIL OF MANZEVI

PLAINTIFF

And

DUNCAN THRING

DEFENDANT

CORAM :

DUNN J.

FOR THE PLAINTIFF :

MR. P. FLYNN

FOR THE DEFENDANT :

MR. A. SHABANGU

JUDGMENT

15TH AUGUST 1997

This is an application for summary judgment. The plaintiff issued summons against the defendant on the 7th May 1997 claiming payment of the sum of E25 530.00 together with interest at the rate of 9% p.a. from the 4th November 1996 and costs. The application is opposed by the defendant.

It is set out in the particulars of claim that the defendant in executing a Writ issued out of the Industrial Court demanded from the plaintiff, over and above the amount reflected on the Writ, payment of the sum of E25 530.00 in respect of a 3% commission. It is stated that the plaintiff paid the amount demanded by the defendant in the bona fide and reasonable but mistaken belief that the defendant was entitled to the 3% commission. It is averred that the payment demanded was in fact illegal and in contravention of section 5(5) of the Third Schedule dealing with the tariff for Sheriffs and Deputy Sheriffs, under the High Court Act of 1954. The Third Schedule referred to should in fact be to the High Court Rules and not the High Court Act.

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A person who makes a payment of money or delivers a thing to another due to a reasonable error of fact in the belief that the payment is owing, whereas it is not, may claim repayment to the extent that the person who received the payment has been enriched at his expense, under the *condictio indebiti*.

See *GOVENDER v STANDARD BANK OF SOUTH AFRICA LTD* 1984 (4) SA 392 and the authorities there cited. That is the basis of the plaintiff's claim. In order to succeed in such a claim a plaintiff must allege and prove that –

1. The transfer or payment was made in the bona fide and reasonable but mistaken belief that it was owing.
2. The transfer must have been made *indebiti*.
3. The error must be one of fact not law.
4. The error must be a reasonable error.
5. The property being reclaimed was transferred to the defendant.

See AMLER'S PRECEDENTS OF PLEADINGS p63 and the authorities there cited.

The defendant maintains that he has a bona fide defence the the plaintiffs claim. The defence is as follows –

4.1 The payment of the amount of E25 530.00 was paid by the plaintiff to me acting voluntarily without any protest on it's part and in accordance with an agreement reached between myself and the said plaintiff which was represented by it's Acting City Clerk and it's Acting Treasurer. The money paid was therefore due in terms of the aforesaid agreement.

4.2 Section 5(5) of the Third Schedule dealing with the tariff for sheriffs and deputy - sheriffs under the High Court Act, 1954 does not govern the situation and the tariff is merely a guide. I humbly submit that the tariff must be looked at as a whole for purposes of ascertaining what the tariff lays down as a guide to the amount a deputy - sheriff, may claim in relation to the execution of a Writ.

4.4.I deny that the plaintiff paid the amount as a result of a bona fide, reasonable but mistaken belief that it was entitled to it because

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at the time of the payment the plaintiff knew that the payment was not being made in accordance with the tariff as prescribed in the Third Schedule of the High Court Rules.

4.7 It is my submission that even if the payment was made erroneously the error was not reasonable because the plaintiff's aforesaid officials were presented with an opportunity of ascertaining the basis of the payment if they were in doubt when the attorney for the execution creditor questioned the payment.

4.9 Further in any event the amount claimed by the plaintiff was not paid indebite but was paid as a result of an agreement between myself and the plaintiff.

The question of the tariff to be applied by the deputy - sheriffs can be disposed of quite easily . Rule 5 of Part II of the Third Schedule, headed Execution of Writs provides in part as follows -

5.The fees shall be as follows –

- (1)-----
- (2)-----
- (3)-----
- (4)-----
- (5) Against Movable property –

(a) If a Writ is paid on presentation, 3% on the amount so paid, subject to a maximum ceiling of E200.00.

Deputy Sheriffs are bound by the peremptory provisions of Rule 5(5) of the tariff. The maximum amount of E200 . 00 cannot be exceeded . The amount of E200 00 is not a guide, it is the maximum which can be charged by a deputy-sheriff in cases where payment is made upon presentation of a Writ against movable property .

Serious problems arise for the defendant in so far as the alleged agreement between the parties is concerned . The defendant has elected not to give any particulars of the agreement such as the time

and place it was made; what its terms were , whether it was oral or verbal and as to whether or not it had

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anything to do with the Deputy Sheriffs right to a commission in the execution of the Writ . It was incumbent upon the defendant in my view to give such particulars and to relate the agreement to the claim in much the same way in which a defendant who raises a counter - claim to a summary judgment application is required to give sufficient detail of such claim so as to enable the court to decide whether it is well founded. Paragraphs 4.1 , 4.2 and 4.9 of the answering affidavit do not, in the circumstances, advance the defendant's case and are not sufficient to resist the summary judgment application.

The question as to whether the payment was made bona fide and in the reasonable but mistaken belief that it was owing is a matter which has been placed squarely in issue in the papers before me.

The plaintiff was granted leave to file a replying affidavit. In this affidavit, the plaintiff denies the contents of paragraph 4.7 of the answering affidavit which is set out earlier in this judgment. The plaintiff states the following at paragraph 8 of the replying affidavit -

The defendant was in the process of executing a warrant and there was very little time to verify any of his allegations. In any event at the time when the payment was made, I sincerely believed that he was entitled to the money and as such authorised the payment.

This is an aspect of the matter which cannot be decided on the affidavit evidence and one which the plaintiff is required to prove in order to succeed in its claim . The circumstances under which the payment was made and the "allegations" which are referred to in the plaintiff's affidavit all need to be established by the plaintiff. This constitutes a triable issue within the meaning of Rule 32 (4) (a) as amended.

Summary judgment is in the circumstances refused . Leave is granted to the defendant to defend the action on condition that he files his plea together with security in the sum of E10 000.00 within 14 days from today's date. Costs to be costs in the cause.

B . DUNN .

JUDGE.