



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 2282/09

In the matter between:

**MENSER IMPORT AND EXPORT (PTY) LTD
t/a CLEAR OUT FASHIONS**

PLAINTIFF

v

**STARLET INVESTMENTS (PTY) LTD
t/a CRIME STOP**

1ST DEFENDANT

THEMBA FAKUDZE

2ND DEFENDANT

CORAM
FOR THE PLAINTIFF

FOR THE DEFENDANT

: Q.M. MABUZA -J
: MR. M. NDLOVU OF MASINA
MAZIBUKO & CO.
: MR. S. MAMBA OF S.P. MAMBA
ATTORNEYS

JUDGMENT 6/8/10

[1] The Plaintiff herein issued provisional sentence summons in respect of a cheque which was referred to drawer ostensibly issued by the 2nd Defendant Mr.

Themba Fakudze on behalf of the 1st Defendant, Starlet Investments (Pty) Ltd t/a Crime Stop.

- [2] The Plaintiff seeks payment of the sum of E7960.00 (Seven thousand nine hundred and sixty Emalangeni) together with costs and interest at the rate of 9% p.a. a ***tempora morae***. Payment is sought from the Defendants jointly and severally the one paying the other to be absolved.
- [3] The Defendants having been called upon to appear on a stated day to admit or deny liability for the said sum; did so appear by filing their affidavit in terms of Rule 8 (5). In it the 2nd Defendant who is a director of the 1st Defendant sets forth the Defendants defence; which is that the 2nd Defendant never signed the cheque. In other words he denies that it is his signature which appears upon the cheque.
- [4] In another paragraph of the same affidavit, he states that he met with the Plaintiff's first attorney Zonke Magagula and agreed that the said sum of E79600.00 would be settled in instalments.
- [5] Thereafter, he states that cheques were issued in favour of the Plaintiff's attorneys Messrs Zonke

Magagula.. Certain cheques were attached to the affidavit. They were made out to Zonke Magagula & Co.

[6] The cheques are as follows:

Cheque no. 1012 dated 28/5/2008 for E1000.00
Cheque no. 569 dated 13/3/2009 for E1000.00
Cheque no. 694 dated 26/6/2009 for E2500.00
Cheque no. 695 dated 30/7/2009 for E2460.00
E6960.00

[7] The cheque dated 28/5/2008 has a Manzini Nedbank stamp dated 28 May 2008; the cheque dated 13/3/2009 has a Manzini Nedbank stamp dated 16 March 2009. The cheques dated 26/6/2009 and 31/7/2009 do not show any dates of presentation for payment by Mr. Zonke Magagula.

[8] There is a further cheque made out to Zonke Magagula cheque no. 1218 dated 2/2/2008 for E1000.00.

[9] Mr. Magagula has filed a confirmatory affidavit to the founding affidavit filed by Nokunceda Menser a director of the Plaintiff. In his affidavit Mr. Magagula has stated that both Defendants were his clients and the cheques

allegedly paid in settlement of this debt were actually paid as fees for work done for the Defendants in respect of two separate matters.

[10] Cheque no. 569 was paid by the 2nd Defendant as a deposit in a criminal matter currently pending in the Manzini Magistrates Court. Mr. Magagula further attached a receipt made out by his offices in favour of the 2nd Defendant for cheque no. 569 for E1000.00. The receipt clearly states that the amount is a deposit for a new file.

[11] Cheque no. 1012 was paid on behalf of the 1st Defendant in respect of Deputy Sheriffs' fees in a matter in which the 1st Defendant was the Plaintiff. The receipt clearly states all this information.

[12] Cheque no. 1218 was surreptitiously left at Mr. Magagula's offices without it being paid to accounts as is the norm. As a result the cheque was never receipted and banked. Mr. Magagula further denies that any instructions were given to him with regard to accepting instalments for this matter.

[13] Mr. Magagula further states that the cheques dated 30th July 2009 and 26th June 2009 were left by the 1st

Defendant's employees at his reception after summons had been issued against the Defendants in the present matter.

[14] Mr. Magagula is a senior practitioner of this Court and has no reason to mislead this Court. I believe him and fully accept the contents of his affidavit.

[15] I hold that the signature on the bounced cheque no. 749 for E7960.00 dated 15th February 2007 belongs to the 2nd Defendant and the 2nd Defendant's denial thereof is in total bad faith and abuse of this Court particularly because the 2nd Defendant agrees in the same affidavit that he was owing the Plaintiff and had made arrangements to settle the same amount with the Plaintiff's first lawyers. I should ideally punish the Defendants by ordering that they pay costs on a punitive scale but shall instead order interest to be calculated from the date of the cheque i.e. 15th February 2007.

[16] In the event provisional sentence is hereby granted for the payment of the sum of E7960.00; interest thereon at 9% from the 15 February 2007; costs on the ordinary scale.

Q.M. MABUZA
JUDGE OF THE HIGH COURT OF SWAZILAND