

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 88/2017

In the matter between

**SWAZI ROOF MASTERS (PTY) LTD
PLAINTIFF**

AND

**KS DISTRIBUTORS (PTY) LTD TRADING
AS BUILD PLUS HARDWARE
DEFENDANT**

Neutral citation: *Swazi Roof Masters v KS Distributors (Pty) Ltd. Trading as Build Plus Hardware (88/2017) [2017] SZHC 268 (12 December 2017)*

CORAM MASEKO J

FOR PLAINTIFF: MR DUBE

FOR DEFENDANT: MR B MAGAGULA

DATE HEARD: 15 September 2017

DATE DELIVERED: 12 December 2017

[1] *Civil Procedure – Provisional Sentence Summons – Whether Provisional Sentence can be granted as a result of Defendant’s dishonoured cheque where the Defendant has also obtained judgment against Plaintiff’s dishonoured cheque – Plaintiff’s debt to Defendant of high amount than Defendant’s – The existence of long standing business relationship.*

Held: Provisional Sentence refused.

INTRODUCTION

[1] On the 25th January 2017 the Plaintiff issued a Provisional Sentence Summons in terms of Rule 8 (1) against the Defendant wherein it claims:-

- (a) Payment of the sum of E89 189 90 (Emalangenis: Eighty Nine Thousand One Hundred and Eighty Nine, Ninety Cents) arising out of a cheque dated the 7th November 2016 drawn by Standard Bank Swaziland Limited, Mbabane Branch, which cheque was deposited in favour of the Plaintiff on 12th December 2016, at First National bank Swaziland Limited, Matsapha Branch, whereupon it was dishonoured and/or it returned unpaid by Defendant's bankers, with words "REFER TO DRAWER" marked across its face; (copy of cheque annexed hereto marked "A")
- (b) Interest thereon at the rate of 9% per annum calculated from the date of service of summons to date of final payment.
- (c) Costs of suit.
- (d) Further and/or alternative relief.

[2] It is common cause that on the 9th February 2017 the Defendant filed an affidavit wherein it denied liability and further raised a point in *limine* that the Provisional Sentence Summons is irregular in that it does not comply with rule 8 (4). At the hearing of the matter Mr

Magagula for the Defendant correctly in my view abandoned the point in *limine*.

CAUSE OF ACTION

- [3] The Plaintiff's cause of action is premised upon a dishonoured cheque which was drawn by the Defendant in favour of the Plaintiff on the 7th November 2016. The cheque was eventually deposited by the Plaintiff on the 8th December 2017 and on the 10th November 2016 the drawee bank endorsed it with the words "REFER TO DRAWER" and thus the said amount of E89 189.90 was not paid to the Plaintiff.
- [4] The Summons was served on one Vernon Sigwane at the Defendant's place of business herein described in the Deputy Sheriff's Return of Service as PLOT 237. 1st STREET, MATSAPHA, within the District of Manzini.
- [5] The summons state further that if the Defendant denies liability for same, it shall not later than 12:00 noon on the 16th February 2017 file an affidavit with the Registrar of this Honourable Court and serve a copy thereof on the Plaintiff's attorney which affidavit shall set forth the grounds of its defence to the said claim and in particular state whether it admits or denies the signature or authority of its agent.

AFFIDAVIT DENYING LIABILITY IN TERMS OF RULE 8 SUB-RULE 5

[6] On the 9th February 2017, the Defendant through its Attorneys did file with the Registrar the affidavit denying liability in terms of RULE 8 (5) and also served a copy of the same on Plaintiff's attorneys. The Defendant's affidavit is deposed to by Mr. Keith Sigwane in his capacity as Director and sole shareholder of the Defendant. The Defendant denies liability to the Plaintiff's claim and on paragraph 4 of the affidavit, he states as follows:

4.1.1 On the 16th March 2011, the Plaintiff and the Defendant entered into written agreement of sale. The terms of the said agreement of sale were *inter alia*;

4.1.1.1 The Defendant could sell treated timber and other material to the Plaintiff.

4.1.1.2 The sales would be on credit and be payable after thirty days of furnish of the invoice.

4.1.1.3 It was in the terms and conditions of the sale that, sales and credit will commence after the approval of the Plaintiff's credit application, which would be signed by authorised representatives of both parties.

The said agreement is annexed to the Defendant's affidavit marked Annexure "BP1"

[7] The Defendant continues to state that subsequent to the signing of Annexure BP1 by the parties, the Plaintiff duly filled in the

application for credit facility with the Defendant and same was duly approved accordingly.

- [8] The Defendant continues to state that (at paragraph 6) pursuant to the credit agreement entered into between the parties. Defendant sold and delivered on credit to the Plaintiff roofing timber during the period August 2012 to November 2012.
- [9] The material terms and conditions of the credit agreement were inter alia that - Plaintiff would make payments within 30 days of the date of issue of the invoice and that should any amount not be paid on due date, then the whole amount in respect of all purchases by the Defendant (Plaintiff in this matter) will become due and/or payable irrespective of the date when the goods were purchased.
- [10] At paragraph 7.4 of the Defendant's affidavit he states further that Plaintiff in the current proceedings breached the terms and conditions of the credit agreement in that it failed to pay the outstanding amounts due as per the statements timeously, and/or at all. To that extent that as at 21st November 2012, there was an outstanding amount owing of E1 243 808.88. A copy of the outstanding statement as at 21st November 2012 is annexed hereto marked "BP3". As a result of this breach, the current Defendant was forced to institute a legal process against the Plaintiff to recover

the debt and this was done in November 2012 under High Court Civil Case No. 1934/2012.

[11] At paragraph 7.5 Defendant states that the parties eventually agreed to settle matter out of court, where the Plaintiff paid a portion of the outstanding amount, however the issue of interest which was due and payable in terms of clause 3.6 of the credit agreement was never settled, that outstanding amount being E1 243 808 88 and the accumulated interest of 2.5% per month amounting to E1 554 761.00.

[12] Defendant further states that the Plaintiff owe an amount of E300 000 00 for a dishonoured cheque issued by the Plaintiff to the Defendant on the 5th August 2012 where upon presentation for payment it was returned by the First National Bank Swaziland on the 10th November 2012 marked REFER TO DRAWER, and ultimately resulted to the institution of the legal proceedings under Case No. 1934/2012.

[13] Defendant further states that sometimes in 2016 it engaged the Plaintiff to do some roofing work in Piggs Peak. Defendant alleges mistake in the issuance of the cheque of E89 189 90 to the Plaintiff which was eventually dishonoured.

[14] Defendant states further that he entered into verbal agreement with Mr. Wynand Pieters, the Plaintiff's Director that he (Wynand) would not bank the cheque since whatever amount that was due to the Plaintiff would be deducted from the amount that was due to the Defendant from the Plaintiff in the proceedings under Case No. 1934/2012. Defendant states further Mr. Wynand agreed to this agreement.

[15] The Defendant concludes by stating that Plaintiff is not entitled to provisional sentence and that the claim in the Provisional Sentence Summons be dismissed with costs.

[16] Plaintiff filed a Replying Affidavit deposed to by Mr. Wynand Pieters and two Confirmatory Affidavits deposed to by Karyn Brown, Secretary to the Plaintiff and Mr. Justin Bisset employed by the Plaintiff as an Engineer.

[17] In this case the cheque was drawn in favour of the Plaintiff on the 7th November 2016 and was only presented for payment at First National Bank Matsapha on the 12th December 2016. In the Replying Affidavit Plaintiff states that at Paragraph 8.7 that Defendant issued a post-dated cheque which when presented to the bank on the 12th December 2016, exactly one (1) month and five (5) days after it was issued, it was marked REFER TO DRAWER.

[18] This statement is not true because Plaintiff himself in paragraphs 8.2, 8.4 insists that the cheque was issued by Defendant's Mr. Sigwane on the 7th November 2016, this is also confirmed by Karyn Brown and Justine Bisset who both claim to have been present when Sigwane signed and issued the cheque so how could the cheque be postdated if it was issued on the 7th November 2017. This contradiction by the Plaintiff creates a serious dispute of fact, just like the denial of indebtedness to the Defendant by the Plaintiff as outlined in paragraphs 7.1 and 7.2 of the Replying Affidavit. These contentious issues can only be resolved through oral evidence in trial. These are triable issues and not conducive to be dealt with in Provisional Sentence Proceedings.

Mr. Wynand Pieters further states that he confronted Defendant's Director who promised that payment would be made when funds became available but it was not to be.

[19] It took the Plaintiff one (1) month and thirteen (13) days to issue the Provisional Sentence Summons against the Defendant on the 25th January 2017 and same was served on the 26th January 2017 as already stated above.

[20] As stated above the Plaintiff states as follows:

'- *Paragraph 7.1. Save to admit having engaged the Defendant on previous credit sale agreement, the rest of the contents of these paragraphs are vehemently denied as specifically traversed. The Defendant is put to strict proof thereof.*

Paragraph 7.2. Plaintiff avers that it cleared all its previous debts with the Defendant, hence it is no longer indebted to the Defendant in whatsoever'.

[21] I observe that the Plaintiff and Defendant extended to each other what I would call reciprocal business indulgencies in dealing with their indebtedness to and with each other. This therefore suggests and points to the only reasonable conclusion that there is a bigger picture out there that cannot be resolved without leading oral evidence in a trial.

[22] Plaintiff states further that on the 7th November 2016 the Defendant ordered for a quotation of roofing materials. This was quoted at E97 073 76 however, due to negotiations between the parties the amount was then discounted to E89 189 90 which resulted in the cheque of E89 189 90 being issued by the Defendant which was later dishonoured by the bank and marked on its face "REFER TO DRAWER".

CASE NO. 1934/2012 - COUNTERCLAIM

[23] On the 5th August 2012 Swazi Roof Masters issued a cheque of E300 000 00 (Emalangeneni Three Hundred Thousand) in favour of KS Distributors. On the 10th November 2012 the said cheque was presented for payment at First National Bank Swaziland Limited

where it was dishonoured and was returned marked REFER TO DRAWER.

[24] On the 21st November 2012 KS Distributors, Defendant in this matter, issued a Provisional Sentence Summons against Swazi Roof Masters, the Plaintiff in this matter.

[25] I observe that the said Provisional Sentence Summons was served personally on Mr. Wynand Pieters on the 15th October 2012, and on the 3rd December 2012 a Notice of Intention to Defend the action was filed.

[26] The Provisional Sentence Summons had clearly stated that in the event Swazi Roof Masters fail to pay the amount claimed it was to appear before this Honourable Court personally or by Counsel at Mbabane on Friday the 7th December 2012 at 09:30am or soon thereafter as the matter may be heard to admit or deny liability for the said claim.

[27] And that if it denies liability for same to file an affidavit with the Registrar of this Honourable Court not later than noon on the 28th November and also serve same on Plaintiff's attorneys. I must point out that no affidavit denying liability was ever filed by Swazi Roof Masters.

[28] This matter appeared before this Honourable Court on the 7th December 2012 (as per the date in the summons for admitting or denying liability) and it was removed from the roll since the parties were negotiating a settlement.

[29] This matter then appeared before this Honourable Court on the 10th February 2017, four (4) years after its last court appearance (on the 7th December 2012), wherein an order for provisional sentence in the amount of E300 000 00 was granted as prayed for in the Summons.

[30] I must point out that when this judgment in Case No. 1934/2012 was granted on the 10th February 2017 as stated above, the Provisional Sentence Summons in this matter (Case No. 88/2017) had already been served on the current Defendant i.e. on the 26th January 2017.

EXISTENCE OF A COUNTER CLAIM

[31] There is no doubt that there is an existing counter claim by the Defendant against the plaintiff.

[32] I observe that the counter claim is now in the form of a judgment debt against the Plaintiff under Case No. 1934/2012 and is of a

larger amount being E300 000 00 as opposed to the claim of E89 189 90 in this matter.

[33] I also observe that there is a long-standing business relationship between the Plaintiff and the Defendant. I am in agreement with Mr. Magagula that the long-standing business relationship often let to the parties negotiating payment terms for the business transactions that they engaged with each other for the following reasons:

CASE NO. 1934/2012

- (i) It took four (4) years for the Defendant (in this matter) to eventually obtain judgment in the staggering amount of E300 000 00. No business can withstand being owed such a huge amount for such a long period unless of course the parties indulge each other in their business dealings.
- (ii) The cheque was issued on the 5th August 2012 and was only presented to the First National Bank for payment only on the 8th November 2012 and was duly processed and eventually marked “REFER TO DRAWER” ON THE 10TH November 2012. This factor also indicates the business relationship between the parties, why would a cheque issued on the 5th August 2012 be presented to the bank for payment on the 8th November 2012.

[34] Mr. Dube for the Plaintiff argued strongly that this was a simple transaction of a dishonoured cheque resulting in the issue of the Provisional Sentence Summons. He argued further that the Defendant never denied the authenticity of the cheque, in particular that Defendant's Director Mr. Sigwane did not deny his signature on the cheque and therefore urged this court to grant Provisional Sentence. He argued further that Defendant's defence of the counter claim of E300 000 00 and the further counter claim of the total amount owing being E1 243 808 99 should not be mixed with the Plaintiff's claim as this was separate and distinct from these counter claims raised by the Defendant.

[35] I do not agree with this argument by Mr. Dube for the following reasons:

- (i) It has not been disputed by the Plaintiff that the parties entered into an Agreement of Sale on the 16th March 2011 annexed to Defendant's Affidavit Denying Liability and marked as Annexure "BP1".
- (ii) It has not been disputed by the Plaintiff that the Plaintiff applied for a credit facility which was signed by the parties on the 13th March 2012 also annexed to the Defendant's Affidavit Denying Liability and marked Annexure "BP2" and in fact Annexed to "BP2" are terms and conditions of the agreement respectively.

- (iii) It has not been disputed by Plaintiff that the clause 3.6 Annexure "BP2" impose 2.5% interest levy on all amounts unpaid at the due date, and that this interest rate was calculated into the amount of E1 243 809.88 which is being claimed as being owed by the Plaintiff to the Defendant in terms of the Statement of Account annexed to Defendant's Affidavit Denying Liability and marked as Annexure "BP3".
- (iv) It has also not been disputed that the dishonoured cheque of E300 000 00 resulting in the Provisional Sentence having been granted against the Plaintiff was a part payment of the outstanding E1 243 808 88.

[36] I must state that the issue for prime consideration is whether in the circumstances of this case, can Provisional Sentence be granted. The merits in *casu* are such that it would not be in the best interest of justice to grant Provisional Sentence because of the defence of counter claim which is for a bigger amount (E300 000 00) than the amount of E89 189 90 claimed by the Plaintiff.

[37] According to the Herbstein and Van Winsen THE CIVIL PRACTICE OF THE HIGH COURT OF SOUTH AFRICA 5TH EDITION VOLUME II AT PAGE 1313 the authors had to say:-

'Provisional Sentence is a mode of procedure provided for in the rules of court, but it existed even in Roman Dutch law, --- The essence of the procedure then and now is that it provides a creditor

who is armed with sufficient documentary proof (liquid document) with a speedy remedy for the recovery of money due without his having to resort to the more expensive, cumbersome and often dilatory machinery of an illiquid action. The procedural method of Provisional Sentence is no magic wand to be used to disarm prospective defendants or dispel all opposition, but is a well recognised, long standing and often used mode of obtaining speedy relief where the plaintiff is armed with a liquid document. The purpose of Provisional Sentence proceedings is thus to enable the plaintiff to obtain an enforceable Provisional Judgment speedily without having to wait for the final determination of the dispute between the parties.'

[38] At page 1315 the authors state as follows:

'A liquid document may be defined as a document in which the debtor acknowledges, over his signature or that of a duly authorised agent, or is in law regarded as having acknowledged without his signature being actually affixed to the document. Examples of documents to which the debtor or his agent has affixed a signature are cheques, promissory notes, mortgage bonds, acknowledgment of debt and deeds of sale.'

[39] In *casu*, the Defendant issued a cheque in favour of the Plaintiff and same was marked "refer to drawer" by the bank upon presentation for payment. The cheque is a liquid document. The cheque was signed by the director of KS Distributors (Pty) Ltd Mr. Keith Sigwane on the 7th November 2016. It is a clear and undisputable indebtedness by KS Distributors to Swazi Roof Masters. The cheque clearly meets the criteria of a liquid document. However, I must point out that there is absolutely no doubt of the existence of the

long standing business relationship between the Plaintiff and Defendant as clearly proved by the Agreement Annexure "BP1"

[40] As observed above, the Agreement alleges that the Plaintiff is indebted to the Defendant in amounts far larger than the E89 189 90 owed by the Plaintiff emanating from the dishonoured cheque. It is the existence of these counterclaims by the Defendant that frustrates the Provisional Sentence route for the Plaintiff.

[41] It becomes clear therefore that these issues cannot be resolved through the Provisional Sentence route, rather these disputes as regards each party's indebtedness to the other becomes a triable fact or issue capable of being resolved through a full blown trial where *viva voce* evidence shall be led and all the other disputed issues be ventilated and addressed through the action proceedings.

[43] The fact that there is a dishonoured cheque does not necessarily mean that Provisional Sentence shall be granted if the Defendant is able to raise a counter claim. In *casu* there is the Provisional Sentence Judgment of E300 000 00 and the documented allegations concerning the E1 243 808 88 as per the Annexures BP1, BP2 and BP3.

[44] It therefore becomes very difficult for me to ignore these counter claims and treat this transaction as separate and distinct from the

bigger transactions as clearly shown and demonstrated in the business history of the parties by the Agreement Annexure “BP1”.

[45] The counter claims in the amount of E300 000 00 and the E1 243 808.88 are special circumstances justifying this court’s refusal to grant Provisional Sentence.

[46] At page 1397 Hebstein and Van Winsen states as follows:

“The special circumstances that have been recognised by our courts arise when the probabilities of success favour neither the Plaintiff nor the Defendant and the Provisional Sentence claim is part of a larger transaction which is in dispute between the parties ---”

[47] At page 1398 the Learned Author states as follows:

‘In MAO-CHEIA v NETO 1981 (3) SA 829 the Court rejected the contention that it had such a discretion only where the validity of the document sued upon was in dispute, and expressed the view that where the liquid document is part of a larger transaction which is in dispute between the parties, and where the probabilities in the principal case favour the defendant or they are approximately evenly balanced, provisional sentence may be either refused or postponed pending the determination of the principal case.

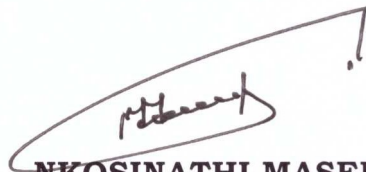
The same principle apply where the Defendant raises a counterclaim as a defence. If the probabilities in relation to the proof of the counterclaim are evenly balanced, the court has a judicial discretion to refuse provisional sentence.’

[48] The existence of the Provisional Sentence Order or Judgment in the amount of E300 000-00 against the Plaintiff together with the other

illiquid counterclaim makes it very difficult for this court to grant the Provisional Sentence.

[49] Consequently I make the following order:-

1. Provisional sentence is hereby refused.
2. The Defendant is hereby directed to file a plea within ten (10) days from date of this order.
3. Thereafter the normal Rules of Court as regards pleadings and further conduct of trial actions to apply.
4. No order as to costs.



**NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT**