

IN THE HIGH COURT OF SWAZILAND

a Barclays

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Barclays Bank of Swaziland Limited

and

Ace Milling (Pty) Ltd.

Moses Motsa

Case no 1447/97

Coram

Sapire ACJ

Judgment

(21/8/97)

The Plaintiff, has sued the defendants for payment of and amount of E195 806,31 interest and costs.

The claim arises out of overdraft facilities which the plaintiff afforded 1st defendant, and in respect of which the second defendant has bound himself as surety and co principal debtor. Plaintiff alleges that the amount claimed represents the balance owing and was payable on demand.

The Defendants have given notice of intention to defend The action instituted against them.

The plaintiff in turn has applied for summary judgment, and supported the application with the usual affidavit required by the rules verifying the cause of action. The defendants have as contemplated in the rule filed affidavits in support of their opposition to the application for summary judgement. The application was argued before me and this is my judgement thereon.

The defence alleged by the 1st defendant, the principal debtor, is that the plaintiff agreed to convert the overdraft into a fixed loan repayable in monthly instalments of a fixed amount payable over forty eight months The first Defendant alleges that it has made payment of the instalments in terms of its undertaking and that in fact payments have been made taking reducing the loan at a more speedy rate than was agreed. As at December 1996 it is alleged in the affidavit, the defendant had repaid E141 000, whereas instalments amounting E90 789 had by that date fallen due.

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In support of these allegations the 1st defendant has attached to its affidavit a copy of a letter addressed by the plaintiff to the 1st defendant, in which the plaintiff offered to convert the then balance owing on the overdraft facilities into a loan on terms and conditions stipulated in the letter.

The letter does confirm the basis of the defence, in that it is clearly an offer to convert the overdraft facility into a loan but the plaintiff contends that it has not been alleged that this offer was accepted, and in particular points out that the mode of acceptance indicated in the letter was complied with. The

plaintiff states that the 1st defendant has not signified its acceptance by returning a signed copy of the letter to the plaintiff.

I am not satisfied that the 1st defendant's defence can be dismissed on so technical a ground. There is no indication that the indicated or preferred mode of acceptance was to be the only way in which the offer could ripen into a binding contract. On the other hand there are indications that the offer was indeed accepted and that both plaintiff and defendant conducted themselves on the basis of the overdraft facility having been converted into a fixed loan. One of the terms on which the loan was granted was that certain individuals including the second defendant would guarantee the 1st defendant's obligations under the loan. The available evidence at this stage of the proceedings suggests that such condition was complied with, and the plaintiff's position was strengthened by the surety undertakings of the named individuals. I cannot at this stage therefore come to the conclusion that no agreement of loan was concluded by the parties, and this application must be decided on the basis that the first defendant's indebtedness arises from a loan and not the overdraft facilities as alleged in the summons.

There is some ambiguity in the letter as to when the loan was to be repayable. On the one hand it is specifically stated that the loan is repayable on demand, yet provision is made for the liquidation of the indebtedness in instalments.

In view of these uncertainties but more particularly because the cause of action set out in the summons, may have been discharged by the substitution of the agreement of loan, it would not be proper to grant summary judgment at this stage.

The defendants are accordingly given leave to defend.

As this defence was raised only at a late stage, costs will be costs in the cause

S W Sapire

ACTING CHIEF JUSTICE