

IN THE HIGH COURT OF SWAZILAND

Civ. Trial No. 1585/96

In the matter between:

Dorbyl Vehicle Trading & Finance Co.                      Plaintiff

vs

Isaac Msongelwa Zwane                                      Defendant

Coram                                                              S.W. Sapire, ACJ

For Plaintiff                                                      Mr. Flynn

For Defendant                                                      Mr. Nxumalo

Judgment

(14/03/97)

This was an application for summary judgment. The cause of action arises out of two agreements in terms of which the Plaintiff provided the defendant with two buses. The agreements were cancelled because the defendant did not keep up with payments in terms thereof and in terms of a settlement which had been agreed thereto and the present action is a claim for damages arising out of the failure of the two agreements . I have considered the matter with some concern and I am not satisfied that this is a proper matter for the application of the summary judgment rules.

It is essentially a claim for damages. A there are a number of issues to do with the proof of damages which arise out of the claim. Although the method of calculation of damages is provided for in the agreements, the calculation has still to be made.

a: DORBYL

2

The evidence of the so called sworn appraiser is not on oath Questions as to whether or not the provisions of the agreement amount to a penalty or not must be considered. If a penalty, what law is to be applied? If the appropriate law is that of the Republic what is such law and how is it to be applied in the present case.?

It is true that the Defendant has limited itself in the opposing affidavit to an answer or defence which is not really an answer to Plaintiff's claim but it does seem that some of the questions might be raised by what is said in the affidavit. The Defendant is in essence questioning the proof of damages.

In the result the defendant will be granted leave to defend and the costs to this application will be costs in the cause.

I also order that the leave to defend be on the following terms: that the defendant within 10 days files a plea in which all its defences to the claim for damages are set forth. The matter may be set down for hearing as a trial on a date to be arranged with the Registrar.

S W Sapire

ACTING CHIEF JUSTICE