

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1419/96

In the matter between

SWAZILAND CONSULTING ENGINEERING

PLAINTIFF

Vs

SAXON (PTY) LTD

DEFENDANT

Coram

S.B. MAPHALALA - J

For Plaintiff

MR. FLYNN (Instructed

by Millin & Currie)

For Defendant

MR. KADES SC

(Instructed by Bheki G.

Simelane)

RULING

Maphalala J:

The matter before me this morning is to determine who has the right to begin leading evidence in this case. Mr. Flynn is of the view that at this stage of the trial it is the defendant who bears the onus to begin. In fortifying the view he took the court through number of paragraphs in the Pleading, viz, paragraph 3 and 4 of the particulars of claim at page 3 of the Book of Pleadings. Further that paragraph 5 is deemed to be admitted. The thrust of his arguments is that the plaintiff is in the dark as to what the defendant's defence is in this case. The defendant ought to lead evidence as the contract is not denied and the remuneration has not been denied. The defendant must set out the content of what that non performance is and lead evidence. He referred me to the writings of Hoffman and Zeffert "The South African Law of Evidence (4th ED) at page 582.

On the other hand Mr. Kades is of the view that this is not so and that Mr. Flynn seem to be perverting the law in that authorities are clear that the onus is on the plaintiff to begin. To buttress his view he referred me to Precedents of Pleadings at page 190, 191 and 192. In sum the proposition advanced by Mr. Kades is that the plaintiff is to begin to lead evidence. As the arguments are still fresh in our minds I am not going to repeat them for the sake of time.

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I have looked at the issues before me carefully although I did not get enough time to read some of the authorities cited. It appears to me that Mr. Flynn is correct that there are two distinct concepts that we are dealing with at this stage. The first being the overall onus which is normally on the plaintiff and the onus to begin where a litigant has made an averment which is not clear to the other side the onus is on him to lead evidence.

In the case of Pillay vs Krishna and another (reported in the case book on evidence (University of South Africa) (unfortunately the title of the book is in Afrikaans and the full citation is not included as there is a

page missing in the book). It was held as follows:

"When a defendant in his plea sets up a plea of payment of money, the onus is upon him, and if he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgement must be given for the plaintiff.

In the case in casu the defendant does not set out the content of what the content of the non performance is. On the basis of the dicta in Pillay (supra) and the exposition by Hoffman and Zeffert cited by Mr. Flynn it is my considered view that the defendant is to begin.

S.B. MAPHALALA

JUDGE