



SWAZILAND HIGH COURT

BRL Leasing

(A Division of Barlows Central Finance Corporation (Pty) Ltd)

Plaintiff

ZIETSMAN, David Edwin

1st Defendant

ZIETSMAN, Elaine Myrtle

2nd Defendant

Civ. Trial No. 777/2000

Coram

SAPIRE, CJ

For Plaintiff

MR. P. FLYNN

For Defendants

MR. B. SIMELANE

JUDGMENT

9 March 2001

This is an application for summary judgment. The plaintiff initiated the action by combined summons and alleged in its particulars of claim that :

- a. On or about the dates set out DZ Civils (Pty) Ltd entered into 3 written instalments sale agreements for the purchase of certain equipment. The terms and conditions of each of the agreements is fully described and it is stated that the company DZ Civils (Pty) Ltd is in arrears in respect of all three agreements in the amount of E421 121.18.
- b. During 1996 and at Isando, the defendants bound themselves jointly and severally as sureties and co-principal debtors in favour of the plaintiff in solidum with the company for the due and punctual payment of all amounts of whatever nature

and/or performance of any obligation which may be owed by the company in terms of or arising out of or incidental to the written instalment sale agreements. A copy of the suretyship is attached.

The deed of suretyship describes the debtor as “DZ Civils (Pty) Ltd”. The instalment sale agreements referred to the purchaser as “DZ Civils (Pty) Ltd”.

The plaintiff is claiming payment of the outstanding amount as certified. The certification appears to be in accordance with the provisions of the agreement, and thus prima facie establish the indebtedness.

The defendants’ reply to the application for summary judgment is (in addition to raising other objections and defences, on the merits of which it would be unnecessary and unwise to comment at this stage) to draw attention to the name of the principal debtor and to state that a company of that name does not exist. There is however a company known as DZ Civils and Buildings (Pty) Ltd.

There is an anomaly but one not necessarily fatal to the merits of Plaintiff’s case. If indeed there is no company registered as “DZ Civils (Pty) Ltd” and if the plaintiff is unable to establish facts on which it could claim rectification of the documents, and to demonstrate that in fact it was DZ Civils & Buildings (Pty) Ltd which was the purchaser and which was the principle debtor, there would be a defence to the claim. There is much to suggest that there has been a misnomer and that the parties intended to refer in both the contract documents and the suretyship to D Z Civils and Builddigs (Pty)Ltd.

These matters cannot be decided on affidavit and the dispute is certainly not one for decision in summary judgment proceedings. If such a defence is raised the plaintiff may have to seek rectification of the contract documents and. of the suretyship.

In these circumstances whatever merit there may or may not be in other defences it would be incorrect to grant summary judgment. I accordingly grant the defendants leave to defend.

As the amount claimed is large and case is one of considerable commercial importance, I order that the defendants file their plea within 7 days of today’s date and that the plaintiff its

replication, if any, within 7 days thereafter. The parties may thereafter approach me through the Registrar to allocate a date for trial and for directions as to the pre-trial procedures to be adopted.

The costs of this application will be costs in the cause

SAPIRE, CJ