

THE HIGH COURT OF SWAZILAND

BUILDERS MERCHANTS INVESTMENTS (PTY) LTD

Plaintiff

And

INTERNATIONAL COMMODITY PROCUREMENT (PTY) Ltd t/a ICP SUPPLIERS

1st Defendant

ENZIWE DUBE

2nd Respondent

VICTOR MASUKU

3rd Respondent

Civil Case No. 724/2005

Coram: S.B. MAPHALALA - J

For the Plaintiff: MR. MDLULI

For the Defendant: MR. G. MASUKU

JUDGMENT

(15th July 2005)

[1] Before court is an opposed application for summary judgment. During the period of November 2004 and December 2004, the Plaintiff agreed to arrange a credit facility in terms of which the Defendants would buy various building materials from the Plaintiff. The total amount of goods sold and delivered to the Defendants totalled an amount of E108, 412-53. In terms of the agreement, upon delivery of the building materials to either the 1st, 2nd, and 3rd Defendant, would countersign the invoices and/or delivery notes as acknowledgement of delivery thereof and the outstanding balance thereat. At times the 3rd Defendant would delegate his agent (1st Defendant's plumber to take goods).

[2] The 1st and 2nd Defendants have filed the affidavit resisting summary judgment of the 2nd Defendant who is the Manager of the 1st Defendant. In the said affidavit he avers, inter alia, at paragraphs 2.1 in fin 22 thereof that the two cheques referred to for E12, 000-00 and E18, 000-00 are not disputed and 1st Defendant tenders to settle them fully. The claimed amount of E66, 412-55 is strenuously disputed and in this regard he advances reasons in paragraph 2.2.1, 2.2.2, 2.2.3, 2.24, 2.2.5, 2.26, 2.27 and 2.2.8 thereof.

[3] The 3rd Defendant has also filed an affidavit resisting the application for summary judgment. The 3rd Defendant is working as a Sales and Marketing Manager of the 1st Defendant. In the said affidavit he confirms the averments contained in the 2nd Defendant's affidavit where reference is made to him and the 1st Defendant. Further, at paragraph 3.2 thereof that the signature appearing at the bottom of annexure "H" is neither the 2nd Defendant's nor his and they do not have any person authorised to execute official documents on behalf of the

1st Defendant.

[4] In argument before me Mr. Mdluli for the Plaintiff filed very comprehensive Heads of Arguments for which I am most grateful. It appears to me that Plaintiff on the claim for E30, 000-00 (being cheques E12, 000-00 and E18, 000-00) would be entitled to summary judgment as Defendants admit liability in respect of this portion of the claim, in fact at paragraph 2.1 of the resisting affidavit it tenders to "settle them fully". On the other hand the remaining claim of E66, 412-55 is another kettle of fish altogether. It appears to me on reading the affidavits filed of record for and against the application that there are numerous dispute of facts which can only be resolved on trial. The most notorious is what appears at paragraph 2.2.8 of the 2^{n<i>i} Defendant's opposing affidavit where he states the following:

"The person who signed annexure "F" is unknown to me as I only authorised the 3rd Defendant aside from myself to execute invoices on behalf of 1st Defendant. Hence such a signature is a fraud. Further, 1st Defendant does not have anyone answering to such signature under its employ".

[5] Another glaring dispute of fact is found at paragraph 3.2 of the 3rd Defendant's affidavit where he avers the following:

"Further, on annexure "H" the signature appearing at the bottom thereof is neither the 2nd Defendants nor mine as we do not have any other person authorised to execute official documents on behalf of the 1st Defendant".

[6] A further dispute of fact centres around a letter marked annexure "CO" to the Defendants opposing affidavits. Defendant avers that this letter was received by the Plaintiff and the latter has denied emphatically that it ever received the said letter. This letter is crucial in determining whether Defendant questioned certain amounts of the claim prior to the application for summary judgment. Plaintiff contends that Defendant never questioned any

amounts in the claim.

[7] According to the authors Herbstein and Von Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th Edition at page 434 the procedure [summary judgment] provided by the rules has always been regarded as one with a limited objective - to enable a Plaintiff with a clear case to obtain swift enforcement of his claim against a Defendant who has no real defence to that claim. The courts have in innumerable decisions stressed the fact that the remedy provided by the rule is an extraordinary one which is "very stringent" in that it closes the door to the Defendant, and which will thus be accorded only to a Plaintiff who has, in effect, an unanswerable case, (see also the cases cited thereat).

[8] In the present case the application is replete with disputes of fact and it cannot be said that the Plaintiff has a clear case as mentioned by the learned authors Herbstein (*supra*).

[9] In the result, application for summary judgment is granted only in respect of the claim of E30, 000-00 which is admitted by the Defendants. In respect of the remaining claim of E66, 412-55 the application for summary judgment is refused with costs. The matter to proceed to trial in this respect.

S.B. MAPHALALA

JUDGE