



**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No: 259/16

In the matter between:

**J & E HARDWARE t/a MICA HARDWARE  
(PTY) LIMITED**

**: PLAINTIFF**

**and**

**M & Q SERVICES (PTY) LIMITED  
QHAWE NXUMALO  
LUNGILE NXUMALO**

**: 1<sup>ST</sup> DEFENDANT  
: 2<sup>ND</sup> DEFENDANT  
: 3<sup>RD</sup> DEFENDANT**

Neutral Citation : J & E Hardware t/a Mica Hardware (Pty) Ltd and M  
& Q Services (Pty) Limited & 2 Others (259/16)  
[2016] SZHC 203 (13 OCTOBER 2016)

Coram : MABUZA –J

Heard : 29 JULY 2016

Delivered : 13 OCTOBER 2016

## SUMMARY

**Application for Summary Judgment – Purported defence aborted in light of concessions – Summary judgment granted.**

## **JUDGMENT**

### **MABUZA -J**

[1] This is an application for summary judgment against the Defendants jointly and severally one paying the other to be absolved for an order in the following terms:

- (a) Payment of the sum of E124,961.00 (One hundred and twenty four thousand nine and sixty one Emalangeni) by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, jointly and severally the one paying the other to be absolved;
- (b) Interest thereon at the rate of 9% per annum a *tempore morae* against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants', jointly and severally the one paying the other to be absolved.
- (c) Cancellation of the Agreements between the parties.
- (d) Costs of suit at Attorney and own client scale, against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants', jointly and severally, the one paying the other to be absolved.
- (e) Collection commission against 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, jointly and severally, one paying the other to be absolved.

(f) Further and/or alternative relief.

[2] The application is opposed by the Defendants and to that end they have filed their affidavit resisting summary judgment.

[3] It would appear from the facts before me that during February 2014 at Nhlanguano, the Plaintiff and Defendants entered into a purchase agreement wherein the Respondents would purchase goods on credit and pay in full within thirty (30) days.

[4] The express and material terms of the agreement were *inter alia* that:

7.1 The Plaintiff shall supply and deliver goods to 1<sup>st</sup> Defendant from time to time, upon request by Defendants.

7.2 Payments shall be due and payable within thirty (30) days of date of issuing statements.

7.3 All overdue amounts shall be subject to a rate of 2.5% per month.

7.4 Upon failure to comply with conditions of payment, the Plaintiff is to cancel all sales and deliveries.

- [5] The Defendants renounced all benefits of legal exception which would be raised against their indebtedness in respects of the balance due.
- [6] The Defendants agreed that should there be litigation that is to be instituted to recover any , the Plaintiff shall be entitled to recover all costs disbursed by it to its Attorneys at Attorney and own client scale together with collection commission.
- [7] The purchase agreement is annexed to the summons. It is alleged by the Plaintiff that it on numerous occasions delivered goods to the Respondent on credit and at other occasions the 2<sup>nd</sup> Respondent would collect the goods from the Applicant's place of business.
- [8] During the period March 2014 to June 2014, the Applicant is alleged to have delivered goods to the Respondent to the value of E124,961-17 (One hundred and twenty four thousand nine hundred and sixty one Emalangi seven cents).

[9] The delivery of the said goods and the amount outstanding is verified in an affidavit in support of summary judgment which has been attested to by Salet Lopes who described herself as a director of Applicant's company.

[10] Ms. Lopes further stated that it was she who verily believed that the Defendants had no *bona fide* defence to the Plaintiff's claim and that they had filed a notice of intention to defend for the purposes of delay.

[11] The Defendants in their affidavit resisting summary judgment deposed to by the 2<sup>nd</sup> Defendant Qhawe Nxumalo and a director of the 1<sup>st</sup> Defendant raised the following defences:

- (a) It was denied that the Defendants were in breach of the agreement of purchase;
- (b) That they were not indebted to the Plaintiff in the sum of E124, 961.17 (One hundred and twenty four thousand nine hundred and sixty one Emalangeneni seventeen cents);
- (c) It was admitted that the Defendants were indebted to the Plaintiff in the sum of E60,395.97 (Sixty thousand three hundred and ninety five Emalangeneni ninety seven cents);
- (d) That an amount of E40,298.11 (Forty thousand two hundred and ninety eight Emalangeneni eleven cents) should have been credited to the 1<sup>st</sup> Defendant's account as there were no goods ordered or delivered on the 10<sup>th</sup> April 2014, 17<sup>th</sup>

April 2014, 26<sup>th</sup> April 2014, 5<sup>th</sup> May 2014 and 9<sup>th</sup> May 2014. That the Plaintiff has added amounts and or invoices which were never delivered to them.

(e) That there were no goods ordered or delivered purchased or taken for this amount.

[12] The Plaintiff filed a copy of the debtors transaction marked “MHS1”. The transaction thereon dated 29<sup>th</sup> May 2014 reflects a cheque from the Defendants which was referred to drawer for the amount of E40,298.11 (Forty thousand two hundred and ninety eight Emalangeneni eleven cents).

[13] At the time of the cheque payment the amount owing by the Defendants is the amount of E178,498.13 (One hundred and seventy eight thousand four hundred and ninety eight Emalangeneni thirteen cents). When the amount of E40,298.11 is added the new balance is E218,796.24 (Two hundred and eighteen thousand seven hundred and ninety six thousand and twenty four cents).

[14] It was argued on behalf of the Defendants that as no goods were purchased the cheque amount should not have been added to the outstanding balance.

[15] The Plaintiff on the other hand is adamant that the Defendants purchased goods and took them away and that the aforesaid cheque was payment for these goods. This was vigorously argued on behalf of the Plaintiff to be the case.

[16] A good bout of common sense dictates that there cannot be payment by cheque without goods being taken or purchased.

[17] During arguments Miss Ndlangamandla for the Defendants argued that the bounced cheque was misposted in exhibit “MSH1”. She argued that the amount on the cheque should have been entered into the credit column and then when the cheque bounced the entry should have been reversed. I agree but this is an accounting error. It does not however distract from the fact that the Defendants owe the amount of the cheque.

[18] In their heads of argument the Defendants have conceded that having seen the invoices in Annexure “MHS1” they admit that they ordered and received goods on the 10<sup>th</sup> April 2014, 17<sup>th</sup> April 2014, 26<sup>th</sup> April 2014 and 9<sup>th</sup> May 2014. Consequently this defence falls away. The amount of the admitted

invoices is E24,267.14 (Twenty four thousand two hundred and sixty seven Emalangeneni fourteen cents).

[19] The Defendants admitted that they owed the amount of E60,395.95 (Sixty thousand three hundred and ninety five Emalangeneni ninety five cents).

[20] In the event, it is without doubt that the Defendant's defence can no longer stand and is hereby dismissed.

[21] The Plaintiff is granted summary judgment as prayed for.

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Q.M. MABUZA  
JUDGE OF THE HIGH COURT

For the Plaintiff : Ms. S. Dlamini  
For the Defendants : Ms. N. Ndlangamandla