IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 53/2017

HELD AT MBABANE
In the matter between:

EKUHLAMKENI FARMERS ASSOCIATION **Appellant**

and

SIPHO DLAMINI **Respondent**

Neutral Citation: *Ekuhlamkeni Farmers Association vs Sipho Dlamini* (53/2017) [2021] *SZSC* 48 (12/05/2021)

Coram: **S.P. DLAMINI JA, J.M. CURRIE AJA AND M.J. MANZINI AJA.**

Heard: 04th March, 2021.

Delivered: 12th May,2021.

SUMMARY : *Claim based on agreement of lease by Respondent – Appellant claims lease terminated and payment made to date of cancellation – Respondent bore onus to prove its claim – Appellant bore onus to prove payment and cancellation of lease – Failed to prove payment and cancellation – Respondent's claim partly succeeds.*

JUDGMENT

CURRIE – AJA

INTRODUCTION

[1] In 2017 the Appellant noted an appeal against a judgment of the Court *a quo.* There have been various interlocutary applications instituted by the Appellant including an application for condonation of the late filing of Appellant's heads of argument, which application was dismissed and the matter for determination at this stage is the appeal. It is unfortunate and inconvenient that this Court must proceed without having the benefit of Appellant's heads of argument nor Bundle of Authorities.

[2] The Appellant/Defendant in the Court *a quo* is an Association duly registered in terms of the company laws of Eswatini which carries on a sugar cane growing business at kaNgomane, Lubombo region.

[3] The Respondent is an adult male and a member of the Appellant and a former assistant secretary of the Association between 2008 and 2010.

[4] In 2009 the parties entered into an oral agreement which was later reduced to writing and an agreement entitled "Acknowledgement of two rented Sails and three brick-makers was signed by the parties ("the Agreement").

[5] The Respondent/Plaintiff in the Court *a quo,* instituted proceedings against the Appellant, the Defendant in the Court *a quo* for, *inter alia,:*

(a) Payment of the sum of E 19500 in respect of 3000 bricks charged at E6.50 per brick produced by the brick laying machines leased to the Appellant;

(b) E 302 400 for the lease of two sails leased to the Appellant in terms of a lease agreement concluded by the then Chair, Mr. Malamlela

Mavimbela and Treasurer, Ms. Dinah Hlatshwayo of the Åppellant and the Respondent;

(c) Confirmation of the Plaintiff's unilateral termination of the lease agreement and return of his equipment.

[6] The Appellant/Defendant admitted the claim of the Respondent/Plaintiff but alleged that it had utilised the canvas sails for not more than 242 days calculated at E 70.00 per day and had paid the sum of E 17 435.45 to the Appellant and requested him to remove the canvas sails from its premises on the 14th July 2010 as it no longer required them. With regard to the three brick laying machines Appellant/Defendant alleged that it purchased its own bricklayers and disputed any lease agreement with the Respondent/Plaintiff.

[7] The Court *a quo* confirmed the termination of the lease agreement and ordered the Appellant to pay the Respondent the sum of E 321 900.00 together with interest thereon and costs of suit.

[8] The appellant then filed an appeal before this Court on 15th June 2017 on the following grounds:

1. **"The Court *a quo* erred in fact and in law in holding that the Appellant was indebted to the Respondent in the sum of E302, 400.00 (Three Hundred and Two Thousand Emalangeni Four Hundred Emalangeni) in respect of the sails.**

2. **The Court *a quo* erred in holding that Appellant was liable to pay the Respondent for the use of the "brick layers".**

    2.1. The Respondent failed to prove how many blocks were made using the block makers.

3. **The Court *a quo* erred in fact and law in rejecting the explanation given by the Appellant's witnesses that the Respondent was paid for the use of his canvas sails."**

[9] It is common cause that a certain Mr. Mavimbela as Chair and Ms. Hlatshwayo of the Appellant and the Respondent signed the Agreement which provided as follows:

"*We the executive committee of the above mentioned farmers association do acknowledge the renting of two sails and three brick – makers belonging to Mr Sipho Dlamini.*

This is with immediate effect which, in essence, is June 23, 2009.
The sales are for the purposes of covering building material, for the construction of our workers' residential compound, against the ever changing weather condition as well covering bags of fertilizers.

We further acknowledge that the agreement reached on the rate to be paid for each sail per day is E70.00 while the brick makers will charge E6.50 per brick.

Payment, as agreed, will be done on stages as may be claimed by the owner of the equipment or upon completion of the two block construction of our employees' residential compound.

In respect of the sail to be covering fertilizers, payment will be done on stages as may be claimed by the owner or at whatever time that

Ekuhlamkeni Farmers Association may feel it no-longer needed the services of the said equipment.

We pray that the two parties uphold to the agreement, breach of which may lead to legal action being instituted by the aggrieved party."

APPELLANT'S ARGUMENT

[10] **Canvas Sails**

The Appellant admits that it leased the canvas sails from the Respondent in terms of the Agreement but contends that the Respondent was paid the sum of E17 435-45 for the use of the sails. There was no convincing evidence whatsoever produced proving that Respondent had been paid in this unusual amount in that the sails were charged out at E70.00 per day and it is therefore not possible that the amount of E17 435.45 could be arrived at. The only evidence that had been produced was a bank statement showing a withdrawal but not the name of the recipient of the funds. Appellant contends that it came to an Agreement with the Respondent in July 2010 to pay him the sum of E17 435.45 in settlement in terms of the agreement but

there was no evidence as to how this amount was arrived at, nor to whom it was paid. Upon payment of the said amount Respondent was requested to remove said sails from the premises of the Appellant but failed to do so and therefore Appellant is not liable for the amount of E302 400 claimed in respect of the sails. Appellant contends that it did not use the canvas sails after that date as they were too expensive and they stored them as they did not have transport to return them to the Respondent. Appellant contends that the Respondent was the keeper of all the records and that when he left he took them with him and it was for this reason that sufficient evidence of the payment to the Respondent could not be produced.

[11] Appellant contends that the amount claimed of E302 400 was computed as follows:

> E70.00 per day for the lease of the sails from Respondent calculated from 23rd June 2009 to the 4th May 2015 being two thousand one hundred and seventy one (2 171) days. However Appellant is not liable for said amount as the lease was terminated by Appellant when it reached a settlement with Respondent, paid him the sum of E17

435.45 and requested him to remove the sails from the premises of the Appellant but failed to do so.

The Bricks

[12] It was admitted by the Appellant/Defendant in the Court *a quo* that the compound of the Appellant was constructed with bricks produced from the bricklayers belonging to the Respondent. The lease agreement provides that each brick would be charged out at E 6.50 but there was no evidence led in the Court *a quo* as to how many bricks were produced and utulised for the construction of the compound.

RESPONDENT'S ARGUMENT

[13] The Respondent's version is that it was never paid for the use of the sails at all. No proof was produced in the Court *a quo* that he had been paid the sum of E17 435.45 or any sum whatsoever. The bank statement had not been discovered, nor attached to any of the pleadings and it did not show who had been paid and for what. Even after the Respondent's letter of demand to the Appellant dated 4th May 2015, there was no response and no proof of payment was produced indicating that Appellant had been paid. Nor was there a response stating that Appellant had terminated the agreement.

[14] Respondent confirms that in evidence in the Court *a quo* the Appellant conceded that the compound was built using the Respondent's brick laying machines. It was put to the Appellant in evidence that 3000 bricks had been used but the Appellant, whilst admitting that the brick laying machines were used, did not confirm the amount of bricks produced.

[15] Respondent denies that there was ever an agreement to terminate the lease as alleged by the Appellant; there was no unilateral termination, nor meeting and no communication. Respondent terminated the lease agreement in its letter of demand dated 4th May 2015 wherein he claimed E 19500 for the bricks charged at E 6.50 per brick and E 302 400.00 in respect of rental of the two sails charged at E 70.00 per day each calculated from 23rd June 2009 to 4th May 2015. In the same letter Respondent demanded the return of three bricklayers and two canvas sails.

[16] It is a fundamental principle in civil litigation that the burden of proof lies with the party asserting an allegation of fact. A party seeking the assistance of the law must prove its claim. The

person seeking the legal remedy bears the burden or onus of proof. The standard of proof in civil litigation is the balance of probabilities. If a claimant satisfies the balance of probabilities for all of the facts that need to be proven to make out the cause of action, it will be successful in the proceedings.

APPLICATION OF THE LAW TO THE FACTS

[17] It is common cause that there was there was a written agreement of lease entered into on the 23 June 2009 including the terms thereof. There was no date of termination in the agreement. It was a material term of the agreement that the Appellant would pay for the use of the sails in stages as and when claimed by the owner or on termination of the agreement if the Appellant no longer required the equipment.

APPELLANT BORE THE ONUS

[18] Appellant contends that it had reached a settlement with the Respondent and paid him the sum of E17 435.45 in settlement of his claims and at the same time terminated the agreement of lease of the sails and bricklayers. The Appellant provides no written proof of such termination. The Agreement

entered into was first an oral agreement which was later reduced to writing. There is no written notice of termination of the Agreement by the Appellant. The Respondent denies that there was an Agreement to terminate together with any payment for the lease of equipment up until the alleged date of termination. The Appellant did not produce direct evidence of payment and it bore the onus to do so.

[19] It is also trite that the onus to prove valid payment rests on the debtor **(Pillay v Krishna 1946 AD 949 at 955).**

[20] In **Nedperm Bank Ltd v Lavarack & Others, Oliver, JA** stated:

> **"from these basic principles of law it follows logically, in my view, that where there are two obligations to be fulfilled by a debtor, he bears the onus of proving, not simply that a payment was made, but also proving the necessary consensus regarding which debt was paid."**

[21] This was confirmed by Viljoen AJ in **Italtile Products (Pty) Ltd V Touch of Class 1982 (1) SA 288 (0) AT 290 H, vi**. :

> **"Although I have myself also not found authority dealing with a case such as the present, where payment is admitted but there is a dispute regarding the debt for which it was intended, I have no doubt that the onus of proving, not only that payment was made, but that the debt in question was paid, rests upon the debtor. This is in accordance with the principle that it is the party making a positive averment who bears the onus of proof. Moreover, it seems to me that the very requirement that a debtor should prove payment of a debt, in itself necessitates proof that the debt in guestion has been paid and not simply that a payment has been made to creditor."**

[22] The Respondent instituted proceedings based on the Agreement. He bore the onus to prove that 3000 bricks had been made using his block machines but he did not and there was not sufficient evidence to prove how many bricks were produced.

[23] The Appellant bore the onus to prove cancellation of the Agreement and payment to the Respondent but failed to do so.

[24] I accordingly make the following order:

1. The Appeal is partly dismissed.

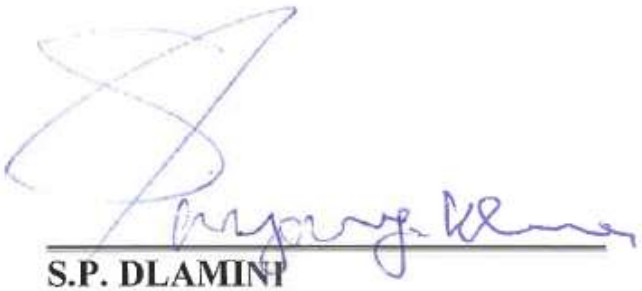
2. The issue of the bricks is referred back to the High Court for the hearing of oral evidence as to how many bricks were used utilizing the Respondent's brick making machines and the due amount.

3. The order of the Court *a quo* that the Appellant pay the Respondent the sum of E302, 400 .00 is confirmed together with interest thereon at 9% per annum *a tempore morae.*

4. Costs are awarded to the Respondent.

J. M. CURRIE
ACTING JUSTICE OF APPEAL

I agree



S.P. DLAMINI
JUSTICE OF APPEAL

I agree

M.J. MANZINI
ACTING JUSTICE OF APPEAL

For the Appellants: MR. Z. MAGAGULA

For the Respondent: MR. M. V. NXUMALO