

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 346/2004

In the matter between:

MAJAHONKE SIMELANE T/A MS TRANSPORT

PLAINTIFF

and

S & B BUILDING (PTY) LIMITED

DEFENDANT

CORAM
FOR THE PLAINTIFF FOR
THE DEFENDANT
Q.M. MABUZA^J

MISS DA SILVA
MR. MOTSA OF ROBINSON &
BERTRAM

JUDGMENT 2/04/09

[1] The Plaintiff has issued summons against the Defendant
for:

(1) (2) Payment of the sum of E54,610.00

Interest thereon at the rate of 9% p.a. a

tempora morae.

(3) Costs of suit

(4) Any further and or alternative relief.

[2] The Defendant denies that it is indebted to the Plaintiff. The Defendant pleads that the parties agreed to a set off of the sum of E51,880.00 Defendant further pleads that some payments were made and others were not made because there was no proof of delivery. The Plaintiff denies that it entered into any agreement with the Defendant or that he was paid.

[3] In proof of its claim the Plaintiff called one witness. Majahonke Simelane, (Majahonke) the Plaintiffs first witness stated that he operated MS Transport, a business that supplied river sand, crushed stone, and plaster sand. He used to supply the said goods to the Defendant. He sent some invoices to the Defendant, one dated 25/10/2002 for E34,610.00 (Exhibit P1) and another dated 25/11/2002 for E38,920.00 (Exhibit P2). These invoices total E73,530.00 (Seventy three thousand five hundred and thirty Emalangeneni only). The Defendant paid an amount of E20,00.00 (Twenty Thousand Emalangeneni only) leaving a balance of E54,610.00 (Fifty four thousand six hundred and ten Emalangeneni only). This is the amount that the Plaintiff claims from the Defendant.

He stated that on the 29/11/2002 he sent one of his drivers by the name of Siphesihle Dlamini (Siphesihle) to go to the business premises of the Defendant at Matsapha to collect a cheque for the outstanding amount of E54,610.00. On arrival at the Defendant's business premises the driver telephoned him and informed him that a certain employee of the Defendant one Jacob Dlamini had informed him that the cheque was not ready. On the following Monday the 2/12/2002 this witness went to the Defendant himself to collect the cheque. He was in the company

of Siphesihle Dlamini. He was informed by the receptionist that Defendant's directors wished to talk with him.

He and his driver were shown to the board room where two men joined them. These were a Mr. Andrei whom the witness knew and Mr. Richard Pasco whom he did not know. These men enquired from the witness and his driver as to who Siphesihle Spa Dlamini was, whereupon the driver responded that it was he. They were shown two cheques made out in the name of Spa Siphesihle Dlamini for E19,800.00 drawn on the 6/11/2002 and another for E32.080.00 drawn on the 29/11 /2002.

[6] Siphesihle Dlamini admitted knowledge of the cheques, and explained that an employee of the Defendant, one Jacob Dlamini (Jacob) had requested him to go and cash the cheque on his behalf using the driver's name. The driver had agreed to this request. The driver admitted that Majahonke had no knowledge of this transaction between him and Jacob. Cheques payable to the Plaintiff were always made out to MS Transport. Majahonke was requested by the directors to fetch his statement and invoice book for them to check if the information therein tallied with the Defendant's. He did so leaving his driver behind. When he returned his driver had disappeared never to be seen again.

[7] The directors requested Majahonke to work with them in looking for Jacob and Siphesihle so that they could be arrested. Thereafter he would be paid his money. On the 25/12/2002 while working at Nhlanguano Majahonke spotted Jacob and caused the Nhlanguano police to arrest him. During January 2003, Majahonke received information that Siphesihle had been seen at his home and he caused Siphesihle to be arrested by the Manzini police. Both Siphesihle and Jacob were charged with fraud. They were

admitted to bail and Jacob absconded to South Africa. Siphesihle continued to attend remands but the charges against him were eventually withdrawn.

[8] The Defendant did not pay the Plaintiff as promised. Instead the Defendant stopped the Plaintiff from supplying them because of this incident. Majahonke instructed an attorney, Mr. Mahlalela to demand the balance owing to the Plaintiff from the Defendant. Mr. Mahlalela spoke to the Defendant's directors who agreed that the Plaintiff resume supplying the Defendant but they would not pay him the amount owing. He denies that he entered into any agreement to set off the amount owing. Instead he instructed his attorney to issue summons which was done during January 2004.

[9] He was cross-examined by Mr. Motsa. He agreed that the amount initially owed was E73,530.00 and that the Defendant paid the sum of E20,000.00 leaving a balance of E53,530.00 instead of the sum of E54,610.00 that is claimed in the summons. He conceded that his attorney had incorrectly calculated the balance owing. He conceded that after paying the amount of E20,000.00, the Defendant refused to pay the balance. Defendant had informed the Plaintiff that the balance was stolen by Siphesihle and Jacob and the amount stolen would be credited to the Plaintiffs account.

[10] During cross-examination Mr. Motsa showed Majahonke some invoices of which the Plaintiff could not prove delivery. Majahonke conceded that the Defendants need not pay the said invoices. These were invoices 8, 9, 91, 92, 93 and 94 totalling E4125.00 (Four thousand one hundred and twenty five Emalangi only). In addition to the above figure the Plaintiff was unable to prove delivery of goods worth E2,550.00 (Two thousand five hundred and fifty Emalangi

only), bringing the total amount to E6,675.00 (Six thousand six hundred and seventy five Emalangeneni only).

[11] Majahonke admitted that when he sent his driver to collect his cheque on the 29th November 2002, the amount of the cheque to be collected was E30,388.00 and that this cheque was not released by the Defendant after the latter had discovered the fraud committed by a member of its staff and Plaintiffs driver. The fraud involved two cheques for the amounts of E19,800.00 and E32080.00 respectively drawn in favour of the Plaintiffs driver totalling the amount of E51,880.00. Majahonke denied knowledge of these amounts and indeed the cheques were drawn in favour of his driver not himself nor M.S. Transport.

[12] Majahonke conceded that his last invoices were MSI dated 25/10/2002 and MS2 dated 23/11/2002 (see pages 9 and 10 of Book of Pleadings). He stated that the Defendant stopped him from supplying it on the 2/12/2002 at a meeting held at the Defendants premises. He further admitted that at this meeting the Defendants asked for his co-operation in helping the police arrest Spa and Jacob. He agreed to help. He also agreed with Defendant's attorney that the relationship between him and the Defendant was sour due to the thefts by Spa and Jacob. He further conceded that the Defendant agreed that he could begin supplying it during January 2003 to March 2003. It was put to him that the Defendant let him supply it because there was an agreement reached on the 2/12/02 that the amounts of money that Spa and Jacob had stolen would be deducted from the amounts in the Plaintiffs invoices. This he denied.

[13] In terms of invoice 20 dated 25/11/2002 for E38920.00 (p. 38 of Book of Pleadings) the Defendant has made a notation on

the invoice to this effect: **"Per discussion agreed E20,000.00 leaving a balance of E19,800.00."**

Majahonke was adamant that he received a payment of E20,000.00 on 2/12/02 and the Defendants informed him that the unpaid balance was to repay money stolen by Spa (and Jacob). This explains the scribbling by Defendant on the invoice dated 25/11/02. He admitted that he was paid E20,000.00 during December 2002. The balance left to be credited to the Defendant tallies with the cheque for E19800.00 made out to Spa dated 6/11/2002. The invoice date 25/11/02 was due to be paid on 25/12/2002. It was paid per cheque no. 007484 dated 25/12/2002 for E20,000.00 made out to MS Transport. The Defendants stated **"that was the full and final payment. No money owed."**

The invoice dated 25/10/2002 was due for payment at the end of November 2002. Defendants reconciliation of that invoice is on page 4 of book of discovered documents. It has certain deductions (at no.s 1, 5, 6,6) totalling E 1982.00) leaving a balance of E30,388.00. the Defendant drew a cheque for this amount in the name of Majahonke Simelane dated 22/11/2002 but cancelled this amount when they discovered the fraud. This would mean the amount of E30,388.00 was credited to Defendant to cover the theft of E32,080.00 by Spa and Jacob. Otherwise Majahonke maintains that he is owed E54,610.00 in respect of the invoices for end of October 2002 and end of November 2002.

[15] According to Majahonke he met with the Defendants twice, on the 29/11/2002 and 2/12/2002. After that his attorney Mr. Mahlalela met with the Defendants.

[16] The defence called Mr. Richard Andy Pascoe as its only witness. He testified that he was the financial manager of

the Defendant. The deductions comprise the difference between the Plaintiffs invoices and delivery notes. He confirmed that Defendant did not pay invoices 91, 92, 93 and 94 because there was no proof that goods for them had been delivered. Defendant did not pay items 1,5 6,6 due to short deliveries. Plaintiff conceded these and the court condones their non-payment.

[17] Mr. Pasco testified that Defendant company did business with Plaintiff. On the 22nd November 2002 Defendant drew a cheque in favour of Plaintiff in the amount of E30,388.00 but before handing it over, Defendant discovered that some fraudulent cheques had been drawn in favour of Siphesihle Dlamini, the Plaintiffs driver. The cheques were drawn in collaboration with the Defendant's accountant Jacob Dlamini. The cheques were for the amounts of E32,080.00, E 19,800.00 and E83,000.00. The cheque for E83,000.00 was not presented for payment but the ones for E32,080.00 and E1 9,800.00 were cashed. This discovery led the

Defendant to cancel the Plaintiffs cheque for E30,388.00. When the Plaintiff and his driver went to Defendant to collect the cheque, a meeting was held between Mr. Pasco, Mr. Nassi, Majahonke and Siphesihle. It was at this meeting that Mr. Pasco disclosed the theft and Siphesihle admitted having cashed the cheques with the collaboration of Defendant's creditors clerk Jacob. He admitted having cashed the cheques and that Jacob had pocketed the lion's share. The parties decided to have a more in depth look at the invoices and what payments had been made. Majahonke undertook to obtain those details and the meeting was adjourned. When Majahonke returned, Siphesihle had absconded. The meeting continued with Mr. Pasco, Mr. Nassi and Majahonke.

It was at this meeting that the parties discussed the issue of fraud and of mutual cooperation and the set off of the moneys that Defendant had been defrauded of. Subsequent to the meeting Defendant applied the set off.

When the Plaintiff filed an invoice for E38,920,00 dated 25/11/2002, Defendant only paid E20,000.00 and credited the balance of E 19,800.00 to itself, this being the amount of one of the cheques drawn in favour of Siphesihle.

[19] Mr. Motsa put to the witness that when Majahonke gave evidence he testified that what was agreed upon at the meeting was co-operation in the sense that once he got the two perpetrators arrested he would be paid his money for October 2002. Mr. Pasco responded that this was not entirely correct. They had agreed to co-operate in terms of trying to recover the money that had been defrauded and it had been agreed that in the meantime an off set in terms of monies that were owed to the Plaintiff. Mr. Motsa further put to the witness that Majahonke had testified that there was no agreement of set off but that this witness and Mr. Nassi had dictated terms to him that Defendant would pay him E20,000.00 only and subtract the money stolen from moneys due to him. The witness denied that Majahonke was dictated to but that the set off was mutually agreed upon. Mr. Pasco further believes that the reason why the Plaintiff did not reflect the amount of E30,388.00 (October 2002 invoice) in the November 2002 invoice and the outstanding E 19,800.00 was proof in that Majahonke was adhering to the agreement of set off.

[20] Miss da Silva asked Mr. Pasco what exactly was agreed to with regard to the co-operation and the extent thereof. Mr. Pasco's response is set out hereunder:

"A We had a meeting and we explained that we had a problem, that there had been fraudulent cheques involving one of his employees, that it involved his company, his account that we should cooperate with each other to try and recover the money. And that due to the awkward nature it would appear that his company has defrauded us we would like as best as possible to maintain a working relationship. And that we would set the amounts of the fraudulent cheques against sand supplied which were current.

PC What was to happen if you had been able to recover the money?

A If we were to recover the money we would have to pay to MS Transport those amounts which we had set off.

PC Mr. Simelane has stated before court that the extent of the cooperation request by yourselves was for him to assist in the capture of Sphesihle Dlamini and Jacob Dlamini the ones involved in the fraud and not for the recovery of the money. What is your take on that?

A That is not entirely correct. Our agreement was that there should be cooperation and that cooperation would include an attempt to recover the money. It would include continuing to make use of MS Transport as a supplier and it included immediately a set off in terms of monies that we had lost against monies that were owed to him. It was workman like understanding and it was accepted by both parties."

[21] As further proof that the agreement of set off existed Mr. Pasco stated that the Defendant continued to conduct business with the Plaintiff and placed orders for supplies of sand even though the same company had defrauded Defendant. The parties continued business with one another

for the entire 2003 until they received summons in January 2004 from Plaintiffs attorney a Mr. Mahlalela at the time. The reconciliation for February 2003 at the end of March 2003 is evidence that business continued. It was common cause that Plaintiffs business closes during the Christmas season i.e. from mid December to early January.

Mr. Pasco further stated that Plaintiffs company was involved in the fraud. He conceded that it had not been established if Simelane was involved personally. Mr. Pasco confirmed that the business relationship continued for a year but would not be drawn to state why it was terminated.

Thereafter the defence closed its case.

I am satisfied that Majahonke has proved that he is owed the sum of E54,610.00. The defence raised a two fold defence firstly that certain invoices were not payable or due because deliveries could not be proved secondly that the balance was extinguished by a set-off which was agreed to by the parties.

Majahonke conceded the first defence and even agreed that this amount be deducted from the amount claimed. Majahonke denied the existence of the agreement to set off the balance. Both Majahonke and Mr. Pasco are the only witnesses. There is no further corroborative oral evidence for either side. Except for the existence of invoice 20 dated 25/11/02 which has the words: "**per discussion agreed E20,000.00 leaving a balance of E19,800.00.**" on it, the terms of this agreement were not recorded. The Court has to decide the existence of the agreement to set off on a balance of probabilities.

Invoice 20 which is dated 25/11/02 is signed by Mr. Nassi. There is no accompanying signature by Majahonke to show concurrence.

At the end of October 2002 the Defendant drew a cheque for E30,388.00 which was cancelled upon discovery of the theft of E32,080.00. The Defendant credited for its account the amount of E30,388.00.

When the next set off was done at the end of November 2002, the Defendant simply credited E19,800.00 to itself and paid to Majahonke the sum of E20,000.00.

At the meeting where the agreement is alleged to have been concluded, there was Mr. Nassi, Mr. Pasco, Majahonke and Siphesihle (Plaintiffs driver). The driver admitted the theft and that he had committed it together with Jacob Dlamini. He admitted that the cheques were drawn in his favour by Jacob and after he had cashed them Jacob took the lion's share. Jacob was the Defendant's accountant.

Jacob Dlamini was not called to the meeting to confirm Siphesihle's story. The Court was not told what interviews if any there were with Jacob. If these took place they were not conducted with Majahonke present.

The theft was committed by Jacob and Siphesihle. The agreement if it existed should have taken into account that a member of the Defendant company was involved. It would have been logical for the parties to agree to a 50/50 set off as both their employees were involved in the theft.

It does not make sense why Majahonke would agree to give up so much money for goods that he had delivered for a crime

committed by Jacob and Siphesihle with Jacob most likely being the perpetrator.

It is illogical in my view to punish Majahonke for a crime he did not commit. It is further unreasonable to expect him to do the work of the police by finding the culprits simply because he needed the business of the Defendants.

It is also unreasonable to actually believe that after finding the culprits the culprits would repay the money and the Defendants would in turn pay Majahonke. Most criminals use moneys that they have stolen long before their capture by the police. That is why there are seldom compensatory orders once a culprit has been convicted except where a statute provides therefore.

I therefore find that the story of an agreement to set off is not true. Majahonke struck me as very simple probably not very literate who was happy to make a living from a simple business of delivering river sand to the Defendants. The Defendants were patient and kind to him and he happily went along. He did not strike me as someone who would bite the hand that fed him by being involved or conniving to the theft of the Defendant's money. Him being punished by not being paid and threatened with the removal of his livelihood by the Defendants was an unkind thing to do. The Defendants acted as a prosecutor, judge and jury. They prosecuted him and penalised him for something that Jacob and Siphesihle did.

The mistakes he made when he gave evidence and subsequently cross-examined do not detract from the fact that the Defendants owe him money. Furthermore the matter occurred during 2002 he was bound to stumble over certain details. Another factor I have taken into account is that he first instructed attorney Mahlalela to whom he entrusted all his documents supporting his claim. By

the time Miss da Silva took over and the matter came to trial Mr. Mahlalela was no longer in practice and had closed office and he was not able to obtain all of his documents.

I make the following order:

(1) The Defendant's defence is dismissed. The Defendant is ordered to pay the Plaintiff the sum of E47,935.00 (Fourty seven thousand nine hundred and thirty five Emalangeneni only).

(2) Interest thereon at the rate of 9% p.a. a **tempora morae;** and

Costs of suit.