



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1827/08

In the matter between:-

MANDLA MAZIYA

Plaintiff

and

MATHUIS NDLOVU

Defendant

Neutral citation: *Mandla Maziya v Mathuis Ndlovu* (1827/08) [2012]
SZHC...(7th May 2012)

Coram: HLOPHE J

Heard: 26/03/12 and 04/04/12

Delivered: 7th May 2012

For the Plaintiff: Miss L. G. Shongwe

For the Defendant: Mr. S. P. Mamba

JUDGMENT

- [1] The Plaintiff issued summons against the Defendant for payment of a sum of E16 050.00 being the outstanding balance of a purchase price of E31 050.00 for goods sold and delivered by the Plaintiff to the Defendant at the latter's special instance and request. There is also claimed interest at 9% together with costs of suit.
- [2] The issues are mainly common course with the disputes being around the time when the payment of the outstanding balance of the purchase price was supposed to be made as well as whether same could be paid to the Plaintiff in light of the counterclaim made by the latter, wherein he claimed that Plaintiff was indebted to him in a sum of E33 575.00 made of the Butchery equipment furniture, utensils and stock allegedly removed from the Butchery in question by the Plaintiff through self help.
- [3] It transpired during the leading of evidence by the parties that Plaintiff and Defendant had not only concluded an agreement of sale referred to above but the Defendant also leased the Plaintiff's premises from which he operated the Butchery business for which the Butchery equipment referred to above was sold.
- [4] One of the common course issues is that the Defendant struggled to pay rent for months. The Plaintiff alleges this went on until he was to realize that the Defendant had vacated the premises with all the

Butchery equipment situated therein, without being noticed. This the Plaintiff claims is what led to him instituting the current proceedings claiming the outstanding balance which was itself not paid beyond the allegedly agreed period. The Plaintiff led only one witness being the Plaintiff himself. Surprisingly, no arrear rentals were claimed notwithstanding the fact that it was owed not being disputed. The Defendant led two witnesses in all in an endeavour to defend the Plaintiff's claim whilst proving the counter claim, which stood undefended as no plea was filed in answer to it even though the pleadings were eventually closed, and a trial date applied for and allocated.

- [5] The Defendant who gave evidence as the 1st Defence witness did not dispute the conclusion of the agreement of sale of the Butchery equipment and its terms except denying that the balance of the purchase price was to be paid in December 2007.
- [6] He said it was agreed it would be paid as and when he had found the money. The Defendant led evidence to the effect that whilst it was arranging to pay plaintiff what he was owed, the latter came on a certain date and removed all the Butchery equipment, furniture, utensils and the meat stock found in the premises without the consent of the Defendant and also without a court order. At the time he removed these items the Defendant claims the Plaintiff found the Defendant's servant by the name of Nelsiwe Maziya who was the Butchery attended employed by the Defendant. The Defendant alleges that the items concerned all added up to a sum of E37 575.00. It was claimed further that these items do not include certain three items which comprised the

mencer, heavy duty saw and a 3 - face saw which were said to be worth E 12 000.00 in all. It was contended these should be regarded as settling the debt between the two whilst the Plaintiff remained indebted to the Defendant to the whole amount claimed in terms of the counter claim. I must mention at this stage that the Defendant did not produce any evidence that the items concerned were not the ones listed by him as having been repossessed. Consequently the notion of their setting off the debt on their own and separately from the others listed is rejected.

- [7] The evidence of the Defendant as regards the removal of all the butchery equipment, furniture, utensils and the stock found inside the butchery was confirmed and corroborated by the Defendant's only witness mentioned above DW 2. She gave her evidence in a forth right manner which with stood cross – examination without being shaken. This evidence, that is that the Plaintiff came to the rented premises on a certain date and removed all the above items from the butchery is further and indirectly strengthened by the evidence of the Plaintiff himself when he, notwithstanding having confirmed that the butchery operated by the Plaintiff was within the same compound as his own business and place of aboard, wants the court to believe that he did not notice the absence of the Defendant's items inside the butchery until after a longtime of his having vacated therefrom. This version is no doubt improbable and does not make sense. It is not likely that all those items would have been removed without him seeing or even learning from the other people that all such items had been, removed from the butchery. Furthermore, and in his own words, the butchery is nearby his place of abroad, which means that he would not have failed to realize the Defendant had removed everything inside the butchery.

[8] From the evidence given in court it is clear that the Defendant does not deny and cannot possibly deny his liability to the Plaintiff for payment of the amount claimed in the conventional claim his contention its due date had not yet arrived because he was to pay it upon finding the money not only improbable but is against all known business notions. Furthermore, DW 2, stated in her testimony that Plaintiff always came to the butchery to ask for his outstanding rentals claiming not to have been paid. Be that as it may, it is a fact that the Plaintiff himself did not defend the counter claim, obviously because he is aware that he helped himself to the items found therein without an order of court. If the Plaintiff did not defend the counter claim; firstly through his failure to plead in opposition thereto and secondly through not challenging the evidence led in court so as to show that the items were worth less than the amounts claim or attached to them by the Defendant who explained why attached such amounts to it, I cannot help in such a case but conclude that the Plaintiff is liable for the counter claim.

[9] If that is the case, I am then only required to determine if the claims do set off against each other to the extent possible. There can be no doubt from the facts that the said claims do set off against each other at least to the extent of the equivalence of the claims. This means that the Plaintiff is then indebted to the Defendant in the sum of the balance after the set off. This is to say after cancelling each other to the extent possible, the Plaintiff remains indebted to the Defendant in the sum of E17 525.00.

[10] Notwithstanding the foregoing, the Defendant's main case is to have the Plaintiff return to him the items I have found he removed from the

premises to the Defendant. The balance outstanding after the set off is claimed as an alternative. The order I make should give effect to this approach owing to the findings I have made herein.

[11] Consequently I make the following order:-

1. The Plaintiff be and is hereby directed to return to the Defendant all the items listed by the Defendant at paragraph 3 of the counterclaim which were removed by the Plaintiff from the rented premises, without an order of court or consent of the Defendant.
2. As soon as Plaintiff complies with order 1 above the Defendant is directed to pay to the Plaintiff the sum of E16 050.00 being the balance of the purchase price of the butchery equipment Plaintiff sold Defendant
3. In the event of Plaintiff failing to return the items referred to in order 1 above to the Defendant within 14 days from date hereof, the Defendant shall be entitled to set off the sum of E16 050.00, being the amount owed Plaintiff by Defendant, from the sum of E33 575.00 which is the value of the items repossessed by the Plaintiff and claimed in terms of the counterclaim.
4. The Plaintiff is ordered to pay Defendant the sum of E17 525.00 at the lapse of the period of 30 days from date hereof

without the items referred to in order 1 above having been returned to Defendant.

5. The Plaintiff is ordered to pay the costs of these proceedings.

Delivered in open Court on this theday of May 2012.

N. J. HLOPHE

JUDGE