



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 1618/2011

In the matter between:

**MTN SWAZILAND LIMITED**

**Plaintiff**

And

**MAXI MUSIC (PTY) LTD**

**Defendant**

**Neutral citation:** *MTN Swaziland Limited v Maxi Music (Pty) Ltd (1618/2011)*  
*[2013] SZHC 115 (11<sup>th</sup> June 2013)*

**Coram:** **M. Dlamini J.**

**Heard:** **22<sup>nd</sup> April 2013**

**Delivered:** **11<sup>th</sup> June 2013**

*– Action proceeding-plaintiff bases his claim on breach of contract – however plaintiff fails to tender any evidence in support – burden of proof on plaintiff – defendant only bears evidential proof on the basis of a prima facie case*

Summary: Serving before me is a combined summons for interest at the rate of 9%, collection commission and costs of suit, emanating from a debt of E6,061,500.00 which was paid by defendant following negotiations between the parties.

[1] *Plaintiff's cause of action.*

Plaintiff submits that his cause of action is based on two grounds. Firstly, goods in a form of airtime were delivered and utilised by defendant for the amount of E6,061,500.00. Summons were instituted against defendant. It was upon the filing of summons that thereafter defendant paid the sum of E6,061,500.00. For the reason that when defendant paid the capital debt, summons had already been issued against him, it follows that the plaintiff is entitled to interest at the rate of 9% *tempore morae*, collection commission and costs of suit at attorney own client scale.

[2] Secondly, by defendant's failure to discharge its side of the obligation, *viz.* payment of the debt, this translated into a breach of contract.

[3] The plaintiff closed its case without adducing any evidence.

[4] *The defendant's defence*

The defendant's Counsel submitted that the issues are as defined in the pre-trial conference minutes *viz.*, whether there was a breach at the instance of defendant which entitled the plaintiff to the claim.

[5] The defendant applied to lead witnesses, in rebuttal. The application was granted.

[6] The first witness on behalf of defendant was **Mr. Richard Sunnyboy Dlamini**. On oath, he identified himself as the Managing Director of defendant. Defendant carried the business of distribution of plaintiff's products in terms of MTN Product and Service distribution agreement which appeared in the bundle of documents at page 17 marked book 2 by this court.

[7] On February 2011, he received a correspondence from plaintiff's distribution department Manager, requesting him to confirm invoices for December 2010 transaction. He in turn asked for documentary proof confirming that the said invoices were for a product sent to defendant. The reason for his request was because the date reflected on the invoice and the said transaction dates were at variance. He further requested for documentary evidence showing compliance with clause 8.1 of the agreement. This is because in terms of the clause, the defendant ought to have placed an order with plaintiff before plaintiff electronically transferred to defendant the stock worth E6,061,500.00. Further once defendant has placed an order, defendant pays for it and plaintiff is to verify payment before dispatching airtime to defendant. In the present case, so ran the evidence, there was no order placed, no payment but stock was electronically transferred to defendant.

[8] Further, should peradventure any of the party owe the other, a statement was to be dispatched to the debtor as per clause 16.3 of the agreement. In *casu*, DW1 adduced there was no statement but merely a letter sent eight months after the alleged transaction. A further reason that prompted him to request for full documentary proof of the debt was to satisfy himself that plaintiff did not make any reversal of the airtime sent.

- [9] Having received defendant replying correspondence plaintiff undertook to attend to the matter. However, time went by without any response. He however, persisted on plaintiff's response. It was his evidence that after a while, he received, not a response to his request but an acknowledgment of debt calling upon defendant to sign it. He further divulged that this acknowledgment of debt read "*stock erroneously supplied*".
- [10] At that instance, he decided to take up the matter away from department's Director to the Chief Marketing Officer. The Chief Marketing Officer of plaintiff responded through short message service by setting up an appointment with him for 18<sup>th</sup> May 2011.
- [11] On the 18<sup>th</sup> May 2011 as he was ready to meet the Chief Marketing Officer, he read an article in the local newspaper, Times of Swaziland, reflecting that the matter has been instituted in court by plaintiff. The Chief Marketing Officer through SMS responded "*I am surprised*". He later sent another SMS apologizing for the turn of events.
- [12] At this stage, Mr. Flynn, on behalf of the plaintiff, objected to the evidence adduced as inadmissible by virtue of it being part of the negotiations. I overruled the objection and indicated that reasons for the same shall follow. I intend highlighting the reasons later in this judgment when adjudging upon the issues herein.
- [13] On the 18<sup>th</sup> May 2011 he was served with the said summons. He instructed Counsel who filed a Notice to Defend. It was further his evidence that the institution of summons without prior negotiations was contrary to clause 22.1 of the agreement.

- [14] On the 25<sup>th</sup> May, 2011 he received from plaintiff a correspondence inviting defendant to the negotiation table. He then requested for a statement in preparation for negotiation.
- [15] Chief Marketing Officer indicated that he had a challenge in obtaining statements. He however, later was given satisfactory proof of the balance owing. It was his evidence that he thereafter commenced negotiations. This was on 1<sup>st</sup> of June 2011.
- [16] A statement reflected at page 86 reflected a number of columns and demonstrated an error which he stated that it was admitted by plaintiff. Again I shall revert to this statement later.
- [17] It was his evidence further that owing to the glaring errors committed by plaintiff who tried to rectify them but in vain, a future way forward in order to prevent recurrence of similar errors was forged between the parties.
- [18] It was his evidence that he requested plaintiff to make a reversal of the airtime sent to him without any prior order. However, plaintiff requested that defendant keeps the airtime and pay for it. The amount was reduced to E4,500,000.00 due and owing. Defendant agreed to this and by agreement paid the said amount by E95,000,000.00 per week installments. The whole debt was dissolved by the time of hearing of this matter.
- [19] Subsequently, plaintiff's attorney submitted an agreement claiming collection commission and costs for defendant's signature. He rejected this agreement on the basis that as it was common cause between them that they made the error, defendant could not be expected to bear the costs and

collection commission. He referred the court to clause 27.8.2 at page 38 of the book of the agreement in support of his assertions. He in turn drafted an agreement but was never signed. Numerous negotiations followed but reached a deadlock. The plaintiff served defendant with a declaration and applied for summary judgment. Defendant successfully defended the same and costs were to be costs in the main application. It was his evidence that by plaintiff committing the error, it was plaintiff who was in breach and not defendant.

[20] He was cross examined at length by Mr. P. Flynn who represented the plaintiff. He was asked whether he did receive the stock of E4,500.000.00 and utilized it. He responded to the affirmative. He was then asked whether he accepted that he was obliged to pay by virtue of having received the airtime to which he confirmed. It was then put to him as follows:

*“You sought to negotiate terms”*

He responded:

*“They preferred that I pay for it and the reason was that it would not affect their target. This was after I had asked it to be taken back.”*

[21] Nothing much turned on the balance of the cross-examination as it bothered on a declaration which was a subject matter of the summary judgment that was dealt with to finality by this court.

[22] The defendant called its second witness one **Mr. Mbuso Mbanjwa**. He took oath and divulged that he was former employee of plaintiff. He was dismissed by plaintiff for the error before court committed at his hands as

employee of plaintiff. A disciplinary hearing was instituted against him for gross negligence and was subsequently found guilty and dismissed. It was his evidence that when he was first employed by plaintiff, he was in another department. He was then requested by management of plaintiff to hold the reigns in the sales department following suspension of two employees who were responsible for such.

[23] It was his evidence that on the first error he accessed the internet based system at work. Used a cellular telephone number which happened to be that of defendant and dispatched airtime worth E6,061,500.00. He subsequently realized the error and tried to reverse it from the system but it would not be reversed.

[24] On the second error, he informed the court that a distributor ordered airtime worth E4,500 but he erroneously punched in more zeros giving a number worth of airtime of E4,500,000.00.

[25] In both instances the stock worth of such amount had not been ordered.

[26] In evidence in chief he was led as follows:

*“Could the distributor be aware of this credit?”*

Response: *“it would depend on whether the distributor’s cellular telephone is on or whether the SMS was delivered.”*

*“Could he (distributor) send it back?”*

Answer: *“No”.*

[27] It was further his evidence that as means to rectify errors, every month end he would do a reconciliation on the accounts. He ought to have a zero variance. He further wrote to Finance and alerted him of the errors. It was his evidence in the instant case that the Finance Manager wrote back to him saying the transactions were not erroneous but properly done. He was nevertheless charged for the same transaction and eventually dismissed for the said errors.

[28] Under cross-examination he confirmed being dismissed in March 2011 for gross negligence. He divulged on cross-examination that his name is reflected against the erroneous transaction as confirmation that he entered the transaction on the system. On being quizzed as to the reason for crediting the distributor in the absence of an order, the witness responded:

*“I did what I found others doing.”*

He was further asked”

*“You know that Mr. Dlamini (DW1) should have placed an order?”*

Answer: “Yes.”

Q. *“It must be in writing?”*

A. *“I did not know that”*

Q. *“Did you attempt to reverse it?”*

A. *“Yes.”*



[29] It was further put to him that he was dismissed for gross dishonest of which he maintained gross negligence.

[30] It further came out through cross-examination that although he did the reversal, he discovered very late that the transactions were not eventually reversed.

[31] In re-examination on the reversal, it became apparent from the printout at page 85 that he did the reversal on a different cellular telephone number than the one he had credited the airtime. It was for this reason that the reversal could not be effected.

[32] The defendant closed its case.

[33] The first port of call before adjudicating on the merits is for me to highlight the guiding principles on the admissibility of evidence under the circumstances of negotiations or the so called “*over the table settlements.*”

[34] Faced with a similar objection, his **Lordship James J. P.** in **Gcabashe v Nene 1975 (3) S.A. 912** at 914 commences by stating:

*“The mere fact that the subsequent letters were not marked “without prejudice” does not make them acceptable in evidence because if they form part of negotiations for a settlement they are also protected from disclosure whether they bear the label or not.”*

[35] The above *dictum* by his **Lordship James J. P.** puts forth the general rule that information passed as a result of negotiations prior to a court proceedings on the same matter is inadmissible as it is done on the basis of

“without prejudice”. This position of our law maintains irrespective of whether the parties’ attention was drawn to the wording “without prejudice” or not. I reiterate that this is the rule in matters of evidence.

[36] However as it is trite law that no rule is without exception, similarly the above cited rule is subject to exception.

[37] This exception was well articulated by **Kekewich J.** in **Kurtz & Co. v Spence & Sons (1887) 5 J L.J. Ch 238 at 241** who is cited in various authorities including **Millward v Glaser 1950 (3) S.A. 547 at 554** (see also **Busisiwe Manana v Franco Calasuonno (2014/2011) [2013] SZHC 11** at page 17) as follows:

*“I shall not attempt to define the words ‘without prejudice’ but what I understand by negotiation without prejudice is this: The plaintiff or defendant – a party litigant may say to his opponent:*

*“Now you and I are likely to be engaged in severe warfare. If that warfare proceeds, you understand I shall take every advantage of you that the game of war permits; you must expect no mercy, and I shall ask for none; but before bloodshed let us discuss the matter, and let us agree that for the purpose of this discussion we will be more or less frank; we will try to come to terms with and nothing that each of us says shall ever be used against the other so as to interfere with our rights of war, if unfortunately, war results.”*

[38] **James J. P.** *supra* eloquently concludes on the same page:

*“Negotiations conducted without prejudice are of course, designed to resolve disputes between the parties and if the negotiations result in a*

settlement then logically evidence about the settlement and the negotiations leading up to it should be available to the trial court because the whole basis for non-disclosure has fallen away. I have found little authority on the subject, doubtless because it is so obvious ...”(my emphasis)

[39] Applying the above *ratio decidendi*, the question I am seized with is whether negotiations herein ended in a settlement.

[40] Firstly from the onset, Mr. P. Flynn, on behalf of the plaintiff submitted that the capital debt herein was paid as a result of a deed of settlement. This is supported by the evidence of DW1.

[41] Secondly, the interest collection commission and costs of suit are *incidentia* arising from the main debt which is the subject of concluded *bona fide* negotiations.

[42] Further, it would be difficult for the court to adjudicate fully on the question of whether defendant is liable to the claim by plaintiff without being privy to the information which led defendant to pay off the capital debt reflected in the particulars of claim.

[43] It is for the above reasons “*so obvious*” as **James J. P.** *op. cit* correctly put it, that I dismissed the objection and admitted the evidence leading to the settlement.

[44] Adjudicating on merits

My duty at this stage is as propounded by **Ota J. A.** in **James Ncongwane v. Swaziland Water Services Corporation (52/2012) [2012] SZSC 65** at paragraph 35 after pointing out that:

*“civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible relevant and credible evidence that is conclusive, and that commands such probability that is keeping with the surrounding circumstances of the particular case.”*

[45] She further stated at paragraph 36 (1)

*“When the Judge has to evaluate the evidence on every material issue in the case, he ought to put all the evidence called by each side on that issue on either side of an imaginary scale of justice and weigh them together, whichever side out-weighs the other in probative value ought to be accepted or believed. If this part of the exercise is properly done, the court will come out with a number of findings of fact.”*

[45] It is however apposite that before I weigh the *facta probanda*, I should point out the issues. The bone of contention is whether there was any breach of contract by defendant in *casu*.

[46] Plaintiff has submitted that there was a breach. However, plaintiff did not adduce any evidence to discharge the cardinal rule that runs across all civil cases that *“he who asserts bears the onus of proof.”* This burden of proof does not shift but remains with the plaintiff throughout the trial as canvassed in **South Cape Corp. v Engineering Management Service 1977 (3) S.A. 534** at 548 where his **Lordship Corbett J. A.** held:

*“In its sense the onus can never shift from the party upon whom it originally rested.”*

[47] His **Lordship Stratford C. J.** with reference from **Halisbury’s Law of England** in **Treagea and Another v Godart & Another 1939 AD 16** at 33 stated on the same view:

*“In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings or their equivalent, and is one that never changes under any circumstance whatever; and if after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him.”*

[48] The above *ratio* leads me to ask, *“what is evidence? As all the authorities seem to suggest that it is evidence that must be weighed. I further ask this question following Mr. P. Flynn’s submission that by defendant’s own evidence under DW2, defendant breached the agreement by placing an order verbatim contrary to clause 8.1 which called for the distributor to place an order in writing. In other words, “Is what has been stated by Counsel on behalf of plaintiff to be put on the side of plaintiff’s scale of justice?”*

[49] **Stratford C. J.** in **Tregea supra** was faced with a similar question. It is worth citing the learned Judge in details due to the peculiar circumstance of this case. He commenced by citing the learned author **Phipson** on **Law of Evidence** as follows:

*“Evidence, as the term is used in judicial proceedings, means the facts, testimony and documents which may be legally received in order to prove or disprove the fact under enquiry.”*

[50] The learned author proceeded:

*“This, however, is too wide, since though it excludes mere argument (i.e. presumption of fact), it would include presumption of law ...which are not usually treated under this head.”*

[51] The honourable judge hit the nail on the head when he held:

*“What is our law of evidence? It is a set of rules which has to do with judicial investigations into question of fact .... These rules relate to the mode of ascertaining an unknown, and generally a disputed matter of fact. But they do not regulate the process of reasoning and argument ... when one offers evidence in the sense of the word which is now under consideration, he offers to prove otherwise than by the reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact... In giving evidence we are furnishing the tribunal a new basis for reasoning.” This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence. Evidence, then is any matter of fact which is furnished to a legal tribunal – otherwise than by reasoning or a reference to what is noticed without proof as the basis of inference in ascertaining some other matter of fact.” (again my emphasis)*

[52] Taking into consideration the *dictum* by **Ota J. A. supra** that I have to put on each side of the imaginary scales of justice and weigh the evidence adduced by each party together with the definition of “*evidence*” by **Stratford C. J.** that evidence exclude arguments, coupled with the principle that he who alleges must prove and that this burden or onus of proof does not shift as supported by **Corbett supra**, the question in *casu*, is whether there is evidence by plaintiff which will call upon this court to put on the one side of the imaginary scale? The cited authorities above, I am afraid, point to the contrary.

[53] Plaintiff chose to make submissions or what the learned **Stratford C. J.** referred to as *arguments* or *presumption of facts*. Plaintiff instituted action proceedings and filed particulars of claim. He then called upon the court to infer that as the defendant paid the capital debt after summons were lodged, and by virtue of paying the debt, he acknowledged the breach and therefore liable to interest, costs of suit and collection commission.

[54] I reiterate this was not evidence as envisaged by the rules of procedure. Plaintiff ought to have adduced evidence in court to establish the breach it was alleging. When presenting the evidence, he does so to establish his cause of action and thereby discharging the burden of proof which is fixed upon him as a matter of substantive law. He can not be held to have done so from the bar nor by his particulars of claim in the absence of any sworn statement either in writing or *viva voce*.

[55] Further I noted that after defendant had closed her defence, plaintiff took advantage of the evidence by DW2 that plaintiff ordered airtime for the sum of E4,500 without complying with clause 8.1 thereby breaching the agreement that regulated their relationship. This tactic move by plaintiff is

totally unattainable in our civil procedure. Firstly, it is clear from this latter submission by plaintiff that plaintiff did not have an iota of evidence to support his allegation for a breach of contract by plaintiff. I say this because if this operated in the mind of plaintiff that defendant breached the agreement by placing an order through a call and not in writing, DW1, the managing director of defendant would have been so cross-examined. DW1 was actually cross-examined at some length by plaintiff but this ground upon which plaintiff now relies on was not put to him. On the contrary plaintiff sought under cross-examination to show that defendant paid the debt because he was liable. In fact the evidence by defendant that he was supplied with stock which he never ordered was not challenged. What was challenged, however, was that defendant did utilize the said airtime, a factor which did not turn for the plaintiff as it was never in issue at any given time.

[56] Secondly, this points to one direction that plaintiff was building his case as it went alone and further using defendant to do so. This procedure has not been heard of in our law. The defendant comes to court not assist the plaintiff but to disprove as it were what plaintiff has proved. When evidence is led by defendant, he does so not to discharge the onus of proof but to rebut evidence adduced by the plaintiff. In doing so, he discharges not onus but burden of adducing evidence in rebuttal. Worse still because this duty upon defendant lies where there is *prima facie* case.

[57] It follows therefore in the process of reasoning that I am bound to engage in a trial, that there being no evidence to put on the side of plaintiff's "*imaginary scale of justice*" as so propounded by the learned Judge **Ota J. A.** *supra* by virtue of plaintiff's failure to discharge its onus of proof, plaintiff cause of action must be dismissed.



[58] This is not one of the matters that one could say falls within the *ratio decidendi* set in **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors 23/2006**, where it was held that courts should be discouraged from upholding technical points but dispose of matters in their merits. This is because there are no merits herein and therefore it is difficult to see how one could dispose of this matter. The principle that Rules of court are not sacrosanct but meant to be observed is apposite *in casu*. **Coetzee J. in Western Bank Limited v Packery 1977 (3) S.A 137** at page 141 wisely pointed:

*“Rules of Court are delegated legislation, have statutory force and are binding on the Court.”*

[59] It is worth noting that defendant was not bound in law to call evidence in rebuttal as there was nothing before court to rebut.

[60] The evidence in rebuttal showed that the bone of contention during negotiations was in respect not of the first erroneous transfer of the sum of E6,061,500.00 but of the E4,500,000.00 which was second entry by DW2. The summons serving before court is in respect of the sum of E6,061,500.00. A declaration for purposes of summary judgment reflected the sum of E4,500,000.00. The summary judgment application was dismissed. There were no amendment to the summons filed as plaintiff from his line of question is demanding costs of suit, interest and collection commission based on the second transfer by DW2 of E4,500,000.00. No explanation was advanced for such failure to amend.

[61] It is clear that the pleadings before court are contradictory. Plaintiff did not challenge DW1 under cross-examination that his claim is based on the sum of E6,061,500.00 as reflected in the summons. In fact, the line of cross examination seems to be in agreement with what DW1 was giving evidence on and that the plaintiff's claim is based on E4,500,000.00 contrary to the particulars of claim.

[62] In **Joseph Mabhalane Masuku v Swaziland Water Services Corporation 50/2012 SZSC 48 [2012]** the court rejected evidence that was contrary to the pleadings. I see no reason why plaintiff's claim should not be rejected herein.

[63] For purposes of bringing an end to the action before court, I accept from defendant's evidence that the plaintiff instituted legal proceedings against it during the process of negotiations and before negotiations could be concluded or said to have failed. This act by plaintiff was contrary to clause 22.1 of the agreement which reads:

“22.1 *If any dispute, other than that referred to in 15 arises between the parties in connection with this agreement or its subject matter which cannot be resolved amicably by the Parties, the parties hereby submit to the jurisdiction of the High Court of Swaziland.*”

[64] I further accept the evidence which was not challenged by plaintiff when DW1 gave it that defendant never ordered airtime that was sent to it. I say this because DW2 who stated that DW1 ordered the airtime when few minutes later attempted to make reversals, he did so using the wrong cellular telephone number. When asked as to where he got that number, he

indicated that it might be one of the distributor's number. As he guessed the number for reversal, it is probable that he might have guessed even the plaintiff's number. After all, this must be accepted by plaintiff who subsequently dismissed DW2 for gross negligence from its employment. Further DW2 indicated that defendant was a major and regular distributor of plaintiff and therefore it is not inconceivable that defendant would have mistaken him to have placed an order when it did not.

[65] In the result, I find that defendant did not breach any contract.

[66] Before I enter the appropriate orders herein, I must state that it is trite that one cannot claim both collection commission and costs of suit. Once legal process have ensured, one is entitled to claim cost of suit and certainly not together with collection commission. I refer to the honourable **Hlophe J.** in **June McKenzie v Sera Ncongwane and Another (1751/2012) [2013] SZHC 24** where the learned Judge held at page 7:

*“Consequently I grant Summary Judgment in terms of prayers (a), (b) and (c) of the particulars of claim except that (c) does not include collection commission, which in my view cannot possibly be claimed together with costs and where the agreement allows it such agreement is to that extent unconscionable in my view.”*

[67] I do not intend to delve further on the rationale for not claiming costs of suit together with collection commission for reason that I have already indicated that plaintiff's claim is without basis.

[68] Plaintiff requested for costs at attorney client scale. He should be able to give what he sought.

[69] When the court adjourned the proceedings, defendant alerted the court that it had filed together with its plea a counter-claim and therefore wished to lead evidence. Mr. P. Flynn objected on the basis that defendant ought to have led evidence on its action before closing its defence.

[70] I agree with Mr. Flynn that it is undesirable that cases should be tried in piece meal. However I do not accept that the door of justice must be shut against defendant for failure to lead evidence during evidence in rebuttal.

[71] The courts will be loath in closing the door against a party wishing to access justice. Courts of law should scrutinize cases and only in exceptional cases should they close the door against a litigant, is our principle of law.

[73] *In casu*, defendant is entitled to call its witnesses to establish its counter-claim therefore.

[74] In the premises I enter the following orders:

1. Plaintiff cause of action is dismissed;
2. Plaintiff is ordered to pay costs of suit at attorney and own client scale;

3. The matter is postponed to the Registrar's date for defendant's counter-claim.

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**M. DLAMINI  
JUDGE**

**For Plaintiff** : **Mr. P. Flynn instructed by S. V. Mdladla & Associates**  
**For Defendant** : **Ms. N. Mzileni**