IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1130/2012

In the matter between:

CURRIE & SIBANDZE ATTORNEYS	**1st**	**Plaintiff**
MUSA MZWANDILE SIBANDZE	**2nd**	**Plaintiff**

And

JOSEPH KHUMALO	**Defendant**

Neutral citation: **Currie & Sibandze Attorneys & Anothers v Joseph Khumalo (1130/2012) [2013] SZHC 26 (28th February 2013)**

Coram: M. Dlamini J.

Heard: 20th September 2012

Delivered: 28th February 2013

Contract – interpretation thereof – parties bound by the terms of a contract – party frustrating another to perform is bound to discharge performance as per terms of the contract -

Summary: 1st plaintiff is a firm of attorneys practicing as such. The 2nd plaintiff is a senior Counsel in 1st plaintiff's firm. On 16th April 2006, the 1st plaintiff as represented by 2nd plaintiff entered into a written agreement wherein the defendant, a client of 1st plaintiff undertook to pay 1st plaintiff 20% from monies recovered from defendant's former employer in respect of unfair dismissal in the event 1st plaintiff successfully prosecuted the matter before the Industrial Court. The 1st plaintiff drew the necessary pleadings secured and a trial date. However, before the matter could go to trial, defendant, without the knowledge or advice of the plaintiffs negotiated directly a settlement with his former employer. He was as a result paid the sum of E324,832.20. The defendant refused to pay 20% from this sum. The plaintiff responded by instituting the action proceeding in a form of combined summons. The defendant having filed Notice to defend, the plaintiff moved for a summary judgment.

[1] Most of the assertion by plaintiffs are not disputed by the defendant. It is common cause that the agreement of 20% recovery fees plus disbursements and incidentals was concluded by the parties for the prosecution of defendant's case against its erstwhile employer. The said agreement is worded as follows:

> "*1. Currie & Sibandze will proceed with litigation against Ubombo Sugar Limited in respect of Mr. Joseph Jabulani Khumalo's alleged unfair dismissal.*
>
> *2. Currie & Sibandze fee will be 20% of any recovery made from Ubombo Sugar.*

3. *Mr. Joseph Jabulani Khumalo will however pay for any disbursements such as postage & petties made up to and including the trial.*

4. *In the event the litigation is not successfully prosecuted, Mr. Khumalo will only be obliged to pay the postages and petties.*"

[2] Defendant however, vociferously opposes the application by the plaintiff. He articulates as follows:

"*3.1* <u>*In Limine*</u>
The Plaintiff's assertion that he is owed the sum of E64,966.44 (sixty four thousand nine hundred and sixty six Emalangeni forty four cents) being monies due and owing to plaintiff by defendant is denied as the plaintiff bears the onus of proving that indeed plaintiff's performance of his contractual obligations have been discharged.

3.2 It is further submitted by the defendant that the plaintiff's performance in this matter must have been due and to that extent the defendant respectfully pleads the defence of Exceptio Non Adimpleti Contractus.

3.3 The above defence is relied upon in so far as the plaintiff's performance of its contractual obligation is in respect of a material term of the contract.

8. *It is submitted by the defendant that an amount of E324,832.20 (three hundred and twenty four thousand eight hundred and thirty two Emalangeni twenty cents) was paid out to it by defendant's previous employer, further 33% of this amount was taxed off leaving a net sum of E217,637.58 (two hundred and seventeen thousand six hundred and thirty seven Emalangeni fifty eight cents) at the defendant's disposal.*

9. *It is further submitted that the amount of E324,832.20 (three hundred and twenty four thousand eight hundred and thirty two Emalangeni twenty cents) paid out to the defendant was as a direct result of his engaging his previous employers.*

    9.1 *It is further submitted that the amount of 20% claimed by the defendant should be commensurate to the plaintiff having performed his mandate to the fullest, which it is respectfully submitted under legal advice that this is a triable issue which can only be properly be determined by a court of law having due regard to the rules of evidence."*

[3] In summarising defendant's opposition one may tabulate the grounds as follows:

i) Plaintiff has failed to prove that he discharged his obligation under the contract;

ii) *Exceptio* n*on adimpleti contractus;*

iii) Plaintiffs failed to perform a material term of the contract;

iv) Even if it could be said that plaintiffs did discharge their part of the bargain under the contract; (a) he was not entitled to 20% gross of the recovered sum. Deductions such as tax should be taken into consideration;

b) he was only entitled to *a pro rata* share commensurate to his performance.

[4] In application of this nature *wit*. summary judgment application my first port of call is to ascertain whether the plaintiffs have established their cause of action. The next enquiry shifts to the defendant in assessing whether he has raised a *bona fide* defence. For plaintiffs' application to succeed, the response should be a yes and a no respectively.

[5] Plaintiffs state in their particulars of claim:

"5. Defendant and plaintiff entered into a fee agreement in terms of which it was agreed inter alia that the plaintiffs' fee will be 20% of any recovery made from Lubombo Sugar Ltd. the written fee agreement is attached hereto and marked "SC1".

6. The plaintiffs instituted legal proceedings in the Industrial Court under case no. 258/2006, seeking compensation for unfair dismissal in the amount of E798,833.20 (seven hundred ninety eight thousand eight hundred and thirty three Emalangeni twenty cents)

7. *The matter was allocated a trial day by the Registrar of the Industrial Court at the behest of the plaintiffs' Mr. Musa Sibandze for the 18th and 19th July 2012.*

8. *The defendant was advised in writing of a trial date and a copy of the letter from plaintiffs to defendant is attached hereto and marked "CS2".*

9. *After appointment of the trial date the said Lubombo Sugar Ltd. engaged defendant directly, unbeknown to the plaintiffs in settlement negotiations.*

10. *The defendant and Lubombo Sugar Ltd. reached agreement and entered into an agreement to settlement which is attached hereto marked "CS2".*

11. *In terms of the agreement of settlement the said Lubombo Sugar Ltd agreed to pay defendant as a settlement of the litigation, the amount of E324,832.20 (three hundred and twenty four thousand eight hundred and thirty two Emalangeni twenty cents) in full and final settlement of defendant's claim against Lubombo Sugar Ltd.*

12. *In terms of the plaintiffs' fee agreement, the 1st plaintiff is entitled to 20% of the settlement amount, in the amount which is in turn due to 2nd plaintiff in his capacity as a former partner in the 1st plaintiff, in the amount of E64,966.44 (sixty four thousand nine hundred and sixty six Emalangeni forty four cents), which is now due and owing and payable and*

which the defendant, despite due demand refuses to pay, in breach of fee agreement with the 1st plaintiff."

[6] From the totality of plaintiffs' particulars it is clear that the plaintiffs cause of action is based on a breach of a written contract. It is my considered view that the plaintiff has established his cause of action as they have pleaded material facts (*facta probanda*) see **Ota J. A.** in **Ezishineni Kandlovu v Ndlovunga Dlamini and Another 58/2012 SZSC 51** at page 20**.**

[7] Embarking on the second enquiry, I bear in mind the *dictum* in **Fathoos Investments (Pty) Ltd and 2 Others v Misi Adam Ali (43/12) [2012] SZSC 70** at page 16 where his Lordship **M. C. B Maphalala J. A**. in an unanimous decision, citing the celebrated case of **Maharaj v Barclays National Bank 1976 (1) S.A. 418 (A) at 426A E** held:

> "*Accordingly, one of the ways in which defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to whether the whole part of the claim, a defence which is both bona fide and good in law.*

If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully" …connotes in my view that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least, disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."

[8] I now address defendant's first ground of defence which is that the plaintiffs have failed to discharge their obligation under the contract.

[9] I must mention from the onset that defendant does not deny the allegations that he concluded the contract, copy of which is attached herein; the plaintiff did prepare and file the necessary pleadings; further plaintiff obtained a trial date in court. He further does not deny that without plaintiffs' knowledge, he *mero motu* negotiated directly a settlement with his erstwhile employer. These material facts are not in issue.

[10] Two approaches to the first issue raised is warranted. Firstly I consider the principles governing the law of contracts under the circumstances of the case in *casu*.

[11] **A. A. Roberts** on **Wessels' Law of Contract in South Africa, 2nd Edition** at paragraph 2913 writes:

"*When once a vinculum juris exist between two contracting parties, the bond continues until the contract is performed. A refusal by one*

of the contracting parties to carry out the terms of the contract gives the injured party an action, but does not break the vinculum juris."

[12] The learned author articulates the same principle with more precision by stating:

"*Poctor servanda sunt; quae ab initio sunt voluntatis ex post facto sunt necessitates*."

[13] This translates in our daily language to:

"*Agreement must be observed. At their inception they are subject to the will of the parties, but once entered into they are binding.*"

[14] At paragraph 2925 the distinguished author points as one of the circumstances where a breach of a contract can occur, the following:

"*Where the promiser, by his own act during the course of the performance, makes the contract incapable of full performance by the other party*."

[15] In *casu* it is clear that the undisputed allegation at paragraphs 9 and 10 of the particulars of claim *viz.* defendant nicodemously negotiating a settlement direct with his employer, rendered plaintiffs incapable of performing to the end their obligation under the contract. No doubt this conduct by defendant amounted to the breach of the contract.

[16] With regard to the appropriate remedy in a breach of contract **Innes J.** in **Farmers' Co-operative Society v Berry 1912 AD 343** at 350 highlighted:

> "*it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it. <u>The election is rather with the injured party</u>, subject to the discretion of the court.*"

[17] Plaintiffs being the injured party elected to enforce specific performance under the contract. I have not been persuaded to deem their elections as wrong and I see no reason to be faulted for their election. On this ground alone defendant has not raised a *bona fide* defence in law.

[18] The second approach is as submitted by Mr. P. Flynn for the plaintiffs. It was contended that the plaintiffs did prosecute the defendant's matter. In support of this assertion Mr. Flynn cited the case of **Milne N.O. v Shield Insurance Co. Ltd. 1969 (3) S.A. 335** at 358 where **Holmes J. A**. on a similar enquiry held:

> "*It has rightly been held that in our modern procedure, litis contestatio or joinder of issue takes place when the pleadings are closed. One turns to the Rules of Court …to decide when litis contestatio takes place.*"

[19] Rule 29 of this court reflects:

> *"Pleadings shall be considered closed if –*
>
> *a) either party has joined issue without alleging any new matter, and without adding any further pleading;*

b) *the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;*

c) *the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or*

d) *the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.*"

[20] In *casu*, the plaintiffs went far further than the above as they secured a trial date for defendant's matter. This evidence having not been challenged by defendant, the defendant's defence on the question of non performance by plaintiffs must fail.

[21] Defendant has further raised *exceptio non adimpleti contractus* as his second ground for dismissal of plaintiffs' application.

[22] **De Villiers J.** in **Myburg v Central Motor Vehicle 1968 (4) S.A. 864** held on the prerequisites of this defence:

> "*The defence of exceptio non adimpleti contractus is only applicable in respect of reciprocal agreements where parties undertake to perform in return for the counter-performance in question. It is of importance that there should be a connection between the performance of the one party and the counter performance of the other party.*"

[23] Discussing this defence **Milne J**. in **U-Drive Franchise System Ltd v U-Drive Yourself Ltd. and Another 1976 (1) S. A. 137** at 149 expanded:

> "*It is clear that our law in a bilateral contract certain obligations may be reciprocal in the sense that the performance of the one may be conditional upon the performance or tender of performance of the other. This reciprocity may exist where obligations are required to be performed concurrently or where the obligations, though interdependent, fall to be performed consecutively. For reciprocity to exist there must be such a relationship between the obligation to be performed by the one party and that due by the other as to indicate that one was taken in exchange for the performance of the other and in cases where the obligations are not consecutive, vice versa. Where a plaintiff sues to enforce performance of an obligation which is conditional upon performance by himself of a reciprocal obligation owed to the defendant, then the performance by him of this latter obligation is a necessary prerequisite of his right to sue and the defendant may in such a case raise the defence known as the exceptio non adimpleti Contractus.*"

[24] By raising the defence of *exceptio non adimpleti contractus* I understand the defendant to be saying until and when plaintiffs can show that they have discharged their obligation under the contract, he cannot be held to be in *mora* as his duty to perform was a condition precedent upon plaintiff's performance. This assertion by defendant is however defeated by the undisputed evidence that the plaintiffs' inability to perform was due to defendant negotiating a settlement with his employer, a supervening factor. It defeats logic as to how defendant expected plaintiff to oblige under the

contract when the matter was settled between himself and his employer before the allocated trial date.

[25] Defendant has submitted further, presumably on the alternative, to the effect that even if one were to assume that he plaintiffs were to succeed in their claim, the sum claimed was subject to tax deduction.

[26] **Fathoos Investment (Pty) Ltd** at page 12 *op.cit.* the learned judge *obiter* stated:

> "*It is trite principle of our law that when a contract has been reduced to writing, no extrinsic evidence may be given of its terms except the document itself nor may the contents of such document be contradicted or varied by oral evidence as to what passed between the parties during negotiations leading to the conclusion of the contract; and, the written contract becomes the exclusive memorial of the transaction. This principle of our law is referred to as the Parol Evidence rule, and its purpose is to prevent a party to a written contract from seeking to contradict or vary the writing by reference to extrinsic evidence at the risk of redefining the terms of the contract. Notable exceptions exist where the contract is vitiated by mistake fraudulent misrepresentation, illegality or duress. See the cases of* ***Johnston v Leal 1980 (3) AS 927 (A) at 943; Soar v Mabuza 1982-1986 SLR 1*** *at* ***2G-3A***.*"*

[27] Tax deduction is imposed by law and is therefore a condition which ought to have been foreseen by the parties. Should the court allow defendant to deduct tax would be tantamount to rewriting the terms of the contract which

as demonstrated from **M. C. B. Maphalala J. A.**'s *obiter dictum* in **Fathoos** would be unattainable in our law.

[28] Defendant has further submitted on the converse in that the court should make a determination and award an equitable amount in that although plaintiffs filed the necessary pleadings, the actual trial never took place.

[29] It is trite that each case must be decided on the peculiarity of its circumstances.

[30] In *casu*, the defendant, "*engaged unbeknown to the plaintiffs in settlement negotiations*" according to plaintiff at paragraph 9 of the particulars and this is not denied.

[31] This smirks of dishonesty on the part of the defendant. Without drawing any further adverse inference from defendant's conduct, it is my considered view that this court cannot in the circumstance disturb the terms of the contract. Nothing has been alleged to have prevented the defendant from engaging the plaintiffs in the negotiation with his employer especially in the light of the existence of the contract between the plaintiff and the defendant. For that reason I am not inclined to disturb the terms of the contract.

[32] Before I make any final pronouncement on the outcome hereof, it would be remiss of me not to commend the plaintiffs for their professionalism and compliance with legal ethics in informing and reaching consensus on their fees with the defendant prior rather than springing a surprise on their client on litigation costs. All practicing attorneys are advised to adopt this procedure which accords well with the dictates of justice.

[33] For the aforegoing I make the following orders:

1. Plaintiffs' application succeed.
2. Defendant is ordered to pay plaintiffs the sum of E64,966.44.
3. Interest at the rate of 9% per annum a *tempore morae* to date of final payment.
4. Costs to follow the event.

M. DLAMINI

JUDGE

For Plaintiff : **Advocate P. Flynn instructed by Musa M. Sibandze Attorneys**

For Defendant : Mr. S. Khoza