



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 2682/2009

In the matter between:

**P. M. D. FORESTRY TOTAL SERVICES  
(PTY) LTD.**

**Plaintiff**

**And**

**PHOLILE SIBANDZE**

**1<sup>st</sup> Defendant**

**SIFISO SIBANDZE**

**2<sup>nd</sup> Defendant**

**Neutral Citation:** *P. M. D. Forestry Total Services (Pty) Ltd. v Pholile Sibandze & Another 2682/2009* [2013] SZHC 80 (3<sup>rd</sup> May, 2013)

**Coram:** Dlamini J.

**Heard:** 8<sup>th</sup> February 2013

**Delivered:** 3<sup>rd</sup> May, 2013

*Action proceedings – application for absolution from instance dismissed – defendant failing to adduce evidence but closes its case – consequences thereof.*

**Summary:** The plaintiff instituted summons claiming for an amended sum of E620,674.69 on the basis that defendant fraudulently obtained such amount from plaintiff while defendant was under its employ. During trial, on behalf of the defendant, plaintiff's witnesses were cross-examined. At the close of plaintiff's case, defendant applied for absolution from the instance. This application was dismissed. Defendant simply closed its case without giving evidence or calling any witnesses on her behalf.

[1] The trial has concluded in that both parties have closed their cases and made submissions. My duty is to ascertain whether the plaintiff has discharged the onus of establishing his claim on a balance of probabilities.

[2] Defining onus, **Corbette J. A. in South Cape Corp. v. Engineering Management Service 1977 (3) S.A. 534** at 548 stated:

*“The word onus has often been used to denote, inter alia, two distinct concepts:*

*i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and*

*ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents onus in its true and original sense”.*

[3] **His Lordship Corbett J. A. supra** continues to highlight:

*“In its sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion the burden of adducing evidence in rebuttal.”*

[4] **Stratford, C. J. in Tregua and Another v Godard and Another 1939 AD 16 at 33** had similarly stated:

*“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 circumstances whatever.”*

[5] Both their Lordships **Corbett J. A.** and **Stratford C. J.** *supra* seem to differentiate between what is commonly referred in our law of evidence as the burden of proof and the evidential burden. The burden of proof always lies with the party that alleges. Thus one will find the parlance “*he who alleges must prove*”. The evidential burden however, it would seem to me, is subject to shifting from one litigant to the other all depending on the issues at hand.

[6] In *casu*, no doubt, the burden of proof lies with the plaintiff and the scales of justice should be on the balance of preponderance.

[7] The plaintiff called a number of witnesses in an attempt to establish its claim.

[8] **Mr. Petros Mangwane Mnisi** gave evidence on behalf of the plaintiff. He informed the court that the defendant had been under the employ of plaintiff as a Secretary. Her duties included preparing the payroll for employees of plaintiff. In May 2009 as the Manager for plaintiff, he was alerted of fraudulent activities which were being perpetrated against

companies dealing with timber. Upon this information and as plaintiff was in the timber industry, he approached the plaintiff's bank and requested it to scrutinize plaintiff's accounts for any unlawful activities. He also decided to check the pay roll. He discovered glaring questionable transactions. Defendant had *mero motu* increased her salary from E2,488.50 to E6,488.50. Defendant had also unilaterally increased the salary of her brother who was her colleague from E2,538.50 to E4,538.50. There were names of persons who had never been employed by plaintiff in the payroll of plaintiff. Defendant was the only person responsible for preparing and effecting salaries to the employees of plaintiff. These ghost employees were actually paid from plaintiff's account. According to the records at the witness's disposal, a total sum of E620,674.69 was misappropriated by defendant from December 2007 to June 2009, the date defendant left plaintiff's employment.

[9] It was **Mr. Mnisi's** further evidence that following this unlawful activities, he formulated disciplinary charges against defendant. Upon invitation for disciplinary hearing, defendant resigned from plaintiff and never turned up for the hearing.

[10] The evidence of **Mr. Mnisi** as corroborated by the subsequent witness could be summarized in a tabulated form as follows:

	Payments
Fictitious employess	E527,244.04
Pholile Sibandze	E80,380.65
Sifiso Sibandze	E13,050.00

<b>Grand Total</b>	<b>E620,674.69</b>

[11] It was his evidence that defendant would receive the clock book for employees, prepare spread sheet and ensure that it balanced. She would then prepare the cheque reflecting total payment of salaries. She then presented it to management for signature. He assumed the entries were correct and simple signed. He did however check the total figure on the pay roll to verify whether it corresponded to the figure on the cheque before signing. The defendant, it would appear, according to **Mr. Mnisi** would pull out the pay roll submitted to him and replace it with the pay sheet that included ghost employees. The defendant would proceed to the bank and present the cheque and this pay roll. At all material times it was defendant's duty to do so.

[12] Subsequently, this witness received a call from defendant. She requested to talk to him about the matter. They subsequently met. Defendant requested that they should settle the matter amicably. He advised her to reduce the same into writing. She called him later to say she has obliged. He informed her to hand the letter to his attorney. His attorney subsequently called him to inform him about a correspondence from defendant upon which she was requesting that they settle the matter. This witness then handed to court a correspondence from defendant counsel. It reflected that:

*“Please find enclosed herewith client’s offer/proposal with regards to the settlement of this matter.”*

[13] This correspondence was dated 21<sup>st</sup> May 2012, a way after the present proceeding had been instituted.

[14] This witness was cross-examined. He was asked as to the time frame he had known defendant. He responded that defendant's father was a director of plaintiff previously and at that time defendant was a school going age. It was put to him that it is him who facilitated and employed the defendant. The witness informed the court that the defendant applied and her application was successful. No special consideration was given to her. It was further suggested to **Mr. Mnisi** that the reason he employed the defendant was to appease her father. He denied this. It was put to this witness that the unlawful activities carried by defendant were well known by this witness. In fact, it was suggested, that this witness and defendant had agreed that the defendant would use this *modus operandi* to have money in the company in order to make up for plaintiff's failure to pay defendant's father his dues as a former director. This witness flatly denied such an arrangement and requested for time to adduce evidence that defendant's father was fully paid by plaintiff. On behalf of defendant it was suggested to this witness that trouble started when the other directors joined in 2005 and after hearing that Peak Timber – a company having similar dealings as plaintiff – was investigating fraudulent transactions in its pay roll. **Mr. Mnisi** denied this. Cross examination carried on however, on grounds which I addressed in the ruling for absolution from the instance application.

[15] The second witness was one **Mr. Glen John Ginindza** who identified himself as an employee of First National Bank. He had occasion to examine plaintiff's account with the bank. He corroborated the fraudulent

activities mentioned by plaintiff's first witness. He highlighted further that a certain **Mr. Phila Dlamini** who was an employee of Truworths was on the plaintiff's pay roll. An amount was transferred into **Mr. Phila Dlamini's** account from plaintiff's account. This amount was soon transferred into defendant's account.

[16] **Mr. Thomas Augustus Stevens** was an accountant of plaintiff. He analysed the plaintiff's account and concluded that there was an amount of E620,674.69 in the negative as a result of the fictitious employees created by defendant and further salary increase without approval of plaintiff.

[17] Having dismissed the application for absolution from the instance, the defendant elected to close her case without giving evidence.

[18] The enquiry at this stage is whether the plaintiff has discharged his duty of establishing his claim on a balance of probability.

[19] This duty does not shift to the defendant. It remains with the plaintiff throughout the trial as well canvassed by **Corbett J. A. supra**.

[20] In considering the question of whether plaintiff has discharged his duty, there is also a duty although not strict *sensu*. This is what the learned **Corbett J. A.** defined as the "*duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent*" commonly referred in our jurisdiction as the evidential burden or as honourable **Corbett J. A. op. cit.** puts it, "*the burden of adducing evidence in rebuttal.*"

[21] In her defence under cross-examination, the defendant alluded that the unlawful activities perpetrated against plaintiff was a scheme between **Mr.**

**Mnisi**, plaintiff first witness who is also a director and herself. This was because defendant's father had not been paid his benefits when he left the plaintiff having established the business.

[22] However, the assertion by defendant ended under cross-examination of **Mr. Mnisi. Mr. Steven**, who was also a director of the company was not cross examined on this. Further the defendant did not take the witness stand to allow the plaintiff an opportunity to cross-examine her on this assertion. Again I refer to the honourable **Corbett J. A.** in **South Cape Corp. supra** at page 548 who states:

*“Where the judgment is for money only, then in an appropriate case, the inference may be drawn, prima facie, that the furnishing of security de restituendo would protect the appellant against irreparable harm or prejudice. This would go a long way towards establishing prima facie, the applicant’s claim for relief and in the absence of any rebutting evidence from the other party (the appellant), might be conclusive.”*

[23] I accept the evidence adduced on behalf of plaintiff. Defendant has not disputed that she did not commit the fraudulent activities outlined by **Mr. Mnisi** and corroborated by **Mr. Stevens** and **Mr. Silindza**. On the contrary defendant has sought to show that what she did was with the approval of **Mr. Mnisi. Mr. Mnisi** has flatly denied the same. This was only put to **Mr. Mnisi** under cross examination. Defendant preferred not to tender any evidence in rebuttal. In the totality the evidence of the plaintiff is not disputed.

[24] The court in **Nonhlanhla Mdluli v Motor Vehicle Accident Fund Case No23/11** where their Lordships in the Supreme Court stated at page 5:



*“There is an abundance of authority which establishes the principle that where the evidence of a witness remains unchallenged that witness’s evidence will as a rule be accepted.”*

[25] The above duty is expected even with more force where the court has held that a prima facie case has been established.

[26] In *casu*, there has been no evidence adduced in rebuttal. The scales of justice therefore tilts in favour of the plaintiff as nothing is to be put on the side of the defendant for purposes of weighing.

[27] It is my considered view in the totality of the above that the plaintiff has discharged the *onus* of establishing its claim.

[28] For the foregoing reasons I enter the following orders:

1. Plaintiff’s cause of action hereby succeeds.

2. Defendant is ordered to pay plaintiff:

2.1 The sum of E620,674.69;

2.2 Interest at the rate of 9% per annum *tempore more*;

2.3 Costs of suit.

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**M. DLAMINI**  
**JUDGE**

**For Plaintiff :**      **Mr. M. Manyatsi**

**For Defendant:**    **Mr. D. Madau**