



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 439/2012

In the matter between

MABEL MAMBA

Applicant

And

IRENE MTHEMBU

Respondent

Neutral Citation: *Mabel Mamba v Irene Mthembu (439/2012) [2015] SZSC 14 (9th February 2015)*

Coram: **Dlamini J**

Heard: **20th November 2014**

Delivered: **9th February 2015**

Trial – question of partnership – signed document tendered – signature not in dispute – respondent’s failure to challenge some of evidence by applicant – court to consider unchallenged evidence as proved partnership – four characteristics each party binds himself to bring something for the joint benefit of all parties, for purposes of making profit and contract be lawful.

Summary: The matter before court commenced by motion proceedings wherein the applicant sought for a declaration order, debatement of the partnership business financials and an interdict. It appears that the matter was referred to oral evidence in order to ascertain whether a partnership agreement did exist between the applicant and the Respondent.

Oral evidence

By applicant

- [1] The applicant on oath informed the court that she was a regular customer of respondent who was operating a salon business. On a certain day, she decided to take her daughter to respondent's salon. Her daughter was not pleased with the condition of the salon. It was her evidence that she then decided to approach the respondent and enquired as to why she had allowed her salon to be dilapidated. Respondent informed her that she was in dire financial need and therefore could not renovate the salon.
- [2] The applicant advised her to approach a financial institution for a loan. She replied that she had already done that but her application was declined by the bank. She enquired as to whether respondent had no friends that she could approach in order to enter into a joint venture for the salon business. Respondent suggested that she had attempted to find one but in vain. It is then that she enquired as to whether respondent would like her to invest in her salon for a partnership. It was her evidence that respondent replied "*she has been praying to God for a long time to help her and now God has heard her*". She then informed respondent that she would return with a proposal on how the partnership should be framed.
- [3] She duly returned and handed over the partnership proposal. She referred the court to a document which was marked by the court as exhibit "IM1". It was applicant's further evidence that when she gave respondent exhibit "IM1"

respondent replied by saying that she was very happy with it. She informed respondent that as she was traveling to London, the partnership agreement and works relating thereto would be concluded upon her return.

[4] Respondent however, suggested that as Easters were around the corner, she would like that they work soon. Applicant then informed her that they should sign “IM1” in the presence of a lawyer upon her return from London.

[5] It was her evidence that respondent requested her to do the renovations before proceeding to London in order to catch up with the Easter’s vibe. She was due for London the following week, Monday after the weekend of the deliberations. She accepted that renovations could be done within the space of seven days as respondent was willing to close the salon for those number of days.

[6] On her return on Monday, she found respondent having closed the salon and removing items in preparation for the renovations. Respondent then suggested to her that she, respondent, would proceed to South Africa to purchase items for the shop. She proposed that they travel together as she had, in terms of the agreement, undertaken to purchase new equipment. Respondent, however, insisted that she wanted to travel to South Africa. She then suggested that as she had to monitor the renovations, she would join respondent later in South Africa.

[7] When respondent left for South Africa, she worked with the respondent’s husband in effecting the renovations. She purchased floor tiles in the presence of respondent’s husband as he had to make an input on the suitability of the tiles purchase. She footed the bill for the tiles. She paid for its workmanship as well. She also paid the carpenter and material for carpenting.

[8] She thereafter booked a flight to Johannesburg and purchased a return ticket for respondent as well. She however, left some money with respondent’s husband in order to cater for extras. She met up with respondent and proceeded to do

shopping for the salon. They finished shopping the next day. She paid for everything that they purchased, namely salon equipment and stock. The total costs was E45,590. She used her credit card to pay. Although there were buses which could ferry the items purchased back to Swaziland, respondent suggested that the cost would be high. Respondent organised transport for the goods. As they spent the night in South Africa, applicant booked a five star hotel where they both spent the night. She had to foot the bill. They flew back to Swaziland and respondent was very happy as she said that it was her first time to fly and be booked in a hotel.

[9] On arrival in Swaziland, they both proceeded to the Ngwenya border post to meet the driver who was ferrying the goods. Respondent told applicant to wait in the car while she went to declare the goods with customs. It was her evidence that she waited for a long time without respondent returning. She became worried. She called the respondent through her mobile phone. The respondent did not pick up. She kept on calling until the respondent responded in an irritable voice stating that she will come out whenever she was through. This witness became more worried. She decided to move her motor vehicle to the exit point in order to be able to see respondent in case she decided to leave without her. She also seized a shop receipt and at its back inscribed an agreement. She then waited for the return of respondent.

[10] Respondent did eventually return. She quickly produced the agreement and asked respondent to sign. Respondent signed. She then handed this document to court and it was marked "IM2". She thereafter dropped respondent and left for her home.

[11] The following morning she went to the salon and suggested that the geyser should be shifted to another position. Respondent suggested to find a plumber. The plumber came and worked on the geyser. When he had finished, applicant paid him a sum of E1,650. As the plumber was leaving, she saw, through one of the

wall mirrors, the plumber giving respondent some of the money she had given him. She wondered as to what was happening. She confronted the plumber later who told her that he had asked respondent to hold on some of the money as the work was incomplete. She enquired as to why he had not asked her as the paying master to do so. She did not get any response.

[12] Carpentry work had been incomplete because the carpenter sourced by applicant was busy elsewhere. This did not go down well with respondent who insisted on getting another carpenter. Respondent did call her carpenter who however, failed to complete the work as he could not fit the pieces together which were already cut.

[13] Another argument ensued on the new mirrors which had to be affixed. Applicant who was, according to her evidence, a professional interior designer and property developer, suggested that the mirrors had to be fixed at a certain position. Respondent was opposed to this. At this point, respondent stopped communicating with applicant. She called her aside and enquired as to the issue. Eventually the mirrors were affixed at respondent's choice.

[14] By the fifth day, so proceeded the evidence, respondent was no longer speaking to the applicant. Respondent was busy arranging the salon according to her desires. However, respondent did inform this witness that she would be opening the salon the following day, being the sixth day. This witness wondered as to the change of mind because respondent had initially agreed to have the salon closed for seven days in order to allow renovation to be completed.

[15] On Saturday applicant went to the salon. She found respondent and the employees packing and arranging things in preparation to commence business. She joined them and customers started flocking in. It was her evidence that she decided to leave because respondent was in a bad mood towards her.

[16] On Sunday, she returned later around 13:00 hours to have a word with respondent. She enquired from respondent as to what her sins were because she appeared to be upset with her. Respondent informed this witness that she has been running the salon for years and she knows more about the business. It is then that respondent informed this witness to stay at home and she would at the end of each month bring her the share of her profit. She enquired how such would work. Respondent insisted that she was demanding such arrangement. At this juncture applicant left for home to ponder over the proposal.

[17] The following day, applicant was due to travel. She wrote exhibit "IM3" to respondent. On her return from London, she had to wait for weeks before getting her response from respondent. She was shocked by the response and she then solicited the services of an attorney.

[18] This witness was subjected to a lengthy cross examination by respondent's Counsel. I shall refer to her cross examination later in this judgment. The applicant then closed her case.

By respondent

[19] Respondent gave evidence in rebuttal under oath. She informed the court that she knew applicant who was her customer at her salon business since 2009. On the 5th of April 2011, applicant in the company of her daughter, came to her salon. She informed her that she has been looking for her. She replied that she has since moved her salon to the present place. Applicant asked as to why her place was now congested and the chairs were not fine. She informed her that they will soon be used to the place and that the carpenter was still working on the chairs. The applicant requested to see her the following day. She agreed.

[20] On the next day, applicant returned and informed this witness that she loved her salon but it was not well arranged. She would help her arrange the salon. It is

then that applicant requested for a piece of paper and a pen. She drew out a sketch and suggested that the salon would look beautiful if so arranged. Respondent answered by advising applicant that she was illiterate in design work and therefore it was difficult for her to tell from the sketch plan that the salon would look beautiful. Applicant suggested that they would talk further. It was then that the applicant said that her salon was strategically situated and therefore she should acquire chairs which are different from the other salons. This witness told her that it was the reason that she had started covering the chairs. Applicant suggested that they go to the eye clinic where she pointed out to her how the place looked like. She said that but her place was not a salon. Applicant said that they should go.

[21] Applicant took respondent to Thembelihle where she suggested to her that she should change everything in the salon. Respondent said that she could not do that as she was a single parent and her child was completing school. At this, applicant advised her to get a loan from the bank. She responded that she could but did not want money that would attract interest as she was servicing a loan for her motor vehicle.

[22] Applicant then informed respondent that she could help her as respondent was someone who liked working. Applicant then asked if she wanted her to lend her money to make the salon look beautiful. She accepted the offer provided there would be no interest. Applicant suggested that she goes home to think over the matter. Applicant returned and agreed to help her. She suggested that she proceed to Johannesburg where she would get a quotation of the items to be purchased in order to ascertain the amount to be loaned.

[23] Applicant suggested that before she goes to Johannesburg they should do the floor tiling. She agreed provided there would be no interest. They went to CTM where tiles of respondent's choice were purchased.

[24] Applicant suggested that they both go to Johannesburg. Applicant asked respondent whether she was aware that she will have to close the salon for some few days. Respondent agreed and advised that as she had to prepare for a wedding, it should be very few days. Applicant said such was not a problem as she had already solicited a carpenter whom she met at Gables.

[25] It was respondent's further evidence that she then signed off leave for her staff. They packed all the items away. Applicant, who was present, suggested that all the removed goods from the salon be housed in her home. Respondent said that she had already organised a storeroom.

[26] It was her (defendant's) evidence that she went to Johannesburg to buy the goods. Applicant on her undertaking that she would join her later, came. They met at the shop Jumbo. Applicant suggested that they find another shop with different salon equipment. They proceeded to that place. Plaintiff pointed at chairs which she admired. Respondent asked if she had seen the prices. Applicant replied that the salon should be different in order to attract customers. She informed her that the price was too high. Applicant said she would have many customers and that she had already informed her that she would start paying after three months in installments. They purchased the chairs and went to look at showers. She pointed at the showers and asked if this witness also liked them. She agreed. Applicant paid for the items. They discussed the issue of transport. Applicant suggested DHL while she suggested someone she knew. That person was called and took the goods.

[27] They went to a hotel to spend a night and boarded a plane back home. They went to the salon and she was surprised to find tiles which were not the ones she had chosen.

[28] They went to the border after the driver had called. She went to customs and paid for the goods with her own money. On her return, applicant produced a paper

written in a pencil and explained that as she was travelling to London, she wanted to make sure that she pays for the things she had bought. It was her evidence that she read the paper and signed it with a pen. Respondent asked for a copy and plaintiff undertook to give her.

[29] On the 14th April, applicant suggested they postpone the opening of the salon. She objected on the basis that she had to prepare for a wedding. She also told her that the sink was damaged. On the 15th April applicant called for the carpenter. The carpenter said that he was busy and he would not come. Respondent then called for her carpenter who came but could not work on the material already handled by applicant's carpenter. Applicant went with respondent's carpenter to purchase another wood and the carpenter did the work.

[30] Applicant came again with mirrors. She was shocked as she had mirrors. The mirrors were fitted. She became very angry. Applicant called her outside and enquired what the matter was. She informed applicant that she had bigger mirrors with frames while hers were very small. However, as applicant had already done it, she was fine with it. She enquired on the price of the mirrors and applicant said they were plus E3.000. The price shocked her as big mirrors cost only E180.00. Applicant was angry and she left.

[31] Applicant returned on Saturday 16th April and requested to have a word with her. She asked what the matter was. She then informed applicant that she was doing things her own way while the salon was hers. It was then that applicant produced exhibit "IM1" and asked her to sign it. Respondent declined on the basis that she had already signed one at the border. Applicant left respondent asking her to think about exhibit "IM1" as she was going to London.

[32] During the course of the week a lady came to her with a letter demanding her to pay within seven (7) days failing which she would come and take her things. She waited for her but instead she received summons.

This witness was also cross examined extensively.

Adjudication

Issue

The question for determination is whether on the evidence presented by both parties there was on a balance of probabilities, a partnership agreement?

Evidence

[33] In proof of her case, the applicant referred the court to three documents, one of which reflected signatures of applicant and respondent. The first partnership document drawn was exhibit “IM1” which reads:

“I MABEL NGOZI MAMBA and IRENE have decided to join in owning Provided Hair Care.

Ireneshall own 60% (sixty percent of the ownership and I Mabel Mamba shall own 40%. This however will start after any moneys I have invested is paid up. Until then, the ownership will be 50% (fifty percent) each.

I shall have the choice of removing all my investment out of the business if I am not happy or the business is not moving in the direction I see not to the business interest or mine.

In which case, I shall also be compensated by Irene if she still intend to run same business in the original New Mall location. This compensation will be to cover useage of items I have provided as well as money spent in getting the business location into good condition. It shall be a compensation of one hundred thousand (E100,000).

In the event Irene”

[34] This document ought to have been taken before an attorney for signature but for trip to London, according to applicant. The second document of partnership agreement reads:

“Contract for Provided Hair Care – name to be change as agreed lated.

I am hereby giving you the possession of all the hairdressing equipment I bought worth nearly or around the sum of E60-70 (sixty to seventy thousand) Emalangen. Also having nearly paid the sum of E29,000.00 (twenty nine thousand Emalangen) for renovating your shop for the purpose of a business partnership of 50% for the first two years and 40% for as long as our partnership goes on in your headressing business. In the event that our business arrangement does not workout I shall take possession of the said equipment and fifty thousand after that in dollars (American)

IRENE L. MTHEMBU

I. MTHEMBU

13/4/2011”

[35] This document was, according to applicant, signed by both parties at the Ngwenya border post. According to applicant, it became imperative to have this document owing to the change of mood of respondent.

[36] A third partnership document was drawn following respondent insisting that applicant should remain at home and respondent would submit monthly profits to her as per applicant and it reads: insert page 35

“This is what I want IRENE

- 1. 50% of the profits from the business up until all my cost is covered – starting first May 2011.*
- 2. 40% after that.*
- 3. E350,000 Emalangen if you chose to cancel the contract*
- 4. Your staff being informed that I am a shareholder.*
- 5. Someone of my choice working on the cash register and you supervising*
- 6. A bank account opened with you and I a signatory to the account.*
- 7. My choice to come in anytime I want to see how things are going or to work and participate.*
- 8. A chance to offer advise as to how the business is run.*
- 9. To be offered everything a business partner is expected to have.”*

[37] Respondent on the other hand, admits having been given exhibits “IM1” and “IM3”. She states that this was after their return from South Africa. She denies ever signing “IM2”. Applicant was cross examined as follows on the three exhibits:

Ms S. P. Mngomezulu : *“IM2” is the partnership agreement?”*

AW1: *“Yes”*

Ms S. P. Mngomezulu : *“How many agreements did you enter into with Respondent?”*

AW1: *“One”*

Ms S. P. Mngomezulu : *“IM2” is the agreement she signed that is before Court?”*

AW1: *“Yes”*

Ms S. P. Mngomezulu : *“Do you know what is a loan?”*

AW1: *“Yes”*

Ms S. P. Mngomezulu : *“What is it?”*

AW1: *“You give someone money to pay later with or without interest”*

Ms S. P. Mngomezulu : *“In exhibit “IM1” you expected her to pay any money you put in?”*

AW1: *“Yes”*

Ms S. P. Mngomezulu : *“In exhibit “IM3” you expected her to pay any money invested?”*

AW1: *“It would be paid in profits not from her physically”*

Ms S. P. Mngomezulu : *“When you put in money you expect her to pay?”*

AW1: *“Yes with interest and from the profits.”*

Ms S. P. Mngomezulu : *“So it was a loan?”*

AW1: *“No.”*

Ms S. P. Mngomezulu : *“I put it to you that this agreement was in fact a loan*

agreement as corroborated by documents you prepared – that is Exh. “IM1” and “IM3”, it appears at the first paragraphs that you expected money to be paid back as it is what you have just told the court?”

AW1: *“When you invest money in the business there comes a point in time when the money invested comes back.”*

Ms S. P. Mngomezulu : *“You also asked respondent to pay money owed to you in seven days?”*

AW1: *“I did ask for my money back.”*

Ms S. P. Mngomezulu : *“On three different occasions you asked for your money back – that is, by exhibit “IM1”, “IM3” and by short message service (SMS).”*

AW1: *“I said the money invested not loaned.”*

[38] It is unnecessary to decide on the validity of exhibit “IM1” and “IM3” by reason that both parties did not sign them. It must, however, be borne in mind that by no means do I suggest that for an agreement to be enforceable, parties should reduce it into writing and be signed. It suffices to state that a total reading of exhibit “IM1” and “IM3” suggests that the parties thereto intended a partnership agreement.

[39] What remains for determination is the validity of “IM2”. Should the court conclude that it is the partnership agreement?

Respondent giving her evidence in chief stated:

“Before I got into the car she produced a paper written in a pencil and she explained before I read it saying “you know I am leaving for London, I want to make sure that you pay for the things we bought”.”

She then proceeded:

“I read the paper and I signed it. It was an exercise book paper. It was written that the things were bought for me and I would pay the things back.”

Her defence Counsel resorted:

“Ms S. P. Mngomezulu : “Turn to page 7 (that is Exhibit.“IM2”) is this the paper you signed?”

RW1: “This is not the paper I signed. The paper was clean.”

Ms S. P. Mngomezulu : “Is this your signature?”

RW1: “It is not me who signed here, but the signature is the same as mine but I did not sign. I first saw this document when I received summons. They sent someone carrying this with other papers.”

Respondent was cross examined at length on this document.

“Mr. K. Simelane: “In your evidence in chief you said document at page 7 is not the document you signed at the border?”

RW1: “Yes.”

Mr. K. Simelane: “You told the court that the signature is not your signature and you do not know how it got to this document?”

RW1: “I said it was mine but I do not know how it got to the paper.”

Mr. K. Simelane: “You did not sign the document?”

RW1: “I did not.”

Mr. K. Simelane: “If you did not sign this paper it could not happen that the signature would be in it?”

RW1: *“As I stated, this is my signature but I did not sign this paper. I could not sign a document which did not favour me as owner of the business.”*

Mr. K. Simelane: *“This is your signature?”*

RW1: *“It might be my signature. I do not know how it reached this document as I did not sign it.”*

Mr. K. Simelane: *“Do you know how your signature got into this document?”*

RW1: *“I do not know how it came here but this is not the paper I signed.”*

Mr. K. Simelane: *“The signature was signed by you and it was not forged.”*

RW1: *“I do not know how it appeared in the document.”*

[40] From the above examination in chief and cross examination, the following can be deduced:

Firstly, the respondent did not put her evidence to applicant that at the border she was given a paper written in a pencil to sign and that the contents of this paper was that plaintiff was demanding back payment of the money loaned.

Lord Justice Hannah CJ in *The King v Dominic Mngomezulu & Others 9 Others 94/90* page 17 citing *S. v P 1974 (1) S. A. 581* at 582 stated:

“As a rule a party should put to each of his opponent’s witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share,”

Secondly, respondent does not deny that the signature in exhibit “IM2” is hers. She, however, disputes ever appending it to “IM2”.

Counsel on behalf of applicant questioned her several times as to how then her signature, which she admits as hers, could have found its way into the document. Respondent answered that she does not know as “*she could not have signed a document which does not favour her as the owner of the business*”.

[41] It is not in issue that the signature in “IM2” belongs to respondent. There is no evidence tendered as to how then respondent’s signature came to be appended on this exhibit except by applicant. It is my finding then that the only reasonable and probable explanation on how respondent’s signature was appended to this document is the one advanced by applicant. Her explanation stands to be accepted in the circumstances. It is therefore my considered conclusion that respondent signed exhibit “IM2” and I accept it as the agreement that the parties *in casu* concluded. It therefore stands to be enforced.

Conduct of parties

[42] Suppose for a second exhibit “IM2” did not exist. The court would be called upon to consider the conduct of the parties in determining whether there was any partnership agreement. This brings me into the definition of a partnership. It is characterized by four features as per **Lord Justice De Villiers JP** in **Joubert v Terry & Co. 1915 T.P.D. 277** at 280 – 281 as follows:

“First, that each partner brings something into the partnership, or binds himself to bring something into it, whether it be money, or his labour or skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally, the contract between the parties should be a legitimate contract.”

[43] The evidence of applicant which stood unattacked during cross examination was as follows:

“AW1: When she left I went with her husband to buy floor tiles. I asked him to come alone as I needed his input to make his wife (respondent) happy. So we went and I paid. We also went to buy paint after we agreed on the colour. I organized for someone to tile the place. I went with the carpenter to buy material.”

Respondent gave similar evidence in chief:

“RW1: We agreed on the tiles and a quotation was made.”

[44] It is common cause that both applicant and respondent purchased the equipment for the salon together in Johannesburg. This is verified by respondent who testified under oath:

“We discussed the issue of going to Johannesburg. She said she would be happy to go with me to Johannesburg. I said it would be difficult as I have already made a booking for one seat.”

She then proceeded:

“In the evening (that is, before leaving for Johannesburg) when we knocked off applicant was present. We removed items from the salon. She suggested we take them to her homestead as she had a storeroom. I said I had prepared a place where we can store them.”

[45] The respondent also testified that at the shop, applicant chose expensive equipment. She stated:

“We went to the headquarters where they sell everything for a salon. We went there and she said “yes, this is what I was referring to”. She suggested we go around the shop looking. We looked at the chairs and she pointed at the ones she

loved and I asked her whether she has seen the price. She said this is the way to attract customers.”

[46] The above demonstrate to me that the parties had entered into a partnership agreement. I say this because if respondent had only sought a loan, there would have been no need for applicant to be present when the old equipment for the salon was removed. Further, one would have expected that when applicant offered a storeroom for the old equipment, respondent would instead of informing her that she had already secured one, queried as to the reason why she wanted to keep the old equipment. The response by respondent points out to me that the relationship between applicant and respondent was not just one of borrower and receiver but of a joint business venture.

[47] The conversation as testified by respondent about travelling to Johannesburg suggests further that the duo entered into a partnership agreement.

“RW1: I said to her (applicant) when I return with the quotation, we can use the road to go and buy.”

[48] If indeed respondent needed a loan from applicant, it is puzzling as to why respondent would travel all the way to get a quotation and come to fetch applicant to go back together to South Africa to purchase the items. If respondent requested a loan, she would have simply asked for the money reflected in the quotation and purchased the items. The prevailing circumstance to me therefore is that this was a partnership. This position was conceded by respondent under cross examination which went:

Mr. K. Simelane: "Have you ever lent someone money?"

RW1: "Yes"

Mr. K. Simelane: "Did that person tell you what the money was for?"

RW1: "My employees – to buy food"

Mr. K. Simelane: "In such situations, do you go to the extent of going with the employee to buy the food?"

RW1: "It depends on the agreement."

Mr. K. Simelane: "Did you ever have gone to do something the debtor would have done with the money?"

RW1: "It has never happened to me."

[49] There is another crucial piece of evidence that was not disputed by respondent. I must also point out that this evidence was adduced by applicant that upon respondent's change of moods, applicant enquired from her as to what the matter was. Respondent informed her that she should stay at home. She (respondent) would work and bring her the share of her profit each month.

[50] In the totality of the above, viz. exhibit "IM2" and the conduct of the parties, it is my considered view that both applicant and respondent concluded a partnership agreement.

[51] I, therefore enter the following orders in terms of the Notice of Motion:

1. It is hereby declared that there is a partnership agreement between applicant and respondent for the business Provided Hair Care operating at the New Mall.

2. Respondent is called upon to account to applicant for the operation of the business from date of signing of partnership agreement.
3. Respondent is ordered to pay costs of suit.
4. As a further relief, respondent is directed to pay according to the partnership agreement (“IM2”) profits received from date of signing the partnership agreement.

**M. DLAMINI
JUDGE**

For Applicant: K. Simelane of Cloete / Henwood - Associated

For Respondent: S. P. Mngomezulu Musa M. Sibandze Attorneys