IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1648/2011

In the matter between:

LOGICO UNLIMITED (PTY) LTD		**Plaintiff**
And		
EVUKUZENZELE WHOLESALERS (PTY) LTD	**1st**	**Defendant**
MOSES MOTSA	**2nd**	**Defendant**

Neutral citation: ***Logico Unlimited (Pty) Ltd. vEvukuzenzele Wholesalers (Pty) Ltd. & Another (1648/2011) [2015] SZHC 145 (04th September 2015)***

Coram: **M. Dlamini J.**

Heard: **28th August 2015**

Delivered: **04th September, 2015**

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Summary: The plaintiff instituted action proceedings, claiming the sum of E25,653.06 for goods sold and delivered at the instance of defendants. Defendants filed a plea admitting delivery of the goods but pointing out that the said goods were later returned to plaintiff by reason that they were damaged. Second defendant stood as surety for first defendant.

Chronology

[1] The plaintiff commenced the pleadings by means of a combined summons on 19 May 2011. The defendants served their notice of intention to defend on 29th June 2011. On 19th June 2012, defendants filed their plea. On 25th November 2013 plaintiff filed an application in terms of Rule 32.

[2] When the matter came before me on 17th April, 2015, having heard both Counsel's submissions, I ordered in terms of Rule 32 (5) (c) which stipulates.

> "*32(5)(c)* *The court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.*"

[3] In line with the above Rule and in view of the issue raised being whether the goods were returned to the plaintiff, I ordered both parties to close pleadings and referred the matter to trial. The trial date was 20th July 2015.

Viva voce evidence

[4] The plaintiff**Aneesa Rosatella** who on oath identified herself as the Accountant of plaintiff and holder of Bachelor of Commerce degree from the University of South Africa. She narrated the procedure to be followed when one was returning goods. The customer fills in the goods in its form. This form is handed to the sales representative who checks the goods returned against the form filed by the customer. He then signs to confirm that the goods returned correspond to the goods mentioned in the customer's claim form. The goods are picked up by plaintiff's driver. His driver also signs to confirm that he has taken back the goods. It was her further evidence that the defendant was fully aware of this procedure. She demonstrated that by submitting to court Exhibit 3 where she pointed at page 3. She identified this exhibit B3 as a claim form submitted by defendants in respect of other goods which were not subject of the dispute in court. In Exhibit B3 she pointed out two signatures, one for their sales representative and the other for the driver who uplifted the goods from defendant. She then referred the court to the claim form under dispute which appears at page 16 of the book of pleadings. In that form, she pointed out, there were no signatures either for the sales representative or the driver. It was her evidence that the goods claimed in this action were never returned. The evidence being that they do not have signatures.

[5] She also mentioned that when she learnt that defendants were asserting that the goods were returned, she went to the sales department. She interviewed the Clerk, sales representative and the driver. All three denied that the goods were returned.

[6] I will refer to PW1's cross examination under adjudication herein. The plaintiff then closed its case.

[7] The defendant called **MbonoNhlakaniphoMotsa** (DW1). On oath, he informed the court that he was employed by first defendant and the second defendant was the director of first defendant. Plaintiff was an agent for various manufacturers of perishables. Plaintiff's mandate was to import goods on their behalf as suppliers and manage them by means of stock rotation.

[8] The goods reflected at page 16 of the book of pleadings were not fit for human consumption. As the stock was for a substantial amount, he had to get authority of the plaintiff's sales manager. These goods were uplifted from first defendant's shelves and taken back by plaintiff's driver. The reason he did not have any signature on the claim form at page 16 is because plaintiff sales manager was not available at first defendant's shop when the goods were uplifted. He did however, make a follow up as he never received credit from plaintiff after the return of the goods. Plaintiff avoided him. He then communicated with the manufacturers of the goods listed at page 16 who understood to call plaintiff and advised it to pass credit to first defendant. However, due to first defendant being sold, he could not pursue the matter further.

Issue

[9] The issue before court was crisp: Did the first defendant return the goods outlined at page 16? In law, has the plaintiff discharged its burden of proof?

Principle of law

[10] **Davis AJA** in **Pillay v Krishna & Another 1946 AD 946** at **952-953**stated on burden of proof:

> *"... namely, 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 not in the sense merely of his duty to adduce evidence to combat a prima facie case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case) so that he can never be asked to do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him: it is an entirely different onus, namely the onus of establishing any special defence which he may have."*

[11] **Innes CJ** in **Frenkel v Ohlsson's Cape Breweries Ltd 1909 TS 957** at **961** pointed out:

> "*When a litigant applies to a court for relief the burden is upon him to show that he is entitled to the remedy which he seeks; and the plaintiff must invariably begin, and must establish his case, except where the pleadings contain admissions which render the defendant liable unless the inferences to which they give rise are rebutted by him."*

[12] The plaintiff pointed out that the claim form submitted by a customer ought to bear two signatures *viz.* for the sales representative and their driver. The sales representative's signature confirms that the goods returned reflected in the form were actually returned. The driver signs to confirm that he did pick up the goods from the customer shown in the claim form.

[13] This witness was cross examined:

"Mr.T. Sibandze: *My instructions are that the reason the document at page 16 is not signed is because the stock was of large quantity?*

DW1: *I do not agree?*

Mr.T. Sibandze: *The sales representative did not sign this document because he said he needed somebody to authorize the taking of goods as they were in large quantities*?

DW1 in his evidence in chief testified:

> "*We had a meeting where all the sales representatives were told that they could not authorize return of goods above E20,000-00. The driver only signs after the sales representative or executive has signed?*
>
> *I did make a follow up with Andrew who said he would come and see me of which he never came. We only knew he was the only one who was to authorize as it was above E20,000-00"*

[14] During cross examination of PW1, PW1 pointed out that even if one were to accept defendant's version that the sales representative could not sign, the driver who collected the goods ought to have signed defendant's claim form.

[15] It is common cause that the claim form is generated and completed by the customer, herein first defendant. For the plaintiff to approve credit based on this claim form, it must rely not only on the claim form as completed by the defendants, but upon the signatures on their claim form of their officers. It is not clear as to why first defendant especially under DW1 who striked this court as an intelligent young man fully vests with business acumen could have allowed plaintiff's sales representative and its driver to leave defendant's premises without any proof that the goods have been collected

by plaintiff's employees. The reason I say DW1 was intelligent in so far as business was concerned is because when cross examined:

"*MsBoxshall Smith:* *Page 13 para 5 of the surety agreement: I agree that in the event of any amount being claimed from me by the company under this suretyship, a certificate by the Accountant to the company shall be sufficient and conclusive evidence as to the amount of my liability*"

DW1 responded intelligently:

DW1: *"Does it mean the Accountant can create any statement and expect us to pay?"*

MsBoxshall Smith: "*Yes"*

DW1: *"Does this make any business sense?"*

[16] Similarly *in casu* the defendant ought to have made sure that the claim form it generated and submitted bore the signatures of plaintiff's signatures to avoid as per DW1's wise and accurate observation another party "*creating any*" claim form and "*expect*" the other "*to pay*" so as to align with "*business sense*" as per DW1.

[17] For the above reason, I am satisfied that the plaintiff has, on a balance of probability, established that the goods sold and delivered to first defendant were never returned. I enter the following orders:

1. Summary judgment application succeeds.
2. First and second defendants are ordered to pay plaintiff each and severally one paying the other to:

    2.1 The sum of E25,653.06 be absolved;

2.2 Interest at the rate of 9% calculated from date of summons;

2.3 Costs of suit.

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M. DLAMINI
JUDGE

For Plaintiff: **B. Smith of Currie &Boxshall-Smith Associates**

For Defendants: **T. Sibandze of SiphoMatse Attorneys**