IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 911/13

In the matter between:

KHUMKANE SIBUSISO MATSEBULA **Plaintiff**

And

SICEBI INVESTMENTS (PTY) LTD **Defendant**

Neutral citation: **Khumkane Sibusiso Matsebula vs Sicebi Investments (Pty) Ltd** *(911/13) [SZH 20]12 February 2016)*

Coram: **MAPHALALA PJ**
Heard: **12 August, 2015**
Delivered: **12 February, 2016**

For Plaintiff: **Mr. Elvis M. Maziya**

For Defendant: **Mr. M. Ntshangase**
(from M .J. Manzini and Associates)

Summary: Civil Procedure – application for Summary Judgment – Defendant pleads **Exceptoi non adimplenti contractus -** the court finds in favour of Defendant – however, order payment to the Plaintiff to the sum of E50 080.20.

JUDGMENT

Introduction

[1] Plaintiff had issued Summons against the Defendant for payment of the sum E81, 461.00 based on a written Agreement of Sale on a certain butchery business situated at Shop 3 Manzini Bus Rank inclusive of fixtures and fittings amongst which a word mixer / mincer listed on the face of the said Agreement of Sale. The said butchery was being sold as a going concern and as a single unit, that is without allocating a price for any single particular item.

[2] Defendant has filed a Notice of Intention to Defend and Plea and Plaintiff filed an Application for Summary Judgment on ground that the defence had been filed solely for purposes of delay since Defendant lacked a **bona fide** defence.

[3] The said Application for Summary Judgment was heard by **Annandale J** who made a ruling that the mater be referred to trial only on the issue of the wors mixer filler - meaning all the issues were common cause. This decision was made after Defendant had raised an issue regarding the wors mixer and filler to the effect that same was smaller than the one Defendant has

expected to be delivered to her. The said items is listed as the third item on the face of the said agreement of sale.

The viva voce evidence

[4] The Plaintiff gave evidence himself and did not call any other witness and the Defendant also gave evidence of one Glory Purity Motsa (nee Dlamini) who gave evidence for the Defendant company. These parties were cross-examined by the respective attorneys of the parties. It appeared in the evidence of the parties that there was no dispute between the parties as to whether the contract was indeed entered into by them and there was also no doubt regarding the wors mixer being the only wors mixer and filler that was being sold, as well as the fact that the Plaintiff was not generally engaged on a day to day basis in the business of running butcheries but was a full time employee of Shiselweni Forest.

[5] The Defendant testified that the said item in issue was not the one she expected since it was smaller that what she already had in her butchery business and that same was for domestic purposes, yet her evidence was also very clear that Plaintiff did in fact deliver the butchery and the wors mixer and fixer at later stage.

[6] The Plaintiff testified that he estimated the value of he item to be approximately E40, 000.00, which evidence was not disputed.

[7] The Defendant during the evidence made a prayer that instead of being ordered to pay the full balance purchase price, that she be allowed that the said

wors mixer and filler be taken as a set off in repaying the balance of the purchase price.

The Arguments

[8] The attorneys of the parties then advanced their arguments on the **viva voce** evidence by the parties. I shall in brief outline the arguments of the attorneys of the parties in the following paragraphs of this judgment.

(i) For the Plaintiff

[9] The attorney for the Plaintiff in his Heads of Arguments dealt with the background of the case in paragraphs 1 to 4 of his Heads of Arguments. I must mention that the background in what is outline by court in my introductory paragraph of this judgment.

[10] The attorney for the Plaintiff then dealt with the arguments on the merits of the matter citing decided cases in support of his arguments.

[11] In paragraph 11 of the said Heads of Arguments the attorney for the Plaintiff contended the follows:

> **"11. It is common cause that the Plaintiff delivered to Defendant the item in issue as set out in the Agreement of Sale, and there is no room for Defendant's contention that the "wors mixer and the filler" is defective or unsuitable for the purpose bought for, since the Defendant is signing the Agreement of Sale with the item in issue as set out in the said agreement has used her own judgment as to the suitability thereof. Nowhere during wither parties**

evidence before Court was it stated that the Defendant ever mentioned, both verbally and in writing, that the said item in issues did not meet the description set out in the agreement, or the description which the Plaintiff had submitted to the Defendant.

[12] Finally, the attorney for the Plaintiff contended that in the totality of the evidence of the parties before court, Plaintiff is entitled to judgment as prayed for in the Particulars of Claim.

(ii) For the Defendant

[13] The attorney for the Defendant canvassed arguments for his client and filed Heads of Arguments, the attorney for the Defendant contended that his client through her evidence and the pleading before court never refused to pay the Plaintiff. She has insisted that she was willing to pay Plaintiff on condition that Plaintiff perform his obligation in terms of the written contract. In particular Plaintiff has until to date not delivered a "wors mincer and filler to Defendant. That when sought to deliver same, Defendant refused to accept same on the ground that the one delivered was too small as previously described by Plaintiff, hence the Defendant raised the special plea of **"Exceptio non adimplenti contractus".**

[14 Defendant has pleaded that the Plaintiff must deliver to her item to her satisfaction before she can make payment of the balance of the contract price. In this regard the attorney has cited the case of **B K Tooling vs Scope Precision Engineering (SA) 1979 (1) 391 at 392** to the following **dictum:**

"It must be accepted that when a creditor in a reciprocal contract is prevented from fully performing his own counter-performance by the failure of the other party's necessary co-operation, he despite his own

incomplete performance can claim performance by the other party, but basically as also in other systems, subject to reduction of the performance claimed, namely by the costs which the creditor saves in that he does not have to perform fully in his own counter-performance."

[15] At page 393 it further stated "according to **Voet 19.1.13** the onus is on the Plaintiff, when the exception is raise against him, to prove that he has in fact performed his side of the contract. Since then, this has apparently never been doubted as far as our law is concerned. In this regard cited the cases of **Hawman vs Nortje 1914 AD 293, Breslim vs Hichems 1914 AD 312** and that of **Van Rensburg vs Straughan 1914 AD 317.**

[16] The attorney for the Defendant therefore contends on behalf of his client that the Plaintiff has failed to prove his complete performance according to Defendant's evidence, the dispute arose when Plaintiff came to deliver the item in dispute wherein he was informed to return the following day when the Defendant's Director would be present. To date the Plaintiff did not came back.

[17] In the final argument the Defendant prays that this court dismiss this action with costs. In the alternative, the court may order that payment be made to Plaintiff less the amount of item missing. In this regard the Defendant annexes hereto quotations for the items missing to assist the court.

The Court's analysis and conclusions thereto

[18] Having considered all the papers before this court the only point for decision by this court is a dispute regarding the size of the machine in dispute being a **"word mincer and filler".**

[19] In my assessment of the evidence of the parties in this regard it was difficult for the court to determine this point because according to Defendant's evidence, the dispute arose when Plaintiff came to deliver the item in dispute when he was informed to return the following day when Defendant's Director would be present. To date the Plaintiff has never returned.

[20] It is my considered view that even on the face of what I have stated above in paragraph [19] it would be unjust to dismiss the action forthwith but I am persuaded by the Defendant's alternative, that this court varies that payment be made to Plaintiff less the amount of item missing. In this regard the sum of E50,080.20 in the quotation filed by the Defendant in the Heads of Arguments.

[21] In the result, for the aforegoing reasons and Application for Summary Judgment is granted less the amount of the missing item as stated above in paragraph [20] of this judgment with costs.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE