



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 816/2015

In the matter between:

SIPHO DLAMINI

Plaintiff

And

EKUHLAMKENI FARMERS ASSOCIATION

Defendant

Neutral citation: *Sipho Dlamini v Ekuhlamkeni Farmers Association (816/2015)*
[2017] SZHC 112 (13th June 2017)

Coram: M. Dlamini J.

Heard: 17th May, 2017

Delivered: 13th June, 2017

- claim based on acknowledgment of debt – acknowledgment of debt remained binding in the absence of any challenge that it was obtained through, for instance, fraud, or coercion or allegation that the Association’s constitution demands that every financial

decision by the executive must be approved by the general meeting.

Summary: The plaintiff's claim is based on an acknowledgment of debt following a lease agreement wherein plaintiff leased three brick layers and two canvas sails to the defendant. Defendant dispute the existence of a lease agreement.

The parties

[1] The plaintiff, (Mr. Dlamini) is an adult male of Mavula area in the Hhohho region and a member of defendant. Defendant is an association duly registered in terms of the company laws of Swaziland and carrying on sugar cane growing business at kaNgomane, Lubombo region.

The parties pleadings

[2] In its particulars of claim, Mr. Dlamini asserts that on the 23rd June 2009 at Mhlume, the defendant (Association) was represented by the then Chair, Mr. Malamlela Mavimbela and its treasurer, Ms Dinah Hlatshwayo and himself entered into a lease agreement wherein, he rented out to the Association three brick layers and two canvas sails. Thereafter the parties signed an acknowledgment of debt.

[3] In respect of the three brick layers, Mr. Dlamini claims the sum of E19,500 and E302, 400 for the two sails. He alleges that the Association refuses to pay him despite demand.

Defendant

[4] The Association admitted Mr. Dlamini's claim in respect of two canvas sails but alleged that it paid him the sum of E17,435.45 and thereafter

instructed him to remove the canvas sails from its premises on 14th July 2010. In respect of the three brick layers, the Association pleaded that Mr. Dlamini, as assistant secretary of the Association, was ordered to purchase two brick layers and the Association paid for them. It disputes any lease agreement in respect of the three brick layers.

Oral evidence

- [5] Mr. Dlamini on oath, testified that he is a member of the Association. Between 2008 and 2010 he held the position of assistant secretary in the Association. Mr. Malamlela Mavimbela was the chair while Dinah Hlatshwayo, the treasurer. The Association's secretary was Silas Nyoni.
- [6] Following that the Association was mandated to construct a compound for its workers, it was decided by the executive board that any person with the relevant equipment should lease it to it. He leased out three brick layers and two canvas sails. Thereafter, this agreement was reduced into writing. Mr. Dlamini handed to court the said agreement and was marked as exhibit A.
- [7] The agreed rate for each brick layer was E6.50 per brick and E70.00 per day for each sail. The total sum due for the brick layers which produced bricks was E195,000 since 23 June 2009 to date of summons being 4th May 2015. The overall total due was therefore E321,900, Despite demand, the Association has refused to pay him.
- [8] Mr. Dlamini further pointed out that when his executive committee exited office, it was through pressure from its members. As a result there was no handover to the current executive board members.

[9] The cross examination of this witness was long and protracted. Much time was spent on the manner in which his executive ran the office and a number of accusations leveled against him such as that he was corrupt and the alleged lease agreement is a result of his corrupt practices. I intend to delve on his cross examination which is relevant to the issue at hand later on in this judgment.

[10] Mr. Dlamini closed his case. The Association moved an application for absolution from the instance. I dismissed the application and reserved reasons for the dismissal. I indicated that I shall incorporate them in my main judgment.

Reasons for dismissal of an application for absolution from the instance

[11] It is well established that the test for absolution from the instance was canvassed by **De Villiers JP** in **Gascoyne v Paul and Hunter 1917 TPD 170** at **173** as follows:

“At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but closes his case immediately, the question for the Court would then be, “Is there such evidence upon which the Court ought to give judgment in favour of plaintiff?”

[12] In persuading the court to grant the application, it was submitted on behalf of the Association that Mr. Dlamini failed to demonstrate to the court how he arrived at the claim of E321,900.00. He also failed to state how many bricks were made from his brick layers.

[13] From the test as advanced by the learned judge, **De Villiers JP supra**, the issue pointed out by Counsel for the Association, refers to the quantum of

the claim. The claim by Mr. Dlamini was clearly outlined and the basis for his claim was exhibit A. On the above therefore, the question whether “*a reasonable man could or might find for the plaintiff*” stands to be answered in the positive.

Main judgment

Association’s defence

[14] The Association arrayed a number of witnesses in rebuttal. The first witness was Alfred Bheki Mngomezulu (Mr. Mngomezulu) who identified himself as the current chair of the Association. His evidence was that Mr. Dlamini was the secretary before he took over. The substantive secretary was substituted by Mr. Dlamini. There was no handover when he took over as chair. Mr. Dlamini had taken all the office equipment and material. They retrieved it from him with the assistance of the Deputy Sheriff. He only learnt that the Association was owing Mr. Dlamini when he was served with summons. He enquired and was advised by the ex-chair that Mr. Dlamini was paid the sum of E17,435.45 in respect of his claim. The payment was in a form of a cheque handed to him while he was in the company of another woman.

[15] As proof of payment, he sought for the bank statement where he verified that Mr. Dlamini was paid. He did see canvas sails and brick layers machine in the premises of the Association.

[16] This witness was cross examined at length. Most of his cross examination focused on issues which were irrelevant to the case at hand. I shall refer to the questions which are relevant for determination of this matter. The first relevant question related to the witness credibility. He was asked to confirm that he only first heard of the Association owing Mr. Dlamini

through the summons. It was put to him that the letter of demand was served upon him. He stated that he did not recall that.

[17] Under cross examination, Mr. Mngomezulu clarified that the payment made to Mr. Dlamini was in respect of the two canvas sails and Mr. Dlamini was advised to collect his sails but did not. He was told all this evidence by his predecessor. It was disputed that Mr. Dlamini was paid any sum of money by the Association. Mr. Mngomezulu insisted that the bank statement was a testimony to this. He pointed out that the bank statement reflected who withdrew the cheque.

[18] Learned Counsel on behalf of Mr. Dlamini then demonstrated that the figure advanced by Mr. Mngomezulu as payment for the sails was impossible in the light of the charge of E70.00 per tent. The figure of E17,435.45 indicated cents whereas a charge of E70.00 would not accumulate any cents. Mr. Mngomezulu indicated that he did not know. Mr. Mngomezulu was challenged with providing proof that the erstwhile chair gave Mr. Dlamini money to purchase brick layers. He answered that he was not given any.

[19] The second witness on behalf of the Association was Malamlela Goodwill Mavimbela (Mr. Mavimbela). He testified under oath as the former chair of the Association. He was aware that Mr. Dlamini leased out sails to the Association in 2009. The fee charged was E50,000. They agreed with the executive committee to pay him E17,000 and thereafter cancelled the lease. They did pay him by cheque in July 2010 although he did not have proof as Mr. Dlamini took everything that was in the office.

[20] In 2009, they sent Mr. Dlamini to go and buy brick layers at Cash Build. Mr. Dlamini came back with the brick layers. He denied the Association

leasing the brick layers from Mr. Dlamini. Mr. Mavimbela was shown exhibit A. He testified that Mr. Dlamini prepared it. I shall revert to his cross examination later in this judgment.

[21] The next witness was Dinah Shonaphi Hlatshwayo. She testified under oath. Her evidence was brief. She told the court that Mr. Dlamini was paid for his items and after that the executive did not continue to engage him.

Analysis of the evidence

Common cause

[22] It is not in dispute that Mr. Mavimbela and Ms. Hlatshwayo as chair of the Association and treasurer respectively signed Exhibit A. Exhibit A reads:

*“Ekulamkeni Farmers Association
P. O. Box 129
MHLUME
23 June, 2009*

Sis/Madam

Re: Acknowledgment of two rented Sails and three Brick-makers

We the executive committee of the above mentioned farmers association do acknowledge the renting of two sails and three brick makers belonging to Mr. Siphon Dlamini.

This is with immediate effect which, in essence, is June 23, 2009.

The sails are for the purposes of covering building material, for the construction of our workers’ residential compound, against the ever changing weather condition as well as covering bags of fertilizers.

We further acknowledge that the agreement reached on the rate to be paid for each sail per day is E70.00 while the brick makers will charge E6.50 per brick.

Payment, as agreed will be done on stages as may be claimed by the owner of the equipment or upon completion of the two block construction of our employees’ residential compound.

In respect of the sails to be covering fertilizers, payment will be done on stages as may be claimed by the owner or at whatever time that Ekuhlamkeni Farmer's Association may feel it no-longer needed the services of the said equipment.

We pray that the two parties uphold to the agreement, breach of which may lead to legal action being instituted by the aggrieved party.

Regards

*Mamlala Mavimbela
(Chairman)*

*Ekuhlamkeni Farmers
Association
P. O. Box 129
MHLUME"*

*Dinah Hlatshwayo
(Treasurer)*

[23] Mr. Mngomezulu, the very first witness on behalf of the association was cross examined:

"M. V. Nxumalo: "You are not telling the truth before court when you say Exhibit A came to your attention when plaintiff wanted his money as it was signed by the ex-Chair and the Treasurer before?"

Mr. Mngomezulu: "I do not oppose that the agreement was signed, but the ex-executive ought to have taken it to the general meeting."

[24] I must point out from the onset that the executive's (whose chair was Mr. Mavimbela) failure to take exhibit A to the general meeting does not render it null and void. It remained binding in the absence of any challenge that it was obtained through, for instance, fraud or coercion or allegation that the Association's constitution demands that every financial decision by the executive must be approved by the general meeting.

Canvas sails

[25] The Association both in its plea and defence admitted leasing of the two canvas sails. However, it contended that Mr. Dlamini was paid. Mr. Mngomezulu who was the first witness to shed light on the payment,

testified that he was told by the ex-chair that Mr. Dlamini was paid for the sails, a sum of E17,435-45. When pressed under cross examination to produce proof, he testified that Mr. Mavimbela will answer to this.

[26] Mr. Mavimbela did not take the issue further as he too failed to adduce any proof of payment. The court was told by the Association's witnesses particularly, Mr. Mngomezulu, that when they took over office they received the cheque book from the former executive. However, he failed to produce even a counterfeit stump of the cheque said to have been given to Mr. Dlamini, who at all material times vehemently deny ever receiving any money from the Association.

[27] Worse still, the said cheque was said to have been signed by the treasurer, Ms. Hlatshwayo. Ms. Hlatshwayo was the third witness on behalf of the Association. Her evidence crumbled from the onset under examination in chief. She was led by Counsel for the Association as follows:

Counsel Z. Magagula: "Was plaintiff paid for the items loaned, that is, three brick layers and two canvass sails?"

Ms. Hlatshwayo: "Yes, he was paid."

Counsel Z. Magagula: "Did the executive cancel the agreement?"

Ms. Hlatshwayo: "We did not proceed with him."

Counsel Z. Magagula: "How much was he paid?"

Ms. Hlatshwayo: "E17,600-00."

Counsel Z. Magagula: "How was it computed?"

Ms. Hlatshwayo: "I cannot recall."

Counsel Z. Magagula: “When did your office terminate the agreement?”

Ms. Hlatshwayo: “I cannot recall”

[28] If at all Mr. Dlamini was paid, this is the witness who would have given a detailed account of the exact figure he was paid as she drew and signed the cheque. She would have told the court how the payment was computed following that the figure in the pleadings reflected cents when it ought not to.

[29] Under cross examination Ms. Hlatshwayo failed even to tell the court in whose favour the cheque was drawn. She was asked in this regard:

“Counsel M. Nxumalo: “Was this an open or crossed cheque?”

Ms. Hlatshwayo: “We used a cheque book. I can’t recall the name of the payee.”

[30] The evidence of Ms. Hlatshwayo is very scanty and the court cannot rely on it. In the result, I find that Mr. Dlamini is still owed the sum of E302,400.00 in respect of the two sails leased to the Association.

Three brick layers

[31] The evidence adduced on behalf of the Association is that Mr. Dlamini was given money to purchase brick layers for the Association. Mr. Mavimbela testified that he was to purchase two brick layers. Ms. Hlatshwayo when asked in chief by Counsel for the Association on how many brick layers was Mr. Dlamini instructed to purchase for the Association, she replied “*Between two or three*”. Again, it is not clear why Ms. Hlatshwayo, a treasurer seized with managing and administrating the finances of the Association would give a general answer to a pertinent issue such as this. This answer, viewed with Mr. Dlamini’s fervent denial of the Association ever dispatching him to purchase brick layers, stands to be rejected.

[32] Further, Ms. Hlatshwayo testified that although she signed Exhibit A, she did not appraise herself of its contents. Exhibit A was eloquently designed as evident in its heading:

“Re: Acknowledgment of 2 rented sails and 3 brick layers”

[33] It is not clear how a person charged with management of the finances of the Association would sign a document committing the Association to finances and later turn around to say that she did not read the contents of the document, whereas the very heading summed it all. The court cannot accept her version.

[34] At any rate, Mr. Mngomezulu when put to him on behalf of Mr. Dlamini that the compound was constructed of bricks produced by Mr. Dlamini’s brick layers, responded that he did not dispute this except that Mr. Dlamini ought to have obtained three quotations. This evidence loses sight of the fact that Exhibit A mentioned the rate of each brick layer and was consented to by the executive charged with the administrative affairs of the Association.

[35] In the final analysis, I find for the plaintiff. It is hereby ordered:

1. The plaintiff’s termination of the lease agreement is hereby confirmed;
2. Defendant is ordered to pay plaintiff the following:

2.1 The sum of E321,900.00;

- 2.2 Interest thereof at the rate of 9% per annum *tempore morae*;
2.3 Costs of suit.



**M. DLAMINI
JUDGE**

For Plaintiff : M. V. Nxumalo of Fakudze Attorneys
For Defendant : Z. Magagula of Zonke Magagula and Co.