



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Case No: 3053/07

In the matter between:

**ALFORD PETER JOHN DE SOUZA**

**APPLICANT**

and

**PETROS DLAMINI**

**DEFENDANT**

Neutral Citation : Alford Peter John De Souza v Petros Dlamini (3053/07)  
[2017] SZHC 27 (04 JULY 2017)

Coram : MABUZA -PJ

Heard : 2013; 2014; 2015; 2016

Delivered : 04 JULY 2017

## SUMMARY

**Civil Law: Claim for rent owing – Defendant admits claim – Pleads counterclaim.**

## JUDGMENT

### **MABUZA -PJ**

[1] In this matter the Plaintiff sued out a simple summons amplified by a declaration for the following prayers:

- (a) Payment of the sum of E340,067.25 (Three hundred and forty thousand and sixty seven Emalangeni twenty five cents) being in respect of rentals;
- (b) Interest on the sum of E6, 137.09 (Six thousand one hundred and  
thirty seven Emalangeni and nine cents);
- (c) Costs of suit; and
- (d) Further and/or alternative relief.

[2] The matter is defended by the Defendant who in his plea admitted that he owed the Plaintiff the sum of E340,967.25 (Three hundred and forty thousand nine hundred and sixty seven Emalangeni twenty five cents) for

rentals but has raised a counter-claim against the Plaintiff in the amount of E573,349.08; interest at the rate of 9% per annum a *tempora morae*; costs of suit; and any further and alternative relief.

[3] The Plaintiff denies any liability to the Defendant in terms of the counterclaim. The parties led oral evidence in support of their respective positions.

[4] The Plaintiff (PW1) led evidence that he and the Defendant (DW1) entered a lease agreement on the 1<sup>st</sup> October 2002 over Farm No. 1060 D, “Beginsel” situate in the Shiselweni Region of Swaziland, measuring 59, 59t2 hectares (the Farm). The lease agreement was to come into operation on the 1<sup>st</sup> October 2002, the date on which it was signed and to subsist for a period of nine (9) years from that date.

[5] The rent was agreed upon at E48,000.00 (Forty eight thousand Emalangeni) for each year escalating at the rate of 10% (ten per cent) of each anniversary. The rent was to be paid annually in advance on or before the anniversary of the lease.

[6] The Farm was let to the Defendant for the purpose of *inter alia* conducting the following activities: dipping cattle and sugar cane production.

[7] The Defendant fell into arrears in respect of the rental and to this end signed on acknowledgment of debt on the 5<sup>th</sup> July 2007 wherein he acknowledged being indebted to the Plaintiff in the following respects:

“2. **ACKNOWLEDGEMENTS**

The Debtor hereby acknowledges himself to be indebted to the Creditor in the agreed amount of –

2.1 E340,967.25 (Three hundred and forty thousand nine hundred and sixty seven Emalangi and twenty five cents).

2.2 Interest on the sum of E6,137.09 (Six thousand one hundred and thirty seven Emalangi and nine cents).

2.3 Legal costs at an agreed amount of E2,000.00 (Two thousand Emalangi) for drafting and preparing the agreement).”

[8] The agreed mode of payment was that:

“The Debtor will liquidate the amounts referred to in paragraph 2 above by way of equal instalments at the rate of E150,000.00 (One hundred and fifty thousand

Emalangen) per annum, commencing on the 01 July 2007 and thereafter subsequent instalments by no later than the second day of each and every succeeding months thereafter, until all amounts owing in terms hereof have been paid in full”.

[9] The Defendant failed to pay in terms of the acknowledgement of debt and the Plaintiff issued summons basing his cause of action on the acknowledgment of debt.

[10] As Plaintiff’s claim is not denied by the Defendant, I find it apt to begin with the Defendant’s evidence in regard to his counterclaim.

### **The Defendant’s case**

[11] The Defendant’s claim is made up of the following claims:

(a)	Irrigation equipment	-	E349,640.00
(b)	Sugar cane	-	E122,209.08
(c)	24 Cattle	-	<u>E101,500.00</u>
	<b>TOTAL</b>	-	<b><u>E573,349.08</u></b>

### **Irrigation Equipment**

[12] The Defendant (DW1) testified that after the lease agreement between him and the Plaintiff was in place, he installed irrigation infrastructure to the value of E349,640.00 (Three hundred and forty nine thousand six hundred

and forty Emalangen). This was during 2002. The Defendant did not testify as to the value of the items at the time he bought and installed the equipment onto the farm during 2002 but instead filed a valuation purportedly carried out by the Ministry of Agriculture and Cooperatives (Land Development Section) dated 11<sup>th</sup> September 2007. The valuation is reproduced hereinunder as follows:

“To Ben J. Simelane and Associates  
 From: Ministry of Agriculture & Cooperatives (Land Development Section)  
 Date: 11 September, 2007

**Re: Evaluation of Existing Irrigation Infrastructure**

This letter serves as a confirmation that, the Ministry of Agriculture conducted a field visit to Farm 60 in Shiselweni District. The aim of the visit was to evaluate the existing Irrigation infrastructure and come out with the cost of that infrastructure. Below is the summary of material and costs:

<b>Item</b>	<b>Description of Item</b>	<b>Total Cost</b>
1	Three phase electric line with transformer	E46635.00
2	Electric cable (30m x 25mm)	E4740.00
3	Meter box (3 phase)	E690.00
4	Pump house and sump	12000.00
5	18m x 160mm flanged suction and delivery pipes	E9600.00
6	420m x 160 mm PVC pipes class 9	E61270.00
7	300m x 75mm PVC pipes class 9	E11880.00
8	1080m x 63mm PVC pipes class 9	E2565.00
9	3600m x 50mm HDPE class 6	E68000.00
10	230 x 50mm x 25mm saddles	E7360.00
11	230 x 25mm x 500mm stand pipes	E85500.00

12	230 x 25mm risermatic valves	E8280.00
13	16 x 50mm end caps	E2120.00
14	Installation costs	E29000.00
	<b>Total</b>	<b>E349640.00</b>

[13] He says that two officers from Swazi Bank, the Plaintiff and himself went to inspect if the irrigation pipes were there. He was then asked to put a value on the pipes and give it to the bank and also for the Plaintiff to know what the value was. He placed the value at E273,293.00 (Two hundred and seventy three thousand, two hundred and ninety three Emalangeni) after depreciation. He said that the amount of E349,640.00 (Three hundred and forty nine thousand six hundred and forty Emalangeni) was the value at installation. And the equipment had only been used for three years and that PVC pipes had a lifespan of 30 years.

Consequently the claim for improvements was now reduced to E273,293.00 (Two hundred and seventy three thousand, two hundred and ninety three Emalangeni) making the new total claimed E497,002.08 (Four hundred and ninety seven, two hundred Emalangeni and eight cents)

[14] The irrigation equipment was to enable him to water the sugar cane he intended to cultivate. He admitted that he did not obtain written permission

from the Plaintiff to install the irrigation equipment contrary to the provisions of the lease agreement.

[15] He testified that when they reached the agreement with the Plaintiff, the latter used to live between Swaziland and Richards Bay and that at the time that he (Defendant) was implementing the project and applying for the loan, they needed all this information from the Plaintiff, like signing of the documents and the like which the Plaintiff came and signed. But that when it came to the installation of the pipes, because he (Defendant) was actually rushing to plant before the end of the year, that is December, the Plaintiff was not around. That he and the Defendant talked about it and the Plaintiff said that the Defendant should go ahead.

[16] When he was asked by Mr. Simelane when the Plaintiff became aware of the installation of the irrigation equipment he responded that “actually I was not hiding anything from him, he knew everything that I was doing on the farm. I can’t remember exactly when but he knew I was doing irrigation and I was going to plant sugar cane”.



[17] The Defendant stated that there were two separate lease agreements between him and the Plaintiff; one for planting sugar cane (60 hectares); and the other to graze cattle.

### **The sugar cane**

[18] The Defendant obtained a loan from Swazi Bank for sugar cane production. He prepared the land followed by trenching and the digging in of the pipelines. The installation of the pipes took place together with the installation of a three phase electrical supply as well as a pump house. The electricity was connected to the pump house. The electricity installation cost him E46,666.00 (Forty six thousand six hundred and sixty six Emalangeni).

[19] The Defendant testified that during the first year of operation (2004 – 2005) he harvested a small portion of sugar cane because he had started very late and there were a lot of rains which prevented him from going into the fields as the roads were slippery.

[20] That during 2005 -2006, he finished harvesting the whole field, but the problem he had was that most of the loan money had gone into transport so

the bank could not finance the seasonal loan which was responsible for the payment of labourers, electricity and rent (running costs).

[21] The same happened during 2006-2007 season. He harvested but could not transport most of the sugar cane as transport was a major problem as they could not get in on time so that most of the sugar cane was destroyed. He stated he was able to take some sugar cane to the mill during 2006 – 2007 and he was able to pay some money to the bank from its proceeds.

[22] He stated that, he harvested 21 hectares but only 10 hectares was taken to the mill due to transport problems and the rest of the cane went bad and he had to destroy it. The tonnage that went to the mill was 431 tonnes. That sucrose content that particular season was 12.943 almost 13% which was very good. Sucrose content, he stated, is the measure of the quality of the cane. And whatever you get there is actually what is used for producing the sugar. In his case the amount of sucrose would have been a percentage of the 431 tonnes.

[23] He stated that 11 hectares of the cane that was cut could not be transported to the mill because of transport problems and it got spoilt, 6 hectares was left

standing. The bank advised him to stop operations because the project was becoming costly. He informed the Plaintiff as he was also owing rent.

[24] He stated that the Plaintiff sent Mr. Potgieter to the Defendant with a letter purportedly written by the Defendant whose contents effectively handed the remaining sugar cane to the Plaintiff to sell for the rent owed. He says that because he was under pressure, he signed the letter as he thought that this was a solution to the rent problem.

[25] The letter is dated 27 October 2006 and is written on the Defendant's letter heads. The contents thereof are reproduced hereunder:

“Friday, October 27, 2006

APJ De Souza  
P.O. Box 753  
Manzini  
Swaziland

Dear Mr. De Souza

This letter confirms that I have authorised Mr. Alford PJ De Souza and/or his duly appointed agents to assist me in the harvesting of the sugar cane crops on Beginsel Farms at Mhlosheni in the Shiselweni District for the monies owed and/or outstanding accounts.

Should you require any further information, please do not hesitate to contact me.

Yours faithfully,

Petros P. Dlamini

- [26] He stated that the intention of the letter was that the Plaintiff was going to harvest the sugar cane, take it to the mill at Big Bend and get it crushed so that he could get the money for the rent.
- [27] After he signed the letter he asked Mr. Potgieter as to how the cane was going to be taken to the mill as he was the one registered there as a quota holder. Mr. Potgieter responded that he had already arranged with a Mr. Rudolf at Sidvokodvo to cut the cane with his labourers and transport it to the mill using his (Rudolf's) quota. After Mr. Rudolf was paid he would pay the money over to the Plaintiff.
- [28] He says that after this conversation, Mr. Potgieter asked him to leave the farm even though he wanted to stay in order to observe how much tonnage had been produced. Mr. Potgieter did not want the Defendant to interfere with the labourers who had been told that the cane belonged to Mr. Rudolf.

He stated that the 6 hectares of sugar cane that was left to Mr. Potgieter was fine.

[29] He says that because there was not much interaction between him and the Plaintiff, he decided to have the sugar cane evaluated. He says that the Plaintiff had already breached the agreement by approaching Mr. Potgieter without contacting him. He approached a specialist from the Ministry of Agriculture who specialises in sugar cane production, Mr. Nhleko (DW2).

[30] Mr. Nhleko valued the sugar cane and prepared a document date stamped 4/10/2006 which is reproduced hereunder:

**MINISTRY OF AGRICULTURE AND CO-OPS**  
**SUGAR CANE SECTION**

**REPORT OF PETROS DLAMINI SUGAR CANE LEFT**  
**UNHARVESTED ON 6HA.**

Petros Dlamini has a sugar cane scheme at Nkhungwini. In 2006, Dlamini when harvesting, he developed some transport problems just after he has started harvesting. Few loads reach the mill on time. But the rest consignment was left idling in the field after it was cutted. About 6Ha of cane was left standing (uncutted).

By these problems Mr. P. Dlamini lost income in the form of left uncutted cane and cutted and not transported cane.

The standing cane of 6Ha multiply by 100 tones of cane per Ha. This gives 600 tones on the 6 Ha. Therefore average sugar sucrose per Ha is 14% which means 14 tones sucrose per Ha. This give  $14 \times 6\text{Ha} = 84$  tones of sucrose. A tone of sucrose was packed at 1454.87 per tone.

Therefore 84 tones is equal to  $84 \times 1454.08 = \text{E}122\ 209.08$

This means Dlamini lost E122 209.00 on the left standing cane on average.

Report compiled by:

**A. Nhleko**

Sugar cane officer

[31] The total value of the 6 Hectares came to E122 209.08 (One hundred and twenty two thousand two hundred and nine Emalangeneni and eight cents).

[32] The Defendant says that both the Plaintiff and Mr. Potgieter did not account to him for the 6 Hectares and neither did he give them his valuation therefore sourced from Mr. Nhlenko.

[33] He testified that sometime during December 2006 or January 2007 he introduced Mr. Vusi Dube to the Plaintiff. Mr. Dube was interested in leasing the farm in order to cultivate maize.

[34] He advised Mr. Dube that the irrigation equipment belonged to the bank. He says that the bank agreed to sublet the irrigation equipment to Mr. Dube.

### **The Cattle**

[35] The Defendant testified that when he left the farm he left his cattle with Mduduzi Mamba (DW3) to look after them. When he left them they were 18 but by 2009 they were 24. That sometime between 2010 and 2011 DW3 made a report that the cattle had been moved to the kraal of Andrew Sibandze (PW3).

[36] The Defendant contacted PW3 and they met at Johnny's shop which is situated between Mbulungwane and Nkhungwini. During their conversation, the Defendant disclosed to PW3 that he understood that his cattle had been moved to PW3's kraal. PW3 responded that he had not stolen cattle and that the cattle graze together and sometimes they came to his kraal and other times return to their kraal. PW3 told the Defendant that his (Defendant's) cattle were dying and no longer the same number.

[37] The Defendant thereafter made a report to the dipping master that his cattle were now in PW3's kraal. There was no need for a stock removal permit because the cattle used the same dipping tank. The dipping master confirmed that the cattle were all dipped together.

[38] The Defendant testified that the 24 head of cattle comprised of 14 cows @ E4,000.00 each; 4 heifers @ E4,500.00 each, 1 ox @ E8,500.00 and 5 steers @ E3,800.00 altogether totalling E101,500.00. And that these were estimate figures.

### **The sugar cane**

[39] The Defendant was cross-examined by Mr. Magagula. He confirmed his evidence in chief by telling the Court that he installed the irrigation pipes towards the end of 2003 and planted his first sugar cane crop during December 2003 to January 2004. From this crop he did not harvest much because it was already towards the end of the milling season. He stated that the harvest was very small, about 5 hectares or less and because it was raining he had a problem of taking the cane out of the field to the loading zone



[40] However, during 2005 he was able to harvest everything. It was during 2006 that the trouble started. He had transport problems. Even though he did harvest only a small portion actually reached the mill, the rest of the cane was left rotting in the field, as well as 6 Hectares which were left standing.

[41] Having pleaded that the Plaintiff harvested the 6 Hectares which were left standing, the Defendant was asked if he knew for a fact that the Plaintiff had harvested the sugar cane that had been left standing at the farm. His response was that he could not answer the question because when he had signed the letter that Mr. Potgieter had brought he was told (by Mr. Potgieter) that he should leave the farm and not disturb the person who was going to harvest the cane. Pushed to answer he stated that he did not know.

[42] It was put to the Defendant that he had further pleaded that the Plaintiff had failed, refused and or neglected to account to the Defendant for the value of the sugar cane harvested from the farm and that this gave the impression that the Plaintiff had received value for the sugar cane, did the Defendant know for a fact that the Plaintiff had actually received value for the sugar cane.

[43] The Defendant responded that he did not know because he was never given any feed back.

[44] The Defendant was shown the undermentioned letter which is reproduced hereunder:

“P.O. Box 1086  
Matsapha  
M202  
Swaziland

Cellular No. 6030774

To whom it may concern

This document confirms that I, Thomas I. Potgieter, ID Number C415283 acted on behalf of Mr. Alford P.J. de Souza whilst he was out of the country and assisted him on Beginsel farms with the Sugar Cane project belonging to Mr. Petros P. Dlamini.

I wish to state the following:

- a. The sugar cane was approximately 1.2 metres tall and very dry as no irrigation system was in operation.
- b. I brought in Mr. Julius from Rudolf farms in Sidvokodvo who is an experienced sugar cane farmer, who advised me that it was not worth the effort and transport, to deliver the sugar cane to the sugar mill.
- c. To try and salvage whatever sugar cane possible, I requested a second opinion from the buyer of Ubombo Sugar Ltd., to the farm. Upon inspection of the sugar cane in the field. He rejected the crop and said it will not be accepted at the Sugar Mill. The sugar cane was of a very poor quality.
- d. At this point in time I had already incurred costs for the harvester’s food, equipment, accommodation and transport.

- e. I then informed Mr. A. De Souza and Mr. P. Dlamini of the above. Mr. de Souza advised me to stop immediately and Mr. P. Dlamini offered the sugar cane project to me, which I declined.

Should you have any queries with this letter, please do not hesitate to contact me.

Yours faithfully,

Thomas I Potgieter”.

The letter is written on letterheads of “Thomas I. Potgieter”.

- [45] Mr. Magagula stressed that the point of showing the Defendant the letter from Mr. Potgieter was to demonstrate that the sugar cane that the Defendant had left was never harvested and as such no value was derived from it which would have off-set the Defendant’s debt.

### **The Improvements**

- [46] The Defendant confirmed that when he met Mr. Dube during January 2007 and suggested to him that he approach the Plaintiff to request to lease Beginsel farm, he (the Defendant) was still paying Swazi Bank for leasing the irrigation equipment because the bank held security over it. The Defendant disclosed that to date he was still paying for the equipment.

[47] The Defendant was asked if when Mr. Dube (Stripes Investments) took over the farm he used the irrigation equipment and whether the Defendant entered into any lease agreement with Mr. Dube for the equipment. The Defendant answered “yes” to both questions.

[48] The Defendant was shown a letter dated October 2008 written by him to Mr. Dube offering the latter to rent the equipment for E30,000.00 (Thirty thousand Emalangeneni per annum) or to purchase it for E220,000.00 (Two hundred and twenty thousand Emalangeneni). The Defendant confirmed that he was the author of the letter.

[49] When asked how he could claim for it in his counterclaim, the Defendant responded that when Mr. Dube left the farm during 2008/9, he left the irrigation equipment on the farm. That when the Defendant tried to remove it, the Plaintiff refused.

[50] The Defendant was reminded of clause 13.3 of the lease agreement which states that:

“Save for addition or improvement which is removed from the Farm as required by the Lessor in terms of clause 13.2, all additions and

improvements made to the Farm shall belong to the Lessor and may not be removed from the Farm at any time. The Lessee shall not, whatever the circumstances, have any claim against the Lessor for compensation for any addition or improvement to the farm, save for such compensation as is specifically provided for in respect of orchards, plantations and crops in terms of clause 14 nor shall the Lessee have a right of retention in respect of any improvements”.

[51] The Defendant was shown a letter written by Messrs Stripes, reproduced hereunder:

“Date: 02 October 2008

To: Mr. Petros P. Dlamini  
P.O. Box 116  
Hlathikulu

Dear Sir,

Re: MEMORANDUM OF AGREEMENT – NOTICE OF CANCELLATION

We refer to the Memorandum of agreement which we both entered into on the 16 January 2007 whereby you sublet me Farm Number 1060D “BEGINSEL” situate in the Shiselweni District. The Two conditions of the agreement were that firstly we were to pay the rentals directly to the Lessor and secondly we were to pay E50,000.00 to Swazi Bank at the end of each cropping season for the irrigation equipment installed on the leased property.

Subsequent to the signature of the Memorandum of Agreement you then removed the irrigation equipment from the leased property. You further failed to restore and or replace the irrigation equipment despite my several reminders and notices

calling upon you to rectify the default. The availability of the irrigation equipment was an essential condition of the Memorandum of Agreement and its non-availability renders our Memorandum null and void. In the circumstances we are now compelled to hold you in default of the said Memorandum of Agreement and to declare the Memorandum of Agreement cancelled in terms of the default clause 7 (a) of the Memorandum of Agreement. We further reserve our rights to claim all the damages we have suffered as a result of your default.

Yours faithfully,

**Vusumuzi A. Dube**  
**For: Stripes Investments (Pty) Ltd**  
cc. Swazi Bank – Nhlangano

[52] The Defendant's response was that Stripes Investments ought to have stated in the letter that when he took over the farm the irrigation equipment was no longer there in particular the 14 sprinklers and pump. It was his further response that the equipment on the counterclaim was not the one that was removed.

[53] It was put to him that as the equipment belonged to the Swazi Bank, the bank had a right to seize it. His response was that he, the Plaintiff and officers from Swazi Bank went to the farm to value the equipment as the Plaintiff wanted to sell the farm but thereafter the Plaintiff indicated that he would not take the equipment.

[54] The bank also wrote to the Plaintiff saying that they could not take the irrigation equipment from the farm because it was a metre deep and that when he (Defendant) wanted to take it, the Plaintiff refused until he put something on the table for him to eat first.

### **The Cattle**

[55] The Defendant confirmed that when he left the farm during 2006, he left his cattle behind because the Plaintiff had advised him not to remove anything from the farm until the rentals were sorted out. He left the cattle under the care of Njabulo Mabuza's herdboys and Mabuza's brother Mduduzi Mamba.

[56] The Defendant further stated that during 2011 Mabuza had gone but had left everything with Mduduzi Mamba. Mamba phoned the Defendant and advised him that the Plaintiff had moved the Defendant's cattle to Andrew Sibandze's kraal. And for that there was no need for a removal permit because the kraals were in the same farm and the kraals were hardly 50 metres apart. And that between 2006 and 2011, Mabuza and Mamba were responsible for dipping the cattle.

[57] On re-examination the Defendant stated that he only leased the irrigation equipment to Stripes Investments but removed movable equipment that belonged to him as it was prone to theft.

[58] Abel Jabulane Nhleko (DW2) next gave evidence. He stated that he was an extension officer under the Ministry of Agriculture. And that he advised sugar cane farmers on commercial sugar cane production. And that he had been doing so for the past 20 years since 1995 and had been an extension officer since 1985 and that he had the relevant qualification of a certificate in sugar cane production.

[59] He testified that during the month of October 2006 he was invited by the Defendant to the farm to inspect sugar cane that would be harvested but could not be taken to the mill because of transport problems.

[60] He inspected a crop that was on a 6 Hectare field and some that had been chopped and was lying on the ground. He assessed the crop according to a



method that they normally used whereby each farmer is given a quota and is expected to produce 100 tonnes of stacks for each hectare, which after being taken to the mill must produce 14% sucrose. After he had carried out the assessment he gave the report to the Defendant. The report which is stamped 4<sup>th</sup> October 2008 is the same one that is reproduced at paragraph 30 supra. DW2 handed it in formally as exhibit H.

[61] He stated that the value of the uncut sugar cane was E122,2009.00 ( ) (Exhibit H) and that according to him the sugar cane had value.

[62] He was cross-examined by Mr. Magagula. He stated that even though he was not a valuator he was qualified to carry out estimates. He said that it was quite difficult to determine the true value of sugar cane as it first had to be taken to the weighbridge to be weighed and then to the mill where the sucrose would be determined.

[63] DW2 was asked if he had noted when the sugar cane had last been irrigated. His response was that he found that the cane was ready to be taken to the

sugar mill and before then it is taken through the dry-off period when it is not watered. He did concede that the amount of time the cane stood in the field unharvested affected the sucrose content.

[64] It was put to DW2 that Mr. Steyn (PW1) had given evidence that he had been engaged by the Plaintiff to make an assessment of the same crop that DW2 had assessed. PW1 came to the conclusion that the crop was of poor quality to an extent that it would not be commercially viable for the Plaintiff to incur transport costs by taking it to the mill due to its quality. DW2 was informed that PW1 had been engaged during the same year as DW3 had been engaged but after the 27<sup>th</sup> October 2006 after the letter written by the Defendant in which he requested the Plaintiff to assist him. The question put to DW2 was why PW1 would come to a different conclusion. DW3 replied that he had no answer to the question.

[65] Petros Bongane Ntuli (DW3) next gave evidence. He testified that he was employed by Illovo Sugar Limited (formerly Ubombo) as an extension manager. That he normally worked with cane growers to whom he gave technical assistance; these were cane growers outside Ubombo Sugar Ltd.

He testified that they had an industry database that is linked to the sugar association (which markets the sugar) and that is where all the records are kept and that they had records for the Defendant for the years 2004 – 2006.

[66] He testified that the Defendant was given a quota during 2003 which was 280 and he started delivering during 2004. He delivered 136.44 tonnes of cane, the sucrose content therefor was 12.55 and that during 2006 the Defendant delivered 431.86 tonnes and his sucrose content was 55.9 which meant that he was below his quota for that year.

[67] DW3 was cross-examined. He testified that he personally visited the Plaintiff's sugar cane project and that he used to keep a record in his diary of the visits but did not have his diary. He recalled that during the period under discussion he visited during February 2006. He could not recall the exact date or the number of visits that he undertook.

[68] He testified that during February he went to check the cane. He stated that the Defendant had cultivated 27.3 hectares and that he had gone there to check on the weeds, whether the cane was fertilised but the Defendant was not there to provide information on whether he had fertilised or not and if

not why not because he had not informed the Defendant of his imminent visit. Dw3 stated that he could not tell the age of the cane because he did not know when the Defendant had last harvested and that there were weeds.

[69] He stated that normally the cane grower estimated the tonnes of sugar cane that will be obtained in a hectare. He then submits this estimate to the mill and thereafter a verification team from the mill goes to the field to verify if the growers estimate is correct. They then come up with the original verified estimate. The Defendant's estimate was 4.5 tonnes per hectare.

[70] It was put to him that DW2 had placed it at 100 tonnes per hectare for the 2006 season. DW3 disagreed with the estimate done by DW2. He did however state that he found weeds and the cane was not fertilised.

[71] Mduduzi Mamba (DW4) testified that during 2000 he rented some land from the Plaintiff in order to graze his cattle. As there was one kraal he joined the Defendant who had 18 cattle at the time. He said that he used to dip the cattle both his and the Defendant's and that he used to buy the medication and vaccinations which were kept by the Plaintiff and that if a cow fell sick the Plaintiff would attend to it if he, DW4 was not around.

[72] He said that he used to inspect the cattle at least once a month when he would go and pay the herd boy and to get a report from the Plaintiff about the condition of the cattle. He denied that his cattle were full of ticks and diseases.

[73] DW4 further stated that at some point the Defendant's cattle were taken from his care and handed over to Mr. Sibandze (PW3) and the Plaintiff notified DW4 of this change. He says that he personally saw the cattle in PW3's kraal. He passed this information onto the Defendant.

[74] He stated that the Defendant's cattle were 24. They included a big ox which was a Brahman cross-breed and two female cattle which were very big and brownish in colour.

[75] It was put to him that PW3 had denied any knowledge of the Defendant's cattle being moved to his kraal. He denied this. He testified that there were 6 males including the ox and bulls, 18 cows which included 6 heifers bringing the total to 24 cattle. And that when he first arrived the cattle were 18.

[76] DW4 was cross-examined. He revealed that he had a lease agreement with the Plaintiff but this was denied by the Plaintiff through Counsel. He also reiterated that the Defendant's cattle were 24. And that he knew that was because he had to count the cattle in order to buy medication for them as he could not vaccinate his cattle only as the ones not vaccinated would infect the vaccinated ones.

[77] He further stated that he used to buy the medication for his cattle and hand it over to the Plaintiff who was also helped by his herdboys who were on the farm. The Plaintiff used to vaccinate the cattle. After DW4 had concluded his evidence, the Defendant closed his case.

### **The Plaintiff's case**

[78] Mr. Julius Steyn (PW1) testified on behalf of the Plaintiff. He stated that he had a diploma from the Agricultural College at Nelspruit which he obtained during 1999. He stated that his professional working history was that after graduating he cultivated sugar for himself.

[79] Thereafter he worked for Antiweed who were contracted to work for sugar cane at Malelane. They did weed control and fertilisation of the sugar cane. PW1 looked after 3000 hectares of sugar cane from 1999 to 2004. After that he worked for Stonetek a commercial farm for 2 years. This was in Komatipoort.

[80] Thereafter he was employed by JJ Rudolf at Sidvokodvo. While at Stonetek, PW1 managed a sugar cane farm which entailed planting, irrigating fertilizing and harvesting sugar cane. At Rudolph's at Sidvokodvo, he did the same as at Stonetek but this time vegetables and pineapples were included.

[81] While at Rudolph's, Mr. Potgieter came to ask advise about a farm at Hluthi area where he needed an assessment done over some sugar cane. This was during 2006. PW1 could not recall the precise date.

[82] PW1 says that he went to the farm and found that the sugar cane fields were hardly kept. The cane was dry and was not irrigated, the leaves were dry and dirty as they had not been sprayed, there was grass and over grown weeds in the fields. He stated that normally when the cane leaves were

healthy they formed a canopy but these were dry. The height was between 1.2cms and 1.5cms. Normally if healthy it would be about 3.5cms. The sugar cane was thin and frail and too small to harvest.

[83] He says that he informed Mr. Potgieter that the sugar cane was not worth harvesting as the costs would be too high and the costs of the sugar cane too low. He says that he could not tell the size of the sugar cane fields as the roads were too bad for him to drive through but he estimated them to be 6 hectares.

[84] PW1 was cross-examined. He revealed that he did not write a report about his observations. He further stated that he was with Mr. Potgieter when he assessed the sugar cane. He agreed with counsel that he did not state the actual value of the sugar cane in his evidence in chief.

[85] When the Plaintiff gave evidence he stated that because he was in dire-straits for money he decided to help the Defendant by transporting the already cut cane to the mill and to cut the remaining standing cane hence the letter dated 27 October 2006 written by the Defendant and exhibited at paragraph 25 supra because before incurring any expenses he needed to be assured that the



sugar cane would be accepted at the sugar mill and to be beneficial to both parties.

[86] He says that to that end he obtained an evaluation of the sugar cane from Mr. Julius Stein (PW1) which was that the sugar cane was of very poor quality and that it would never have been accepted at the sugar mill. At that stage he decided not to proceed with the agreement with the Defendant because there was no way that any money would be recovered. Consequently the remaining sugar cane was not cut and the cut cane was not transported to the mill.

[87] He stated that when the Defendant signed the acknowledgment of debt on the 3<sup>rd</sup> July 2007, he did not say anything about the Plaintiff owing him money for the sugar cane that he had agreed that the Plaintiff could cut and take to the mill as well as the money for the already harvested but untransported cane.

**Re: Improvements on the farm**

[88] In response to the issue of improvements that were effected on the farm by the Defendant, the Plaintiff stated that there were no improvements. He said

that most of the items being claimed by the Defendant as improvements were taken away by various people for example the draglines, sprinkler head and pump.

[89] He further stated that he personally had no use for these things and had requested the Swazi Bank to remove them as they had a lien over the irrigation equipment. That the Swazi Bank actually came up with a figure of E132,000.00 (One hundred and thirty two thousand Emalangeni) as the value thereof.

[90] When it was put to the Plaintiff that the Defendant in his counterclaim averred that the Plaintiff was enriched by the improvements on the farm, he denied this and responded that there were no improvements left on the farm as the Defendant and his friends and associates had removed them. And that whatever was left on the ground or fixed to the property was worthless to him. Even the new owner had also refused to accept whatever was left because he had no use for them.

[91] The Plaintiff referred the Court to the lease agreement paragraph 13.2 which states that **“new line alterations, additions and improvements are not to**

**be carried out by the Lessee without the prior written consent of the Lessor”. Equally Clause 13.3 “states that all additions and improvements made to the farm shall belong to the Lessor and shall not be moved from the farm at any time”.**

[92] The Plaintiff pointed out that the Lease Agreement precluded the Defendant from claiming any compensation for any additions or improvements on the farm except in respect of orchards, plantations, crops, trees or vines in terms of clause 14. Therefore the counterclaim was according to him null and void.

**Re: The Cattle**

[93] When he was confronted with the issue of the Defendant’s cattle which he was accused of removing from the farm during June 2011 his response was that the cattle were moved from the farm between January 2010 and the first week of March 2010.

[94] He says that on the 1<sup>st</sup> January 2010 he sent an SMS to the Defendant to remove his cattle from the farm and the Defendant text back saying that he was going to move his cattle to the next door farm. This was the last he heard about the cattle. He says that the new owner took occupation of the farm on the 23<sup>rd</sup> December 2009.

[95] He stated that he did not know all the cattle as itemised at paragraph 10.1 of the counterclaim. He knew that some of the cattle had ear tags and that he did not believe that 24 cattle belonged to the Defendant because the kraal where the Defendant kept his cattle was one with Mr. Njabulo Mabuza, Mduduzi Mamba (DW4) and Richard Ndlangamandla. He said that there was a separate kraal for Andrew Sibandze (PW3) and Zama Ngcobo (PW4).

[96] The Plaintiff says that he had no control or say in the management of the cattle. His responsibility was in grazing them that is, to make sure that there was grazing for the cattle. He said that it was the owner's responsibility to take care of the cattle. He denied that he attached the cattle legally or otherwise as stated by the Defendant in his counterclaim.

[97] He further stated that the Defendant's cattle were either given away or registered in the name of Richard Ndlangamandla. Some cattle the Defendant exchanged with PW3 for enabling him (the Defendant) to pay lobola; some Defendant used to pay Zama Ngcobo as a form of payment for ploughing the sugar cane fields for the Defendant.

[98] The Plaintiff stated that the value of the cattle as stated by the Defendant was exaggerated and too expensive. He said that the cattle were neglected by the Defendant as he did not vaccinate them regularly and at times did not dip them. Instead some of the other owners assisted him because there was a legal requirement for the cattle to be clean.

[99] The Plaintiff stated that he and the other cattle owners tried several times to set up meetings with the Defendant in order to discuss the status of the cattle but the Defendant would keep them waiting for 4 to 5 hours without appearing and switching off his cell phone.

[100] The Plaintiff denied that he was enriched to the amount of E101,500.00 (One hundred and one thousand, five hundred Emalangen) being the value of the cattle as claimed by the Defendant. All that he wanted was to be paid

the money that the Defendant owed him as set out in the acknowledgment of debt.

[101] The Plaintiff was cross-examined by Mr. Simelane. It was put to him that he was informed by the Defendant that the latter was going to use piping in order to irrigate his sugar plantation. And that the Plaintiff even suggested that in order to cut costs the Defendant use some piping on the farm which had been installed by his father in-law but the Defendant could not find it. The Plaintiff responded that they did not discuss the Defendant's business in any detail because it did not concern him how the Defendant grew his sugar cane. And that the pipes that his father in-law used were from long ago and they did not verify it. He stated that the Defendant knew about the piping because he is from that area and not because the Plaintiff had told him.

[102] He was asked when he became aware that the Defendant was installing or had installed the piping on the farm. He responded that the Defendant may have informed him that he was installing irrigation pipes but he was not keeping tabs on what he was doing on the farm.

[103] Asked why he did not terminate the lease agreement because the Defendant was doing something that the lease did not permit his response was that he was outside the country as his wife was sick and secondly he had a job that he had to do with the Swaki Group of Companies.

[104] Elsewhere he says that he only became aware of everything when the Defendant stopped farming sugar cane. He stated that the lease was terminated during December 2006 when the Defendant sought to sublease to a Mr. Dube.

[105] It was put to him that the lease was terminated by Mr. Potgieter who was sent by the Plaintiff to evict the Defendant from the farm. The Plaintiff denied this and responded that Mr. Potgieter had come to assist the Defendant to cut the sugar cane and to transport it to the Mill.

[106] It was put to him that Mr. Potgieter never assisted the Defendant and his response was that that was because the sugar cane was substandard and initially Mr. Potgieter was under the impression that the sugar cane was of good quality and that the sugar cane was cut and in a good state, that arrangements to take it to the Mill had been made. But Mr. Potgieter could

not do anything after the opinion of Mr. Steyn that there was no point in taking the sugar cane to the Mill

[107] It was put to him that the letter dated 27<sup>th</sup> October 2006 (see paragraph 25 supra) was drafted by the Plaintiff for the signature of the Defendant he denied this and said that they discussed it with the Defendant, thereafter the Plaintiff typed it and the Defendant signed it.

[108] There was a mild exchange about whether Mr. Potgieter brought the letter for the Defendant's signature or not. However, it was not stated how Mr. Potgieter and the Plaintiff acquired the Defendant's letter heads if it was not with the Defendant's condonation.

[109] It was put to the Plaintiff that after the Defendant signed the letter, Mr. Potgieter told him to no longer come to the farm. The Plaintiff denied this and stated that the Defendant came to the farm on two separate occasions; one occasion with Swazi Bank officials and on another to test the pump. The Defendant agrees with this in fact he says he went there on three occasions.



[110] It was put to him that when the letter was written, the Defendant was actually harvesting sugar cane. The Plaintiff agreed. Asked if the Defendant had transported the harvested sugar cane to the Mill, the Plaintiff agreed but added that there was a lot of sugar cane left on the farm.

[111] It was put to him that there was nothing wrong with the sugar cane after the Plaintiff took over the 6 uncut hectares as the Mill had accepted an earlier crop from the Defendant. The Plaintiff responded that he did not take over because the sugar cane was useless as it was laying there for weeks and months and the uncut sugar cane was a meter and a half, it had not been watered or weeded and that is why the Mill refused to take it.

[112] The Plaintiff could not produce any documentary proof that the Mill had rejected the sugar cane save that he was told by Mr. Potgieter and Mr. Steyn that the sugar cane was not useful to the Mill.

[113] It was put to him that he had actually disturbed the Defendant in the middle of a harvesting season. The Plaintiff responded that it was the Defendant who went to the Plaintiff and told him that he could not transport sugar cane to the Mill because he had transport problems. The Plaintiff says that he

only tried to assist the Defendant so that both sides could make money. He stated that the letter was written and signed before he had gone to the farm to verify if the sugar cane was fine and when he did do so, he found that the cane was useless.

[114] The Plaintiff re-iterated that some cattle were given to Zama Ngcobo as pay by the Defendant; and some were exchanged with PW3. He further denied having taking 24 cattle from Mduduzi Mamba (DW4). He says that in order to do so he would have needed to obtain stock removal permits from the dipping master.

[115] The Plaintiff re-iterated his evidence of the constant failure to meet with the Defendant despite setting up meetings to do so, the Defendant would fail to turn up. This was to discuss matters pertaining to the Defendant's cattle.

[116] The Plaintiff was asked about the 3 three phase electricity on the farm that the Defendant had installed and his response was that it was not useful to the farm. The farm had a single phase electricity which does the water, lights and borehole. The three phase electricity was specifically for sugar cane irrigation.

[117] The Plaintiff re-iterated that he never refused the Defendant entry to the farm. And that the Defendant came to the farm twice; once with the Swazi Bank officials and the second time to test the pump. He agrees that he refused that the Defendant test the pump because he wanted to use a tractor instead of electricity.

[118] The issue of Mr. Steyn valuating the sugar cane contrary to clause 14.5 of the lease came up. That clause provides that:

**“any compensation for any tree, vine or crop which is to be payable the lessor to the Lessee shall be determined by an expert”.**

[119] It was put to the Plaintiff that clause 14.5 should have been used to employ an expert to value the sugar cane. The Plaintiff’s response was that Mr. Steyn was the expert and because the cane was useless there was no point in bringing anymore experts.

[120] The issue of the Defendant having been evicted by the Plaintiff kept coming up but the Plaintiff parried it by saying that the Defendant was never evicted.

There was no court order to that effect. Furthermore the Defendant sublet the farm to Mr. Dube in order for the latter to cultivate maize.

**Re: The Cattle**

[121] The Plaintiff re-iterated that he sent a text to the Defendant to remove his cattle, which the Defendant did to the farm next door owned by a Mrs Dlamini.

[122] Andrew Velaphi Sibandze (PW3) next gave evidence. He testified that he knew the Defendant by virtue of the fact that they used to graze cattle together on the Plaintiff's farm. He stated that he had his own kraal and that at some point they had swapped two cattle with the Defendant. Mr. Sibandze further testified that he was not aware of any cattle belonging to the Defendant which were taken by the Plaintiff. He further stated that he had built his own kraal and his cattle were distinguishable by way of marked ear-tags.

[123] During cross-examination, Mr. Sibandze refuted claims that the Defendant's cattle were taken to his kraal by the Plaintiff. This testimony corroborates

with the Plaintiff's version that he did not take the Defendant's cattle nor moved them to Sibandze's kraal as alleged by the Defendant.

[124] When questioned about his knowledge about one Mduduzi Mamba, Mr. Sibandze admitted to knowing him but denied ever being aware that the said Mamba was in charge of the Defendant's cattle.

[125] Zama Ngcobo (PW4) gave evidence next. He testified that he knew the Plaintiff as he leased a portion of the Plaintiff's farm, for the purposes of grazing his cattle. The lease arrangement between the Plaintiff and PW4 began in May 2005. It is PW4's testimony that he is well known to the Defendant since they grew up together in the Shiselweni district, specifically at Moihoek.

[126] PW4 testified that when he came to the farm there were on-going sugar-cane cultivation which ceased sometime in 2006. He testified that he noticed that there was cut sugar-cane lying in the transport bay, which was never transported to the mill and it ended up being eaten up by livestock. PW4 testified that there was some sugar-cane which stood uncut in the fields and

eventually left to fallow until sometime in 2007 when the Defendant sub-let the farm to one Mr. Vusi Dube, whose intention was to plant maize. When asked how he knew Dube would plough maize, PW4 stated that since he also owns a tractor, Dube hired him to plough his land.

[127] When questioned about the Defendant's equipment/and or improvements in the farm, PW4 testified that during the tilling of the fields, the tractor would pull out some relatively old irrigation pipes, PVC pipes that were burnt by fire, some drag lines which were set aside before his tractor ploughed the fields. He further stated that he was not aware as to what happened to the remainder of the equipment which had been put aside during the tilling of the land.

[128] When questioned about the cattle, PW4 testified that he had built a separate kraal where he kept his cattle which were about 50 at the time. He further testified that that when he initially came to the farm around 2005, the Defendant's cattle were in an averagely good condition, which later deteriorated significantly towards 2008 since they were not well taken care of by the Defendant. PW4 testified that he acquired about 6 cattle from the Defendant, some of which were outright sales and in some instances the

Defendant would request cash advances from him and the cattle would be provided by the Defendant as security for the loan.

[129] With regards to the transfer and change of ownership of the cattle PW4 had acquired from the Defendant, he testified that change of ownership would be effected with the assistance of the dip-master, a Mr. Shabangu. He testified further that the transaction would be carried out against the register book.

[130] Nothing much turns on the cross-examination except confirmation by PW4 that the area he ploughed was later taken over by Mr. Dube.

[131] The Plaintiff closed his case after the evidence of PW4.

**The Sugar cane (122,209.00)**

[132] The Defendant says that during 2006-7, he harvested some sugar cane which he transported to the mill. Following this first crop he harvested some more cane but because of transport problems it lay fallow on the ground. He also left some 6 hectares standing unharvested. He also failed to pay the rent.

[133] They subsequently agreed with the Plaintiff that, the Plaintiff would assist the Defendant in harvesting the sugar cane crops at Beginsel Farm ... for monies owed and outstanding accounts” To seal that agreement a letter dated 27<sup>th</sup> October 2006 was typed by the Plaintiff and signed by the Defendant. (See paragraph 30 supra).

[134] This arrangement was concluded before the Plaintiff had seen the sugar cane and before he gave the letter to his agent, Mr. I. Potgieter. Mr. Potgieter enlisted the expert help of Mr. Steyn (PW1) to go and assess the uncut sugar cane. Mr. Steyn was employed by J.J. Rudolf of Sidvokodvo who also cultivated sugar cane. The evidence is that Mr. Potgieter was going to use the sugar quota of Mr. Rudolf in order to sell the sugar cane to Ubombo Sugar Ltd in Big Bend (now Illovo Sugar Ltd).

[135] PW1 and Mr. Potgieter proceeded to Beginsel Farm to assess the sugar cane. Mr. Steyn testified that the sugar cane was not worth harvesting as the costs would be too high and the costs of the cane too low. This is the uncut cane which was on 6 hectares.



[136] PW1 stated that the sugar fields were improperly kept. The cane was dry and not irrigated, the leaves were dry and dirty as they had not been sprayed, there was grass and overgrown weeds in the fields. The cane was stunted and its height was between 1.2 cms. and 1.5 cms. and not the normal 3.5 cms.

[137] The evidence of PW1 is corroborated by the evidence of DW3, Petros Ntuli a defence witness who testified under cross-examination that he could not tell the age of the cane because he did not know when the Defendant had last harvested and that there were weeds and the cane was not fertilised. His estimate was 4.5 tonnes per hectare. He disagreed with the estimate of DW3, Mr. Nhleko whose estimate was 100 tonnes per hectare.

[138] Mr. Nhleko inspected the fields during October 2006 and Mr. Ntuli during February 2006. The letter authorising the Plaintiff to harvest the cane is dated 27<sup>th</sup> October 2006. Mr. Steyn and Mr. Potgieter went to inspect the fields shortly after the letter dated 27<sup>th</sup> October 2006 was penned. They found that the cane was in bad shape.

[139] The Defendant was proved to be a man not keen to look after his property. His cattle were also proved not to be cared for. So I believe the witnesses that informed the Court that his cane was poor because it was not taken care of properly.

[140] It is pertinent to state that the agreement incorporated in the letter of 27<sup>th</sup> October 2006 was not part of the lease agreement and is not subject to the provisions of paragraph 14.1 and 14.5 of the lease agreement.

[141] I would award the Defendant 4.5 tonnes per hectare under this head which translates to E65,433.60 (Sixty five thousand four hundred and thirty three Emalangeni sixty cents) (E45 x 1454.08) and not E122,209.08 (One hundred and twenty two thousand two hundred and nine Emalangeni and eight cents)

**The irrigation equipment (E349,640.00)**

[142] The equipment herein was financed by the Swazi Bank who until recently had a lien over it. The Defendant testified that when new it cost E349,640.00 (Three hundred and forty nine thousand six hundred and forty) but had depreciated to E273,293.00 (Two hundred and seventy three

thousand two hundred and ninety three Emalangeni). The equipment was installed at the farm for purposes of irrigating the sugar cane.

[143] The Plaintiff says that he has no use for it and that the Defendant was welcome to it. Other items were randomly removed by the Defendant and his agents. The claim under this head fails and I so hold.

[144] The Plaintiff testified that contrary to the provisions of the lease the Defendant never sought written permission from him to install the irrigation equipment. And that paragraph 13.3 of the lease provided as follows:

“All additions and improvements made to the farm shall belong to the Lessor and may not be removed from any time. The Lessee shall not, whatever the circumstances have any claim against Lessor for compensation for any addition or improvement on the farm **save for such compensation as is specifically provided for in respect of orchards, plantations and crops** in terms of clause 14 below nor shall the Lessee have a right of retention in respect of such improvements”

[145] It is trite therefore that the Defendant is not entitled to any compensation and I so hold.

**The cattle (E101,500.00)**

[146] The Defendant testified that when he left the farm he left his cattle under the care of DW3. DW3 told him that the Plaintiff informed him that he had driven the cattle into PW3's kraal. The Plaintiff denied this assertion by DW3. PW3 also denied that the cattle were among his lot. The Plaintiff testified that he had heard that the cattle were driven to neighbouring farm owned by Mrs. Dlamini.

[147] Evidence was given by the Plaintiff and PW3 that the Defendant's cattle were in poor health and could not have been valued at E101,500.00.

[148] The number and movement of cattle is normally recorded in the dipping master's register. The dipping Master was not called to give evidence. He would have assisted the Court with regard to the number, the value and the movement and ultimate fate of the cattle claimed.


[149] It seems to me that the appropriate forum for the Defendant under this head is to lay a charge of stock theft with the police who will investigate the whereabouts of his cattle.

[150] In the circumstances I find that a case on a balance of probabilities has not been made out in respect of this head and I order absolution from the instance. Once the Defendant has all the relevant information to support his case he is at liberty to institute action afresh against the party(s) that is responsible for the disappearance of his cattle.

[151] The order of the Court is as follows:

- (a) The Plaintiff is ordered to pay the sum of E65,433.60 (Sixty five thousand four hundred and thirty three Emalangeneni sixty cents) to the Defendant in respect of the sugar cane.
- (b) The Defendant's claims in respect of irrigation equipment and cattle are hereby dismissed with costs.
- (c) The Plaintiff's claim in terms of prayers (a), (b) and (c) of the Plaintiff's declaration is hereby granted.

PAT MBABANE Crim. Case No. 252



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**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Plaintiff : Mr. B. Magagula  
For the Defendant : Mr. B.J. Simelane