IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1790/2016**

In the matter between:

MFANUKHONA MUZI MNISI Plaintiff

And

DIMAKATSO DEBRA VILANE Defendant

Neutral Citation: Mfanukhona Muzi Mnisi *v Dimakatso Debra Vilane (1790/2016) [2023] SZHC 245 (31 August 2023)*

CORAM: **N.M. MASEKO J**

FOR THE PLAINTIFF: **S. MASUKU AND N. GUMEDZE**

FOR THE DEFENDANT: **S. HLOPHE AND N. MANZINI**

DATES HEARD: Commenced 11/10/2018
Ruling on Absolution from the instance 10/12/2021
Defence Case 12/04/2023
Final Submissions 01/06/2023

DATE OF JUDGMENT: 31/08/2023

Preamble:

Civil law – Civil suit – delict – liability – lease agreement – breach of the material terms of the lease agreement.

Quantum damages – assessment of damages – failure by the Plaintiff to mitigate the financial losses promptly and timeously resulting to Court awarding the damages within its discretion.

JUDGMENT

MASEKO J

[1] On the 6th October 2016 the Plaintiff sued out a Combined Summons against the Defendants. Firstly the global amount that was being claimed was E1 836 000-00 (Emalangeni One Million Eight Hundred and Thirty Six Thousand) in respect of loss of income for the three (3) year term of the lease including the period in which the premises were locked putting the Plaintiff out of business.

[2] However, on the 18th June 2018, the Plaintiff filed a 'notice to amend the particulars of claim' and the figure of E1 836 000-00 was replaced with a figure of E391 500-00 (Emalangeni Three Hundred and Ninety One Thousand Five Hundred) in respect of loss of income for the two (2) years three (3) months period in respect of loss of income for the balance of the remaining term of the lease in which the premises were locked putting the Plaintiff out of business.

[3] It is common cause that the trial commenced on 07/09/2018 when trial dates were allocated, and it was eventually concluded on the 01/06/2023

when final submissions were made. The delay in finalising the matter was caused by many factors including issues of ill health of one of the parties and also by the scourge of COVID 19, as well as the change of attorneys.

[4] At the close of the Plaintiff's case the defendants applied for absolution from the instance, however, this application was dismissed on 10/12/2021 and Defendant's case eventually commenced on the 12/04/2023 and was closed on the 13/04/2023 and final oral submissions were made on the 01/06/2023. This is the judgment of the matter.

[5] The Plaintiff testified as PW1 and also led evidence of his business partner Muzi Goodboy Dlamini who testified as PW2.

[6] On the other hand the Defendant testified as DW2 and her daughter Masinhle Vilane testified as DW1.

Plaintiff's Case

[7] PW1 testified that he together with PW2 (his business partner) started trading in January 2013 and only signed the lease agreement in June 2013. He testified that at all material times they paid the rentals and he alleged further that DW1 Masinhle Vilane would often come to the butchery on certain instances and take meat without paying and then at the end of the month or when rentals are due they would then deduct Masinhle's bill from the rental fee and then pay her the balance.

[8] PW1 testified that they continued trading at Elethu Logoba Butchery until 13th September 2013 when they were unexpectedly locked out of the premises by the Defendant without being given a notice and reasons for such lock-out. He testified that they were locked out without any court order authorizing the Defendant to lock them out. He argued that since they were locked out without any due process the Defendant acted unlawfully and exposed them to financial prejudice in terms of losing stock in trade, loss of income and loss of money that was in the premises at the time and also loss of butchery equipment – in particular cutlery. PW1 testified that on the 13/09/2023 he received a call from their employees informing him that the Defendant had locked them out of the premises where there was stock, money, business books, cutlery and butchery equipment which belonged to them.

[9] PW1 testified that he then informed his business partner PW2 of the lock-out by the Defendant, and they quickly travelled to Manzini to meet DW1. In his testimony PW2 also testified that they travelled to Manzini where he met DW1 alone without PW1. They met at KaKhoza, and PW2 testified that DW1 informed him that the Defendant locked the premises because she wanted to paint/renovate the premises. PW1 testified further that after the premises had been painted the Defendant leased the premises to someone else, and they lost all their stock, the money in the business premises, their equipment and they also lost the income they were generating from the business.

[10] Both PW1 and PW2 testified that the premises were locked by the Defendant unlawfully and without due process. They argued that there was no court order authorising the Defendant to lock the premises. PW2 testified that after the Defendant had locked them out of the premises she

went to the Matsapha Police to try and legitimise the unlawful eviction by requesting the police to call PW2 in connection with this matter. PW2 testified that indeed the police called him at the instance of the Defendant, and he refused to entertain the police in connection with this matter. The Plaintiff (PW1) and his business partner (PW2) testified and corroborated each other concerning the unlawful eviction from the Elethu Logoba Butchery premises and the loss of income, loss of money in the premises, loss of stock and equipment as well as loss of their business books. It is common cause that some of the books of the business were recovered together with some of the cutlery.

The Defendant's Case

[11] The Defendant testified in her defence as DW2 and her daughter Masinhle Vilane testified as DW1. The Defendant acknowledged the existence of an oral agreement between the parties for the Plaintiff to occupy and operate the butchery business for a period of three months as from 1st May 2013 and thereafter a written lease agreement was going to be entered into between the parties. The Defendant testified that whilst the period of the oral agreement was still running and unbeknown to her, the Plaintiff approached the Defendant's daughter (DW1) and requested for a written lease agreement which they wanted to present to FINCORP in order to obtain funding for their business. The Defendant testified that indeed the lease agreement was prepared by her Accountant Mr Edward Magongo, and was signed by her daughter on the 1st May 2013 and also signed by the Plaintiff and his partner on the 14th June 2013.

[12] The Defendant was emphatic in her testimony in her defence that she was unaware of the existence of the lease agreement found at page 13 of the Book and marked as Exhibit "A" since her daughter DW1 had signed same

without her knowledge and authority. The Defendant only acknowledged payment of only E2 800 (Emalangeni Two Thousand Eight Hundred) for the May 2013 rental, and stated that no rentals were paid for the months of July – August 2013.

[13] The Defendant acknowledged that she locked the premises to force the Plaintiff and his business partner (PW2) to come to her and discuss the payment of the arrear rentals because the Plaintiff and his business partner were now avoiding her. She testified further that after she had locked the premises she approached the Matsapha Police Station to try and broker a meeting between herself and her tenants for them to pay her rentals and also collect their items from the butchery, but the Plaintiff and PW2 refused to attend the meeting. The Defendant testified that an attorney by the name of Sabelo Chicken Dlamini collected some of the items from the premises on behalf of the Plaintiff. The Defendant denied the presence of the stock, money and the other items claimed to have been in the butchery premises at the time she locked out the Plaintiff. DW1 testified in support of her mother the Defendant. She denied ever taking meat from the Plaintiff's business and having the rentals deducted to pay for such meat. She also testified that the lease agreement was signed only to facilitate the loan application filed by the Plaintiff with FINCORP.

[14] DW1 testified that her mother DW2 was not happy because the rent for the premises was not forthcoming from the Plaintiff and she (DW2) decided to lock the premises. DW1 confirmed under cross-examination by Mr Gumedze that the Defendant (DW2) did not give the Plaintiff a written notice of the cause of complaint and of her intention to lock the butchery premises.

Analysis of the Evidence

[15] I must state at the outset that the Defendant did not call Edward Magongo the person who drafted the lease agreement and who was also her Accountant at the time. It was important that the said Magongo testify to shed some light on the rent money allegedly paid to him by the Plaintiff and why it was eventually paid to him as opposed to the practice at the time that it be payable to the Defendant through DW1.

[16] In her testimony in chief and under cross-examination, DW1 never testified that she prepared and signed the lease agreement behind the back of DW2 the Defendant. This is crucial because when the Defendant testified under cross-examination that is when she disclosed that she learnt about the lease agreement for the first time here in Court when the matter was proceeding. This is contrary to the Defendant's Plea and the Pre-Trial Minute, as will be shown hereunder.

[17] In the Defendant's Plea the existence of the lease agreement is acknowledged and no issue was raised that the Defendant was not aware of the written lease agreement. The Defendant's plea was drafted in such a manner that there was general consensus between the parties that the whole dispute centres around the lease agreement, whether it was complied with or whether there was none compliance with the said lease agreement by the parties. For example, the lease agreement provided that the Plaintiff was to deposit the monthly rental at a designated First National Bank Account, however, the aforesaid rentals were paid directly to DW1 in cash and she accepted the money on behalf of her mother DW2.

[18] Even during the pre-trial stage the parties made admissions which are contained in the pre-trial conference minute dated the 24/02/2017 where both parties admit that **"the Plaintiff and Defendant entered into a lease agreement"** and that **"it is admitted that a sum of E2 500-00 (Emalangeni Two Thousand Five Hundred) was paid by the Plaintiff as security"**.

[19] The pre-trial conference minute strengthens the general acknowledgement by both Plaintiff and Defendant of the presence of the lease agreement and that the said lease of the butchery premises was based on the written lease agreement. In this regard and for ease of reference I refer to the Minute with sub-heading:-

> **"Issues for trial**
>
> - **whether the Plaintiff fulfilled its obligations in terms of the lease agreement and paid rentals**
> - **whether the Plaintiff's business locked lawfully or not**
> - **whether there was proper cancellation of the lease agreement**
> - **whether the Defendant gave the Plaintiff a notice of two (2) calendar months before termination of the lease agreement**
> - **whether the Defendant returned to Plaintiff the items in the premises**
> - **whether the defendants are in breach of the lease agreement."**

[20] It is on these basis that I find it strange that during the trial the Defendant denied knowledge and existence of the written lease agreement, yet during the pleading stage until the pre-trial conference no issue whatsoever was ever raised concerning the non-existence of the lease agreement herein marked as Exhibit "A". There is no doubt in my mind that this is an after-thought on the part of the Defendant caused by her failure to comply with the aforesaid lease agreement in so far as not implementing the clauses predicating the cancellation of the lease agreement and possible eviction of the Plaintiff if he together with PW2 were not complying with the terms

of the said lease agreement. The relevant clauses in the lease agreement are as follows:-

Clause 5 Termination

5.1 The lessee (should be lease) shall be terminable at the instance of the lessor on the two calendar months written notice to the lessee. Such notice is to take effect on the first day of the first month and terminate on the last day of the second month of the notice period.

5.2 The lessee is to give the lessor two calendar months' notice if they wish to cancel the lease agreement before its expiration.

[21] It is my view that the Defendant was under a legal duty in terms of Clause 5.1 of the lease agreement to afford Plaintiff the two months' written notice before she unilaterally and unlawfully locked out the Plaintiff from the business premises in the manner in which she did, and without due process.

[22] The other alternative for the Defendant would have been to exercise her landlord hyphothec rights of lien by obtaining a Court order to restrain the Plaintiff's property in the butchery premises pending payment of her arrear rentals if any. In fact this would have made the issue of whether there are arrear rentals or not dealt with in an appropriate forum. This is a crucial trial issue mentioned amongst the other equally crucial issues in the Minute for the pre-trial conference.

[23] The defendant acted unlawfully and in a high-handed manner when she locked the premises in the manner described by the Plaintiff and also confirmed by PW as well as DW1 Masinhle and the Defendant herself. Even where the lease agreement was entered into orally, the lessor does not have the right to take the law into her/his own hands and evict tenants in the manner the Defendant did. Such unlawful action attracts unavoidable delictual damages.

[24] The Defendant is a seasoned business woman and surely she should have appreciated that she was exposing herself to a civil suit for breach of contract and delictual damages by locking out her tenants who were in full operation of the butchery business. The Defendant admitted in her evidence that there was stock in the cold room, although she denied the presence of the beef carcass which the Plaintiff and PW2 alleges was in the premises. If she had taken an inventory of all what was in the premises in the presence of the police or someone in authority, I believe it would mitigate any damages only in so far as to the items which were in the premises, but certainly not to legitimize the otherwise unlawful eviction of the Plaintiff from the butchery business without a Court Order.

[25] When the Defendant denied knowledge of the written lease agreement during her evidence in her defence, she was in my view trying to avoid the consequences of the non-compliance with Clause 5.1 (supra) of the lease agreement i.e. failing to afford the Plaintiff the requisite two calendar month's notice in writing of her intentions to terminate the lease agreement because she claimed that rentals were not being paid by the Plaintiff and that they were also avoiding her. DW2 was under a legal duty to comply with Clause 5 in order to protect and vindicate her landlord hypothec rights and not to take the law into her own hands by closing the butchery premises in the manner she did.

[26] It is for that reason why I state with certainty that all the trial issues raised by the parties in the Minute of the pre-trial conference have been canvassed in evidence by the parties during the trial, however, I must point out that the Defendant has failed to prove that she acted lawfully when she locked out the Plaintiff out of the business without due process. Further the unlawful actions of the Defendant amount to an unlawful breach of the contract, and in the circumstances the Defendant cannot at law benefit from her own wrongdoing.

[27] **R.H. Christie** author of legendary text titled *THE LAW OF CONTRACT IN SOUTH AFRICA 1983 Edition Interprint Durban* states as follows at page 481:-

> 'The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of contract or, in the first two cases, to be *in mora*, and, in the last case, to be guilty of positive malperformance. It is traditional in English textbooks to talk of discharge by breach, a phrase that at one time was taken as meaning that all the obligations under the contract came to an end if either party committed a breach, and were replaced by obligations arising from the breach by operation of law.'

[28] At page 500 of the book, the learned author RH Christie *(supra)* continues to state as follows:-

> 'The concept of repudiation, as has been indicated in the previous section, overlaps the concept of breach going to the root but is by no means identical to it, and it never seems to have been suggested that the innocent party's right to cancel for repudiation rests on a tacit forfeiture clause. It rests rather on the common sense view that the innocent party should not be obliged to continue with a contract that the other has renounced.
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> In **Schlinkmann v van der Walt 1947 (2) SA 900 (E) 919** Lewis J said:-

'Repudiation is in the main a question of the intention of the party alleged to have repudiated. As was said by Lord Coleridge LCJ in **Freeth v Burr (1874) LR 9 CP at p. 214**:-

> "the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract"

a test which was approved by the House of Lords in Mersey Steel Co. v Naylor (1884) 9 AC 434. In Re Rubel Bronze and Metal Co and Vos [1918] 1 KB at p. 322 Mc Cardie J said as follows:-

> "The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not be as a rule be deemed to amount to reputation ---- But, as already indicated, a deliberate breach of a single provision in a contract may under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain ---- In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and the general circumstances of the case."

To this I would add only that the onus of proving that the one party has repudiated the contract is on the other party who asserts it.'

[29] It is my view that the conduct of the Defendant in locking out the Plaintiff from his business was a major breach of a term of the lease agreement which goes to the root of the aforesaid lease agreement, since the aforesaid unlawful conduct of the Defendant prevented or obstructed the Plaintiff from performing his obligations in terms of the contract. Even in a situation where huge amounts of arrear rentals have accumulated, the lessor does not have a right to resort to self-help, rather the law demands due process.

[30] In cases of landlord and tenant relationship where arrear rentals are in issue, the law of landlord hyphothec is very protective of the rights of lien afforded to a lessor of immovable property. Even in a Court of law, such cases are usually heard on urgency and *ex parte* basis, the reason being that the right of lien exists to secure the fulfilment of the contractual obligations by a party who seems to be on the verge of non-compliance with his part of the obligations, for example, where the lessee has defaulted on rental payments and accumulated huge arrear rentals, a landlord lien is an appropriate remedy to invoke, because it lets the whole process of restraining the removal of the defaulting lessee's property to be executed by an officer of the Court pursuant to a landlord hyphothec order duly issued by a Court of law.

[31] *In casu* if the Defendant had exercised her landlord tacit hyphothec lien rights by operation of the law, possibly this matter would not be before Court, at least, for the delictual damages suit arising out of the unlawful eviction of the Plaintiff from the premises by the Defendant.

[32] On the 30th September 2015 **DE REBUS Archive 2015**, published an article titled: Dispossessed and unimpressed: the *mandament van spolie* remedy where it states as follows at pgs. 3 and 5:-

> "[3] It is an established principle of law that where a person claims that his or her goods are in possession of another person unlawfully, such an aggrieved person should not personally and by force take back the goods but use established legal procedure. Should the aggrieved person resort to self-help by taking back his or her alleged property without a Court order, a Court may order that the person who resorted to self-help return such property. A Court may make this order regardless that the person to whom the property is being returned is a thief or a legitimate possessor."
>
> "[5] In matters concerning the dispossession of rights, the requirements of dispossession is satisfied by showing that a previously exercised utility has been disturbed. In that order, the emphasis of physical

possession involves rather strained reasoning. For example, when a tenant is locked out, it is regarded as dispossession because his or her access rights have been disturbed. The dispossession of a right will always be manifested by the deprivation of an externally demonstrable incidence, such as the use arising from or being intergral to the right in question..."

[33] It is therefore my considered view that the Plaintiff has proven its case against the Defendant on a balance of probabilities. The Defendant is therefore liable to pay the Plaintiff damages.

The Quantum of Damages

[34] It is common cause that during the trial of this matter, the Plaintiff addressed the issue of the quantum of damages, and equally the Defendant also dealt with this issue. It is my view therefore that this Court has heard the parties on the aspect of the quantum of the damages.

[35] It is trite law that the normal remedies for breach of contract are available to the lessee, namely specific performance, cancellation if the breach is a major one, and damages. Consequential loss for example, includes such matters as the extra expense of hiring other accommodation and the profit which would have been made from operating the business, and *in casu*, the butchery business.

[36] PW2 Muzi Goodboy Dlamini testified that he was responsible for the administration of the business including the maintenance of the business books. In my view he demonstrated the financial loss they suffered with the Plaintiff as a result of the unlawful eviction from the butchery premises by the Defendant. The Defendant herself conceded that there was stock

in the premises although only denying the presence of the beef carcass, and she also denied the existence of money in cash amounting to E15 700-00 (Emalangeni Fifteen Thousand Seven Hundred).

[37] In my view this was a bare denial without any substance and without any merit. If she had taken lawful actions to tacitly enforce her landlord lien over the property of the Plaintiff, she would be covered and protected by the law, but as things stand the benefit of doubt must be afforded in favour of the Plaintiff who together with his business partner PW2 found themselves in an unenviable position in having their business abruptly locked without any form of notice afforded to them in terms of the lease agreement. The Defendant committed a grave error by locking out the Plaintiff unilaterally from the business in the manner she did. It appears that from the books of accounts that were salvaged PW2 was able in my view to fairly demonstrate their financial losses. I take into account that this is a small business operation wherein the owner or owners would be in a position to outline their general business operation.

[38] In determining the quantum of damages the Court must consider whether the harm or loss was foreseeable and in fact caused by the breach or wrongful act of the Defendant. This is the position *in casu*, the Defendant locked out the Plaintiff from the leased business premises without regard for stock in trade as well as the Plaintiff's items in the said premises. In my view this harm or loss caused by the Defendant on the Plaintiff was foreseeable. It was uncalled for and unlawful for the Defendant to take the law into her own hands by locking out the Plaintiff from a business that was operating.

[39] In as much as the Plaintiff has suffered financial harm, there is the aspect of mitigation of the losses by the Plaintiff whereby he and PW2 were duty bound to take reasonable steps to minimise the harm or loss resulting from the breach or wrongdoing by the Defendant. Upon learning that the Defendant had locked the business, the Plaintiff and his partner PW2 were under a legal duty to approach the Defendant on the same day to find out the cause of the lock- out, however, they did not do that but only approached DW1 who could not assist them.

[40] They could have also launched spoliation proceedings on urgency but they did not. PW2 testified that they did not inform DW1 that there was E15 700-00 because money is a private thing. However, this is a lot of money and the Defendant and DW1 were to be made aware of the presence of the money in the premises. The failure by the Plaintiff to mitigate the losses has the effect of limiting the damages which the Court may award.

[41] It is trite law that the quantum of damages is primarily intended to compensate the injured party for the actual harm or loss which he/she has incurred. The compensation aims to place the injured party in the position they would have been in if the breach or wrongdoing had not occurred. The position is that the damages awarded should reflect the fair and reasonable amount necessary to restore the injured party to their original financial position or standing before the injury or harm was committed.

[42] The legal position is that the calculation or assessment of damages arising from a delict varies depending on the nature of the harm or injury suffered and the legal principles governing that particular specific case. In breach

of contract cases, damages are typically assessed by determining the difference between the position the injured party would have been in if the contract had been performed and their actual position as a result of the breach. In delictual claims damages may be assessed based on factors such as lost wages, loss of income and profit and other relevant factors. This is the position *in casu* where there is a breach of contract which has resulted to delictual damages.

[43] *In casu*, the damages pertain to loss of stock and loss of income. The Court hearing a matter has a discretion to assess the quantum of damages of course taking into account the evidence presented, legal principles and the specific circumstances of this case. The Court's discretion is aimed at providing a fair and just compensation to the injured party.

[44] *In casu* I have found that the Defendant is liable to compensate the Plaintiff of the delictual damages claim as a result of the suit, however, **as I indicated above herein that the Plaintiff and his business partner had a duty to act promptly to mitigate the loss and they did not do so**, I am therefore going to exercise my discretion in granting reasonable and fair compensation in favour of the Plaintiff.

[45] Consequently, I hereby grant the following order:-

1. The Defendant is liable to compensate the Plaintiff in the manner set herein:-

   (a) Loss of earnings E100 000-00 (Emalangeni One Hundred Thousand)

(b) Loss of stock in the premises E20 000 00 (Emalangeni Twenty Thousand)

(c) Loss of cash in the business E7 000 00 (Emalangeni Seven Thousand).

2. Interest at 9% per annum a *tempore morae* of the sums awarded in paragraph 1 (a), (b) and (c) above.

3. Cancellation of the agreement between the parties.

4. Cost of suit on the ordinary scale.

So ordered.

N.M. MASEKO
JUDGE