



**IN THE HIGH COURT OF ESWATINI**

**CASE NO. 99/2019**

**HELD AT MBABANE**

In the matter between:

**SHOBASHOBA INVESTMENTS (PTY) LTD**

**PLAINTIFF**

**AND**

**LUPHIKO LWAMGWAGWA INVESTMENTS (PTY) LTD DEFENDANT**

***NEUTRAL CITATION:***

***SHOBASHOBA INVESTMENTS VS LUPHIKO  
LWAMGWAGWA INVESTMENTS (99/2019) SZHC  
– 25 [23/08/2023]***

**CORAM:**

**BW MAGAGULA J**

**HEARD:**

**01/11/2022; 28/11/2022; 23/02/2023;  
28/02/2023; 02/03/2023; 26/04/2023; 09/05/2023;  
03/07/2023 and 12/07/2023**

**DELIVERED:**

**23/08/2023**

*SUMMARY: Civil Law - Law of delict – Breach of an oral contract for transportation services – Requirements thereof – A Plaintiff must adduce evidence that it was part of the oral agreement that there should be a hearing before termination – evidence adduced during the trial point to the direction that it was the Plaintiff that was in breach of the contract – Plaintiff failing to prove an essential requirement for a delictual claim, which is wrongfulness.*

*HELD: The Plaintiff's claim is dismissed with costs.*

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## **JUDGMENT**

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### **BW MAGAGULA J**

### **BACKGRUND FACTS**

- [1] The central issue for determination is an alleged breach of an oral agreement entered into by the parties on the 3<sup>rd</sup> January 2013. The Defendant is in the business of growing and producing bananas at Siphofaneni. The Plaintiff was the transporter who had been entrusted to transport the harvested bananas from the Defendant's fields to the pack-house.
- [2] The oral agreement was to run for a period of two years from January 2018 to December 2020. It appears that the Defendant was not satisfied with the

quality of the transportation services rendered by the Plaintiff, to the extent that a letter of complaint was written. The Defendant subsequently terminated the transportation contract on the 30<sup>th</sup> October 2018 and gave the Plaintiff one month to cease operating.

- [3] The Plaintiff takes issue with the termination and alleges that it constitutes a breach of the oral agreement. As such, it has suffered damages to the sum of E130, 000 (One Hundred and Thirty Thousand Emalangeni).
- [4] On the pleadings, the Defendant's case is that the contract was terminated lawfully as a result of the Plaintiff's own breach of the haulage contract. Specifically, the Defendant avers that the Plaintiff's truck had endless mechanical problems which affected the Defendant's production and ultimately its markets.

#### **EVIDENCE ADDUCED BY THE PLAINTIFF**

- [5] The Plaintiff paraded the evidence of a single witness to support its claim. That is PW1, who co-incidentally is the Plaintiff's Director, Mr Shobane Zwane. It is now apposite to traverse on his evidence. In his evidence in chief, Mr Zwane in summary, told the court the following:-

- 5.1 That he knew the Defendant. There was an oral agreement of hauling bananas from the Defendant's fields to the pack house, with his company.
- 5.2 The agreement was for a duration of two (2) years.

- 5.3 He was using his truck to collect the Defendant's bananas from their fields.
- 5.4 He was the driver of the truck at all material times.
- 5.5 He started working for the Defendant in 2015.
- 5.6 That, during the subsistence of the contract, he received a letter of termination giving the Plaintiff a one month notice.
- 5.7 That Plaintiff received a letter from the Defendant dated 18<sup>th</sup> September 2018 at page 6 of the Book of Pleadings. The letter was complaining that the Plaintiff's truck was unroad-worthy. It was unable to collect the Defendant's produce as agreed. The letter further complained that the Plaintiff's truck sometimes would run out of fuel while collecting the Defendant's produce. However the Plaintiff denied all the allegations levelled against his company because he was always there, as he was driving the truck himself.
- 5.8 He also told the court that he expected to be called by the Defendant to a meeting to discuss the issue after receiving the letter dated 18<sup>th</sup> September 2018. However, that meeting did not materialize. He further testified that had he been called to discuss the complaint, he would have remedied the causes of complaint. However, he was never afforded an opportunity to remedy the complaints by the Defendant. He also testified that if his trucks had gone for service, he would make alternative arrangements to transport the Defendant's bananas.

5.9 The letter at page 6 of the Book was said to have been co-signed by Babili Multipurpose and the Defendant because they were sharing a warehouse. The witness confirmed that he had a discussion with Babili Multipurpose and they resolved all the issues. After the engagement with Babili Multipurpose, he was then allowed to proceed with the haulage of bananas.

5.10 On the quantum, the Plaintiff would be paid per month an average of a sum of E10, 000.00 (Ten Thousand Emalangeni). He benchmarked the Plaintiff's claim using E10, 000-00 (Ten Thousand Emalangeni) per month. The narrative being that since only thirteen (13) months were left before the lapse of the contract, the witness then multiplied E10, 000-00 (Ten Thousand Emalangeni) by the balance of the months left for the duration of the contract. Mr Zwane then handed in a bank statement which showed payments previously made by the Defendant for work done in the past. Examples given were payments made on the following dates;

5.10.1 28<sup>th</sup> January 2018 a sum of **E11, 654.00** (Eleven Thousand Six Hundred and Fifty Four Emalangeni).

5.10.2 29<sup>th</sup> March a sum of **E8, 457.00** (Eight Thousand Four Hundred and Fifty Seven Emalangeni).

5.10.3 31<sup>st</sup> May 2018 a sum of **E13, 156.00** (Thirteen Thousand One Hundred and Fifty Six Emalangeni).

## **Cross Examination**

[6] Mr Zwane was cross-examined at length by the Defendant's counsel Mr K.Q Magagula. The following are the highlights of the cross-examination:-

- 6.1 He confirmed that the Plaintiff had an agreement to haul the Defendant's bananas.
- 6.2 He admitted that bananas are perishable products
- 6.3 He admitted that a party is entitled to terminate a contract in terms of the law. However, if he had been given a chance to remedy the situation he would have not given that opportunity by the Defendant.
- 6.4 He confirmed that he received a letter complaining about the Plaintiff's performance, as a result of the mechanical condition of his trucks and fuel shortage. He insisted that he expected to be called by the Defendant for a meeting. He further highlighted that he also wanted to discuss issues of fuel as the fuel price soared. He had hoped that the agreed rate would be reviewed.
- 6.5 He also admitted during cross examination that the letter dated 18<sup>th</sup> September 2022 was inviting him into an urgent meeting. The Plaintiff confirmed that the meeting did not take place.
- 6.6 It was also put to him that there were many times in when the Plaintiff would source alternative transport services.

## **THE DEFENDANT'S CASE**

[7] The Defendant led two witness to support it's case. DW1 Bongi Dlamini and DW2 Mr Simon Ngcamphalala. The former is the Defendant's Secretary General and the latter is Manager.

[8] DW1 in his evidence in chief, told the court the following:-

- 8.1 That between the year 2018 and 2020, he was serving as a Secretary General of the Defendant. He is aware of the issues culminating to the cancellation of the haulage contract between the Defendant and the Plaintiff.
- 8.2 He testified that, the Plaintiff was engaged for a two year haulage contract for the Defendant's bananas during the harvesting season. There was no written contract, it was an oral agreement. The Plaintiff was to transport ripe bananas to the pack house.
- 8.3 The Plaintiff had a truck which was driven by his employed drivers, one Mancoba and Mbedla. After sometimes the Plaintiff began to experience problems in the execution of the mandate. It's truck would from time to time develop mechanical problems. Sometimes the truck would not come to collect harvested bananas at the detriment of the Defendant.
- 8.4 Sometimes the Plaintiff's drivers would complain about shortage of fuel such that they would go to fuel the truck and not come back.
- 8.5 The witness testified that he would sometimes call the Plaintiff's Director telephonically when the truck could not show up. The

Plaintiff's Director would then organize an alternative truck which would come to collect the Defendant's bananas the following day.

- 8.6 The witness submitted that the Defendant incurred financial losses as the bananas would get spoilt and could not be marketable. The pack house manager, one Mr Tjotjo would complain about the late delivery of the bananas from the fields. He also called the Plaintiff's Director enquiring why the truck was failing to deliver the bananas on time. Defendant viewed the Plaintiff's sub-standard performance as a breach of the contract. He also testified the Defendant would incur unnecessary expenses by paying the pack-house services even when there was no packing because of the Plaintiff's continuous breach of the agreement.
- 8.7 The witness further testified that the Plaintiff would try and mitigate the impact of the breakdowns by sourcing another truck. However, the relief transport would also break down more often than not. The Plaintiff once source a tractor relief transport, being tractor which was on good condition. Unfortunately, the owner took it back in no time. He sought another tractor which unfortunately transported the Defendant's product few days then it developed mechanical faults. He brought an alternative truck, which also developed mechanical faults. He sought another alternative, a bakkie van from Jomo Gamedze, it also transported the Defendant's bananas few days, and unfortunately could not last because the product would be spoilt.



- [9] This witness was cross-examined by the Plaintiff's counsel Mr Jele. As part of the cross-examination he was asked if there were occasions where the bananas were collected late or not at all from the fields. He alluded to that fact. However, when he was pressed to produce evidence in the form of records, he said he did not have same in his possession.
- [10] The witness went on to tell the court that some bananas would spoiled due to spending the nights in the field after harvesting. The witness failed to inform the court of the specific dates on which the Plaintiff failed to collect the produce. The witness also mentioned the Plaintiff's vehicles were problematic as they would run out of fuel or go as far as Matsapha for refueling. This witness also failed to inform the court of the specific dates when such occurred. It was put to this witness that the lack of conclusive evidence in the form of documentation was important for the court to see the extent of breach by the Plaintiff, if any.
- [11] In cross-examination Dlamini was probed on the number of vehicles used by the Plaintiff for the contract and he mentioned that there was one vehicle and later on stating that there were two vehicles. He went on to mention that the Plaintiff would sometimes hire vehicles to service the contract. This is clear evidence of the fact that the Plaintiff had the capacity to fulfill the contract as agreed.
- [12] This witness also spoke to the letters appearing in pages 6 and 7 of the book of pleadings. On page 6 is the letter alluding to unsatisfactory service of the

contract by the Plaintiff. The letter raised a number of complaints which in summary are late coming and/or absenteeism. Above we have addressed the lack of sufficient corroboration regarding the complaints. This letter was signed by both chairpersons of the Defendant and the other company Babili Multipurpose.

[13] This letter also requests for an urgent meeting with Plaintiff in order to map a way forward. The letter does propose a date for such meeting however, the Plaintiff's Director was called by Babili Multipurpose and whatever differences between the parties were cured and the contract with the latter continued smoothly.

[14] The Defendant never called such meeting, and the onus was upon them to do so. This witness mentioned that they expected the Plaintiff's Director to come to them for such meeting. Of particular importance with this letter is that it does not give the Plaintiff any opportunity to remedy whatever complaints by the Defendant.

## **DW2 – SIMON NGCAMPHALALA**

[15] Mr Ngcamphalala told the court the follwong:-

15.1 That he was employed by the Defendant as a Field Supervisor.

15.2 He is responsible for the entire Defendant's banana fields.

- 15.3 He supervises all works on the fields which include, supervising security officers, workers, trucks, and the overall running and work at the Defendant's fields.
- 15.4 He knows the Plaintiff and its Director. In as much as he does not know the terms of engagement, but he knew that Plaintiff was transporting bananas from the Defendant's fields to the pack-house.
- 15.5 He testified that, the Plaintiff failed to service the Defendant in a satisfactory manner.
- 15.6 He told the court that the Plaintiff used a truck for the haulage and was driven by Mancoba and sometimes Mbedla.
- 15.7 The Plaintiff's Director, Mr Shobane Zwane was not the one driving the truck, but his drivers.
- 15.8 The Plaintiff would sometimes not pitch to transport the harvested bananas from the fields.
- 15.9 The Defendant's employees would sometimes harvest bananas and leave it on the ground since the Plaintiff's truck was nowhere to be found. He would call the Plaintiff's Director complaining that the truck was not on the field to collect bananas and advised on the loss occasioned.
- 15.10 The Plaintiff also brought a red tractor which also developed mechanical problems.

15.11 Plaintiff also complained that bananas would become spoiled while on the fields because of the Plaintiff's inefficiency. Bananas should not be handled by many people.

[16] This witness was also cross examined, but nothing of significance change from what he told the court in his evidence in chief.

## **EVALUATION OF THE EVIDENCE**

[17] In as much as the court will not give a comprehensive analysis of the testimony of all the witnesses, especially regarding their reliability and credibility as a detailed account of their testimony appears above. It suffices to comment though that the Plaintiff's Director's insistence that he personally drove the truck appears not to be supported by the Defendant's witness. Both of them alluded to the fact that there were drivers that were employed. Not that this issue turns much on the case of both parties. This issue also does not show that he was a poor witness. The inconsistencies and gaps in his testimony are not such that his reliability or his credibility are impugned.

[18] The court also observes that throughout his evidence, Mr Zwane did not mention to the court that as part of the oral agreement between the parties, it was a term of the agreement that upon termination of the agreement to breach, it will be a request that the party accused of breach will first be called for a hearing before the termination is effected.

[19] The letter dated 18<sup>th</sup> September 2022 does not say anywhere that the Plaintiff's Director shall be telephonically called. The Plaintiff did not challenge the allegations, he never responded to the letter of complaint he just ignored same to his detriment.

[20] The court also finds it relevant to consider the Plaintiff's conduct after receiving the letter of termination. It is common cause that it is the Plaintiff that suggested the issue of a meeting to address the concerns. It was therefore not unexpected for the Plaintiff to expect that the suggestion of a date or dates on which such a meeting would be held, would come from the Defendant. Having said so, as the party which was being accused of serious breaches that go to the core of it's obligation in terms of the oral agreement, one would have expected the Plaintiff to take active steps to dispel the aspersions. Especially because the Plaintiff was given notice. Plaintiff should have utilized that period to either communicate in terms of suggesting a date or to counter the allegations of breach in a term of a written response. It chose to do nothing up until the agreement terminated.

## **THE LAW**

[21] The cause of action by the Plaintiff is founded on the law of contract, an unwritten one to be specific. That is what the Plaintiff has pleaded in the particulars of claim.<sup>1</sup> It is therefore key that we revert to the law pertaining to oral contracts. A contract is an agreement reached with the intention of creating a legal obligation with resulting rights and duties. A verbal contract

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<sup>1</sup> See paragraph 9 of the Plaintiff's particulars of claim.

is binding, however it is not uncommon in verbal to be followed by numerous disputes as to the actual terms and conditions between the parties.<sup>2</sup>

[22] In the matter of **Imvuselelo Investments (Pty) Ltd vs Usuthu Forest Products Limited**,<sup>3</sup> where a Plaintiff had brought an action for wrongful cancellation of the contract by Defendant, claiming that it was entitled to 30 days' notice as per the written contract. The Supreme Court confirmed a decision of the High Court which had found that the Plaintiff was not entitled to the notice before cancellation as the fire that led to the cancellation was indeed started by the Plaintiff's employees.

[23] The court further held that the issue of notice claimed by the Plaintiff depends on the interpretation of the contract provisions. In as far as the law regarding a contract of unspecified duration is concerned, the following was said by Coetzee J in **Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) 1984 (1) SA 433 (W) at 441D – E**;

- 1) It is a question of construction of the agreement according to the ordinary principles of construction;*
- 2) Since, however, such agreement, ex hypothes, contains no express provision dealing with determination by the party who asserts that it should be inferred, it is a question of construction*

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<sup>2</sup>www.bugerhugserattorneys.co.za

<sup>3</sup> Supreme Court Case No. 102/2017

*in the wider sense of ascertaining what the intention of the parties was when they entered into the agreement.*

*3) There is no presumption one way or the other.*

*4) The onus is on the party who asserts that the parties intended something which they omitted to state expressly to demonstrate that this was so.*

## **APPLICATION OF THE LAW TO THE EVIDENCE**

[24] A reflection of the Plaintiff's cause of action for the amount claimed is warranted at this point. The Plaintiff has premised the delictual claim on the basis of breach of the contract.<sup>4</sup> Unfortunately the entire Plaintiff's particulars of claim do not disclose the basis of the breach, is it the period of the notice given or the very act of termination of the contract by the Defendant.

[25] The court only go to decipher the basis through the replication and through cross examination of the Defendant's witnesses when it was put to them that the Plaintiff was not given a hearing before the decision to terminate.

[26] In the heads of argument, the Plaintiff relies on the evidence given by it's sole witness (PW1) Shobane Zwane. This witness told the court that the Plaintiff was never given any notice of any failure to perform in terms of the agreement. The letter received on the 18<sup>th</sup> September 2018, in as much as it mentioned the late coming and non-collection of produce, mentions a need for

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<sup>4</sup> See paragraph 9 of the particulars of claim.

a meeting between the parties to thrash issues. However, no dates were proposed. The Plaintiff however, did not plead in the particulars of claim that it was part of the oral agreement between the parties that it would be given notice before termination. Sight must not be lost that the cause of action is based on breach of the oral agreement. Therefore, the conduct constituting the breach should have not only been pleaded but evidence adduced that it formed part of the oral agreement between the parties.

[27] Since the burden of proof rested on the Plaintiff regarding the breach of the contract, Plaintiff fell short in discharging this onus.

[28] On the other hand, the Defendant argues that it terminated the contract lawfully due to the breach by the Plaintiff who provided substandard transport services. This breach, it is argued, related to a material term of the contract which was the transportation of the bananas from the fields to the pack-house. The Plaintiff in it's particulars of claim acknowledging that this was a material term of the contract.<sup>5</sup>

[29] During the trial DW1, Mr Bongi Dlamini, told the court that the conduct that signified breach on the part of the Plaintiff *inter alia* included late arrival of the transport. Their motor vehicles were also breaking down and the transportation operations were compromised. He continued to tell the court that the Defendant's employees used to report the pack-house they would sit

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<sup>5</sup> See paragraph 5 of the particulars of claim.



and do nothing as the Plaintiff could not provide transport to load the bananas from the field to the pack-house.

[30] This witness confirmed that the Plaintiff's Director Mr Zwane was engaged regarding these problems. During cross-examination this witness was only challenged as not having adduced evidence to support the allegations he was making against the Plaintiff. During the cross-examination it also came out that the break downs were caused by the state of the roads in the farm which were described as horrible. The evidence of this witness to the effect that the Plaintiff had been engaged for a long time regarding the breakdown of the vehicles was also not controverted. The only issue that was put to this witness was that, the Defendant had already taken a unilateral decision to terminate the contract.

[31] The evidence of DW1 was largely corroborated by DW2, Simon Maphalala, who was the Defendant's second witness. He told the court that he is a supervisor at the Defendant's farming operations at Madlenya. He told the court that the Plaintiff was responsible to transport the Defendant's bananas from the fields to the pack-house. Regarding the performance of the Plaintiff as a transporter, the witness did not mince his words. He told the court that the Plaintiff was not performing. He qualified his answer by telling the court that, the Plaintiff's vehicles would arrive late in the fields. Sometimes the Plaintiff's driver would leave the harvested bananas lying on the ground, with the reason that the vehicles needed to be fueled in Matsapha or Siphofaneni. The drivers had a tendency of not coming back after fueling. The cut bananas would spend the night on the ground. He told the court that once this happens, the bananas depreciate in value.

[32] The court makes a finding that this witness was credible. His evidence is not only consistent with the letter of termination, but it corroborates that of DW1 to a large extent. The Plaintiff's insistence that the Plaintiff did not suggest a date for the meeting wherein it could have started its side of the story cannot carry the Plaintiff's case any far. Especially in light of its own glaring breach of the contract.

[33] It is unthinkable that the Defendant would have not been expected to terminate the contract in light of the breach, which was on material terms of the contract. The transportation of the bananas. The Plaintiff failed dismally not only to adduce evidence that it was part of the contract that a meeting had to be convened first before each party could terminate, but also that its own sub-standard performance was in fact not the reason for the alleged breach of the contract and subsequent basis for the Defendant to terminate the contract.

[34] This court agrees with the sentiments expressed in the matter of **Singh v McCarthy Retail Ltd (t/a McIntosh Motors) (429/98) [2000] ZASCA 41; 2000 (4) SA 795 (SCA); [2000] 4 All SA 487 (A) (14 September 2000)** that a party may cancel a contract based on a breach, if it is so serious as to justify cancellation by the consent party. In the matter at hand, the breach by the Plaintiff was indeed serious. In all fairness, the Defendant even gave the Plaintiff notice of 30 days. If the Plaintiff was desirous of making representatives it could have taken the initiative and active steps to do so after it received the letter and within the period of notice. So, the argument that the letter did not suggest dates do not hold water.

[35] During the Plaintiff Director's testimony he told the court that, while he received the letter calling him to an urgent meeting, he would attend the meeting if he was telephonically called to come. He also complained that he was not given an opportunity to remedy the breach, he thought they shall meet first before any cancellation. On the other hand, the Defendant laments that, upon receipt of the letter dated 18<sup>th</sup> September 2018, he ought to have taken upon himself, to enquire about the venue of the meeting and the time, in any event there is a known meeting place which the Plaintiff's Director was aware of it.

[36] The Defendant took the failure to attend the meeting, shows that the Plaintiff was deliberately failing to remedy the breach of contract. This shows that the Plaintiff have no consideration to the care business of the Defendant. This is amplified that, he told the court that, he has no knowledge that, bananas are perishable. It was therefore incumbent upon the Defendant to remedy the losses by the cancellation.

[37] The justification that he ought to have been called telephonically cannot pass *muster* since even Babili Multi-purpose signed the cancellation letter of the agreement on the bases, the Plaintiff was failing to service the extraction agreement as evidence above.

[38] It is submitted that, since the production and farming of bananas was the core business of the Defendant, it was enjoined to mitigate its loss by the cancellation of the extraction contract. No other business man in the shoes of

the Defendant would have tolerated the mess caused by the Plaintiff as a result of his continuous breach of contract. At page 97, the Learned Author, Gibson Eight edition, quoting with approval the case of **Hazit vs Transvaal & Delagoa Bay Investment Co. Ltd 1939 AD 372;**

*“The injured party cannot allow the damages to increase day by day and do nothing about it. He must do all that is reasonably necessary to minimize his loss. The extent of his liability depend on the facts of each particular case, but he is not required to take any step which a reasonable and prudent man would not take ordinary in the cause of his business.”*

[39] In the case of **Horus Properties (Pty) Ltd vs Mar and Dar Swazi GRC (Pty) Ltd, The Royal Eswatini Police and Attorney General Case No. 485/2020**, the court held that, it is a fundamental rule of law of contract based on logic and common sense that, where a party to a contract commits a fundamental breach of the contract. The aggrieved party is at liberty to declare the contract cancelled or terminated-doctrine of election-and claim whatever relief may be available to it consequent upon such breach and cancellation.

[40] There is another aspect of this matter which warrants determination. The nature of the Plaintiff's claim is one founded in delict, as Plaintiff claims damages for the alleged breach of the two year contract. In light of the courts finding that the Defendant cannot be faulted for cancelling the contract due to the failure by the Plaintiff to perform it's own obligations of the contract satisfactorily, it follows that the Plaintiff has failed to prove one of the

essential requirements for a delictual claim, which is wrongfulness. Even on this ground, the Plaintiff's claim cannot be sustained. The legal position is that an act which causes harm to another, is in itself insufficient to give rise to delictual liability. For liability to follow prejudice must be caused by a wrongful act, that is legally reprehensible. In the absence of wrongfulness, a Defendant will not be held liable. See **Herschel v Mrupe 1954 (3) SA 464 (A) 490**.

[41] Due to the foregoing reasons, the court finds that the Plaintiff has not only failed to prove its claim for damages due to the breach of contract, but it has also failed to prove the quantum of E130 000. The Plaintiff's claim ought to fail.

### **ORDER**

- a) The Plaintiff's claim is hereby dismissed.
- b) Costs to follow the event.



**BW MAGAGULA**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For the Plaintiff: Mr S. Jele (S.M Jele Attorneys)

For the Defendant: Mr KQ Magagula (Sithole & Magagula Attorneys)