

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 3091/21

In the matter between:

FORMAX ESWATINI (PTY) LTD

Plaintiff

And

AFROTIM CONSTRUCTION (PTY) LTD

Defendant

JUDGEMENT

Neutral citation:

Formax Eswatini (pty) Ltd vs Afrotim Construction (pty) Ltd (3091/21) SZH 262 (25th September 2023).

Coram:

S.M. MASUKU J

Dates Heard:

14th August 2023 and 29th August 2023

Date of Judgement:

25th September 2023.

Flynote:

Law of contract – Letting and hiring of Formwork equipment, Kwik –stage, scaffolding tube, multiform and other contingencies..

Summary:

The Plaintiff and the Defendant entered into an oral agreement for the letting and hiring of formwork

equipment and other contingencies. Defendant admitted that an amount of E457 922-34 (Four hundred and fifty seven thousand, nine hundred and twenty two emalangeneni thirty four cents) remained unpaid to the Plaintiff whilst the Plaintiff claimed that an amount of E539,009-22 (Five hundred and thirty nine thousand, nine emalangeneni twenty two cents) remained unpaid. The difference of E81 086-86 (Eighty one thousand and eighty six emalangeneni, eighty six cents) remained in dispute for trial.

Held:

The Plaintiff established on a preponderance of probability that the Defendant owed it outstanding invoices amounting to E539,009-22 (Five hundred and thirty nine thousand, nine emalangeneni twenty two cents). Judgement awarded in Plaintiff's favour

Introduction

[1] The Plaintiff's claim succeeds in the proven amount of E539,009.22 (Five hundred and thirty nine thousand, nine emalangeneni twenty two cents). Judgement is thus entered as follows;

- (a) Payment of E539 009-22 (Five hundred and thirty nine thousand, nine Emalangeneni twenty two cents).
- (b) Interest thereon at 9% per annum, a *tempora morae* from date of summons to date of final payment.
- (c) Cost to follow the course at an ordinary scale.

- [2] In this action, the Plaintiff and the Defendant entered into an oral agreement for the letting and hiring of formwork equipment, kwik-stage, scaffolding tube, multiform and other contingencies. It is common cause that the agreement was concluded on the 30th April 2021.
- [3] The Plaintiff was represented by one Mr Ntsika Mavundla and the Defendant by Mr Isaac Magagula. The terms of the agreement were *inter alia*, that, the Defendant signed a Credit Application form for the lease of the Form Work Equipment provided by the Plaintiff which consisted of the equipment described in paragraph 2 above.
- [4] The Plaintiff delivered the Form Work equipment to the Defendant for use at Defendant's construction site at Ebuhleni Police Station for the contracted period.
- [5] The Defendant deposited E300,000-00 (Three hundred thousand emalangeni) to the Plaintiff in terms of a credit facility agreement. The Plaintiff then supplied all specification of the scaffolding material required by the Defendant. The Defendant received and enjoyed the usage of the scaffolding material and agreed to pay the invoices at the usual 30 days period from receipt of invoices at Plaintiff's usual or customary rates.
- [6] All these issues appeared to be issues not in dispute from the pre-trial conference minutes held by the parties on the 10th August 2023 after the court had directed the parties to conduct a meaningful pre-trial conference.
- [7] After all the issues that had been raised in the Defendant's plea, issues that stood for determination at trial as reflected in the pre-trial minute were that; (i) the Plaintiff acknowledged to have received some payments from the Defendant for some of the issued invoices. The payments were made into the

Plaintiff's account. The Plaintiff claimed that invoices that remained unpaid by the Defendant amounted to E539,009-22 (Five hundred and thirty-nine thousand, nine emalangeneni twenty-two cents);(ii) the Defendant, *per contra* placed the amount due to the Plaintiff at E457,922-34 (Four hundred and fifty seven thousand nine hundred and twenty two emalangeneni thirty four cents).

- [8] The net effect if we were to go by way of the pre-trial minute of the parties, is that the trial had to determine if the Defendant was liable to pay the difference of E81,086-88 (Eighty one thousand and eighty six emalangeneni eighty eight cents) to the Plaintiff derived from the E539,009-22 (Five hundred and thirty nine thousand, nine emalangeneni twenty two cents) and the E457,922-34 (Four hundred and fifty seven thousand, nine hundred twenty two emalangeneni thirty four cents) that the Defendant admits is outstanding and due to the Plaintiff.
- [9] With hindsight , the issue of the E81 086-88 (Eighty one thousand and eighty six emalangeneni eighty eight cents) in dispute should have been resolved before trial by first granting summary judgement in the undisputed amount of E457,922-34 (Four hundred and fifty seven thousand, nine hundred and twenty two emalangeneni thirty four cents) against the Defendant so that the trial only determines the Defendant's liability in the disputed difference of E81 086-88 (Eighty one thousand and eighty six emalangeneni eighty eight cents). We went the long way around as it will be demonstrated by the evidence led below.
- [10] This approach is buttressed by the fact that the court had to rely on the evidence of an uncontroverted witness Nsika Lucky Mavundla (Pw1) brought to testify by the Plaintiff. The Defendant closed its case to rely on the cross-

examination of Mr Mavundla who stood firm on the facts surrounding the invoices brought and the calculations.

- [11] Mr Mavundla introduced himself as the Plaintiff's Technical Manager ,who had been with the company for a period exceeding two years. He professed to have represented the Plaintiff at the inceptions of the transaction in April 2021. He represented the Plaintiff in two meetings before the trial one held on 19th July 2023 and the other 4th August 2023 where the parties tried to resolve the queries on the invoices that are a subject matter of the disputed amounts.
- [12] Mr Mavundla testified in examination in chief that the lease agreement allowed the Defendant to pay for the use of the equipment on a monthly basis (30 days) on receipt of invoices sent and accepted by the Plaintiff. The Plaintiff made an upfront payment of E300 000-00 (Three hundred thousand emalangeneni) on the first invoice dated 12th April 2021. The immediate payments made thereafter were on time but the Plaintiff started to fall behind in its payments. Not only that, it kept making short payments hence the deficit. The short payments were not part of the agreement. Although the Plaintiff queried or objected to the short falls, the Defendant would only comment on them without paying.
- [13] He testified that the invoices were delivered by the Plaintiff in person to the Defendant's Technical team, checked and signed by both parties. All invoices were signed irrespective of whether they were paid or not. The court was shown fourteen payments that were made after the lump sum payment of E300 000-00 (Three hundred thousand emalangeneni). The payments varied according the amounts invoiced. The payments were made between the 30th April 2021 to the last payment made on the 21st April 2022.

- [14] When allocating the payments to the issued invoices, the Plaintiff discovered a variance between its balances outstanding and that of the Defendant which was caused by the Defendant's mistaken capture in their ledger a superseded invoice.
- [15] The Defendant had captured a tax invoice dated 7th June 2021 issued before the final invoice which had irregularities that the Defendant had raised to do with the inconsistencies in the rates of the equipment it was receiving that were different from the initial rates. The Defendant asked the Plaintiff to rectify the irregularities which they did with a certain Mrs Motsa from the Defendant's Quantity Surveyor's Office. The superseded invoices was for an amount of E601 614-83 (Six hundred and one thousand six hundred and fourteen emalangenì eight three cents) which was then corrected to give a new outstanding balance of E539 009-22 (Five hundred and thirty nine thousand, nine emalangenì twenty two cents). The difference, he testified was marginal but corrected and accepted by Mrs Motsa on behalf of the Defendant.
- [16] When Mr Mavundla was asked why was there an issue now when the irregularities were settled. He answered that technically there should not be any issues because just before trial the parties had a meeting on the 19th July 2023 and 4th August 2023 in an attempt to address the re-surfaced quiry on the superseded invoices. He testified that despite the Plaintiff's substantial evidence to back up the re-issued invoice, the Defendant did not accept it with no particular reason. They kept on saying the Plaintiff should pull the case out of court and settle it amongst themselves.
- [17] Mr Mavundla was asked in examination in chief to show the court the invoices that were paid up and those outstanding. He showed the court invoices to be found in the bundle of document presented by the Plaintiff. The invoices were

also included in the book of pleadings. In the bundle the invoices were found at page 18 up to page 35. He testified that the invoices were sent to the Defendant as hard copies and were also e-mailed. They were also received by the Defendant prior to the parties recent meeting of the 19th July 2023 and 4th August 2023.

- [18] He testified that the tax invoice of the 12th July 2021 at page 18 of the bundle reflected a balance of E458 490-79 (Four hundred and fifty eight thousand, four hundred and ninety emalangeni seventy nine cents). It was reduced by a part payment of E66 623-04 (Sixty six thousand, six hundred and twenty three emalangeni four cents) made on the 3rd August 2021 leaving a balance of E525,113-83 (Five hundred and twenty five thousand, one hundred and thirteen emalangeni eighty three cents) on the 1st September 2021 an amount of E4 622-45 (Four thousand six hundred and twenty two emalangeni forty five cents) was paid reducing the balance to E529,736-28 (Five hundred and twenty nine thousand seven hundred and thirty six emalangeni twenty eight cents) on the 28th September 2021 and amount of E9 272.94 (Nine thousand, two hundred and seventy two emalangeni ninety four cents) was paid leaving the amount of E539,009-22 (Five hundred and thirty nine thousand, nine emalangeni twenty two cents) which amount the Plaintiff claims to be due owing and payable.
- [19] In cross –examination Mr Mavundla was asked if the revision of the invoices was made known to the Defendant. He testified that the irregularities were actually picked up by the Defendant and the Plaintiff had to go and fix them so, the whole time they were aware of the corrections. He said all in all, after they had ratified the invoices on the 7th July 2021, the Defendant had to discard those invoices and substitute them with the corrected ones.

- [20] It was further suggested to the witness that the total invoices sent to be paid by the Defendant was not E610 614-64(Six hundred and ten thousand, six hundred and fourteen emalangeni sixty four cents) (the amount in the invoices before the correction) but amounted to E520 527-00 (Five hundred and twenty thousand, five hundred and twenty seven emalangeni) hence there was no need according to the Defendant for further payments where there was no indication that such had to be paid.
- [21] Mr Mavundla's response was that the statement was a bit misleading because the parties sat down on the dates in July and August 2023 and deliberated on the matter extensively to both their satisfaction. The Defendant's representatives signed acknowledging the revised invoices. If counsel's submissions was true that there was an issue, then the Defendant would have raised it in writing disputing the revision presented to them. There was no such correspondence.
- [22] From the aforesaid evidence both in chief and cross examination, the Defendant did not dispute that there were invoices that it had queried as irregular. That the quiry was with regards to the rates charged by the Plaintiff at the later stage of the contract. Defendant did not dispute that the queries were attended to by the Plaintiff. That new invoices were then issued as shown in the bundle of documents filed from the 12th July 2021 to 28th September 2021. It also did not deny that the superseded invoices were discarded and are not on record, only the revised invoices were presented in the pleadings and later at trial. The Defendant also did not dispute that they had a meeting at which the revised invoices were discussed and that they acknowledged them without any further quiry. The final amount presented is the amount of E539,009-22 (Five hundred and thirty nine thousand nine

emalangeneni twenty two cents) presented on the summary account statement dated 3rd March 2021 at Page 2 of the Plaintiff's bundle.

- [23] The Defendant closed its case without calling any witness to substantiate its defence and besides it is the finding of this court that the cross – examination by Defendant's counsel did not shake the Plaintiff's documentary proof of the amount of E539,009-22 (Five hundred and thirty nine thousand nine emalangeneni and twenty two cents) as due owing and payable.

Onus of Proof

- [24] The onus is upon the Plaintiff to prove its case on a preponderance of probabilities. If the court is satisfied, it will grant judgement for the Plaintiff. If the Plaintiff fails to discharge the onus, the court may dismiss the Plaintiff's Claim. Her Ladyship Justice Ota in the case of James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 (30 November 2012 at Paragraph [33] stated:-

"...Although civil cases are won on a preponderance of evidence, yet it has to be preponderance of admissible, relevant and credible evidence that is conclusive, that commands such probability that is in keeping with the surrounding circumstances of the particular case. The totality of the evidence before the court however must be considered to determine which has weight and which has no weight. (underlining added).

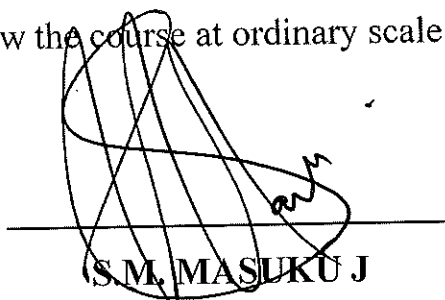
- [25] In *casu*, only the evidence of the Plaintiff is assessed which as stated earlier was not shaken by cross-examination. The admission by both parties that there was an oral agreement of letting and hiring of formwork equipment, the

evidence to establish same was dispensed with. The Plaintiff was left to establish the quantum on the balance that remained unpaid.

[26] The court comes to the conclusion that the Plaintiff has established on a preponderance of probability that the Defendant owed outstanding invoices amounting to E539,009-22 (Five hundred and thirty nine thousand, nine emalangen and twenty two cents) which is due owing and payable as claimed.

[27] The Plaintiff succeeds and judgement is entered as follows:-

- (a) Payment of the sum of E539,009-22 (Five hundred and thirty nine thousand, nine emalangen and twenty two cents).
- (b) Interest thereon at 9% per annum from date of summons to date of payment.
- (c) Costs to follow the course at ordinary scale.



S.M. MASUKU J
JUDGE - OF THE HIGH COURT

For the Plaintiff: Mr Mtshali of Mtshali Ngcamphalala Attorneys.

For the Defendant: Mr Mongi Nsibande of Mongi Nsibande & Partners