



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal case No: 43/12

In the matter between:

MATHIUS NDLOVU

APPELLANT

VS

MANDLA MAZIYA

RESPONDENT

Neutral citation: *Mathius Ndlovu and Mandla Maziya (43/12) [2012] SZSC69 (30th November 2012)*

CORAM: S.A. MOORE JA, M.C.B. MAPHALALA JA, E.A. OTA JA.

Heard 19th November 2012

Delivered 30th November 2012

Summary

Civil Appeal - law of contract - respondent sued appellant for E16 050.00 being the balance of the purchase price for goods sold and delivered – appellant filed a counterclaim for E38 075.00 which was not defended – appellant entitled to E22 025.00 in respect of a set-off.

JUDGMENT

M.C.B. MAPHALALA , JA

[1] This is an appeal against the judgment of the Court *a quo* for granting an amount which is less than the amount in the counterclaim notwithstanding that the counterclaim was not defended. The trial judge made the following orders: firstly, that the plaintiff be and is hereby directed to return to the defendant all the items listed in paragraph 3 of the counterclaim which were removed by the plaintiff from the leased premises without an order of Court or consent of the defendant. Secondly, that as soon as the plaintiff complies with order 1 above, the defendant is directed to pay the plaintiff the sum of E16 050.00 (sixteen thousand and fifty emalangeni) being the balance of the purchase price of the butchery equipment which the plaintiff sold to the defendant.

[2] Thirdly, that in the event of the plaintiff failing to return the items referred to in order 1 above to the defendant within fourteen days from date hereof, the defendant shall be entitled to set-off the sum of E16 050.00 (sixteen thousand and fifty emalangeni fifty cents) being the amount owed to the plaintiff by the defendant from the sum of E33 575.00 (thirty three thousand five hundred and seventy five emalangeni) which is the value of the items repossessed by the plaintiff and claimed in terms of the counterclaim.

[3] Fourthly, that the plaintiff is ordered to pay the defendant the sum of E17 525.00 (seventeen thousand five hundred and twenty five emalangeni) within thirty days from the date hereof in the event the items referred to in

order 1 above have not been returned to the defendant. Fifthly, that the plaintiff is ordered to pay costs of these proceedings.

[4] The appellant noted an appeal to this Court; and, the ground of appeal is that the learned judge *a quo* erred in fact and in law in granting the counter-claim to the sum of E33 575.00 (thirty three thousand five hundred and seventy five emalangeni) when the defendant's counterclaim was the sum of E38 075.00 (thirty eight thousand and seventy five emalangeni). The appellant was the defendant in the Court *a quo* and he had filed a counterclaim to the respondent's action. Judgment was granted in his favour for an amount which was less than the counterclaim; hence, the appeal to this court.

[5] The respondent instituted an action in the Court *a quo* for payment of E16 050.00 (sixteen thousand and fifty emalangeni) being in respect of goods sold and delivered to the appellant at his own special instance and request; he further sought interest at the rate of 9% per annum calculated from the date of issue of the summons to date of final payment as well as costs of suit. Notwithstanding that the respondent alleged that the appellant owed rental for the premises; he did not claim arrear rental.

[6] In the Declaration, the respondent alleged that on the 19th June 2007, the parties concluded an oral agreement in terms of which the respondent sold and delivered to the appellant, on a credit basis, butchery equipment valued at

E31 050.00 (thirty one thousand and fifty emalangeni); the appellant paid a deposit of E15 000.00 (fifteen thousand emalangeni) and the balance of E16 050.00 (sixteen thousand and fifty emalangeni) was to be paid before December 2007. In breach of the agreement, and despite demand, the appellant failed, refused and/or neglected to pay the respondent the said amount of E16 050.00 (sixteen thousand and fifty emalangeni). The appellant admitted payment of the deposit of E15 000.00 (fifteen thousand emalangeni) but denied that the balance was due and payable before December 2007; he argued that the balance was payable before the termination of the lease which was in respect of the premises in which the appellant conducted its butchery business. The lease was for a period of two years commencing on the 1st July 2007 up to the 1st July 2009.

- [7] The appellant filed a counterclaim to the action; he submitted that on the 13th May 2008, the respondent locked the premises without due notice in respect of the balance of E16 050.00 (sixteen thousand and fifty emalangeni). The appellant further argued that during the lockout, there was a stock of meat inside the premises valued at E4 500.00 (four thousand five hundred emalangeni) as well as salt and spices valued at E150.00 (one hundred and fifty emalangeni). The appellant lodged a counterclaim of E38 075.00 (thirty eight thousand and seventy five emalangeni); and, in the alternative, he claimed the release of the butchery equipment locked inside the premises by the respondent. He further claimed costs of suit as well as interest at the rate of 9%

per annum a *tempore morae*. The respondent did not defend the counterclaim; the pleadings were eventually closed, and, a trial date was applied for and allocated.

[8] The Court found correctly that the respondent had unlawfully removed the butchery equipment, utensils, meat stock and furniture from the premises without the consent of the appellant or a Court order. The removal of the items was effected in the absence of the appellant and in the presence of his employee. The appellant claimed that the total value of the items removed by the respondent amounted to E38 075.00 (thirty eight thousand and seventy five emalangeni). He further argued that the items removed from the premises should be regarded as settling the debt he owed to the respondent. However, this argument was rejected by the Court *a quo* on the basis that the appellant did not produce any evidence that these items were not the same as those which had been repossessed by the respondent.

[9] His Lordship found that the appellant did not dispute his indebtedness to the respondent in the sum of E16 050.00 (sixteen thousand and fifty emalangeni), but that his contention was that the due date had not arrived. Similarly, the trial Court found that the respondent did not defend the counterclaim; hence, it effected a set-off and held that the respondent was liable to the appellant for the amount of E17 525.00 (seventeen thousand five hundred and twenty five emalangeni).

[10] When the appeal was heard, only the appellant's counsel was in attendance and there was no appearance for the respondent. Furthermore, there were no heads of argument filed on behalf of the respondent notwithstanding that his Counsel was served with the Notice of Appeal as well as the Record of Proceedings. Appellant's Counsel informed the Court that he was advised by Respondent's Counsel telephonically on the very same morning that the appeal was not opposed; and, that there would be no appearance by or on behalf of the respondent.

[11] The Court was not impressed with the non-appearance of Counsel for the respondent since she had an ethical duty to attend as an officer of the Court, and, then explain her instructions on the appeal. The conduct of Respondent's Counsel was reprehensible and demonstrated a naked disregard for the authority of the highest Court in the country. It is to be expected of Counsel to appear in Court on the date of hearing even when they are no longer pursuing the case, as a matter of courtesy; it is during their appearance that they should advise the Court of their instructions not to pursue the matter. This ethical duty on Counsel is not limited to appearances before this Court, but, to all Courts of judicature in the country.

[12] Notwithstanding the information given by appellant's counsel, the Court directed the Court Orderly to call the name of the respondent outside the

courtroom three times in order to ascertain that he was not present in Court; and, there was no response.

[13] It is apparent from the evidence that the trial Court made an arithmetical error when effecting the set-off; the undefended counterclaim is for an amount of E38 075.00 (thirty eight thousand and seventy five emalangeni), and, the undisputed claim in convention is for an amount of E16 050.00 (sixteen thousand and fifty emalangeni) bringing the difference to E22 025.00 (twenty two thousand and twenty five emalangeni).

[14] With regard to set-off, the Supreme Court in the case of *Swaziland Polypack (PTY) Ltd v. Swaziland Government and Swaziland Investment Promotion Authority* Civil Appeal No. 44/2011, quoted with approval the case of *Standard Bank v. S.A. Fire Equipment* 1984 (2) SA 693 (C) at 696 F-H where *Justice Rose-Innes J* stated the following:

“It seems reasonably clear that the defence of compensation or set-off is a defence “in rem”, since set-off is similar to payment and results in the discharge, in whole or in part, of a debt. Set-off occurs, or may be invoked, only when two persons have incurred indebtedness each to the other, from whatever cause or causes, and both debts are for liquidated amount in money due and payable at one and the same time. When this situation arises each debt, or claim compensates the other, each is written off against the other and a balance is struck whereby both debts, if equal in amount, are discharged just as if both have been paid. If the one debt is greater than the other, of course, the lesser debt is discharged and the

greater is reduced by the amount of the lesser. Such being the nature of set-off, it is not a defence in personam, but a defence in rem, since it extinguishes the debt whoever may be the debtor.”

[15] Accordingly, the judgment of the Court *a quo* is set aside and substituted by the following judgment:

1. The respondent is directed to pay an amount of E22 025.00 (twenty two thousand and twenty five emalangeni) to the appellant within fourteen days from date hereof.
2. The respondent is ordered to pay costs of the appeal.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree:

S.A. MOORE
JUSTICE OF APPEAL

I agree:

E.A. OTA
JUSTICE OF APPEAL

FOR APPELLANT
FOR RESPONDENT

Attorney S. Mamba
Attorney L.G. Shongwe

DELIVERED IN OPEN COURT ON 30th NOVEMBER 2012