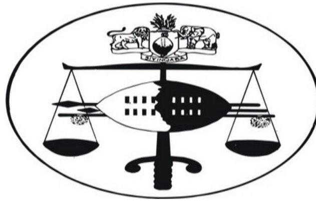

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 63/2019**

In the matter between:

SOLOMON MTHETHWA Appellant

And

SHISELWENI FORESTRY COMPANY LTD Respondent

Neutral Citation: *Solomon Mthethwa vs Shiselweni Forestry Company (63/2019) [2022] SZSC 39 (18 May, 2022)*

CORAM: **S. P. DLAMINI JA**

N. J. HLOPHE JA

A. M. LUKHELE AJA

DATE HEARD: 18 May, 2022

DATE DELIVERD: 01 September, 2022

Summary: *Civil Law; – Whether contract legally terminated; absolution from the instance raised after close of plaintiff's case; whether proof of breach of contract established; whether evidence of proving damages adduced; – Held that the High Court did not misdirect itself in upholding the exception; – Held that the appeal is without merit and stands to be dismissed with costs and such costs to include duly certified costs of Counsel.*

JUDGMENT

S. P. DLAMINI – JA

PARTIES

[1] The Appellant was the Plaintiff and the Respondent was the Defendant at the hearing before the High Court. The Parties will be referred throughout this judgment as cited before this Court namely as the Appellant and the Respondent respectively.

[2] The Appellant was at the relevant period a Liswati business man engaged in timber extraction and transport business. The Respondent is a company registered in accordance with the company laws of the Kingdom of Eswatini and engaged in various aspects of the timber industry.

INTRODUCTION

[3] It is common cause that the Parties, on 24 October 2013, entered into a written contract for the extraction and transportation of timber in terms of which the Appellant was engaged by the Respondent as an independent contractor to extraction and transportation of timber.

[4] It appears that the parties, very early in their business relationship, began to experience challenges in their said contractual relationship.

[5] The challenges between the Parties culminated in the termination of the contract by the Respondent in April 2014. As a result of the termination of the contract, the Appellant approached the High Court for relief.

PROCEEDINGS BEFORE THE HIGH COURT

[6] The Appellant commenced proceedings before the High Court by way of Summons dated 9 July 2014.

[7] The Appellant in paragraphs 4, 5 and 6 of the Particulars of Claim states as follows;

> ***"4. On or about the 24th October 2013 and at Nhlangano, the Plaintiff and the Defendant entered into a written extraction and transportation agreement in terms of which the Defendant engaged the Plaintiff to amongst other things ensure that certain loads of timber products are extracted from Shiselweni Forestry Company plantation to depots or transported to markets and elsewhere in the designated areas which was to run for a period of five (5) years.***
>
> ***A copy of the agreement is annexed and marked 'A'.***
>
> ***5. The Plaintiff duly discharged all his obligations in terms of the said agreement at all material times hereto.***
>
> ***6. On or about the 7th April 2014, the Defendant wrongfully and without any lawful justification unilaterally terminated the agreement between the parties without giving the Plaintiff opportunity to remedy the breach if any as provided in the agreement.***
>
> ***A copy of the termination letter is annexed hereto and marked "B".***

[8] The Appellant in paragraphs 7 and 8 states further that;

> ***"7. It being a material term of the agreement that a written notice is to be made if one party is in breach thereof and given three days to remedy such breach.***
>
> ***8. As a result of the Defendant wrongful unilateral termination of the agreement between the parties Plaintiff has suffered damaged in the sum of E7 950 000.00 (Seven Million Nine Hundred and Fifty Thousand Emalangeni) representing loss of profits (monthly, future and anticipated) due to the Plaintiff in terms of the agreement between the parties, calculated as follows:***
>
> ***8.1 Monthly profits – E150 000.00 (One Hundred and Fifty Thousand Emalangeni)***
>
> ***8.2 Loss of future and anticipated profits (duration of contract) less payment of seven (7) months worked = E140 000 x 53 months = E7 950 000.00.***
>
> ***Copies of receipts of some of the payment(s) are annexed hereto marked "C"".***

[9] The Appellant in paragraph 9 states further that;

> ***"9. The said sum of E7 750 000.00 (Seven Million Nine Hundred and Fifty Thousand Emalangeni) is now due, owing and payable but despite demand the Defendant refuses, neglects and /or fails to pay the same.***
>
> ***WHEREFORE PLAINTIFF CLAIMS:***
>
> ***a) Payment of the sum of E7 950 000.00 (Seven Million Nine Hundred and Fifty Thousand Emalangeni).***

b) Interest at the rate of 9% per annum".

[10] The Appellant's Claim was defended by the Respondent. The Respondent filed its plea to the Particulars of Claim in terms of which it denied that it

was liable to the Appellant. The Respondent prayed that the Appellant's claim be dismissed with costs.

[11] Thereafter, the necessary legal steps were followed including the filing of the Parties' Discovery Affidavits and holding of a Pre-Trial conference and the pleadings were closed.

[12] The Appellant's evidence in chief was led and cross-examination followed. Thereafter, the Appellant closed his case.

[13] The Respondent thereupon moved an application for absolution from the instance.

[14] The High Court per His Lordship Fakudze J. rendered the judgment on the application for absolution from the instance dated 9 October, 2019. The court concluded at paragraph 28 of the judgment that;

> **"…the Plaintiff has failed to establish a *prima facie* case and therefore the absolution application succeeds with costs including the costs of Counsel as stipulated in Rule 68(2)."**

[15] The Appellant was dissatisfied with the judgment of His Lordship Fakudze J. and he launched the appeal before this Court.

<u>PROCEEDINGS BEFORE THIS COURT</u>

[16] The Appellant launched the present appeal before this Court by way of Notice of Appeal dated 21 October 2019. The appeal is opposed by the Respondent.

[17] The Appellant advanced three grounds of appeal in challenging the impugned judgment of the High Court namely; that;

"1. The court *a quo* erred both in fact and in law by granting absolution from the instance when the evidence before it established a *prima facie* case against the Respondent.

2. The court *a quo* erred both in fact and in law by finding that there was adequate notice prior to the termination of the contract. The court disregarded the evidence of the Plaintiff that the notice was not proper in many respects. A few examples why the notice was not proper is because it was not an authentic company document. The purported notice was also in bad faith and the tonnage was not realistic in the circumstances.

3. The court *a quo* erred both in fact and in law by holding that the Appellant had not proved quantum as firstly the stage for proving quantum had not arrived and secondly there was evidence as to how the amount claimed was arrived at".

<u>APPELLANT'S CASE BEFORE THIS COURT</u>

[18] In his quest to persuade this Court to uphold his appeal, the Appellant filed Heads of Argument dated 8 July 2020. Subsequently, the Appellant filed Supplementary Heads of Arguments dated 5 May 2023. At the hearing of the matter Counsel informed the Court that the Appellant's Supplementary Heads of Argument incorporated his initial Heads of Argument. Therefore, reference

to Appellant's Heads of Argument herein is directed to the Supplementary Heads of Argument.

[19] The Appellant in his Heads of Argument paragraph 2 summarizes his case as follows;

> **"…the court *a quo* erred by granting absolution from the instance when the evidence before it established a *prima facie* case against the Respondent; it erred by finding that there was adequate notice prior to the termination of the contract as the notice was not proper in many respects; and that it erred by holding that the Appellant had not proved quantum as firstly the stage for proving quantum had not arrived and secondly there was evidence as to how the amount was arrived at".**

[20] Regarding the Court's alleged misdirection in granting absolution from the instance, it was argued on behalf of the Appellant that at the close of the Respondent's case there was sufficient evidence adduced before the High Court upon which a reasonable Court might have given judgment against the Respondent. In other words the Appellant's submission was that at the close of his case an application for absolution was not legally sustainable hence there was a case for the Respondent to answer. In support of Appellant's submission

reliance was placed on the case of **LEVCO INVESTMENTS (PTY) LTD v STANDARD BANK OF SA** (*sic*) **LTD 1983 (4) SA 921(A)** at page **928B.**

[21] With regard to the termination of the contract by the Respondent, it was argued that the Respondent failed to give Notice of the termination of the contract to the Appellant as envisaged in the terms of the contract. It was argued in this regard that the Appellant in his evidence in chief demonstrated that the purported notice to terminate the contract fell short of the requisite standards and was nothing more than a demonstration of the Respondent's Harvesting Manager's hatred of the Appellant since the latter had thwarted his attempt to solicit a bribe from him.

[22] With regard to the claimed damages, it was submitted for the Appellant; Firstly that there was sufficient evidence in the form of bank statements and other information for the court a quo to assess the damages and, Secondly, that the Court failed to do so; Thirdly and alternatively the Court had the discretion to summon or recall witnesses to give necessary evidence to allow it to assess damages.

RESPONDENT'S CASE BEFORE THIS COURT

[23] In the Respondent's Heads of Argument it was submitted for the Respondent that the High Court did not misdirect itself in the Court's conclusion that the Appellant had failed to establish a *prima facie* case.

[24] It was submitted further for the Respondent that having regard to the totality of the evidence, the High Court was justified to conclude that "**there was no evidence upon which the Court could or might find for the Appellant.** Therefore, it was submitted further**, "that absolution from the instance was correctly granted with costs of the action including the costs of Counsel in terms of Rule 68 (2) of the High Court Rules".**

[25] It was further submitted for the Respondent that **"when absolution is sought at the close of the Plaintiff's case the test to be applied is whether there was evidence upon which a Court applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff"**. For this proposition, Respondent's case was supported by **ERASMUS, SUPERIOR**

COURT PRACTICE AND HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA, 4TH EDITION AND GASCOYNE v PAUL AND HUNTER 1917 TPD 170 AT 173.

[26] In demonstrating the applicable test, the case of **GORDON LLOYD PAGE AND ASSOCIATES v RIVERA 2001(1) SA 88 (SCA)** was relied upon. In that case the test was stated as follows; **"This implies that a Plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence a Court could not find for Plaintiff".**

[27] With regard to the issue of damages, it was contended for the Respondent that it was essential for the Appellant to prove the claimed damages in the Particulars of Claim. According to the Respondent, the Appellant failed to prove the claimed damages for the following reasons;

27.1 That no documentary evidence was discovered by the Appellant and the Appellant did not lead any evidence to establish profit before the High Court.

27.2 That there was no agreement or record in the Pre-Trial conference that evidence for damages would be led separately.

27.3 There was no application by the Appellant at the appropriate stage to lead evidence separately as envisaged in Rule 33(4) of the High Court Rules.

[28] With regard to the issue of Notice, it was contended that the letters dated 14 February 2014 and 20 February 2014, are indisputable evidence that the Appellant had been given notice to remedy.

[29] Finally, it was submitted that it was shown under cross-examination that the Appellant was not a credible witness.

THE APPLICABLE LAW TO THIS CASE

NOTICE OF CANCELLATION

[30] It is trite in our law that one of the remedies available where a party claims a breach of a contract is cancellation of the contract.

[31] In AJ Kerr, the principles of the law of contract, Fifth Edition, Butterworth 1998, it is stated that;

“thus the aggrieved party may decide to cancel and to seek no additional remedy; or he may claim cancelation and restitution as in Tuckers Land and Development Corporation (Pty) Ltd v Hovis, or he may claim cancellation and damages:

’[w]hen one party announces that he intends to break the contract the other may treat it as broken for all time, and may immediately institute his action for damages for such breach of contract’.

The damages “are to be assessed in relation to the date of performance (subject to the mitigation rule) but “some slight latitude” is allowed. If the date of performance has not arrived when the action is heard the damages are normally to be assessed prospectively; but (1) account must be taken of events which may be regarded as having been certain to happen and which would have rendered the aggrieved party’s rights less valuable or valueless, and (2) the rule on mitigation of loss applies. It applies from the date when cancellation took place or ought to have taken place. Which is not necessarily the date originally set for performance.

By acting on such a notice of intention of the promisor [repudiation], and taking timely measures, the promise may in many cases, avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been diminished.”

[32] The other party must be notified of the breach complained of and the cancellation of the contract as a result of the breach.

In the Watershed South African case of **Datacolor International (Pty) Limited and Intamerket (Pty) Limited Case No: 2001(2) SA (SCA)**, the Court had this to say;

"[28] The innocent party to a breach of contract justifying cancellation exercises his right to cancel it a) by words or conduct manifesting a clear election to do so b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after the time (cf Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other related cases 1985 (4) SA 809 (A) at 832C-D).

[29] In Jaffer v Falante 1959 (4) SA 360 (C) at 362F-G it was stated:

Communication to the buyer of the seller's election would appear to be desirable so as to crystallise the rights and position of the parties to the contract. For it to suffice for the seller merely to decide to cancel the contract without notifying his decision would

leave the buyer in an invidious position. It seems to me both on principle and on authority that this is not the law."

This statement has been approved by this court in Swart v Vosloo 1965(1) SA 100 (A) at 105F-H and reiterated in Miller and Miller v Dickinson 1971 (3) SA 581 (A) at 587H-588A in the following terms:

"In this Court it was not disputed on behalf of the appellants that in law, in the absence of an agreement to the contrary, a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party and that cancellation does not take place until that happens."

ABSOLUTION FROM THE INSTANCE AND THE APPLICABLE TEST

[33] The test applicable in deciding whether to grant absolution from the instance was articulated by his Lordship Sey J in the matter of **Mandla Ngwenya and The Commissioner of Police and The Attorney General civ. Trial No.1779/2003 (2016) SZHC 68** (High Court of Swaziland as it then was, at paragraphs 10,11,12,13 and 14;

"[10] At the close of the case for the plaintiff, counsel for the defendants applied for absolution from the instance on the basis that the plaintiff had failed to make out a prima facie case and therefore the defendant had no case to answer.

[11] This application for absolution from the instance is governed by the provisions of Rule 39 (6) of the Rules of the High Court which reads as follows:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one *(sic)* counsel on his behalf may address the court and the plaintiff or one *(sic)* counsel on his behalf may reply. The defendant or one *(sic)* counsel on his behalf may thereupon reply on any matter arising out of the address of the plaintiff or his counsel."

[12] The overriding consideration for granting absolution from the instance at the end of the plaintiff's case is that it is considered unnecessary in the interests of justice to allow the case to continue any longer in the absence of a prima facie case having been made out by the plaintiff.

See
Putter v Provincial Insurance Co Ltd and Another 1963 (4) SA771 (W)

Also
Adecor (Pty) Ltd v Quality Caterers (Pty) Ltd 1978 (3) 1037 (N) 1078F

[13] In the case of Gascoyne v Paul and Hunter 1917 T.P.D.170 at 173 Villiers J.P. opined thus:

"At the close of the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? The question therefore is, at the close of the case for the plaintiff was there a prima facie case against the defendant Hunter; in other words, was there such evidence upon which a reasonable man might, not should, give judgment against Hunter?"

[14] The test for absolution to be applied by a trial Court at the end of the plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G-H in these terms:

"when absolution from the instance is sought at the close of the plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court applying its mind reasonably to such evidence, could or might (not should, nor ought to)."

PROOF OF DAMAGES

[34] It is a well settled requirement of law that a party who seeks damages bears the legal onus of proving same through sufficient evidence the damages claimed.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE AND CONCLUSIONS

[35] With regards to the Notice of the Cancellation of the Contract, whilst Appellant seeks to portray the narrative that there was no notice given, the papers and evidence before this court show otherwise.

There were two letters written to the Appellants regarding notice to terminate the contract. As far as the first is concerned, he claims that it was activated by

malice because the author, Mr Uys had unsuccessfully sought a bribe from him. He claims that the fact that it was not on the letter heads of the company was proof enough. The evidence about the alleged bribe is wanting to say the least. The issue of the letter heads has no bearing at law. In my view as long as a letter comes from the other contracting party and is signed by a competent person, that should be adequate. Therefore, the ground of appeal regarding the notice of cancellation is without merit and stands to be dismissed.

[36] Regarding the grant of absolution from the instance, the Appellant's claim was premised on the assertion that the Respondent "**wrongfully and without lawful justification unilaterally terminated** the agreement between the parties without giving the plaintiff opportunity to remedy the breach as provided in the agreement." (My underlining). Appellant's claim is not supported by the papers and the evidence before this court. The Appellant was warned on a few occasions about his breach of the agreement between the parties. Infact, a second agreement was entered into between the Parties in the spirit of affording the Appellant the opportunity to ameliorate his breach of the agreement; and when Appellant continued with his breach of the agreement the Respondent gave notice of the cancellation of the agreement.

When the plaintiff closed his case he had not established a *prima facie* case as enunciated in the cases cited above. See also **RUTO FLOUR MILLS (PTY) LTD v ADELSON (2) 1958 (4) SA 307 (T) AND CLAUDE NEON LIGHTS (SA) LTD v DANIEL 1976 (4) SA 403 (A).** This ground of appeal has no merit and stands to be dismissed.

[37] Regarding proof of damages, the Appellant attempted to claim that damages were proved through some receipts. But clearly this was insufficient evidence and as a matter of this fact it became clear that it was unsustainable. The Appellant argued alternatively that evidence could still be led and the Court was under some obligation to call witnesses. The Court was under no such legal obligation to call any witness. It was open to the Appellant by way of application to seek to reopen his case before judgment and when granted to lead the necessary evidence.

The matter is further complicated by the fact that there is no indication that any evidence was to be led by the Appellant after the close of his case on the Pre-

Trial conference minutes or elsewhere in the papers. This ground of appeal stands to be dismissed.

[38] I have found no misdirection on the judgment of the High Court. To the contrary, it is my conclusion that His Lordship Fakudze J. was correct in granting the absolution from the instance in the circumstances of this case. Therefore, there is no legal basis for this Court to interfere with the judgment of the High Court.

COURT ORDER

[39] In view of the aforegoing, this Court makes the following order;

1. That the Appeal is dismissed.

2. That the Respondent is awarded costs at the ordinary scale, such costs to include costs of Counsel as certified in terms of rule 58 of the High Court Rules.

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S. P. DLAMINI

JUSTICE OF APPEAL

I agree ______________________________

N. J. HLOPHE

JUSTICE OF APPEAL

I agree ______________________________

A. M. LUKHELE

ACTING JUSTICE OF APPEAL

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