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# IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 3036/96

In the matter between

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| **MIKE NDZABANKULU HLONGWANE** | **APPLICANT** |
| And | |
| **SWAZILAND DEVELOPMENT AND SAVINGS BANK** | **RESPONDENT** |
| Coram | S.B. MAPHALALA – J |
| For Applicant | MR. NXUMALO |
| For Respondent | MR. S.C. DLAMINI |

**JUDGEMENT**
**(18/04/2000)**

Maphalala J:

The matter came before court by way of motion. The applicant applied for an order in the following terms:

a) Directing the respondent to return a Massey Ferguson 188 tractor with registration no. SD 458 HS to the applicant forthwith or alternatively.

b) An amount of E18, 000 – 00 (eighteen thousand emalangeni) which is the fair and reasonable value of the tractor mentioned in a) herein above and alternatively,

c) Directing the respondent to refund the applicant the sum of E6, 484 – 00 (six thousand four hundred and eighty four emalangeni) being in respect of instalment paid to the respondent towards the payment of a loan agreement which the respondent has cancelled.

d) Interest thereon at the rate of 14.5%.

e) Costs of suit on attorney and own client scale.

The parties filed the pertinent affidavits. On the 2nd May 1997, the matter appeared before Dunn J (as he then was) who noted that there was a dispute of fact in this

matter and directed that the matter be referred to the Registrar for the calling of ***viva voce*** evidence. The point of dispute observed by the learned judge was whether or not applicant surrendered the tractor to the respondent. Subsequent to that the matter was postponed a number of times until finally the court heard the evidence of the applicant who was in turn cross-examined by the attorney for the respondent. The applicant then closed his case where respondent closed his case and the court heard submissions.

The history of the matter is as follows:

The applicant is a cotton farmer of KaNdzangu area- Siteki in the Lubombo region. He applied for a loan to purchase a tractor from the respondent on or during November 1992. Some time in January 1994, he was granted the said loan by the respondent for the sum of E18, 000 whereas he proceeded to Phongola in South Africa where he purchased a Massey Ferguson 188, which was subsequently registered as SD 458 HS. The loan agreement between the parties is embodied in a document captioned annexure "A" which spells out the terms and conditions of the loan. Of significance, applicant was to pay a sum of E6, 484 – 00 over 36 months plus interest on or before 31st July 1995 to 31st July 1997. It appeared from the papers that sometime in 1995 the applicant fell into arrears although this was strenuously denied by the applicant in his papers and also in the ***viva voce*** evidence. The applicant's version is that he made timely payments of the loan in compliance with the agreement and thus long before the 31st July 1997, he had paid the instalment of E6, 484 – 00 as evidenced by receipts nos. 42752 and 41961 captioned "B1" and "B2", respectively.

The tractor was removed by the respondent from his homestead and possession, notwithstanding that he had paid on time the initial instalment as per the agreement. Applicant cries foul that the actions of the respondent were malicious and wilful breach of the agreement and as such he was entitled to the tractor. He went on to complain that he was subjected to heavy losses and inconvenience because of the action of the respondent in depriving him of the said tractor without legitimate cause. He was not able to plough sufficient crops during the season after the tractor was taken by the respondent.

The tractor was subsequently sold by the bank to a third party for E20, 000 – 00 (emalangeni twenty thousand) and applicant was advised by a Manager of the respondent in a letter dated the 30th September 1996 annexed as "C" in applicant's papers.

When the matter came for arguments as I have earlier on alluded to the applicant told the court that in 1995 whilst he was using the tractor his extension officer came to him. He told him that a certain Langwenya had said he was in arrears in which he replied in the negative. He was further told that if he did not want to return the tractor he might even lose the other tractor he had placed as a collateral. He told this officer of the bank that he had already paid his first year payment. This officer came back and that is when applicant took the tractor to the bank with documents. When he explained to Langwenya the latter did not want to listen to him and instructed other bank officials to drive the tractor and park it somewhere because he did not want to be involved with the issue of a certain Shabangu. Shabangu was the Bank Manager he

made the agreement with. He then went home and learnt later that the tractor had been sold.

The applicant applied to this court to direct the respondent to pay him back the money he had already paid because it was the bank which breached the agreement.

The respondent's case as gleaned from its opposing affidavit is briefly this; the applicant was informed that he was in arrears. The amount of E6, 484 – 00 which applicant had to pay after every harvest. Applicant personally drove the tractor onto the respondent's Siteki premises and surrendered it because he had failed to pay off the arrears. Applicant failed to pay the 1996 instalment and in terms of the loan agreement the respondent was entitled to call up the entire balance.

The court heard submissions. Mr. Nxumalo took the view that the court has to take the evidence presented before it. Respondent elected not to give evidence in this matter. I was referred to ***Becks on Civil Pleadings (5th ED) at page 40*** together with Rule 6 of the High Court Rules (as amended). It was argued that the evidence showed that applicant did not surrender the tractor to the bank and thus it cannot be said that he repudiated the contract.

On the other hand Mr. Dlamini for the respondent submitted that applicant does not disclose a cause of action. In his papers the applicant makes out a case that he has fully complied with the agreement. However, Mr. Nxumalo is arguing the issue of interest which was not canvassed in their founding affidavit. The bank could not have responded to it as it only emerged for the first time here in court.

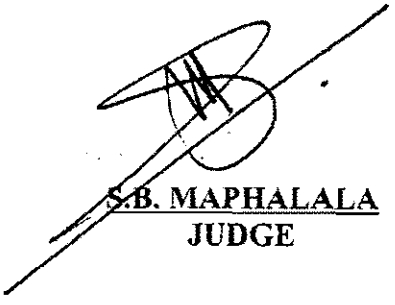
These are the issues before me. I am inclined to agree with Mr. Nxumalo that in view of the only evidence presented before me it cannot be said that the applicant repudiated the contract he had with the respondent. The applicant told the court in-chief that in 1995 a certain extension officer came to him and told him that Langwenya had said he was in arrears. He told the bank officials that he was not in arrears. He told him that he had already made his first year payment. The officer came back some days later and that is when he took the tractor to the bank with documents. When he explained to Langwenya he did not listen to him but instructed another bank official to drive the tractor and park it somewhere because he did not want to be involved with the issue of Shabangu. Shabangu was the Manager whom the applicant entered into the agreement with on behalf of the respondent. He later heard that the tractor had been sold to a third party. It appears to me from the aforegoing that the applicant did not repudiate the agreement.

Annexures "B1" and "B2" in his founding papers support his contention that he had paid the instalment for the year. These annexures are dated the 16th December 1994, for the sum of E1, 484 – 00 and 17th March 1995 for the sum of E5, 000 – 00 being receipts reflecting his payments to the bank. This appears to me was in conformity with annexure "A" being the agreement itself. The agreement stipulates as one of its terms and conditions that:

> "Repayment E6, 484 – 00 plus interest on or before 31st July 1995 to 31st July 1997".

By the 31st March 1995, the applicant had already paid the sum of E6, 484 – 00. Clearly, the respondent breached the agreement and the applicant is entitled in law to the remedy he seeks.

I thus grant an order in terms of prayer C of the notice of motion and costs.



**S.B. MAPHALALA**
**JUDGE**