



# **IN THE HIGH COURT OF SWAZILAND**

**CASE NO. 2531/2008**

**HELD AT MBABANE**

**BETWEEN**

**ELVIS METISO...**

**VUSI SHONGWE...**

**FIRST PLAINTIFF**

**SECOND PLAINTIFF**

**DLUDLUMA INVESTMENTS**

**(PTY) LIMITED...**

**SAMUEL J. DLAMINI...**

**FIRST DEFENDANT**

**SECOND DEFENDANT**

**CORAM**

**AGYEMANG J**

**FOR THE PLAINTIFF:**

**DLAMINI ESQ.**

**S.**

**FOR THE DEFENDANTS:**

**NGCAMPHALALA ESQ.**

**B.**

**DATED THE 7 DAY OF AUGUST 2010**

## **JUDGMENT**

In this action, the plaintiff claims the following reliefs from the defendants:

1. The return of a butchery refrigerator or E15,000 being its value;
2. Payment of E87,000;
3. Costs of suit;
4. Further and/or alternative relief.

The plaintiffs are adult male Swazis and business partners. The first defendant is a company incorporated and registered in accordance with the laws of Swaziland and the second defendant is a Swazi adult male, cited as the main operator in the first defendant who must be held liable for the breach by the first defendant of its contract with the plaintiffs.

The matters giving rise to the instant action are the following: In or about 2007, the plaintiffs herein desirous of operating a butchery, approached one Sibusiso Dlamini who they believed to be the manager of a commercial premises situate at Zakhele, for a place to operate the butchery. The said Sibusiso, son of the second defendant and apparently in charge of the premises, executed a lease on behalf of the first defendant company which lease recited the second defendant as the representative of the former. The terms of the lease admitted in evidence as exhibit A, were as follows: the premises of the butchery would be let at a monthly rental of E1,500; it would run for a period of sixty months from the first of October 2010; it was terminable upon one month's notice given by either party. Besides this, the lease was terminable by mutual consent upon the giving of ninety days' notice in advance of proposed termination.

As aforesaid, it was duly executed and attested by the parties and witnesses respectively. Recounting the events that led to their renting of the premises, it was the evidence of the first plaintiff that he was introduced to the second defendant in the latter's house, by one Mr. Mahlobo. On that occasion, the second defendant allegedly referred the first plaintiff to Sibusiso Dlamini whom he described as the Managing Director of the business.

It was the first plaintiff's further evidence that as the butchery was not equipped, the plaintiffs commenced their use of the premises by fitting the place out. It was in this adventure that the plaintiffs placed a display fridge, purchased from one, Mr. Sithole a fridge repairer through the said Mr. Mahlobo for an alleged price of E15,000. The said sum was allegedly paid in four instalments. The first plaintiff however tendered only three receipts evidencing three instalments alleging that he had misplaced the last receipt. The receipts amounting to E12, 200 were tendered in evidence and admitted as exhibits B, B1 to B2.

It was the case of the plaintiffs that after they went into occupation of the premises upon the five-year lease for two months, Sibusiso Dlamini, by subterfuge recovered the keys from them. He was alleged to have informed them that the keys were needed for an inspection to be undertaken by health inspectors. The rental had been paid for the two months occupancy. According to the first plaintiff, it was on a tip-off by the said Mr. Mahlobo that he went to the premises where he found someone else in occupation and the butchery operational. According to the plaintiffs they sought audience with the said Sibusiso Dlamini without success as he appeared to be evading them. Thus did they commence the present action.

It was the case of the plaintiffs that the first defendant with which they entered into a lease agreement breached same by putting someone else into occupation of the butchery without their knowledge, and consent and without cancelling. Furthermore, that the first defendant acting by its manager Sibusiso Dlamini, deprived the plaintiffs of their display fridge which they had placed in the butchery. The loss the plaintiffs incurred included money he had allegedly put in the enterprise and had not been able to recover; the money he said, were the proceeds of the sale of his motor vehicle. The plaintiffs alleged also that they were prevented from operating their business which they estimated would have yielded profit of E87,000 within the five-year period of the lease. Thus did they commence the present action seeking the aforesaid reliefs.

The plaintiffs called one witness, the said Mr. Mahlobo who corroborated the evidence of the plaintiffs in every material particular. It was the evidence of this gentleman the owner of a butchery at Ngwane Park, that he introduced the first plaintiff to the second plaintiff, a resident of Mashali and owner of a butchery at Zakhele in Sikhombe. The introduction was to get the second defendant to lease the butchery to the first plaintiff who was desirous of running a butchery business. He described the second plaintiff as owner of the first defendant. It was the further evidence of this witness that sometime thereafter he saw the first plaintiff with a piece of paper, a matter that led him to conclude that an agreement for the rental of the butchery had been reached between the parties. The witness corroborated the plaintiffs' evidence that he it was through whom the plaintiffs bought a second-hand display fridge for the butchery from Mr. Sithole, a fridge repairer who also

carried on a trade in used and repaired/refurbished refrigerators. He confirmed the purchase price thereof to be E15,000 and alleged that the plaintiffs were given possession thereof after E8,200 had been paid for it. Although he testified that the full purchase price was made, it was his evidence that he received three instalment payments. The witness alleged further that the second defendant informed him that the said Sibusiso Dlamini was his son and business manager. He confirmed also that although the plaintiffs occupied the butchery for a short time, the period was used up equipping the butchery; they never ran the business. The witness also confirmed that the keys were taken from the plaintiffs upon a pretext that they were needed for an inspection by health workers and that someone else was surreptitiously placed in occupation of the butchery equipped with the plaintiffs' display fridge.

It was the case of the defendants that Sibusiso Dlamini who signed the lease that placed the plaintiffs in occupation of the butchery did so without the authority of the first defendant the owner thereof. Regarding the plaintiffs' fridge, the defendants alleged that it was taken away from the butchery by the true owner, one Mr. Khumalo from Fairview. Two witnesses testified for the defence.

It was the evidence of the second defendant in an attempt to deny the liability of the first defendant, that he as co-owner with his son Mbongseni Dlamini was in charge of the business of the first plaintiff. He alleged also that he who alone was responsible for the signing of documents for and on behalf of the first defendant, fell ill in the year 2007, and left the running of the business to his younger son Sibusiso Dlamini. It was his evidence that although the said

Sibusiso was responsible for selling in the store, for collecting rents and for generally running the place in his absence, he had no authority to enter into contracts with others on behalf of the first plaintiff. He testified that indeed not even his co-owner Mbongseni had such authority.

He recounted that the first defendant was formed for the purpose of securing a loan to buy a building which was a one-stop shopping complex whereat was found a liquor store, grocery store and a butchery. This was the premises that Sibusiso was left in charge of, including the butchery taht was not in official use (it was sometimes used by one Nonhlanhla for cooking) when the second defendant fell ill and was taken to his parental homestead at .

The evidence of the second defendant was instructive in that whereas he denied the authority of his son Sibusiso to sign a lease agreement on behalf of the first defendant, he acknowledged that when Mr. Mahlobo and some persons who were with him went to Sibusiso to negotiate for the rental of the butchery, Sibusiso informed him it. He admitted also that Sibusiso informed him when the said persons paid rent for the premises and furthermore, that the rental had been used to buy stock for the store. Indeed , it was his evidence that he got Sibusiso to collect the keys of the butchery form the plaintiffs only because the butchery had not opened for business fiver months after its rental by the plaintiffs.

Of note also was his acknowledgement that he was informed that the plaintiffs who had rented the place had placed a display fridge thereat which item was taken away by someone else.

One Mr. Khumalo gave evidence regarding the display fridge that was placed at the butchery by the plaintiffs and which is the subject of a claim in casu. It was his evidence that he it was who took the fridge form the butchery and that he did so because it belonged to him. Recounting matters in purported support of his claim, he alleged that as a fridge repairer who sometimes bought second-hand fridges which he repaired and put up for sale, he bought a display fridge which lacked a compressor and glass. The intent was that it would be sold after it was repaired. He alleged that he gave the fridge to one Mr. Khosa, another repairer to repair same and sell it. According to him, the said Mr. Khosa informed him that he had sold the fridge to certain person whom he was no longer in contact with. So it was that when he serendipitously found the said fridge while he was engaged in the repair of a cold room at the butchery in question, he reclaimed it. It was his evidence that he recognised the fridge from its appearance, including that it had no compressor or glass just as the one he had given to Mr. Khosa to sell.

At the close of the evidence, the pleadings, the following stood out as issues for determination:

1. Whether or not the plaintiffs were lawfully placed in occupation of the butchery by the first plaintiff;
2. Whether or not the lease agreement was breached by the first defendant;
3. Whether or not the defendants can be held liable for the loss of the plaintiffs' fridge;
4. Whether or not the second defendant ought to answer for the wrongful act of the first plaintiff;

5. Whether or not the plaintiffs are entitled to their claim.

The plaintiffs have based the primary relief sought in this action on the alleged breach of contract by the first defendant, brought about when in disregard of the lease agreement executed between it and the plaintiffs herein, the first defendant retook possession of the butchery the subject of the lease and placed another person thereat. The plaintiffs supported their claim with the duly executed lease which was admitted in evidence as exhibit A. Exhibit A purported to be a lease document emanating from the first defendant duly represented by the second defendant. It was signed by the parties, the said Sibusiso Dlamini signing for and on behalf of the first defendant, and duly witnessed. Learned counsel for the defendants in his final submissions before the court, asserted that the instant action must fail by reason of the failure of the plaintiffs to place the original lease document before the court. I cannot agree with this position for, in the absence of the original document, the photocopy thereof was admitted in evidence and marked exhibit A. The failure of the plaintiffs to produce the original document will thus not be held to be fatal to this action.

The defendants have put forward the defence that Sibusiso did not have the requisite authority to enter into the agreement on behalf of the first plaintiff so that the lease was invalid and unenforceable against the first defendants herein. But is that position tenable? Testifying before this court, the plaintiffs alleged that they had believed the said Sibusiso to be the manager of the first defendant. In fact, he alleged that at the only meeting he had with the second defendant in the presence of the said Mr. Mahlobo, the second defendant informed him that Sibusiso was the Managing Director of the company. This



assertion was never challenged in cross-examination. But more than this, the second defendant acknowledged that when he was put out of commission, he placed Sibusiso in charge of the business and that his duties were to sell in the store and also to deal with the tenants by collecting rents. In fact so involved was Sibusiso in the business of the first plaintiff, that the second defendant referred to him as his “eye”. Learned counsel for the plaintiffs has urged the court to find an agency relationship between Sibusiso and the company and furthermore, that Sibusiso’s act was ratified by the company. my quarrel with that assertion in spite of the second defendant’s apparent acceptance of the letting out of the butchery by Sibusiso is that no evidence of a formal ratification in the form of a resolution was presented before the court. But it seems to me that the agency argument raised unnecessary matters which did not merit consideration. This is because the plaintiff’s evidence that Sibusio was the manager of the business was corroborated by the second defendant who outlined the large responsibilities Sibusiso had in the company’s business during his absence therefrom. It is evident from the second defendant’s own evidence which substantially corroborated the plaintiff’s case, that Sibusiso was held out by the second defendant who (on his own showing was the power and authority behind the first defendant), as a person in authority in the first plaintiff company during the second defendant’s absence. In such a circumstance, when Sibusiso held himself out as one who could represent the first defendant in the agreement with the plaintiffs, on the application of the Turquand rule, see: ***Royal British Bank v. Turquand (1856) 6 E&B 327 Exch. Chamber***, the plaintiffs were entitled to

assume that he had such authority for they had no way of knowing about the internal workings of the first defendant, a company.

The first defendant will thus be held to have been properly represented by Sibusiso in the lease agreement between it and the plaintiffs. I find then that the plaintiffs were lawfully placed in occupation of the butchery by the first defendant upon the lease exhibit A; the first defendant will thus be held liable for the breach thereof.

The evidence led by the plaintiffs which was in fact corroborated by the second defendant, was that after they had been placed in occupation, the said Sibusiso collected the keys of the butchery from them and placed another person thereat without reference to and in total disregard of the lease executed between the parties. The second defendant testified that he sought to retake possession of the premises because he was informed that five months into the lease, the plaintiffs had failed to conduct business at the butchery. The plaintiffs alleged that they in fact occupied the butchery for two months and were paid up in rent at the time the premises were unlawfully retaken from them.

It is important to note that the second defendant did not seek to repossess the premises because of a failure to pay rent or the breach of covenant or condition by the plaintiffs. In fact, the plaintiff's assertion that Sibusiso used a ruse to collect the butchery's keys from them was never challenged during cross-examination. It therefore stood unrefuted. According to the second defendant, his reason for taking the drastic action against the plaintiffs was simple: that the plaintiffs had not started operating a business. But whether it was five months or two months, the plaintiffs who had been placed on the

premises for a period of sixty months per terms of the lease ought not have had the premises recovered from them thus effectively terminating the lease because they failed to commence business, for such was not stated to be a condition of the operation of the lease.

In the premises, I find that the act of recovering the keys from the plaintiffs and placing other persons in occupation at the butchery the subject of exhibit A, thus depriving the plaintiffs of its use was wrongful was in breach of the lease which was the contract to let the premises to the plaintiffs. I hold the same to be a fact.

The plaintiffs alleged in pleading and in evidence that they placed a display fridge at the butchery which was lost to them when Sibusiso took the keys from them and the butchery was given to other persons. The defendants did not deny that the plaintiffs put a fridge in the butchery, indeed the second defendant testified that Sibusiso informed him of it and also that someone else had taken it out of the premises. The defendants put forward the case, and called one Mr. Khumalo in proof of their stance, that the fridge was taken by the latter gentleman who claimed same as his own.

I am in no doubt that when Mr. Khumalo was permitted to take out the display fridge from the premises, the first plaintiff which had permitted the plaintiffs by reason of the lease agreement to place same thereat, made themselves liable to the plaintiffs who had placed same at the butchery. This is because it was not for the first plaintiff or its representative to determine whether or not the fridge belonged to the plaintiffs or to another, which in effect was what it did when it allowed a third person, asserting a claim of right to the fridge, to take same away without reference to the plaintiffs. I find then that the first

defendant which took custody of the plaintiff's fridge when it retook possession of the butchery, must be held liable for its loss.

Although the first defendant on the showing of the second defendant was ran at his command, there is no evidence that the second defendant hid behind the cloak of a company to do anything that adversely affected the plaintiffs. In the defendants' pleading, they alleged the first plaintiff to be a company with an operational address. I was not persuaded that this is a proper case for lifting the veil of incorporation in order to hold the second defendant personally responsible for the act of the first defendant. It is for this reason that I will not hold the second defendant personally liable for the breach of contract.

The plaintiff has claimed E15,000 for the lost display fridge, alleging the said sum to be the purchase price thereof. The claim is one for special damages that must be pleaded and proved. The evidence led by the plaintiffs as corroborated by the second defendant, was that the plaintiffs did put a display fridge at the butchery and that it was taken out by another while the butchery was no longer in possession of the premises. Contrary to the assertion of learned counsel for the defendants in his submissions, the plaintiffs whose property had been kept by the first defendant in a shop the latter took over and permitted another to have the use thereof, had no reason to reclaim their fridge from the perceived new owner with whom they had no dealings. It was the unchallenged evidence of the plaintiffs that after it came to their knowledge that the butchery was in the possession of another, they tried

unsuccessfully to contact Sibusiso to seek some amicable settlement. The evidence of the plaintiffs that they could not very well in these circumstances make a claim from the new occupant unknown to them, is not unreasonable. The contention of the defendants therefore that the plaintiff could have reclaimed the fridge to mitigate their loss is untenable in the present instance. It is my view that the loss of the display fridge placed at the butchery was caused by the first defendant whose representative Sibusiso disposed the plaintiffs. Unfortunately, the receipts offered in substantiation of their claim for the value of the fridge, alleged to be E15,000, amounted to only E12, 200. This is because the first plaintiff alleged that the receipt for last instalment payment had been misplaced. I have no reason to doubt the plaintiffs' evidence that the fridge was bought through Mr. Mahlobo from a Mr. Sithole (which evidence was corroborated by the former gentleman). I must however, award the sum of E12, 200 being the amount proven by the plaintiffs to them instead of the E15,000 claimed for the fridge.

With regard to the claim of E87,000 as damages (which sum is said to be for the unexpired term of the lease – fifty-eight a months at E1,500 profit per month, I find no basis for such claim. To begin with, there is no justification for the figure representing the plaintiffs' profit in the business. Mr. Mahlobo the plaintiffs' witness who testified that he was the owner of a butchery stated that there was no fixed profit and that sometimes he did not make the average profit of E1,400 per month. But even if Mr. Mahlobo had given exact figures of monthly profit, this court could not rely on same altogether. This is because evidence regarding what he put in the business by way of stock, his turnover including overheads and before profits, was not given. In any case,

in casu, the plaintiffs on their own showing, did not commence business and had no way of knowing how much profit they would make selling their products from the premises at Zakhele. In fact, it is open to question if the plaintiffs were even ready to commence business as the second plaintiff admitted that they had not in fact had a trading licence, but were intending to use a licence belonging to a previous owner. No evidence was adduced to satisfy the court that this would have been possible and that the plaintiffs had the requisite permission to use the said licence. Moreover, the plaintiffs, although undoubtedly inconvenienced by the breach of contract, paid rent for two months and no rent at all for the fifty-eight months for which they claim loss of profits. It seems to me that for all these reasons, the sum claimed by the plaintiff may not be awarded as there is no basis for such computation. As a general rule, loss of profits such as the plaintiffs are claiming must be proven by cogent evidence, see: ***The Commissioner of Police and Anor. V. The Pesco Services Civil Case No. 61/09 delivered on 28<sup>th</sup> May 2010 (Unreported)***. The plaintiffs failed to adduce evidence of patrimonial loss. In his attempt to do so, the first plaintiff made an oblique reference to such loss by alleging in a nebulous fashion, that the plaintiffs had been unable to recover monies they had spent in preparation for the business expended in purchases for butchery equipment; these monies the first plaintiff alleged to be the proceeds of the sale of his car. No evidence of the sale of the vehicle or any other expenditure of monies apart from the purchase of the display fridge (already compensated for by the award of proven special damages) was led. In the circumstance, it is my view that the profits claimed being the sum of E87,000 calculated at E1,500 profit per month for fifty-eight months

have not been proven. In a case like this however, the court, in its bid to place the plaintiff in the position he would have been in had the contract not been entered into, may consider evidence relating to inconvenience and loss of time of the plaintiffs, see: **Jocke v. Meyer 1945 AD 354** in the assessment of damages. Unfortunately, the only evidence led regarding inconvenience suffered by the plaintiffs was the fact that they were prevented from commencing business against their expectation.

I also bear in mind the fact that the plaintiffs in their preparation to commence business occupied the premises for two months and paid rent therefor. The first defendant's breach occasioned when Sibusiso acting on the instructions of the second defendant repossessed the premises, clearly resulted in the loss of the said monies expended in expectation of future profits from the business which never took off. I find this circumstance a proper case to convert the rental paid by the plaintiffs, being the sum of E3,000 into damages. To this amount, I award a modest amount equal to the rent for two months for the loss of time and also, inconvenience caused to the plaintiffs (two months spent in preparations for the business that was prevented from taking off), and award the sum of E6,000 as nominal damages to the plaintiffs, see: R.H. Christie's The Law of Contract in South Africa 548-549, citing dicta of Innes CJ in **Farmers' Co-op Society (Reg.) v. Berry 1912 AD 343 AT 352**; also, **Kotze JP in Wheeldon v. Moldenhauer 1910 EDL 97 101**.

Judgment is entered for the plaintiff for:

1. The sum of E12,200 being special damages;
2. The sum of E6,000 being nominal damages;

3. Costs of suit

4. Interest at the rate of 9% per annum.

The last relief is awarded under the claim for further or alternative relief, for I find that this is a proper case to award interest.

**MABEL AGYEMANG (MRS.)**

HIGH COURT JUDGE