IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 926/14

In the matter between:

SOLOMON MTHETHWA **PLAINTIFF**

AND

SHISELWENI FORESTRY COMPANY **DEFENDANT**

Neutral citation: *Solomon Mthethwa and Shiselweni Forestry Company [926/14] [2019] SZHC 189 (9th October, 2019)*

Coram: FAKUDZE, J

Heard: 30th July, 2019

Delivered: 9th October, 2019

(ABSOLUTION FROM INSTANCE)

Summary: *Civil Procedure – Application for absolution from instance - Applicant alleges that Respondent given opportunity to remedy poor performance – also given final warning before termination of contract – further alleges that Respondent has failed to tender evidence in proof of damages, Respondent having closed its case at time of filing of absolution from instance application – Respondent states that it has established breach – Applicant should therefore state its side of the story – Further alleges that damages are always proved after liability has been determined – absolution from instance upheld with costs including costs of counsel.*

BACKROUND

[1] On or about the 24th October, 2013, the Plaintiff and Defendant entered into a written contract of extraction and transport in terms of which the Defendant contracted the Plaintiff as an independent contractor to extract and transport timber to various depots and designated areas.

[2] The Defendant, through its Harvesting Manager, did a forecast, determined the monthly tonnage to be met by the contractor and the target to be met by each individual contractor as well as allocation of compartments to be harvested by the various contractors of the Defendant.

[3] The Plaintiff states that sometime in April, 2014 the Defendant unlawfully terminated the contract referred to in paragraph 1, primarily because the Plaintiff had threatened Defendant's Harvesting Manager. The termination was unlawful in that no proper Notice and prior warning had been given to Plaintiff in terms of Paragraph 12.1 of the contract. The Plaintiff issued out Summons suing the Defendant for E7.9 Million Emalangeni.

[4] The Defendant filed its Plea and the Pleadings have been closed and documents have been discovered. A pre-trial conference has been held. The trial commenced sometime in July, 2019 and the Plaintiff has closed its case.

Absolution from instance

[5] Following the closing of the Plaintiff's case, the Plaintiff filed an Application for absolution. The Defendant has resisted its granting. It is this Application that is the subject of the present litigation.

THE PARTIES' CONTENTION

The Applicant

[6] The Applicant's contention is based on two issues, that is the issue of prior warning before the contract was terminated and that of failure by the Respondent to quantify the damages.

[7] On the issue of Notice, the Applicant states that the cause of action in this matter is based on the averment that there was no notice given to the Respondent to remedy the breach. The court was addressed on the Defendant's Plea which refers to a letter dated 14th February, 2014 which required compliance with the contract by 22nd February, 2014. On the 20th February, 2014 the Applicant's attorneys replied to a letter from the Respondent's attorneys and warned it to remedy the breach. The letter from the Respondent's Attorneys dated 17th February 2014 is clearly in response, to what was described by the Respondent's own attorneys as a final written warning on grounds of poor performance which was a reference to the letter dated 14th February, 2014.

[8] It is the Applicant's contention that in clause 12.1 of the Extraction Agreement, it was stated that where there is a material breach of a term, three days notice to remedy same must be given. As early as 2011, the Respondent had been warned of the breach. This led to a new contract being entered into between the parties which is the subject of this litigation. At page 45 of the amended Book of Pleadings paragraph 3.2 of the Plea, specifically mentions the fact that there was a material breach because over a long period the Respondent failed to meet its target of timber to be extracted from the forest. In March 2013, the Respondent had not met the target and he further refused to sign the 5100 tonnage requirement. In page 47 of the Book of Pleadings (paragraph 6) the Respondent stated that he cannot meet the target.

[9] The letter of 14th February 2014 and the further letter dated 20th February, 2014 are indisputable evidence that the Plaintiff had been given notice to remedy. He has therefore failed entirely to prove in evidence an essential element of his cause of action. Not only was the poor performance attributed to the tonnage being high, the Respondent in cross examination admitted that there were challenges pertaining to equipment.

[10] The other challenge is that there are glaring contradictions in the Affidavit filed by the Respondent sometime on 14th April, 2014 challenging the termination of the contract and the evidence of the Respondent especially during cross examination. The Respondent sought to distance himself from them by saying that he merely signed the Affidavit without reading its contents. He attributed the blame on his Attorney. One example will suffice. In examination in chief, the Respondent stated that Dollos Uys sought a bribe and that this was done in the presence of Nhlanhla Shongwe. Under cross examination the plaintiff said that Shongwe was in the field when the alleged bribe was sought.

[11] The second issue that constitutes the basis for the Applicant's application for absolution from the instance is that the Respondent has made a globular demand for damages to the tune of E7.95 million without substantiating same. The Applicant contends that the current action is an action for damages in respect of a breach of contract. Evidence is therefore necessary to prove this element. In paragraph 8.1, 8.2 and 9 of the Particulars of Claim it is alleged that the Respondent made a monthly profit of E150,000.00.

Therefore the sum claimed is E7950.000 Emalangeni being E150 000 x 53 months. Under cross examination, the Respondent conceded that he had various expenses being wages and salaries, fuel and equipment expenses. He also stated that his books of account were managed by an accountant. Not a single document in respect of business expenses or monthly profit was discovered nor was any evidence led to establish profit. This court was referred to the transcript filed in respect of the Respondent's evidence in chief. He was asked how he arrived at E7950,000 Emalangeni. He responded by saying that he was making profit of E150 000 per month. He does not mention the 53 months alleged in the Particulars of Claim. Not only was evidence necessary in respect of income and expenses but acceptable evidence calculating and establishing damages was essential.

[12] During oral submissions, the Respondent's legal representative argued that in his submission on damages that the trial only concerned liability and damages were still to be dealt with later. If the issues were to be separated this would have been agreed and recorded in a pre-trial conference or formally applied for in terms of Rule 33(4). Neither happened in this case. Therefore the belated contention after closure of the Respondent's case is an attempt to escape the consequences of the total failure to present proper evidence on damages. It is therefore submitted that the failure to establish damages is in itself a fatal failure to establish an essential element of the claim. The court cannot assess quantum and award damages in the absence of this evidence. The damages sought are not general damages and the court therefore requires fact and figures and a methodology to assess damages.

The Respondent

[13] The Respondent contends that the test for absolution is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the Plaintiff. This means that a Plaintiff has to make 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 no court could find for the Plaintiff.

[14] The Respondent contends that the test has been formulated is that the court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff. Where absolution is granted, a court should order it in the interest of justice. The Respondent further contends that it told the court that the extraction contract was concluded in 2013, October. On the 7th April 2014, the contract was terminated for reasons stated in the letter. The Respondent was never given notice of any failure to perform in terms of the agreement. In February 2014 he did however receive a letter purporting to be a notice but when he made follow ups there was no response and he notified the Applicant that he did not consider this as a notice. These issues require the court to hear the Applicant to ensure that justice is served. How else will the court rule on these issues without the benefit of evidence from them?

[15] The Respondent states that the purported Notice was not proper and that it required the Respondent to extract 5100 tonnes of timber per month as there was a market for it. Despite the number being impossible to extract by a

single contractor, the Respondent mentioned that he would require the Applicant to allow him to harvest compartments that were extractable. He further went on to mention that they gave him compartment LB56, a compartment that was difficult to extract timber from. He further mentioned that no machinery could reach the compartment and that he did not have trucks or bells to extract the timber from this compartment.

[16] The Respondent states that the Applicant had the duty, in terms of clause 5.1.2 to ensure that the contractor is given reasonable and adequate access in the circumstances to the timber in the plantation to the infield depot or depots which is required to be removed or delivered to markets. Even the 5100 tonnes target is difficult to accept as the Respondent did not sign same in agreement with the set target. Could it be a ploy by the Applicant to disguise their intended breach of contract?

[17] On the issue of the damages, the Respondent states that where causation ends, quantum begins. Liability is decided on a balance of probabilities but quantum is determined by assessment. The issue of quantum is to follow the decision on liability. They cannot be decided together at once. The submission by the defendant that they are to be proved fully at the outset is false and misleading. The application for absolution should therefore be dismissed with costs.

The Applicable law

[18] In laying a base for the absolution from the instance test, the Learned Justice M.M. Sey stated in **Ngwenya V Commissioner of Police (2700/07) SZHC 103 (08 April, 2011)** as follows:

> *"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 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) find for the Plaintiff."*
>
> *The Learned Justice continued and observed as follows:*
>
> *"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 no longer in the absence of a prima facie case having been made out by the Plaintiff."*

[19] In **Gascoyne V Paul and Hunter, 1917 T.P.D 170** Harms J.A. states the principles 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, no court could find for the Plaintiff……. As far as inferences from the evidence are concerned the inference relied upon by the plaintiff must be a reasonable one not the only reasonable one."*

[20] The Supreme Court of Swaziland likened the notion of the absolution from instance to an application for discharge of an accused person at the close of the crown's case. His Lordship Dr. B.J. Odoki stated in **Mabuza V Phinduvuke Bus Service Case No. 66/2017 [2018]** as follows:

> *"An Application for absolution from the instance is much on the same footing as an application for discharge of an accused person at the close of evidence for the prosecution.……"*

[21] The informing factor in the granting of an absolution application is that the Plaintiff must make out a *prima facie* case in the sense that <u>there is evidence relating to all the elements of the claim</u> to survive absolution because without such evidence a court could not find for Plaintiff.

<u>Court's analysis and conclusion</u>

[22] The Respondent states its case in paragraph 6 to 7 of the Particulars of Claim as follows:

> *"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 as provided in the agreement. A copy of the termination letter is annexed hereto and marked "B."*
>
> *7 It being a material term of the agreement that written notice is to be made if one party is in breach thereof and given three days to remedy such breach."*

[23] The Applicant contends that the notice was given to the Respondent by the virtue of the correspondence of the 14th February, 2014. The Respondent was called upon to comply to Shiselweni Forestry Company (S.F. C) standards as stipulated in the contract. The correspondence also states that "this is your last warning." The Respondent was given one week to fix this. The Applicant states that it does concede that the correspondence had no letter heads from the company, but it nevertheless served the purpose of notifying the Respondent. This correspondence is found in page 50 of the Bundle of Discovered Documents by the Applicant.

[24] It is the Applicant's contention that there was further notification from its attorneys dated 20th February, 2014 when these attorneys were responding to the Respondent's attorneys letter of 17th February, 2014. The Respondent was informed that it was in breach of the agreement and warned, that if he failed to remedy the breach, he will face the consequences. The correspondence of 17th February 2014 is in page 46 of the Bundle of Pleadings and that of the 20th February, 2014 is in page 50. The contract was terminated on the 7th April, 2014 and this was way beyond the 3 days' Notice stipulated in the Agreement.

[25] The Respondent argues to the contrary when it says that it did receive the correspondence of the 14th February, 2014. He was in a forest when same was delivered to him by Malcos Dlamini who was Assistant Harvesting Manager. When the Respondent enquired about who gave the correspondence to Malcos, the response was that it was from Uys Dollos, the

Harvesting Manager. When the Respondent enquired from Uys, Uys told him that the correspondence was from Uys superiors. The Respondent approached the General Manager, Mr. Kleeves who told him that he must not bother about the correspondence. He also told him that Mr. Kleeves instructed Malcos that the Respondent must give him another compartment, but Uys insisted that he must work on the one assigned to him by Uys. As far as the correspondence of the 20th February, 2014, is concerned the Respondent said that he never saw it as same was between his attorney and the Applicant's attorney.

[26] It is this court's humble view that the Respondent was fully aware of the correspondence of 14th February, 2014 and its import as seen in these two instances. The Respondent acted on it by approaching his attorney leading to the attorney's letter of 17th February, 2014. The Applicant's attorney responded to same on the 20th February, 2014. This is also clearly seen in what he said in paragraph 16 of the Founding Affidavit to the Notice of Motion dated Wednesday, 16th, April 2014. In this Notice the Respondent was challenging the termination of his services. This Notice of Motion is one of the Bundles of Pleadings that has been and it is in pages 7 to 18. He says in paragraph 16:-

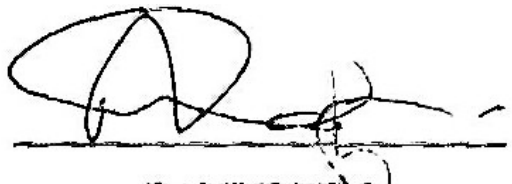
> *"Early in the month of February, 2014 I received a letter from Dollos Uys whereof he falsely accused me of so many things like that my stumps were high, my bark strippers were poor, my occupational safety standards were poor, and that my mining timber was poor. I was being singled out as the worst of performers among the*

contractors whereas there were harvesters whose standards were grossly appalling but still favourites in the eyes of Dollos Uys."

[27] The Respondent tells us what he did with this letter when he said in Paragraph 17 *"I then decided to take up the matters with my present attorneys because I was seeing that I shall see a repeat of what happened in 2012, that is losing my contract again yet I have been plunged into heavy debt just to ensure proper performance under the new contract*." This is inconsistent with the Respondent's version that he was told to ignore the correspondence by Mr. Kleeves. It is this court's view that the Respondent did receive the correspondence and acted upon it. Since the cause of action is that no prior warning was given to the Respondent before the contract was terminated, the evidence tendered proves otherwise.

[28] On the issue of damages proven after the Plaintiff has closed its case, it was stated in **S V Felthun [1999] 2 All S.A. 182 (A)** *"That a trial court has a general discretion in both civil and criminal cases to allow a party who has closed his case to re-open it and lead evidence at any time up to judgment is beyond doubt."* Since no application has been made by the Plaintiff to re-open its case, it would be premature to exercise one's discretion on this point. It suffices for now that in this court's view 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).



FAKUDZE J.

JUDGE OF THE HIGH COURT

PLAINTIFF: S. JELE

DEFENDANT: ADVO. FLYNN INSTRUCTED BY CURRIE ATTORNEYS