



**IN THE HIGH COURT OF ESWATINI**  
**JUDGMENT**

**HELD AT MBABANE**

In the matter between:

**Case No.: 1236/2020**

**ROBERT RICHARD JAMES KIRK**

**ROB'S FILLING STATION (PTY) LTD**

And

**TERRENCE MABILA**

**PRIME TIME LOGISTICS (PTY) LTD**

**1<sup>st</sup> Plaintiff**

**2<sup>nd</sup> Plaintiff**

**1<sup>st</sup> Defendant**

**2<sup>nd</sup> Defendant**

**Neutral Citation:** *Robert Richard James Kirk and Another vs Terrence Mabila and Another* (1236/2020) [2023] SZHC 389 (22/12/2023)

**Coram:** **K. MANZINI J**

**Date Heard:** 16 October, 2023.

**Date Delivered:** 22 December, 2023.



**SUMMARY:** *Civil procedure – Plaintiff is suing on the basis of an oral loan agreement – Plaintiff has discharged its onus in terms of Rule 18(6), as well as on a balance of probabilities.*

*The Plaintiffs' claim is granted with costs.*

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## **JUDGMENT**

**22/12/23**

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**K. MANZINI – J:**

- [1] The 1<sup>st</sup> Plaintiff is Robert Richard James Kirk, a major adult male of Matsapha in the Manzini district and the Managing Director of the 2<sup>nd</sup> Plaintiff.
- [2] The 2<sup>nd</sup> Plaintiff is Rob's Filling Station (Pty) Ltd, a limited liability Company, duly registered in terms of the laws of Eswatini and carrying on business at the Mahhala Shopping Complex, Matsapha in the Manzini District.
- [3] The 1<sup>st</sup> Defendant is Terrence Mabila, a LiSwati male adult whose full and further particulars are unknown to the 1<sup>st</sup> Plaintiff except that the 1<sup>st</sup> Defendant is the Managing Director of the 2<sup>nd</sup> Defendant.



[4] The 2<sup>nd</sup> Defendant is Prime Time Logistics (Pty) Ltd, a company duly registered in terms of the laws of Eswatini, and having its principal place of business at D3 Workshop, Usuthu Premises, in the Manzini District.

[5] In this matter the Plaintiff instituted this action in order to recover the following:

5.1 E80,000.00 (Eighty Thousand Emalangeni).

5.2 Interest at the rate of 9% per annum *a tempore morae*.

5.3 Costs of suit

5.4 Further and/or alternative relief.

[6] During the opening statement, at the hearing of the matter it was submitted on behalf of the Plaintiff that this is an old matter wherein the Defendants were initially represented, however the Attorneys withdrew and there has been no further appearance on their behalf since 2022. It was further submitted on behalf of the Plaintiff that a loan extended to the Defendant herein was advanced, and never paid back despite demand.



## **BACKGROUND**

[7] The background facts (which are not in dispute) to the Plaintiffs' claim are that money was lent and advanced to the 1<sup>st</sup> Defendant by the 1<sup>st</sup> Plaintiff. The loaned amount is of E80,000.00 (Eighty Thousand Emalangeneni). The Plaintiff is in possession of proof of payment of the sum to the 1<sup>st</sup> Defendant and this sum, despite lawful demand was never paid back to the Plaintiff. At all material times the Plaintiff was represented. At the initial stages, and when summons were issued, the Plaintiff was represented by the DEMHLETA Legal Law firm. At a later stage, the Plaintiff was represented by B.S. Magagula Attorneys, which office, filed a Notice of appointment and Substitution as Attorneys of Record on the 9<sup>th</sup> of September, 2022. The Defendants were also represented initially, however over the course of time, the offices of Manyatsi and Associates, ceased to attend the proceedings, and also failed to make discovery after filing a plea in August, 2020. The Notice to Compel Discovery was served upon the office of Manyatsi and Associates on the 20<sup>th</sup> of October, 2022. Application to have the matter allocated a trial date in this matter was filed in March, 2023, and at this point the Defendants' erstwhile Attorneys had still not made discovery, nor had they made any kind of indication that they were interested in proceeding with this matter. The matter proceeded as an





*ex parte* trial, pursuant to the provisions of Rule 16 (4) (b). This Rule stipulates that a party who was formerly represented is given a maximum of ten days after his/her attorney withdraws, to notify all other parties of a new address for service. This did not occur *in casu*.

### **THE PLAINTIFF'S CASE**

- [8] The 1<sup>st</sup> Plaintiff (hereinafter referred to as P.W.1) was the only witness who testified at the proceedings. He testified that he is a resident of the Lusushwana area, Matsapha within the Manzini Region. According to the sworn testimony of P.W.1 he is the Manager and Director of a number of businesses that he operates in the Matsapha area. He testified that he is the Director of the Robs Filling Station (Pty) Ltd, which entity is the 2<sup>nd</sup> Plaintiff in these proceedings. He stated that the 2<sup>nd</sup> Plaintiff herein is primarily a fuel retail business.
- [9] According to the testimony of P.W.1 the 1<sup>st</sup> Defendant is known to him as a former personal friend. He testified further that he knows the 2<sup>nd</sup> Defendant to be the Director of Prime Time Logistics (Pty) Ltd, which entity is the 2<sup>nd</sup> Defendant in these proceedings. According to P.W.1, he was approached by the 1<sup>st</sup> Defendant whilst he was at his office in



Matsapha, and where he asked to be advanced a loan of E200,000.00 (Two Hundred Thousand Emalangeni). According to P.W.1 he was informed by the 1<sup>st</sup> Defendant that his logging business in Bhunya was not going well, and he needed a cash injection to try to resuscitate this business. He stated that this conversation occurred in the 2018, at Matsapha.

[10] The testimony of P.W.1 was that he explained to Mr. Mabila that he did not have such a huge sum of money in his personal capacity, but he could purchase an asset from him, and the 1<sup>st</sup> Defendant could buy it back from him when his finances finally recovered. P.W.1 testified that the 1<sup>st</sup> Defendant then produced his bakkie, being a Land Cruiser model which he put up for sale. P.W.1 testified that when this was done, he then paid over a sum of E100,000.00 (One Hundred Thousand Emalangeni) to the 1<sup>st</sup> Defendant, and these funds were paid out of the account of the 2<sup>nd</sup> Defendant. According to P.W.1, the 1<sup>st</sup> Defendant was, according to their agreement, supposed to return the money after two months, and if he was not able to do so, he (P.W.1) was then to pay over the remaining E100,000.00 (One Hundred Thousand Emalangeni) of the sale price, and this would have concluded their sale agreement, in respect of the bakkie. He stated that in terms of their agreement, if the 1<sup>st</sup> Defendant was paid the remaining E100,000.00 (One Hundred Thousand Emalangeni), and the



sale duly completed and concluded, then he (P.W.1) would then take possession of the vehicle from the 1<sup>st</sup> Defendant. P.W.1 testified that after this transaction the bakkie had remained in the custody of the 1<sup>st</sup> Defendant.

[11] The Plaintiff's Counsel referred P.W.1 to the Discovery Affidavit, and in particular a document labelled P.R. 1. P.W.1 explained that this document is an invoice for the sale of the vehicle, and the document was issued by the 2<sup>nd</sup> Defendant, and dated the 16<sup>th</sup> of September, 2018. The invoice, according to P.W.1 details the banking details of the 2<sup>nd</sup> Defendant, and this is the account into which he would have made payment to in the event that he needed to over the remaining E100,000.00 (One Hundred Thousand Emalangeni). He referred the Court to the stamp belonging to the 2<sup>nd</sup> Defendant.

[12] The testimony of P.W.1 was that he had authorized two separate payments of E50,000.00 (Fifty Thousand Emalangeni) each from the account of 2<sup>nd</sup> Defendant, so as to pay over the total of E100,000.00 (One Hundred Thousand Emalangeni) to the 1<sup>st</sup> Defendant. P.W.1 proceeded to make reference to two documents which are payment notifications issued by the First National Bank, and both dated the 14<sup>th</sup> of October, 2019. He pointed



out however that the payments were actioned by the bank at different times (being 19:56:19, and 19:56:20 respectively). The Bank payment notifications were labelled P.R.1 (a) and P.R. 2 (b) respectively and all of the documents were entered as part of the Plaintiff's evidence by the Court.

[13] P.W.1 testified that in terms of this oral agreement with 1<sup>st</sup> Defendant, the loan was being extended to him in his personal capacity, but he had used a vehicle belonging to the 2<sup>nd</sup> Defendant as security for the loan. P.W.1 further testified that the 1<sup>st</sup> Defendant had failed to make payment of the E100,000.00 (One Hundred Thousand Emalangen) agreed upon. The testimony of P.W.1 was also that throughout this entire period, the Land Cruiser bakkie, that had been used as security remained in the 1<sup>st</sup> Defendant's possession. According to P.W.1 he had tried several times to contact the 1<sup>st</sup> Defendant telephonically, but he would not answer his calls. The testimony of P.W.1 was that the 1<sup>st</sup> Defendant did make one payment of E20,000.00 (Twenty Thousand Emalangen) which payment he duly acknowledges, and confirms receipt of.

[14] P.W.1 testified that he eventually instructed his attorneys, and the said attorneys tried to negotiate with the 1<sup>st</sup> Defendant's attorneys, and





undertakings were made by the 1<sup>st</sup> Defendant to make further payments. He stated however, that these undertakings bore no fruit, as the 1<sup>st</sup> Defendant failed to make any payments at all. P.W.1 testified that to date, 1<sup>st</sup> Defendant still owes him a sum of E80,000.00 (Eighty Thousand Emalangeni). He stated also that whenever he does try to call the 1<sup>st</sup> Defendant, he still does not answer his calls. The testimony of P.W.1 was also that he once bumped into the 1<sup>st</sup> Defendant at a stop sign in Matsapha, and they did speak at that time. According to P.W.1, 1<sup>st</sup> Defendant undertook yet again to make payments, but he had since disappeared, and had never made good on the undertakings made.

- [15] The Plaintiff testified that the Plaintiff had accordingly made out its case and therefore prayed for an order in terms of the summons.

### **ANALYSIS AND FINDINGS OF THE COURT**

- [16] The Plaintiff has relied on an oral contract that was purportedly concluded between Mr. Kirk himself, as the Managing Director of the 2<sup>nd</sup> Defendant, and Mr. Mabila who acted in his capacity as the Managing Director of the 2<sup>nd</sup> Defendant. The oral agreement herein relates to a loan that was



advanced by the Plaintiff to the 1<sup>st</sup> Defendant in his official capacity as Managing Director of the 2<sup>nd</sup> Defendant.

[17] The said agreement was purportedly concluded at Matsapha, in the year 2018. This despite lawful demand, the Defendant has failed to make payments of the balance of the amount still owed to the Plaintiff. The Court taking into account the provisions of Rule 18(6) which provides as follows:

*“A party who in his pleadings relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded...”*

[18] *In casu*, the Plaintiff was able to establish before Court that the said contracts were concluded at Matsapha, at the Plaintiff's principal place of business when the amount of E100,000.00 (One Hundred Thousand Emalangenì) was loaned and advanced to the Defendant. In the present circumstances and according to the evidence in chief of the 1<sup>st</sup> Plaintiff, which evidence was not controverted, the 1<sup>st</sup> Defendant despite lawful demand has only paid a sum of E20,000.00 (Twenty Thousand



Emalangeni) of the total amount owed of E100,000.00 (One Hundred Thousand Emalangeni) which was initially loaned to him.

[19] The Court taking into account the entirety of the facts placed before it in terms of the testimony, as well as the documentary evidence which was made part of the evidence of the Plaintiffs, finds that the Plaintiff has successfully discharged its legal burden of proving on a balance of probabilities that the Defendant has acted in breach of the oral contract.

[20] The Defendant herein is hereby held to be in breach of the contract, and the judgment herein is entered in terms of the following orders against the Defendants:

- (a) Payment of the sum of E80,000.00 (Eighty Thousand Emalangeni).
- (b) Interest of 9% per annum *a tempore morae*.
- (c) Costs of suit.



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K. MANZINI  
JUDGE OF THE HIGH COURT OF ESWATINI



**For the Plaintiffs:** MR. B.S. MAGAGULA (B.S. MAGAGULA  
ATTORNEYS)

**For the Defendants:** NO APPEARANCE

