IN THE HIGH COURT OF SWAZILAND

Lomasontfo Trust Association Limited

v

Usuthu Pulp Company (Pty) Ltd

Case No. 824/1998

Coram S.W. Sapire, C J

For Applicant Elvis Maziya

For Respondent Reginald Stephen Willis

Judgment

(14/08/98)

The applicant in this matter seeks an order to rectify what is referred to as a MAP agreement and claims payment of certain money consequent thereon.

The applicant entered into a contract with Usutu Pulp Company (Pty) Ltd which is the respondent in this matter in terms of which the applicant was to plant an area with pine tree with a hope that in some years there would be timber which would be bought by Respondent. In order to assist the Applicant to do this the Respondent in terms of the agreement undertook to make advances and payments to finance the planting and maintenance of the forest the agreement it is in writing and signed by the parties.

The applicant has come on motion for rectification for rectification of the agreement. In choosing this way to approach the court the Applicant has multiplied the problems it faces because, as it should have foreseen, important factual elements of its claim are in dispute. These disputes cannot be resolved without recourse to oral evidence. I do not however, have to consider whether the application is to be dismissed on this ground, in view of other defects in the case presented by the Applicant.

See Fourie's Poultry Farm (Pty) Limited v Kwanatal Food Distributors (Pty) Limited (In Liquidation) 1991 (4) SA 514 (N) @ 527 and

Christie The Law of Contract in South Africa 2nd edition p 403

The Respondent contended, in limine, that on the Applicant's own version as recited in the founding affidavit, no case for rectification and the relief claimed consequent thereon is made out.

The founding affidavit recites that the deponent is the managing director of the applicant. The applicant is the owner of a farm in the Manzini district measuring 243 hectares. From July to October 1996 the parties negotiated terms and conditions upon which the applicant was to undertake a tree planting project on its farm. The parties were ad idem that their contract would eventually be reduced to writing and signed.

As a preliminary step, a document, a copy of which is attached to the founding affidavit (Annexure A) headed " MAP CONTRACT APPROVAL FORM AGREEMENT" between the parties, was completed In it the salient points of the proposed agreement were expressed. It was specifically recorded that an agreement was then being finalized on "legal issues" The Respondent furnished Applicant with an

"ADVANCE SCHEDULE", indicating the advances it could expect to be paid in terms of the proposed agreement. These documents the Applicant alleges formed the basis of the MAP AGREEMENT, which was to be signed by the parties. These preliminary documents were clearly not intended to constitute the agreement between the parties

The material terms of the agreement on which the parties eventually agreed, so the applicant alleges, were that the Respondent would furnish the applicant with pine tree seedlings free of charge. These that Applicant would plant on the entire farm. This allegation does not correctly reflect the wording of either Annexure A or Annexure D the latter being the agreement eventually signed by the parties. The Respondent undertook to provide financial and technical assistance to the Applicant to support its embarking on the project and to maintain the forest until the trees were ready for felling. It was expected that the duration of the project would be eighteen to twenty years, after which the timber would be sold to the Respondent which would deduct the amount of its advances made to the Applicant over the growing period, with interest, from the purchase price

The agreement provides that for the purposes of calculations to be made in terms thereof a hectare was defined as 1330 spots. By this is meant plant pits or actual plants. In the event the Respondent supplied he Applicant with 472 500 seedlings which were all planted. Relying on simple arithmetic alone the Applicant correctly says 355,3 hectares have been planted, notwithstanding that this is an area considerably bigger than the farm. On this basis Applicant claims that it was entitled to advances in terms of the agreement amounting to E307 860-34. Respondent has however paid only E103 002-80 calculated on a planting of some 246 316 trees or 185.2 hectares.

The MAP agreement provides (para 3.1) "Usutu undertakes to assist the grower to plant an area of approximately 183(one hundred and eighty three) hectares of pinus species on the property..." Based on this the Respondent has made payment of advances which fall short of the amount the Applicant has calculated they should be.

A second point of difference between the parties is that the applicant claims that from the items of "reasonable costs" referred to in paragraph 3.3 of the MAP agreement, fertilizing costs of E69.16 per hectare have been omitted and from Annexure D to the agreement mentioned therein. The applicant has not attached a

complete copy of the agreement to its founding papers, and in particular the schedule to which reference is made is missing. The lacuna has been cured by the Respondent having filed a complete copy of the agreement, including Annexure D, to which I consider I might refer, notwithstanding that Applicant' s case for present purposes must be decided on the allegations in the founding affidavit.

In the preliminary documents (Annexure B) reference is indeed made to such an item, and the amount provided therefor is indeed as alleged by the Applicant. Annexure D to the MAP agreement does not include such an item and the amounts to be paid to the Applicant in terms of the signed agreement is smaller to this extent than the amounts which the applicant seeks to claim

In order to make the claims for increased advances the Applicant asks that the agreement be rectified to provide for the specification of a greater area of cultivation, an increased amount for reasonable costs, the inclusion in the schedule of an amount of E69-16 for fertilizing costs, and the consequent increase in the expressed rate of compensation. The rectification would also involve the maximum amount of the refund referred to on paragraph 3.5. Being increased from E145 909.56 to E307 860-34. This summarises what is claimed in para 1.1 to 1.4 of the notice of motion.

The circumstances in which the agreement came to be signed are of importance. The applicant relates in paragraphs 14 and following of the Founding affidavit that by the end of March 1997, the Respondent had

paid to Applicant "progress payments" "up to the sum of E103 002-80 representing 246 316 trees and therefore 185.2 hectares"

Upon completion of the planting, the applicant relates, the Respondent furnished the applicant with the original MAP agreement for signing, but the Applicant refused to sign because it contained the very figures that the applicant now wishes to have changed. The applicant queried what it calls "the changes" which had been made in the final draft of the agreement and requested the Respondent to rectify them. This Respondent refused to do and indicated that that it would not pay the Applicant the advances if the Applicant did not sign the agreement as it was. "The

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dispute continued until there was extreme pressure on the part of the Applicant to get some money from the Respondent in order to pay wages to Applicant's employees," who were becoming restive at not having been paid.

The applicant goes on to aver that

'The applicant accordingly signed the agreement much against its wish and under duress. Further the Respondent made it clear that the queries raised by the Applicant would still be open for discussion after signature of the agreement"

This makes it quite clear that when the applicant signed the agreement it was fully aware of the terms as expressed therein. Although not satisfied with those terms it nevertheless accepted them by subscribing to the agreement. This is not the same as being in error. As far as the Respondent is concerned it too signed the contract stipulating for those terms upon which it was only prepared to contract. There was no error on its part.

The Applicant's averments fall far short of disclosing a common intention to contract on the terms for which it now contends.

A written agreement can be rectified if it is proved that on account of a common error, the document does not reflect the contracting party's common intention

Weinerlein v Goch Buildings Ltd 1925 AD 282 Meyer v Merchant's Trust 1942 AD 253 Rand Bank v Rubenstein 1981 (2) SA 207 W

In the present case there was clearly no intention to contract on the terms for which the Applicant contends. While it is not necessary that the parties should have meant to insert different terms or to have used different words from those

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which appear in the signed document the party seeking rectification has to show at least that there was a common intention to contract on the terms for which it contends. This, the Applicant has conspicuously failed to do.

The allegation of duress is misleading and does not advance the Applicant's case. Applicant's remedy if it had been forced to contract on the terms contained in the written agreement would have been to avoid the contract. There is no basis alleged for such relief.

The point in limine is therefor upheld and the application is dismissed with costs

S W Sapire

Chief Justice