HIGH COURT OF SWAZILAND

Lomasontfo Trust Association Limited

Applicant

V

Swaziland Insurance Brokers (Pty) Ltd 1st Respondent

Usuthu Pulp Company (Pty) Limited 2nd Respondent

Civ. Case No. 3120/98

Coram S.B. MAPHALALA - J

For the Applicant Advocate P. Flynn

For the Respondents Advocate R.S.Willis

JUDGEMENT

(05/08/99)

Maphalala J:

The matter came on motion for an order in the following terms:

1. Directing the 1st respondent alternatively the 2nd respondent alternatively the 1st and 2nd respondent jointly and severally, to pay an amount of El73, 183-97 to the applicant being the proceeds under a fire insurance policy.
2. Directing 2nd respondent to supply free seedlings to replace the damaged timber in terms of an agreement entered into between the applicant and 2nd respondent.
3. Interest thereon at the rate of 9% per annum a temporae from the 1st September, 1998.
4. Granting the applicant the costs of application.

5. Granting the applicant such further and/or alternative relief as the court may deem meet.

The application is supported by the affidavit of one Elvis Mbongeni Maziya who is a Director of the applicant. The application is opposed by the 1st and 2nd respondents who filed their answering affidavits together with pertinent annexures. The applicant then filed a replying affidavit with relevant annexures.

The applicant entered into a contract with Usuthu Pulp Company (Pty) Ltd which is the 2nd respondent in this matter in terms of which the applicant was to plant an area with pine trees with the hope that in some years there would be timber which would be bought by the 2nd respondent. The agreement is referred to as the Map Agreement. In order to assist the applicant to do this the 2nd respondent in terms of the agreement undertook to make advances and payments to finance the planting and maintenance of the forest. The said agreement is in writing and signed by the parties.

In terms of Clause 10 of the agreement the applicant was responsible to insure such timber against loss or damage including loss occasioned by fire and applicant was to bear the risk of loss as stipulated in the said Clause of the agreement. Further, Clause 7 of the agreement applicant was to be responsible for the replacement of such damaged timber in the event of such damage taking place. Applicant has complied with Clause 10 of the agreement in particular by insuring the timber in terras thereof with the (Swaziland Royal Insurance Corporation) SRIC and a copy of the insurance policy is

attached to the applicant's founding affidavit marked annexure "C" through its agent being the 1st respondent. On the 16th June, 1988 a fire damaged the timber insured and applicant reported such event to 2nd respondent who is also named in the insurance policy in terms of Clause 10 of the agreement. 2nd respondent according to applicant's papers was authorized by applicant to make a formal report to the insurer Swaziland Royal Insurance Corporation through its agent 1st respondent and 2nd respondent did make such report and the insurer (SRIC) paid 1st respondent the insured amount of El73, 183-97 by correspondence from 1st and 2nd respondent dated 21st August, 1998 and the 2nd

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September, 1998, respectively copies of which are annexed to the applicant's papers marked annexures "D" and "F" accordingly, 1st respondent informed applicant that it had paid the insurer amount of El73, 183-97 to 2nd respondent. According to 2nd respondent's letter at paragraph 9 2nd respondent informed applicant that it had attached the amount of E173, 183-97 for certain alleged debts owed by applicant to 2nd respondent. According to the applicant the said attachment by the 2nd respondent is without any order of this court and its actions as such are unlawful and wrongful. Applicant in its papers avers that 1st respondent was also not authorized by applicant to make any payment to 2nd respondent since applicant is the insurer in terms of the insurance policy and in terms of Clause 10 of the Map Agreement and its action as such are unlawful.

Applicant avers that in the premise, the 1st respondent has failed, refused and/or neglected to make due payment to the applicant in terms of the said insurance policy, and the 2nd respondent therefore was and remains liable to the applicant for payment of the sum of E173, 183-97. As a result of that the 2nd respondent has been enriched without just cause at the expense of the applicant who is impoverished in the sum of E173, 183 -97, and the 2nd respondent is thus liable to the applicant for the payment of the said amount. Applicant avers further that the said amount is urgently needed in order to replace the damaged timber in terms of Clause 7 of the Map Agreement within this summer season since applicant needs approximately three months of good rains during planting and rains usually deteriorate by the end of March each summer season.

At paragraphs 18, 19, 20 of the applicant's founding affidavit it avers why the matter is urgent and how it is prejudiced by 2nd respondent's action.

The first respondent had filed an answering affidavit of one Theodore Pheiffer with a number of pertinent annexures. Mr. Pheiffer is the General Manager of the 1st respondent where he raised a number of points in limine, viz paragraph 5 - that the applicant does not make out a cause of action against the 1st respondent on its papers and that the applicant is now suited against the 1st respondent, paragraph 6 - no liability on

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the part of the first respondent is alleged on applicant's papers. In fact the applicant's allegations indeed show the opposite, paragraph 7 - first respondent would ask this court to dismiss the applicant's application against the 1st respondent together with costs as between attorney and own client.

On the merits paragraphs 1, 2, 3, and 4 are admitted by the 1st respondent. Paragraphs 5, 6, 6.1, 6.2, 6.3 and 7 1st respondent submit that it has no independent knowledge of its own as the allegations contained in these paragraphs. Accordingly 1st respondent does not admit or deny same but refers the court to the averment set out in the papers of the 2nd respondent. As for paragraph 8 1st respondent avers that it cannot admit or deny applicant's due compliance with Clause 10 of the Map Agreement. However, he states that through the brokerage of the 1st respondent, the 2nd respondent and the applicant are joint beneficiaries under the contract of insurance with Swaziland Royal Insurance Corporation in terms of a fire (growing timber policy number FF 031689). He annexed a transaction advice for this policy which the applicant has failed to annex to its papers marked "XF2". Paragraph 9 is admitted to a certain extent. He avers that 1st respondent was informed by the 2nd respondent about the fire which took place on the 16th June 1998, on the property of the applicant. 1st respondent's dealings have been exclusively with 2nd respondent and for a brief summary of the claims submitted, he refers the court to annexure "TF3", being a report by the Forest Services

Manager of the 2nd respondent, Mr. M. Dlamini. The figure on which the parties concluded the matter was indeed the amount of E173, 183 - 97. Paragraph 10, 11 and 12 are admitted. Paragraphs 13, 14 and 15 are denied by the 1st respondent who avers that it does believe that the 2nd respondent has attached this amount of money as it is quite evident from what 1st respondent has set out above that the monies were paid over to the 2nd respondent as a beneficiary under the policy. Paragraph 16 is denied by the 1st respondent. As for paragraphs 17, 18, 19, 20, 21, 22 and 23 of the applicant's founding affidavit the 1st respondent avers that it has no knowledge as to the allegations contained in these paragraphs and accordingly cannot admit or deny same.

The 2nd respondent filed an answering affidavit deposed by one Mandla Ronald Dlamini who is the Forest Operation Development Manager of the 2nd respondent. The 2nd respondent raises two points in limine, viz paragraph 5.1. The applicant brings this application before this court well knowing the general rule that where a dispute of fact is inevitable the correct procedure is not by way of motion but by way of action and paragraph 5.2. in answering the applicant's papers filed of record the 2nd respondent has been forced to raise bona fide and unavoidable issues of fact by putting the applicant to proof of its allegations and 2nd respondent submits that same may not be able to be resolved by this court. 2nd respondent submits that it will be apparent from the papers that disputes of fact will need to be decided. In so far as any of these cannot be decided on motion it is prayed that this application be dismissed together with costs.

On the merits the 2nd respondent denies paragraphs 6, 6.1, 6.2, 6.3, 6.4,7. In paragraph 8 2nd respondent avers that in terms of Clause 10 of the Map Agreement, the applicant was obliged to insure and keep insured in the joint names of the applicant and the 2nd respondent, the planted area of the property, which indeed applicant so did as is evidenced by annexure "MD4" being the transaction advise for policy number FF031689, being a fire (growing timber) policy with the Swaziland Royal Insurance Corporation. Applicant and 2nd respondent are insured parties in terms of the transaction advice for the policy of insurance as per annexure "MS4". The applicant was indebted to the 2nd respondent in the amount of E253, 189-83 and after set off E80, 006 - 83. This indebtedness arose out of damages suffered by the 2nd respondent due to the fire which the applicant is liable for in terms of the Map Agreement. Further, that the applicant never performed in terms of Clause 5 and consequently the 2nd respondent was left with no security. Paragraphs 15, 16, 18, 19, 20, 21, 22 and 23 are denied and applicant is put to strict proof thereof.

The answering affidavit of the 2nd respondent is supported by the affidavit of David Michael Wood who is the Commercial Director of Sappi Forests (Pty) Limited, the ultimate holding company of the Sappi group of companies (which includes the

respondent, which is a member of the Sappi group). His affidavit is largely to explain the following:

• The underlying concept and rationale of this Map (Management Associated Procedure) scheme
• The purpose and objectives of this scheme and the obligations of the various role players therein.
• The history and magnitude of the corresponding Map scheme operated by Sappi in the Republic of South Africa.

The applicant then filed a replying affidavit to 1st and 2nd respondent's answering papers. The affidavit is again deposed by the Director of the company Mr. E. Maziya who explained how they got to join the 1st respondent with the 2nd respondent in this suit. The applicant denies knowledge of the transaction advise documents and maintains that it alone is the insured. Further, that there are no disputes of facts in this matter as raised by the 2nd respondent in the in limine point as this is not supported by any allegations of what the dispute of facts are.

The matter then came for arguments.

It is contended on behalf of the applicant that the insurance policy which is the subject matter of the dispute indicate that the insured is the applicant. Therefore, the holding of the money is not legally justified. The 2nd respondent has no right to receive the money because it is not insured in terms of

the insurance policy.

Further, that in terms of the Map Agreement Clause 7 the 2nd respondent is obliged to supply free seedlings to replace the damaged timber. Annexure "TF2"of the 1st respondent's affidavit is not an endorsement or a variation of the insurance contract.

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Furthermore, it contended on behalf of the applicant that the facts advanced by the applicant in its papers that no cause of action has been made is not true. On the point that the Map Agreement has been terminated is not known to the applicant.

On the second point in limine Mr. Flynn submitted that none of the dispute of facts are raised in the papers. There are no disputes of facts in this matter.

In sum, the applicant as argued by Mr. Flynn on the papers before court has proved its case and thus entitled to an order in terms of prayer 1, 2, 3 and 4 of the notice of motion.

On the other hand it was contended on behalf of the 1st respondent that it is not in possession of the sum of E173, 183 - 97 and has not since the 19th August, 1998. It is accordingly submitted that applicant makes out no case against 1st respondent, and its application is bad in law. The 1st respondent applies to the court to dismiss the application in respect of the 1st respondent together with costs. Applicant was reckless in bringing the application as it did against 1st respondent who is indeed applicant's agent, which applicant at all times had knowledge of. In reply to 1st respondent's answering affidavit applicant concedes the obvious situation, yet persists with its application against 1st respondent well knowing same to be bad in law, by alleging further allegations relevant only in respect of a possible cause of action against Swaziland Royal Insurance Corporation. Applicant has emulced 1st respondent (its own agent) in extensive legal costs. For that reason it is contended on behalf of the 1st respondent that this court should exercise its discretion in favour of a costs order against applicant in respect of 1st respondent on the scale as between attorney and own client.

On behalf of the 2nd respondent it is contended that in terms of the Map Agreement applicant is indebted to 2nd respondent for certain financial assistance which monies are due and payable on the occurrence of certain non compliance by the applicant on occurrence of certain events. These lead to the cancellation or performance by the

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parties in terms of the agreement being rendered impossible. In particular Clause 4.4 of the Map Agreement reads:

"Notwithstanding anything to the contrary herein contained, in the event that the timber or any portion thereof, becomes not commercially marketable through fire, the grower shall be obliged to repay its indebtedness..."

Further in particular Clause 12.1.9 read together with Clause 12.1.12 of the map agreement reads:

"Should for any reason whatsoever the grower entirely of substantially cease to carry on farming the timber to which this agreement relates prior to delivery of such timber... Usuthu shall at its election and without prejudice to any of its other rights or remedies be entitled... to immediately recover from the grower all amounts (including interest) then owing by the grower to Usuthu in terms of this agreement".

On the 16th June 1998, fire damaged the timber so insured 2nd respondent elected to invoke the provisions of Clause 4.4 and requested applicant to make payment of all outstanding monies owed by applicant to 2nd respondent within 14 days. Based on annexures TF3 and MD5 2nd respondent formally reported to Swaziland Royal Insurance Corporation and ensured processing of the relevant claim as a co-insured. 2nd respondent has used the proceeds from the claim pay out of E173, 183 - 97 to offset against applicant's indebtedness in the amount of E253, 189-83 as at 30th June, 1999.

These therefore, are the issues before court. I have considered all the papers filed of record as well as the arguments advanced on behalf of the parties in this dispute.

I proceed to determine the case against the 1st respondent. I am in total agreement with Mr. Willis that no cause of action has been shown by the applicant against the company. Applicant in its answering affidavit concedes that to be so and Mr. Flynn in his arguments as it relates to the 1st respondent that they have not asked for an order in respect of the 1st respondent. My view, which is in tandem with that of Mr. Willis is that

if that was the attitude adopted by the applicant they, should have withdrawn the application against the 1st respondent in the proper way. Now we have a situation where 1st respondent has instructed counsel at great expense to prepare and argue the matter on its behalf. The applicant has emulced 1st respondent (its own agent) in extensive costs well knowing that the case against it was bad in law. One cannot escape the logical consequence that applicant should bear the brunt of costs to be levied on a scale as between attorney and own client, (see Nel vs Waterberg Land Bourners Ko-operatieve Vereeniging1

Now coming to the case against the 2nd respondent. On my reading of the papers before me and on considering the arguments advanced in this case it appears to me that the nub of the matter between the two parties is whether the applicant is the sole insurer under the policy of insurance or both parties are co-insured in view of the intentions of the parties when they entered the Map Agreement. I am inclined to hold the latter view to be the true position in this case. The key to the whole issue lies within the provisions of the Map Agreement. In terms of the said agreement applicant is indebted to the 2nd respondent for certain financial assistance rendered which seems to be common cause which monies are due and payable on the occurrence of certain non-compliance by the applicant of occurrence certain events. These according to the agreement lead to the cancellation of performance by the parties in terms of the agreement being rendered impossible (see Clause 4.4 cited above).

Further, Clause 12.1.9 read together with Clause 12.1.12 of the Map Agreement makes it abundantly clear that is the position. It is common cause that on the 16th June 1998 fire damaged the timber so insured. The 2nd respondent elected to invoke as it was entitled to Clause 4.4 and requested applicant to make payment of all monies outstanding owed by applicant to 2nd respondent within 14 days. Based on annexures TF3 and MD5 the 2nd respondent reported to Swaziland Royal Insurance Corporation and insured processing of the relevant claim as a co-insured. If regard is had to the map agreement as a whole i.e. its objectives, terms and conditions, it is abundantly clear from in

1 1946 A. D. 597.

particular Clauses 5, 10 and 16 that 2nd respondent sought to secure applicant's indebtedness to itself. Clause 10 exists for the benefit of both the applicant and the respondents as part of such aforementioned security. I am in agreement with the contention on behalf of the 2nd respondent that the common intention of the parties that particularly in the event of fire damage the insurance policy were to ameliorate applicant's indebtedness to 2nd respondent. My view is that 2nd respondent was rightly and lawfully placed in possession of the insurance monies by the Swaziland Royal Insurance Corporation where applicant to be placed in possession of these monies, applicant would be unjustly enriched at the expense of the 2nd respondent and this will fly in the face of the Map Agreement which binds each party to each other with certain rights and obligations flowing therein. It could never have been the common intention of the parties for Clause 10 to exist to enrich applicant in the event of a fire, at a stage when applicant was indebted to 2nd respondent. It appears to me from the papers that 2nd respondent is a co-beneficiary under the insurance policy. It may well be that ex facie the only name appearing on the insurance policy is that of the applicant but this does not take the matter any further in view of the spirit of the Map Agreement enshrined in its provisions I have alluded to earlier on in the course of this judgement.

Further, there is no obligation on the part of the 2nd respondent in terms of Clause 7 of the Map Agreement to supply free seedlings to the grower being the applicant. As a matter of fact Clause 7 of

the Map Agreement outlines the general obligations of the grower not "Usuthu" therefore prayer 2 of the notice of motion is groundless. Further, applicant in his founding papers deposed that it needs the insured money which is the subject matter of this dispute to procure seedlings and take advantage of the rainy season. This to me creates a patent inconguity between the prayer in the notice of motion and the papers purporting to support that prayer. Applicant is blowing hot and cold.

For these reasons I hold that the application ought to fail and costs to be that on the scale as between attorney and own client. Applicant knew fully well the nature and import of the Map Agreement when lit launched this application but nonetheless has

to commit 2nd respondent to legal cost. It appears the applicant has done that to its own peril. Consequently, this court enters an order to the following effect:

i) Application against both 1st and 2nd respondent is dismissed with costs at attorney and own client.

ii) Counsel fees to be exempted from the prescribes of Rule 68 of the High Court Rules.

MAPHALALA - J