

THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 4427/2006

In the matter between

ALFRED TSABEDZE

Applicant

Vs

THE MAHLANGATSHA COMMUNITY FOREST COMMITTEE

1st Respondent

JAMES XABA

2nd Respondent

ROBERT SIGCOKO NTJALI NTALI

3rd Respondent

MOSES NGWENYA

4th Respondent

NATHI JELE

5th Respondent

Coram Banda, CJ

For the Applicant Mr. M. Simelane

For the Respondents Mr. Madzinane

JUDGMENT

[1] The applicant and the respondents entered into a contract to sell and buy timber. The purchase price for the timber was E67 000 calculated at E5 200 per hectare. The area to be harvested was 14.9 hectares. It was a term of the contract that the buyer shall pay a deposit of E10 000 and that the balance would be paid in instalments of E10 000 every one month. It was also agreed that the buyer had to pay 50% of the total price upon harvesting and transporting 50% of the timber. The felling of timber had to commence within 60 days after the signing of the contract. The contract was signed on 8th September 2006. It was also a term of the contract that the purchaser was required to carry out his operations within the principle of good silviculture.

[2] It would appear, and this is not disputed, that the applicant had fallen in arrears of payment for two months. The applicant had defaulted to make the monthly payment on 10th October 2006. It is the respondent's case that the applicant had told them that he had no money to pay and had requested that he should be allowed to pay his first instalment on 27th October. When the date arrived the applicant was not able to make the payment. On 1st November 2006 the applicant met the respondents and he again requested that he be allowed to double the payments for the end of

September and October and that the payment would be made on 10th November. He promised he would pay E20,000 and again when that date came he failed to pay and did not attend a meeting which was scheduled for the 10th November 2006. On 20th November 2006 the applicant sent his wife to tell the respondents that the applicant would pay off the arrears of E15 000 in weekly instalments of E5 000.00 with effect from 25th November. Once again the applicant failed to make payments as promised. The respondents requested the applicant to attend meetings but the applicant failed to attend any of them. The respondents contended that while the applicant was failing to pay and attend meetings he continued to harvest the timber to the prejudice of the respondents. It is, therefore, the respondents' case that they had no alternative but to stop the applicant from harvesting the timber in order to protect their interests. They accordingly cancelled the contract and informed the applicant. The applicant obtained an order for interdict against the respondents.

[3] The applicant is now seeking a final order against the respondents contending that the dispute, which has arisen between them, should be referred to arbitration as stipulated in the contract between them. The respondents have submitted that there is no contract subsisting between the parties because the applicant

repudiated it when he failed to honour the monthly payments as agreed in the contract. They have submitted that the applicant was aware that, as a result of the repudiation of the contract, the timber had been sold to one Mr. Corrie Woerst and the applicant could not, therefore, rely on a contract which was automatically repudiated

[4] Mr. Simelane, for the applicant, has submitted that the respondents have disobeyed the order of the Court which sought to maintain the status quo and that they are in contempt of Court. He has, therefore, contended that the respondents cannot seek any relief from the Court as they come to it with dirty hands. He has further submitted that the respondents were bound to go for arbitration as agreed in the contract and he has argued that damages would not be adequate remedy to the applicant.

[5] Mr. Madzinane, for the respondents, first addressed the issue of whether this is a proper application for spoliation and after referring to the averments in support, he came to the conclusion that this is an application for an interdict. He submitted that the applicant and his counsel admit that there were two months arrears of payment contrary to the terms of the contract between the parties. Mr. Madzinane contended that the contract had been repudiated and the applicant could not, therefore, rely on it. He submitted that a

party to a contract cannot seek to enforce it unless he himself has discharged his part of the contract. He argued that the applicant had failed to pay in accordance with the terms of the contract. He submitted that the contract, on which the applicant relies was repudiated by him and he cannot rely on it for arbitration. He has argued that the court order which granted the interdict was served on the respondents on 20th December 2006 after the timber had already been sold to Mr. Woerst. Mr. Madzinane further argued that Mr. Woerst had started removing the timber before the applicant came to Court to obtain the order and submitted that the respondents could not, therefore, be in contempt of Court. The respondents had told the applicant and the latter knew from 6th December that the respondents had sold the timber to Mr. Woerst.

[6] It is clear and there can be no doubt that the applicant was in arrears and despite the indulgence which the respondents had extended to him he failed to pay for the timber as agreed in the contract. The applicant was aware that, as a result of the arrears which remained unpaid, the respondent had treated the contract as repudiated. The applicant was also aware that as a result of that repudiation the respondents had sold the timber to a third party. And by the time the applicant came to Court to seek the order for interdict he was already aware of these facts and indeed at the time

the order was served on the respondents, the contract had been repudiated and the timber had been sold to Mr. Woerst. A contempt of Court arises where there is an intentional refusal or failure to comply with the order of the Court. The learned authors of The Civil Practice of the Supreme Court of South Africa have put the legal proposition in this way -

"Civil contempt is the wilful and mala fide refusal or failure to comply with the order of the Court."

[7] I can find no evidence, in this case, which would support that definition of contempt of Court. I have considered the facts as disclosed by the affidavits before me and I have also considered the submissions by both counsel. This is a case in which if the applicant was so minded, could sue for damages for breach of contract. Damages would be an adequate remedy. I am satisfied and I find that there is no merit in this application which I must dismiss with costs from the date of 6th December 2006 when the applicant ought to have known that the timber had already been sold. The order of the Court is that the application is dismissed with costs.

Pronounced at the High Court sitting at Mbabane this 16th day of July 2007.

R.A. BANDA
CHIEF JUSTICE