IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIV. TRIAL NO. 4263/05**

In the matter between:

TWK CULTU LIMITED

AGRI RE Plaintiff

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[1] This is an action in which the Plaintiff claims judgment against the 1st Defendant in the respective sums of E2, 602,344-00 and E5,459,742-00; *mora* interest on the first sum at the rate of 15.5% from July, 2003 to date of payment; *mora* interest on the latter sum at the rate of 15.5% from 31 July, 2003 to date of payment and costs of the suit, including costs of Counsel.

<u>Dramatis Personae</u>

[2] The Plaintiff, TWK Agriculture Limited, is a company duly incorporated in accordance with the company laws of the Republic of South Africa, having its main business situate at 11 De Wit Street, Piet Retief. I shall henceforth refer to it as "TWK", or simply as "the Plaintiff. The 1st Defendant, on the other hand, is Swaziland Meat Industries Limited, a company, duly incorporated in accordance with the company laws of this Kingdom. Its principal place of business is situate at Industrial Sites, First Avenue, Matsapha. I shall refer to it as "SMI". The 2nd Defendant, Simunye Cattle Company Limited, is also a locally registered company carrying on its principal place of business at the Matsapha Industrial Sites, First Avenue, in Matsapha.

[3] It must be mentioned at this nascent stage of this Ruling that the 2nd Defendant was cited only to the extent that it could possibly have an interest in the outcome of the claim. There is otherwise no particular or any relief being sought against it by the Plaintiff

in this action.

Nature of Claim

[4] At the heart of the Plaintiffs claim is the proper interpretation to be accorded to an agreement called the Technical Services and Marketing Agreement, hereinafter referred to as "the TSM A.", particularly an annexure thereto. The Plaintiff claims and it is common cause that the said agreement was entered into at Matsapha, in this Kingdom, on 23 October, 2001, between SMI, of the one part and the 2nd Defendant, of the other. TWK, it is apparent, was not party to the TSMA. SMI was, at the signature of the said agreement, represented by one Jonothan C. Williams, its managing director and the 2nd Defendant was represented by one Petrus Jacob du Plooy. I shall, for present purposes, not say much about the terms of the said agreement as alluded to in the pleadings, save to say that the TWK considers itself entitled to the amounts claimed by virtue of certain clauses in the TSMA.

Absolution from the Instance

[5] At the close of the case for the TWK, SMI, through its Counsel, Mr. Klevansky S.C., indicated that it wished to and did in fact apply for absolution from the instance. This application is governed by

the provisions of Rule 39 (6) of the Rules of this Court and it is with that issue that this Ruling is concerned. I shall presently consider, in measured detail, the law applicable to the above mentioned Rule.

The Law applicable to Applications for Absolution from the Instance

[6] Rule 39 (6), reads as follows:

> "At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one counsel on his behalf may address the court and the plaintiff or one counsel on his behalf may reply. The defendant or one counsel on his behalf may thereupon reply on any matter arising out of the address of the plaintiff or his counsel".

The *locus classicus* judgment on the interpretation accorded this sub-Rule for a long time, is the case of *Gascoyne v Paul and Hunter* 1917 T.P.D. 170 at 173, where the applicable test was stated thus by de Villiers J.P.:

> "At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? . . . The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant Hunter; in other words, was there such evidence upon which a reasonable man might, not should, give judgment against Hunter?"

[7] In *Gordon Lloyd Page and Associates v Rivera and Another* 2001 (1) S.A. 88 (S.C.A.) at 93, Harms J.A., after quoting the test applied in *Claude Neon Lights (S.A.) v Daniel* 1976 (4) S.A. 403, said the

following at G-J:

> "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 *(Marine & Trade Insurance Co. Ltd v Van der Schyff* 1972 (1) S.A. 26 (A) at 37G-38A; Schmitd *Bewysreg* 4th ed at 91-2). 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 . . . The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff . . . - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury *(Ruto Flour Mills).* Such a formulation tends to cloud the issue. The Court ought not be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court." (Emphasis added).

[8] It would appear from the above excerpt that His Lordship shifted away from the traditional position adopted in matters of this nature and found it proper to jettison the standard previously applied, which appears to have been very much steeped in jury trials when we do not in our jurisdiction and generally in this part of the legal world, conduct jury trials. I am not certain if Swaziland did at any stage conduct trials by the jury. The learned Judge of Appeal advocated for a test where the Court trying the case (and not some other Court or person), brings its own judgment to bear on the evidence adduced before it and decides whether the

> plaintiff has, at the close of its case, made out a case such that that Court could or might find for it, even in the absence of the defendant's evidence at that stage. If it could find for the plaintiff on that evidence, then the defendant ought to be put to its defence. If not, then *cadit quaestio;* that constituting a proper case for the grant of absolution from the instance.

[9] Speaking for myself, I incline to the test advocated for by Harms J. A., particularly considering the changed circumstances in which trials are conducted in this Kingdom and in the Republic of South Africa, which is markedly different from the times of *Gascoyne v Paul and Hunter (supra).* It is that test that I shall apply *in casu,* in which case I will bring to bear on the evidence led, (an issue I shall necessarily dedicate time to later in this judgment) this Court's judgment and not that of another person or Court. It is however moot whether at the conceptual level there might actually be a marked difference in the Court's approach to the evidence if the latter test be applied as opposed to the former.

[10] In consequence, I fully align myself with the test adopted and applied by the Supreme Court of Zimbabwe in *United Air Carriers (Put) Ltd v Jarman* 1994 (2) Z.L.R. 341 (S.C.), where Gubbay C.J. pronounced the test in the following language:

> "A plaintiff will successfully withstand such an application if, at the close of his case there is

> evidence upon which a court, directing its mind reasonably to such evidence, could, or might (not should or ought) to find for him."

[11] Having reminded myself of the test which is to serve as a beacon as I consider the case at hand, I now proceed to consider what is supposed to be the evidence led during the trial and which, according to the authorities cited above, this Court must have recourse to, in order to answer what may prove to be the decisive question at this stage, namely, whether there is evidence on which this Court could or might find for the Plaintiff herein.

Application of the law to the facts

[12] It is important that I should point out at this nascent stage of the Ruling that this was a rather unusual case. I say so for the reason that no *viva voce* evidence was led for and on behalf of the Plaintiff at all. Mr. Wise indicated at the inception of the trial that he was making his opening statement, a procedure that is perfectly in order, regard had to the provisions of Rule 39 (5). In this regard, Mr. Wise, learned Counsel for the Plaintiff, took the Court on a "conducted tour" of the pleadings, together with some of the documents, including agreements and letters that were discovered in terms of Rule 35. He also commented on the pleadings during his address and at times unfavourably about the SMI's pleadings. It was after this engaging and laborious exercise

that Mr. Wise, indicated that he was closing the Plaintiffs case, without, as I have pointed out, any witness having been called on the Plaintiffs part, to lead any oral evidence in proof of any aspect of the Plaintiffs claim.

[13] It was at that point that Mr. Klevansky, learned Counsel for the SMI, indicated that he was moving an application for absolution from the instance. This application was primarily predicated on the ground that although in the address, the Plaintiff made reference to certain agreements and documents,

no evidence was given in support of the case contended by it. In the absence of such evidence, the argument ran, it cannot be properly said that the Plaintiff has made a *prima facie* case calling for SMI to be placed on its defence. There are other grounds on which the application was predicated and I shall, if necessary, make reference to them in due course.

[14] In order to place the 1st Defendant's contentions in proper perspective for the reader who was not in Court, it is now opportune to examine as briefly as possible the allegations contained in the pleadings, as supported, where necessary, by relevant documents filed of record. The matters stated in the

succeeding paragraphs can be properly said to be common cause or at the least, not seriously contested.

[15] The background giving rise to the present *lis* is to be found in an annexure to the T.S.M.A, marked "B". It was referred to as the "Investment Proposal". It would appear, although it preceded the other agreements, that said Proposal was the mother of all the other agreements. In a nutshell, the said Proposal was with regard to the establishment of a feedlot to supply SMI with cattle, which were to fulfill Swaziland's European Union (E.U.) beef quota.

[16] It was then decided, in view of the fact that Swaziland could not, at that time meet its aforesaid beef quota, and that SMI had the only E.U. accredited abattoir in the country, that SMI should take advantage of the demand and establish a cattle feedlot to optimize the benefits of opportunity provided by the acceptance of cattle obtained from the Republic of South Africa for nurturing and eventual slaughter in line with E.U. requirements.

[17] TWK and SMI then decided to float a new company as a vehicle to take advantage of the E.U. quota requirements. This was a public company to which SMI would subscribe to 51% of the shares thereof,

whilst TWK would subscribe to 49%. The first auditors of the new company were to be K.P.M.G. The management of new company S.C.C., was to be undertaken by SMI in terms of the TSMA. At the heart of the claim are the provisions of clause 3 (1) of the said Annexure B to the TSMA, which read as follows:

> "At the end of the year, the total paid to SCC for the export qualifying cattle it has supplied to SMI will be adjusted (either up or down) in order to fairly divide the total profit made by both companies from these cattle".

[18]It would appear, from the Plaintiff's pleadings that it contends that the words "fairly divide the total profit made by both companies", occurring above, should be read so as to also include equally sharing "losses". To this extent, the Plaintiff relies in part on alleged representations on the part of SMI's managing director for the contention that the word "profit" referred above should be read to include "loss" as this, it was further contended, was the intention of the parties. Needless to say, SMI has adopted a contrary stance, insisting that the word "loss" must be accorded its ordinary meaning, in the circumstances and that the wording of clause 3(1) accurately reflects the parties' intention regarding the issue.

Bases for application for Absolution

[19] I now come to consider the bases raised by the 1st Defendant on which it is contended that the application for absolution must be granted. The pith of SMI's argument is that the Plaintiff did not lead any evidence to make out a *prima facie* case regarding the following elements of its claim; the insertion of the word "loss" into the relevant clause of the TMSA; no evidence regarding the alleged representations made by SMI's Smith aforesaid, the reliance of the Plaintiff thereon and the prejudice sustained by the Plaintiff as a result of the reliance thereon. It was the 1st Defendant's contention that as a result of the Plaintiffs failure to lead evidence on such important elements of its claim, the Court would be exercising its discretion properly if it refused to grant the application for absolution from the instance.

[20] The Plaintiff, in the heads of argument relied on a number of cases and generally adopted the position that where the claim revolves around the proper interpretation to be accorded to a document, particularly an agreement, then the Court can properly decide that matter without the aid of *viva voce* evidence and that the Court may, in that circumstance, arrive at a particular finding notwithstanding that no oral evidence was led. Cases cited in support of this approach included *Body Corporate of Brenton ParkBuilding No. 44/1987 v Brenton Park CC* 1988 (1) S.A. (C) and

Government of the Republic of South Africa v Pentz 1982 (1) S.A. 553 (T). Mention was also made at some stage, of the case of *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk* 1961 (1) S.A. 355 (A.D.)

[21] In the latter case, Schreiner J.A. made the following remarks at 340:

> "Where the Plaintiffs evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that a reasonable man might give to the document and the interpretation he ought to give to it tends to disappear. Nevertheless, even in such cases the trial Court should normally refuse absolution unless the proper interpretation appears to be beyond question".

It must be mentioned however, that in *Gafoor* case (op *cit),* unlike in the instant case, oral evidence had been led in that case and there were also some admitted facts on the record. This is apparent from page 337 of the judgment. It would also appear that when the Court made reference to production of a document the interpretation of which the case revolves, that document had been properly produced in evidence. There is, before Court, no version, save what was stated by Mr. Wise in his opening statement given, as to the interpretation to be accorded the relevant clause of the TMSA.

[22] The cases of *Pentz* and *Body Corporate of Brenton Park BLDG (op*

cit), do not, in my view, lend any assistance to the Plaintiff. I say so for the primary reason that in both cases, it is clear that there were some admitted facts which rendered it unnecessary to lead any evidence and the Court accordingly proceeded to determine those cases without recourse to oral evidence. In the instant case, no evidence was led at all and furthermore, there was no agreed statement of facts, which could provide the route for the Court to possibly determine the issue notwithstanding that no oral evidence had been led.

[23] It must be recalled that pleadings do not constitute evidence. As such, it is necessary for a party, on whom the onus lies, to present evidence before Court in support of the allegations contained in the pleadings. The need to call evidence in support of the skeletal material pleaded can only be obviated in instances where as I have indicated, the facts in issue are agreed *inter partes.* I however, deal with this matter fully in paragraphs 24 and 25 below. Certainly, the oral address by the Plaintiffs Counsel, in his opening statement, cannot be regarded as evidence at all and which can be said to attempt to discharge the onus placed upon the Plaintiff.

[24]It would appear to me that the circumstances in which a plaintiff in a proper action cannot lead evidence in proof of its claim are clearly

circumscribed. The ones that would readily commend themselves in this jurisdiction, are the following:

(a) where there are no controversies or triable issues on the facts before Court, thereby requiring the Court in the circumstances, to only determine what the law applicable to those admitted facts is. See the Ghanian case of *Datsomor v Lang* [1982] 1 G.L.R. 206 (C.A.). This also appears to be in line with the provisions of section 15 of the Civil Evidence Act, 1902;

(b)where there is an application for summary judgment in terms of Rule 32 of the High Court Rules;

(c)default judgments, in respect of both failure to file a notice to defend or the plea in line with Rule 31 (3) (a) and (b);

(c)where there is a payment into Court or an offer to settle the plaintiffs claim in terms of Rule 34;

(d)where there is a judgment on confession in line with Rule 31 (1) and (2); and

(e)where the Court grants provisional sentence in terms of Rule 8.

[25] In all other cases, where a plaintiff has launched a claim against a defendant, the onus ordinarily lies on that plaintiff to satisfy the Court on a preponderance probabilities that it is entitled to its claim, save of course in respect of unlawful arrest cases. In those ordinary cases, the plaintiff is required to lead evidence in proof of its claim and

specifically in order for it to discharge its onus and possibly be placed in a position where it can be adjudged by the Court, subject of course to the strength or otherwise of the defendant's defence, to be entitled to the claim. I may only mention that in relation to Rules 8 and 32, there may be evidence led before the Court may grant judgment and this is in the form of affidavit evidence.

[26] I am of the considered view that in the instant case, the Plaintiff contended for a particular interpretation to be accorded to the TMSA. It was necessary in that regard, to have a witness testify thereto and to be cross-examined thereon, if necessary, by the Defendants on the interpretation contended for. The Defendants would, at the same time have been entitled during the cross-examination process, to put their version regarding what they regard as the proper interpretation, to that or those witnesses.

[27] What compounds matters is that as one peruses the Plaintiffs pleadings further, particularly its Rejoinder, one notices that there are allegations of representations allegedly made by Williams on which TKW allegedly relied. There, however, is no evidence as to what those representations are; how they were made; the fact of reliance thereon and the consequences to the Plaintiff as a result of reliance thereon. There is no evidence as to how a reasonable man in the Plaintiffs position would have reacted to the representations.

[28] The Plaintiff, in this regard relied on the case of *Sonap Petroleum (S.A.) (Pty) Ltd v Pappadogianis* 1992 (3) S.A. 234 in dealing with the issue of the alleged representations. In the absence of relevant evidence, the *Sonap* case cannot, in my view, assist the Plaintiff as can be seen from my remarks in the immediately preceding paragraph. Much store seems to have been laid by the Plaintiff in argument, on some letters that were allegedly written by Williams. These were not properly tendered as evidence and there is no indication, in the absence of oral evidence, as to how the said letters constituted the representations alleged by the Plaintiff in its pleadings.

In the instant case, it must be mentioned that the letters referred to and identified by Mr. Wise in his opening address, were not tendered in evidence and conversely, as will now be apparent from what I have said earlier, no version contended by the Plaintiff was testified to in evidence. It must be recalled that the mere discovery of documents in terms of Rule 35 does not on its own, entitle a party, without further ado to utilize those documents during the trial. In this regard, even the admission of the document by the other party is not sufficient. There must be a procedure followed by the party seeking to rely on the said document to have it formally tendered in evidence. At that point, the Court will then mark the said document accordingly as an exhibit and it can thenceforth be properly relied upon and the Court may accord

appropriate weight thereto.

[30] It will be seen in the context of the instant case that the decision or failure to call any witness had the concomitant result of there being no witness to formally tender any documents which the Plaintiff may have wished to rely upon in support of its case and in discharging the onus saddled upon it. It is accordingly my view that Mr. Wise could not, from his seat as Counsel, properly introduce letters upon which the Plaintiff would have sought to rely, short of following the procedure for tendering the said documents I have adverted to above. This I am given to understand, is the position in England, to which we are instructed to get guidance by section 43 of the Civil Evidence Act *{op cit).*

[31] In further argument, reference was also made by the Plaintiff to the case of *Union Government (Minister of Railways) v Sykes* 1913 A.D. 156 and *Gandy v Makhanya* 1974 (4) S.A. 853 for the proposition that if some facts are peculiarly within the knowledge of the defendant, the Court will usually require less evidence of such facts from the plaintiff to create a *prima facie* case. I agree with the statement of the law in those cases as being undoubtedly correct. It would appear in both the above cited cases that evidence had been led by the plaintiff and it was found that in those circumstances, that the subject matter was peculiarly within the defendants' knowledge, hence it was proper

that absolution be not granted.

[32] The Plaintiff also referred the Court to the case of *R v Kritzinger* 1952 (2) S.A. 401 and to *Ruto Flour Mills (Pty) Ltd v Adelson (2)* for the proposition that the Court should, in dealing with the application for absolution (for present purposes), consider the possibility that the plaintiff's case may be strengthened by the evidence emerging from the defendant's case. That is a proposition that I fully agree with in a normal case and where the plaintiff or the prosecution, in a criminal case, will have led evidence from which the Court may then consider the possibility referred to in the two cases above.

[33] This principle, undoubtedly correct as it may be, cannot be properly or fairly applied, in my view, in a case such as the present, where the plaintiff, on whom the onus rests, does not lead any evidence, but the Court orders the defendant, to lead evidence, because perchance that evidence may strengthen the plaintiff's case. Such an approach would, in my view totally erode the incidence of proof and would amount to the defendant having to disprove its liability, without the plaintiff having made even a *prima facie* case requiring an answer from the defendant.

[34] As I have indicated, I have no qualms on the facts of those cases that the statement of the law commends itself. I do not, however,

think that such a position can be said to apply in a case where the plaintiff, on whom the onus rests, does not lead any evidence whatsoever, and furthermore, where there is no statement of agreed facts. If that were to be the case, then what would in effect be happening is that the plaintiff would not discharge the onus upon it at all. All he or it would be required to do would be to show its face in Court, have its Counsel make submissions and then the burden would, without more and through some process of metamorphosis, shift to the defendant, the plaintiff having led no iota of evidence in proof of its claim. I doubt that this is the situation in which the above authorities are to apply and I hold that this is certainly not the case.

[35] Joubert, the learned author, Laws of South Africa, First Reissue, Vol. 9, Butterworths, page 444 para 639, deals with the incidence of proof in civil trials. He states that the basic rule is "that he who asserts must prove - because if one person claims something from another in a court of law, he has to satisfy the court that he is entitled to it". It must be mentioned in this regard that the normal way of proving a claim is by leading evidence, unless the issues in contention are agreed upon, in which event, an agreement on those issues would be filed with the Court.

[36] The learned author Eric Morris, in his work entitled, Technique in Litigation, ***cf*** at page 175 states that, "The object of leading evidence is

to establish facts. The facts which you should prove are those that are material to your case, and nothing more". What then happens in a case such as the present, where no evidence is led and there is no agreement regarding the facts?

[37] The same author Joubert, at page 451, para 646, deals with a situation in which there is failure to lead or give evidence. He states the following in that regard:

> "In civil cases the failure to adduce or give evidence is usually looked upon as a strong indication that such evidence would be to the detriment of the party concerned. Consequently, it would entitle the court to select from alternative inferences that which favours the opposite party."

I agree with the above proposition. In the instant case, there is no reason, let alone a plausible one furnished as to why the Plaintiff did not lead any evidence in proof of its claim when from all indications, it bore the onus to prove all the elements of its claim, including if I may add, the interpretation it seeks to be accorded to the TMSA. There is no other inference, particularly in the absence of an explanation, that I can draw from the Plaintiff's failure to lead evidence than that the evidence due to be led would have been inimical to the Plaintiff's case.

[38] In his work Technique in Litigation, Juta and Co., 3rd ed, 1985, at page 169, the learned author states in respect of the preceding paragraph that one method by which the drawing of an inference, most probably an adverse one, can be avoided, is by the defaulting party showing that its witness cannot testify. In this respect, the esteemed author cited the case of *Gouws N.O. And Another v Montese Township And Investment Corporation (Pty) Ltd And Another (2).* In that case, medical

evidence was adduced to show that the witness' memory and whose evidence was supposed to be led had been impaired by old age among other reasons.

[39] As I have pointed out in this case, there has been no attempt on the Plaintiffs part to dissuade this Court by tendering a reasonable explanation as to why an adverse inference against the Plaintiff should not be drawn in the present case in view of its failure or conscious decision not to call witnesses to lead relevant evidence to discharge the onus upon it and to thereby convince this Court that it is entitled to the relief it seeks.

[40] In the premises, I am of the view, regard had to the entire conspectus of the case, that the Plaintiff has failed to make a

prima facie case which would require the Defendant to open its case. In the result, I issue the following order:

40.1 The application for absolution from the instance be and is hereby granted.

40.2 The Plaintiff be and is hereby ordered to pay the costs on the scale between party and party, including the costs of two Counsel as certified in terms of Rule 68 (2) of the Rules of this Court.

DELIVERED IN OPEN COURT IN MBABANE
ON THIS THE 10 DAY OF JUNE, 2009.

T.S MASUKU
JUDGE

Messrs. Currie & Sibandze for the Plaintiff

Messrs. Kemp Thompson for the 1st Defendant