



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 1529/2014

In the matter between:

**YAMTHANDA INVESTMENTS (PTY) LTD**

**Plaintiff**

And

**THE CENTRAL BANK OF SWAZILAND**

**Defendant**

**Neutral citation:** *Yamthanda Investments (Pty) Ltd v The Central Bank of Swaziland (1529/2014) [2015] SZHC 171 (9<sup>th</sup> October 2015)*

**Coram:** M. Dlamini J.

**Heard:** 26<sup>th</sup> August 2015

**Delivered:** 9<sup>th</sup> October, 2015

- *“There is a form of repudiation, however, where the party who repudiates does not deny that a contract was intended between the parties but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract.” (as per Rumpff JA)*

Summary: By means of a summary judgment application, the plaintiff claims the sum of E85,158.00 with interest for goods sold and delivered at the instance of defendant. The defendant refutes ever receiving the goods mentioned.

### Evidence

[1] When the summary judgment application was argued before me, I ordered that the matter be referred to trial on the aspect of ascertaining what exactly was delivered.

[2] PW1, **Anel'emabhele Palisa Shabangu** testified on oath that she was the director of the plaintiff. Plaintiff was awarded a tender by defendant in October 2013 where it was to deliver diaries in December 2013. She however had an accident and she could not meet the deadline as she and her secretary ran the office of plaintiff. She referred the court to a tender award for the sum of E85,158.00. She pointed out that in terms of the tender award, she was advised to communicate with one Sibusiso Mngadi, an employee of defendant. It was her evidence that during the processing of the diaries, she did communicate with other employees of the defendant viz. Zanele who was Mr. Mngadi's secretary as Mr. Mngadi was always busy.

[3] Having encountered a car accident, she wrote a letter of apology to defendant and stated the reason for the delay in delivering the diaries. Defendant under the hand of Mr. Mngadi advised her that she should not rush delivery of the diaries as they would be used the following year, 2015.

[4] She eventually delivered the 300 diaries referred to as filofaxes. When she delivered the diaries, she was attended to by the store lady of defendant who made a call to the communications department. She was, however,

advised to go back with the diaries and that she would be told as to when to deliver. This was early March 2014. She obliged and later made a follow up with Zanele and Lindokuhle of defendant. She was advised that their boss was not available for instructions. After a week or two, she called Mr. Mngadi who informed her that he had been suspended from work. Upon this information, she went back to defendant's office where she was attended by Zanele. Zanele reported her presence to one Mr. Ndzinisa. Mr. Ndzinisa talked to her through the telephone and enquired as to why she was communicating with Mr. Mngadi on the tender. She explained that the tender award instructed her to communicate with Mr. Mngadi. He further enquired as to why she did not come to the tender board to communicate with it. She responded that her experience in most companies was to communicate with a specific person rather than an entire board. Mr. Ndzinisa then undertook to call her in a day or two. On the Friday however, a Masuku lady called her. When she attended to her, she was given a letter of cancellation of the tender award.

[5] The cancellation letter advised her that she should communicate with Mr. Ndzinisa. When she tried to reach him, she was informed that Mr. Ndzinisa was on leave. She did however, get his cell phone number. When she called, Mr. Ndzinisa always advised her that he was too busy. She decided to take a legal route.

[6] It was her evidence further that in March 2014 the diaries she intended to deliver were in sealed boxes and no one saw the contents. Further, if it was true, as per defendant's deposition that she delivered the wrong item, the letter of cancellation would have so stated.

[7] Cross examination centred around plaintiff delivering empty shells instead of diaries. Plaintiff refuted defendant's assertions. The plaintiff closed its case.

[8] The defendant called **Zanele Mkhonta, DW1** to testify on its behalf. She identified herself as the employee of the defendant. When the tender was awarded to plaintiff, she was the secretary to Mr. Mngadi.

[9] PW1 testified that when the tender was awarded to plaintiff, Mr. Mngadi came to the office and informed her together with Lindokuhle that the tender had been awarded to plaintiff. She then enquired from Mr. Mngadi as to whether the quotation was for everything *viz.* the cover and the insert. Mr. Mngadi responded by stating that he thought so, but they should find out from plaintiff in order to be sure. She then called plaintiff and enquired. Plaintiff advised that it would not supply any inserts. Upon this, response, Mr. Mngadi instructed her to order inserts from another company. This was at the end of October 2013. She did get a quotation and placed an order for inserts from another company.

[10] Thereafter inserts were delivered but plaintiff did not deliver the covers. Towards the end of the year, they learnt from the local newspaper that the director of plaintiff had a car accident. They received correspondence from plaintiff advising them of the accident and that they would face challenge in delivering the goods in time.

[11] At the end of February, they were informed by Mr. Ndzinisa that Mr. Mngadi had been suspended and one of the issues pertained to plaintiff's tender award. Sometime in March, she received a call from a lady at the stores advising her that the plaintiff was by the gate to deliver the diaries.

She spoke to PW1 and advised her that Mr. Mngadi was not in the office. It was her further evidence that at this information, PW1 must have left. However, PW1 did later come to the office and spoke to her and Lindokuhle. She also showed them the communication she had been having with Mr. Mngadi. They referred her to Mr. Ndzinisa who spoke to her but did not know the content of the communication.

This witness was not cross examined.

### Determination

[12] From the line of cross examination of PW1, defendant, as per its affidavit resisting summary judgment application, asserted that the plaintiff delivered incorrect goods. The defendant deposed:

*“4.8 The plaintiff, on or about the 11<sup>th</sup> March 2014 brought to the Defendant’s premises 300 diary covers as a purported performance of its contractual obligations.*

*4.8.1 The Defendant refused to accept the delivery by the Plaintiff, and by letter dated the 11<sup>th</sup> April 2014 the Plaintiff was advised that the tender had been cancelled due to lack of service, that is due to Plaintiff’s failure to supply the diaries within the agreed time frame. A copy of the letter is annexed hereto marked “CBS5”*

It then concluded:

*4.9 It is submitted that the Defendant could not accept the purported delivery and subsequently advised the Plaintiff that the tender has been cancelled for two reasons, namely:*

*a) The Plaintiff failed to honour its obligations in terms of the contract by failing to deliver the diaries on or before the 1<sup>st</sup> December 2013;*

*b) The Plaintiff delivered diary covers only, whereas the contract was for the supply of diaries.*

5. *It is my humble submission that the refusal to accept the purported delivery by Plaintiff and the subsequent cancellation of the tender was as a result of the Plaintiff's failure to discharge its contractual obligations and therefore the conduct of the Defendant was lawful and justifiable"*

### Issue

[13] Was defendant's subsequent conduct of "*refusal to accept the purported delivery by plaintiff and the subsequent cancellation of the tender, lawful and justifiable,*" as per defendant's paragraph 5 above, in the circumstances of this case? In legal terminology, did the plaintiff repudiate the contract in order to warrant cancellation thereof by plaintiff?

[14] **Rumpff JA in Van Heerden v Sentrale Kunsmis Korporasei Bpk 1973 (1) SA 17 A at 30 B-H** lucidly highlighted:

*"The word 'repudiation' has also led to difficulties because it is an ambiguous word constantly used without precise definition in contract law. I do not attempt an exhaustive list of the senses in which the word has been used, but I may give some instances. Repudiation of a contract is sometimes used as meaning that the defendant denies that there ever was a contract in the sense of an actual consensus ad idem. If that is the case, a submission of disputes under the contract never comes into operative existence any more than the contract to which it was to be ancillary. Short of this, one party, though not denying that there was the appearance of assent, might claim that the consent was vitiated by fraud or duress or mistake or illegality, and in that sense it is often said that he repudiates the contract. There, again it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute. There is a form of repudiation, however, where the party who repudiates does not deny that a contract was intended between the parties but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition or the breach of duty should invalidate the contract. A dispute upon such an issue would generally be within an ordinary submission of disputes under or arising out of the contract or similar words, though the award in a certain event might have the effect of declaring that the contract had ceased to be, or even had never become binding."* (underlined, my emphasis)

## Evidence

[15] PW1 informed the court that having won the tender to supply diaries, she had a misfortune of being involved in a car accident. She then wrote a letter of apology to defendant advising them of her ordeal and that she would deliver later than agreed. It was her further evidence that at all material times, she communicated with Mr. Mngadi. She referred the court to the contents of the tender award which read:

*“For further enquiries, please contact Mr. Sibusiso Mngadi – 2404 2147 or 2404 2249.”*

[16] Having received the correspondence of apology, Mr. Mngadi responded by short message service as follows:

*“Dear Anele,*

*In view of late delivery of diaries for 2014, we request that you change the filofaxes to 2015 as we have already distributed filofaxes for 2014 to all staff.*

*Best regards*

*Sibusiso Mngadi”*

[17] In law, this response by defendant clearly shows that plaintiff’s request to be granted an extension of time in order to effect delivery was granted. Defendant did not adduce any evidence showing the contrary.

Defendant deposed:

*“4.7.2 The Plaintiff sent another letter of apology dated 23<sup>rd</sup> January 2014, a copy of which is annexed hereto marked ‘CBS 4’. What should be noted in this letter is that the Plaintiff did not even state when it would deliver the diaries.”*

[18] However reading from the short message service sent to PW1, it is clear as to the date of the next delivery plaintiff had to comply with and that is “2015”.

[19] The defendant has further argued that the plaintiff failed to deliver the goods ordered. The tender advertisement as attested by PW1 reads:

*“The Central Bank of Swaziland is inviting suitably qualified companies to tender for the supply of 300 diaries for Central Bank’s staff members. The diaries should be corporate and incorporate the specifications below:*

*Size: Management Size – 24 cm (h) x 19.5 cm (w)  
Cover: Leatherette finish, padded with magnetic rivet/fastener  
Banding: Gold foiling with individual personalisation  
Colour: Royal Blue”*

[20] Plaintiff was cross examined at length on the aspect of having delivered the wrong product. Her cross examination was as follows:

*“Mr. Manzini: “What is the purpose of a diary?”*

*PW1: I have clients buying only inserts and I have clients buying only covers. So I would not know what defendant wanted it for.”*

*Mr. Manzini: Repeats question.*

*PW1: “It depends on the company. For writing notes and appointments.”*

*Mr. Manzini: “Would that empty shell serve the purpose?”*

*PW1: “I never supplied an empty shell and I would not know what an empty shell is. I supplied a filofax.”*

*Mr. Manzini: “They ordered an empty shell?”*

*PW1: “A filofax “*



Mr. Manzini: *“Whatever defendant asked you to deliver, it was a full diary”*

PW1: *“But they did not see it. How can they say it was empty?”*

[21] Indeed the evidence by PW1 that she was caused to returned by the gate when she went to deliver the goods finds full support from defendant’s witness, DW1. She stated under oath:

*“Sometime in March before Easter, I was called by the lady at the Stores. She told me that PW1 was at the gate with deliveries. I told them I could not attend to them as Mr. Mngadi was not in the office and I did not know for how long I spoke to PW1 that there was an issue with the diaries .... I think PW1 left the bank and there was no communication until PW1 came to the office.”*

[22] DW1’s evidence shows that none of defendant’s employees examined the “deliveries” as attested to by PW1.

[23] Further, as pointed out by PW1, if she had delivered the wrong commodities, the letter of cancellation which came after she had attempted delivery, would have pointed out as one of the reasons for cancelling the tender award. This letter which was admitted in court was silent on this issue.

[24] Thirdly, the evidence of DW1 pointed very clearly that plaintiff was to deliver filofaxes without inserts as she testified that having called plaintiff to ascertain whether she would deliver both, they learnt that she will deliver only the covers. Inserts were then ordered from another company. In other words, from the onset, it was clear that plaintiff had to deliver filofaxes. Even the short message service (sms) sent by Mr. Mngadi granting plaintiff extension to deliver late refers to filofaxes. The tender itself gives a description of a filofax.

[25] In the above, I enter the following orders:

1. Summary judgment application is granted;
2. Defendant is ordered to pay plaintiff:
  - 2.1 The sum of E85,158-00
  - 2.2 Interest at the rate of 9% *tempore more*;
  - 2.3 Costs of suit.

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**M. DLAMINI  
JUDGE**

**For Plaintiff: M. Sithole of Sithole & Magagula Attorneys**

**For Defendant: M. Manzini of C. J. Littler & Company**