IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1468/2017

In the matter between:

Recon Transportation Solutions (Pty) Ltd **Applicant**

And

Swazispa Holdings Limited **Respondent**

Neutral citation: *Recon Transportation Solutions (Pty) Ltd v Swazispa Holdings Limited* (1468/2017) [2018] *SZHC 15* (20 February 2018*)*

Coram : T. L. Dlamini J

Heard : 24 October 2017

Delivered : 20 February 2018

Summary: *Law of contract – In March 2014 the applicant and respondent concluded an agreement for the transportation of staff members of the respondent – An award agreement was signed by the parties setting out a framework of the terms of the agreement – A comprehensive agreement setting out in detail the terms and conditions was to follow – In April 2016 the contemplated comprehensive agreement was signed – Following a non–satisfactory service, the respondent issued a notice on 22 June 2017 of its intention to terminate the agreement, with the last day being 30 September 2017 – Applicant thereafter filed the present application and challenged the termination of the agreement.*

Held: *That under the 'caveat subcriptor' rule the applicant is bound by the agreement in terms of which it was terminated – Application dismissed with costs, including costs of counsel in terms of Rule 68(2).*

JUDGEMENT

[1] The applicant is a company registered in accordance with the company laws of the Kingdom of Swaziland. It provides transport services, including the

transportation of staff members for the respondent to and from certain designated pick up points.

[2] The respondent is also a company registered in terms of the company laws of the Kingdom of Swaziland. Generally, it provides hotel services.

[3] The application before court has been brought under a certificate of urgency wherein the applicant seeks the following orders:

1. Dispensing with the normal rules relating to time limits, manner of service and procedures in application proceedings and enrolling and hearing the application as one of urgency in terms of Rule 6 (25) of the High Court Rules.

2. Condoning any non–compliance with the Rules of this Honourable Court.

3. Interdicting and restraining the respondent from appointing another service provider to render transport services which the applicant currently renders to the respondent pending finalization of this application

4. Ordering the respondent to comply with the provisions of the "*award agreement*" which the parties concluded on or about 3 March 2014 until 1 April 2019.

5. Declaring that the agreement which the parties concluded on or about 15 April 2016 is *null* and *void* and of no legal force and effect.

6. Alternatively to prayers 2 to 5 above, and pending finalization of legal proceedings to be instituted by the applicant within 30 days, that an order be issued that:

6.1 The respondent is interdicted from appointing another service provider to render the transport services which the applicant currently renders to the respondent.

6.2 The respondent be and is hereby ordered and directed to forthwith comply with the terms of the award agreement

6.3 The orders referred to in prayers 6.1 and 6.2 shall lapse should the applicant fail to institute legal proceedings for the relief set out in prayers 2 to 5 within 30 days from date hereof.

7. Ordering the respondent to pay costs of this application

8. Further and/ or alternative relief as the Honourable Court may deem just and appropriate in the circumstances of this case including, but not limited to, an order to maintain the status *quo* pending finalization of this application.

[4] The applicant contends that two agreements for the provision of transport services were entered into between the applicant and the respondent. The first agreement is an award agreement in terms of which the applicant was awarded the contract for provision of transport services. It was signed on the 3rd March 2014.

[5] The second agreement, in my assessment and finding based on the documents filed of record, is a comprehensive agreement setting out in detail the terms of the award agreement. I say so because in the penultimate page of the award agreement the following is written:

> *"A Contract is being finalized and will be available in due course for signature."*

[6] The second agreement was signed by the respondent on 14 March 2016 and by the applicant on the 15th April 2016. I will herein refer to it as the "*2016 agreement"* whereas the first agreement will be referred to as the "*award agreement."* Copies of both agreements were annexed to the application.

[7] The parties began to perform their obligations under the agreement immediately after signing the 'award agreement' in March 2014. On the 22 June 2017 the respondent wrote to the applicant and notified it about its intention to terminate the agreement. The applicant was given a three (3) months notice of the termination and the agreement was to end on 30th September 2017.

[8] Further correspondence regarding the termination was exchanged between the attorneys of the applicant and the respondent. The last correspondence filed before this court is from the respondent's attorneys dated 11th August 2017. From the correspondence it succinctly appears that no common position was reached and the termination notice stood as communicated by the respondent.

[9] The applicant contends before this court that the termination is unlawful and is contrary to the agreement concluded by the parties. The applicant's argument is that the initial agreement as per the 'award agreement' ran its course and the contract was thereafter renewed in terms of the renewal option clause of the award agreement. In other words, the applicant argued that the renewed contract doesn't have the termination clause which the initial agreement provided for. The applicant's attorney therefore argued that the renewed contract could not be terminated as was the case with the initial award agreement but ought to be allowed to run the agreed renewal period of 24 months up to the end of March 2019.

[10] On the 27th September 2017 the applicant launched the present proceedings under a certificate of urgency. The respondent was required to file its intention to oppose by close of business, and to file its answering affidavit by noon of the following day (28th September 2017). The matter was to be heard on the 29th September 2017 at 8:30 am.

Issues which are common cause

[11] From documents and/ or annexures filed of record, the following facts are common cause:

(i) On the 3rd March 2014 the respondent awarded to the applicant a tender for the provision of transport services for its staff members. The members of staff were to be transported back and forth from designated pick up points.

(ii) The award was through a letter addressed to the Director of the applicant and is headed *"RE: STAFF TRANSPORTATION TENDER (SWH – RF1001/14) – AWARD AGREEMENT."*

(iii) At the penultimate page of the award letter/ agreement, the following is recorded:

"*A contract is being finalized and will be available in due course for signature*.

Yours Faithfully

LANCE ROSSOUW
AREA MANAGING DIRECTOR"

(iv) Mr Lance Rossouw appended his signature above his name. Mr Wiseman Magagula, acting in his capacity as Director of the applicant, initialed the award letter or agreement and also appended his signature acknowledging and confirming his acceptance of the terms and conditions stipulated in the award. He did so on the 3rd March 2014.

(v) The applicant then commenced rendering the transport services in terms of the award.

(vi) In the month of April 2016 the respondent then sent to the applicant an agreement for its signature. The Director of the applicant duly signed the agreement on behalf of the applicant

on the 15th April 2016. The respondent had already signed it on the 14th March 2016.

Determination of contended issues

[12] In addition to opposing the application on its merits, the respondent also raised points *in limine.* The points *in limine* are that the matter is not urgent, that there is no application for referral of the alleged constitutional issues to the constitutional court (full bench of this court), there are material and foreseeable dispute of facts, and that the relief sought (declaration of agreement as *null* and *void*) is not competent. Below I determine these issues, starting with the preliminary points *in limine*

(a) Urgency

[13] In persuading the court to hear the matter urgently, the applicant states in its founding affidavit the following:

*"**URGENCY***

58 *In light of the fact that the notice of termination is effective as from 1 October 2017, and the fact that the first respondent threatens to appoint another operator to take over the services of the applicant, I submit that the matter is urgent. Clearly if the normal court rules are followed, the applicant will not be able to obtain the relief before 1 October 2017.*

59 *It is now settled law that this Honourable Court must concern itself with substantial justice as opposed to deciding such important cases on technical issues and as such the Honourable Court is requested to condone any delay in launching of these proceedings and grant the interdict pending finalisation of this matter on the merits. In fact this is a case of serious commercial importance to the Applicant and as such it is necessary that the merits thereof be heard and decided urgently while an interdict is operational to preserve the status quo between the parties.*

60 *The application is as near as possible to the requirements of Rule 6 (25) of the High Court Rules and therefore the Applicant humbly prays that it may please the Honourable Court to dispense with the normal and usual time limits, manner of service of process and procedure followed in normal applications and to enroll and hear this matter as one of urgency."*

[14] In opposition, the respondent states in its answering affidavit that there is no justification for the drastic abridgement of the applicable time periods provided for in the rules of this court as the applicant waited for more than three (3) months (from 22 June 2017) to bring the application to court. It further contends that the delay is not even explained anywhere by the applicant.

[15] In the replying the affidavit applicant explains the delay by stating that there were talks and negotiations relating to the dispute now before court and as such it should not be punished for first attempting an amicable settlement before litigating. He implored the court to follow the judgment of the Court of Appeal in the **Shell Oil Swaziland (Pty) Ltd vs Motor World (Pty) Ltd t/a Sir Motors, Appeal No. 23/2006** (unreported) in which the Appeal Court advise Judges to decide matters on their merits than on technicalities as doing so result in injustice.

[16] I am in full agreement with counsel for the respondent that the **Shell Oil** judgment (supra) is not a justification for attorneys to disregard the rules,

and is not an excuse that serves as a justifiable reason for non – compliance with the rules of this court.

[17] The applicant was notified by letter dated 22 June 2017 that the agreement is terminated and will not go beyond 30 September 2017. Further correspondence was exchanged between the attorneys of the applicant and the respondent. The same position was maintained regarding the termination of the agreement. In a letter addressed to the Director of the applicant by the respondent's attorneys dated 31st July 2017 the respondent states, *inter alia*, what I quote below:

> *"9 …Regrettably, the time for doing that has long passed and our client is insistent on exercising its rights in terms of clause 4.3 and to that end, you are notified that the agreement shall terminate on 30 September 2017 as per the notice given to you by our client in the letter of 22 June 2017. In that regard, kindly note that as from 1 October 2017, your vehicles will not be allowed onto our client's premises as a new operator will have been engaged.*
>
> *10. We trust that this sets out our client's position absolutely clearly."*

[18] On the 10th August 2017 the applicant's attorneys wrote to the respondent's attorneys and stated, *inter alia*, what I quote below:

> *"8. Accordingly, your client's purported termination is based on a clause of the agreement that the party never agreed upon. The purported termination is therefore defective and of no force and effect."*

[19] The respondent's attorneys responded to the letter cited in the above paragraph on the 11th August 2017 and stated, *inter alia*, what I quote below:

> *"4. We reiterate that the termination that our client has effected stands and your client will not under any circumstances be allowed to carry out the services post–September 30."*

[20] Considering the contents of the above quoted correspondence, and the fact that no other correspondence pertaining the termination was furnished to this court, I am of the view and finding that any negotiation and engagement regarding the termination of the agreement came to an end and stopped on the 11th August 2017.

[21] The applicant has not explained or gave any reason why it did not immediately or soon thereafter approached the court. There is no justifiable reason, in my opinion, why the matter was brought to court on the eleventh hour and under a certificate of urgency. I accordingly find no merit in the urgency and the point *in limine* is upheld.

[22] The respondent and the court were unjustifiably and unnecessarily put under pressure to deal with the application on an urgent basis. The respondent was effectively to file its notice to oppose and the answering affidavit in one and a half day. This was notwithstanding the fact that the application, bulky as it is, was served personally upon the respondent when the applicant was or ought to have been aware that the respondent was represented by attorneys in the dispute.

[23] As regards urgent applications, **Herbstein and Van Winsen**, **The Practice of the High Courts of South Africa**, **5th ed,** state the following at pages 431–432:

> *"**…** in urgent applications an applicant is allowed, depending on the circumstances of the matter, to make his rules, which should as far as practicable*

*accord with the normal rules of court. A respondent **must** endevour to act according to the rules that the applicant made, but can object to these rules when the matter comes before the court."* (own emphasis)

[24] The respondent had no choice but to dance to the song and tune set by the applicant regarding the filing of papers. In my view, the respondent's counsel is entitled to compensation by an appropriate order for costs in terms of Rule 68 (2).

[25] In addition to the above, when the matter first came before me on the date elected by the applicant (29 September 2017), I referred the matter back to the Registrar for allocation of a hearing date after the parties had closed pleadings and filed heads of arguments. At the request of the applicant, the Registrar allocated 11th October 2017. The respondent's counsel then hastily filed her heads on the 10th October 2017 whereas the applicant had not filed any heads yet it ought to have filed before the respondent.

[26] When the matter was before court on the 11th October 2017 the attorney for the applicant was not ready to proceed with arguments. Instead he submitted that he wanted to seek a hearing date from the Presiding Judge.

[27] Counsel for the respondent submitted that she was dragged to court at short notice and was therefore ready to proceed with arguments. She referred the court to a letter addressed to the respondent's attorneys by attorneys for the applicant and is dated 9th October 2017. The letter states, inter alia, what I quote below:

> *"2. We are in the process of getting a date for hearing of this matter before duty Judge this week and we will serve your office with a set down.*
>
> *3. Since there is counsel briefed in this matter, please indicate which date is suitable to her between the 11th, and 12th October 2017."*

[28] After the above quoted letter, the matter was set down for 11th October 2017. Counsel for the respondent therefore came to court ready for arguments, but only to find that the applicant's attorney was not ready to proceed. In my opinion and finding, counsel for the respondent is entitled to compensation for her wasted time and effort by an appropriate order for costs.

(b) Referral of constitutional issue (s) to a full bench

[29] Other than the bare allegation made by the applicant to the effect that the respondent's notice of termination is unconstitutional, there is no constitutional issue that was raised. During arguments, the applicant's attorney submitted that it is not every allegation of a constitutional issue that requires to be determined by the constitutional court. He argued that in the present application there is no constitutional question that requires a referral to the constitutional court.

[30] The respondent, in answering the allegation that the termination of the agreement is unconstitutional, stated that a party who alleges a constitutional violation doesn't just throw the issue to the court but makes reference to the fact that it will make application for referral of the issue to the constitutional court.

[31] As I have already indicated that the applicant's attorney conceded during arguments that there is nothing in the matter that requires a determination by

the constitutional court, I therefore will not proceed to make a determination on this issue but will determine the disputed issues.

(c) Material and foreseeable disputes of facts

[32] Counsel for the respondent submitted that application proceedings are not suitable where there are material and foreseeable dispute of facts. Legally, that position is correct and a plethora of cases have been decided on it. She submitted that the correspondence between the attorneys clearly set out disputed facts. She argued that the respondent persistently outlined breaches of the contract by the applicant but the applicant kept denying the same.

[33] The respondent's counsel also submitted that it is not even a question of foreseeable dispute of facts but a known dispute of facts as can be seen from the correspondence between the applicant and the respondent. For that reason, she submitted that application proceedings are not suitable for the present matter and the application ought to be dismissed.

[34] On the other hand the applicant's attorney submitted that this is a matter which can be decided on the papers before court. He argued that clause 2.3.2 of the award agreement ought to have also incorporated a provision on how the renewed or optional agreement would be terminated. I find it apposite herein to reproduce clause 2.3 of the award agreement. It provides as quoted below:

> *"2.3 Contract Duration*
>
> *2.3.1 This agreement shall commence on the commencement date and shall remain in force for a period of thirty six (36) months (the "Initial Period). During this time either party may terminate this agreement by giving ninety (90) days written notice.*
>
> *2.3.2 Provided this agreement shall remain in existence through ought the initial period, the company shall renew this Agreement following the expiry date of the Initial Period for a further twenty four (24) months period ("the Option Period").*

[35] The argument made on behalf of the applicant is that clause 2.3.2 does not state how the renewed agreement would be terminated. The applicant's

attorney therefore submitted that as there is no such termination provision, the renewed agreement could not be terminated. Below I quote what the applicant states in the founding affidavit:

> "*17 Crucially, it is important to note that although provision was made that either party could terminate the agreement in the initial period of thirty six months, the award agreement did not provide for termination of the agreement during the following twenty four months period (the option period)".*

[36] As a general rule, when agreements make provision for renewal at the end of the agreed initial period, the renewal becomes on the same terms and conditions stipulated for the initial period, unless the parties agree to amend those terms. The applicant's attorney submitted that the termination clause was only in respect of the initial period but fell away when this period lapsed and the agreement was renewed under the renewal option clause. That is legally incorrect. The termination clause still forms part of the renewed agreement terms. *In casu,* the respondent correctly exercised a right which both parties were entitled to in the event they wished to terminate the agreement.

[37] The aforegoing is my finding and I so order. It is apposite that I mention that this finding also determines the question before this court on the merits of the case. The application is therefore liable to be dismissed.

[38] This court will not turn a blind eye to the alleged breaches of the agreement by the applicant. The allegations, which are however disputed by the applicant, relate to the roadworthiness condition of the transport that the applicant utilized to discharge its obligations under the agreement. They also relate to a failure by the applicant to pick up and deliver the staff of the respondent in time at the designated pick up points. In my view, these issues cannot be determined on the papers before court without the aid of oral evidence. The point of law on existence of material dispute of facts succeeds and is upheld by this court.

(d) Competency of prayer 5

[39] In prayer 5 the applicant seeks a declaratory order declaring the 2016 agreement *null* and *void* and of no legal force and effect. In paragraph 48 of the founding affidavit, the applicant states, *inter alia*, what I quote below:

> *"48… Its failure to do so when there was a duty upon it to have disclosed it to the applicant, constitutes negligent misrepresentation which allows the applicant to set the agreement aside. This is what the applicant prays for in this application. Further legal argument will be addressed at the hearing hereof."*

[40] Counsel for the respondent submitted that a declaration of the agreement as *null* and *void* based on misrepresentation, as the applicant seeks, is an incompetent relief. She argued that the relief to be sought in a case of misrepresentation is cancellation of the agreement and restitution, or cancellation coupled with damages, or damages without cancellation.

[41] The attorney for the applicant *inter alia* states in paragraph 5.3 of the heads of argument, as follows:

> *"5.3 … the "2016 agreement" was signed and purportedly entered into with the "mistaken belief" that its terms and conditions were the same as those of the 2014 agreement yet that was not the case."*

[42] In my view, the first enquiring which this court must make is the question of whether or not there was a misrepresentation in the first place.

[43] According to **AJ KERR at page 267** of his book **The Principles of the Law of Contract, 6th ed**, a representation has been judicially defined as

> *"a statement made by one party to the other before or at the time of the contract of the some matter or circumstance relating to it."*

[44] The author goes on to state that ***"If such a statement is incorrect it is a misrepresentation."*** This definition was adopted by **Herbstein J** in the case of **Wright v Pandell 1949 (2) SA 279 at 285.**

[45] In the founding affidavit the applicant states as quoted below:

> *"19 … during April 2016, ie. at a stage when the applicant had already been rendering services in terms of the award agreement for more than two years, the first respondent sent a document headed "Agreement" to me for signature. I cursorily glanced at the document, and it appeared simply to record in some more detail the terms of the award agreement that had previously been signed by the respective parties. I did not think that this agreement would have different terms and conditions from the award agreement, and there was no reason to believe that it would.* (own emphasis)

20 The document presented to me had already been signed by somebody on behalf of the first respondent, apparently on 14 March 2016. I appended my signature on behalf of the applicant on 15 April 2016. (own emphasis)

21 …

22 There was no indication given to the applicant, whether verbally or in writing or otherwise, that the terms of the award agreement would be amended. It was especially never agreed or even discussed that the duration of the agreement would be amended."

[46] Counsel for the respondent correctly pointed out during arguments that the 'award agreement' is a mere five (5) page document whereas the 2016 agreement is a fifteen (15) page document. That being the case, there is no merit in my opinion in the submission that the applicant was of the view that the 2016 agreement recorded the same terms as the award agreement. From what happened, I am of the opinion and finding that there was no misrepresentation at all by the respondent. In its own words the applicant "***cursorily glanced***" at the agreement and then signed it. This is a clear conduct of being indifferent and negligent.

[47] It is my finding and decision that this is a case wherein I should follow what the Supreme Court held in the matter of **Galp Swaziland (Pty) Ltd v Nur and Sam (Pty) Ltd t/a Big Tree Filling Station and Another (13/2015) [2015] SZSC 13(29 July 2015)** where their Lordships state the following at page 56:

> *"In our view the maxim caveat subcriptor applies here. A person who signs a contractual document thereby signifies his assent to the contents of the document and if these subsequently turn out not to be to his liking he has no one to blame but himself."*

[48] In the case of **South African Railways and Harbours v National Bank of SA Ltd 1924 AD 704 at 715-16 Wessels JA** pointed out that the law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds; that even when from a philosophical standpoint their minds did not meet, the law will assume that their minds did meet if their acts indicate this and that they contracted in accordance with what they purported to accept as a record of their agreement.

[49] I wish to add that save for the alleged breaches relating to the roadworthiness of the applicant's vehicles and the failure to keep the agreed pick up times for the staff, the execution of the agreement was successful for a period of over two years. This is evidence, in my opinion, that the parties were of the same mind (*ad idem*) concerning the obligations flowing from the agreement.

[50] The text in the 2016 agreement which the applicant points out as indicators that the parties were not of the same mind constitutes trivial issues in my opinion. They are merely typing errors brought about by the now common copy and paste tendency of secretaries and attorneys. They simply require to be rectified than to have the agreement nullified.

[51] For the aforegoing, the application is unsuccessful and I issue the following order:

1. The application is dismissed.

2. Applicant is ordered to pay costs of suit, including costs of Counsel in terms of Rule 68(2) of the Rules of this Court.

T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : Mr S.M. Simelane

For Respondent: Adv. J.M. Van de Walt, instructed by Mr Maseko of Henwood and Company