



IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:

Case No. 2136/2010

KUBUTA AGRIC DESIGN & CIVILS (PTY) LTD

Plaintiff

And

**EMANGWENI HOLDINGS SUGAR ASSOCIATION
(PTY) LTD**

Defendant

Neutral citation : ***Kubuta Agric Design & Civils (Pty) Ltd v Emangweni Holdings Sugar Association (Pty) Ltd (2136/2010) [2019] SZHC 252 (13th December, 2019)***

Coram : **M. Dlamini J**

Heard : **12th December, 2019**

Delivered : **13th December, 2019**

Civil action : *Claim for services delivered - is there evidence of probative value adduced by the plaintiff? Evidence of probative value is one which is admissible, relevant and credible - inconsistent and contradictory evidence stands to be rejected -*

: *the principle of our law that no man should benefit from his own fault stands to apply in this case -*

: *plaintiff's cause of action succeeds -*

Summary: The matter was referred to trial after defendant's special plea failed.

Oral evidence

Plaintiff

- [1] The first witness on behalf of plaintiff was **Andreas Wouterus Vriend (Vriend)**. In the year 2005 – 2006, he was the director of plaintiff. He was director as well in A and A Properties (Pty) Ltd.
- [2] He testified that plaintiff's core business was selling irrigation and agricultural implements. **Mr. Zwane**, contacted his co-director **Adam de Beers** and advised him that one of his farms near Nkonyeni needed their services. He wanted them to change the irrigation system. They proceeded to the Nkonyeni farm to assess it. They drew a plan, offering services in phases. The total costs on all phases was about E4 million. Defendant's bank, Swazi Bank, raised some

concerns that the sum was high. It is then that a breakdown in phases was submitted. The phases plan was drawn at a meeting held with defendant's director, **Mr. Zwane**.

[3] In the said meeting, phase one was agreed upon. Plaintiff was called upon to replace the dilapidated pivots with two of them. The two centre pivots were to be in two different sizes. One was for fifty two hectares while the other thirty seven. However, following a further agreement, the second pivot was reduced to thirty two. It was further agreed that plaintiff should clear the farm in order to accommodate the two pivots. A new quotation had to be presented in terms of this phase one undertaking. Plaintiff subsequently revised the quotation and the sum was as per exhibit B8. The total was then E815 000.

[4] Thereafter, they received from Swazi Bank the document at page B17. They began the work. The pivots were financed by A and A Properties. The work was completed in April, 2005. On 21st April, 2005 they issued an invoice for the work done. It is reflected at B18. **Mr. Zwane** on behalf of defendant refused to sign for the invoice as per the condition of payment in terms of exhibit B17 issued by Swazi Bank. B17 which was described as a purchase authority from Swazi Bank expired on 14th March, 2005. On the submission of the invoice **Mr. Zwane** was to sign it and present it to the Swazi Bank to pay. **Mr. Zwane** refused to sign the invoice. **Mr. de Beers** failed to persuade **Mr. Zwane** to sign despite several meetings with him.

[5] **Mr. Zwane** advanced that in his understanding, the defendant were to not only clear the land in order to install the pivots but would further prepare the land for cultivation of sugar cane. This was not in the revised quotation and in the purchase order. Plaintiff turned to Swazi Bank as it had a good rapporteur from previous dealings to try and resolve the impasse. A meeting was held with officials from Swazi Bank where **Mr. Zwane** was present. The meeting was at the defendant's farm. It was observed in that meeting that the work was done according to instruction. In that meeting, **Mr. Zwane** changed his complaint to say that the land had not been properly cleared. He complained about a shallow donga saying that it hindered one of the pivots. He also complained about the existence of stumps.

[6] All these complaints were not provided for in phase one. They assured defendant that the pivots were well placed and would function according to expectation. A and A Property was the country's agent in passing a guarantee. A and A Property issued a warrant for the work done in favour of defendant. Swazi Bank proposed that a third party be invited to inspect the work done. The third party agreed upon was Royal Swaziland Sugar Corporation (RSSC). This necessitated a second meeting on site. RSSC officials, Swazi bank, **Mr. de Beers**, **Mr. Zwane** and this witness were present. **Dr. Musa Dlamini** of RSSC issued a report. All parties received copies of this report. Its conclusions were that the centre pivots were performing as per design and that they met the requirements of the crop.

[7] The report from **Dr. Musa Dlamini** did not deter defendant from its persistence of refusing to sign the invoice. **Mr. Zwane** remained adamant. This was despite subsequent meetings with defendant. The witness then decided to inform defendant that he would dispatch tractors to the farm to close the donga and prepare the land for cultivation. It was further agreed with **Mr. Zwane** for the defendant that the area complained about of 0.3 hectares which did not get water would be installed with sprinklers. This area had been deliberately left out from irrigation as the parties had originally agreed that the area would be used to extend the road running in the farm. However, later **Mr. Zwane** complained that the water was not reaching it.

[8] This witness testified further that he made it clear to **Mr. Zwane** that all this work would be undertaken not because plaintiff was admitting negligence but first to maintain a good relationship with him. In turn **Mr. Zwane** agreed to pay 85% of the invoice while the plaintiff was undertaking the additional work. The balance would be paid on completion. This witness prepared and sent an invoice for 85% of the costs due. It summed to E675 000. He also dispatched the tractors to commence the additional work. The donga was filled. However, **Mr. Zwane** refused to sign the 85% invoice. They decided to pull off working. The situation escalated. They resorted to litigation. During this cause, **Mr. Zwane** asked that everything be in writing. The plaintiff authored exhibit B1. There was a subsequent correspondence as per B3. **Mr. Zwane** refused to sign the correspondence.

[9] The defendant has since then refused to pay despite that it is utilising the pivots for irrigation. Following that A and A Properties had purchased the pivots, through a bank facility overdraft, and that payment was not forthcoming from defendant, A and A Properties received a letter of demand from its bank. As they were unable to settle within ninety days, the bank called up their facilities. The interest rate changed from 9% to 16%. They lost business. He lost his farm. Effectively, the plaintiff had to close business. Plaintiff paid a sum of E95 000 to the attorneys as legal costs as he had to go to Fincorp to get a loan. Interest on the facility was E244 500.

[10] He was subjected to a lengthy cross-examination but on defined issues. The first defence put to **Mr. Vriend** was that the agreement to purchase pivots were between Swazi Bank and plaintiff at the exclusion of defendant. This witness referred the court to annexure C26 as a letter written by defendant directed to Swazi Bank requesting the bank to issue a guarantee for the pivots. He therefore denied what was put to him. He was pressed several times on this question. He stood his ground.

[11] The second witness for the plaintiff was **Sandile Lucky Dlamini**. He testified under oath that in 2005 he was the employee of A and A Properties. He was acting as Manager. He was aware that plaintiff had done work for defendant. Around 2009 or 2010, he received a message from **Mr. Vriend** who was out of the country at that time that he should go to defendant who would give him a cheque. **John Ndlovu** was to fetch him. He went to defendant. He found **Mr.**

Zwane. **Mr. Zwane** directed him to his accounts section and said he should pick up the cheque. He did.

[12] He went to the bank, across the road where **John Ndlovu** was waiting for him. As there were by the teller at Swazi Bank, ready to cash the cheque, the teller instructed them to go upstairs. They waited for about forty five minutes. The bank officials came and told them that there was no money in the account. The account was closed. He could not remember what was written on the cheque due to time lapse. It was disputed under cross-examination that **Mr. Zwane** ever met this witness and that he instructed him to get a cheque from his accountant.

[13] It was demonstrated to him that PW1 (**Vriend**) did not testify on this evidence. If he had sent him to collect the cheque, **Mr. Vriend** would have so testified. He was asked as to where the cheque was. He said the bank took it. It was disputed that he could be sent to cash a cheque of E815 000 and that a bank would return a cheque to the drawee for insufficient funds.

[14] The third witness was **Masibuse Frank Khumalo**. He is one of the managers at eSwatini Bank (Swazi Bank) in the agri-business department. His evidence centered around exhibit B17 also found in defendant's plea as exhibit A20. He also outlined the procedure where a client applied for a loan. **Mr. Khumalo** testified that exhibit B17 was a purchase authority or order. It was issued by his bank to its customer following an instruction by the customer. It informs the

bank's customer that there are funds in the bank to pay the supplier after supplying or discharging the services required by the bank's customer.

[15] Exhibit B17 was valid for a month. After a month, the customer is expected to submit the purchase order together with an invoice which is authorised by the bank's customer. The bank would process payment within ten days from receipt of the said documents from its customer. In the present case, its customer who was defendant did not authorize payment. The defendant did not write to the bank requesting it to pay the plaintiff. As a result the bank never paid the supplier who was plaintiff.

[16] **Mr. Khumalo** further referred the court to exhibit C26. He stated that this was the correspondence authored by defendant directed to the bank. The defendant requested the bank to issue the purchase order which is exhibit B17.

[17] **Mr. Khumalo's** cross-examination was very lengthy. It was pointed out to him that he could not say much on the decisions pertaining the matter because at that time he was not serving at the Mbabane branch. He disputed this and pointed out that he was guided by the information on the file on what transpired.

[18] It was pointed out to him in various ways that the bank concluded a contract of supply with the plaintiff. The defendant was never involved. All that the defended saw was when the plaintiff arrived at the farm to install the pivot. Exhibit A20 (purchase order) is testimony to this as it is entitled “request to supply.” It informs plaintiff to supply and install the pivots at defendant. It is further signed by the bank and not defendant. **Mr. Khumalo** disputed such interpretation of the purchase order. He pointed out that in as much as the purchase order called for plaintiff to supply and install the pivots and the bank authored it, it was at the instance or instructions of the defendant, its client. The defendant had concluded the contract with the plaintiff.

[19] He was queried on whether the bank did cancel the guarantee (purchase order). He pointed out that there was no need for such as the authority to obtain a loan granted to defendant expired after a period of three months. The purchase order or guarantee cancelled itself. He was challenged at great length that the bank failed in its undertaking to pay the plaintiff and not the defendant. This was more so as the guarantee was not cancelled by the bank. Nothing was communicated to the defendant that the bank had failed to pay the plaintiff.

[20] **Mr. Khumalo** respondent by producing the original copy of the invoice and emphasised that the bank could not pay without defendant

signing it. He further produced minutes of a meeting held among the officials from the bank and RSSC and plaintiff with defendant. He testified that RSSC produced a report to the effect that the work had been done in accordance with standard specification. Despite this findings by RSSC, defendant declined to give the bank authority to pay. The invoice remained unsigned even though the purchase order called upon defendant, as consignee, to sign it.

[21] Learned Counsel for defendant then referred **Mr. Khumalo** to C27 and pointed out that on 8th March, 2005 defendant had issued an unequivocal instruction to the bank to pay plaintiff. **Mr. Khumalo** read exhibit C27 and pointed out that such was a request to pay after “*completion*” and “*on full commission.*” Defendant did not commission the payment. For that reason, the bank could not honour the guarantee.

[22] He testified further that defendant raised a number of concerns on the manner the work was executed. He complained of an unfilled donga, unprepared field for sugar cane growing and that one pivot failed to cover a 1.5 hectares. Defendant told the meeting where officials from the bank and RSSC were present that he would not authorise payment until his concerns were addressed.

[23] It was lastly put to **Mr. Khumalo** that defendant paid the sum of E815 000 through a loan sourced from FINCORP. He was challenged to produce a bank statement in the name of defendant following that defendant issued a subpoena to the bank for the same. It was pointed out that the bank was persistently refusing with the statement as it would show that defendant repaid the bank the sum of E815 000 together with interest.

[24] **Mr. Khumalo** testified that firstly there was no statement to produce for the reason that following defendant's refusal to authorise payment, the bank considered that there was no loan granted to defendant. There was therefore no account opened as the bank keeps different accounts for its client. Secondly, defendant did not pay any money in respect of the purchase order under exhibit B17. **Mr. Khumalo** then produced a statement reflecting a nil against the sum of E815 000 guarantee in favor of plaintiff and testified that such was his documented evidence. Learned Counsel for the defence applied that this document, together with the minutes be admitted as evidence. There was no objection from the plaintiff's Counsel. The minutes were marked as exhibit "**D**" and the bank's statement "**E**."

[25] The plaintiff closed its case and the defendant opened its defence and led one witness. **Mr. Robert Lobi Zwane** testified on behalf of defendant.

[26] **Mr. Zwane** identified himself as one of the directors of the defendant. **Mr. Zwane** testified that he knew plaintiff. **Mr. de Beers**, who represented plaintiff arrived at his farm and advised him that he had been assigned by the bank to carry out a certain project in his farm. He enquired if the bank had issued him a guarantee as that was how banks operated. **Mr. de Beers** produced and showed him a guarantee.

[27] **Mr. de Beers** thereafter ordered two center pivots. He installed them. He went to inspect the work. He found that there was a small portion which was not covered by one of the centre pivots. He pointed this out to **Mr. de Beers**. **Mr. de Beers** worked on it and the work was completed. He heard that plaintiff was paid. He was notified that plaintiff had been paid. He dismissed as utter lies the evidence by **Vriend** that plaintiff concluded the agreement to supply and install two pivots with defendant represented by him. He demanded to be shown a written agreement to that effect. He pointed out that **Mr. de Beers** came to him and asked to change his pivots. The ones he had on site were not problematic at all. He agreed because ownership of the farm was with Swazi Bank.

[28] **Mr. Zwane** disputed that he went to the bank to request it to ask plaintiff to do the work. He pointed out that he was approached to change the pivots. He enquired on the reason for changing them. However, because the bank was always at a superior level than him as the owner of the farm, he could not press on with the question. He

could not have the last word. He testified that if he had a relationship with plaintiff, documentary evidence would be available to that effect. Instead there is a document pointing that the plaintiff entered into a contract with the bank.

[29] He profusely denied that he refused to sign the invoice. He testified that never at any time did he refuse to sign any document. He testified that there was fraud at the bank as after **Mr. de Beers** complained that he had not been paid, he demanded for his bank statement. The bank declined to produce one. He conceded that upon inspection, and in the presence of RSSC they found that the work was not complete. There was one pivot which had not been well assembled and a piece of the ground not cleared. They pointed this out and the plaintiff worked on it. Plaintiff thereafter went to the bank and was paid.

[30] Evidence that the plaintiff was paid was that plaintiff remained silent over the years until recent. Had it been correct that he was not paid, plaintiff would have been on his neck since then. Further, the bank would have also told him that defendant did not pay plaintiff.

[31] He testified that he did not know what document was when referred by his Counsel to the purchase order. He wondered why he had to sign the invoice as he did not give the plaintiff any work but the bank.

If the bank failed to pay plaintiff, plaintiff ought to have taken the bank to court. Defendant was never part of the transaction.

[32] **Mr. Zwane** testified that he heard through the grape vine that someone testified in court to the effect that he gave him a cheque of E815 000 as payment for the plaintiff. He testified that the said witness came to tell the court the truth in so far as that the plaintiff was paid. The only portion which was incorrect is that defendant paid the said E815 000. He ought to have told the court that it was the bank that paid the said sum. **Mr. Zwane** then requested this court to establish a commission of enquiry against plaintiff's Counsel and his client. This was because after he was told that he had not paid, he engaged an attorney who went to the bank and received documents showing that he had paid. Plaintiff went silent thereafter until after fifteen years that he instituted legal proceedings claiming that he was never paid.

[33] His cross-examination was very brief. It was pointed out to him that this matter had always been in court. He disputed same. He was referred to exhibit C26, a correspondence authored by him addressed to the bank to prepare a guarantee in favor of plaintiff. It was pointed out to him that he could not deny any knowledge of the transaction or contract between plaintiff and defendant of the supply and installation of the pivots. He replied by saying that he was confused on why then the bank failed to pay plaintiff as he requested it to pay. When it was

pointed out to him that the bank failed to pay plaintiff because he refused to authorise payment, he said that exhibit C26 was sufficient and he was not to instruct the bank to pay thereafter. He challenged the bank to produce evidence that he was to sign the invoice. He was referred to the terms of the guarantee which called upon him to sign the invoice. He testified that such was absurd as he had no contract with plaintiff to do the works but the bank.

[34] Lastly he was asked as to where the centre pivots were. He said that they were available. When pressed further as to their where about, he said that he could not reveal that but defendant should do so.

Adjudication

[35] Has the plaintiff established its case on a balance of probabilities? In other words, is there evidence of probative value adduced by the plaintiff? Evidence of probative value is one which is admissible, relevant and credible.¹

Performance guarantee or Letters of comfort

[36] The general position governing documentary bank guarantee is that the underlying contract has no effect on the obligation imposed upon the bank to pay the supplier. In other words, the terms of the contract leading the parties to opt for payment by means of these instrument is irrelevant or does not bind the bank. They are often paid on

¹ James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65 (20th November 2012) paragraph 3

presentation by the supplier. However, these documents or letters by the bank, as they are often referred to do not come without conditions. The bank is bound by the conditions stipulated in them. For instance, one may stipulate that the bank shall pay upon presentation of bill of lading. All that the bank does is upon presentation of the document together with a bill of lading pays the sum of the document or guarantee. Whether the goods have arrived in safe condition or not is none of the bank's concern. Learned Counsel for the defence referred to **Denel Soc Limited v Absa Bank Limited**² where the Court cited **Denning J** as follow:

“A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relationship between the supplier and the customer, nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to the guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.

[37] I must clear one misconception operating in the mind of the defendant that when his Lordship authored, *“The bank must pay according to the guarantee, on demand if so stipulated, **without proof or conditions,**”* was by no means saying that the bank should ignore the conditions stipulated in the guarantee itself. He merely meant that the bank was only bound by condition in the guarantee itself and not external

² Case No:199/2001

conditions such as poor or incomplete performance of work. The learned justice clarified this point in its first sentence when he stated, “The bank.....must honour that guarantee **according to its terms.**”

Plaintiff's case

[38] The plaintiff's case was simply that it was engaged by defendant to supply and install two centre pivots at plaintiff's sugar-cane farm near Nkonyeni. The total costs of the work according to the quotation submitted to defendant was for E815 000. Defendant duly arranged for payment with its bank, eSwatini Bank (Swazi Bank then). The bank issued a guarantee. Attached to this guarantee was a condition that the defendant sign the invoice.

[39] Plaintiff proceeded to discharge its part of the bargain by purchasing the two centre pivots. These pivots were purchased through a loan sourced from A and A Properties (PTY) Ltd. The loan attached interest. Plaintiff further cleared the land and installed the two centre pivots. It quickly prepared an invoice and submitted the same to defendant. Defendant refused to sign the invoice as per the condition of the guarantee. Defendant raised complaints on the work performed. Plaintiff, although not necessarily admitting that the work was substandard, attended to those complaints on the basis that defendant would pay 85% of the sum due and the balance on completion. Despite that defendant refused to pay.

[40] Plaintiff resorted to litigation. Plaintiff asserted that the work was done according to standard. There were no basis for the concerns raised by defendant. Its evidence in this regard finds support from a report by RSSC. Plaintiff claimed the sum of E815 000, legal interest thereof, bank rate interest charged on the loan from A and A Properties, costs of suit and legal fees paid to the bank by A and A Properties.

Defence

[41] The defendant has raised various inconsistent defences. Firstly, it denied any contract to supply and install centre pivots with the plaintiff. It testified that plaintiff entered into a contract with the bank who was the title holder of the farm. It was helpless in this regard as the pivots which were on site were functioning well. It was in a similar position of master and servant.

[42] Secondly, the defendant raised that it did instruct the bank to pay. The bank agreed by issuing a guarantee. Failure to pay by the bank ought to attract legal action against the bank and not defendant. Once the guarantee was issued, defendant was free from liability as against the plaintiff. Thirdly, the bank paid plaintiff and defendant paid the bank in turn.

Common cause

[43] It is not in issue that the two centre pivots were supplied and installed by the plaintiff at defendant's farm at a costs of E815 000. The defence raises as an issue as to at whose instance the centre pivots were supplied and installed. The plaintiff testified that it was at the instance of the defendant. This was disputed by the defendant.

Determination

[44] The evidence of **Mr. Khumalo** which remained unequivocal despite lengthy and often repeated cross-examination on the same point reflected that the defendant approached the bank and applied for a loan to pay its supplier, the plaintiff for supply and installation of two centre pivots. The loan application was successful. Testimony to this application was exhibit C26 which read:

“EMANGWENI HOLDING SUGAR ASSOCIATIO (PTY) LTD

P. O. BOX 199

MANZINI

SWAZILAND

15th January, 2005

RE-TWO CENTRE PIVOTS IN THE FARM (52 HECTARES OF EACH)

We kindly request the bank to issue a guarantee letter for KUBUTA AGRI DESIGN & CIVILS to replace the two centre pivots which is presently existing in the farm with two centre pivots on the 52 hectares of each.

Meanwhile the lawyer is still preparing the draft we kindly request the bank to issue the guarantee letter for the two centre pivots on the 52 hectares of each to save the sugarcane in the farm.

Payments will be made in completion of the project on approval by the Sugar Association in the site of the irrigation and the engineering site, (and Swazibank Agricultural department and ourselves which is Emangweni Holding Sugar Association.

We have really considered the importance of a qualified Manager in the farm.

We are looking forward for an urgent positive response since the situation is very hectic with the sugarcane in the farm.

Yours faithfully

EMANGWENI HOLDING SUGAR ASSOCIATION”

[45] It must be noted that this correspondence was authored by defendant on 15th January, 2005. Subsequent to this correspondence, the bank issued the purchase order. There is no justiciable ground to reject this evidence and to accept the evidence of defendant that he knew nothing about the transaction which led to the supply of the two centre pivots in his farm on the face of exhibit C26. Exhibit C27 lands further credence. It read:

“The Manager

SWAZI BANK

P. O. BOX 199

8th March, 2005

RE-REQUEST OF PAYMENT OF A AND A PROPERTIES

Referring to the letter dated the 28th February, 2005 of purchase order number 100315 from Kubuta Agri Design & Civils we kindly request you as the bank that after completion of the project and on full commission payment of E815 000.00 be made directly to A & A Properties with the bank details enclosed below.

Name: A & A Properties

Bank: STANDARD BANK

Branch: SWAZI PLAZA MBABANE

Account number: 0140007171701

We really appreciate your sincere co-operation.

Yours faithfully

EMANGWENI HOLDING SUGAR ASSOCIATION

cc. Kubuta Agric Design & Civils”

[46] Like exhibit C26, the defence did not dispute ever writing these two exhibits. In fact under cross-examination, defendant admitted to writing exhibits C26 and C27. Again the evidence of **Mr. Khumalo** that when the bank issued exhibit B17 the guarantee it was in response to exhibit C26 must be accepted.

[47] A third ground for accepting **Mr. Khumalo's** version is found on defendant's plea. The plaintiff alleged:

“3. *During or about February to March 2005 and at our Matsapha and/or Sidvokodvo, Plaintiff, duly represented by A & A properties (PTY) Limited and/or A W Vriend and /or E J De Beer, and Defendant, duly represented by R. Zwane, entered into an agreement which was partly in writing, in terms whereof Plaintiff undertook to supply and install two centre pivot irrigation systems on Defendant’s.*”

[48] To the above, defendant pleaded:

“6. AD PARAGRAPH 3

The allegations contained herein are admitted, save to state that the agreement referred to herein was subject and/or on condition that the bank (Eswatini Bank) agrees to fund the project anticipated and agreed upon by the parties and that if approved, the bank would make direct payment of whatever amount was due on completion of the project to the Plaintiff. The issue of payment on condition of the project was therefore between the bank and the Plaintiff and did not involve the Defendant.”

[49] This admission coming from the defendant put the matter to rest. I must nevertheless point out further that the defendant was fully aware of the contract between it and the plaintiff. It concluded the contract

with plaintiff. This was further attested to by **Mr. Zwane** who testified on behalf of defendant in chief:

*“Thereafter, (plaintiff) having completed the work, I asked to go and see it. **Indeed he did what we had agreed upon.** We went to inspect and we found that only a small portion was incomplete. We asked him to complete it. He did.”*

[50] His lawyer asked him as to who were “we.” He replied that it was the company (defendant). Again this is evidence that defendant engaged plaintiff to provide and install the centre pivots.

Was the bank liable to pay after issuing the purchase order?

[51] It is common cause that the bank issued the purchase order. The purchase order was addressed to plaintiff calling upon it to supply and install the centre pivots for E815 000 to the defendant. The purchase order read:

*“On presentation to us of this authority **TOGETHER WITH THE RELATIVE INVOICES SIGNED BY THE CONSIGNEE ATTACHED**, within 31 days of the above-quoted validity date, we undertake to pay your account within 10 days of presentation provided neither the quality nor the limit*

authorized is exceeded. Any discount allowable by you must be deducted on the invoices.

For: SWAZILAND DEVELOPMENT AND SAVINGS BANK.”

[52] It is common cause that the consignee who was defined as the defendant did not sign the invoice. Defendant testified that there was no need for it to sign any document after the bank had issued the guarantee. **Mr. Zwane** on behalf of the defendant further testified:

“I was never asked to sign any document. No one brought that to my attention. It is my first time to see this document (referring to exhibit B17).”

[53] However, the evidence of **Vriend**, corroborated by that of **Mr. Khumalo** was to the effect that despite a report by RSSC certifying the work and several requests to the defendant as represented by **Mr. Zwane** to sign, he declined.

[54] Turning to defendant, **Mr. Zwane** was not clear on which version he intended the court to consider. He proffered two inconsistent reasons on the purchase order. As demonstrated above, he first said that after the bank had issued the guarantee, he was not obliged to do anything. This was said several times. He later said that no one brought the

document to his attention. His version stands to be rejected on this ground of inconsistency and contradictions therefore.

[55] I therefore accept the evidence of the plaintiff that in as much as defendant had arranged for a guarantee, he failed to discharge his side of the bargain by signing or commissioning payment. The bank was bound not to pay the plaintiff in the absence of authority from its client. Defendant ought therefore to have paid direct from its pocket after frustrating the guarantee. The principle of our law that no man should benefit from his own fault stands to apply in this case.

Did the bank pay plaintiff and did defendant pay the bank?

[56] The defendant also pointed out as a further defence that the bank paid the plaintiff. Testimony to that is that the plaintiff remained silent for fifteen years and only to put up a claim then. Further, defendant was made to pay the bank. The plaintiff was confronted with evidence to this effect when defendant's lawyer produced statements from the bank. I must hasten to point out that this evidence that plaintiff was at one point in time confronted with evidence of payment is totally without merit. This is because at the beginning and the better part of defendant testimony was that the bank refused to give its director **Mr. Zwane** statements showing that defendant repaid the loan under the purchase order of E815 000 to the bank and further that plaintiff was paid.

[57] The defendant under **Mr. Zwane** even called for this court to set a commission of enquiry and also call upon the Law Society to establish one. The defendant repeatedly told the court that the bank has persisted in refusing to give it evidence that it paid plaintiff and it in turn paid the bank. It was a sudden turn of evidence for the defendant to then testify that the bank gave it such documents and the plaintiff was shown the same. Thereafter plaintiff went silent. Once again this version is inconsistent and therefore stands to be rejected.

[58] The court has evidence from **Mr. Vriend** and **Mr. Khumalo** that the bank did not pay plaintiff. The basis was that defendant refused to commission payment. The plaintiff's oral evidence was supported by exhibit "D" and "E". "E reflected:

"Balance

"E Nil payment of E815 000 to Kubuta Agric Design and Civils is still outstanding."

[59] The last sentence thereat read that the issue of E815 000 was still to be decided by the High Court. In the premises, I find no merit in defendant's third defence.

Quantum

[60] The plaintiff had claimed in its combined summons:

“Claim 1

9. *In consequence of Defendant’s breach as aforesaid which is material, Plaintiff is entitled to cancel the agreement.*

10.

10.1 *On 31st May 2010 at Manzini, Plaintiff cancelled the agreement, informed the Defendant in writing of such cancellation and demanded immediate return of the two centre pivot systems.*

10.2 *A true copy of the notice is attached hereto as Annexure “F”.*

11. *Defendant has to date failed to return two centre pivot systems to Plaintiff.*

12. *The value of the pivot systems is E815 000.00.*

13. *In the premises, Plaintiff is entitled to have the two centre pivot systems restored to its possession, alternatively to payment of the value thereof, namely E815 000.00.*

14. *The pivot systems have been damaged beyond economical repair by the Defendant, consequently the Plaintiff has elected to seek payment for the same.*

CLAIM 2

14. As more result of Defendant's aforesaid breach of the agreement, Plaintiff has suffered extensive damage, calculated as follows:

14.1 Plaintiff was unable to meet its commitments to own banker who provide credit to Plaintiff for the importation of the two pivot systems for South Africa and is presently being sued for the outstanding amount and faces attachment of its property. Plaintiff's damages are as follows:

14.1.1 Legal costs E 95 000.00

14.1.2 Loss of interest @6% per annum E 244 500.00

14.1.3 Loss of creditworthiness and
Reputation resulting in an inability
To obtain credit and conduct its
Business E1 600.000.00

14.1.4 Loss of guarantee on the two pivot
Systems due to Plaintiff's liability
To have service in time E 81 000.00

14.1.5 Further work performed to
Persuade Defendant to pay the
Amount due E 89 000.00

TOTAL E2 110 000.00

1. Claim 1

1.1 *Immediate return of the two centre pivot irrigation systems;*

1.2 *In the event the defendant failing to comply with the order in 1.1 supra, that the Sheriff of this Court ordered and authorized to seize the aforesaid centre pivot irrigation systems and hand same to Plaintiff;*

1.3 *Alternatively to 1.1 supra:*

1.3.1 *Payment of amount of E815 000.00;*

1.3.2 *Interest on the amount of E815 000.00 from 14 March 2005 to date;*

1.4. *Costs;*

1.5 *Further or alternative relief;*

2. *Claim 2*

2.1 *Payment of the sum of E2 110 000.00;*

2.2 *Interest on the aforesaid sum of E2 1110 000.00 at the rate of 9% per annum a tempore morae from date of issue of summons to date of payment;*

2.3 *Costs of suit.”*

[61] **Mr. Vriend** pointed out that it was now praying for the payment of the sum of E815 000 instead of the return of the pivots. I must point out that even if the court intended to grant the return of the two centre pivots, it would be constrained not because of time lapse but by

defendant's answer on plaintiff's Counsel question that the pivots were available but when pressed on where exactly they were, **Mr. Zwane** refused to answer the question saying that the company (defendant) should be asked that question. It was not clear how as the company spoke through him as it did when the contract of supply and installation of the pivots was concluded, a fact admitted both on defendant's written plea and evidence in chief. The court is left with one option therefore to order payment in terms of the quotation and invoice.

[62] Turning to claim 2, **Mr. Vriend** testified with reference to E95 000

“These were costs to Robinson Betram when they issued the letter of demand against my company (plaintiff). Fincorp did not pay for them.”

[63] He was led:

“You claimed interest of E244 500.”

He respondent:

“I have to pay interest at 16%.”

[64] On the rest of the claim of E81 000 and E89 000 he testified that **Mr.de Beers** would give evidence on those. **Mr. de Beer** did not. He was not called as a witness. It follows that the claim falls off. What

remains to be considered are the sum of E95 000 legal fees and E244 000 interest charged which was reduced pro rata to be 6% by plaintiff following that 16% considered other loans by plaintiff where defendant was not part of. **Mr. Vriend** testified that the plaintiff had a number of loans. When it failed to service its loans due to defendant failure to pay, the bank called up all the facilities. The sum of E815 000 was one of the facilities called up by plaintiff's bank. The interest escalated from 8% to 16%.

[65] No evidence was adduced contradicting **Mr. Vriend's** assertion in regard to the above. The cardinal rule is that unchallenged evidence is deemed to be accepted by the party. For this reason, it must be admitted.

[66] In the result, I enter the following orders:

66.1 Plaintiff's cause of action succeeds;

66.2 Defendant is ordered to pay the plaintiff the following sums;

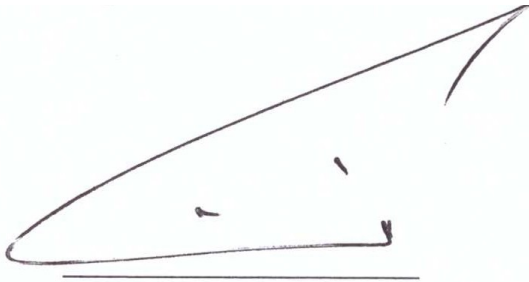
66. 2.1 E815 000.00;

66. 2.2 E95 000.00;

66.2.3 E244 500.00;

66.2.4 interest thereof at the rate of 9% per annum
a tempore more;

66.2.5 costs of suit.



M. DLAMINI J

For the Plaintiff : J. Henwood of Henwood and Company

For the Defendant : B.S. Dlamini of B.S. Dlamini and Associates