IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO: 1964/2016**

In the matter between:

AFRICA CHICKS (SWZ) (PTY) LTD **PLAINTIFF**

And

TRENCOR INVESTMENTS (PTY) LTD **DEFENDANT**

Neutral citation: *Africa Chicks (Swz) (Pty) Ltd v Trencor Investments (Pty) Ltd (1964/2016) [2022] SZHC 240 (03/11/2022)*

CORAM: **B.S DLAMINI J**

DATE HEARD: 18 October 2022

DATE DELIVERED: 03 November 2022

Summary: *Action proceedings- Sale and delivery of goods- Plaintiff supplying broiler chicks and chicken feed to the Defendant- Plaintiff suing for non-payment of goods by Defendant-Defendant admitting to have received goods in question but contending that all goods were duly paid for-Determination of whether or not goods duly paid for; Abuse of Court process- Procedure for filing notice of withdrawal as Attorneys of Record.*

Held; *Plaintiff able to prove that it supplied the goods in question to the Defendant and that the sum claimed for the sale has not been settled by Defendant.*

Held further; *The conduct by Defendant's Attorneys of filing notice of withdrawal as Attorneys of Record on*

resumption of trial amounts to an abuse of court process. Court entitled to reject such and ordering that trial proceeds as planned.

JUDGMENT

INTRODUCTION

[1] On the 6th November 2016, the Plaintiff sued the Defendant for two different sums of money namely, the sum of E 642,212.14 and a further sum of E 460,152.02 respectively. The sum of E 642,212.14 is said to arise from the sale and delivery of broiler chicks to the Defendant at the latter's special instance and request. The sum of E 460,152.02 is said to arise from the sale and delivery of chicken feed to the Defendant which was at the latter's special instance and request.

[2] The action was opposed by the Defendant. In its plea, the Defendant, in disputing the Plaintiff's claim alleges that;

"Contents herein are denied and Plaintiff is put to the strict proof thereof. Defendant denies owing Plaintiff the amount claimed as all outstanding amounts were settled by Defendant."

[3] After pleadings were closed, the parties applied for a trial date in accordance with the normal procedure. The matter was initially set for trial on the 26th and 27th July 2021 before His Lordship, Mamba J. The matter could however not proceed as scheduled on the allocated dates since the Judge appointed to hear the matter was not available to hear same due to other commitments. The legal representatives of the parties were advised to present themselves in Court on the 24th March 2022 for purposes of setting new trial dates.

[4] On the 24th March 2022, only the Plaintiff's legal representative was present in Court. The matter was allocated the 20th and 21st April 2022 as new trial dates. The Plaintiff was directed by the Court to prepare a notice of set-down for trial and to immediately serve it upon the Defendant's attorneys of record. Such notice of set-down for trial was indeed prepared timeously by the Plaintiff's Attorney and was duly served upon the Defendant's Attorneys of record.

[5] On the 20th April 2022, being the first day of trial, none of the parties appeared in Court for the matter to proceed as scheduled. At approximately 09:50 am, the matter was called three times and, there being no appearance by both sides, the Court was left with no choice but to remove the matter from the roll.

[6] The Plaintiff's attorney prepared a notice of set-down for allocation of new trial dates. On this date, namely 5th May 2022, both legal representatives appeared in Court and the matter was allocated the 20th and 23rd June 2022 as being new trial dates.

[7] The matter could however not proceed on the allocated dates due to the unavailability of the Court. The unavailability of the Court was explained in advance to the parties. The matter was then allocated the 28th July 2022 and 1st August 2022 as being new trial dates. On the 28th July 2022, being the first day of trial, Mr Tengbeh, the Defendant's attorney did not show up in Court but instead sent another attorney (Miss Charamba) from the offices of *S.V Mdladla & Associates* to inform the Court that he would be filing a notice of withdrawal as attorneys of record for the Defendant.

[8] The Court informed the Defendant's attorney that the intended notice of withdrawal as attorneys of record for the Defendant would be improper as such could not be filed on the trial date. The Defendant's attorney was directed to inform the Defendant that the matter would proceed on the next trial date, namely the 1st August 2022. However on this date, namely the 1st August 2022, the Defendant was not in Court and its attorney insisted that they could not proceed as they had filed and served a notice of withdrawal as attorneys of record. The Court was not handed the said notice of withdrawal as attorneys of record for the Defendant.

[9] Reluctantly, and purely for the sake of the Defendant, the Court, on the 1st August 2022, decided to allocate new trial dates being the 17th and 18th October 2022. This was in the presence of both legal representatives for the parties.

[10] Surprisingly, on the 11th August 2022, the Defendant's attorneys filed and served a '*Notice of Appointment as Attorneys of Record*'. This effectively means after the matter could not proceed on the allocated dates due to the Defendant's attorneys' withdrawing from the matter,

the latter attorneys immediately re-appointed themselves as attorneys of record for the Defendant in the matter. It does not take 'Solomonic' wisdom to understand that the notice of withdrawal as attorneys of record was filed purely to avoid the trial. Defendant's Attorneys' conduct will be dealt with more fully herein below.

[11] The Plaintiff's attorneys prepared a notice of set-down for trial and served same on the Defendant's Attorneys. The notice of set-down was alerting the Defendant's Attorneys (even though they were present in Court on the 1st August 2022 when the dates were allocated) that the matter would now proceed to trial on the 17th and 18th October 2022.

[12] On the 17th October 2022, being the first day of trial, again Mr. Tengbeh did not show up but instead, sent Attorney Miss Charamba to inform the Court that he was engaged in another matter at the High Court. The Court could not accept such and again informed Miss Charamba that the matter would proceed on the day. On realizing that the matter was to proceed on the 17th October 2022, Miss Charamba requested that the Plaintiff's witness be led in chief and that they be allowed to undertake cross-examination on the next trial date, which

was the following day. The Court acceded to the request by Defendant's Attorney. On the following day, namely the 18th October 2022, the Defendant's Attorneys, instead of cross-examining the Plaintiff's witness chose to file another notice of withdrawal as attorneys of record.

[13] The Court rejected the notice of withdrawal filed on behalf of the Defendant on the 18th October 2022 and ordered that the matter proceeds on trial. The Plaintiff indicated that it was closing its case after leading its one and only witness, Miss Julia Rita Saulos.

PLAINTIFF'S EVIDENCE

[14] The Plaintiff's evidence was presented through its only one witness, Miss Julia Rita Saulos (hereinafter referred to as "PW1"). The evidence by this witness was that she was employed by the Plaintiff in the year 2016 and that she presently occupies the position of Country Director within the Plaintiff. The witness stated that prior to being Country Director, she was employed by the Plaintiff as Operations Manager.

[15] According to the testimony of Miss Saulos, the Plaintiff is a company that is involved in the production of day old chicks which it then supplies to the local market. The witness stated that one Mr. Vusi Humphrey Dlamini, a Managing Director of the Defendant, was one of the Plaintiff's major customers. PW1 stated that the Plaintiff would supply the day old chicks to the Defendant on a weekly basis to his various farms situated at Motshane and Sigangeni. The witness stated that on a weekly basis, the Plaintiff would supply between 20,000.00 to 25,000.00 day old chicks to the Defendant.

[16] The evidence by PW1 was that the business arrangement between the parties was that the Plaintiff would supply on credit to the Defendant, the day old chicks and that the Defendant was expected to settle or pay for such goods within 7 or 14 or 30 days. The evidence by PW1 was that the credit facility existing between the parties was that upon delivery of the specified goods, an invoice would then be generated by the Plaintiff which the Defendant was required to settle within the agreed period. PW1's evidence was that upon payment of the goods delivered by the Defendant, the Plaintiff would allocate the sum of money paid by Defendant's to a specific invoice. Alternatively, if the

money could not be directed to a specific invoice, such payment would be allocated to the oldest unpaid invoice as per standard business practice.

[17] This arrangement, according to PW1, continued until the Defendant's payment of goods delivered became inconsistent and eventually stopped. PW1 stated that upon making payment, the Defendant's accounts department would thereafter generate a reconciliation statement showing a list of deliveries and a list of payments made by it to the Plaintiff.

[18] PW1's evidence was that Defendant stopped making payments in the year 2015. The Defendant, according to the witness, withdrew its orders with the Plaintiff and basically stopped dealing with the Plaintiff. The Plaintiff then issued several demands to the Defendant for payment of the outstanding amounts of money due to it. According to PW1, the Defendant's officers gave several explanations for not being able to pay the outstanding amounts including that its computer systems had crashed. PW1 stated that they made copies of all

documents including orders, delivery notes and invoices to the Plaintiff but they would still not pay.

[19 According to PW1, the Defendant would also give the excuse that the person who was doing their accounts had left their employ and that they were in the process of reconciling their books and would get back to the Plaintiff. PW1's evidence was that the Defendant's officers kept giving one excuse after the other for not paying the outstanding sum of money due to it.

[20] PW1's evidence was that the Plaintiff uses a pastel program for its accounting system. The witness stated that they printed a full ledger from their accounting program and sent this to the Defendant. According to PW1, the Defendant itself had undertaken an assessment of the sum of money due to the Plaintiff and established that only a sum of E 589,535.03 was outstanding in respect of the broiler chicks supplied by Plaintiff to it. This means the Defendant was disputing a sum of E 26,427.47 on this particular claim. In this regard, PW1 showed the Court a document prepared by the Defendant to show that

it was only disputing a sum of E 26,535.47 on the claim for broiler chicks supplied.

[21] It was PW1's evidence that the Plaintiff was also involved in the business of supplying broiler feed sourced from the Republic of South Africa to its customers. The Defendant was one of the Plaintiff's customers for broiler feed. According to PW1, the credit arrangement existing between the parties was that the Defendant was expected to pay for the feed supplied to it by the Plaintiff within a 30 day period. According to PW1, the Plaintiff supplied feed and medication for the chicks to the Defendant. The witness stated that, the debt outstanding from the Defendant would at times rise up to E 3,000,000.00 but the Defendant would gradually reduce the debt until it would be slightly above E 1,000,000.00. PW1 stated that currently, the Defendant is indebted to the Plaintiff in the sum of E 642,212.14 for broiler chicks supplied to it and another sum of E 460,156.02 in respect of broiler feed and medication supplied to it. PW1, denied that the Defendant has settled these sums of money as alleged in its plea.

[22] **ANALYSIS AND CONCLUSION**

This Court will first deal with the notices of withdrawal as attorneys of record filed by the Defendant's attorneys on two different occasions. In **Nedbank (Swaziland) Limited v Baslam Investments (Pty) Ltd t/a Fair Price Furnitures and Another (2016/11) 20 March 2013 SZHC 65,** it was held by the High Court of Eswatini, *per Ota J*, that;

> **"[2] Let me interpolate and observe here, that when this matter served before me for argument on the 15th March 2013, learned counsel Mr Mabuza who appeared for the Plaintiff, urged from the bar a Notice of Withdrawal of Attorneys of Record for Defendants filed on 14 March 2013 by S.P Mamba Attorneys. Mr Mabuza urged the Court to discountenance the said Notice of Withdrawal on the premises that leave should have sought for same, in view of the fact that the matter was set down for argument on the 15th March 2013 and notice of set down was duly served on the Defendant's Attorneys on the 6th March 2013.**

[3] I agree with Mr Mabuza. This matter was set down for argument on the 15th March 2013 and a Notice of Set Down was served on defence counsel on the 6th March 2013. It smacks of gross disrespect for the Court for Counsel to simply file a notice of withdrawal the day before argument of the application, without formally seeking for the leave of Court to do so. I do not think that the Court can be subjected to such treatment, more so as the Defendants did not even have the common courtesy of filing the Notice of Withdrawal with the Court. The Court first had sight of the said notice in open Court when it was urged upon it by counsel Mr Mabuza. This is certainly an unacceptable practice worthy of condemnation.

[4] A similar situation as in *casu*, presented in the case of *Silence Gamedze and Others v Thabiso Fakudze, Civil Appeal Case No. 14/2012.*

[5] In that case and in the wake of the Supreme Court session in November 2012, Appellant simply filed a Notice of

Abandonment of his appeal which had been pending for several months and tendered costs without bothering to appear in Court to tender apologies for his conduct. The notice of abandonment was also not filed with the Court.

[6] The Supreme Court discountenanced the Notice of Abandonment, proceeded with the appeal and ordered costs to be paid by the Appellant on the punitive scale of attorney and own client scale, as a mark of its disapproval of what it termed the egregiousness of Appellant's conduct."

[23] The conduct displayed by Defendant's attorney is appalling and conspicuously bad. It must be discouraged at all cost. This Court will show its disapproval by issuing an appropriate order as to costs. There is a limit to which an attorney can circumvent and seek to frustrate the due process of law by playing around with the Rules of Court, thereby ensuring that a matter does not get to be heard by the Court. Practitioners ought to properly utilize the Rules of Court and not use them as a shield for their inept conduct and to frustrate the other party by shrewdly tempering with the smooth flow of the wheels of justice.

An Attorney who engages in this kind of conduct shall regrettably have to bear the harsh consequences.

[24] All facts considered, it was proper for this Court to reject the *Notice of Withdrawal as Attorneys of Record* filed on behalf of the Defendant. Its primary purpose was not genuine but was filed with the aim to either delay or simply prevent the trial from taking off. Such conduct is unacceptable.

[25] Turning now to the Plaintiff's claim as supported by the evidence of PW1, it is the Court's conclusion that the evidence of the Plaintiff through its witness, was sufficient to fortify and validate the Plaintiff's claim against the Defendant.

[26] In summary, PW1's evidence was that the Plaintiff supplied broiler chicks as well as chicken feed and broiler medication to the Defendant in terms of the credit facility arrangement existing between the parties. PW1's evidence was that there still remains the sums of E 642,212.14 and E 460,156.02 outstanding on the goods supplied by the Plaintiff to the Defendant. According to PW1, they furnished the Defendant with copies of the unpaid invoices, duly signed delivery

notes and a printout of the entire ledger account of the Defendant kept in Plaintiff's pastel program.

[27] In the Supreme Court of Appeal case of **Rautini v Passenger Rail Agency of South Africa (853/2020) [2021] ZASCA 158 (8 November 2021)**, it was held by the Court that;

"[14]. The facts of this fall squarely within those in President of the Republic of South Africa vs South African Rugby Football Union (SARFU), where the Constitutional Court held as follows:

"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule, it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords

in Browne v Dunn and has been adopted and consistently followed by our courts."

[28] On at least three different occasions, this Court gave the Defendant an opportunity to either test, discredit or dispute the evidence of the Plaintiff presented through PW1, by availing themselves and participating on the trial, but the Defendant chose to play 'hide and seek' games, thereby effectively depriving itself of this opportunity. The result is that Plaintiff's evidence, through PW1, remains uncontroverted, undisputed and unchallenged.

[28] In **Herbstein & Van Winsen, <u>The Civil Practice of the Supreme Court of South Africa</u> (5th Ed), Vol 1, at page 888,** it is stated by the authors that;

"If when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove a claim to the extent that the burden of proof lies upon him, and judgment must be given accordingly, in so far as that burden has been discharged. Where, however, the claim is for a debt or liquidated demand, no

evidence is necessary unless the court otherwise orders. A party who appears when the hearing starts, but thereafter withdraws and absents himself from the remainder of the proceedings, must also be accounted a defaulter within the meaning of the rule." [underlined for emphasis]

[29] The learned authors further state (at page 889) that;

"In Sayed v Editor, Cape Times (2004 (1) SA 58 (C)), Davis J relied upon statement of a textbook that:

"It has long been recognized that where in an action a party chooses not to appear at the trial or, having appeared, withdraws from the trial, the other party remaining need not content himself with an order of absolution from the instance but may elect to lead evidence in order to satisfy the Court that he or she is entitled to judgment on the issues raised by those claims. The right to grant the final judgment should, however, be exercised with caution and only in special circumstances. In some cases the Courts have granted final judgment on the ground that the plaintiff was in deliberate default not due to circumstances beyond his or her control."

[30] Another factor which weighs heavily against the Defendant is the manner in which it has pleaded its case in the plea filed in Court. In substantiating its claim, the Plaintiff has attached annexures showing a long history of the business transactions between the parties. The ledger for the supply and delivery of broiler chicks to the Defendant shows an outstanding balance of E 642,212.14. Similarly, the ledger for the supply of chicken feed shows an outstanding balance of E 460,156.02.

[31] Against all this information by the Plaintiff, the Defendant is content in merely alleging that "*Defendant denies owing Plaintiff the amount claimed as all outstanding amounts were settled by Defendant.*" This does not constitute a proper way of pleading 'a denial'. The statement by the Defendant is a classic example of a "bare denial". In as much as pleadings ought not to contain evidence, still the Defendant was required to elucidate in its plea as to how, when and in what manner it alleges to have settled all the invoices for the goods sold and delivered to it by the Plaintiff. Even without evidence, this Court was in a position to grant judgment for the amounts claimed against the Defendant.

[32] It is stated by the learned authors **Herbstein & Van Winsen (supra- at page 592)** that;

"...In the course of his judgment dismissing the appeal, Tindall J (Feetham and Krause JJ concurring), after setting out the provisions of the rule, remarked:

"A plea ought to state expressly the defence which the defendant relies on, but it may happen to be so drafted that it indicates impliedly that the defendant intends to rely upon a certain defence. And if the terms of the plea do indicate, by implication, that the defendant intends to rely upon a certain defence, then I think it is the duty of the defendant to state clearly and concisely the material facts on which that defence is based..."

[33] It is the Court's conclusion that Plaintiff is entitled to the relief claimed and that costs be awarded at the punitive scale on account of the unacceptable conduct displayed by the Defendant's Attorney.

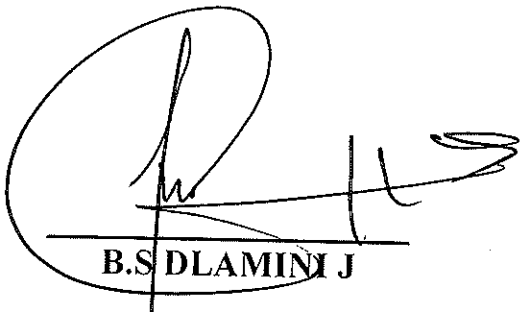
[36] The Court therefore grants orders as follows;

(a) **Defendant is to pay to the Plaintiff or its Attorneys the sum of E 642,212.14 in respect of Claim 1.**

(b) **Defendant is to pay to the Plaintiff or its Attorneys the sum of E 460,156.02 in respect of Claim 2.**

(c) **Defendant to pay interest at the rate of 9% on claim 1 and claim 2 calculated from date of issue of summons to date of final payment of claims.**

(d) **Defendant is to pay costs of suit at the Attorney-Own Client scale.**



B.S DLAMINI J

THE HIGH COURT OF ESWATINI

For Plaintiff: *Mr. S.M Simelane (S.M Simelane & Co.)*

For Defendant: *Mr. F. Tengbeh (S.V Mdladla & Associates)*