



IN THE HIGH COURT OF ESWATINI

CASE NO. 323/2018

HELD AT MBABANE

In the matter between:

DEVINE ARTISTS INVESTMENTS PTY LTD

PLAINTIFF

And

BUNYE BETFU SAVINGS AND CREDIT COOPERATIVE

SOCIETY LTD

1ST DEFENDANT

FINANCIAL SERVICE REGULATORY AUTHORITY

2ND DEFENDANT

NEUTRAL CITATION:

**DEVINE ARTISTS INVESTMENTS (PTY)
LTD AND BUNYE BETFU BUHLE BETFU
SAVINGS AND CREDIT COOPERATIVE
SOCIETY LTD & ANOTHER (323/2018) SZHC
– 323 [05/12/2023]**

CORAM:

BW MAGAGULA J

HEARD:

**27/10/2021, 02/11/2021, 10/11/2021,
11/11/2021, 19/11/2021, 12/01/2022, 24/01/2022,
17/03/2022, 22/03/2022, 04/05/2022, 05/05/2022,
12/05/2022, 19/07/2022, 02/08/2022, 16/08/2022,
07/11/22, 28/03/23, 29/03/23, 30/03/23, 20/06/23,
19/07/23 and 03/08/23**

DELIVERED:

05/12/2023

SUMMARY: Civil Law - Law of Contract – for the development of a member cards issuing system – Interpretation of contracts revisited terms thereof binding on the parties *to* the contract. Defendant's defence hinges on the fact that some of the board members of the Defendant felt the system was not working to their satisfaction – the contract does not specify how it should work nor did it provide that payment was conditional on the board members approving that the system is working. Requirements of a fraudulent contract – Turquand Rule principle considered.

Held: Plaintiff has on a preponderance of probabilities been able to prove its case – Plaintiff's claim granted with costs.

JUDGMENT

BW MAGAGULA J

BACKGROUND FACTS

[1] This is a claim for a payment in the sum of E312 931.78 (**Three Hundred and Twelve Thousand Nine Hundred and Thirty One Emalangeni Seventy Eight Cents**). It represents a balance subsequent to the payment of E469, 397.67 representing 60% deposit. The total amount of E782, 329-45 represented the total cost of the membership card issuing system, which was developed by the Plaintiff on behalf of the Defendant subsequent to a written contract entered into by the parties. The Plaintiff is a limited liability company carrying on business in Mbabane, District of Hhohho. Whilst the Defendant

is a Savings and Cooperative Society having its offices along Gwamile Street in Mbabane.

[2] The Defendant's defence as per the plea, is that the contract is fraudulent and is not binding. The Defendant also avers that the Plaintiff failed to supply or deliver the system as quoted. A different system was instead supplied which failed to produce the expected results.

[3] The Defendant has also filed a counter claim against the Plaintiff and seeks to resile from the agreement it entered into and prays that same be declared as null and void. The basis alleged is that the contract is fraudulent. The Plaintiff's officials unlawfully colluded with the former deputy chairperson of the Defendant to defraud the Defendant

[4] In the counter claim the Defendant further seeks a refund of the 60% deposit paid in the sum of E469 397.67 (**Four Hundred and Sixty Nine Thousand Three Hundred and Ninety Seven Emalangeni Sixty Seven Cents**).

[5] I am loathe to burden this judgment any further with a detailed recapitulation of the Plaintiff's evidence. This has already been done in the judgment pertaining absolution from the instance, which was handed down on the 17th March 2023.

PLAINTIFF'S CASE

- [6] Fundamentally, the Plaintiff's claim is for the payment of the balance of the contract sum of E312 931.78 (**Three Hundred and Twelve Thousand Nine Hundred and Thirty One Emalangeneni Seventy Eight Cents**). This is referred to as a balance because it common cause that the initial contract sum was for the amount of E782 329.45 (**Seven Hundred and Eighty Two Thousand Three and Twenty Nine Emalangeneni Forty Five Cents**). Subsequent to the agreement, the Defendant paid the sum of E469 397.67. The difference between these amounts is what is the subject of the Plaintiff's claim.
- [7] In a nutshell, during trial the Plaintiff led only one witness, Mr Thapelo Lekgowe. He told the court that pursuant to an agreement entered into by the parties, his company was mandated to develop for the Defendant a membership card issuing system for the Defendant. This witness presented to court a copy of the agreement which appears to have been duly signed by the parties.
- [8] Mr Lekgowe proceeded to tell the court that as part of the agreement, the Defendant paid the 60% deposit. In compliance with the agreement Plaintiff then developed the system. When complete, Plaintiff approached the Defendant and a presentation date was arranged for a demonstration of it's functionality. According to Mr Lekgowe, the system was able to function and few cards were printed. However, there was a glitch because one of the engineers that was working on the development had removed a certain part from the system, due to non-payment. The witness maintained that the system

works perfectly fine. He told the court that upon the payment of the balance by the Defendant, the removed part would be able replaced and the system would function optimally.

[9] This witness was cross examined extensively by Mr N. Manzini, the Defendant's Attorney. The following came out of the cross examination;

9.1 He conceded that the payment in respect of the deposit was paid to a company called GM Tronics trading as Cinisela Suppliers, not the Plaintiff.

9.2 He also mentioned that GM Tronics is directed by one Mcabango Gwebu. At the time the payment was made, the witness was not aware that Mcabango Gwebu was a director of the payee. Coincidentally, Mr Gwebu is the same official of the Defendant that the Plaintiff had be directed to work with as a contact person for the Defendant.

The Defendant's Case and Counter Claim

[10] The first witness for the Defendant was it's Manager Mr Mpumelelo Ginindza (DW2). He told the court that he is aware of the contract that was entered by the parties before court, he had a copy in his office and the Accountant also kept a copy. He told the court that the Defendant's internal policies were violated when the procurement of the card printing system was done. The Defendant was represented by members of the board of directors when the contract was entered into, yet it was the management that was supposed to be responsible for procurement and such related contracts. He continued to confirm that indeed the Plaintiff came to deliver the equipment, but the board

members of the Defendant were not happy with the manner in which it worked. He also told the court that the Plaintiff delivered a few members cards not all of them. This witness also emphasized on the submission of a trading licence as a requirement by a vendor in order to be awarded a contract at the Defendant's undertaking. Mr Ginindza also testified that the reason why the Plaintiff was not paid, is because the Defendant's board of directors were not happy with work of the Plaintiff.

[11] As per the procedure, Mr N.D. Jele Counsel for the Plaintiff was given an opportunity to cross-examine this witness. The following are the highlights of the cross examination;

11.1 The witness agreed with Mr Jele that the procurement policy he had referred to earlier in his evidence in chief was not produced in court. He also conceded that it was an internal document and the Plaintiff could not have been aware of it at the time the contract was entered into.

11.2 Mr Ginindza also accepted that he was not personally involved when the contract was negotiated and entered into, the Plaintiff dealt with the board members directly.

11.3 It also came out during cross examination that it was set as a condition by the Defendant's board members that the Plaintiff must produce a trading licence prior to contracting with the Defendant. The witness conceded to this.

DW2 – NONHLANHLA GININDZA

[12] This witness narrated to the court that she is a former board member of the Defendant. She was in office from October 2017 to 2022 and served under the supervisory committee. Their role as a committee was to look after the interests of the members. She confirmed that as a committee they found a copy of the contract between the Plaintiff and the Defendant when they came into office.

[13] The witness continued to tell the court that as soon as they settled into office, the Plaintiff submitted an invoice for payment. That was around March 2018. They could not process the payment because the membership cards were not there. On the issue of the contract itself, this witness acknowledged that during the handover, Mr Mabanda Nxumalo, the former chairperson had mentioned that there was a contract with the Plaintiff for the development of a card system for the membership. This witness also acknowledged that the Plaintiff did make a presentation to the board on how the system should work. However, the witness said they were disappointed that the system only produced one card.

[14] This witness was also cross examined. She confirmed that she is not an Information Technology Expert. She also conceded to the fact that Mr Mcabango Gwebu and Ms Gcebile Vilakati were nominated by the former board of directors to supervise the performance of the Plaintiff as they had the requisite expertise in this area.

[15] It was also accepted by this witness that none of the board members had an expertise in Information Technology and no external expertise was engaged by them to assist either during the presentation or thereafter on the functionality of the system.

DW3 – RONNIE GININDZA

[16] The third witness for the Defendant was Mr Ronnie Ginindza (“DW3”) who also testified under oath. “DW3” testified that he was elected to the board in the year 2017. This witness testified that after they were elected into office, they received a letter from the Plaintiff demanding to be paid the balance of E312, 000-00 (**Three Hundred and Twelve Thousand Emalangeni**).

[17] The witness proceeded to narrate that the board decided to visit the office of the Plaintiff. They were shown a laptop and a camera. They then went back to the board to report and a decision was taken not to pay the Plaintiff. This witness also confirmed that he attended a presentation of the system to the board by the Plaintiff’s officials and one card of a member he did not know was able to be printed.

[18] They expected the cards to have or show the name of the member the witness explained. The cross examination of this witness was brief, it was put to him that Plaintiff performed in terms of what was required of it.

DW4 – FORTUNATE LUKHELE

[19] This is another former board member of the Defendant. She testified that the board of the Defendant received a demand for the payment of the balance of

the contract sum. They subsequently went to see what items were there. She told the court that they found a laptop and a camera as the only items that were in the quotation. The printer was not the one indicated in the quotation.

[20] She continued to tell the court that she attended a presentation of the system and one card worked and it showed the information of the member inclusive of his picture and loans. "DW4" confirmed in chief that the contract was signed by Ms Thobile Dlamini who was the Secretary of the Board at the time. The witness decried that the previous board processed the payment of the 60% deposit on the 12th October 2017 even before the contract was signed on the 13th October 2017.

[21] It was established from "DW4" under cross examination that she is also not an Information Technology Expert like all the defence witnesses to say the system did not work. It was put to her that the allegations that the board did not find a printer was an afterthought as it is not in her affidavit resisting summary judgment and she did not give an answer.

[22] It was put to the witness "DW4" that the process of the payment of the deposit by the Defendant was done by the Defendant's own officers without the Plaintiff and she confirmed that.

DW5 – ERIC SEYAMA

[23] This witness told the court that he was one of the board of directors during the year 2017.

[24] He proceeded to testify that the Plaintiff bought “things” for E90, 367.80 (**Ninety Thousand Three Hundred and Sixty-Seven Emalangenani Eighty Cents**) as seen on paragraph 13.2 on page 46 of the Book of Pleadings and the balance went to profits. Under cross examination “DW5” admitted that the contract was not only for procuring goods but also services. It was demonstrated that the sum that was said to be for profits also paid for paying for the services rendered. “DW5” admitted that the contract was signed by Thobile Dlamini.

ANALYSIS OF THE PLAINTIFF’S EVIDENCE

[25] I find it necessary that in as much as the evidence of the Plaintiff’s witness was dealt with at length in the judgment pertaining to the application for absolution from the instance, that I revisit the Plaintiff’s evidence in relation to the merits of this matter.

[26] PW1, Mr Thapelo Lekgowe was the only Plaintiff’s witness. His version to the effect that the Plaintiff developed a membership card issuing system was not disputed. What was put in issue by the Defendant’s Counsel during cross examination, was that the system could not work. Secondly, that at the time the Plaintiff entered into the contract, it was not in possession of a valid trading licence. In as much as this witness justified why the system could not

work¹, the truth is that he conceded that during the demonstration, the system could not function optimally or as expected. The question is, how does the malfunction affects the Plaintiff's case if it does? The answer lies on what the Plaintiff has pleaded as averments supporting it's case in the particulars of claim.

[27] In the particulars of claim, the Plaintiff pleaded that it entered into a contract for the supply or development of a membership card issuing system. On the 13th October 2017. It would be folly for this court to ascribe an interpretation that would say, it was not specified in the agreement that the system must work. Off course the system must perform the purpose for which it was purchased.

[28] In this regard, I find that PW1 correctly and outrightly told the court that system could not operate optimally. He did not end there, he proffered an explanation why it did not work, which is the sabotage by the hired engineer who removed the part. He assured the court though, that if Plaintiff can receive payment, the engineer would be paid and the part will be installed.

[29] As it was observed in the judgment for absolution from the instance, this witness was able to demonstrate convincingly that indeed the parties entered into the contract and the Plaintiff developed the system. He also confirmed

¹ Apparently one of the engineers had remained a part from the system because he had not been paid.

that the Plaintiff now required the balance as per the agreement and same was not forthcoming from the Defendant.

ANALYSIS OF EVIDENCE AS ADDUCED BY THE DEFENDANT'S WITNESSES

- [30] Mr Mphumelelo Gininidza the manager of the Defendant, outrightly conceded that he is aware of the contract that was entered into by the parties before court. He had a copy and the Accountant also kept a copy. This then flies in the face of what the Defendant has pleaded in the plea. In paragraph 3 of the plea the Defendant emphatically denies that such an agreement was ever concluded by the parties. What this witness seemed to punch holes in, is the manner in which the contract was entered into. He stated that it was concluded against their internal policies. Although, he could not take the court into confidence by producing a copy of that policy. Be that as it may, the court is in doubt if even if he did so, that would have taken the matter any further. The internal policies regulated internal process to be followed by office bearers or employees of the Defendant. The alleged policies do not form part of the agreement between the parties before court. In any event, it is not the Defendant's case before court that the reason why payment is being withheld is because internal policies were contravened. The Defendant has not pleaded so in the plea. In any event, that argument would contravene the Turquand Rule. The board of directors of the time presented themselves to the Plaintiff as the persons who were rightfully authorized to represent the Defendant in the dealings. The Plaintiff was entitled to assume that all internal prerequisites and requirements that allow the Defendant to enter into such a transaction were complied with. It was not for the Plaintiff to then enquire as

to whether in doing so, they followed all their internal procedures. Therefore, even if the policy was produced by this witness I doubt if it would have added any evidential weight to the Defendant's case.

[31] This witness further told the court that he conceded that the Plaintiff came to deliver the equipment. However he told the court that the board members were not happy in the manner in which it worked. The language used here deserves a mention and comment. In the technical nature of the issue of dispute being development of a card system. *"One needs to make sense when witness says the board was not happy in the manner in which it had worked"*. One would have expected the witness to be specific and talk to the unhappiness which talk to the Defendant's defence in the plea. What is it that they were not happy about? Was this happiness a delivery that was expected of the Plaintiff as set out in the agreement? Those are the questions that triggered when such vague and general language is used by a witness. This witness also touched on the issue of the trading license as being a requirement for a vendor to be awarded a contract. Again, this appears not to be the Defendant's defence in the plea. In any event, even when it is considered as a stand-alone issue that the Defendant raised through its witnesses before court. It does not take the matter any further. The agreement as signed by the parties does not set out the acquisition of a trading licence by the Plaintiff as part and parcel of the terms and conditions binding the parties. It is therefore in my view, irrelevant and it does not add any evidential weight in so far as the advancement of the Defendant's case.

[32] Consideration of the second witness Nonhlanhla Ginindza will now be made. This witness appeared as well to be general in her testimony. The language that she used as well was general and not specific. For instance, when she was asked by the Defendant's counsel in chief as to what she did when she got into office between the years 2017 – 2022. She told the court that as soon as they settled into office they received an invoice for payment from the Plaintiff. She conceded that the chairman Mr Mabandla Nxumalo, the former chairman had in fact in his hand over notes told them about the contract. However, in court she then tried to make an impression that in as much as she was aware of the contract, but as a board they only received a copy. As if the existence of the contract was an issue. What was initially an issue was the names of the person who signed the contract on behalf of the Defendant. Initially the Plaintiff had pleaded in the particulars of claim that it was Mabandla Nxumalo. That was amended accordingly. Also, she conceded that the former chairman whose board had entered into the contract, had acknowledged the contract. In his handover notes he disclosed that such a contract exists. As to why this witness then highlight the existence of a copy as if the authenticity of the contract was an issue, is not immediately clear. It appears to me that the fact that the former chairperson included this issue on his handover notes to the new board is an acknowledgment that the Plaintiff was engaged. The contract was part of the substantive issues that were before the new board. They knew that the Plaintiff was engaged.

[33] The witness also acknowledged that the system was developed and delivered by the Plaintiff. However, where the loose usage of the terminology comes to the fore is when this witness said **“bekukhona konkhe lebekufanele**

kwenteke". Which could be interpreted to mean that there was everything that was supposed to be done. Now, what does one makes out of such a testimony. We are talking of a card printing system here. So, if a witness in trying to justify why the payment was not made, comes to court and say such there was everything that was supposed to be done, why was not the payment not processed then? This witness went further to say the matter was discussed by the board and it was then referred to the supervisory committee which she served in. She told the court that they investigated and they sought support documentation. They asked for quotations and invoices. However, she then told the court that at first, they were presented with the proof of payments, but later on when they asked for same it appeared that Mr Mcabango Gwebu had removed them even on the computer system. Even if the court accepts that this was the case, but how does this constitute a defence to the Plaintiff's defence. If Mcabango Gwebu a former board member of the Defendant's decided to remove proof of payments and quotations from the Defendant's computers, what has that got to do with the Plaintiff's claim? How is it relevant to the terms of the contract that was entered into by the parties? Again, this sort of evidence in my view did not add any evidential weight to the Defendant's case and did not speak to the defence that was set out by the Defendant in the plea. It appears to go on a long winded route to cast some aspersions on the conduct of Mcabango Gwebu. Even if Mcabango's conduct was odd or unbecoming, how is that relevant to the Plaintiff's claim? The court also note that certain aspects of this witness's evidence was contradictory to the version that was given by DW1 – Mphumelelo Ginindza. This witness outrightly told the court that the system was delivered by the Plaintiff. However the cards were not complete. On the other hand, Miss

Nonhlanhla Ginindza told the court that only one card was printed by the machine. This is inconsistent with Mr Mphumelelo Ginindza's evidence.

[34] This witness also conceded under cross-examination that she is not an information technology expert and the people who had been mandated by the board to supervise the performance of the Plaintiff technically, were Mcabango Gwebu and Gcebile Vilakati. Hence, the court makes a finding of fact that this witness did not have the necessary technical aptitude to make an opinion nor a finding on the technical functionality of the system.

[35] The other witness that gave evidence in court was Mr Ronnie Ginindza. He is also one of the former board members who served in 2017. More or less he repeated what Miss Nonhlanhla Ginindza had said. They received a letter of demand from the Plaintiff demanding to be paid the balance of E312 000-00 (**Three Hundred and Twelve Thousand Emalangen**). What is worthy of mention in so far as his evidence is concerned, is that after they went to the office and they were shown a laptop and the camera, the board then took a decision not to pay the Plaintiff. This witness again said during the presentation of the system, one card was produced of a member that he did not know. He also told the court that as a board, they expected the cards to show the name of each member.

[36] One would have expected this witness probably to take the matter further and demonstrate to the court on what basis did the board take a decision not to pay

the Plaintiff. Which clause of the contract justified that decision so as to support the defence as articulated by the Defendant in the plea? Disappointingly, that was not done.

[37] Miss Fortunate Lukhele like the rest of the board members that gave evidence before court, told the court that she also served in the board during the 2017 term. This witness also confirmed that there was a handover that was done by the former chairman Mr Mabandla Nxumalo. The issue forming the subject matter before court was also part of the issues comprising the handover. The former chairman told them that 60% had already been paid and 40% was outstanding. Regarding the functionality of the system, this witness also said she attended the presentation of the system and only one card was produced.

[38] This witness also confirmed during her evidence in chief that the contract was indeed signed by Miss Thobile Dlamini, who was the secretary of the board at the time. I pose here to comment on this apparent concession to one of the contentious issues. In my view, the concession then addresses the issue of the availability of the original contract, and also it settles the uncertainty which was created by the evidence of Dzeli, who had said Mabandla Nxumalo signed. Clearly, this evidence settles this issue. The Defendant's own witness confirmed that there was a contract and it was signed by Miss Thobile Dlamini.

[39] Mr Eric Seyama as well like his other colleagues in the board, was not in office when the contract was entered into. He came to the picture when it was time for payment. He also admitted that he was not an expert in the merx under issue and the services that the Plaintiff was engaged to do. This is evident in the language he also used to describe some of the components of the membership card system. He referred to as “things”. He was also fixated on the profits that the Plaintiff were to make from the agreement, which in my view was an irrelevant consideration as a basis to refuse to make payment. The Defendant agreed on the price in the agreement. The members of the board in the office at that time are presumed to have applied their minds to all terms and conditions of the agreement including the price.

[40] The last witness for the Defendant was Mr Eric Seyama (“DW5”) who testified under oath as well. DW5 testified that he was elected into the office with the rest of the defence witnesses “DW2”, “DW3” and “DW4” in the year 2017. “DW5” repeated the evidence of the defence witnesses and we will not regurgitate it here. We will only deal with something that was differently said by him.

[41] “DW5” testified that the Plaintiff bought things for E90, 367.80 (Ninety Thousand Three Hundred and Sixty-Seven Emalangen Eighty Cents) as seen on paragraph 13.2 on page 46 of the Book of Pleadings and the balance went to profits. Under cross examination “DW5” admitted that the contract was not only for procuring goods but also services. It was demonstrated that the sum

that was said to be for profits also paid for paying for the services rendered. "DW5" admitted that the contract was signed by Thobile Dlamini.

THE LAW

[42] It is now almost trite that in a civil case the *onus* rests on the Plaintiff to adduce credible evidence to support its case. This is done when the Plaintiff on a preponderance of probabilities it satisfies the court that its version is true, accurate and acceptable. And also shows that the version advanced by the Defendant is false or mistaken and false to be rejected. In deciding whether the evidence is true or not the court will weigh up and test the Plaintiff's allegation against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound with the consideration of the probabilities. If the balance of probabilities favours the Plaintiff, the court will accept his version as probably true. If however, the probabilities are evenly balanced, in the sense that they do not favour the Plaintiff's case any more than the Defendants. The Plaintiff can only succeed if the court nevertheless believes him and is satisfied that his version is true and that the Defendant's version is false².

[43] In his work **RH Christie (The Law of Contract of South Africa Third Edition at page 579)**. The author states that an Applicant is always entitled

² National Employers General Insurance vs Jagers 1984 SA (4) 437 at 440 DHP.

to claim a specific performance in respect of the contract, assuming he makes a case and his claim will be granted subject to the court's discretion.

[44] Another author LT Harms in his works "**Amler's Precedents of Pleadings**" at page 356, states that a party wishing to claim specific performance in terms of a contract must;

44.1 *Allege and prove the terms of the contract;*

44.2 *Allege and prove compliance with antecedent or reciprocal obligations or tender to perform them;*³

44.3 *Allege non-performance by the Defendant; and*

44.4 *Claim specific performance*

[45] The learned author RH Christie refers to the *locus classicus* on the subject being the case of **Farmers Co-op Society v Berry 1920 AD 343 – 350** and quotes the following passage;

Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in Thompson v Pullinger

³ See: SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle 1955 (3) SA 541 (D) and RM Van de Ghiste & Co. (Pty) Ltd v Van de Ghiste 1980 (1) SA 250 (C)

(1894) 1OR at p301, 'the right of a Plaintiff to the specific performance of a contract where the Defendant is in a position to do so is beyond all doubt'. It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the Defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a Defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Stoney (Equity Jurisprudence, sec. 717, (a), 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it'. The election is rather with the injured party, subject to the discretion of the Court".

THE DEFENDANTS SUBMISSIONS

[46] The Defendant has eloquently made the following submission as per the heads of arguments:

[47] It is submitted that the contract sued upon is fraudulent. The Defendant did not have a copy of the contract in its offices. A copy was later provided to it by Plaintiff.

[48] The Plaintiff does not have the original contract;

[49] One Director of the Plaintiff, Dzeli Mdluli, in her affidavit emphasized that the contract was signed by the Former Chairperson of the Defendant, Mabandla Nxumalo;

[50] The other Director, Thapelo Lekgowe, on the other hand in his oral evidence insisted that the contract was signed by the former Secretary, Thobile Dlamini.

[51] The Plaintiff applied to amend its particulars of claim. However, such amendment did not cover or amend Dzeli's statement under oath which stated that the contract was signed by Mabandla Nxumalo.

[52] The said Mabandla Nxumalo denied signing the contract, as per his affidavit where he also denied having ever met with Dzeli, yet Dzeli had stated under oath that the contract was signed in her presence by Mabandla.

[53] There is still the contradiction between the two Directors of the Plaintiff as to when the contract was signed and who signed it on behalf of the Defendant.

The Court cannot just ignore the affidavit by Dzeli who did not give oral evidence to clarify or explain why she insisted that the contract was signed by Mabandla Nxumalo. The Court should take note that the said Dzeli was in

attendance in Court from the beginning of the trial till the end. No explanation was given as to why she could not take the stand to explain herself.

[54] Dzeli in her affidavit told the Court that funds were paid to G.M Tronix, and that G.M Tronix was Plaintiff's sister company.

54.1 Thapelo when giving oral evidence also stated that G.M Tronix is Plaintiff's sister company.

54.2 However, under cross-examination Thapelo told the Court that G.M Tronix was a company owned by Mcabango Gwebu and that he did not know at the beginning that the account in which the funds were paid to belonged to the 'contact person', who is Mcabango Gwebu.

[55] The above admission by Thapelo that the account belonged to the contact person is proof that there was collusion between the former Deputy Chairperson (the contact person) of the Defendant and the Plaintiff and its Directors.

55.1 The Plaintiff sent a letter to the Defendant, page 10 of Bundle "A", where it stated that it was giving its bank account details.

In the letter, Plaintiff's Directors told the Defendant that "Please find our banking details below for our company Divine Artist Investments trading as Ciniseka Investments".

55.2 *The Plaintiff lied to the Defendant when it said the bank account belonged to it. The Plaintiff further lied when it said its trading style is Ciniseka Investments.*

[56] To prove further that the whole transaction was fraudulent, the requisition to transfer was prepared and signed by the former Chairperson Mabandla Nxumalo, and the former Secretary Thobile Dlamini on the 12th October 2017 – See page 13 of “Bundle A”. This is before the contract was signed on the 13th October 2017.

[57] The Defendant further told the Court that the Plaintiff did not have a trading license, as well as a place where it was trading from. PW1 confirmed to the Court that the Plaintiff did not have a trading license and that it did not have offices at the time it was awarded the contract.

57.1 **The Trading License Order No. 20 of 1975. Section 5 (1)** provides as follows;

“5. (1) After a day to be determined by the Minister by Notice in the Gazette, no person may conduct any business –

a) *Except under and in accordance with the terms of a license or a license issued under and still valid under the law hereby repealed; or*

b) *In any place which is not situate within a general business area without the written authority of the Minister;*

c) *In any specific goods unless his license authorizes him to do so.*

(NOTE: the Minister by Legal Notice 8 of 1976 has appointed the 2nd February, 1976, as the day determined under Section 5 (1).

[58] From Plaintiff's own Directors, the Plaintiff could not trade lawfully because it did not have a trading license and an office. The Plaintiff was in breach of all the provisions of Section 5 (1) (a), (b) and (c) as quoted above.

[59] The Court cannot therefore endorse an illegal act or conduct by granting the order sought by the Plaintiff. The only lawful decision would be to declare the contract null and void because the Plaintiff could not legally do business as it was in breach of Section 5 (1) of the Trading Licenses Order No. 20 of 1975.

[60] The Plaintiff's witness failed to demonstrate that the system works. Mr Lekgowe first failed to demonstrate to the Defendant's Board, and also failed to demonstrate to the Court. He had set up his equipment in Court but it did not work and the Court witnessed this itself.

[61] Furthermore, the Plaintiff procured items which are different from that which it had quoted.

[62] Dzeli Mdluli, in her affidavit stated that the deviation was authorized by the former Chairperson of the Defendant, yet PW1 told the Court that they communicated with the contact person Mcabango Gwebu who approved the deviation. This contradiction further compounds the Plaintiff's problems with

the impugned contract. The contradictions between the two Directors of the Plaintiff cannot be ignored. The Directors are also husband and wife and stay together.

62.1 *It should be clear to the Court now as to why Dzeli was not called not give evidence on behalf of the Plaintiff even though she was present in Court from the start of the trial till the end. The only conclusion to be made is that the Plaintiff did not want her to contradict what she had said in her affidavit, which has transpired to be untrue or lies, as this would expose them that their case is premised on lies and fraud.*

ADJUDICATION

[63] After all has been said and done, sight must not be lost to the fact that the parties on their own elected to reduce their agreement into one single memorial, which is the signed agreement. Ultimately the parties are bound by the contract that they entered into. The court can only look at the four corners of this agreement for the terms and conditions regulating the agreement between the parties.

[64] The Plaintiff in paragraph 3 of the particulars of claim pleaded specifically as follows;

“On or about the 18th October 2017, and in Mbabane the Plaintiff and the Defendant concluded a written agreement for the development of a membership card issuing system”.

[65] In response to the above quoted paragraph the Defendant in its plea, denied the entire contents of this paragraph and challenged the Plaintiff to produce the original written agreement. Contrary to such a bold denial the Defendant's first witness DW1 – Mphumelelo Ginindza did not only confirm that he is aware of the contract, but confirmed that as an Accountant he kept the copy. The signature of the person who signed the contract being that of Thobile Dlamini, was also identified by one of the witnesses Fortunate Lukhele. This then flies on the face of the Defendant's denial in the plea, that on the 13th October 2017, the parties concluded a written agreement. It appears that the denial of such a fact by the Defendant was without any factual basis. None of the witnesses it called was able to vouch for such a denial. Hence, the court can easily dispense with this issue and make a finding that indeed this contract was entered into. The denial of either of the signature or of entering into the contract has got no factual or legal basis.

[66] The first witness in his evidence in chief, also alluded to the procurement having been done. Although, he punched holes on the lack of compliance with internal procedures by the then board, but as a matter of fact, he confirmed that this procurement was done and the equipment was delivered. Although he said it would have been proper that the procurement be done by management. The court accepts the sentiments that were shared by this witness and his concerns. However, in term of the Turquand Rule, this cannot be a defence against the Plaintiff. The latter is entitled to assume all internal processes were followed before the agreement was entered into. Whatever the case maybe, that cannot be a ground to find fault with the procurement as against the Plaintiff. He actually did not attempt to do so even in his testimony.

I have no doubt that this witness is credible, he is the manager of the Defendant in an event, and he is responsible for the day to day running of the SACCU business. He is expected to know this. It is then mind boggling why the Defendant had to deny the existence of the written agreement in the plea, only for its own witnesses to come to court and concede that they are aware of the written agreement and the procurement of the card system from the Plaintiff.

- [67] In a claim for specific performance the court has a discretion to grant or refuse an order for specific performance which discretion must be exercised judiciously and not capriciously nor upon a wrong principle. See: **Mavimbela vs SEDCO Mswazi Estate Late Darlington and Others**⁴. See: also **Savela Investments (Pty) Ltd vs SEDCO Civil Appeal Case No. 27/2008 and 43/2008. R.H Christie**⁵ also provides that;

“The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all...the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract”.

- [68] On the trading licence argument, which is that the Plaintiff could not trade lawfully without a trading licence. On reading of the statute that the Defendant relies on, there is no provision that nullifies an agreement due to the absence of a trading licence. That it might criminalize both the non-furnishing thereof is quite another matter. Infact when this agreement is considered, it appears

⁴ Civil Case No 27/2008

⁵ The Law of Contract in South Africa 2nd Ed page 587

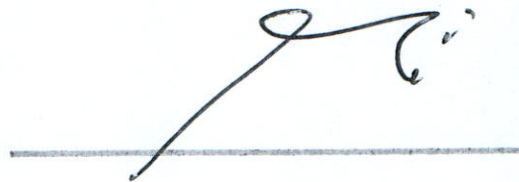
that the Defendant is blowing hot and cold. When the Defendant paid the deposit, the absence of a trading licence was a non-issue. This begs the question when the Defendant suddenly remember that possession of a trading licence was part of the conditions of engaging the Plaintiff. This appears to be a facile attempt to avoid the payment of the balance, the court rejects this defence.

[69] The Defendant has pleaded and argued extensively that the contract must be set aside because it is fraudulent and was a result of collusion. Unfortunately there is no iota of evidence that was adduced during the trial to substantiate such allegations. Collusion is defined as a secret or illegal cooperation or conspiracy, especially in order to cheat or deceive others⁶. None of the Defendant's witness dealt with these allegations and adduced evidence with depth on who on the part of the parties participated in the conspiracy. When? and how? The court was told of Mr Mcabango Gwebu removing the documentary payments trail from the Defendant's system. But this does not speak to the contract being fraudulent and/or being a result of collusion. There is therefore no legal basis for setting aside the agreement as it has been contended in the counter-claim filed by the Defendant. Infact, the entire counter claim of the Defendant has not been supported by any evidence led by the Defendant's witnesses during the trial. It ought to fail, and it is dismissed accordingly. The whole board of the Defendant at the time was aware of the contract. Hence there is no factual or legal basis for the fraud and collusion.

⁶ See: Oxford Dictionary

[70] In the totality of the foregoing, it is therefore the court's finding that the Plaintiff has succeeded in proving its case on a preponderance of probabilities. The court will therefore grant the Plaintiff's claim as follows;

- (a) Payment of the balance of E312, 931.78 (**Three Hundred and Twelve Thousand Nine Hundred and Thirty-One Emalangeni Seventy –Eight Cents**).
- (b) Interest thereon at the rate of 9% per annum calculated from the date of summons to date of final payment.
- (c) Costs of suit.

A handwritten signature in black ink, appearing to be 'BW Magagula', is written over a horizontal line.

BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For the Plaintiff:

Mr N. D Jele (Robinson Bertram)

For the Defendant:

Mr N. Manzini (CJ Littler & Associates)