IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 920/2019**

In the matter between:

BUY AND SAVE SUPERMARKET T/A POWER TRADE **PLAINTIFF**

AND

RICKS LOGISTICS (PTY) LTD **DEFENDANT**

JUDGEMENT

Neutral citation: *Buy and Save Supermarket T/A Power Trade & Ricks Logistics (Pty) Ltd (920/2019) SZHC 116 (4th June 2024).*

Coram: *S.M. MASUKU J*

Date of heard: *04/07/2023,11/07/2023,10/08/2023,14/12/2023, 19/12/2023 and 17/04/2024*

Date delivered: *04th June 2024*

Summary:

Law of contract- whether or not the Defendant should be held liable to compensate the Plaintiff for residual insurance sums per consensual agreement to pay between the parties.

Special contracts- Goods in Transit (carriers) Insurance- Transporter's liability for the safe delivery of the goods not strict absolute liability issue.

The Defendant (Plaintiff in –reconvention) filed a counter-claim for repayment of E100 000 (One hundred thousand emalangeni) paid as deposit on the agreement to pay.

Held:

The Plaintiff's claim dismissed with costs at ordinary scale. The Defendant (Plaintiff in –reconvention) granted judgement in the amount of E100 000 (One hundred thousand emalangeni) together with interest and costs at ordinary scale.

[1] In this action Buy and Save Supermarket (Pty) Ltd ("The Plaintiff") sued Ricks Logistics (Pty) Ltd ("The Defendant") for payment of the sum of E373 000-00 (Three hundred and seventy three thousand emalangeni). The Plaintiff's claim is based on the Defendant's liability for loss of goods which was incurred as a result of the Defendant's truck being hijacked and the Plaintiff's goods stolen.

[17] The Plaintiff called Mr Malik Merchant (Pw1) to the stand. He testified that the Plaintiff was a wholesale company that bought goods (stock) from local markets but due to so much competition it sourced out goods from cash and carries from the Republic of South Africa (RSA). For that purpose, the Plaintiff would hire transporters to transport the goods on their behalf.

[18] Their first engagement with the Defendant was on or about April or May 2017 where they hired the Defendant to transport goods to the value of E743 920-32 (Seven hundred and forty three thousand nine hundred and twenty emalangeni thirty two cents). He testified that when they first engaged there was no agreement on the limit of the value of the goods to be transported but to avoid the risk they agreed not to overload the trucks by weight. Thirty two tons of weight was to be their maximum. When the court asked what risk he was referring to, he said this risk was the risk of the truck being hijacked.

[19] He described the process that was involved before the loading of the goods. The first stage was, they looked at the suppliers' promotional pricing. They then asked for a quotation of the goods they would like to purchase. They would then place an order which takes two to three days to prepare a load. Once ready they would then ask a transporter to collect the load. The truck goes to the supplier, at the dispatch the goods are loaded using an invoice, which the driver would have been using to physically check the goods as they are being loaded. The Defendant's driver would then sign the invoice on behalf of the Plaintiff.

[20] He was asked in examination in chief what brought him to court, he testified that he was pursuing the Plaintiff's claim for E373 000 (Three hundred and seventy three thousand emalangeni) money that the Defendant had agreed to

pay by letter dated 23 January 2019 shown to the court. He testified that the Defendant was then aware of the hijack when he approached him. He said he showed him the invoice of the goods and explained that the Plaintiff had already received E400 000 (Four hundred thousand emalangeni) from their insurers (SRIC). He said from subtracting the E400 000 (Four hundred thousand emalangeni) from the invoice of E881 054.49, the amount of E473 000 was outstanding. less the E100 000 (One hundred thousand Emalangeni) the Defendant had already paid their balance due was the E373 000 that the Plaintiff was claiming. They were claiming the balance of E737 000 (Seven hundred and thirty seven thousand emalangeni) in this action.

[21] When asked in examination chief if it was correct that he had misrepresented the value of the transported goods from the real value of E881 054(Eight hundred and eighty one thousand emalangeni fifty four cents) to E400 000 (Four hundred thousand emalangeni), he said it was simple not correct. He alluded to the fact that the Defendant's driver had disclosed in the police report that the goods had been plus/minus E900 000(nine hundred thousand), there was no chance that he had undervalued the goods and there was no reason for him to have done that. The witness also showed the court proof of payment for the E881 054-49 (Eight hundred and eighty one thousand fifty four emalangeni and forty nine cents)invoiced goods.

[22] On the contention that the Defendant made an undertaking to pay subject to the Defendant being paid by its insurers, he said the commitment was not made subject to them being paid by their insurer. This was not the case because if it was them it would have been reflected in the offer letter dated 23rd January 2023.

[23] In cross examination, it was first put to Mr Merchant that certain assertion he made regarding the process leading up to the transportation of the goods were not true. It was put to him that from the time the Defendant dispatched its driver, until dispatch and loading, the Defendant would not be aware of the value of the goods. He agreed.

[24] He also agreed that one of the things he required the Defendant to do before transporting his goods was that he should take out a Goods In-Transit Insurance (GIT). That from time to time he would be required by the Defendant to provide proof of the current cover for that period. This he said became necessary because there was an increase in the hijackings. He also agreed that on or about the 6th December 2017 he had called for that proof and the Defendant provided it hence he instructed them to transport his hijacked goods in 2017. He confirmed that he would not have dealt with the Defendant if he did not have GIT Cover. He confirmed further that the value of the Insurance was very relevant and important on their agreement. The weight of the goods was also important to the Defendant to avoid over loading fines.

[25] He was asked, if it was his evidence that he would not have dealt with the Defendant if he had not taken a GIT cover and that the value of the insurance was relevant and important to both parties. Why would the Plaintiff then load goods over the insurance covered value? Mr Merchant gave no clear answer, he then said "It was a mistake to load goods that the Insurance could not cover".

[26] It should be noted from evidence of Mr Mechant that he accepted that the loading of the goods in excess of the insurance cover was a mistake of both parties, if the Plaintiff had known that a hijacking would occur, the Plaintiff

would not have exceeded the amount of the cover when loading the goods. This is how the questioning went;

DC: "Are you saying it was a mistake to load goods that the Insurance could not cover?

PW1; "It was a mistake on both sides"

DC; "Is it not correct that it was the Plaintiff's instructions that the Defendant's driver should check the quantities of goods against the invoice to make sure that all the invoiced goods are loaded?

Pw 1; It is a general practice but I can say not 100% to be certain with everything in the pallet."

Dc; 'At your company's instructions?

Pw1;I say both parties'

DC' At whose instructions was it actually?

PW1; 'Yes our instructions"

Later on towards the end of the cross- examinations, the defence posed the following questions,

DC; "You had been asked on the issue pertaining to the overloading of the Truck and you said it was a mistake...what did you mean?

PW1; 'I see a mistake from the Plaintiff's perspective. I had no control, I wish it was loaded to the value of E500 000 (Five hundred thousand emalangeni). It was usual that the goods in transit between us would be more than the value of E500 000(Five hundred thousand emalangeni).

DC; No further questions…

[27] The Defendant introduced Mr Muhle Patrick Mngomezulu(DW1) the Managing director of the Defendant. He informed the court in examination-in-chief that the Plaintiff and Defendant entered into an oral transport agreement early 2017. The Defendant agreed to transport goods (stock for trading for the Plaintiff from Johannesburg or Nelspruit to Eswatini.

[28] They agreed that the Defendant would take out and at all material times maintain a Goods In- Transit Insurance cover (GIT) to protect the Plaintiff's goods in transit. He said the transporter would claim from the Insurer in the event an incident occurred. He continued to testify that the terms and conditions that were applicable to the insurance contract were that it had a certificate which stipulated that they could only load goods within limits of the value provided by the policy. In their case the value was E500 000 (Five hundred thousand emalangeni).

[29] He testified that it was the responsibility of the Plaintiff to ensure that the load was within the limit of the Insured value. Once the Plaintiff's goods were ready for collection, Mr Malik would call the Defendant's official to inform them the order was ready for collection from a particular place in South Africa. The details of the address would then be given to the driver of the truck for collection.

[30] The Defendant he said was not privy to the value of the stock as that was between the Plaintiff and the supplier. The Defendant's driver would only be aware of the quantity that determined the weight of the goods and the value when the goods were being loaded by the supplier at the Plaintiff's instructions. He testified that their driver would be given the invoice when

loading so that he can just tick the boxes of the goods that were being loaded according to Plaintiff's specification. The driver had no mandate to alter or change or refuse what to be loaded.

[31] He testified that for this particular instance he did get a report that their truck was hijacked as it was picked up by the Defendant's satilite at Haartesbees place which was a complete opposite direction of its destination, quite a distance and the truck was found idling on its own.

[32] The theft was reported to the police and his driver filed a report which he only got to see later from his insurers. The driver recorded that the goods in transit or stolen were worth plus/minus E900 000(Nine hundred thousand emalangeni).

[33] He testified that Mr Merchant sent a claim to his office and on the basis of that information his office filed a claim from their GIT to the value of E473 000 (Four hundred and seventy three thousand emalangeni).

[34] He testified that the Plaintiff did not inform him or his office of the actual value of the goods. He testified that the Insurance company repudiated the Defendant's claim in a letter dated 28th June 2019. He further told the court that it took the insurer about eight months to reject the claim which they had filed in October 2018. He said between the filing of the claim and the repudiation, he communicated with Mr Merchant who informed him that there was pressure on his side hence he was following up on the insurance pay out. He informed him that his boss (Mr Merchant's boss)wanted his money and wanted to know why it was taking long for the insurance to settle the claim. He testified that he informed Mr Merchant his company was also

still waiting for a response. Each time he followed up with the insurers,they informed him they were investigating.

[35] He testified that the pressure mounted even for the Defendant and their relationship was getting bad. He then asked Mr Merchant for a physical meeting the following year in January 2019. They finally got to meet. He said he apologized on behalf of the Defendant because he wanted to keep the relationship healthy going forward. Mr Merchant in turn informed him that he was just an employee of the Plaintiff and had pressure from his boss. Mr Mechant then asked him to put in writing a settlement proposal. He then wrote the proposal letter dated 23 January 2019 which proposed a settlement of the E473 00 (Four hundred and seventy three thousand emalangeni) with a down payment of E100 000(One hundred thousand emalangeni) , the remaining balance by instalments of E74 600(Seventy four thousand six hundred emalangeni) for a period of five months.

[36] The Plaintiff accepted the upfront payment together with the instalments. Mr Mngomezulu was asked what he understood by the acceptance letter which was dated 27th February 2019. He testified that, to him the proposal was accepted and that amended their relationship, they also understood the delay of the insurance pay out.

[37] He testified that when they discussed the settlement possibility, Mr Merchant never showed him the invoice when he spoke to him about the incident. He told the court that he was never informed at that meeting that he had his own insurance cover. When he was informed that Mr Merchant had informed the court that there were occasion in the past where they had exceeded the insurance limit of E500 000 (Five hundred thousand emalangeni) and that an invoice of E743 920-32 (Seven hundred and forty

three thousand nine hundred and twenty emalangeni thirty two cents) in 2017 was produced in court in support of that assertion, he said he was not aware of that overload, he never saw that invoice and it was the first time he had it in court. He said had he known he would have asked his insurers to extend the limit to cover that value. His insurers allowed for an extension of any particular load in excess.

[38] He testified that he was surprised by the Insurance investigation results that the Insured goods in transit had exceeded the limit to E881 054-49 (Eight hundred and eighty one thousand emalangeni forty nine cents) and had that been communicated to the Defendant he would not have agreed to transport them without an extended valued for the cover. The Defendant had not seen the packing list even though he knew that his driver gets to see the invoice when verifying the load as it got loaded. He was therefore surprised to learn through the forensic Investigation Insurance report that the goods were in excess of the limit.

[39] He testified that, if he has known of the overload in value he would not have made the settlement proposal. He was trying to find a way of settling the matter and not necessary admitting liability. He said what motivated him to even consider the need to settle the matter was the business relationship. They were a small company that had just started in 2017, they did not want to lose a client. He even suggested an alternative, that his company could agree to do the same load covering E743 920-30 (Seven hundred and forty three thousand nine hundred and twenty emalangeni thirty cents) just as to come to some sort of set-off. He felt it was very improper for the Plaintiff not to disclose this information especially because it was not difficult to extend the value of the cover had he asked.

[40] He testified further that if he had known of this non-disclosure he would not have paid the E1000 000 (One hundred thousand emalangeni) and the settlement proposal. He was not surprised of the insurance repudiation because they carried out a forensic investigations and came up with the information. He said he made the settlement proposal as he was confident the insurance would be settled whilst they continued doing business with the Plaintiff.

[41] In cross examination Mr Mngomezulu admitted that although he had testified that the settlement proposal was contingent to the outcome of the insurance pay out, the Defendant's settlement proposal letter did not capture that condition.

[42] When he was asked why the Defendant failed to honour the settlement proposal/undertaking. He testified that the reason the Defendant halted payments was because the Insurer indicated to him that the Plaintiff had not disclosed that there was an overload which was beyond the value of the GIT. He said, that had not been revealed to him by Mr Merchant in breach of the transport agreement. After the Defendant had made the first payment and during their meetings, the insurer repudiated the Defendant's claim.

[43] In cross –examination counsel for the Plaintiff asked;

PC; Do you still maintain that the Plaintiff engaged in the conduct of violating the GIT policy?

DW1; " I still maintain that position.

The value of the goods overloaded were not declared, it was over E800 000 (Eight hundred thousand emalangeni). when the GIT is E500 000 (Five

hundred emalangeni) No communication was made to me or my office to extend the GIT, we did not know until we were informed by the insurers that the truck was overloaded. The value of the goods were not declared to the Insurer. The Plaintiff gave me a value of E473 300 (Forty hundred and forty three thousand three hundred emalangeni) to claim and the insurer said this was not the value of the goods on the case number that this incident was reported."

Summary of the Evidence at Trial

[44] The witnesses' evidence can be summarized as follows:

44.1 The parties had an oral transport agreement wherein the Defendant would transport the Plaintiff's stock for trade by road from South Africa to Eswatini.

44.2 The Defendant agreed to insure the goods in transit to cover the risk of the goods from damage, loss hijack whilst in transit. He took out a Goods in Transit Insurance (GIT) to the value of E500 000 (five hundred thousand).

44.3 The parties agreed that the value of the goods as covered by the GIT should not exceed E500 000 (Five hundred thousand emalangeni) at any given moment of its transportation. The Defendant would be required from time to time to provide proof of the current cover for any given period.

44.4 It is common course that the Defendant's truck was hijacked whilst ferrying the Plaintiff's stock and the stock was lost. The Defendant was liable for the safeguard and delivery of the stock as loaded.

44.5 It turned out that the value of the goods lost was E881 054-49 (Eight eighty one fifty four thousand emalangeni forty nine cents) an amount beyond the agreed insurance cover of E500 000 (Five hundred thousand emalangeni).

44.6 The Plaintiff was entirely responsible to ensure that his stock did not exceed the insurance value at any given moments of its transportation because it arranged the orders with its suppliers. The suppliers invoiced the Plaintiff directly and once the stock was ready for pick up the Plaintiff instructed the Defendant to send their truck to transport the stock.

44.7 The invoice is not shared with the Defendant to know the value of the stock until loading. This is where the invoice is for the first time given to the Defendant's driver whose job is to tick and ensure all the items in the invoice are loaded. He had no authority to temper with the values, his interest was only on the weight of the stock on his truck. The maximum weight being 32 tons.

44.8 The evidence is that there had been an overload in value of the stock before in 2017 and this was a second overload that unfortunately went wrong.

44.9 The Plaintiff did not disclose to the Defendant and the Insurers of the overload in values that exceeded the GIT policy in the amount of E500 000 (Five hundred thousand emalangeni). This led to the

Defendant's insurers repudiating the claim after a forensic investigation revealed the true value of the goods lost.

44.10 The Plaintiff recorded its regrets that it was a mistake on its part to have overloaded the truck with stock in access of the insurance limit.

44.11 The insurers took close to 8 months to process the Defendant's claim and the Plaintiff exerted pressure on the Defendant to settle the claim seeing that its insurers were taking time to respond to the claim. The Defendant for the sake of their relationship under took to settle the Plaintiff's clam of E473 000 (Four hundred and seventy three thousand emalangeni) by making a down payment of E100 000 (One hundred thousand emalangeni) and the balance to be paid in six monthly instalments.

44.12 The Defendant paid the first E100 000 (One hundred thousand emalangeni) but stopped when its insurers informed them that it was repudiating the claim because of the overload in value as disclosed by the incident report being plus / minus E900 000 (Nine hundred thousand emalangeni).

44.13 The Defendant made the proposal to settle contingent to being compensated by the Insurers. The Plaintiff did not disclose to the Defendant and the Insurers of the overload in value of the stock. The Plaintiff had not disclosed to the Defendant that it had filed its claim until their meeting in January 2018 when they discussed the Plaintiff's claim.

44.14 The Plaintiff's failure to disclose the value of the stock when it was privy to the invoiced goods as they negotiated the settlement proposal and the insurers constituted a breach of the GIT policy.

44.15 That settlement agreement was therefore voidable at the instance of the Defendant entitling the Defendant to resile on the agreement and claim the E100 000 (One hundred thousand emalangeni) paid as deposit.

The law and submissions of the parties

[45] The GIT Insurance policy was neither discovered by the parties during the discovery stage, nor during the trial. An attempt to hand it at re-examination of the defence witness was fiercely objected to by the Plaintiff. The objection was sustained. The non presentation of the Insurance policy does not mean that it does not exist, it does, it became a common cause fact that the parties agreed that the Defendant took out the policy to the limit value of E500 000 (Five hundred thousand emalangeni) per load to cover the Plaintiff's interest in case of loss of the goods in transit. Evidence was also led that from time to time the Plaintiff would require proof of the cover from the Defendant.

[46] It is general knowledge that a Goods in Transit (carriers) Insurance (GIT) enables carriers to manage commercial settlements with customers. It covers loss or damage to insured goods or livestock. The policy provides two types of cover. The Comprehensive coverage, protects against all losses or damage, while specific event coverage includes damages caused by major events. The Defendant's witness spoke at length about the policy because he

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took it out to cover their business. He testified that it was a comprehensive cover and the Plaintiff could not dispute that fact.

[47] This type of insurance. the court was told is an inland transit insurance covering the risk of business goods of the insured while in transit on land. Its premium is based on the value of goods in transit for that period. The insurance covers the packing and unpacking, loading or offloading, transportation and storage during the entire move. It covers damage/loss of goods due to mishandling or accidents, theft and hijacking during transportation. This was the nature of the GIT that covered the business of the parties in *casu.*

[48] It was argued on behalf of the Defendant that it is common cause that the higher the value of the goods in transit, the more attractive the load was especially for the thieves and hijacking criminals as such load would be considered to be more rewarding. Therefore the higher the value of the goods the more the risk there would be of a hijack. The parties therefore had to limit the value to E500 000 (Five hundred thousand). The Plaintiff's witness testified that to cut down the risk they would not load very high value on the goods. The plaintiff's witness (Pw1) also testified that the parties insisted on the transporter to have the GIT and they would not have dealt with the Defendant if it had no insurance cover.

[49] It was also evidence of the Plaintiff under cross-examination that the loading of the goods in excess of the insurance cover was a mistake and if the Plaintiff had known that things would turn the way they did, the Plaintiff would not have exceeded the amount of the cover when loading the goods.

[50] The legal position in our jurisdiction is that the transporter's liability for the safe delivery of the goods is not a strict absolute liability issue. This therefore means that ordinarily where the loss or damage of the goods is occasioned by the fault, negligence or willful act of the transporter or its employees, the transporter will be held liable of such losses. (*see* Anderson Shipping (Pty) LTD v Polyssius (Pty) LTD 1995 SA 42 AD.

[51] In *casu*, there is no evidence led before the court on how the theft of the goods occurred. The closet evidence we received was the circumstances of the hijack contained in the Plaintiff's particulars of claim and the driver's report to the police after the incident. It showed that he was hijacked by persons who posed as traffic police who stopped him and held him using firearms. Nothing shows that there was negligence on the part of the driver and therefore part of the Defendant. It is therefore safe to conclude that there is no evidence led for this court to conclude any *culpa or dolus* against the Defendant to be liable for loss of the goods.

[52] The overloading in value of the goods during its transportation would however result in breach of the Insurance Policy because of the limitations undertaken by the transporter. If it is found that as between the Plaintiff and the Defendant, the Plaintiff caused the breach by overloading the value of the goods whose responsibility falls squarely on it , the Defendant ought to be absolved from compensating the Plaintiff of any damages arising from the repudiation by the Defendant's insurer. The breach of the conditions of the Insurance cover emanating from non disclosure of the excess in value of the goods affects the policy holder irrespective of whether it is caused by the Plaintiff or the Defendant, The Insurer is bound to repudiate the Defendant's claim. The limits would have been extended if the Plaintiff had

asked for such from the Defendant, There is therefore no basis in law on which the Defendant should compensate the Plaintiff where there is no liability for such.

[53] On the proposal to settle or agreement to settle,the Plaintiff contended that on the principle of *pacta sunt servanda* (agreement must be honoured) the Defendant must be ordered to settle its claims despite that the claim was repudiated due to the Plaintiff's non disclosure or wrongful conduct.

[54] The Plaintiff cited the case of I Pieters & Co v Salomon 1911 AD 121 at 137; to support the notion that the offer by the Defendant to settle the claim and the actual payment of the deposit of E100 000 (One hundred thousand emalangeni) which was accepted by the Plaintiff, created a binding contract and agreement to pay. Innes JA in the case above stated as follows;

"When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promissor or are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition he omitted to mention and of which the other party was unaware".

[55] This however is not a solitary proposition in this subject matter. It is common cause that courts have found ways to interfere with contracts validly executed even where the terms are clear and unambiguous. They do so on the basis of equality and good faith which are the very underpinnings of the doctius of *pacta sunt servanda.*

[56] The Defendant submitted that for this principle to be applicable, the parties must have freely and voluntarily undertaken to comply with the contract's obligations.

[57] The Defendant submitted further that if a party enters into a contract on the strength of misrepresentation or non-disclosure of facts, it cannot be legally concluded that an individual entered into the contract freely and voluntary If such person was induced to contracting by the misrepresentation and he relied on it. The contract is simple voidable at the instance of the innocent party and the other party on realizing that he was induced through misrepresentation or non disclosure he may resile from such contract.

[58] In the case of Barend Petus Barkulizen v Ronald Stuart Nupier CCT 75/05 (2007) ZACC5, Ngcobo J enunciating freedom of contract alluded at paragraph 75 as follows;

"On the one hand, public policy as informed by the constitution requires in general that parties should comply with constitutional obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt Servanda as noted gives effect to the Central Constitutional values of freedom and dignity, self- autonomy or the ability to regulate one and own affairs even to one's own detriments is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the value of freedom and dignity" at paragraph 87, the learned judge writes" Pacta sunt Servanda is a profound moral principle, on which the concerns of any society relies. It is also universally recognized legal principle.

[59] In the case of Bhekinkosi Bright Simelane v First Finance (Pty) Ltd and 2 others (388/2015 [2015] SZHC M.Dlamini J at page 8 paragraph 13 observed;

" A closed reading of the ratios enunciated above, the effects however is as follows, MCB Maphalala J (as he then was) having come to the view that once a debtor agrees to pay "collection commission", finance charges inclusive of interest, the balance of the loan account as well as costs at attorney and client scale" he is bound by the terms of the contract, quickly pointed out, "that depends on the legality of the contract." In other words, the court should not end by considering consensus ad idem but go further to examine if the entire contract is not in violation of either statutory or common law rule such as in duplum". (underlining added).

[60] The evidence in *casu* is that the Plaintiff misled the Defendant when he failed to disclose to it at the critical conclusion of the offer to settle and its acceptance that the value of the goods was at E800 000 (Eight hundred thousand emalangeni) when the GIT had a limit of E500 000(Five hundred thousand emalangeni) No disclosure was made either to the Defendant nor the Insurer prior to the filing of the claim.

The evidence in chief went this way; PC; "Had you known the true position at the meeting of the 1st week of January 2018 before you wrote the settlement letter what would you have done?

DW1; "I would have engaged him and would have talked to him and made him aware that he has breached and acted outside the parameters of the agreement,

PC; Had you known about those breaches would you have paid the E100 000 (One hundred thousand emalangeni) as down payment and made the proposal to maintain the business relationship?

DW1; "I would not have made that payment and the settlement proposal."

[61] It is the court's view that the Defendant made the settlement proposal without knowledge about the misrepresentation or non disclosure by the Plaintiff on the true values of the goods. He testified that had he known about these breach, he would not have paid the E100 000 (One hundred thousand emalangeni) and not made the payment proposal. This vitiates the principle of *Pacta Sunt Servanda* which requires that parties must freely and honestly enter into contracts. The court therefore condones the Defendant's stand position to resile on the contract and allows the Defendant's counter claim for the return of the Deposit of E100 000 (One hundred thousand emalangeni) it paid to the Plaintiff.

Conclusion

[62] The Plaintiff's claim for E373 000 (Three hundred and seventy three thousand emalangeni) stands to fail. The Defendant is not liable to the Plaintiff's short fall on the insurance claim. The Defendant is also not the cause of the repudiation by its insures. The fault entirely lies on the Plaintiff's failure to observe its agreement not to jeopardize the G.I.T policy

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[63] The Plaintiff's misrepresentation or non disclosure of the true value of the goods in transit to the Insurer and the Defendant breached the principle

pacta sunt servanda. The Defendant was justified to resile the proposed agreement to settle the Plaintiff's claim.

[64] Operative Orders.

64.1 The Plaintiff's claim for the payment of E373 000 (Three hundred and seventy three thousand emalangeni) is dismissed with costs at an ordinary scale.

64.2 The Defendant's counter claim (Plaintiff in reconvention) of E100 000 (One hundred thousand emalangeni) succeeds together with interest at 9% per annum from date of judgement to date of payment.

64.2 Costs for the counter claim should follow the course at ordinary scale.

S.M. MASUKU J.

JUDGE - OF THE HIGH COURT

For the Plaintiff:- Mr Tembeh of S.V Mdladla and Associates

For the Defendant:- Mr S.C.Simelane with N.E Ginindza of NE Ginindza Attorneys.