

**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**APPEAL                      CASE  
NO.41/09**

**In the matter between:**

**TWK AGRICULTURE LTD**

**PLAINTIFF/  
APPELLANT**

**AND**

**SWAZILAND MEAT INDUSTRIES  
LTD SIMUNYE CATTLE COMPANY  
LTD CORAM**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

**FOR THE APPELLANT**

**ADV. R.M. WISE SC  
AND ADV. L.J. VAN  
TONDER ADV. W.H.  
KLEVANSKY SC AND  
ADV. P. FLYNN**

**FOR THE 1<sup>st</sup>**

**RESPONDENT**

**JUDGMENT**

## **MAGID AJA**

### HISTORY

[1] On 23<sup>rd</sup> October, 2001, Swaziland Meat Industries Ltd ("SMI") and Simunye Cattle Company Ltd ("SCC") concluded a written contract which was described as The Technical Services and Marketing Agreement ("TSMA"), the preamble to which is self-explanatory and reads as follows:-

**"Whereas it has been agreed that SMI shall manage the business of SCC;**

**And whereas the objective is to optimize shareholder value over the long term as measured by shareholders equity and return on shareholders investment;**

**And whereas it is the intention to find synergies that add value to the Shareholders operations, whilst taking cognizance of Swaziland's commitment to the EU under the Cotonou Agreement which includes the Beef Protocol under which beef is exported."**

[2] The TSMA gave SMI very considerable powers over the management of the affairs of SCC but it in turn accepted the responsibility to establish a cattle feed lot. Although it has little to do with the disputes involved in this appeal Clause 3 of TSMA obliged SCC to make payment on the following terms to SMI, namely:-

**"SCC shall pay to SMI the following upon the terms and conditions of payment set out below:**

3.1 **The full recovery of all necessary costs directly incurred by SMI in its own right or for and on behalf of SCC in terms of this Agreement including but not limited to all staffing expenses; and**

3.2 **An additional flat fee to cover SMI's cost to provide financial and payroll services and executive supervision. It is recorded that the rate as at the effective date shall be the sum of E12,000.00 (twelve thousand Emalangeni) per month which shall be reviewed on each anniversary of the effective date; and**

3.3 **A performance profit share calculated at 7.5% (seven comma five percentum) of the pre-tax profit made by SCC in any 1 (one) financial year as certified by the auditors;**

3.4 **All payments shall be made as follows:**

3.5 **within 30 (thirty) days of monthly invoices in respect of 3.1 and 3.2 above;**

3.6 **within 30 (thirty) days of the approval by the Board of Directors of SCC of the final accounts of SCC as certified by the Auditors relating to 3.3 above."**

[3] Clauses 4.1 & 4.2 of the TSMA provided as follows:

**"4.1 SMI shall have the sole right and obligation to purchase from SCC the entire volume of production of cattle by SCC upon the terms and conditions set out herein;**

**4.2 The Purchase Price to be paid by SMI for the said production and method of payment is as is set out in Annexure "B" hereto."**

[4] Annexure "A" to the TSMA was a document described as "Investment Proposal: Establishment of a Feedlot to supply Swaziland's cattle requirements to fulfill the E.V. Beef quota" dated June 2000. Nothing in that document affects the decision of this appeal. Annexure "B\*" to the TSMA, on the other hand, is the document whose interpretation is central to the appeal. In Clause 10 of the TSMA (the definitions clause), Annexure "B" is described as meaning "the annexure relating to the calculation of the price payable by SMI to SCC for cattle from the Feedlot."

[5] Clause 3 of Annexure "B" reads as follows:-

**"3. Annual adjustment of the total paid to SCC for the export cattle.**

3.7 **At the end of the year the total paid to SCC for the export qualifying cattle it has supplied to SMI will be adjusted (either up or down) in order to fairly divide the total profit made by both companies from these cattle.**

3.8 **Initially the profit will be divided equally between SMI and SCC."**

[6] Further clauses of Annexure "B" which may be relevant are the following:

**"5. The final payment as envisaged in 3 above will be calculated as laid out in a pro-forma format in Annexure "B3".**

3.9 **These calculations will be performed by SMI during the month following production of year-end accounts for the two companies.**

3.10 **Each company's auditors will verify the calculations.**

**6.5 Variations to this pricing mechanism will be allowed if agreed to in writing by both parties."**

[7] Finally Annexure "B3" reads as follows, omitting, because they are irrelevant, the sums of money quoted therein:-

**"1) The profit made by both companies in raising, processing and marketing these animals:**

**Gross income (a)  
SCC's costs (b) SMI's  
costs (c) Profit (e)**

**2) Payment to be made to (or by) SCC:**

**SCC's 50% share of the profit (e)/2  
SCC'S costs (b) Total payment  
Amount already paid for the cattle  
Annual adjustment to be paid to (or by) SCC**

**3) Payment to be made by (or to) SMI**

**Gross income received by SMI (a)**

**Deduct -  
SMI's 50% share of the profit (e)/2  
SMI's costs (c)  
Amount already paid to SCC for the cattle  
Total deductions**

**Annual adjustment still to be paid by (or to) SMI."**

#### THE LITIGATION

[8] TWK Agriculture Ltd ("TWK") took cession of the claim of SCC under Clause 3 of Annexure "B" and instituted an action in

the Court *a quo* against SMI for payment of the sum of some E8 million which was alleged to be the amount payable to SCC in terms of Clause 3 of Annexure "B". SCC was joined in the action as a second defendant purely by reason of its interest in the litigation.

[9] TWK's claim was set forth on Annexure S2 to the Particulars of Claim and calculated in accordance with the proforma calculation set out in Annexure "B3" which I have quoted in paragraph [7], *supra*. The claim purported to be calculated on the basis of the 2003 and 2004 financial results of both SMI and SCC.

[10] SMI's defence was based on the fairly simple proposition that upon a proper construction of Clause 3 of Annexure "B" the adjustment of purchase price of the cattle sold by SCC was only to occur when the parties had made profits and not when their trading resulted in losses, as, it was common cause, occurred in the 2003 and 2004 financial years.

[11] For present purposes, it is only necessary to state that the parties held a pre-trial conference at which the following agreement was made:

**"3. BUNDLES**

3.11 **The documents in the bundles are what they purport to be unless challenged but insofar as certain documents are incomplete or have incorrect pages inserted these will be supplemented or corrected if necessary.**

3.12 **The documents are to be admitted in evidence but are not accepted as being the truth of their contents, subject to their being legally and factually relevant."**

[12] THE PROCEEDINGS IN THE COURT A QUO

Mr. Wise, who appeared for TWK in the Court *a quo*, opened the plaintiffs case at some length and referred in the opening to the relevant portions of the pleadings and to various documents which he submitted were to be admitted

as evidence in accordance with the pre-trial minute. He then closed the plaintiffs case whereupon Mr. Klevansky, for SMI, applied for absolution from the instance.

[13] Masuku J upheld Mr. Klevansky's argument and duly granted an order of absolution from the instance with costs. In the course of that judgment, Masuku J dealt with the proposition that an adverse inference could be drawn against a party who does not call an available witness and went on to say:

**"As I have pointed out in this case, there has been no attempt on the Plaintiffs part to dissuade this Court by tendering a reasonable explanation as to why an adverse inference against the Plaintiff should not be drawn in the present case in view of its failure or conscious decision not to call witnesses to lead relevant evidence to discharge the onus upon it and to thereby convince this Court that it is entitled to the relief it seeks."**

[14] THE PROCEEDINGS IN THIS COURT

TWK has appealed against the decree of absolution from the instance and in support of the appeal, Mr. Wise strongly criticised the learned Judge's finding that there was no case for SMI to meet.

[15] As will appear shortly I agree with the conclusion of the learned Judge *a quo*, but I respectfully disagree with his reasoning. In my view, a determination of the issues between the parties depends primarily, if not exclusively, on the interpretation of Clause 3 of Annexure "B".

[16] Mr. Wise sought to persuade us that the documents to which he referred us indicated that both SMI and SCC considered that the Clause applied whether the parties made a profit or incurred a loss until KMPG, who were then the auditors of both companies, pointed out that the

Clause referred only to profit. At that stage, according to Mr. Wise, SMI "changed its mind" as though that were a crime. Incidentally, having regard to the provisions of Clause 6.2 of Annexure "B", which I have quoted in paragraph [6] supra, it is not surprising that the auditors pointed out what appeared to them to be an incorrect application of Clause 3 of Annexure "B". Mr. Wise submitted that as evidence showed that before the financial position as between SMI and SCC had been resolved the parties had a common intention, that common intention was the correct interpretation of the Clause. Mr. Wise relied for this submission on passages from the judgments in SHILL v. MILNER 1937 AD 101 at 110/111 and SHACKLOCK v. SHACKLOCK 1949(1) SA 91(A) at 101.

[17] The passage on which Mr. Wise relied in SHILL v. MILNER, *supra* reads as follows:

**"... but the respondent's evidence shows that he took the same view of the appellant's obligations. On this question the words of Stratford, JA in BREED v. VAN DEN BERG (1932, AD 283, at page 292) are in point: 'If one of two parties to a contract asserts that it has a certain meaning and the other agrees that this is the meaning to be given to it, a Court of law will give effect to that meaning. If this mutually accepted meaning is in conflict with the clear construction of the contract, we have all the requisites for rectification of the document. If, on the other hand, the parties give to an indefinite and vague document by itself unenforceable, a meaning consistent with it, then the latter in the eye of the law is the meaning it should bear. In both cases we cannot go beyond the intention of the parties when once we have a clear express of that intention'. I infer that the meaning of the last sentence is that the Court cannot go beyond the meaning which both parties have agreed to put on the contract. I do not interpret this statement of the law to mean that in the former of the two instances rectification is a necessary preliminary; the learned Judge of Appeal was not dealing with this question. In my view the agreed meaning put on the contract by both parties in the trial Court must be held to preclude the appellant from saying the order made was not covered by his obligations under the contract".**

The facts in *SHILL v. MILNER* differ completely from those in this case. What had happened was that the trial Court had made an order which did not strictly accord with the terms of a contract between the parties. But each party had given evidence of what amounted virtually to a trade custom which they each agreed would have constituted substantial performance of the contract. The Appeal Court was accordingly not prepared to interfere with the trial Court's order when it accorded with what the parties accepted amounted to substantial performance of the contract. Moreover, in the present case, there is no evidence of an actual agreement as to the meaning. Mr. Wise relied on an alleged common intention which might have justified a rectification, but is not sufficient to create a new meaning for words which are clear and unambiguous.

[19] *Shacklock, supra*, is equally distinguishable. The case related to an agreement concluded in 1932 between former spouses in the course of their divorce. In 1941, the United Kingdom tax authorities changed the law relating to income tax in a manner which adversely affected the amount of maintenance the former husband had to pay his ex-wife. In 1948, when the matter came before the Appellate Division, the ex-husband had been paying maintenance in the manner contended for by the ex-wife for over fifteen years. In those circumstances, it is not surprising that Centlivres JA said in the course of his judgment at 101:

**"By their conduct both parties construed clause 4 of the agreement in the meaning contended for by the plaintiff, and, assuming that that clause is ambiguous, their conduct constitutes an additional reason for holding that that meaning is correct.**

After all, for a period of over fifteen years the parties had predicated their conduct on the basis of an interpretation which the contract was, according to the learned Judge of



Appeal, capable of bearing. But that is a far cry from binding parties to an interpretation of a contract by alleged conduct before any substantial dispute arises about its interpretation, and, moreover, one which contradicts the language of the contract.

But there is an even greater reason to distinguish. *SHILL v. MILLER and SHACKLOCK*. Mr. Wise was constrained, in response to a question from the Bench to concede that Clause 3 of Annexure "B" was unambiguous, though he qualified the concession by suggesting that there was some difficulty of interpretation which created room for potential ambiguity. He had some difficulty in describing the alleged "potential ambiguity". The so-called "golden rule" in interpreting contracts is said to be to seek the intention of the parties in the language used by them. Thus, in *WORMAN v. HUGHES* 1948(3) SA 485 (A) at 505m, Greenberg JA said:

**"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract".**

Where there is no ambiguity, there is virtually no room for extrinsic evidence as an aid to interpretation. As it was put by Schreiner JA in *DELMAS MILLING COMPANY LTD v. DU PLESSIS* 1955(3) S.A. 447 (A) AT 454F-G.

**"Where although there is difficulty, perhaps serious difficulty, in interpretation but it can nevertheless be cleared up by linguistic treatment this must be done. The only permissible additional evidence in such cases is of an identificatory nature; such evidence is really not used for interpretation but only to apply the contract to the facts."**

[22] The word "profit" appears in each of Clauses 3.1 and 3.2 of Annexure "B". By no stretch of the imagination could it be taken to be equated to the word "loss".

According to the Shorter Oxford English Dictionary (SOED) the most appropriate definitions are as follows:

[21.1] the word "profit" is:

**"The pecuniary gain in any transaction; the excess of returns over the outlay of capital; in commercial use chiefly in plural. The surplus product of industry after deducting wages, cost of raw material, rent, and charges".**

[21.2] the word "loss" is:

**"An instance of losing. Also, a person, thing, or amount lost. Detriment or disadvantage resulting from deprivation or change of conditions; an instance of this. Opposite to gain."**

As appears from [21.2] "loss" is indeed the opposite of "gain", which itself is a synonym for the word "profit".

[23] That being the case there is no room for anything other than what was in DELMAS MILLING, *supra*, described as the linguistic treatment of Clause 3 of Annexure "B". It is clear, therefore, that it provides for the adjustment of the price payable to SCC for its cattle only when the parties have made a profit from their trading during the course of a year. It was not necessary for both SMI and SCC to have shown an annual profit; it would be sufficient if one of them had made a profit that was greater than any loss which might have been suffered by the other. I say this because Clause 3.1 refers to a "total profit", which, in the circumstance postulated, would have been made. Indeed, the pro forma form of calculation in Annexure "B3" commences with a hypothetical "gross income" from both companies from which are deducted the cost respectively incurred by SCC and SMI in order to generate that combined notional gross profit.

[24] Mr. Klevansky for SMI argued that Clause 3 of Annexure "B" was clear and unambiguous. When it was put to him that in that case the costs of all the pleadings subsequent to the Particulars of Claim and all the costs of and incidental to the trial in the Court *a quo* had been wasted and that SMI should have taken an exception to TWK's Particulars of Claim, Mr. Klevansky was constrained to agree.


[25] In his argument in reply Mr. Wise, relied on a passage from the judgment in GAFOOR v. UNIE VERSEKERINGSADVISEURS (EDMS) BPK 1961(1) SA 335 (A) at 340 B-C where Schreiner JA said:-

**"Where the plaintiffs evidence consists of the production of a document on which he sues and the sole question is the proper interpretation of the document, the distinction between the interpretation that he ought to give to it tends to disappear. Nevertheless, even in such cases the trial Court should normally refuse absolution unless the proper interpretation appears to be beyond question."**

He accordingly suggested that it was not open to us to decide the case on the interpretation of Clause 3 of Annexure "B" without considering the evidence contained in the documents to which he had referred us and the Court *a quo*. The submission has no merit, because, having concluded that the disputed Clause was clear and unambiguous, we were, firstly, not entitled to consider any evidence other than the language of the Clause itself and, secondly, applying the GAFOOR principle, we are satisfied that the meaning which we are applying to the Clause is the only, let alone the best possible, interpretation to apply to the Clause.

[26] In the result, therefore, the Order I propose is the following:

1. The appeal is dismissed with costs including the costs of two counsel.
2. The order granted by Masuku J on 10<sup>th</sup> June 2009 is confirmed save that there will be added to paragraph 40.2 thereof, the following, namely:

  
P.A.M. MAGID  
ACTING JUSTICE OF APPEAL

  
J.G. FOXCROFT  
JUSTICE OF APPEAL

  
S.B. MAPHALALA

"provided however that such costs shall be limited to the costs of a successful exception by the First Defendant to the Plaintiffs

I AGREE

I AGREE

ACTING JUSTICE OF APPEAL Delivered in an open court on the  
27th day of November 2009