IN THE SUPREME COURT OF SWAZILAND

Civil Appeal No: 33/2013

In the matter between:

MTN SWAZILAND LIMITED **APPELLANT**

AND

MAXI MUSIC (PTY) LTD **RESPONDENT**

Neutral citation: *MTN Swaziland Limited v. Maxi Music (Pty) Ltd (33/2013) [2013] SZSC 65 (2013)*

Coram: **S.A. MOORE, JA**
M.C.B. MAPHALALA, JA
E.A. OTA, JA

Heard: 06 November 2013
Delivered: 29 November 2013

Summary

Civil Appeal – Breach of contract – the appellant sued the respondent for payment of stock together with collection commission, interest and costs of suit at attorney and client scale – the basis of the claim is a breach of contract to pay for goods sold and delivered in terms of the contract – principles governing breach of contract discussed – held that the stock delivered was not ordered by the respondent as required by the contract – held further that the appellant acted in breach of contract by delivering stock which was not ordered by the respondent – held that the respondent was in the circumstances not liable to the claim – appeal dismissed with costs at attorney and client scale.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] On the 11th June 2013 the Court *a quo* dismissed an action instituted by the appellant against the respondent for payment of stock in the form of airtime allegedly purchased by the respondent. The appellant further sought payment for interest, collection commission as well as costs of suit at attorney and own client scale. When delivering judgment in the claim in convention, the Court *a quo* postponed the trial of the Counterclaim to a date to be allocated by the Registrar of the High Court.

[2] The appellant filed a Notice of Appeal on the 9th June 2013. The grounds of appeal are as follows:

1. The Court *a quo* erred in failing to find that the respondent was liable, at the time of the institution of the action, for the balance owing on stock supplied and that on payment of that amount in settlement of the claim, the respondent was accordingly liable for costs and collection commission.

2. The Court *a quo* erred in law and in its interpretation of Clause 22.1 of the agreement by finding that the plaintiff had contravened Clause 22.1 by instituting legal proceedings.

3. The Court *a quo* erred in law in its findings in respect of the discharge of the onus by the appellant. In this regard the Court *a quo* erred, in particular, by finding that:

   3.1 The appellant took advantage of the evidence of the respondent's second witness (DW2) and that this was not permissible in civil procedure whereas the appellant was entitled to advance its case by testing this evidence and so discharge its onus.

   3.2 The appellant was building its case as it went along and using respondent to do so which the Court *a quo* held "...has not been heard in our law" (paragraph 56 of judgment).

   3.3 When evidence is led by a defendant, he does so not to discharge the onus of proof but to rebut evidence adduced by the plaintiff (paragraph 56 of the judgment).

4. The Court *a quo* erred in law in finding that there was no evidence adduced by the appellant and that, the appellant's cause of action must be dismissed (paragraph 57 of judgment).

4.1 The Court *a quo* erred in law in its finding in that the finding assumes that a plaintiff who closes his case without leading evidence *ipso facto* fails to discharge the onus.

5. The Court *a quo* erred in finding that the pleadings were contradictory.

6. The Court *a quo* erred in law and in the exercise of its discretion with regard to costs by ordering the appellant to pay costs on the attorney and own client scale. The Court erred in making the said order on the basis that the appellant had sought costs on that scale against the respondent and that it was therefore appropriate that such a costs order should be made against the appellant.

7. The Court *a quo* erred in finding that a litigant could not claim both costs and collection commission and erred in relying on a judgment which held that an agreement which provided for costs and collection commission was “unconscionable”.

8. The respondent closed its case and sought the dismissal of appellant’s claims without pursuing its Counterclaim or leading any evidence thereon. The Court *a quo* erred in finding that the respondent was nevertheless permitted to proceed with its Counterclaim after the conclusion of the trial in this case. The Court *a quo* erred in postponing

the respondent's Counterclaim, after the conclusion of the trial, to a date to be determined by the Registrar of the High Court.

[3] At the commencement of the appeal, the respondent moved an application for condonation of the late filing of its Heads of Argument. The reason for the delay was that the appellant served the respondent with a draft record of proceedings on the 13th September 2013 which was not certified by the Registrar of the High Court as being correct; the draft record had no Registrar's stamp, signature or certificate from the Registrar of the High Court certifying the record as being correct. However, the two-month's period stipulated in the Rules for filing the Record had lapsed. The respondent regarded the draft record to be a discussion document.

[4] On the 1st October 2013, Attorney Nondumiso Mzileni-Mbelu for the respondent, advised Attorney Noel Mabuza, for the appellant to rectify the Record. On the 3rd October 2013 the appellant's Attorney invited the respondent's Attorney to a meeting scheduled for the 4th October 2013; and, he was advised that the proposed date was not suitable to respondent's Attorney as she was travelling to South Africa. Ironically, on the 3rd October 2013 at 1629 hours, the respondent's Attorney was served with appellant's Heads of Argument without having rectified the Record.

Similarly, the appellant's Heads of Argument was also filed out of time by five days.

[5] On the 8th October 2013, the respondent's attorney noticed that the matter had been placed on the roll for hearing on the 6th November 2013, and, that the appellant had instructed Advocate Patrick Flynn to appear on its behalf at the trial; she prepared and filed the respondent's Heads of Argument on the 17th October 2013. Attorney Mzileni-Mbelu contends that she had to conduct extensive research when drafting the Heads of Argument since she had not instructed Counsel. To that extent she argued that the respondent was not in wilful default of the Rules of this Court.

[6] It is apparent from the preceding paragraphs that the respondent had filed and served a formal application for condonation. During the commencement of the appeal, Advocate Flynn for the appellant, told the Court that the appellant was in possession of an application for condonation for the late filing of a certified record of proceedings as well as its Heads of Argument; and, that such application had not been served upon the respondent or filed in Court. When the Court enquired from the appellant if it was opposing the respondent's application, the Court was advised that the application was not opposed in the circumstances on the basis that the appellant was seeking a similar indulgence from the Court. This Court has

the power to extend any time prescribed by the Rules; and to that extent condone non-compliance with the Rules for sufficient cause in terms of Rules 16 and 17 of the Rules of this Court.

[7] Rules 16 and 17 provide the following:

> **"16. (1) The Judge President or any Judge of Appeal designated by him may on application extend any time prescribed by these rules:**
>
> **Provided that the Judge President or such Judge of Appeal may if he thinks fit refer the application to the Court of Appeal for decision.**
>
> **(2) An application for extension shall be supported by an affidavit setting forth good and substantial reasons for the application and where the application is for leave to appeal the affidavit shall contain grounds of appeal which prima facie show good cause for leave to be granted.**
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> **17. The Court of Appeal may, on application and for sufficient cause shown, excuse any party from compliance with any of these rules and may give such directions in matters of practice and procedure as it considers just and expedient."**

[8] After considering the submissions made by both counsel, the Court granted the application for condonation. I should mention, however, that even if the appellant had opposed the application, the Court would have granted condonation on the basis that the respondent had established sufficient

cause on the application in accordance with Rule 17 of the Rules of this Court. It is well-settled that the phrase "good cause" and "sufficient cause" are synonymous and mean that the defendant must at least furnish a reasonable explanation for his default sufficiently to enable the Court to understand how it defaulted and to further assess its conduct and motives: see *Usutu Pulp Company v. Swaziland Agricultural and Workers Union* Civil Appeal No. 21/2011 at para 42. In addition the defendant must show that there are reasonable prospects of success on appeal. See *Johannes Hlatshwayo v. Swaziland Development and Savings Bank and Others* Civil Appeal case No. 21/2006 at para 17.

[9] In the present case, the appellant instituted legal proceedings in the Court *a quo* against the respondent for payment of the sum of E6 061 500.00 (six million and sixty-one thousand five hundred emalangeni) in respect of stock sold and delivered to the respondent. The appellant further sought interest at the rate of 9% per annum a *tempore morae*, collection commission as well as costs of suit at attorney and own client scale. The proceedings were by way of Simple Summons, and, the appellant subsequently filed a Declaration after receipt of a Notice of Intention to Defend.

[10] It is common cause that the parties concluded a written contract on the 12th November 2009 in terms of which the respondent was appointed a distributor to sell appellant's products, *inter alia*, "air time" and other cellular phone products and services. The material terms of the agreement were as follows: firstly, that the respondent would sell airtime, sim cards, data cards and handsets, and any other product determined by the appellant. Secondly, that on delivery of the airtime by the appellant, the respondent would acknowledge receipt of such airtime. Thirdly, that receipt of a returned dispatch or a delivery note by the appellant, would serve as absolute and incontrovertible proof of delivery. Fourthly, that the receipt of airtime by the respondent would constitute delivery of the airtime. Fifthly, that all stock would be paid by cash on delivery save where the respondent has been given credit or alternative payment method by the appellant. Sixthly, that the appellant may terminate the contract forthwith by notice to the respondent. Seventh, that on termination of the agreement, all monies owed by either party to another would become immediately due and payable. Eighth, that on termination of the agreement, the respondent would immediately cease selling airtime. Ninth, that a dispute, *inter partes*, which cannot be resolved amicably would be determined by the Court *a quo*. Tenth, that the appellant has the right to vary the product services without consultation and/or agreement with the respondent. Eleventh, that

where one party breaches the contract, then the aggrieved party would be entitled to attorney and own client costs.

[11] Notwithstanding the claim of E6 061 500.00 (six million and sixty-one thousand five hundred emalangeni) reflected in the Simple Summons, the Declaration reflected a claim of E4 500 000.00 (four million five hundred thousand emalangeni) as being the stock sold and delivered by the appellant to the respondent. The appellant did not amend its Summons in respect of the cause of action.

[12] The appellant contends, in the Declaration, that subsequent to the institution of legal proceedings, the parties agreed that the respondent would liquidate the debt in weekly instalments of E95 000.00 (ninety five thousand emalangeni); the appellant further advised the respondent that the outstanding amount was E3 971 500.00 (three million nine hundred and seventy-one thousand five hundred emalangeni). It is this amount which formed the basis of the Application for Summary Judgment; it is clear from the evidence that the appellant lodged Summary Judgment proceedings after the respondent had refused to pay for costs at attorney and client scale, collection commission as well as interest at the rate of 9% per annum a *tempore morae.*

[13] It is common cause that the respondent had opposed the Application for Summary Judgment on the basis that it had not ordered the airtime; and, to that extent, it demanded documentary evidence to that effect. Clause 8.2 of the contract between the parties provided that the distributor is obliged to place orders for airtime in writing in the form and manner prescribed; and, that the distributor has to acknowledge receipt of the airtime in writing in the form of the operator's official dispatch or delivery note duly signed. In terms of Clause 16 all stock is payable by cash on delivery save where the distributor has been given credit.

[14] It is apparent from the evidence that the respondent never ordered airtime in the sum of E6 061 500.00 (six million and sixty-one thousand five hundred emalangeni) from the appellant as reflected in the Simple Summons. Similarly, the respondent never ordered airtime of E4 500 000.00 (four million five hundred thousand emalangeni) as reflected in the Declaration. The appellant unilaterally and without the knowledge, request or consent of the respondent transferred Virtual Top Up airtime to the respondent's cellular phone number 76061500 on the 18th June 2010. Mbuso Mbanjwa, a former employee of the appellant, testified in the Court *a quo* as DW2. He told the Court that he did transfer the airtime to the respondent without an order or knowledge of the respondent. He further told the Court *a quo* that when he realised the mistake, he tried to reverse the transaction but

failed because the reversal was made on another cellular phone belonging to the respondent, 76333650, and not the cellphone into which the airtime had been transferred. He was giving evidence on behalf of the respondent during the trial.

[15] It is further apparent from the evidence that the appellant breached the contract by unilaterally transferring the airtime to the respondent without a written order. However, the evidence of Mbuso Mbanjwa shows that the appellant was constantly acting in breach of the contract by accepting verbal orders from distributors and processing them. The appellant was further obliged in terms of Clause 16.3 of the contract to furnish the respondent with a monthly statement showing the amount owing by the parties, one to the other, pursuant to the agreement. However, the appellant did not comply with this provision of the contract otherwise the appellant would have known that there has been a transfer of airtime worth E4 500 000.00 (four million five hundred thousand emalangeni) into its cellphone.

[16] The evidence shows that the appellant did not inform the respondent timeously of the transfer of the airtime, after failing to reverse the transaction. There was also no attempt on the part of the appellant to reverse the airtime from the respondent's cellphone into which they had

transferred the airtime, being 76061500, after failing to reverse it from cellphone No. 76333650. The respondent only became aware of the transfer eight months later.

[17] Clause 1.1.37 provides that the appellant will make all possible means to give distributors access to the V-Recharge website so that the distributor would view the V-Recharge transactions; however, such access was not made available to distributors contrary to the said provision. Such a facility would have enabled the respondent to see the transaction in question very soon thereafter.

[18] Notwithstanding that the transfer was made on the 18th June 2010, the appellant only informed the respondent of the transaction on the 23rd February 2011 contrary to the provisions of Clause 16.3 which provides for monthly statements of account. On receipt of the correspondence from the appellant, the respondent sought clarity from the appellant whether or not the transfer had not been reversed since it was not aware of the transaction; however, such information was not provided. Whilst the parties were still discussing the matter as required by Clause 22 of the contract, a newspaper article appeared on the 18th May 2011 entitled "MTN wants E6m from Maxi Music". Clause 22 provides that if any dispute, other than one arising out of an audit in terms of Clause 15, arises between the parties with

regard to this agreement or its subject-matter which cannot be resolved amicably by the parties, they should submit to the jurisdiction of the High Court.

[19] When confronted by the respondent on the Summons, the appellant expressed surprise at the newspaper article and acknowledged that they were still negotiating the matter. According to the appellant, its Attorneys had been instructed to engage the respondent on the possible signing of an Acknowledgement of Debt and subsequent letter of demand. The parties were still discussing the matter when the appellant instituted legal proceedings before the Court *a quo* by means of a Simple Summons.

[20] The respondent defended the proceedings by filing a Notice of Intention to Defend. Notwithstanding the Summons, the appellant again requested the respondent to negotiate a settlement of the matter. The respondent accepted the invitation for further negotiations on the basis that the parties were still discussing the matter when the appellant instituted the proceedings. On the 25th May 2011, the respondent asked the appellant to furnish it with the outstanding balance; and, the respondent was advised by electronic mail that the balance was E3 748 770.00 (three million seven hundred and forty eight thousand seven hundred and seventy emalangeni).

[21] It is apparent from the evidence that during the formal negotiations between the parties which commenced on the 1st June 2011, the appellant acknowledged their error of transferring stock to the respondent without its prior knowledge, request or consent. The appellant further undertook to rectify the error by ensuring that distributors should have the right to accept or reject the Virtual Top Up by upgrading their VTU system; it is not in dispute that at the time, the respondent as a Distributor, could not reject the airtime if it was transferred without its consent. Similarly, distributors could not reverse the airtime back to the operator. However, during the trial, it became apparent that the VTU system had now been upgraded such that the distributor is now able to accept or reject airtime sent to him.

[22] During negotiations, the respondent asked the appellant to reverse the VTU in question since it had not been ordered; however, the appellant asked the respondent to pay for the airtime because a reversal would affect their target. It is against this background that the respondent accepted the airtime and offered to pay E95 000.00 (ninety five thousand emalangeni) every Wednesday with effect from the 6th July 2011. The payment was made in terms of Clause 16.2 of the contract which provides that all payments shall be made by a bank guaranteed cheque or by direct deposit to the operator's bank account. It is not in dispute that the respondent did not default in the payment of the agreed amount of E3 748 770.00 (three

million seven hundred and forty eight thousand seven hundred and seventy emalangeni) on a weekly instalment of E95 000.00 (ninety five thousand emalangeni) until it was paid in full.

[23] Subsequent to the negotiated settlement, the appellant's attorney submitted a draft agreement which required the respondent to pay costs, collection commission as well as interest. However, the respondent refused to sign the draft agreement on the basis that it was contrary to Clause 27.8.2 which provides that any costs, including attorney and own client costs, incurred by a party arising out of the breach of another party of any of the provisions of the agreement would be borne by the party in breach. The respondent further contends that during negotiations, they had agreed with the appellant that the draft agreement would specify that the appellant had made an error by delivering stock which was not ordered by the respondent.

[24] Pursuant thereto, the respondent drafted its own agreement which provided that each party would pay its own costs; however, the appellant refused to sign this draft agreement drawn by the respondent. After a series of failed attempts to resolve the matter, the appellant filed a Declaration as well as an Application for Summary Judgment on the 24th January 2012. It is apparent from the evidence that the intention of filing these pleadings was to compel the respondent to pay interest, costs of suit at attorney and own

client scale as well as the collection commission when considering that the respondent had already commenced weekly payments of E95 000.00 (ninety five thousand emalangeni) with effect from the 6th July 2011.

[25] The Application for Summary Judgment was subsequently dismissed by the Court *a quo* in light of the Affidavit Resisting Summary Judgment; and, the matter was referred to trial. The Court further ordered that costs would be costs in the main action. It is common cause that when the matter came before the Court *a quo* for trial on the 22nd April 2013, the respondent had already liquidated the debt; and, the only issue before Court was whether the appellant was entitled to the payment of interest, costs of suit at attorney and client scale as well as the collection commission. The liability of the respondent depended ultimately upon whether or not it had breached the agreement between the parties as contemplated by Clause 27.8.2 of the contract.

[26] It is apparent from the evidence of Richard Dlamini, the Managing Director of the respondent as well as that of Mbuso Mbanjwa, the former employee of the appellant, that the respondent had not ordered the airtime from the appellant; and, that the transfer of the airtime was due to the fault of the appellant. Mbuso Mbanjwa was the appellant's employee who transferred the airtime into the cellphone of the respondent by error; thereafter, he tried

to reverse the airtime but failed because the reversal transaction was effected in another cellphone belonging to the respondent and not from the cellphone to which the airtime had been transferred.

[27] Similarly, Clause 8 of the agreement requires that the order for stock has to be made in writing; however, it is apparent from the evidence of Mbuso Mbanjwa that the appellant did not comply with this provision because it accepted and implemented verbal orders from distributors. In the instant case the appellant had acknowledged that the transfer of the airtime was an error on their part. It is against this background that the appellant dismissed Mbuso Mbanjwa from its employment on the basis of gross negligence.

[28] It is further apparent from the evidence that the respondent only became aware of the transferred airtime eight months later in February 2011. The appellant concedes that at the time of the transfer, the respondent could not determine whether or not the airtime had been transferred into its gadget; furthermore, it could not accept or reject airtime which it did not order, and, that it was only the appellant who could reverse the transaction.

[29] It is not in dispute that the respondent asked the appellant to reverse the airtime which had been transferred in error, but the appellant asked that the airtime should not be reversed because a reversal could affect its target.

Similarly, it is a term of the contract that the sale of stock is a cash transaction, and, that before it is loaded, the appellant has to verify whether the distributor has the necessary credit before processing the order. The appellant was not entitled to transfer the stock without that verification of credit, in addition to a written order.

[30] The appellant also failed to reconcile the respondent's account by sending monthly statements of account as required by Clause 16.3; if this had been done, the respondent would have noticed the transfer of airtime at the end of June 2010 when the transaction occurred. Similarly, the appellant had undertaken in terms of Clause 1.1.37 to give distributors access to the V-Recharge website so that they could view their transactions with the appellant; however, this was not done, otherwise, the respondent would have discovered the transaction soon after it was effected.

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[31] Similarly, Clause 22 places a duty upon the parties to resolve any dispute between them relating to the agreement or its subject – matter amicably save for disputes relating to audits as reflected in Clause 15 of the agreement. It is apparent from the evidence that the appellant prematurely instituted the proceedings when the matter was being negotiated. In addition, when the oral agreement to pay E95 000.00 (ninety five thousand emalangeni) weekly was concluded and implemented by the respondent,

the appellant proceeded to file a Declaration as well as an Application for Summary Judgment. The appellant did not observe Clause 22 of the agreement and it acted in breach thereof.

[32] It is well settled in our law that a breach of contract is the failure of a party to perform his obligations in accordance with the terms of the contract. *Watermeyer CJ* in the case of *Aucamp v. Morton* 1949 (3) SA 611 AD at 619-620, quoting the English cases of *Wallis v. Pratt and Haynes* 1910 (2) K.B. 1003 at p. 1012 and *Mersey Steel and Iron Co v. Naylor* (9 A.C. 434) at p. 443 stated the principles as follows:

> **"A party to a contract who has performed, or is ready and willing to perform, his obligations under the contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law, it has been recognised that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class, he has the alternative of treating the contract as being completely broken by the non-performance,**

and ... he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.

The rule of law, as I always understand it, is that when there is a contract in which there are two parties, each side having to do something ... if you see that the failure to perform one part of it goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform any part of it when that which is the root of the whole and substantial consideration for my performances is defeated by your misconduct'."

[33] It is common cause that the respondent filed a Counterclaim to the plaintiff's action; however, during the trial, the respondent after leading its two witnesses in convention did not lead evidence in respect of the Counterclaim. After closing arguments had been made on the claim in convention, the respondent sought to reopen its case and lead its evidence in reconvention. Counsel for the appellant objected on the basis that the respondent ought to have led evidence on the Counterclaim before closing its defence. In her judgment, the judge in the Court *a quo* had this to say at para 69-73:

"69. When the Court adjourned the proceedings, defendant alerted the Court that it had filed together with its Plea a Counter-claim and therefore wished to lead evidence. Mr. P. Flynn

objected on the basis that defendant ought to have led evidence on its action before closing its defence.

70. I agree with Mr. Flynn that it is undersirable that cases should be tried at piece meal. However, I do not accept that the door of justice must be shut against defendant for failure to lead evidence during the evidence in rebuttal.

71. The Courts will be loath in closing the door against a party wishing to access justice. Courts of law should scrutinize cases and only in exceptional cases should they close the door against litigant is our principle of law.

73. In *casu*, defendant is entitled to call witnesses to establish its Counterclaim therefore."

[34] The judge in the Court *a quo* consequently ordered the matter to be postponed to a date to be allocated by the Registrar of the High Court for the trial of the Counterclaim. It is common cause that the Counterclaim was filed by the respondent together with its Plea. The appellant in turn filed its Replication in convention as well as its Plea in reconvention. In the circumstances the appellant was at all material times aware of the claim in reconvention. Furthermore, other than raising technical objections, the appellant does not specify the prejudice it stands to suffer. After the respondent had led its evidence in reconvention, the appellant would be entitled to cross-examine the witnesses and further lead its own evidence.

[35] The premise of the Common law rule that judgment on a claim in convention may be stayed pending the decision of the Counterclaim is that the claim and Counterclaim should be adjudicated together *pari passu*; however, the Court has a discretion to refuse to stay judgment on the claim in convention pending the determination of the Counterclaim. The Court's discretion is wide and is not confined to cases in which the Counterclaim is frivolous or vexatious and instituted merely to delay judgment on the claim in convention. The Court has in many occasions exercised its discretion in favour of granting judgment on the plaintiff's claim, subject to security *de restituendo* being furnished, where the defendant is dilatory in prosecuting its Counterclaim.

- See *Ere Foundry (Pty) Ltd v. San Sales (Pty) Ltd* 1984 (1) SA 372 (D).
- *Truter v. Degenaar* 1990 (1) SA 206 (T) at 208-211.
- *Marshal Timbers LTD v. Hauser & Battaglia (Pty) Ltd* 1976 (3) SA 437 (D) at 438.
- Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, fifth edition, Andries Charl Cilliers *et al*, Juta 2012 at pp 670-671.

[36] It is also the judicial accord that as a cross-action, a counterclaim is to be treated for all purpose, for which justice requires it to be so treated, as an independent action. See *Almon v. Bobbet* (1889) 22 QBD 543 at 548. Its faith does not therefore depend on the plaintiff's claim. Thus, if the plaintiff's case is dismissed, stayed or discontinued, the counter-claim may nevertheless be proceeded with. See *McGowan v. Middleton* (1883) 11 QBD 464. I find from the totality of the aforegoing legal principles juxtaposed with the established facts and circumstances of this case, that the court *a quo* was correct to have postponed the counter-claim to a further date. This is in view of the fact that the respondent could have led evidence at the trial *nisi prius* but for the objection of the appellant which objection in my considered view, was completely devoid of merits as I see no prejudice that the appellant could have suffered by the Respondent re-opening its case after submissions *a quo* to advance evidence on its counter-claim. It is on record that no such prejudice was urged *a quo* by Advocate Flynn. The postponement was thus in my view in accord with substantial justice, moreso as it is common cause that the counter-claim is of such a nature that it can be dealt with separately.

[37] The appellant acted in breach of the contract as evidenced by the preceding paragraphs. In accordance with Clause 27.8.2 of the Contract, it is liable to pay costs on the attorney and client scale.

[38] Accordingly, I make the following order:

(i) The appeal is dismissed with costs at attorney and client scale.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

S.A. MOORE, JA
JUSTICE OF APPEAL

I agree

E.A. OTA, JA
JUSTICE OF APPEAL

For Appellant

Advocate P. Flynn
Instructed by Attorney
N. Mabuza

For Respondent

Attorney N. Mzileni-Mbelu

DELIVERED IN OPEN COURT ON 29 NOVEMBER 2013