IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE Appeal Case No. 44/2015

In the matter between:

MPE TIMBERS SWAZILAND (PTY) LIMITED **1st Appellant**

TIMBER MAGNET (PTY) LIMITED **2nd Appellant**

and

NGWANE TREATED TIMBERS (PTY) LIMITED **Respondent**

Neutral citation	:	MPE Timbers Swaziland (Pty) Ltd & Timber Magnet (Pty) Ltd v Ngwane Treated Timbers (Pty) Ltd. (44/2015) [2015] SZSC 06 (09 DECEMBER 2015)
Coram	:	MAPHALALA AJA, ANNANDALE AJA and CLOETE AJA.
For the Appellants	:	ADVOCATE P VAN DER BERG
For the Respondent	:	ADVOCATE P. FLYNN
Heard	:	16 NOVEMBER 2015
Delivered	:	09 DECEMBER 2015

Summary **:** ***Contract – Suspensive condition – Fictional fulfilment if reciprocal duty to use best endeavours to fulfil conditions not honoured.***

JUDGMENT

CLOETE -AJA

PRELIMINARY

[1] Both Appellants and Respondent properly filed Applications for condonation of the late filing of Heads of Argument and neither party opposed the Application of the other and as such both Applications were granted with no Order as to costs.

BACKGROUND IN BRIEF

[2] 1. The facts of the matter were dealt with extensively by the Court a quo and

are best summarised as set out below, the facts either having been found to have been proven by the Court *a quo* or common cause between the parties. The parties will be referred to as in these appeal proceedings.

2. During or about 2007 the First Appellant had a series of negotiations with various parties for the sale of its business as a going concern, including its assets.

3. For reasons which are not pertinent here, Respondent took possession of the business and the assets of the Respondent during or about 2007 and traded for its own account from that date.

4. During or about 2011, the parties belatedly decided to formalise their hitherto informal agreement by entering into a formal written agreement.

5. Attorney P. M. Dlamini was tasked with drawing such formal agreement which, according to his uncontradicted evidence, he duly did and according to further uncontradicted evidence, the drawn agreement was given to one Cope, who was a director of both First Appellant and Respondent and the document was signed in February 2012 simultaneously with an agreement known as the “Cession of Debts”.

6. After the agreement had been signed, it was given to a creditor, SIDC, who, the evidence showed, lost the said signed agreement for some unknown reason.

7. Attorney Dlamini was then required to reproduce the document which had been signed and lost and that appears to be the document which will be referred to as Annexure ‘A’ and which appears at page 22A of the record of proceedings and which was an annexure to the Particulars of Claim of the Respondent in the Court *a quo.*

8. During or about October 2012 the First Appellant itself, purportedly represented by one van der Lingen and/or the Second Appellant, unlawfully, without any form of notice or any order of Court, dispossessed the Respondent and its personnel from the business and the business assets.

9. The Respondent launched vindicatory proceedings in the Court *a quo* and the matter was heard fully by the Court *a quo* which hearing included oral evidence and the Court *a quo* duly handed down its Judgment on 14 August 2015 when the following Order was made;

1. *Plaintiff's cause of action succeeds and Defendants' counterclaim fails.*

2. *Defendants or any other person in possession of the business or the business assets through the First Defendant, including the Second Defendant are hereby ordered to immediately restore possession of the business and the business assets to the Plaintiff.*

3. *Alternatively, the First Defendant is hereby ordered to perform its obligation in terms of the agreement of sale and to restore possession of the business and the business assets to the Plaintiff.*

4. *Further alternatively, the First Defendant is hereby ordered to make payment to the Plaintiff of the amount of E5,448,660.00 together with interest thereon a tempore morae.*

5. *The First Defendant is ordered to pay costs of the suit on Attorney client scale.*

10. Both Appellants noted an appeal against the Judgment of the Court *a quo*. It is not necessary to repeat all of the grounds of appeal and reference will be made hereunder to those grounds which were argued and referred to in the Heads of Argument of the Appellants.

11. Respondent, having elected to exercise its rights in terms of the provisions of paragraph 2 of the Judgment of the Court *a quo* above,

brought an Application to the Court *a quo* for possession of the business and business assets to be restored to it and Appellants brought a counter application to stay the proceedings pending the hearing of this appeal and the Court *a quo* ordered that the business and its assets be kept under the control of the Deputy Sheriff pending the outcome of this Appeal and directed that the Appeal be heard in this session of this Court.

APPELLANTS' GROUNDS OF APPEAL TO THIS COURT

[3] 1. That the Order of the Court *a quo* was ambiguous and as such unenforceable.

2. That there was no proof before the Court *a quo* that an agreement had been concluded between the parties.

3. That in the event of it being found that Annexure 'A' constituted the agreement between the parties, the suspensive conditions at 4 of Annexure 'A' had not been met and as such that the agreement lapsed and was of no import.

4. That all the terms of the agreement, if Annexure ‘A’ was found to be such agreement, had not been met and as such the Respondent could not sue for breach if it was in breach itself.

5. That the non-joinder of MPE Timbers (Pty) Limited, a South African company, which was, according to them, one of the sellers in terms of Annexure ‘A’, rendered the proceedings to be fatally effective in the Court *a quo*.

6. That the Court *a quo* erred in finding that the Second Appellant was not registered at law.

7. That the Court *a quo* erred in finding that van der Lingen could not assert any claim in favour of the Defendants as they were then.

8. The issue of the dismissal of the counterclaim of the First Appellant.

9. The issue of the Court *a quo* ordering that the Appellants pay costs on the scale as between Attorney and Client.

10. In the event however Counsel for the Appellants, quite correctly, only based his argument on three main Heads as set out in 2, 3 and 5 above.

ARGUMENT BY COUNSEL FOR APPELLANT

[4] 1. As regards the first ground Counsel argued;

1.1 that the Respondent had pleaded that Annexure 'A' was binding but also pleaded four other alternatives relating to an agreement coming into being;

1.2 that no clear cut evidence was adduced to prove that an agreement was ever entered into;

1.3 that in the alternative there was no proof that a tacit agreement had come into place, even coupled with the fact that the Respondent had been in possession of the business and the assets since 2007 and referred the Court to various authorities relating to the requirements for the existence of tacit agreements and specifically to **Standard Bank of SA Ltd v Ocean Commodities 1983 (1) SA 276 (A) at 292 A** where it was held that the Courts require proof of a tacit agreement, that is unequivocal conduct which is capable of no other interpretation that the parties intended to and did in fact contract on the terms alleged. The Court *a quo* relied on conduct which did not constitute unequivocal conduct;

1.4 that the evidence of the witnesses called by the Respondent went no further than to show that a written document was drawn up but does not show that the agreement was in fact concluded;

2. As regard to the second ground of Appeal, Counsel argued;

2.1 that if it was found that Annexure 'A' constituted the agreement between the parties, Annexure 'A' provided the following under the heading *Suspensive Conditions*;

"4.1 The obligation of the Sellers [inter alia the First Appellant] to sell and of the Purchaser [the Respondent] to purchase on the terms of this agreement is conditional upon;

4.1.2 the cancellation of the existing loan agreement between the sellers [inter alia the First Appellant] and the SIDC and the signing of the new loan agreement between the SIDC and the purchaser [Respondent]."

2.2 That the Respondent had alleged in its Particulars that the suspensive conditions had been fulfilled but that evidence showed that the suspensive condition was not fulfilled "although there was talk to conclude some sort of agreement with SIDC, the fact that the Deed of Sale disappeared, persuaded SIDC not to conclude such an agreement";

2.3 that pending the fulfilment of a suspensive condition there is no contract between the parties and referred to **Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A);**

2.4 that the suspensive condition must be fulfilled before the date provided for in the agreement or alternatively before the lapse of a reasonable time and referred to **Design & Planning Service v Kruger 1974 (1) SA 689 (T).**

3. As regard to the third ground of Appeal, Counsel argued;

3.1 on the front page of Annexure 'A' there are two sellers namely the Appellant and the South African Company MPE Timbers (Pty) Limited;

3.2 throughout Annexure 'A' reference is made to the sellers;

3.3 It is trite that when an agreement provides for joint sellers, or joint purchasers, they must all be joined in the litigation. A failure to do so constitutes a fatal non-joinder. Non-joinder of a party is an issue which a Court, even a Court of Appeal, can and must raise *mero motu* and referred the Court to **Amalgamated Engineering (Supra); Pretorious v Slabbert 2000 (4) SA 935 (A); Erasmus (Supra) at B1-95.**

3.4 **Counsel properly conceded that this ground was not raised in the Court *a quo* and was raised for the first time in the Notice of Appeal and the Heads of Argument.**

4 The Appellant accordingly requested this Court to make an Order in the following terms;

> *"1. The appeal is upheld with costs, such costs to include the certified costs of Counsel.*
>
> *2. The findings of the Court a quo is set aside and substituted with the following orders;*
>
> *a) The Plaintiff's claim is dismissed.*
>
> *b) Absolution from the instance is granted in respect of the First Defendant's counterclaim.*
>
> *c) The Plaintiff is ordered to pay the First Defendant's and the Second Defendant's costs.*

ARGUMENT BY COUNSEL FOR RESPONDENT

[5] 1. As regards the first issue raised by the Appellants, namely the conclusion of an agreement, Counsel argued;

1.1 what was proved was an actual agreement in the form of Annexure ‘A’ and it was normal and usual to plead various options in pleadings;

1.2 the uncontradicted evidence of Attorney Dlamini was that;

1.2.1 he was instructed to draw an agreement which he handed to Cope and which was signed in February 2012;

1.2.2 the signed agreement was lost by SIDC;

1.2.3 that he was tasked with reconstituting the lost signed agreement which he did in the form of Annexure ‘A’;

1.2.4 that the Cession of Debts was drawn up by him and signed simultaneously with the lost agreement.

1.3 Van der Lingen admitted that he knew about the agreement and that Cope would give evidence and stated that Cope was in the Court building during the trial;

1.4 witness Nhlabatsi stated that Cope had signed the agreement and this was not contested by the Appellants. Cope was not called as a witness to contradict any such evidence and as such the Court is entitled to draw an adverse inference that the reason why Cope was not called was because he would

have had to concede that an agreement had been entered into;

1.5 the Appellants had filed a special plea invoking the provisions of Section 20 of Annexure ‘A’ and even though it was not proceeded with, it clearly indicated that the Appellants had knowledge of the contents of the signed lost agreement and as such Annexure ‘A’.

2 As regards the second issue raised by the Appellants, namely the issue of the suspensive condition not being met, Counsel argued;

2.1 the agreement between the parties came into effect in February 2012;

2.2 negotiations with SIDC were on going with the knowledge of Cope;

2.3 since there was no time stipulated for the suspensive condition to be met, it had to be completed in a reasonable time and there was no proof that such reasonable time had elapsed or that the Appellants had participated in such negotiations at any time;

2.4 that in terms of 4.2 of Annexure ‘A’, which we will deal with below, no notice of nature had been given by the Appellants to the Respondent;

2.5 that the Suretyship of Cope to SIDC was in fact one of the main issues and as appeared at page 150 of the record, van der Lingen admitted, in response to a question from Counsel **"You came in there based on hearsay information given by Cope and others, you dispossessed people of property and did that unlawfully and you do this because it sees you would be coming to the rescue?"** he replied, **"Yes"** and to the further question **"The people you wanted to rescue had personal surety to SIDC like Cope"** he replied, **"Yes"**;

2.6 4.2 provides an obligation on both parties to procure fulfilment and further analysed the provisions of 4.2 including the flexibility of the date for fulfilment of conditions.

3 As regards the third issue raised by the Appellants, namely the issue of non-joinder, Counsel argued;

3.1 the South African company MPE Timbers (Pty) Limited, is inelegantly cited as one of the sellers at 22A of the Book of Pleadings but when one looks at the preamble to Annexure 'A' at 22D of the Book of Pleadings, the following appears;

"And whereas the Sellers have mainly conducted its business through MPE Timbers Swaziland (Proprietary) Limited and have used MPE Timbers (Proprietary) Limited as its marketing arm in the Republic of South Africa"

3.2 it is clear that that company was merely an agent of the Respondent and there is no evidence before the Court that it owned any shares in the Respondent which in fact owned the business and the business assets;

3.3 for a party to be joined, such party must have a direct and substantial interest in the proceedings.

3.4 all the correspondence filed of record and all bank accounts and records produced before the Court *a quo*, referred and related only to the Respondent;

3.5 the Cession of Debts agreement entered into simultaneously with the lost signed agreement only referred to the Respondent, accordingly the South African company had no direct interest and its only interest was as a sale and marketing agent;

3.6 this ground of appeal was not canvassed in the Court *a quo* and was raised for the first time in the Notice of Appeal and the Heads of Argument and as such should not be heard by this Court;

3.7 as regards the allegation by the Appellants that the Court *a quo* was obliged to raise the issue of non-joinder *mero motu* he referred the Court to **Ngcwase and Others v. Terblanche, N. O. and Others (AD) 1977 (III)** and specifically to what was set out at **806 (G);**

> *"He also contended that he wanted to raise on behalf of First and Second Respondents the question of the non-joinder of the other members of Fourth Respondent school board in their private capacities. There is no reason why the question of non-joinder could not have been raised before us. It is settled practice that this Court can even mero motu raise the question of non-joinder to safeguard the interest of third parties as was done in* ***Amalgamated Engineering Union v. Minister of Labour, 1949 (3) S.A. 637 (A.D.).*** *The present matter is, however, not a case in which the non-joined members of Fourth Respondent school board have such an indivisible interest with the Appellants that the Judgment of this Court must necessarily affect them notwithstanding the principle of res inter alios acta."*

3.8 the Respondent accordingly prayed for the dismissal of the Appeal with costs including the certified costs of Counsel.

FINDINGS OF THIS COURT

[6] 1. As regards the first ground argued by the Appellant;

1.1 the uncontradicted evidence of Attorney Dlamini was that he drew an agreement identical to Annexure 'A', simultaneously drew the Cession of Debt agreement, handed them to Cope, that the agreements were signed and the signed sale of business agreement was handed to SIDC who lost it;

1.2 Van der Lingen, purportedly representing the Appellants, admitted knowledge of the agreement and it is telling that Cope was not called to give evidence on the existence or not as the case may be of the signed agreement and as such this Court can draw an adverse inference in that regard as did the Court *a quo;*

1.3 Nhlabatsi gave uncontradicted evidence that agreements were drawn and signed;

1.4 The Appellant raised a special plea, although not argued, citing the provisions of Clause 20 of Annexure 'A';

1.5 At page 14 of the Heads of Argument of the Appellants it is stated, by reference to the transcript that "although there was talk to conclude some sort of agreement with SIDC, the fact that the Deed of Sale disappeared persuaded SIDC not to conclude such an agreement";

1.6 As such there is in our view no need to canvass any issues relating to a purported tacit agreement and we find that, in agreement with the Court *a quo* that an agreement identical to Annexure 'A' was signed in February 2012 but was lost by SIDC subsequently;

1.7 this ground must accordingly fail.

2 As regards the third ground argued by the Appellant;

2.1 we agree with Counsel for the Respondent that in many respects Annexure 'A' was inelegantly drawn and from the record of proceedings and the preamble to Annexure 'A' as referred to above, clearly points to the South African company MPE Timbers (Pty) Limited being nothing more than a marketing agent;

2.2 there is no evidence that that company owns or owned any interest in the capital of the Respondent at any time and the Appellant, in making the allegation, had ample opportunity both in the pleadings and in the hearing of the matter before the Court *a quo* to raise and argue the issue but failed to do so and cannot raise this as a new ground on appeal;

2.3 even if they did so, for the sake of clarification, an entity to be joined must have a direct interest in the subject matter and there is no proof before the Court that the South African

company had any interest other than the right to market the products of the Respondent;

2.4 the allegation by the Appellants that this Court is obliged to raise the issue of non-joinder *mero motu* and that the Court *a quo* should also have done so is with respect misguided. See the **Ngcwase** case referred to above;

2.5 this ground was not raised or argued before the Court *a quo* and as such this Court has no obligation to consider it on appeal.

2.6 accordingly this ground must also fail.

3 Which leaves the remaining ground of appeal which was the second head referred to in the arguments of both Counsel.

4 Having found that Annexure 'A' was an identical replica to the signed agreement, we come to the provision of Clause 4 thereof. Counsel for both sides raised their own issues relating to Clause 4 but we believe it necessary to repeat the provisions of 4.1 and 4.2 in their entirety and it is our underlining of the various provisions below.

4.1 The obligation of the Sellers to sell and of the Purchaser to purchase on the terms of this agreement is conditional upon;

4.2 The parties to this agreement shall use all reasonable endeavours to procure that the condition in this Clause are fulfilled by ……or such later date as may be agreed, but if all such conditions have not been fulfilled (or waived by the Purchaser) by that date, then the Purchaser may give notice writing to the Seller, cancelling this agreement, which shall from the date such notice is given be void and of no effect and none of the parties to this agreement (provided it shall have used all reasonable endeavours to procure the fulfilment of the conditions in this clause) shall be under any liability in respect of this agreement.

5 Clearly these clauses, for the reasons of the wording underlined, provide that;

5.1 there was a reciprocal duty on both parties to use all reasonable endeavours to procure the fulfilment of the suspensive conditions;

5.2 since there was no date, as argued by both parties, this should have been achieved within a reasonable period but clearly flexibility was envisaged by the wording relating to a later date as may have been agreed;

5.3 although it provides that notice may have been given by the Appellants, given the circumstances, we believe that such notice should have been given;

5.4 in addition it clearly provides in the words in brackets that the party giving such notice must have used all reasonable endeavours to procure the fulfilment of the conditions.

6 We have taken the arguments of both parties into consideration but what perplexes this Court is that the Appellants, acting through van der Lingen, without any Order of Court or having put the Respondent on any terms or having given the Respondent notice of cancellation of the agreement or any other notice, merely dispossessed the Respondent of the business and the business assets when it had clearly not itself abided by its undertakings in terms of Clause 4.2 of the agreement which clearly provides for reciprocal obligations which then resulted in the Respondent being fully justified in bringing a vindicatory action against the Appellants which resulted in the Judgment of the Court *a quo* being granted against the Appellants.

7 For that reason this Court closely studied the authorities relating to fictional fulfilment of conditions of a contract and the advancement of the law and of the jurisprudence relating to this concept over the

years. The issue is debated in elegant detail in **Christie's The Law of Contract 6th Edition** from page 153 onwards and in that regard;

7.1 Firstly it is clear that the doctrine of fictional fulfilment is based on the principle that a party cannot take advantage of his own default to the loss or injury of another. See **Scott v. Poupard 1971 2 SA;**

7.2 The issue was first dealt with by Innes CJ in **MacDuff & Company Limited v. Johannesburg Consolidated Company Limited 1924 AD** where at 591 he stated;

> *"I am therefore of opinion that by our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of dolus on his part"*.

7.3 **Christie's** at Page 154 argues that Innes CJ made it clear that in stating the doctrine of fictional fulfilment he was using *dolus* not in a narrow sense of fraud or want of good faith but in its widest sense which include any deliberate or calculated action to prevent fulfilment;

7.4 At Page 155 **Christie's** states that it was unfortunate that the word *dolus* found its way into the formulation of the doctrine by Innes CJ;

7.5 In **Koenig v. Johnson & Company Limited 1935 AD 262 272 Wessels CJ** said;

> *"The nature of the contract is always an important element. In some cases the person benefited by the non-performance of the condition can sit still and do nothing to assist in its fulfilment, in other cases it is his legal duty to assist in the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfilment of the condition in order to escape the consequences of the contract, the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith".* (our underlining)

7.6 various other advancements were made relating to this doctrine and at page 156 **Christie's** states that;

> *"the conclusion to which the cases point therefor is that the doctrine applies equally to true conditions precedent and to terms of the contract that operate as conditions precedent. That in either case it will apply when there has been bad faith……and at all levels no distinction is drawn between acts and omissions. See* ***Du Plessis NO v. Goldco Motor & Cycle Supplies (Pty) Limited 2009 6 SA 617 (SCA) [24]-[27].***

7.7 while the Swaziland Courts refer to decisions of the South African Courts and are guided by mainly Roman Dutch

principles, Swaziland has the obligation to develop its own jurisprudence;

7.8 in our view it is clear that there is no firm evidence in the record of proceedings in the Court *a quo* that the Appellants did anything to keep to their part of the bargain of a reciprocal duty emanating from Clause 4.2 of Annexure 'A' to use its best endeavours to ensure the fulfilment of the conditions precedent set out at 4.1 of Annexure 'A' and after allowing the Respondent, unhindered, to run the business and be in possession of the business assets for a period exceeding five years and for no apparent good reason at law and without any notice or any order of any Court to dispossess the Respondent of the business and the assets subsequently relying on the non-fulfilment of a condition precedent, in our view clearly must fall within the now advanced and expanded doctrine of fictional fulfilment;

7.9 under those circumstances we are of the view that the Appellants cannot, as espoused in **Scott v Poupard,** cited above, take advantage of their own default to the loss or injury of others and we accordingly find that under those circumstances the doctrine of fictional fulfilment of the suspensive conditions applies in this instance.

8 Accordingly the final ground of appeal must also fail.

9 In our view the Respondent also clearly elected to follow its right in terms of the vindicatory Order to repossess the business and the

business assets and as such the alternative pleas and orders fall away and as such there is no reason to interfere with the Judgment and orders of the Court *a quo* in that regard.

10 The Appellants did not argue the issue of their counterclaim and as such there is no reason to interfere with the Judgment of the Court *a quo* in that regard.

11 As far as the issue of costs awarded by the Court *a quo* is concerned, we will not interfere with the Judgment of the Court *a quo* in that regard and in any event the issue was not argued by the Appellants with any great conviction.

IT IS ORDERED

[7] 1. The appeal is dismissed with costs including the certified costs of Counsel.

2. In the light of the Applications brought by the parties subsequent to the Judgment of the Court *a quo,* the said Judgment is amended to read;

2.1 Plaintiff's cause of action succeeds and Defendants' counterclaim fails;

2.2 the Deputy Sheriff or the Defendants or any other person in possession of the business or the business assets through the First Defendant, including the Second Defendant, are hereby ordered to immediately restore possession of the business and the business assets to the Plaintiff;

2.3 the First Defendant is ordered to pay costs of the suit on the Attorney and client scale.

R. J. CLOETE
ACTING JUSTICE OF APPEAL

I agree

S. B. MAPHALALA
ACTING JUSTICE OF APPEAL

I agree

J. P. ANNANDALE
ACTING JUSTICE OF APPEAL