IN THE SUPREME COURT OF SWAZILAND

Civil Appeal Case No.37/2015

In the matter between:

ROYAL SWAZILAND SUGAR CORPORATION **Appellant**

VS

UNICORN CONCEPTS (PTY) LIMITED **Respondent**

Neutral citation: *Royal Swaziland Sugar Corporation v Unicorn Concepts (Pty) Limited (37/2015) [2015] SZSC 38 (9 December 2015)*

Coram: **M.C.B. MAPHALALA CJ, DR. B.J. ODOKI JA** and **M.D. MAMBA AJA**

Heard: 13 November 2015

Delivered: 09 December 2015

[1] Civil law – law of contract – offer and acceptance. A party to a contract is bound by all the terms and conditions embodied in the contract, where the acceptance thereof is unconditional.

[2] Civil law – law of contract – respondent claiming performance of contract and claiming payment thereof. Contractor impliedly warrants that his work has been done in workmanlike and competent manner and such work is free from any material defects. Substantial performance of contract is sufficient compliance with contract.

[3] Civil law – appeal – appellant complaining that work by respondent is substandard and refusing to pay for it. No evidence that the work done is not fit for purpose. Substantial performance proven. Appeal dismissed.

JUDGMENT

MAMBA AJA

[1] In the beginning of February 2012, the appellant invited the respondent to tender for renovations or refurbishments of some of its tennis courts and basket-ball courts in Mhlume and Simunye. The Respondent was one of about four entities who tendered for the said works and was represented by its managing director Mr Busalive R. Bhembe (hereinafter referred to as Bhembe). The appellant was represented by Rodney Bongani Ndzinisa, its estate service manager (hereinafter referred to as Ndzinisa).

[2] In order to tender for the works, the respondent was required to inspect the said courts and make a written quotation. Ndzinisa assigned Livingstone Dlamini to be the foreman to supervise or oversee the work at Mhlume whilst Sicelo Tembe was assigned to do the same at Simunye.

[3] Bhembe submitted the respondent's quotation to the appellant and thereafter the appellant advised the respondent by way of its purchase

order that the respondent had been awarded the tender and work had to start in earnest as the appellant needed the renovations to be completed within the month of February 2012. There were two courts to be renovated at Mhlume. One was a tennis court and the other was a basketball court. At Simunye there were two tennis courts.

[4] The tennis and basket-ball court at Mhlume were situated at or known as Hambanathi whilst the tennis courts at Simunye were at the Simunye country club. It is common cause that there were other tennis courts at the appellant's Mhlume Estate, such as Hlanganani and Madevu, (see page 187 line 30 of the Book of pleadings).

[5] In its quotation, which in this case also constitutes the tender document, the respondent listed all the items that it would do in renovating or refurbishing the courts in question. It also stipulated the price or costs for each item or such activity. In turn, the appellant duplicated or copied this quotation as its purchase order and award of the tender. The tender for the Mhlume project is annexure B at page 10 of the Book of Pleadings and the corresponding purchase order by the appellant is annexure A, at pages 8 and 9 of the Book of Pleadings. The total charge or fee is a sum of E163 260.00. The quotation for the Simunye project is a sum of E149 400.00, as reflected in annexure D. Its corresponding purchase

order is annexure C at page 11 of the Book of Pleadings. This brings the total cost or value of the tender award to a sum of E312 660.00, which is the amount claimed by and awarded to the respondent by the court *a quo* against the appellant.

[6] From the above facts, it is plain to me that although this transaction or tender was basically treated by the parties as one, it is in reality two tenders merged into one. The two tenders are clearly severable from each other. I shall return to this aspect of the matter later in this judgment.

[7] In the tender award or purchase orders referred to above, the following words appear immediately above the signature of the author thereof:

'Important: This order and the contract resulting herefrom are subject to RSSC purchasing Terms and Conditions which are available from RSSC on request.'

There is, however, no document that was signed by both parties herein, either before or after the award of the tender to the respondent.

[8] It is common cause that the appellant's purchasing terms and conditions were never given to the respondent and the respondent did not request for them after the tender award. A copy of these Terms and Conditions have been filed herein as RSSC1 beginning at page 23 and ending at page 37

of the Book of Pleadings. They have been regrettably repeated without any explanation or justification at pages 207 to 221 of the Book of Pleadings. This is totally unnecessary and unduly burdens the court record.

[9] It is not disputed that prior to the tender under consideration herein, the respondent had done similar work for the appellant and was aware of the existence and applicability of the appellant's general Terms and Conditions referred to above. I mention this point because it constitutes, in the main, the appellant's defence that it acted in terms of these Terms and Conditions in terminating the contract under consideration or at least in withholding payment to the respondent.

[10] Although the issue of the applicability or otherwise of these Terms and Conditions was extensively contested in this court and the court *a quo*, I do not think this is an issue that should detain this court as it did in and to the court *a quo*. The simple answer to the issue is this: The purchase order by the appellant specifically informed the respondent that the tender award or purchase order was subject to this Terms and Conditions. Having unconditionally accepted the purchase order, and started to execute his mandate in terms thereof, the respondent cannot in law be heard to say that he was not given a copy of these Terms and Conditions

of purchase or that these terms do not form part of the contract. That, I would think, is basic or trite law. Therefore, to the extent that the court *a quo* held that these Terms and Conditions of purchase did not form part of the tender award or contract, the court was in error.

[11] I have set out above the factual background and legal issues in order to lay out the framework under which the parties contracted and under which the dispute between them arose. I now revert to the merits of the appeal or dispute.

[12] The respondent started executing the contract early in February 2012. The work began simultaneously in both locations, i.e. Mhlume and Simunye. I shall examine first the Simunye project, where the appellant's representative or overseer was Sicelo Ezra Tembe. He gave evidence in the court *a quo* as DW1. The respondent led the evidence of Bhembe in support of its case.

[13] In terms of the quotation and purchase order for Simunye, the respondent undertook to:

(a) scrape and repair 2 concrete bases measuring 36 x 18 metres,

(b) remove and poison vegetation inside the court,

(c) apply an under coat to the surface,

(d) apply a coloured top coat to the surface,

(e) make markings of tennis court lines,

(f) replace the dividing fence between the courts,

(g) paint the poles for the fence,

(h) replace the tennis court nets and

(i) make or provide a gate in the fence between the courts.

[14] Bhembe testified that the respondent carried out the work as per the contract but when the respondent sent an invoice to the appellant for payment, the latter then alleged that it was not happy with the work done and was therefore not paying. It is common cause that the said invoice was sent to the appellant on or about 24 February 2012. Ndzinisa informed Bhembe that his superior in the form of Mr. Joe Khumalo had said that the appellant would not pay because the work done by the respondent was substandard or its quality was below that which the appellant expected. This was the reason for appellant's refusal to pay. Ndzinisa and Bhembe inspected the tennis court in question but Ndzinisa was unable to point out what was wrong with the work.

[15] When Joe Khumalo insisted to Mr Bhembe that the work was substandard, Bhembe informed him that the work had been done as per the quotation and if the appellant wanted something to be done over and

above that quotation, this could be renegotiated and a new contract concluded. Mr Khumalo in a letter dated 08 March 2012 informed the respondent that '… the quality of the workmanship at both the Simunye Country Club and Hambanathi Village tennis courts is below the acceptable industry standard … on the following grounds:

- The acrylic re-surface is not smooth;
- the Hambanathi courts colour coating seems to have been exposed to impurities e.g. leaves and debris;
- the patch binder material used to fill, level and repair low spots and depressions has developed cracks; and
- the green and maroon colour coats of the tennis courts are not uniform;
- the paint on fence and gates is of poor quality; workmanship.'

He demanded that these deficiencies be rectified within a period of seven (7) failing which the appellant would cancel the agreement. The respondent insisted that it had carried out the works as per its quotation. What followed was that the appellant terminated the contract, withheld payment to the respondent, engaged an expert chartered surveyor to assess the work done by the respondent, and, eventually hired another contractor to upgrade and re-surface the courts. The said cancellation was not in writing however. The upshot of this stance by the appellant

was the action before the court below wherein the respondent successfully sued for the payment of the full contract price.

[16] It is significant at this stage, I think, to note that when Mr Joe Khumalo interacted with the respondent, he did so in his capacity as the Property Services Manager of the appellant. He had never been introduced to the respondent and he was never at anytime introduced to the respondent. I shall return to this issue when I consider the Terms and Conditions of purchase already referred to above.

[17] The court *a quo* held that the appellant only raised the issue of defects in the works after the respondent had completed the work and was demanding payment. It therefore accepted the evidence of Bhembe that the appellant's allegations of the existence or presence of defects was nothing but an excuse to avoid payment. Alternatively, the court held that the respondent had in any event substantially performed its part of the bargain or contract. The appellant has appealed, *inter alia*, against both these findings by the court below.

[18] Apart from the expert report by Ngwenya Wonfor, the appellant appears to have heavily relied on the evidence of Sicelo Ezra Tembe (DW1). DW1 complained about the surface being too rough. He argued that such

a surface '…may turn the ball to any direction' and this would pose a danger to the tennis players, especially those above the age of forty years. He also said he complained about water stagnating on certain parts of the surface. I do not, however, find it necessary to burden this judgment further with the evidence of DW1 as he candidly informed the court that he had no knowledge of the work that was being done. He was there to observe and learn how resurfacing or rescreeding a tennis court is done. In his evidence in chief, he stated as follows:

> 'I arranged with Sicelo to tell me when he will start resurfacing and rescreeding of the court. My reason was that since I've never seen it done I only read about it, I wanted to see it practically done.' (Page 131 lines 4 to 7).

His lack of knowledge in this respect is demonstrated by his insistence of the water stagnation and smoothness of the surface being addressed during the application of the first coat. The respondent advised him that such issues would be addressed when applying the second and final coat.

[19] On examination of the work done by the respondent, DW3 made the following six observations, namely:

> '(a) Concrete base screed was towelled in an untidy manner. This needs to be power floated to a smooth finish.

(b) application of under coat and top coat coloured surfacing including marking tennis lines-finish coat looks untidy with brush marks including badly marked tennis lines;

(c) replacing net-available on site, though we need to confirm quality;

(d) replacing fence dividing both courts (upper fence half suitable whereas bottom fence half need to be removed and replaced with suitable one.

(e) Court steel poles are all painted except for the top edge of the horizontal rail.

(f) Access gate between both courts through dividing fence is missing.' (vide page 232 of the Book of Pleadings).

[20] On the smoothness of the surface the report says it was untidily done. In short, it was not sufficiently or adequately smooth. The respondent testified that the surface was fit for purpose as making it any more smooth would pose a danger to its users, as players would easily slide, slip and fall. However, when the court conducted the inspection in loco, Bhembe informed the court that the surface in those two tennis courts had been down by the respondent. The appellant did not deny this assertion. This fact would seem to suggest that Coastal Pool, which was later engaged to upgrade and resurface the courts did not find anything wrong

with the surface and thus did not interfere or tamper with it. Regarding the nets, the available and undisputed evidence is that these were supplied by the respondent to the appellant. The appellant accepted them. Again, whilst accepting that the mesh fence in between the courts was of different size mesh or holes, the respondent stated that this was of no consequence at all as such holes were sufficiently small not to allow a tennis ball through them. He stated that this was the major consideration in deciding on the size of mesh of the fence to be installed. Again, there was no evidence to gainsay this. Regarding the gate between the two courts, the respondent testified that the requirement was to provide an opening only and this is what the respondent did. The only answer by the appellant to rebut this assertion was that the figure or amount quoted for doing so was too high for this exercise. This cannot, in my judgment be an answer to the dispute. The bottom-line is that the appellant accepted this quotation.

[21] In amplification of his report, DW3 at page 179 lines 5-10 stated as follows:

> ‘At Simunye, the base was in good condition. The top screed was untidy, it ought to be smooth. The paint was fine both green and maroon, although it had a bad or untidy screed. The nets were said to be available, the supervisor said he had taken them.

> The fence was not tight, it needed strengthening. The poles were fine.'

Crucial or significant in this evidence is the lack or want of an assertion by this witness that the untidy finish in the painting and screed made the tennis courts not fit for purpose or unplayable. Further, there was no complaint about vegetation resurfacing in the courts. It is this evidence or lack thereof which persuaded the court below to hold that there was substantial performance of the contract by the respondent.

[22] In paragraph 48-50, the learned judge in the court below stated as follows:

> '[48] If I am wrong in the above, there is another aspect of this dispute over the texture of the surface which needs legal approach. **Wessels J** in **Hitchins v Breslin 1913 TPD 677** at 683 -683 stated:
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> > '*But where the price is a lump sum, if the contractor has not yet completed his contract he cannot sue for the contract price. There are, however, exceptions so this proposition, and an important one occurs where the contractor has completed the work except as regards some minor details. In such a case the maxim, 'de minimis non curat lex' applies and the law will not deprive a man of his money merely because he has omitted some insignificant details.*

[49] The learned Judge then cited **Gould v Henderson Cons. Corporation Ltd. 1980 T.S.** at page 980 by **Solomon J:**

> "*The mere fact that a small defect of that nature (value £1 10s) has been established in a contract involving an amount of £725 does not in my opinion justify the magistrate in holding that the work has not been completed, and that the retention money in the hands of the defendant could not be recovered by the plaintiff.*
>
> *In order to judge whether the defect is small or great we must consider the nature and object of the contract. If there is some trifling omission in a contract to build a house in the Court may hold that the building contract has been substantially carried out and award to the contractor the money due under his contract. If, however, the defect in a contract of a technical nature is small in appearance but great in its scope, the Court will not readily hold that the contractor has completed his contract*" (my emphasis)

[50] DW3 stated of the surface: "*The top screed was untidy. It ought to be smooth.*" No further evidence was advance to indicate that this "*untidy screed*" rendered the courts non-functional for its purpose or posed as a danger to its users. From the understanding

> of DW3's evidence, the *ratio decidendi* in **Hitchins** *supra* applies fully *in casu* by reason that the screed was only "*untidy*" and nothing further could be said of it with regard to the overall view of the work done by plaintiff."

I am unable to find fault with this assessment of the evidence by the learned trial judge. See *also AA ALLOY FOUNDRY (PTY) LTD v TITACO PROJECTS (PTY) LTD 2000 (I) SA 639 (SCA) and KHOOSIAL SINGH v BMW FINANCIAL SERVICES (SA) PTY LTD and Another, case5345/2006 (DCLD)* (Judgment delivered on 23 October 2007) and the cases cited therein.

[23] The appellant has, as one of its ground of appellant, stated that 'the court erred by finding that the basis of the contract between the parties was the quotation supplied by the respondent, [and] by not finding that the basis of the contract was the Purchasing Order read together with The Standard General Terms and Conditions of the Appellant….' I have already dealt with this issue above and there is no need for me to plough the same ground twice herein. However, there is no evidence at all that the appellant ever adhered to the terms of the said Terms and Conditions of Purchase. For instance, clause 10 of the Appellant's Terms and Conditions of Purchase provides as follows:

‘Supplier’s Default

Should Supplier fail or neglect to carry out its obligations in terms of the Order, or refuse or neglect to comply with any reasonable orders given to it in writing by the Engineer in connection with the Order, or make a material breach of any of the provisions of the Order, the Engineer may give notice in writing to Supplier to make good the failure, neglect, refusal or breach complained of. Should Supplier fail to comply with the notice or to justify its actions within a reasonable time, RSSC shall have the right to terminate the Order forthwith by giving written notice to Supplier, and upon such termination the provisions of clause 12. hereof shall become effective.’

Clause 1.1.7 stipulates that:

‘The “Engineer” shall mean the Factory Manager acting on behalf of RSSC or some other person employed by RSSC and appointed by the Factory Manager, or by RSSC, and notified to Supplier.’

[24] At all times material hereto Joe Khumalo was the Appellant’s Property Services Manager and not the factory manager. Even accepting for the moment that he was employed the appellant, there is not even a Scintilla

of evidence that he was appointed by the factory manager or the appellant to act as he did in this case. Besides being appointed as aforesaid, the respondent had to be notified of such appointment. No such notification was ever made herein. Ndzinisa also did not make any written complaint to the respondent. There is further no written notice of termination of the contract by the appellant herein. The letter of the 08 March 2012 is only a threat to terminate the contract if the demands stated therein are not met within the stipulated period.

[25] It is not difficult to understand or appreciate why the inspection of the works must be done by an Engineer or someone specifically appointed by him. The Engineer is skilled in the relevant work and or endowed with the necessary or relevant knowledge or know-how pertaining to the work. He thus has the necessary knowledge to make a judgment call on site and also articulate his complaint or grievance. As already stated, both Ndzinisa and Joe Khumalo were not shown to have been duly appointed to act as they did. Ndzinisa, as already stated, made no written report to the respondent.

[26] I have already stated that although the claim was for the total contract price for the two projects or sites, these projects are plainly separate and severable from each other. In other words, the works at Simunye and the

quality thereof may be ascertained, viewed and determined separately or distinctly from the Mhlume Project. Indeed the complaints by the appellant are not the same for the two projects.

[27] Whilst, I do agree with counsel for the appellant that the respondent was expected to carry-out the contract and perform its task in a workmanlike manner; so that the final product is fit for the purpose for which it was made or constructed, I see no evidence in this appeal suggesting that the renovations of the tennis courts in Simunye rendered such courts not fit for purpose or use. Such an undertaking to make the court fit for purpose, by the construction company is in my view implied in the contract. That the appellant's Terms and Conditions of Purchase provided for such warranty or guarantee, was in my judgment surplusage.

[28] From the above analysis of the evidence and legal principles relevant thereto, I cannot find fault with the decision of the lower court in respect of the Simunye contract or project. I would dismiss the appeal in this regard.

[29] The want or lack of authority and due diligence or compliance with the Terms and Conditions by Joe Khumalo and Ndzinisa, in respect of the works at Simunye equally applies to the project at Mhlume. Livingstone

Dlamini, the person assigned by Mr. Ndzinisa to monitor the work at Mhlume did not file a written report or complaint. He did not give evidence in court either.

[30] I should observe from the outset that I entirely agree with the appellant that the trial court was in error in stating that the appellant led the evidence of only three witnesses. There were four witnesses for the appellant. The trial court, rather inexplicably failed to discuss or consider the evidence of the fourth witness, i.e. Ishmond Mgidziko Fakudze. This witness testified on the identity of the tennis court and basket-ball courts that were the subject of the Mhlume contract. In terms of the relevant contract, the courts to be renovated were at Hambanathi. However, according to the evidence a report by DW3, the information compiled was in respect of courts at Hlanganani. He (DW3) stated that he was instructed to inspect and compile a report in respect of the courts at Hlanganani. (See page 180 of the Book of Pleadings). Dw3 informed the court that he later learnt whilst the matter was going on in court that the name of the site ought to be Hambanathi.

[31] After examining the evidence of DW3, the Learned trial judge stated as follows:

> '[32] The only witness who spoke on behalf of the defendant about the court at Mhlume was DW3. His evidence was, however, startling under cross examination as he revealed that the courts at Mhlume which he was taken to for assessment had not been renovated at all. They were very old courts. There was disparity as to which court he had examined at Mhlume. His report reflected that he attended to Hlanganani court while before court PW1 testified that he renovated Hambanani. DW3 testified that when the case *in casu* was progressing in court, he learnt that his report ought to have read Hambanani and not Hlanganani. Defendant's case from the onset was not that he failed to renovate the court at Mhlume but that his renovations were substandard. It follows therefore that from the evidence of DW2 that he never received any complaints about Mhlume and Dw3's testimony that the court which he examined at Mhlume had not been renovated that there cannot be any substantive issue about the renovations at Mhlume. Mhlume courts stand to be eliminated form this suit and defendant is obliged to pay.'

(The evidence of course refers to Hambanathi instead of Hambanani. The court erred in this regard). DW3 was not the only witness who testified about the courts at Mhlume. Ndzinisa and DW4 did testify about the courts at Mhlume. In particular, Ndzinisa informed the court that the

consultant, DW3, had made a mistake in his report by referring to Hlanganani courts and not Hambanathi. (See his evidence at page 164 lines 12 and 13 of the court record). Ndzinisa did not, however, tell the court how the error was committed. He did not inform the court that he personally knew that the consultant had been taken to Hambanathi and not Hlanganani. Again when Ndzinisa was shown and questioned about the pictures for the site at Mhlume, and told that 'the pictures are for Hlanganani, he merely said: 'I don't know about that.' (Page 173 line 17). He seemed to confirm this later in his evidence when he said: 'Yes, according to the report.'

I find this evidence by Ndzinisa very suspect considering that he had been under the employ of the appellant as Estate Service Manager since 1998. One would have expected him to be able to identify the courts in question even from still photographs after such a long period in that capacity. It was his job, *inter alia*, to maintain these courts.

[32] DW4 was the appellant's Contract Engineer since February 2012. He served his induction during the first month and only took full charge as Contracts Engineer in March 2012. He did not deal with the respondent. He testified that he had personally taken DW3 to Hambanathi location to do the inspection or assessment of the courts there. He identified the pictures in question as those of Hambanathi court and not Hlanganani.

He said he took full responsibility of the error in the name of the courts in the report by DW3. He could not, however, explain how the error came about.

[33] In assessing and analysing the evidence, the court did not make any credibility findings based on the demeanour of any of the witnesses. That being the case, whilst the learned judge ignored or did not consider the evidence of DW4 in its judgment, this court is, as the lower court was, in an equally good position to assess that evidence based purely on its overall or general tenor, probabilities, efficacy or lack thereof. Rule 33 (3) of the Rules of this Court supports this view. It provides as follows:

> '(3) Even where the notice of appeal seeks to have part only of the judgment reversed or varied, the court of appeal may draw any inference of fact, give any judgment, and make any order which ought to have been made and may make such further or other order as the case may require, and such powers may be exercised in favour of all or any of the respondents or parties whether or not they have appealed from or complained of the decision under appeal.'

[34] DW3 informed the court that he got a telephone call to conduct the inspection of the courts. It is not clear from his evidence who, on behalf

of the appellant instructed him. He was, however, certain that once at the appellant's premises, he dealt with DW4. It was DW4 who showed him the sites to be inspected. This evidence is confirmed by DW4. Surprisingly though, neither of these two witnesses even made an attempt to shed light on how the mistake, if indeed it was such, in the name of the Mhlume court was made. This evidence was vitally important in the case and I have no doubt that DW4 was called to testify specifically on the identity of these courts. All he did though was to say he took full responsibility for the mistake in the report and the courts that were inspected were at Hambanathi. He did not say that he had erroneously told DW 3 that the site was at Hlanganani. Again, when shown pictures of the courts that were inspected by DW3, he was unable to deny that these were pictures of Hlanganani courts.

[35] It is important to remember that DW3 was an outsider. He was a consultant engaged solely to make an assessment of the work allegedly done by the respondent. He, in all probability did not know the names of the various courts at Mhlume. He was therefore informed by the appellant's employees to do an inspection at Hlanganani. This inspection was conducted in or about 18 April 2012 and his report is dated 27 April 2012. The report, in block letters refers to Hlanganani Village, Mhlume and so does the notation on the relevant pictures. This report was in the

possession of the appellant for about two years before they noticed that it referred to Hlanganani instead of Hambanathi. This unexplained error was discovered during the actual hearing of the case. The assertion by the appellant that this is indeed an error is, in my judgment just staggering. It is incapable of belief in the circumstances. I reject it. It is an afterthought or belated stratagem by the appellant in its attempt to avoid payment to the respondent.

[36] In the light of what I have said above, and, in particular in the preceding paragraph, the report by DW3 and his evidence is totally irrelevant in this case as it does not relate to the courts at Mhlume that were the subject matter of the dispute between the parties herein. The evidence of DW4 is also lacking in detail and fails to assist the court on the issue in dispute. The end result is that there is and there was no genuine written report by the appellant detailing its complaints to the respondent about the latter's workmanship.

[37] For the above reasons, I would dismiss the appellant's appeal pertaining to the courts at Mhlume as well.

[38] In the result, the appeal is dismissed in its entirety with costs.

M.D. MAMBA AJA

I agree.

M.C.B. MAPHALALA CJ

I also agree.

DR. B.J. ODOKI JA

For the Appellant: Mr. Z. Shabangu

For the respondent: Mr. O. Nzima