IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD IN MBABANE **CASE NO.102/2017**

In the matter between:

IMVUSELELO INVESTMENTS (PTY) LTD **Appellant**

And

USUTHU FOREST PRODUCTS LIMITED **Respondent**

Neutral Citation: *Imvuselelo Investments (PTY) Ltd vs Usuthu Forest Products Limited (102/2017) [2018] SZSC 32 (20 September, 2018)*

Coram: **SP Dlamini JA, MJ Dlamini JA, SB Maphalala JA**

Heard: **19 July, 2018**

Delivered: 20th September, 2018.

JUDGMENT

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[1] The parties had entered into a five - year agreement in terms of which the plaintiff (the appellant herein) would harvest gum trees and be paid by the defendant (the respondent). The contract became effective from 1st September 2015 and first payment to plaintiff was due at the end of October 2015. The terms of the agreement were understandably elaborate and stringent [on the part of plaintiff.] The plaintiff had to raise money in order to pay, *inter alia*, the salaries of its employees whilst awaiting payment from the defendant. In the result, plaintiff had to pay its employees at the end of September from its own resources. However, plaintiff did not pay its workforce as arranged on the 30th September or 9th October 2015, until the late afternoon of 13th October 2015. In the mean time employees of plaintiff became restive and rowdy and caused fire to defendant's forest on the evening of the 13th October. The upshot was termination of the agreement by defendant by Notice dated 14th October 2015 with effect from that same day.

[2] Plaintiff brought an action for wrongful cancellation of the contract by defendant claiming that the alleged acts of its employees were not part of the agreement and that in any case it was entitled to a 30 days' notice before termination of the contract. Accordingly, plaintiff claimed damages in the amount E13,775,000 with interest at 9% per annum *a tempore morae*. The

action was unsuccessful and hence this appeal on a number of grounds, the main being that the court *a quo* erred in finding that plaintiff was not entitled to a 90 days' notice before cancellation and that the fire was indeed started by plaintiff's employees.

[3] It is worth noting that in its particulars of claim plaintiff states that it was entitled to a 30 days' notice under clause 17.2.2 of the agreement. But in its grounds of appeal plaintiff says that it was entitled to a 90 days' notice before cancellation. There is no indication where exactly in the agreement this notice of 90 days is to be found. There is no such period of notice in terms of the agreement. Clause 17.2.5 does not so provide. In its para 1.2 of the grounds of appeal plaintiff says that "The contract signed by the parties made it mandatory that three [3] months' notice be given to a party in breach". And in its heads of argument, para 10, plaintiff meekly says *"…..the appellant was entitled to be given notice as per the contract"*. Again, no part of the contract is referred to as providing for such notice as claimed.

[4] This ground of appeal based on a 30 or 90 days' notice before termination of the contract must be dismissed. Defendant stated its reason for cancelling the contract in a letter dated 14th October 2015. The contract was cancelled on that day without notice. The letter was headed: "*Notice of Termination of Contract"*. But it was more of information than notice. In that letter defendant referred to the fire which had damaged part of its forest on the evening of the 13th October and attributed the cause of that fire to the

employees of the plaintiff's as a result of plaintiff failure to comply with the terms of the contract. Defendant placed the full responsibility for the fire incident on the shoulders of the plaintiff, alleging plaintiff to be guilty of *"gross negligence resulting in malicious damage to Usuthu property"*. Defendant then concluded: *"…and in light of this you are hereby advised that your harvesting contract…is hereby terminated with immediate effect…"*

[5] Plaintiff denied that the fire alleged by defendant was caused by employees of the plaintiff. In this regard, plaintiff referred to the fact that even though the police were informed none of its employees had been prosecuted for the alleged arson. And that in any case, arson or similar misconduct by plaintiff's employees was not part of the contract. In the result plaintiff claimed to have been entitled to a month's notice before termination. The defendant, however, contended that there were other terms of the contract binding plaintiff such as compliance with labour laws, workmen's compensation and public liability, insurance documents, and plaintiff was "obliged to ensure that its personnel do not damage any property belonging to or controlled by the defendant", and was "*obliged to refrain from committing an act which would be an act of insolvency if committed by a natural person"*, and the plaintiff was not to sub-contract any of the contractual services without consent in writing by defendant.

[6] It is difficult to see how the court *a quo* erred in finding against the plaintiff. The approbation- reprobation argument cannot carry plaintiff's

case very far. It is unthinkable that defendant would have entered into the contract of five years only to terminate it after the first month. There has got to be some credible explanation that made defendant change its mind. The plaintiff has to convince the Court that the alleged arson was in fact not the reason for the alleged breach of the contract. Plaintiff must have an explanation of how the fire was caused, an explanation pointing at the defendant as the person behind the arson to create an excuse to terminate the agreement. It is not enough for the plaintiff to simply deny that its employees caused the fire to 'teach' the plaintiff not to unduly delay their payment. The payment of salaries by the 9th of the following month was late enough: to further delay payment was criminal and unjustifiable by any account. Even on a balance of probabilities the argument of reprobation is very weak. No evidence was tendered to show at what point defendant reprobated. At what point or date of the month was the financial assistance expected by the plaintiff from the defendant. Did plaintiff ever call upon defendant to 'assist' as agreed in time to pay the employees by the 9th of October?

[7] The issue of notice claimed by the plaintiff depends on the interpretation of the contract provisions. The court *a quo* rejected this argument on the basis that the *raison d'etre* for the contract, the felling of gum trees, stood to be extinguished as a result of the fire, and therefore any notice also fell away since there would be no work in the period of the notice, that is, there would be "nothing to fell". The alleged redeployment of the employees of plaintiff by the defendant falls short of stating that these employees in effect continued the work that plaintiff had been disengaged from. There might

have been work to be done and there might in fact have been gum trees to fell. It must have been the mismanagement of the workers by non-timeous payment of their salaries that became critical to the sustenance of the agreement. The failure of plaintiff to manage and keep satisfied its workforce rendered plaintiff a security risk to the industry. What if another fire broke out during the period of notice and consumed more gum trees because of the negligent failure of the plaintiff to maintain satisfied employees? Was defendant expected to take that risk? Thus, the presence of more gum trees to be felled is no full answer to the security risk presented by plaintiff's failure to secure funds to operate the contract efficiently.

[8] The first ground of appeal based on 'aprobation/ reprobation' (sic) does not hold much water. In terms of this argument plaintiff says defendant fully acknowledged that *"[plaintiff] had financial constraints and (yet) proceeded to offer assistance, firstly, in cash but later offered a letter (guarantee) to the bank"*, so that *"both parties were aware of the financial situation"* of the plaintiff. In my opinion, this cannot be a defence for not complying with the terms of the contract. To allow this argument would simply render the contract in effectual. That argument also runs counter to clause 2 of the agreement which makes the signed contract the *"entire agreement"* and not to be varied or altered *"unless in writing and signed by or on behalf of the parties"*. The contention of the plaintiff would affect an alteration to the contract which was not in writing and signed by both parties. And it cannot he argued that defendant had waived a provision of the agreement to become party to the unlawful alternation.

[9] The letter of guarantee dated 7th October 2015 by defendant to Nedbank was meant to assist plaintiff secure the necessary funds to execute the contract; it was not meant to amend the contract. Considering the nature of the business of the defendant, changing the terms of the contract as impliedly contended by the plaintiff would be self-defeating for the defendant. In clause 7.1.8 the agreement, it is provided that: *"The contractor must at its own cost provide, and at all times have, all the resources necessary to carry out the harvesting services"*. Several other requirements needed to be fulfilled and complied with by plaintiff at its own cost including compliance with labour laws, extending in some cases to the personnel, agents and subcontractors. Thus, the letter of guarantee could not be helpful to plaintiff and cannot exonerate it for any failure to comply with the terms of the contract. We have already dealt with the second ground of appeal.

[10] A concerning aspect of the assistance promised by defendant to plaintiff is that plaintiff declined payment of 80% of the invoiced amount in favour of a letter of guarantee for a bank overdraft. In that way it is evident that the plaintiff preferred to have money in hand the expenditure of which it could control. In the result there was no assurance that the money obtained by overdraft would he spent only for purposes of the agreement such as paying the salaries of the employees. Even then, with the letter of guarantee, securing the needed funds by way of overdraft would not ensure that the funds would be available at the time plaintiff needed the funds – as it later

happened. The bank could still ask unanticipated questions thus delaying the process to the ire of the employees.

[11] The contract could have been terminated on a number of grounds. Clause 17.2.3 does not require any notice to be given to the party in breach as is the case with clause 17.2.2. In its letter of termination, defendant wrote in para 1: *"… Upon arrival on site and investigations it was ascertained that the fire was lit by some of your employees, the root cause being none (sic) payment of their salaries and failure to communicate with them on this matter"* [on this matter.] Clause 17.2.3 reads:

> *"Should [the contractor] materially breach a material term of this Agreement or breach several of its duties or obligations which collectively constitute a material breach of this Agreement, then Usuthu shall be entitled to terminate this Agreement (…..) on written notice given to the contractor"*.

[12] Following from above and in light of the letter of cancellation, the next question is whether the breach by plaintiff is a breach of a material term of the Agreement. Defendant did not cite any specific clause of the contract as having been breached. That the burning or destruction of the forest the reason to be for the contract is a material breach of the contract brooks no doubt. The forest is the very essence of the undertaking between the parties. And also that the burning of the forest was caused by plantiff's failure to pay its employees on time. We are told that earlier on the afternoon of the 13th October, the employees of plaintiff were agitating at

Usuthu premises on account of their unpaid salaries. That when ultimately paid at about 6:30 pm that day, still some employees remained unpaid. There were cumulative reasons why payment was not made in time or at all, in some cases. The reasons point to the plaintiff having failed to act proactively to secure the necessary finances. Whether it is said that the 'root cause' for the noise and subsequent burning of the forest by the employees was 'non-payment' or 'delay' in payment it makes no difference: fire was ignited to defendant's prejudice as a result.

[13] In paragraph [53] of the judgment of the court *a quo* it is written: *"….The combustion at the hand of Imvuselelo was a breach of an expressed material term of the contract as pointed out above"*. And para [47] of the judgment states:*"…..It becomes a material term upon breach which gives rise to consequences prejudicial to the other party to the contract and such breach goes to the root of the contract"*. Thus, if the breach was of a material term, going to the root of the agreement, the issue of notice as contended for by plaintiff becomes otiose. Hence the 'zero tolerance policy' adopted by defendant makes eminent sense.

[14] In the result, I can find no fault with the judgment of the court *a quo*. I also agree with the costs order of the court *a quo*. This appeal is dismissed with costs.

M.J. Dlamini JA

I Agree **S.P. Dlamini JA**

I Agree **S.B. Maphalala JA**

B. Gamedze **for Appellant**
Adv. P. Flynn **for Respondent**