IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 89/2019**

In the matter between:

EMANGWENI HOLDINGS SUG ASSOCIATION (PTY) LTD APPLICANT

And

KUBOTA AGRIC DESIGNS & CIVILS (PTY) LTD RESPONDENT

Neutral Citation: *Emangweni Holdings Sugar Association (Pty) Ltd* vs *Kubuta Agri Designs & Civils* (Pty) Ltd *(89/2019) [2020] SZSC 37 (12 November, 2020)*

CORAM: **S.P. DLAMINI JA**

S.B. MAPHALALA JA

J·. M. CURRIE AJA

DATE HEARD: 29 October, 2020

DATE DELIVERED: 12 November, 2020

Summary: *Civil Law -law of contract -Respondent claiming performance of contract and claiming payment thereof -Appellant claiming Bank obliged to pay mid not Respondent as it was not a party to the contract -Bank guarantee not evidence of cession -Respondent to prove case on balance of probabilities -probabilities considered*

- *Held that Respondent proved its case on a balance of probabilities and Appeal dismissed.*
- *Respondent awarded costs.*

JUDGMENT

BRIEF BACKGROUND

[1] The Respondent as Plaintiff had instituted action proceedings against the Appellant as Defendant for,:

(a) The return of two (2) p:i.vot irrigation systems in the sum ofE 815 000 (eight hundred and fifteen thousand Emalangeni) provided by the Respondent to the Appellant, alternatively payment of the sum of E 815 000 (eight hundred and fifteen thousand Emalangeni) plus interest thereon at the rate of 9% per annum from 14 March 2005 to date of payment arising from a contract between the parties;

(b) Payment of the sum of E 2 110 000.00 in respect of damages occasioned by the Appellant's breach of contract.

[2] Given that the pivots had been supplied in 2005 and the fact that so many years had passed the Respondent abandoned the claim for vindication and sought judgment in the sum of E 815 000.00 (eight hundred and fifteen thousand Emalangeni).

[3] The trial ran its course and the learned Judge in the court *a quo* granted judgment in favour of the Respondent as follows:

"[66] In the result, I **enter the following orders:**

.1 Plaintiff's cause of action succeeds:

66.2 Defendant is order to pay the plaintiff the following sums;

66.2.1 E 815 000.00

66.2.2 E 95 000.00

66.2.3 E 244 500.00

66.2.4 Interest thereon at the rate of 9% per annum a tempore morae;

66.2.5 Costs of suit."

[4] The Appellant being dissatisfied with a judgment of the High Court noted an appeal against the judgment of the High Court per Her Ladyship M. Dlamini **J.** that was delivered on 26 July 2019.

[5] The appeal is opposed by the Respondent. The Appellant thereafter launched two interlocutory applications, being an application for leave to amend its Notice of Appeal and an Application for Condonation for the

late filing of Heads of Argument and an extension of time for filing of the Heads of Argument. Both these applications were opposed and determined by this Court prior to dealing with the main appeal. The Court, *inter alia,* dismissed the Application for Condonation for the late filing of Heads of Argument and an extension of time for filing of the Heads of Argument but granted the Appellant leave to amend its Notice of Appeal and file same.

MERITS OF THE APPEAL

[6] At this stage the Court is only concerned with the merits of the Appeal as per the Amended Notice of Appeal.

AMENDED NOTICE OF APPEAL

[7] The amended Notice of Appeal provides:

"1. The court a quo erred in law and in fact in not holding that Eswatini Development and Savings Bank (Swazi Bank) was a necessary party in the dispute involving the Appellant and Respondent and thus ought to have been joined as a Co- Defendant in the proceedings a quo.

2. *The court a quo erred in law and in fact in not holding that the respondent did not prove its case against the Appellant on a balance of probabilities.*

3. *The court a quo erred in law and in fact in not holding that the Respondent was not paid the sum of E815 000.00 on the facts of this matter.*

4. *The court a quo erred in law and in fact in not holding that, assuming the Respondent was not paid, the Appellant was not to be blame for that on the/acts of this matter.*

Alternatively:

4.1 The Court a quo erred in law and in fact in not holding that, assuming the Appellant was to blame for Respondent's non payment, the latter's remedy was an order compelling the Appellant to sign the Respondent's invoice.

5. *The Court a quo erred in law and in fact in holding that the sums of E 95, 000.00 and E 244, 500.00 were proven as damages and legally competent to be claimed from the Appellant.*

6. *The Court a quo erred in law and in fact in granting relief to the Respondent based on the hearsay and unverified testimony of PW 1,*

Mr.

Vriend and without calling the officer from Eswatini Bank who allegedly issued the instruction that the invoice issued by the Respondent be signed by the Appellant's Director before payment could be made."

[8] The only significant difference between the original Notice of Appeal and the proposed amendment is the introduction of the challenge against the impugned judgment on the basis that hearsay and untested evidence of PWl, Mr. Vriend was relied upon by the court *a quo.*

[9] By filing an Amended Notice of Appeal it is assumed that the Appellant abandoned the original grounds of appeal.

[1O] It is common cause and not disputed that the Respondent supplied centre pivots to the Appellant. The Appellant seeks payment in respect thereof.

[11] The Appellant contends that Appellant was not liable to make payment to the Respondent but that a third party being Eswatini Development and Savings Bank ("the Bank"), which was not joined as a party in the proceedings in the court *a quo* ought to have effected payment to the Respondent.

THE APPELLANT'S CASE

[12] The Appellant's Counsel has filed supplementary Heads as it was entitled to do, in response to the amended Notice of Appeal.

[13] The Appellant's Counsel did not deal in detail with all the grounds of appeal raised in the Amended Notice of Appeal but contended that the learned Judge in the court *a quo* ought to have made an overall assessment of the probabilities and ought not to have relied upon the untested evidence of Mr. Vriend (P'Wl in the court *a quo).* In particular, it was contended for the Appellant:

(a) That the court *a quo* ought to have found that the Respondent/Plaintiff in the court *a quo* had not made out a case against the Respondent/Defendant.

(b) That in a civil trial the onus is on the Plaintiff to prove its case on a balance of probabilities and not on the defendant to prove the correctness of the facts alleged against it. He relied on the case of **Pillay vs Krishna 1946 AD 946 at 951-2** where it was stated:

".If one person claitns something from another in a court of law, then he has to satisfy the court that he is entitled to it....The

onus is on the person who alleges and not on his opponent who merely denies it."

(c) That the learned judge in the court *a quo* failed to distinguish between the concept of burden of proof as opposed to the evidential burden as expressed by Corbett, JA *in* SOUTH CAPE CORPORATION (PTY) LIMITED vs ENGINEERING MANAGEMENTS SERVICES (PTY) LIMITED 1977 (3) SA 534 AD at p.548 as follows:

"As was pointed out by Davis AJA in PILLAY vs. KRISHNA 1946 AD at 952-3 the word onus has often been used to denote inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense..• In this sense the onus cannot shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal•..This may shift, or be transferred in the course of the cases, depending upon the measure of proof furnish d by the one party to the other.••"

(d) That the learned judge in the court *a quo* had to consider and determine the following issues:

(i) Whether there was a business relationship between the Appellant and the Respondent.

(ii) Whether there was any role to be played by Eswatini Bank in the parties' business relationship and to what extent;

(iii) Whether at the time of the institution of proceedings by the Respondent, (Plaintiff in the court *a quo)* the sum ofE 815 000 had not been paid to the Respondent.

(e) That in determining these issues the Respondent bore the onus on a balance of probabilities.

(f) That as the learned judge in the court *a quo* was faced with two opposing versions of what took place she should have had regard to the case of **STELLENBOSCH FARMERS' WINERY GROUP LIMITED** & **ANOTHER vs. MARTELL** & **CIE SA,** which provided:

" ... **To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's findings on the credibilit)[7] of a particular witness will depend on its**

impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleased or put on his behalf, or with established fact or with his own extra curialstatements or actions, (v) the. probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of the other witnesses testifying about the same incident or events.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discarding it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all the factors are equipoised probabilities prevail."

(g) That the learned judge in the court *a quo* failed to apply her mind to the aforegoing legal principles. She thus misdirected herself and committed a grave irregularity that resulted in a serious failure of justice. In particular she made a serious error of law by admitting and place reliance on the hearsay evidence of Andreas Vriend (who was presented as PWl).

[14] That the learned judge in the court *a quo* failed to apply her mind to the issue of who initiated the supply and installation of the centre pivots at Defendant's farm. He maintained that the invoice should have been signed by either the Plaintiff or A & A Properties, a third party and not Mr. Zwane of the Defendant. As the court was faced with two conflicting versions of what transpire<1 the Court had a duty to determine the matter on an overall assessment of the probabilities and ought to have made a finding on the credibility of the witnesses called by both parties. He relied on the case of **James Ncongwane vs Swaziland Water Services Corporation (Civil Appeal No. 52/2012 at page 29-30** where it was held that:

".. **.Although civil cases are won on a preponderance of evidence, yet** it **has to be preponderance of admissible, reliant and credible evidence that is conclusive and that command such probability that is in keep with the surrounding circumstances of the particular**

case.'

[15] The Appellant contended that the trial judge appeared not to be alive to the aforegoing principles who appeared not to discredit the *bona fides* of the Bank and made no comment as to why Bank officials had not been called to testify. Furthermore, she made no comment on the Respondent's failure to call those Swazi Bank officials whom Mr. Zwane alleged knew about the matter. Had she considered all the probabilities contended by the Appellant's Counsel she would have come to a different conclusion that the Respondent never discharged its onus of proving its case on a balance of probabilities. In particular it was submitted on behalf of the Appellant that:

(a) Had she done so she would have found that it was improbable that PW2 (Sandile Dlamini) was ever sent to Zwane's office to collect a cheque for the sum ofE 815,000. It is highly improbable that a cheque for such a large amount would have been for encashment over the counter and that the cheque would have been kept by the bank upon stating that such account had either been closed or had insufficient funds.

(b) If the Respondent was in possession of such a cheque it would have gone by way of provisional sentence rather than by way of trial.

(c) It was highly probable that Zwane was telling the truth when he gave evidence that he never met the Respondent's directors at the George 'hotel and that he, himself never entered into a contract of sale for the pivots and contended that it was De Beer who dealt with Swazi Bank regarding the replacement of the pivots.

(d) She would have disregarded the evidence of Khumalo and Vriend when they said the Bank never dealt with suppliers directly but went through the Bank's customers.

(e) She would have found it highly probable that Zwane was never called upon to sign the invoice as the Bank failed to make available the Bank official who invited Zwane to sign. In any event how was Zwane's signature going to change the fact that he had already given the Bank authority to pay the money directly to AA Properties upon verification by a neutral third party, being Royal Swazi Sugar Corporation who supervised the project, that the supply and installation was in order.

[16] This contention is particularly inexplicable on the part of the Appellant as the Guarantee issued by the Bank provided that it was a condition of the Guarantee that Mr. Zwane was to sign the invoices before payment would be made.

THE RESPONDENTS' CASE

[17] The Respondent's case is briefly summarized as follows:

(a) Eswatini Development and Savings Bank ("the Bank") issued a payment guarantee in favour of the Respondent, for payment of the irrigation equipment, valid until the 10th March 2005 reading:

"On presentation to us of this Authority TOGETHER WITH THE RELATIVE INVOICES SIGNED BY THE CONSIGNEE ATTACHED, within 31 days of the above quoted validity date, we undertake to pay your account within 10 days of presentation provided neither the quality nor the limit authorised is exceeded ..." (own emphasis)

The consignee referred to was the Appellant who never signed the invoices and as a result the Respondent was not paid.

(b) The Bank was not party to the contract between the Respondent and the Appellant, did not have a substantial interest therein and would only act on the instructions of its client, the Appellant. There was no cession of the Appellant's obligation to ensure or secure payment to the Respondent, to the bank. As such, it was neither necessary nor

required to join the Bank as a party to the proceedings.

(c) The Respondent contf:nded that it is trite law that he who alleges must prove his allegation. The Appellant was obliged to prove payment but failed to do so. Both the Respondent and the Bank deny payment and it was the Appellant which was ultimately responsible for payment. The terms of the guarantee placed the onus on the Appellant's director, Mr. Zwane, to sign the invoices before payment wouU be made by the Bank and the Appellant knew full well that its director, Mr. Zwane had to sign the invoice in order for payment to be effected by the Bank.

(d) As the invoice provided that the Appellant's director had to sign the invoice there was no need whatsoever to call a witness from the Bank to state what is contained on the face of the invoice.

ANALYSIS

[18] The nub of the matter is that the Respondent had supplied two centre pivot irrigation systems to the Appellant in 2005, 15 (fifteen) years ago, and is seeking payment thereof.

[19] The Appellant surprisingly contends that it was not obliged to make payment of the amount claimed by the Respondent. Appellant startling

contends that their director, Mr. Zwane was not a party to the contract to install the replacement irrigation equipment on his farm and that the contract was concluded between the Bank and the Respondent without his knowledge and that the Bank should make payment. There is no evidence whatsoever to suggest that the Defendant ceded its obligations to the Bank.

[20] This contention is implaustble as there was a letter addressed to the Bank signed by Mr. Zwane requesting the bank to issue a Guarantee for payment of the irrigation equipment. Clearly therefore the Appellant was a customer of the Bank and the Appellant must have arranged facilities with the Bank in order for the Bank to issue a Guarantee to effect payment after completion and on fulJ commission. Thereafter all the Appellant was required to do to effect payment was to sign the invoice which he failed to do and the Respondent has never been paid for the installation of the irrigation equipment.

[21] It appears to me, having considered all the papers filed of record, that the Appellant has studiously used technicalities, delaying tactics and delays within the legal system in order to avoid payment.

[22] Having considered the facts of the case and the evidence presented before this Court by both parties and the impugned Judgment I concur fully with the conclusions reached by the Court *a quo* and the conclusion reached by the Court *a quo* cannot *be* faulted. Accordingly, the judgment of the High court is confirmed.

[23] When considering the two versions placed before this Court I conclude that the Respondent clearly established its case on a balance of probabilities and discharged the onus and that it was entitled to payment for the irrigation equipment by the Appellant but was not paid - Refer **Pillay vs Krishna 1946 AD 946 at 951-2 supra.**

COURT ORDER

[24] In view of the aforegoing, this Court makes the following order:

The Appeal is dismissed.

2. Costs are awarded to the Respondent.

M. CURRIE AJA

I agree

S. P. DLAMINI JA

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I agree

--S--.-B. MAPHALALA JA

FOR THE APPLICANT: Advocate L. Maziya
(Instructed by B. S. Dlamini
& Associates)

FOR THE RESPONDENT: Advocate M. Van Der Walt
(Instructed by Henwood & Company)