



IN THE SUPREME COURT OF ESWATINI
JUDGMENT

HELD AT MBABANE

CIVIL APPEAL CASE NO. 06/2018

In the matter between:

Lowveld Trucking (Pty) Ltd

Appellant

And

Swaziland Railway

Respondent

Neutral Citation: Lowveld Trucking (Pty) Ltd v Swaziland Railway
(06/2018) [2021] SZSC 20 (25th September, 2021)

Coram: MCB MAPHALALA CJ, JP ANNANDALE JA AND
JM CURRIE AJA.

Heard: 12th August 2021

Delivered: 25th September 2021

CASE SUMMARY

Law of contract: Action for damages – alleged breach – notice of termination – acceptance or rejection, not both – approbation and reprobation incompatible - mooted new contract did not materialise – five months’ notice period rejected, soliciting of thirty – six months period. High Court dismissal of action challenged on appeal. Condonation – yet again manifesting herein – 50% related costs ordered in favour of the respondent. Appeal dismissed with costs.

JUDGMENT

Annandale JA

- [1] This appeal from the High Court comes as a result of the dismissal of an action which was instituted by Lowveld Trucking. It sought recognition of a mooted contractual agreement, alternatively damages arising from loss of future earnings due to early termination.
- [2] The appellant before us rendered road transportation services to Swaziland Railway over a period of time. The contractual arrangement between the parties was set out in a “Cartage Service Contract...” dated the 3rd May 1996, a copy of which the Appellant annexed to its combined summons. (Annexure “LT1”). In it, the duration of the contract is set out as follows:-

“The contract period is 2 (two) years commencing 1st April, 1996 ending on the 31st March, 1998. Thereafter the contract can be renewed for a further two years provided both parties agree to the two year extension. Within the two years each party can terminate the contract by giving two months’ notice if not satisfied with the services expected from either party as stipulated in article 1.6”.

Article 1.6 stipulated that in the event of unsatisfactory service, Swaziland Railways could terminate the contract by giving two months' notice, or without any notice at all if Lowveld Trucking was to totally fail in rendition of service for five consecutive days. The latter party could terminate upon two months' notice.

- [3] It is obvious that by the time Trucking issued summons in February 2007, the contract between the parties had long since terminated by effluxion of time. There is no evidence of renewal as was provided for in the agreement. Instead, it rather seems that from the 31st March 1998 when the contract expired, the parties continued with their relationship as it used to be, but without a written agreement. From time to time they met and discussed relevant issues such as the adjustment of rates payable for services.
- [4] This loose arrangement continued for quite a long period of time and apparently it was for the mutual benefit of both parties. However, if it was to be labelled as a tacit renewal of the initial contract, it would have been on the same terms as the original. The annual adjustment of payable rates would lend support for a tacit continuation in line with the agreement of 1996. This loose arrangement did not last indefinitely.
- [5] In June 2001 the two parties held a formal meeting whereat the future of their relationship was discussed. Lowveld Trucking wanted to secure a bank loan for funds to purchase trailers for its business with Swaziland Railways. For this purpose, it was minuted that "Swaziland Railways [is] to prepare a five (5) year document describing [the] business arrangement

we have with Lowveld Trucking to submit this and other documents to the bank in support of his (sic) loan application”.

[6] Whatever followed thereafter, no written contract as envisaged in June 2001 was produced in the course of the subsequent litigation. The Appellant contended that it operated under a five year contract, but if that was to be accepted, it would have been able to produce a copy thereof in the course of pursuing its claim against the Respondent.

[7] The Respondent requested a copy of the averred agreement on the 27th February 2006 through its attorneys, with no positive result. It must therefore be accepted that the one and the only written contract between the parties is the two-year contract dated the 3rd May 1996, a copy of which is annexed to the Appellant’s combined summons dated the 7th February 2007.

[8] In the particulars of claim, it was alleged that:

“On or about September 2005 and at Mbabane, the Plaintiff and the Defendant entered into an oral agreement which was to be prepared and reduced into writing by Defendant and provided for signature not later than November 2005 in terms of which Plaintiff was to provide the Defendant with transport in terms of five (5) trucks at a fee for a period of five years commencing on the 1st April 2006 and terminating on the 31st March 2011, save for specific terms which are set out hereunder, the terms and conditions of the agreement between the parties were similar to annexure “LT1” hereto”.

[9] From all of the available evidentiary material, the inescapable conclusion is that subsequent to the tacit continuation of the initial two year contract on an informal basis, there was a meeting of minds in June 2001 that a formal written contract for a period of five years would be drafted and signed, but that it never in actual fact materialised. Instead, the informal continuation of business between the parties simply proceeded for another four years.

[10] As time passed, Swaziland Railway became increasingly concerned about the standard of service delivery by Lowveld Trucking. There were issues about customer complaints, road safety, the dress code of transportation staff and so forth. These issues were ventilated at various meetings between the parties, together with further concerns by the Appellant. These were the increasing presence of additional service providers who wanted to participate in the business of providing transport services for the Respondent, and did so on various occasions.

[11] Eventually, on the 27th October 2006 the Respondent wrote a letter to the Appellant and gave notice of termination of services. The Respondent wrote:

“I would like to inform you that the cartage services you provide to Swaziland Railway will come to an end on the 31st March 2007.”

It also extended an invitation to tender for the Respondent’s transport needs as from the 1st April 2007.

[12] Soon thereafter, on the 3rd November 2006, the Appellant responded to the Notice of Termination. It acknowledged receipt of the Notice without any challenge or raising any form of dispute. They only sought to ameliorate the consequences of termination by stating:

“We consider it appropriate to advise Swaziland Railways that the period of notice (5 months) is inadequate considering the following:

- 1) That Lowveld Trucking has entered into long-term financial obligations on the basis of the cartage agreement.
- 2) Consequently we request a reasonable time to download over financial obligations, which in our humble [view or submission] should be 36 months”.

[13] If this is not a clear manifestation of acceptance of the Notice of Termination, the Court *a quo* would have erred in holding that it is indeed clear and unequivocally so. In her judgment, the learned Judge held that:
[58, 59]

“From Trucking’s response, it is clear that Trucking accepted the termination of its contract of service. It did not raise an issue with the termination of its services except that it requested for a longer period of service of notice from five months to thirty six months. That request was declined by Railway.

It is the cardinal rule of our law that where a party to a contract accepts its cancellation, it cannot later be allowed to rely on the provisions of that terminated contract. This point was canvassed by Railway both under cross- examination of Mr. Hlanze and

evidence-in-chief of Mr. Ngubane. The proverbial term rhymes well in this case, “A party cannot approbate and reprobate at the same time”. If Trucking wished to contest the termination notice, it ought to have done so from the onset. It is estopped from doing so after accepting termination”.

[14] It is this crucial finding which is challenged in the first ground of appeal, thus worded:

“The Court *a quo* misdirected itself in holding that the Appellant accepted the termination of contract when the Appellant did not. There being no evidence for the Court *a quo* to arrive at this conclusion. There being evidence of correspondence from the Respondent to the Appellant which shows that even the conduct of the parties post the letter of termination was proof of the continuation of the contract”.

[15] To approbate and reprobate is a phrase borrowed from Scots law, where it is used to express the principle embodied in the English doctrine of election – namely that no party can accept and reject the same instrument (per Scrutton LJ, Verschures Creameries Ltd. v Hull & Netherlands Steamship Co., [1921] 2 KB 608) and also see Stroud’s Judicial Dictionary, 3rd Edition, 1952. A person is said to approbate and reprobate where he takes advantage of one part of the document or transaction and rejects the rest (Scots Law). The maxim runs, *qui approbat non reprobat*, one who approbates cannot reprobate. The doctrine is the same as the English law of election (See The Dictionary of English Law by Earl

Jowitt, Vol.1, 1959). It is trite that our law also accepts and applies this doctrine.

[16] The Judgment which is now sought to be impugned on appeal arose from a claim which the now Appellant instituted against the Respondent. It was therein alleged that the Notice of Termination, referred to above, was of “no force and effect” and that it “render[ed] (rendering) (sic) the agreement subsisting”. Whatever this serves to appraise an opponent as to the details of the claim it is challenged with, it could well be taken to mean that the “Notice of Termination” upon which its claim allegedly became alive, is based upon the “Cartage Service Agreement...”, a copy of which is annexed to its summons. The claim continued to pray in the main for an order “*Declaring the agreement made by the parties in September 2005 to be of full force and effect until 31st March 2011*”.

[17] As already noted above, the Appellant *qua* Plaintiff *a quo*, despite being called upon to do so, could at no stage of the matter place a copy of the averred contract before the court for any consideration. An entirely different version of an erstwhile contract was attached to the summons. It is this old two year contract which contained a few terms and conditions, including termination arrangements. It also is common cause that over quite a few years after its expiry, the parties conducted themselves in the usual manner, even to the extent of periodical meetings and adjustment of amounts payable. But, in order to have a different contract declared to be valid and binding, operable over a period of just over five years, (September 2005 – 31st March 2011), required much more than the mere bald allegation of a contractual agreement.

- [18] This, of course, would have emanated from the catalyst which sparked the litigation, the contentious letter of “Notice of Termination”, which would then be argued to have contravened the contractual terms of the contract of such agreement which the appellant first needs to have validated.
- [19] The claim in the alternative is for an award of E1 114 124 – 50 as being due to it “*being the contract balance*”, together with interest.
- [20] The first determination which the learned presiding judge had to make was whether there is or has been any new contractual arrangement between the parties, as alleged. It thus considered the case which was brought before it by the plaintiff. Was it proven, even on a less onerous evidentiary burden of a preponderance of the probabilities, that there was indeed a long-term contractual agreement, and so proven to be by he who alleges it to be so?
- [21] If such long-term contractual agreement could have been proven to exist, it would then have superseded the old original two-year agreement, which has been tacitly continued with over a good number of years.
- [22] The main question which now arises is whether the letter of termination is what it says it is. It is central to the determination of this appeal. This letter served to inform the Appellant “that the cartage services you provide to Swaziland Railway will come to an end on the 31st March

2007". The letter is dated the 27th October 2006, establishing a notice period of five months.

- [23] The wording and meaning of this phrase does not lend itself to ambiguity, indirectness or misunderstanding, unless linguistic misapplication is attached to it. In the face of this, the Appellant then replied that they acknowledged receipt of the letter (of termination). Lowveld Trucking wrote: "I acknowledge receipt of your letter dated the 27th October 2006 advising us about the termination of our cartage agreement with effect from the 31st March 2007." This is a clear and unequivocal manifestation of acceptance, acquiescence, election.
- [24] What the Appellant then set out to achieve an extension of the five months period of notice. It felt it to be "inadequate" because long-term financial arrangements have been made with its bankers, to first "download over" financial obligations. An appropriate period was "in our humble should be 36 months" (sic).
- [25] It would require great innovativeness to conclude otherwise, as was also held by the Court *a quo*, that the claim stood to be dismissed. But that is not the end of the matter. Since it was correctly held that the envisaged contract as espoused by the appellant has not been proven to exist or have any application, the focus then shifted to the previous tacit continuation of the old two year contract of the 3rd May 1996, the terms of which the contractual parties continued with over some years.

[26] Clause 1.6, “Performance”, records the testament of their agreement to also provide for *termination*.

“Swaziland Railway serves (sic) [reserves] the right to terminate this contract by giving two months’ notice”.

[27] It could also terminate without any notice at all in the event that the operator “totally fails to render service for five consecutive days”.

[28] In its Notice of Termination, Railway *mero motu* and *ex gratia* gave a period of five months notice, instead of the much shorter period of two months. Meanwhile, it must be recalled that the period of notice is part and parcel of the Notice of Termination. It is only the secondary aspect of the Notice which was sought to be extended from the offered five months. That this does not derogate from the principle of “approbation and reprobation” is quite acceptable. The main issue, termination, which has not been challenged or questioned at all, got the ball rolling, so to speak. Once accepted that termination has been established, the Appellant cannot now come and blame the Court *a quo* for its own failures.

[29] With the main issues disposed of by the High Court, it still remains to enquire about the incorporation of tacit terms when a contract is silent on duration. I say so because the initial contract of yesteryear provided for an entirely different notice period as to that which was now an offer. Five months, not two. This is not the only contractual term which manifests itself in a new form. It is also the aspect of annual re-

adjustment of cartage fees payable, which was another variation of the old and original agreement.

[30] A concern arises from a situation where both parties dispute as to when their contract is to become terminable. Worst case scenario is that both parties could be bound in perpetuity, especially when there are not clear, unambiguous, uncertain or express terms dealing with the duration of their contract. A most instructive scenario to demonstrate this legal issue is a case from the Supreme Court of South Africa in Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd [2014] SCA 73.

[31] It involved the determination of whether a contract between two parties contained a *tacit* term to the effect that the contract was terminable by either party on *reasonable notice*. The written agreement between the parties regulated the importation of agricultural chemical products. The present appeal before us regulated an agreement for the provision of transportation.

[32] With that contract being silent as to its duration, the issue to decide was to whether the agreement had a tacit, alternatively implied term that the agreement was terminable by either party on *reasonable notice*. The High Court held that the contract was NOT terminable on *reasonable notice*. If this was to be given proper effect to, the result would become a contractual and ongoing *bond in perpetuity*.

- [33] On appeal, the Supreme Court of Appeal (Bloemfontein) found that the contract contained no express term dealing with the contract's duration, but there was also no indication that they intended to continue indefinitely, forever and a day. In the matter now before us, there was a very loose application of their express agreement on notice period pre-termination.
- [34] Initially, it was two months, later on the Respondent presented it as five months, more than twice as long. Then there is also the Appellant who sought the period of five months to be extended to thirty –six. The parties herein required contact fairly often and to maintain a close working relationship with regular meetings and interaction. Over time, details of their relationship changed, such as the amount payable for services. It is indeed also clear that the Appellant had ongoing financial obligations for some time to come. It extended itself to its bankers in order to have enough wheels on the road to service its delivery routes. It is reasonable, in my considered view, to have rigorously pursued a longer period of notice following a Notice of Termination, in order to still continue with its business for a while longer. It was held in Plaaskem that it was necessary and commercially efficacious that the tacit term should have the effect that the contract would be terminable upon reasonable notice. It was added that a tacit term must be formulated so that it is a clear formulation of what such “reasonable notice” would entail. It was accordingly ordered, on appeal, that the agreement between the parties contained a tacit term that the contract may be terminated by either party or reasonable written notice to the other. (See also the commentaries on Plaaskem by O'Connor and Moodley of Cliffe Dekker Hofmeyr, August 2014 and De Rebus, (August) DR18). Plaaskem v Nippon was also the approach of the Courts in Amalgamated Beverage

Industries Ltd v Rond Vista Wholesalers 2004 (1) SA 538 (SCA); Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd 1984 (1) SA 433 (W); and Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and other Related cases 1985 (4) SA 809 (A). In these cases it was held that where the circumstances of an agreement show that all that the parties intended was a temporary arrangement, but that the contract was silent as to its duration, it is reasonable to infer that they contemplated termination on reasonable notice.

[35] There is distinction in comparative law between this jurisdiction, and for instance, the Republic of South Africa, Namibia, Botswana and so on. The Consumer Protection Act of 2008 (Act 68 of 2008) of South Africa allows for certain fixed term consumer contracts to be terminated on 20 days' notice, thus removing the uncertainty regarding termination periods. It also specifies a maximum period of two years for such fixed term consumer contracts. This is not applicable locally. In a contractual agreement such as the one under consideration, the parties are at liberty to determine notice periods as they wish.

[36] Under our Common Law, the duration and termination procedure will have to be determined contractually by establishing whether there are any specific termination grounds, including voluntary termination, on which the parties can rely. Terms could include periods of time, future events certain and uncertain, dissatisfaction, certain forms of dispute, and so forth.

[37] Neither this Court, nor the High Court, has been called upon to determine any specific period of notice in this matter. This is because the Appellant

did not call upon its adversary to defend a specific period of notice subsequent to its acceptance of having been given Notice of Terminating of services. Even so, if regard is to be given to the reasonableness of the five months period of notice as contained in the Notice of Termination, the Appellant could not be heard to have it held as unreasonable. It certainly could not insist on a period of thirty six months. It also has to fail with the period of notice as set out in its prayer for alternative relief, to end on the 31st March 2011. Instead, it now endeavoured to shift its approbation of notice to a reprobation of their contractual agreement. It claimed that the Court must declare the existence and validity of a new but unproven agreement between the parties, a contract which was successfully disowned by the other party. It also sought to claim loss of future earnings, over a million Emalangeni. This would have been the consequence of violating the averred contractual agreement between them, but which agreement it failed to establish as crucial *facta probantia*. It was not successful and the High Court, in my respectful and considered view, rightly dismissed the cause of action.

- [38] Counsel for the appellant spiritedly argued its case, including the averment contained in the second part of the first ground of appeal namely an unsubstantiated allegation that not only did the Court *a quo* misdirect itself in holding that the appellant accepted the termination of the contract, but that there was no evidence to arrive at such conclusion. The fallacy of this contention is best demonstrated in its self-destructiveness. On the one hand, while in the process of seeking to establish an unproven contract, then simultaneously seeking alternative relief to cover loss of future contractual earnings, which would have resulted from such contract. On the other hand, to want its manifested

acceptance of the notice of termination to be negatived. To top it all, it was then further argued that there was no evidence to arrive at this conclusion.

[39] If the Appellant was able to prove the existence of the alleged contract, it would certainly have been expected to do so. It could not, despite being put to task to do it. To now blame the adverse decision on an absence of evidentiary material is not feasible. As amply demonstrated above, acceptance of termination was unequivocal. It cannot be aligned with a mooted but uncompleted contract of cartage. It cannot be so that instead, a new agreement materialised but was reneged by the Respondent, thereby validating a claim based on contractual violation and consequent loss of future financial benefits from an ongoing venture.

[40] The same fate befalls the second ground of appeal. This so called misdirection would have been the finding *a quo* that the contract between the parties was a two year contract when there is “undisputed evidence” that the Respondent was first to draft a written agreement for a period of five years in June 2001. Either way, the contract was said to be still in subsistence at the time of termination.

[41] What the “undisputed evidence” does establish is that there was a meeting between them whereat the Appellant brought it to the attention of the Respondent that its bankers wanted assurances of ongoing business between the parties. This was to motivate the Bank to provide finances over a period of time. It also seems to me that at the meeting on the 7th July 2005, dissatisfaction in the manner in which Lowveld Trucking

conducted itself in the course and scope of its cartage services surfaced and was made a pertinent issue. This again becomes the topic of the day when a further meeting was held on the 21st July 2005.

[42] This trend was starkly absent from the minuted meeting which was held on the 8th June 2001. It was at that meeting when it was noted that Swaziland Railway would have prepared a five year “document (sic) describing the business arrangement we have with Lowveld Trucking to submit this and other documents to the bank in support of his (sic) loan application”. If this is an indication of a meeting of minds, it would be a valid conclusion. However, no such written agreement materialised in turn. It was mooted, but it never came to fruition. The Appellant might have had a clear concept in its mind about such a desired contract, but it could not prove it to sustain its cause of action.

[43] The third ground of appeal has it as a misdirection that no consideration was given to evidence that a haulage contract was not advertised and that there was no bidding process which could possibly have resulted in reinstatement of the Appellant.

[44] There is and was no obligation on the Respondent to have done so. Neither the initial contractual arrangement, nor any subsequent event or binding agreement required of the respondent to yet again consider any bid by the Appellant in response to an advertisement or tender of a haulage contract, or even, a need to advertise it and seek aspiring haulage contractors to do any business of with it. In my view, it would be an

injustice to now elevate this aspect to a ground on which the appeal could be upheld.

[45] In my considered judgment of all the facts, law, evidence and the authorities, the learned Judge *a quo* made no misdirection or other error in her dismissal of the matter with costs, now sought to be impugned on appeal.

[46] *In fine*

As has been the case in almost any second matter which is called on the roll of the Supreme Court for hearing of an appeal, there is the ever present malady, euphemistically referred to as a condonation application. If a judgment is to be dissected, analysed and criticised on appeal, with the adjudication being done under a Marula tree, an entirely different set of rules, if any, would apply. When an appeal is to be determined by this Court, there are very specific rules which apply. One such instance is the time frame within which appeals are to be noted and prosecuted. Heads of Argument and Authorities also have specific time frames as to when the pleadings and papers have to be lodged with the Registrar. It is all too often that legal representatives involved with appeals fail to adhere to the Rules, then become obliged to seek condonation for late filing.

[47] This particular matter has previously attracted an Order of Court on the 19th September 2018 that it be struck off the roll and that leave be granted to the appellant to reconstruct omitted portions of the record, in liaison with the respondent's attorneys. The omitted portions of the record were

in fact not of cardinal importance. A transcript of the proceedings in the High Court, evidence of a hundred and forty three pages, was also subsequently filed. Astonishingly, counsel did not particularly refer us in the course of argument to extracts or quotations from the transcript, which must have cost a considerable amount of money to transcribe. In addition, the bulk of evidence as heard by the High Court is more concerned with under- performance, miscreancy and operational issues in the course of engagement.

[48] Furthermore, the Appellant filed an application for the late filing of its “brief” heads of argument, the filing which was out of time for diverse stated reasons. This was in August 2018, prior to the order of striking off. In September 2020, the Appellant yet again filed an application to be granted leave to file its Supplementary Heads and Authorities and to be condoned for its non-compliance with the Rules. To this, the Respondent objected and filed an answering or opposing affidavit, followed up by detailed and comprehensive heads of argument relating to condonation, as well as a bundle of relevant authorities.

[49] All of this adds to the already very hefty costs of litigation. Such costs do not add any value to the merits of an appeal and can be tedious to adjudicate upon. Time in court is an expensive commodity and someone always has to foot the bill.

[50] At the time when this matter was called on the roll, the Court held session without the physical presence of either counsel. Their virtual remote appearance was facilitated due to COVID 19 infections. It was then that

upon enquiry by the Court, Mr Z Jele who represented the Respondent waived his challenge to the condonation application which was brought by the Appellant. He had already filed an opposing affidavit, Heads of Argument and Authorities in an endeavour to stifle the application to condone late filing by the Appellant. With the application otherwise being compliant with the requirements as has been set out in a plethora of precedents, condonation was then summarily granted and counsel presented their respective positions regarding the merits to the appeal itself.

[51] I must remain mindful that under these circumstances, the Respondent cannot be faulted for its resistance to a second application for condonation. It incurred further costs by laying a legal challenge to deal with the condonation application. In the end, it was not necessary for this Court to separately decide the ancillary application, but it is only due to the accommodating concession by Mr Jele to rather have the merits of the appeal being dealt with, instead of first having to circumnavigate and traverse the merits of yet another opposed condonation application.

[52] In these circumstances, I am not persuaded to avoid a costs order in the condonation application, even if it became almost academic on the date of the hearing. Balancing the issues at hand, I think it would be at least appropriate for the Applicant/Appellant in the condonation application to pay one half (50%) of the Respondent's cost associated with its opposition thereto.

[53] For the foregoing reasons, I would order that:

- 1) The appeal be dismissed, with costs.
- 2) Costs occasioned by the Respondent in opposing the condonation application dated the 3rd September 2020 shall be shared by both litigants on a 50/50 basis.

JP ANNANDALE

Justice of Appeal

I agree

MCB MAPHALALA

Chief Justice

I agree

JM CURRIE

Acting Justice of Appeal

For the Applicant: Mr S. Jele of Mabila Attorneys in Association with N. Ndlangamandla & S. Jele.

For the Respondent: Mr Z Jele of Robinson Bertram Attorneys, Mbabane.