

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO : 1794/04

In the matter between :

SWAZH.AND SUGAR ASSOCIATION

Plaintiff

and

EIS MARKETING (PTY) LTD.

Defendant

CORAM: EBERSOHN J

JUDGMENT HANDED DOWN ON 31st OCTOBER 2006

FOR PLAINTIFF: ADV. R.M. WISE SC

INSTRUCTED BY CLOETE

CORPORATE IN ASSOCIATION

WITH E.J. HENWOOD & D LAM INI

FOR DEFENDANT: ADV. P. FLYNN

INSTRUCTED BY R.J.S. PERRY ATTORNEYS

JUDGMENT

EBERSOHN J.

[1] The plaintiff and the defendant on the 17th March 2004 entered into a written agreement in terms whereof the plaintiff who as a government body has the sole right to sell sugar in Swaziland, allocated a certain number of tonnes of sugar it would sell to the defendant upon the terms and conditions of a written agreement between the parties.

[2] It is necessary to quote the following relevant clauses of the agreement:

"3.4 The PURCHASER acknowledges that any quantity of sugar to be collected by the PURCHASER from the point of sale and delivery shall not be released to the PURCHASER unless the SELLER authorises the relevant mill in writing to do so, which authority will not be given unless the SELLER, in its sole discretion, is satisfied that payment has been made in advance for the sugar or any credit facility granted has not been exceeded and that the credit facility account has been conducted satisfactorily by the PURCHASER in all respects."

"3.5 The parties agree that orders for sugar will be placed either for bulk sugar, for sugar packed in one metric tonne bags or for sugar packed in 50 kilogram bags. In the case of bulk sugar, the PURCHASER shall be liable to pay for the exact quantity of sugar collected, as evidenced by the mill weighbridge slip. In the case of bagged sugar, payment will be based on the designated weight of the bag, converted to tonnes for the number of bags collected, subject however to the condition that total weight reflected on the mill weighbridge slip shall not differ by more than 0.25% from the weight for which the PURCHASER has paid."

"5.1 In the event of a credit facility not being granted to the PURCHASER, the PURCHASER shall make payment to the SELLER of the full purchase price of each quantity of sugar purchased prior to the delivery thereof, such payment to be in full settlement of the said purchase price and to be in either cash and free of exchange or by way of a guaranteed cheque from an acceptable financial institution free of any exchange and/or commission, payable at the Mbabane office of the SELLER in Swaziland Emalangeni."

"5.2 In the event of a credit facility being granted to the PURCHASER, the PURCHASER shall abide strictly with the terms and conditions of such facility."

"5.3 Where the PURCHASER makes payment by way of a bank cheque or other bank payment instrument, the payee shall be identified on each such cheque or other instrument. Only amounts drawn on the PURCHASER'S bank account will be accepted by the SELLER as payment for any sugar purchased."

"5.4 The granting of credit facilities to a PURCHASER shall be in the sole and absolute discretion of the SELLER."

"5.5 The SELLER reserves the right at any time to cancel any credit facility granted, should the account of the PURCHASER not be conducted in terms of the conditions under which the facility was granted."

"14.1 In the event of the PURCHASER being in breach of any provision contained in this agreement, all of which the parties acknowledge are material, and the PURCHASER failing to remedy such breach within a period of seven (7) days of receiving notice identifying such breach from the SELLER, the SELLER shall, without prejudice to any other rights which it may have at law, be entitled to exercise one or all of the rights set out in Clause 14.1.114.1.5 below namely:

14.1.1. Immediately cancel this agreement and any credit facility granted to the PURCHASER , without the need to give the PURCHASER any form of written notice in respect of such cancellation, and/or

14.1.2. Claim any outstanding monies owing to it by the PURCHASER, together with interest thereon at the prime rate of interest levied by Standard Bank Swaziland Limited from time to time plus two percentum (2%), the PURCHASER acknowledging that any sum outstanding on any credit facility granted will immediately become due owing and payable, and/or

14.1.3. Claim any damages of whatsoever nature which the SELLER may have suffered; and/or

14.1.4. Claim any costs incurred in instructing its attorneys to institute any action against the PURCHASER on the scale as between attorney and own client, including collection commission on the scale laid down by the Law Society of Swaziland from time to time for which the PURCHASER accepts liability in terms hereof, and/or

14.1.5. Immediately cease all supplies of sugar to the PURCHASER notwithstanding any existing order remaining unexecuted."

"19. No variations or amendments to any of the terms or provisions of this agreement shall be binding upon the parties hereto unless reduced to in writing and signed by both of them. It is specifically recorded that no agent or servant of either party has any authority to alter or vary any of these conditions unless he is properly authorised to do so by resolution."

[3] The defendant from time to time purchased sugar from the plaintiff in terms of the agreement.

[4] The Defendant at some stage was sued by the plaintiff for the payment of E1 ,301,055-00being in respect of sugar sold and delivered and the plaintiff also cancelled the agreement. This claim arose under somewhat peculiar circumstances.

[5] The defendant raised a plea of confession and avoid and relied on the principles of estoppel to avoid paying plaintiff's claim.

[6] Mrs. Martina Jacomina Sauerman, the managing director of the defendant, testified that the defendant added value to the sugar purchased from the plaintiff by milling and repacking the sugar for various of their clients.

[8] In her evidence Mrs. Sauerman reiterated that the plaintiff kept to its rigid procedure namely a client

could order sugar in terms of the allocation, the client pays for it in advance and after the plaintiff was satisfied that the payment was good, then only would the plaintiff furnish the purchaser with a release note and the purchaser would then be entitled to proceed to one of the plaintiffs bulk stores where the sugar could be collected by the purchaser.

[9] She testified that the defendant had an agent by the name of Bernard Schutte who purchased quite a lot of sugar from them since about May 2003. He had good contacts with big customers in and around Johannesburg and Pretoria. Most of the customers he did business with paid COD or within 7 days. The defendant, however, had to pay cash for the sugar in advance and the position became stressful for the defendant.

[10] Mr. Schutte then informed her that he had a good deal coming up and which would alleviate the cash shortage.

[11] Schutte then informed her that he could obtain donor funds from London and the United Kingdom and that these donor funds would be transferred directly to the defendant. He further informed her that big companies overseas made donations to corporations in South Africa and in this specific instance the ZCC church would benefit. He also informed her that if the money was paid directly to the church there would be no tax benefit for the donor company and the payment had to be made by the company for some food commodity such as sugar and after the commodity was sold the money could be paid to the church. It was an attractive proposition for her as they did not have a credit facility with the plaintiff and the overseas funds could be used interest free according to Schutte. She indicated to Schutte that the defendant would participate in the scheme only after the payment was made up front.

[12] Schutte on the 13th April 2004 informed her that a Swift transfer of £197 500 (one hundred ninety seven thousand and five hundred English pounds) would be paid into the plaintiff's account with Standard Bank Mbabane. A Swift transfer was explained to the court as being an electronic payment by computer and that it was virtually foolproof.

[13] On the 13th April 2004 she accordingly contacted the plaintiff through an officer she became

acquainted with one Ketsiwe in the financing department and informed her of the impending Swift transfer. Ketsiwe communicated with the bank and thereafter informed her that it was not done yet. The next day Ketsiwe telephoned her and informed her that the bank advised her that the transfer had arrived and the next day Ketsiwe advised Mrs. Sauerman that the payment was reflected on the CAT screen of her computer which was linked to the bank's computer. Mrs. Sauerman was advised by Ketsiwe that Mrs. Sauerman could place orders for sugar which she did without delay. The defendant in fact bought a vast amount of sugar thereafter.

[14] A few days later, however, the bank informed the plaintiff that the relevant cheque deposit and which was reflected on the plaintiffs bank account was in fact a fraudulent cheque. The Plaintiffs Mrs. de Souza communicated with Mrs. Sauerman who at that stage was in Pretoria. Mrs. Sauerman went to Swaziland the next day where it appeared that a cheque deposit was made on the account of the plaintiff and not a Swift transfer and that the cheque was fraudulent. The account of the plaintiff was debited with the amount of the fraudulent cheque. Mrs. SDauerman testified that Mr. Schutte informed her that he had already transferred the funds she transferred to him to the ZCC Church.

[15] The defendant alleged that at the time it was informed of the cheque being fraudulent it had remanufactured and repacked all the sugar received from the plaintiff and that the sugar could not be returned to the plaintiff.

[16] Mrs. Sauerman testified that she was under a lot of pressure by Schutte to pay over to Schutte as soon as she received payment from a client, which she did and that the defendant was out of pocket.

[17] According to Mrs. Sauerman the transaction landed the defendant in a lot of problems.

[18] On the 3rd June 2004 the plaintiff's attorneys addressed a letter to the defendant confirming that due notice was given to the defendant of its breach in terms of clause 14 of the agreement and that the defendant was given 7 days within to rectify the breach. As the breach was not rectified the attorneys gave notice to the defendant that the written agreement between the parties was cancelled and the attorney gave notice of their client's intention to sue the defendant for the sugar sold and delivered.

[19] Summons was issued by the plaintiff and the defendant filed a plea of estoppel and paragraph 6 of the counterclaim wherein the allegations regarding estoppel are made reads as follows:

"The Defendant is not indebted to Plaintiff in the said sum of £1,407,882-93 in that the Plaintiff had acknowledged receipt of payment for the sugar supplied and had accordingly issued release notes to the Defendant in terms of the agreement."

[20] It must be noted that Mr. Schutte was not called to give evidence on behalf of the defendant.

[21] It appeared that for some reason or another the bank did not state on the bank statement of the plaintiff, after the deposit was made, that it was a "**cheque deposit**", as it did with other cheque deposits a bit lower down on the statement but instead after the date 15 April 2003 caused the following to be inserted as far as one can make it out: "**04304152DN0BEI001**" with regard to the foreign cheque banked at the Mbabane branch of Standard Bank.

[22] Barry Neil Schutzler who works in the Corporate Banking Division of Standard Bank was called by the plaintiff to testify and he explained the digits quoted as being inter alia referring to a foreign cheque banked on the account.

[23] In terms of the agreement the defendant would only be entitled to sugar it paid for in advance and then in any case the defendant would only be entitled to release notes with regard to the sugar after it was verified that the payment into the bank account was good. Clearly the onus would rest on the defendant to prove that the payment was good. In this instance it was Mrs. Sauerman who used the phrase "Swift transfer" and mentioned the huge amount in English pounds when she informed the plaintiff of the possible transfer of funds. The phrase "Swift transfer" and the huge amount in English pounds was apparently repeated by the employee of the plaintiff when she telephoned Standard Bank and she enquired about such a transfer. The next day the bank employee noticed the "04304152DN0BEI001" on the bank statement and also the huge amount and she, incorrectly, assumed that it related to the Swift Transfer the plaintiff was making enquiries about and she informed the plaintiff that it had arrived. The plaintiffs employee informed Mrs. Sauerman accordingly. The next day the plaintiffs employee saw the many digits on her CAT screen and also the huge amount and she related what she saw to what she heard from the bank the day before.

[24] The principles of estoppel are quite well known.

[25] The person who pleads estoppel has to establish that he acted on the faith of a representation made to him by the representor and that, in doing so, he altered his position to his detriment. In other words he has to show inter alia that he was misled by the misrepresentation. He has to show, too, that he acted reasonably in relying on the representation made to him. **(Lawsa Vol 9 First Re-issue para 458)**.

[26] All the bank did was to inform the plaintiff that what they assumed to be the transfer has arrived and the same information was conveyed to the defendant. All the parties erred with regard to the kind of payment that was made. That is all. There is no question of estoppel and the defendant still has to perform in terms of the agreement between the parties.

[27] As such the defendant cannot plead that what the bank erroneously assumed to have been the transfer was through the process of estoppel a valid payment on its account with the plaintiff as is required by clauses 3.4,3.5,5.1 and 5.3 of the agreement.

[28] The defendant was not prejudiced and received the sugar and as the cheque was fraudulent the defendant must obtain funds from elsewhere to pay the plaintiff for the sugar it received. It is further a matter between the defendant and their agent Mr. Schutte with regard to the damages the defendant allegedly suffered. The Court was informed that there was a letter from Schutte in the discovery of the defendant but the Court ruled that it was inadmissible as being hearsay in that Schutte did not testify and the Court did not read the said letter.

[29] It is common cause between the parties that in the event of the Court finding in favour of the plaintiff that the defendant's counterclaim will fall away. Under the circumstances I shall not further deal with the counterclaim.

[30] The plaintiff also claimed E106, 827.93 as an foreign exchange loss. During cross-examination by Mr. Flynn Mr. Schutzler conceded that there was no foreign exchange loss as the bank in the first instance did

not buy local currency and did not later have to buy English pounds again and this time at a higher rate. This claim will not be allowed.

[31] The plaintiff claims interest based on the rates of Standard Bank. There is no evidence that the plaintiff is exempted by section 10 of the Money-Lending and Credit Financing Act, 1991 from the provisions of the act and all interest the plaintiff may claim and be granted is 8 % per annum in terms of section (l)(b) of the said act.

[32] The plaintiff requested costs of the scale of attorney and client. Costs are in the discretion of the Court. I find that there is nothing in the conduct of the defendant which warrants this Court censuring the defendant to pay costs on such a scale. The costs of counsel will, however, be certified in terms of rule 68(2).

[33] I accordingly make the following order:

- 1. Judgment is granted in plaintiffs favour in the amount of £1,301,055-00 with interest thereon at the rate of 8% per annum from the 21st April 2004 until date of payment of the E1,301,055-00.**
- 2. Order 1 is subject thereto that upon the defendant paying the capital and interest referred to therein in full, the defendant shall become entitled to a rebate of E119,945-65 and a credit for bags returned in the sum of E65,700- 00.**
- 3. The entire counterclaim is dismissed.**
- 4. The defendant is ordered to pay the costs of the action on the ordinary scale of party and party and the costs of counsel are certified in terms of rule 68(2).**

P.Z. EBERSOHN
JUDGE OF THE HIGH COURT