



IN THE HIGH COURT OF SWAZILAND

Civil case No: 1521/12

In the matter between:

EURO – SWAZI INVESTMENT (PTY) LTD

APPLICANT

AND

SWAZILAND POST AND

TELECOMMUNICATIONS CORPORATION

RESPONDENT

Neutral citation:

*Euro-Swazi Investment (Pty) Ltd and Swaziland Post and
Telecommunications Corporation (1521/12) [2013]
SZHC33 (2013)*

Coram:

M.C.B. MAPHALALA J,

For applicant
For Respondent

Attorney M. Mabila
Attorney Derrick Jele

Summary

Civil Procedure – Contract – the applicant seeks to enforce a contract concluded between the parties – the respondent opposing the application and contending that the officers who signed on its behalf did not have authority to do so and that consequently the contract was invalid – the turquand rule discussed and applied – application granted on the basis of the rule with costs.

**JUDGMENT
28 FEBRUARY 2013**

[1] This is an urgent application seeking the following orders: firstly, directing the respondent to forthwith comply with the agreement concluded between the parties with regard to the disposal of scrap material. Alternatively, directing the respondent to forthwith grant the applicant and/or its employees access to the respondent's premises where the scrap material is kept subject to the agreement between the parties. Secondly, directing the respondent to forthwith allow the applicant to proceed with work in accordance with the agreement between the parties at the premises where the scrap material is kept subject to the agreement between the parties.

[2] The applicant alleged that in March 2012 the respondent ran an advertisement in a local daily newspaper inviting interested and suitably qualified service providers to express their interest to supply certain goods, services and works including that of dealing in scrap material. A proposal submitted by the applicant was accepted and a written agreement was concluded between the parties on the 22nd May 2012; thereafter, the applicant discharged its obligations in terms of the agreement until the 2nd August 2012 when the respondent denied the applicant access to premises where the scrap material was being collected. The respondent further advised the applicant verbally to stop collecting the scrap material allegedly on the instructions of the Managing Director of the respondent.

- [3] Attempts to have a meeting between the applicant and the Managing Director of the respondent was not successful. At the instance of applicant's attorneys, a meeting was held between the parties on the 13th August 2012 and the respondent agreed to comply with the agreement. The respondent further undertook to furnish a written confirmation the following day. At the meeting the respondent was represented by its Managing Director Amon Dlamini and Sydney Jele from its legal department. The applicant was represented by its director Dr. Khalid Patel, Sirsj Mohamed and its Attorney Mduduzi Mabila.
- [4] However, on the 14th August 2012 and after persistent inquiries, the respondent advised applicant's attorney in writing informing them that the Board's meeting would be held on the 15th August 2012. On the 17th August 2012, the respondent advised that its Board had resolved that an investigation on the respondent's internal scrap processes would be conducted. On the 21st August 2012, the applicant's attorneys requested the time-frame within which such an exercise would be completed. On the 22nd August 2012 the respondent's Managing Director Amon Dlamini advised Sirsj Mohamed telephonically that the exercise would not take more than ten days. On the 30th August 2012, the applicant's attorneys wrote a letter to the respondent requesting that the applicant be allowed to work in terms of the agreement; however, no response was forthcoming from the respondent, and, the ten day period referred to by the respondent has expired.

- [5] The applicant argued that the action by the respondent is both wrongful and unlawful and in breach of the agreement between the parties. The application is opposed by the respondent who has filed an Answering Affidavit in which it has argued that the contract is invalid and not enforceable for the following reasons: firstly, that the tender was awarded without following the mandatory tendering process of the respondent. Secondly, that the contract was signed by the General Manager Corporate Services and not the Managing Director and / or Company Secretary.
- [6] The respondent further alleged that it received reliable information that the applicant was in collusion with some of its employees and disposing copper cables called “2000 pair cables”SS valued at E6 000 000.00 (six million emalangeni) as scrap; the said information was said to have been received from the respondent’s internal auditor Sibusiso Kunene.
- [7] The respondent argued that the contract between the parties was on the face of it unlawful since it was signed by the General Manager Corporate Services John Nsibandze and witnessed by Titus Nzima, the Senior Manager Supply Chain. He contended that the applicant was aware of the internal controls of the respondent which require that contracts of one year and above should be signed by the Managing Director or company secretary. It further argued that the two officers who signed the contract were suspended pending investigations, and, that the investigating team has referred certain aspects of

their findings which are criminal in nature to the police for further investigations; and, that the investigations will affect the performance of the contract. The respondent averred that the investigations were now complete, and, that they concluded that the contract was invalid.

[8] The respondent argued that the parties had a previous contract concluded between the parties; hence, the applicant was aware of its procurement procedures: firstly, that contracts of twelve months and above had to be signed by the Managing Director or company Secretary; secondly, that the applicant knew of the tender process of obtaining three quotations from service providers. However, no previous contract was annexed in proof thereof.

[9] The Acting Managing Director denied speaking to Sirsj Mohammed as alleged or at all that the investigations would take not more than ten days; he argued that he could not have said this since he did not know how long the investigations would take. He urged the court to strike out this part of the evidence as hearsay; however, he did not file a Notice to Strike Out so that the application could be properly argued.

[10] Confirmatory affidavits in support of the respondent were filed by the company Secretary Sydney Jele and Siboniso Kunene who is the Head of Risk and Internal Audit.

[11] The applicant filed a replying affidavit and argued that the contract between the parties was valid and enforceable, and, that the respondent cannot lawfully resile from the contract on the basis that its internal processes were never followed. It further argued that it was apparent from the Answering Affidavit that the respondent did not deny that the parties had concluded the agreement upon the terms and conditions averred by the applicant.

[12] The applicant further argued that the respondent was estopped from denying that its General Manager Corporate Services has no authority to sign such contracts because the Acting Managing Director did sign previous contracts on behalf of the respondent when he held the same position in the company. He attached annexure “APD” which was a contract of sale between the respondent and Buhle Bekuhlobisa (PTY) Ltd; the Contract was in respect of the sale of scrap copper cables and was concluded in February 2009. The purchaser was required to make a down payment of E200 000.00 (two hundred thousand emalangen) immediately upon signing the contract. It is interesting to note that the respondent has not sought leave to file a Further Affidavit in response to this allegation.

[13] The applicant denied colluding with the respondent’s employees to anyone to dispose of any cables outside the agreement between the parties. It argued that its employees whilst performing their duties in terms of the agreement between the parties, they received an instruction from the respondent’s Senior Manager

Supply Chain that they should dispose “the 2000 pair copper cables”; and that, they were not aware that the instruction had not been authorised by the respondent. The applicant further argued that the said cable was never removed from the premises since the acting Managing Director had subsequently advised the applicant’s employees to desist from removing the cables. It was further argued on behalf of the respondent that in a subsequent meeting with the respondent this matter was fully clarified. Again it is interesting to note that the respondent has not seen it proper to deal with these allegations notwithstanding that they are material to the outcome of these proceedings.

[14] In a further affidavit the applicant also argued that there is no evidence that it knew the internal processes of the respondent with regard to the signing of contracts, and, that the respondent does not allege that these were internal procedures communicated to the applicant. The applicant further argued that the respondent had failed to disclose that the employees who were suspended pursuant to the internal investigations have since been reinstated as of 25th August 2012.

[15] The applicant argued that the respondent has failed to comply with clause 6.0 of the Agreement which provides that “any complaints from either party will have to be in writing and either party will be given fourteen working days to address any complaints so raised”. According to the applicant this was not

done. A Confirmatory Affidavit by Sirsj Mohammed has been annexed to the applicant's replying affidavit confirming that the Acting Managing Director of the respondent Amon Dlamini telephoned him and told him that the investigations will be completed in ten days.

[16] It is common cause that the contract in question was concluded between the parties. The respondent seeks to resile from the contract on the basis that the General Manager Corporate Services did not have authority to sign the contract on its behalf; and, that only the Managing Director or the Company Secretary of the company had the requisite authority to do so. There is no evidence before this court that the applicant was aware of the internal processes of the respondent.

[17] The evidence by the applicant that the Acting Managing Director of the respondent did sign a similar contract when he occupied the position of General Manager Corporate Services has not been disputed. The allegation by the respondent that the parties had previously concluded a similar contract in which the Managing Director of the respondent signed on its behalf was not substantiated and no evidence was furnished in that regard. Similarly, there is no evidence that the respondent had furnished to the applicant information regarding its internal processes.

[18] The Swaziland Posts and Telecommunications Corporation Act No. 11 of 1983 does not vest upon the Managing Director or the Corporate Secretary the power to sign contracts on behalf of the corporation. Sections 13 (2) (a) as well as 13 (2) (l) of the Act give those powers to the corporation. Section 10 of the Act does not assist us in resolving this matter; it provides, inter *alia*, that the control and executive management of the corporation vests in the Managing Director. It can be implied from section 10 that the Acting Managing Director has the usual powers accorded to his status over and above his powers expressly provided in section 11 of the Act; however, the Act does not exclude the General Manager Corporate Services from signing on behalf of the corporation as it happened in the contract between *Swaziland Post and Telecommunications Corporation and Buhle Bekuhloba (PTY) Ltd.*

[19] In the case of *Legg & Co. v. Premier Tobacco Co.* 1926 AD 132 at 134 and 135 it was held that a third party contracting with a director who purports to have authority to act on behalf of a company is not bound to enquire into the “indoor management” of the company if the act was within the objects of the company and the director’s act was apparently regular; the third party is entitled to assume that the director has that authority *de jure*.

[20] In this particular case the applicant was entitled to assume that the General Manager Corporate Services had such authority because he had signed a similar contract on behalf of the respondent. Furthermore, the contract was

witnessed by the respondent's Senior Manager Supply Chain Mr. Titus Nzima. It is also not in dispute that the contract fell under the department of the General Manager Corporate Services. The respondent further ratified the contract by accepting the down payment of E100 000.00 (one hundred thousand emalangeni) from the applicant when the contract was concluded. The contract itself was concluded on the 22nd May 2012 and continued unabated until August 2012 when the respondent stopped it; it is inconceivable that the acting Managing Director could not witness the transportation of the scrap metal from the premises for a period of about three months.

- [21] In the case of *Mine Workers' Union v. J.J. Prinsloo; the Mineworkers Union v. Greyling* 1948 AD 831 at 844-849 it was held that the South African law has adopted the Rule in *Royal British Bank v. Turquand* that a person dealing with a corporation is bound by the terms of the Statutes or Constitution governing its contractual power, but that the necessary acts of internal management of the corporation are presumed to have been performed. The Court further held that the rule is not to be limited to trading organizations but should be applied to corporations generally, including trade unions which are bodies corporate in South Africa unlike in England. The court also held that a party cannot rely on this assumption if he knows that the necessary steps of internal management have not in fact been taken, and, that the presumption that such steps have been taken does not depend on the party having actual knowledge of the constitution.

[22] At page 849 of the *Mine Workers Union* case, (supra) *His Lordship Greenberg JA* stated the following:

“It seems to me that the true position is that the necessary acts of internal management are presumed to have been performed and not that a particular person is entitled to assume that they have.... This presumption does not arise when the other contracting party knows that the acts have not been performed.”

[23] The above authorities reflect the law in this country. *Justice Stanley Maphalala* in the case of *DDM Estates (PTY) Ltd and Another v. Standard Bank Swaziland Ltd and Another* Civil case No. 3151/2001 at page 189 (HC) quoting with approval the case of *Royal British Bank v Turquand* (supra) stated the following:

“My considered view is that, the first respondent on the basis of the Turquand rule, there was no obligation on it to enquire that the internal formalities of first applicant had been complied with (see *Royal British v. Turquand* (1856) 6E & B 327...). According to the rule, all acts of internal management or organisation on which the exercise of such authority is dependent may, in terms of same, be assumed by a *bona fide* third party to have been properly and duly performed.”

[24] The respondent has also argued that the applicant has failed to comply with the provisions of section 117 of the Act which provides the following:

“117. Where any action or other legal proceedings is commenced against The corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect-

- (a) The action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of the intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent;**
- (b) The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”**

[25] The correspondence of the 3rd and 8th August 2012 made by applicant’ attorney to the Managing Director of the respondent comply with the provisions of section 117 of the Act. In both letters applicant’s attorney made it clear to the respondent that it was acting in breach of the contract by denying access to applicant’s employees to do their work; he further advised that if he did not get a positive response, the applicant would seek redress in court. It is common cause that these legal proceedings were only instituted on the 5th September 2012. In the circumstances this point of law is bound to fail.

[26] Accordingly, the application succeeds and the following orders are made:

- (a) The respondent is directed to comply forthwith with the agreement concluded between itself and the applicant regarding the disposal of scrap material.
- (b) The respondent is directed to grant access to the applicant forthwith to proceed with work in accordance with the agreement between the parties at the premises where the scrap material is kept.
- (c) The respondent is directed to pay the applicant costs of suit on the ordinary scale.

M.C.B. MAPHALALA

JUDGE OF THE HIGH COURT