



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 887/91

In the matter between:

Hartwood Industries (Pty) Ltd	Plaintiff
and	
Swazi Timber Products Limited	1st Defendant
M. Ramkolowan	2nd Defendant
R.S. Minett	3rd Defendant
John Lindsay Sabatta	4th Defendant
Reginald Anthony Zammit	5th Defendant
Robert Edward Alexander	6th Defendant

CORAM:	Hull, C.J.
FOR PLAINTIFF	Mr. Berman S.C.
FOR DEFENDANTS	Mr. Sapire S.C.

Judgment

(10/6/94)

The plaintiff company ("Hartwood"), the first defendant, which is also a company ("Swazi Timber Products") and the fourth, fifth and sixth defendants collectively ("Alpine") were the three parties to a contract made in writing in 1990. The agreement was signed by Swazi Timber Products at Matsapa on 28th June, by the fourth and sixth defendants at Pietermaritzburg on 26th July, by Hartwood on 27th July in Johannesburg, and by the fifth defendant at Matsapa on 28th July respectively. The agreement accordingly was concluded by 28th July.

The nature of the agreement was to terminate, with effect from 1st June, 1990 a joint venture that had been carried on at least partly in Swaziland between Hartwood, Swazi Timber Products and Alpine, to provide for the sale by the joint venturers of their interests in the enterprise to Swazi Timber Products, and to make consequential provision.

It is common ground that the second and third defendants, Mr. Ramkolowan and Mr. Minett, who also signed that written agreement and who are described in it as shareholders of Swazi Timber Products, thereby bound themselves to Hartwood and Alpine as sureties for the performance by Swazi Timber Products of its obligations under that agreement.

It was provided (inter alia) in clause 7 that the document constituted the whole agreement, and also that no variation of the agreement was to be effective unless also reduced to writing and signed by or on behalf of the parties.

In the present action, Hartwood claims (Alpine having been joined formally and not opposing its claims) relief relating to the following matters:

(a) Its alleged right under the agreement (the 1990 agreement) and also under an alleged subsequent agreement (the 1991 agreement") to be indemnified by Swazi Timber Products in respect of liability for an overdraft facility in a Swaziland bank now held in the name of a company called Swazi Timber Propertiless (Pty) Limited trading as Lamboards Swaziland ("Swazi Props"), which I will simply call "Lamboard" for clarity of distinction, and which is a subsidiary of Swazi Timber Products;

(b) An outstanding amount in respect of specified fixed assets of Hartwood, which is admittedly owing under the 1990 agreement to Hartwood;

(c) An amount of E11286.00 allegedly owing under the 1991 agreement; and

(d) interest as prayed (liability for which is not in real dispute to the extent that in each case Hartwood succeeds in its claims.)

Swazi Timber Products counterclaims for damages and interest for alleged breach of Hartwood and Alpine of a duty to disclose the existence of a contingent liability under a foreign exchange

purchase contract which Swazi Timber Products took over under the 1990 agreement ("the Forex dispute").

In the 1990 agreement, clause 5.1 provided (inter alia) for the taking over by Swazi Timber Products of the overdraft facility held by the joint venture ("the HAJV account") as at 1st June 1990. That clause provided as follows:

"5.1 Payment of joint venture overdraft and creditors

"5.1.1 The Purchaser with effect from the effective date, assumes sole responsibility and liability for the payment of the joint venture overdraft and creditors. The parties record that as at the effective date the amount of joint venture overdraft and the value of the creditors was approximately 980 250,00 Emalangeni. The Purchaser undertakes that it will settle all accounts of the creditors other than the Bank which were due and owing as at the 31st May 1990 by no later than the 31st August 1990.

"5.1.2 The Purchaser shall be entitled to continue to utilise the joint venture overdraft facility subject to the following terms and conditions:

"a) The overdraft facility shall not be allowed, at any time to exceed the amount of 431 000 00 Emalangeni; the overdraft facility was reduced by E19000 from E500 000 to E481 000 in respect of a guarantee issued by the Bank in favour of the Swaziland Government Department of Labour.

"b) The Purchaser shall furnish S.A parties or their agents with copies of the Bank statements relating to the joint venture overdraft at the end of each month and at any other time if requested by any of the S.A parties to do so.

"c) The Purchaser further undertakes that it will ensure that the joint venture overdraft shall be reduced by not less than 50 000,00 Emalangeni per month with effect from 1st October 1990. The S.A. parties shall be entitled to instruct the Bank to limit the overdraft facility accordingly.

"d) Immediately after signature hereof the Purchaser shall use its best endeavours to procure that any guarantee or suretyship furnished by or on behalf of the SA parties in respect of the joint venture overdraft is cancelled with effect from the effective date without the SA parties being obliged to pay any amounts or incur any other obligations. In the interim, alternatively, in the event that the Purchaser shall not be able to obtain the release of the SA parties from such guarantees or suretyships the Purchaser indemnifies the SA parties against any amount which they may be obliged to pay in respect of any guarantee or suretyship furnished by them or on their behalf and any resultant loss or damage to the SA parties. The Purchaser undertakes that it will tender its own guarantee to assist in procuring the release of the SA parties and, if so required by the Bank, it shall procure that its shareholders and directors shall, in addition, tender their personal guarantees to the Bank.

"5.1.3 The parties shall seek the consent of each of the joint venture creditors to their respective obligations to each creditor being assigned to Swazi with effect from the effective date. Until that consent is obtained Swazi indemnifies each of the SA parties against any cost, liability or expense which it may suffer or incur to any of those creditors arising from any joint venture liability assumed by Swazi in terms of 5.1.1."

"The purchaser" refers to Swazi Timber Products, and "the S.A. parties" to Hartwood and Alpine. The account in respect of which the facility existed was on 1st June 1990, held with the Standard Chartered Bank of Swaziland Limited. However in July of 1990, at the request of Mr. Ramkolowan acting on behalf of Swazi Timber Products, Hartwood, which had earlier in the same month had informed the bank of the arrangements between the parties to the 1990 agreement, asked the bank - on the 16th of the month - to open a new account in the name of Lamboard, and to close the existing joint venture account and transfer the joint venture overdraft facility to the new account. Alpine was party to this change. The new arrangement was put in place on 10th August 1990 by the bank. The circumstances in which it came about were recorded in writing, but the document to which I have already referred which embodied the 1990 agreement itself was not amended, textually or by specific reference.

Thereafter Swazi Timber Products began to carry out its obligations under the 1990 agreement, making payments in reduction of the Lamboard overdraft account ("the Lamboard account"). It began however to experience difficulties in making payments under the 1990 agreement and the Forex dispute arose.

Further negotiations took place, involving all three parties. As a result, Hartwood contends (though Swazi Timber Products denies this), a further agreement was made either in Johannesburg or in Matsapa on or about 14th March 1991 (the 1991 agreement) between the parties.

Hartwood contends that this agreement varied the terms on which Swazi Timber Products would continue to reduce the overdraft, originally the HAJV account but now the Lamboard account, for which it had assumed responsibility under the 1990 agreement, and that in any event it provided for Swazi Timber Products to pay to Hartwood E11 286 on 30th April 1991 in full settlement of liability for provision for depreciation. It also contends that the alleged 1991 agreement settled the Forex dispute.

Its case in respect of the Lamboard account, put shortly, is that Swazi Timber Products is in default of its obligation under the 1990 and 1991 agreements, that the bank has called in the overdraft, and that because Hartwood is eventually liable under a chain of linked guarantees to pay the moneys owing in the overdraft, it is entitled under the 1990 agreement to be indemnified by Swazi Timber Products for that liability.

It also alleges that the 1990 agreement, by reason of a mistake common to all of the parties to it, omitted to make provision for the transfer of the overdraft from the HAJV account to the Lamboard account. In that respect, it seeks rectification of that agreement.

Swazi Timber Products' response is that there is no basis for rectification and that the 1990 agreement did not contain a misdescription of the overdraft account, occasioned by an error common to all of the parties. It says that on the evidence, Hartwood's liability to the bank in respect of any overdraft has been extinguished.

It also says, while denying the alleged 1991 agreement, that if it is found to exist, then Mr. Kolowan and Mr. Minett are not bound by it, and that it has the effect of extinguishing their suretieships.

At the trial, the only evidence that was led (except for the introduction of any agreed exhibits) was that adduced for Hartwood. In his final submissions, Mr. Sapire for Swazi Timber Products said that he did not in substance challenge the testimony of Hartwood's witnesses or their integrity. He did however rely on the "embellishments" or additional evidence that he elicited in cross-examination, and he did submit on a proper interpretation of their evidence, they (or perhaps more precisely Hartwood in pursuing its claim) had misconstrued the true position.

He submitted that Hartwood's claim in respect of the overdraft was misconceived. It had not established that it had suffered any loss or had become exposed to any liability in respect of the Lamboard account. It had not pleaded and nor did the evidence show that by an indirect chain of linking guarantees, Hartwood was liable to the bank.

This case has had an unfortunate history. The trial began quite early last year. Then an issue arose as to non-joinder. Then it was postponed for several months. The hearing eventually resumed early this year. At the conclusion of the evidence and the oral submissions, another short period of time elapsed while counsel prepared and submitted further written arguments, which were clear and helpful. Thereafter because of a misunderstanding within my Chambers for which I am solely responsible, further time passed, and since then more time has passed because of other commitments.

With respect, I do not consider that there is any merit in Swazi Timber Products' response to Hartwood's claim in respect of the overdraft.

What Swazi Timber Products undertook to do, in terms of the document that constitutes the 1990 agreement, was to assume sole responsibility and liability for the payment of the joint venture overdraft. It was by the terms of that document permitted to continue to have the benefit of it on specified conditions, which envisaged that it would pay it off in instalments.

In the same document, it also undertook to use its best endeavours to procure that Hartwood and Alpine would be freed from any guarantee or suretyship furnished by them "or on their behalf" in respect of the overdraft. Failing that it undertook to indemnify them against any amounts that they might be obliged to pay under any such guarantees or suretyships "and any resultant loss or damage" to them.

The unrebutted evidence for Hartwood shows that they did have contractual liabilities by way of guarantee or suretyship to the bank. It also shows very clearly that as the parties were in the process of concluding the formalities of signing the 1990 agreement, Swazi Timber

Products requested and obtained the concurrence of the other parties to a change of arrangement whereby the overdraft would be transferred to the Lamboard account. Some argument was addressed at the hearing to the question whether this was simply a change of name. In law, I do not think that it was. In my view the effect of the arrangement was that Swazi Timber Properties (Pty) Limited (i.e. "Lamboard") thereby became the principal debtor, as far as the bank itself was concerned, for the amount owing in the overdraft and also, as far as the bank itself was concerned, that the new guarantor directly to the bank became the legal entity to which it (the bank) would have recourse if the principal debtor were to default.

That is not however the issue. The question here is as to what the contractual obligations of the present parties are to each other. In that context, the expression "change of name" is in my opinion not without evidentiary significance. It was the expression first used by Swazi Timber Products itself, in proposing a change of account in what in my view amounted to an exchange of side letters, while the formalities of the main document were on the course of being concluded. It is also significant, as evidence of the intention of the parties, that after the main document (the 1990 agreement) had been signed and the bank had put in place the new overdraft arrangements, Swazi Timber Products clearly began to act on those arrangements - in the context of beginning to carry into effect the main document. On the evidence, Swazi Timber Products were aware - must have been aware - that Hartwood already had a potential liability

at least for the overdraft. They were aware that Hartwood arranged a new guarantee, while reserving its rights under the main document. And although as Mr. Sapire pointed out a litigant may (at least ordinarily) be able to invoke a point of law at any time, I myself think it is also of evidentiary significance that before these proceedings began, Swazi Timber Products never suggested that Hartwood's possible liability on the overdraft had been extinguished.

Having regard to these various things, and in weighing the evidence as to the intention of the parties, I think it would - at least at first sight - offend a commercial person's sense of commercial propriety to think that it might be open to Swazi Timber Products to contend that, against the background of these events as they occurred, the parties were agreeing that Hartwood (and Alpine) were being thereby released from any liability or potential liability to the bank, which liability was being taken over by a third company unrelated to the parties to the agreement. Swazi Timber Products' initial use of the expression "change of name", and its subsequent actions until it ran into difficulties, and Hartwood's own actions in asking the bank to implement the new arrangement and its other actions at that time to arrange a new guarantee, indicate very strongly that neither of them saw that as being the nature of the agreement. Nothing that Alpine did suggests that it was otherwise.

The fact that Mr. Steward, the bank's commercial banking manager, said in evidence that he did not regard the joint venture (or Hartwood) as being someone against whom the bank would have recourse in the event of default does not in my view make any difference. The bank had its own arrangement to secure its position. No doubt it would not have agreed to the transfer of the overdraft account if it did not first ensure that it did have its own arrangements. The fact that Hartwood may have procured these other arrangements is however in one sense incidental - incidental as far as the bank was concerned - to the contractual arrangement that existed between Hartwood, Alpine and Swazi Timber Products.

In my judgment, the arrangement between the parties to the 1990 agreement for the transfer of the overdraft from the HAJV account to the Lamboard account, being in writing, is properly to be construed as

being part of the 1990 agreement, as a side agreement, or to be a variation or modification of it in writing. If that is wrong, the omission to include it in the 1990 agreement was in my view nevertheless an error common to all of the parties to that agreement, which should be rectified accordingly. If that is not right, I am in any event of the view that Swazi Timber Products waived the requirement of clause 7.1 in the main document.

The evidence of Mr. Steward was that Swazi Timber Products was in default on the Lamboard overdraft and that the bank had called up the guarantee provided by the First National Bank of Southern Africa Limited in respect of the overdraft.

Mr. Cooney did testify that First National Bank had provided the guarantee at the instance of Hartwood's parent company (i.e. in turn, acting on behalf of Hartwood), that Hartwood would eventually be liable through a chain of linking guarantees through those other two companies, and that the guarantees had been called.

In my judgment Hartwood is entitled to a declaration that Swazi Timber Products is obliged to pay to it the principal sum owing on the overdraft and the interest thereon.

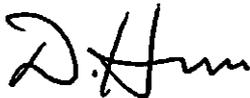
I am also of the view that Hartwood is entitled to declaratory orders to the same effect against Mr. Ramkolowan and Mr. Minett. They were signatories to the main document. Mr. Ramkolowan was also the officer in Swazi Timber Products who negotiated the change of account, as the correspondence shows. He proposed that Mr. Minett be a signatory to the new account: see Document 23, dated 9th July 1990. As a matter of fact he must have been acting with the other man's authority and I so infer.

As far as Hartwood's other claims are concerned, and Swazi Timber Products' counter-claim, Hartwood is in my opinion entitled to judgment. The claims for the moneys owing for the Hartwood's fixed assets, and the electricity accounts, are not disputed. The claim against Swazi Timber Products for the sum of E11 286 does not depend on the 1991 agreement being signed by all of the parties or on its

being in writing. It stands by itself. The evidence of Mr. Cooney and Mr. Zammit was clear that Mr. Cooney negotiated ("brokered", as Mr. Zammit put it) an agreement to that effect between Swazi Timber Products, Hartwood and Alpine.

Swazi Timber Products bears the onus of proving its counterclaim. I do not consider that it can be said at all that it has done that on a balance of probabilities and it has not shown what damages, if any, it allegedly sustained.

(The Court then stated that it would make orders in terms of paragraphs 1.1, 1.2, 1.7, 1.8, 1.9, 1.10 and 1.11 of the draft order marked "B" and attached to Hartwood's final written submissions; and requested further clarification on the relief claimed in paragraphs 1.3, 1.4 and 1.5 of the draft order. After hearing submissions, the Court then postponed the completion of judgment until 9.00 a.m. on 15th June 1994.)



DAVID HULL
CHIEF JUSTICE