CIVIL CASE NO. 2942/2000

In the matter between:

JOHANNES M. NKWANYANE — PLAINTIFF

AND

THE MINISTRY OF NATURAL RESOURCES
AND ENERGY — 1st DEFENDANT
ATTORNEY GENERAL — 2nd DEFENDANT

CORAM	K.P. NKAMBULE-J
FOR PLAINTIFF	L.R. MAMBA
FOR DEFENDANTS	P. MSIBI

JUDGEMENT 31/5/04

Plaintiff issued summons against defendant on 8th March, 2004. The cause of action emanated from 1st defendant's action of unlawfully damaging the plaintiffs farm (Bansela 520 situated in Lavumisa). The 1st defendant caused an excavation to be made there in order to obtain clay to construct a holding dam at Lavumisa. As a result of the aforesaid excavation, a pit measuring 2.5275 hectares in area was left on the otherwise arable land as a result of which the plaintiff has been prevented to carry on farming operations on that portion of the property, an activity which the plaintiff had hitherto carried thereon for gain.

The amount being demanded, or alleged to be owed by the defendant as reasonable and necessary costs for repairing the damages caused is the sum of E4,364,289-00.

In its plea the defendant admit that it carried out the excavations in respect of the dam, but deny that such excavation was unlawfully carried out. They further deny that they have a duty to restore the excavated * land to its original position. They aver that such a duty does not exist in law.

Defendant has also filed a counter claim amounting to E 180,000-. They aver that the plaintiff and the defendant entered into an agreement of settlement in case No. 1226/99 on the 26th November, 1999 in terms of which the plaintiff was paid E180,000-00 in full and final settlement of his claims.

The matter then came for arguments where two issues were canvassed. The first issue is the claim made by the defendant that the El 80,000-paid to the plaintiff was in full and final settlement of all claims by the plaintiff.

The agreement does not say so. Article 5 of the agreement deals with the creation of a servitude at No. 520 Bansela farm. It reads as follows:

> "*It is agreed that the present road and pipeline created by the Swaziland government in farm Bansela No. 520 Shiselweni be registered as a servitude in favour of the Swaziland government and that such servitude shall be effected by the applicant's attorneys and all costs thereof shall be bome by the Swaziland government and be payable on demand.*"

The other point which was raised by Mr. Msibi from th.eL.bar was that the pipeline and the road was not on Bansela farm and that plaintiff was unjustly enriched by being paid the E 180,000- as compensation. On inspection in loco PW2 the surveyor showed the court the perimeter of the farm. It was clear to everybody including Mr. Msibi that indeed the area where the pipeline and the road was constructed belonged to Bansela farm. The width of the area is 18 metres from either side of the road.

From the foregoing it is clear that the counter claim has no merit.

Regarding the second point Mr. Mamba for the plaintiff led three witnesses. PW1 told the court that he is the owner of Farm No. 520 Bansela situated in Lavumisa in the Shiselweni region. He told the court that sometime in 1994 a construction company came into his farm and started digging and removing soil. When he enquired as to why they were damaging his land. The workmen told him that they got the go ahead from the Ministry of Natural Resources and that if he had any complaint he should go and discuss the issue with the Ministry.

According to this witness he went to Mbabane and discussed the issue with the then Minister of Natural Resources Arthur Khoza who told him not to worry because he would be compensated for the damage done to his land. He went home and waited for government to either pay him compensation or fill the area which was damaged. Government could not honour the agreement.

Donald B. Ngomane PW2 told the court that he is a surveyor by profession. He studied at SCOT and completed in 1982. He has been working as such for 22 years. He told the court that his duties entail

location of pegs and quantifying volumes and surveying the topography of areas.

According to Mr. Ngomane he carried out a survey on Farm No. 520 Bansela in Lavumisa. He located the pit in question and then produced diagrams. This witness produced and explained Ex C to the court. Ex C showed two portions of the excavated pit. The other portion is on government property. This part covers one quarter of the excavated area. Three quarters of the excavated area is on Farm No. 520 belonging to the plaintiff.

This diagram further shows us the pegs demarcating Farm 520 from the adjacent government farm. From the diagram it is clear that part of government farm was annexed into Farm No. 520 when the fence was constructed.

PW3 Mr. Steven Scott Michell was introduced as an expert. On 4/2/04 he inspected the farm at Lavumisa. He said the aim was to enable the farm to be refurbished. He then handed over a report (Ex D) after explaining its contents to the court.

This is the case that turns on the quantification of damages. PW2 an expert has given evidence and part of the excavated land is not in the applicant's land.

The government has offered no evidence at all. This means that the story by the plaintiff stands unchallenged. Mr. Msibi in submissions has admitted that government is liable to make good the damage caused by government. He however, states that government should be ordered to fill the excavated pit.

Mr. Mamba in reply told the court that his client is entitled to damages and not specific performance because government has failed to remedy the situation in ten years and the question is why should they be allowed to do it now.

This is a point worth looking into. *Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. The right of a plaintiff to the specific performance of a contract, where the defendant is in a position to do so, is beyond all doubt. It is true that courts will exercise a discretion in determining whether or not decrees of specific performance should not be made.

They will not of course, be issued where it is impossible for the defendant to comply with them. There are many cases in which justice between the parties can be fully and conveniently done by an award of damages.

The question that comes to mind after a consideration of the surrounding circumstances of this case is whether payment of a sum of E4,364,289- will serve the interest of justice. In this instance I am looking at the issue of unjust enrichment. In this regard the court has been left handicapped because there is no evidence as to the value of the whole property (Farm 520). It might be possible that the amount claimed is by far in excess of the value of the property in which case this would serve to enrich plaintiff at the expense of the defendant.

It is not necessary for the purposes of this case to lay down any general rule as to when a court will and when it will not decree the specific performance of a contract. It suffices to state that under circumstances the decree would be equitable.

It is ordered as follows:-

1. That defendant is ordered to repair the damage caused on plaintiffs land by re-filling the pit created by digging clay on plaintiffs land. Works should commence on or before the
* 30th June 2004; failing which defendant should pay E4,364,289-00 as damages. Payment to be made on or before 30th June 2004.

2. In the event the defendant elect to pay the damages, interest on the above sum at the rate of 9% per annum from the date of judgement to date of payment.

3. Costs of suit to be borne by the defendant who is also plaintiff in reconvention.

K.P. NKAMBULE

JUDGE