

# IN THE HIGH COURT OF SWAZILAND

CASE NO. 2563/2004

BETWEEN

INYATSI CONSTRUCTION LIMITED...

PLAINTIFF

AND

ALPHEUS LANGWENYA...

DEFENDANT

CORAM

AGYEMANGJ

FDR THE PLAINTIFF:

J. HENWDDD ESQ.

FDR THE DEFENDANT:

F. MTHEMBU (MS)

**DATED THE 23RD DAY OF OCTOBER 2009**

## JUDGMENT

In this suit the plaintiff is claiming the following against the defendant:

1. Payment of the sum of E13,500;
2. Interest on the sum of E13,500 at the rate of 2% per month a tempore morae to the date of final payment;
3. Costs of suit;

4. Further and/or alternative reliefs. The plaintiff herein is a company registered under the laws of Swaziland. The defendant is a private person, a businessman residing at Mhlaleni, District of Manzini. The present action is grounded upon the alleged unjust enrichment of the defendant at the expense of the plaintiff herein. The matters giving rise to the present action are these: the plaintiff carries out the business of construction. At all times material to this case, the plaintiff was involved in the construction of a road from Mhlaleni to Nhlangano. It was the case of the plaintiff that for its work, it needed to use gravel which it sourced from a burrow pit at Mhlaleni opposite Caltex filling Station and

stockpiled at Mbhikwakhe, Matsapha. The gravel was carried from the

source to the site of stockpiling, a distance of about two to three kilometres on trucks owned by the plaintiff and driven by employees of the plaintiff. It was also conveyed per the same mode to the place of work, a cliff at Mhlaneni, where it was used in the road works.

On the 20<sup>th</sup> day of August 2002, the plaintiff was informed per its Security Manager, that some of the gravel that was meant for use at the construction site where the road was being rehabilitated, had been diverted and was being deposited elsewhere. An inquiry by the said officer revealed that seventeen loads of gravel had indeed been deposited on land belonging to the defendant and indeed the eighteenth load was dumped at the site in the sight of the said officer and another, while they conducted an inspection of the unauthorized place of delivery - a deviation of about four hundred meters from the place of stockpiling. It was the testimony of the plaintiffs Security Manager that during the inspection which he conducted of the defendant's homestead (where the gravel had been delivered), with one Edwin Mbingo, the defendant admitted that he had asked for, and obtained the loads of gravel from the plaintiffs drivers to whom he had allegedly paid E40 per load. He allegedly named the driver he dealt with as Nxumalo. An inquiry conducted by the Security Manager elicited the information that three drivers who were subsequently disciplined for their misdeeds: Paulos Nhlengetfwa and Derrick Damini as well as the said Nxumalo had been involved in a deal with the defendant unknown to the plaintiff, in connection with which gravel belonging to the plaintiff was delivered to the

defendant. It is the case of the plaintiff that eighteen loads of gravel belonging to the plaintiff were delivered to the defendant.

The plaintiffs Financial Manager who also testified in support of the plaintiffs case alleged that the gravel that was dug by the plaintiff, transported and stockpiled at its premises for its use, was obtained at expense to the plaintiff. Regarding the expense she testified that the plaintiff paid royalties to the Government for every load of gravel excavated and furthermore, paid for the cost of excavation, stockpiling, labour supervision and fuel used for transportation on the plaintiffs trucks. Thus the plaintiff per its Plant Director computed its charge for each load of gravel (having regard to the expenditure aforesaid), from the stockpile where it was taken, to the defendant's homestead, to be E750. The gravel she said, was not for sale and the price computed did not include profit.

It was thus the case of the plaintiff that in making a request of its drivers to deliver gravel intended for use at the construction site, at his homestead without the plaintiff paying for same, the defendant acted in a manner intended to enrich himself unjustly by depriving the plaintiff of its due which was the sum payable for the delivery of eighteen loads delivered to his homestead; the sum of E13,500 at E750 per load. The plaintiff thus made a claim for the said sum of E13,500 upon an invoice made out to the defendant. This was after the defendant allegedly failed to render an apology to the plaintiff or settle the amount owing in spite of the urging of the plaintiffs Security Manager who knew the defendant to be a pastor in his church and deferred to him for that reason. The defendant, having neglected to pay same, the plaintiff commenced the present action for the aforesaid reliefs.

It is the case of the defendant that drivers of the plaintiffs trucks engaged in dumping what he described as "dirty soil" or "dark and muddy gravel" at a place close to his homestead at Mhlaleni, offered to dump gravel on his land. According to the defendant, the driver informed him that he was going to throw away the gravel which he had been informed was not good. He alleged that he accepted this as he needed gravel to use as a landfill at his homestead, and he had in fact been collecting gravel for the purpose as he sometimes did, when the offer was made. He alleged that he made this arrangement with the said drivers believing that the gravel was waste material and was simply being thrown away. He alleged that having received ten

loads of such gravel (he later said there were eight), he gave the said drivers E40 each (there were two of them) to buy Coca Cola, in appreciation. It was following this that a sedan driven by a gentleman came to the homestead. The driver appeared to confer with the drivers of the truck and went away only to return the next day with one Mr. Ncongwane. This second gentleman questioned him about the gravel to which he responded by telling him of the offer made by the drivers to dump waste material at his homestead. He alleged that he informed the inquisitor that he had not paid for the gravel but had given the drivers E40 each in appreciation of their deed. Three days the said gentlemen returned with a Police Officer to the site. The police officer allegedly advised the defendant not to use the gravel as it was being claimed by the plaintiff. Thus did he refrain from using the gravel deposited at his homestead. The plaintiff however failed to recover same. He further denied that he had received any invoice from the plaintiff in connection with the gravel in question. He alleged that his only business dealing with the plaintiff was regarding the supply of eight boulders onto his land for which he paid.

The defendant tendered photographs in evidence purporting to show from where the defendant believed the plaintiff excavated gravel, the area of the plaintiff's construction, and the piles of gravel on land belonging to him upon which grass had grown. They were admitted as exhibits C, C1-C3.

At the close of the pleadings the following stood out as issues to be determined:

4. Whether or not the defendant received gravel belonging to the plaintiff from the servants of the plaintiff;
5. Whether or not the defendant's conduct unjustly enriched him to the detriment of the plaintiff;
3. Whether or not the plaintiff was impoverished by the defendant's act.

The plaintiff has the burden of proving the elements constituting unjust

enrichment, see: ***Willis Faber Enthoven (Pty) Ltd v. Receiver of Revenue***

**7992 (4) SA 202 (A) at 224;** also ***McCarthy Retail Ltd v. Short Distance Carriers CC 2001 (3) SA 482;*** and further: ***African Diamond Exporters (Pty) Ltd v. Barclays Bank International Ltd 1978 (3) SA 699.***

In the Instant case this enterprise included that the plaintiff had to demonstrate that the defendant was enriched by his act and to the detriment of the plaintiff at that, that the enrichment was unjustified, and further, that the plaintiff was impoverished thereby.

It seems to me that the plaintiff led sufficient cogent evidence to discharge its burden of proving unjust enrichment of the defendant at its expense on the balance of the probabilities. I say so for reasons appearing hereunder. First of all, evidence was led on behalf of the plaintiff, a legal persona, that the plaintiff regularly acquired gravel for its benefit. To acquire same, the plaintiff excavated the gravel at Mhlaleni, opposite Caltex Filling Station, transported and stockpiled same at a site chosen for such for its use.

The plaintiff was said to have obtained permission to enable the acquisition from the Government of Swaziland to which it paid royalties for excavation. There was thus ample evidence that the gravel that was carried by the plaintiffs employees from the place of digging until it reached its final destination, belonged to the plaintiff. Evidence was further led that the said gravel dug for the use of the plaintiff, was transported on the plaintiffs trucks and stockpiled and from there, it was transported to the place that the plaintiff carried out its business which at the material time, was a cliff at Mhlaleni. On 20<sup>th</sup> of August 2002, gravel which was being carried on trucks owned by the plaintiff and driven by its drivers, found its way to the defendant's homestead. Testimony was given on behalf of the plaintiff that the drivers who carried the gravel were instructed by the plaintiff to deliver same to its works site the cliff at Mhlaleni where the plaintiff was carrying out rehabilitation of a road.

According to the Security Manager of the plaintiff who testified on its behalf, when he received a report that the plaintiff's gravel had been diverted to a place other than the plaintiff's works site, he followed up and conducted an inspection of the unauthorised dumping ground. Over at the site which turned out to be the defendant's homestead, the witness testified that he counted seventeen loads of gravel already delivered and that the eighteenth still being offloaded in his presence.

The witness testified that the defendant who was at the scene did not deny the report the witness had received that it was gravel belonging to the plaintiff that had found its way there. The defendant simply said that it had been dumped by the plaintiff's drivers. The defendant

however, in defending this suit brought against him, has alleged that the drivers offered to deliver the waste gravel they were going to throw away, onto his land and that he believed the driver's assertion that it was waste material as he found the gravel to be dirty, muddy and dark.

The defendant did not deny that the gravel was in fact carried on trucks belonging to the plaintiff and driven by employees of the plaintiff. There is no controversy over the fact therefore, that the gravel whatever it was meant for, was being carried at the expense of the plaintiff when it was delivered to the defendant by the plaintiffs employees at his request. As aforesaid, the defendant has persisted in the defence that he was informed that it was waste material by those who carried same - the plaintiffs drivers, and that he believed it because of the way it appeared to him: muddy, clayey, and dark. This is in face of the uncontroverted evidence that gravel carried by the plaintiffs employees on the plaintiffs trucks at the instance of the plaintiff, was dumped not where it was intended by the plaintiff, but on the defendant's land and this without the knowledge of the plaintiff. Added to this uncontroverted evidence was the unchallenged evidence of the plaintiff's first witness that the drivers who delivered the gravel to the defendant at his request allegedly confessed to a conspiracy (referred to as a deal) with the defendant and that they were sanctioned for same by the plaintiff.

The plaintiff thus discharged its burden of establishing the defendant's bad faith in that he took delivery of the gravel knowing it to belong to the plaintiff from drivers of the plaintiff who he had no reason to believe were authorised by the plaintiff to deliver gravel to him. Nor did he pay for same. In face of this evidence adduced by the plaintiff, the defendant on whose premises the plaintiff's gravel was found alleged that he took delivery in good faith, defendant took delivery of gravel belonging to the plaintiff: he thus assumed the burden to demonstrate his good faith. Contrary to the submission of learned counsel for the defendant, the plaintiff on whose behalf evidence had been led regarding the defendant's misappropriation of its gravel in circumstances justifying a finding of bad faith, had no burden to call witnesses to rebut the defendant's assertion that he was misled by the plaintiff's drivers. Since it was the story of the defendant that he received the gravel in good faith upon the word of the plaintiffs drivers, his it was to adduce such corroborative evidence, the purport of which would negate a finding of unjust enrichment.

it seems to me that the defendant in this circumstance had to do more than just assert that he held the belief that the gravel was waste material because the plaintiffs drivers allegedly said so and the gravel looked dirty. He had to adduce evidence to demonstrate that although he took delivery of gravel carried on the plaintiffs trucks by its employees, he did so without the intent to defraud the plaintiff.

The defendant led no such evidence which could have included the production of the said drivers upon whose word he allegedly relied. The defendant tendered and relied on pictures he took of piles of gravel at his homestead and of a place where he believed the plaintiff dug the dirty gravel from. It seems to me that these did not discharge the burden he assumed at that point to show that he had no reason to believe that the gravel he received belonged to the plaintiff, or was of use to the plaintiff (in that he believed it to be waste material).

There is no controversy that the plaintiff is a company. The defendant knew the drivers to be employees of the plaintiff and ought to have known that when they carried gravel for whatever purpose (for work or even as waste), they did so on the plaintiff's behalf.

In order to receive gravel carried on the plaintiffs trucks by its employees, a prudent person acting bona fide ought to have verified from the company whether the alleged assertion by the drivers that the gravel was meant to be thrown away was in fact true and then, since the employees and trucks of the plaintiff were involved in the venture, sought permission for the waste material in that case to be diverted onto his land. Anything short of this gave credence to the bad faith alleged by the plaintiff which was not negated by the defendant's assertion that he believed what the drivers allegedly told him because of the appearance of the gravel. The defendant did not lead evidence of any prior knowledge he had of the type of gravel used by the plaintiff in its business. To say therefore that the gravel was muddy, dark and clayey and therefore had the appearance of waste, when he had not established that gravel usually used by the plaintiff had a different appearance, could not support his assertion that he held an honest belief that it was waste.

In the premises, I am drawn irresistibly to the conclusion, and find on the preponderance of the probabilities, that when the defendant took delivery of gravel carried on the plaintiff's trucks by the plaintiff's employees, he did so without reference to the plaintiff to which it offered no

payment and in a bid to gain an advantage rightfully due the plaintiff. I hold the same to be a fact.

I hold it to be a fact also that the loads of gravel delivered to the defendant, were eighteen in number.

I say this for the following reasons: it was always the plaintiff's case, in pleading and in the evidence led on its behalf, that the number of loads of gravel were eighteen in number. This was denied by the defendant in his pleading. In evidence, the defendant 'at first alleged that he stopped the delivery after ten loads were dumped at his homestead, later however, he maintained said the loads of gravel had been eight in number.

The plaintiff's first witness in prosecution of the plaintiff's claim, gave an eyewitness account that he saw seventeen loads already delivered and the eighteenth one in the process of delivery when he arrived at the defendant's homestead. In spite of the rigorous cross-examination of that witness conducted by counsel on behalf of the defendant, the eyewitness's account of the number was not challenged.

It is trite learning that where a party who is represented fails to challenge the evidence of an opposing witness in cross-examination, that assertion may stand as fact.

I find then that on the balance of the probabilities, the evidence led on the plaintiff's behalf that eighteen loads of gravel belonging to it were delivered to the defendant was more probable than not, especially in face of the lack of cross-examination on this vital piece of evidence and furthermore, in face of the conflicting numbers given by the defendant: first an assertion that there were ten loads and later, eight.

There is no controversy over the fact that the defendant did not pay for the loads of gravel delivered to him on the plaintiff's trucks by the plaintiff's employees. On the defendant's own showing, he took the gravel free of charge from the drivers and gave them E40 each, not for each load as the plaintiff alleged, but in appreciation of the benefit they had given him. Was the defendant enriched by his conduct at the expense of the plaintiff? It seems to me that he was. Learned counsel for the plaintiff has argued that the defendant was not as he did not use the gravel because of the involvement of the Police at the instance of the plaintiff.



It cannot be denied however that the defendant when testifying on this said that the Police Officer who accompanied employees of the plaintiff for an inspection at his homestead told him not to use the gravel as it was being claimed by the plaintiff. On his showing, the Police Officer told him that he had merely come for an inspection and furthermore that he never returned to the site. The defendant furthermore did not say that the officials of the plaintiff to which the gravel belonged said the same, nor was any mention made that the plaintiff would recover the gravel.

The plaintiff had two options at this point: to recover what belonged to it, or to seek payment for what it had been deprived of. That the plaintiff took the latter route could not be faulted, for it was not bound to go to the extra expense of reloading and transporting the gravel. It seems to me that the defendant who did not use the gravel that had been delivered to his homestead chose not to do so and that if he did so out of fear of a Police Officer who never returned to the site, or the hope that the plaintiff would recover same, there was no justification for so doing. I am reinforced in my opinion by this: that although the defendant under cross-examination denied that he received the plaintiffs invoice for the gravel delivered to him at his instance, there is no denying that the defendant produced same during discovery as having been received by him.

I hold it to be a fact thus that he did receive the invoice - exhibit A dated 21/5/03 and a reminder of his indebtedness contained in a letter exhibit B dated 11<sup>th</sup> June 2003. Even if the defendant was in doubt regarding the plaintiffs intentions before the receipt of the invoice (although there was no justification for such), surely at that point when he received the plaintiffs

Invoice exhibit A, it ought to have been clear to him that the plaintiff was not interested in recovering the gravel but rather required payment therefor. The defendant requested for and obtained the gravel for his benefit which on his showing was to fill a hole on his land. The eighteen loads of gravel he received remain at his premises as shown in the pictures tendered in evidence by himself, and may be used whenever he chooses to. I find that the defendant was enriched by it.

I find further, that there was no justification for the defendant's act which enriched him for he had no reason to request drivers who were the plaintiff's

employees, to deliver gravel acquired by the plaintiff at its expense, to him without paying for same. The act of taking delivery of gravel which belonged to the plaintiff and was to be used for the plaintiff's business without reference to the plaintiff, deprived the plaintiff of what was due it.

The defendant's enrichment was thus unjust and at the plaintiffs expense.

I hold the same to be a fact.

Was the plaintiff impoverished by the defendant's act?

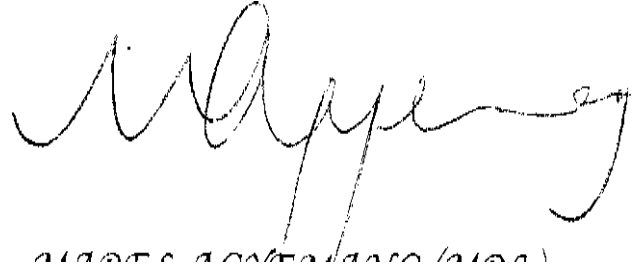
It most certainly was, for the gravel was dug and transported at expense to the plaintiff. That the gravel was diverted from the use to which the plaintiff intended (which according to the plaintiffs witness, was its use on the road under rehabilitation), deprived the plaintiff of the benefit due him for which he expended money.

The plaintiffs second witness testified that it cost the plaintiff E85 per load in royalties paid to the Government for excavation. The gravel was carried on trucks belonging to the plaintiff and fuelled by it. The plaintiff's witness and Finance Manager testified that there were labour charges for excavating, transporting and stockpiling of the gravel. The total cost of excavating and transporting the gravel she said was E750 per load, it seems to me that it does not lie in the mouth of the defendant (as learned counsel seemed to suggest on his behalf,) that the distance between the place of stockpiling and the defendant's homestead was a mere four hundred metres. The plaintiff's Finance Manager who testified on its behalf said that the said charge did not include profit as the gravel was for the use of the plaintiff and not for sale.

In the absence of contrary cogent evidence led to demonstrate the falsity of the components of the plaintiff's computation or its unreasonableness, it seems to me that this court has no reason to reject the sum computed by the plaintiff using its own methods of determining its outgoings on its activities, to be the value thereof.

I therefore hold that the plaintiff was impoverished to the tune of E13,500 which was the charge for eighteen loads of gravel at E750 per load. I find that the plaintiff has discharged its burden of proving its case against the defendant on the preponderance of the probabilities. The plaintiff's claim must thus succeed.

Accordingly, I enter judgment for the plaintiff for the reliefs contained in the summons.

A handwritten signature in black ink, appearing to read "M. Apper", is written over a faint, illegible printed name. The signature is fluid and cursive.

HIGH COURT JUDGE

Costs awarded to the plaintiff.