IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 555/05**

In the matter between:

CATHULA DVOKOLWAKO FARMERS

ASSOCIATION **PLAINTIFF**

VS

A.J. NYMAN SWAZILAND (PTY) LTD **DEFENDANT**

CORAM **MAMBAJ**

FOR PLAINTIFF **MR Z. MAGAGULA**

FOR DEFENDANT **ADV. M. VAN DER WALT**

Ruling on application for absolution from the instance
November, 2009

[1] The plaintiff, a duly registered Association of sugarcane farmers, has its principal place of business at Manzana, Dvokolwako Area in the Lubombo Region.

[2] The Defendant is A-J. Nyman Swaziland (Pty) Ltd, a company duly incorporated and registered with limited liability in terms of the company laws of Swaziland.

[3] The plaintiff claims in this action for judgement against the defendant, in the sum of E190 107.12 and other ancillary relief. The action is basically one for special damages founded or based on breach of contract and or alternatively poor and or incompetent workmanship and there are two instances of such breach alleged by the plaintiff in its particulars of claim; namely:

(a) The Defendant's failure to monitor the plaintiff's irrigation system and equipment resulting in a crop failure totalling E16000.00 as a result of the plaintiff having to replant about 6.6 hectares of its fields.

(b) The Defendant's failure to correctly install the water pump or as required by the plaintiff and agreed upon between the parties resulting in damages amounting to E68000.00 in respect of unnecessary consumption and or wastage of electricity power; the reasonable and necessary costs for the rectification and or correction thereof totalling E97800.62 and E7 333.12 in respect of a new water pump and engineering expenses or charges, respectively. (I note that the four figures or amounts stated under (a) and (b), herein make up a sum of E189 133.74 and not the E190 107.12 that is claimed in the summons).

[4] The said contract was oral and the parties were represented by their duly authorised agents or representatives. The identities of these agents are, however, disputed by each side. The plaintiff avers that its representative was Harry Dzimba, its chairman at the time and the defendant was represented by Gordon Vermaak. The defendant's version is that Tim Shongwe acted for the plaintiff whilst Pierre Vermaak was the defendant's agent. Nothing turns on this apparent dispute of fact in the representation of the parties for purposes of this ruling herein.

[5] The defendant denies liability altogether and avers that

> "...it monitored the [irrigation] system and gave assistance and advice to the plaintiff [at all times] covered by the 12 month warranty that was a term of the contract and that the plaintiff failed and or refused to follow the expert advice so given by the defendant and this resulted in the damage to plaintiff's pumps or equipment."

It is the defendant's further allegation that the warranty aforesaid excluded

"6.3.1 damage caused by improper handling or misuse by plaintiff;

6.3.2 a failure by the plaintiff to comply with the defendant's instructions for the operation of the system; and

6.3.3 normal wear and tear."

The Defendant pleads finally that it correctly installed the irrigation system as required and as agreed to and that the cause of the breakdown in and of the system, was because the plaintiff failed to operate it properly and or as instructed by the defendant.

[6] I heard evidence from three witnesses led by the plaintiff and at the close of the case for the plaintiff, the defendant applied for absolution from the instance, arguing, to paraphrase the wording of rule 39 (6) of the rules of this court, that there is no evidence before me upon which a judicial officer or a court might find in favour of the plaintiff. VIDE **TWK AGRICULTURAL LTD v SMI LTD AND ANOTHER, Civil Trial 4263/05** (unreported Judgement delivered on the 10 June, 2009) where Masuku J quoted with approval the following excerpt by Harms JA in **Gordon Lloyd Page and Associations v Rivera and Another, 2001 (1) SA 88 (SCA) at 93:**

> "This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff **(MARINE AND TRADE INSURANCE CO. LTD v VAN DER SCHYFF 1972 (1) SA 26 (A) at 37G - 38A;** ...As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one ...The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is evidence upon which a reasonable man might find for the plaintiff... a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (RUTO FLOUR MILLS). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court."

On this, Masuku J remarked that

> "The Learned Judge of Appeal advocated for a test where the court trying the case (and not some other court or person), brings its own judgement to bear on the evidence adduced before it and decides whether the plaintiff has, at the close of its case, made out a case such that that court could or might find for it, even in the absence of the defendant's evidence at that stage. If it could find for the plaintiff on that evidence, then

> the defendant ought to be put to its defence. If not, then cadit quaestio; that constituting a proper case for the grant of absolution from the instance. ...it is, however, moot whether at the conceptual level there might actually be a marked difference in the Court's approach to the evidence if the latter test be applied as opposed to the former."

[7] I, with utmost due respect, share the above exposition of the test to be applied in such instances and have nothing of my own to add apart from, rather reluctantly noting that; it is generally accepted that

when a court refers to a judicial officer acting reasonably or judiciously or where it refers to a mere reasonable person, its view of that person is that which in the opinion of the presiding officer is reasonable in the circumstances. It's a value laden judgement. The presiding officer in effect substitutes his own reasonableness for that of the notional reasonable man or judicial officer. The opinion of the presiding officer becomes the opinion of the reasonable man.

[8] I now examine the plaintiff's evidence in relation to its case as pleaded and the defendant's defence thereto.

[9] (a) The sum of £16,000.00 occasioned by replanting. An examination of this aspect of the claim and indeed most of the other claim by the plaintiff, involves a two stage enquiry, viz; (i) the cause of the damage and (ii) the quantum or measure of damages occasioned thereby.

[10] The Plaintiff's cane field is divided into several sections referred to as blocks. There are about 24 of such blocks or divisions. They are numbered from block 1 to 24. According to PW2, Stephen Mavundla only blocks 2,3,4,6,7 and 9 were affected by the crop failure. 66.6 tons of seed-cane was used to correct this. And the cost for this was a sum of E16,000.00 inclusive of labour and transportation costs. Mavundla also testified that blocks 2 and 3 needed a complete replanting because there was a total crop failure whilst gap-filling had to be done on the rest of the blocks affected as there was partial crop failure.

[11] All 3 witnesses for the plaintiff testified that the crop failed because of lack of sufficient water in the pipes or irrigation system that was installed in the affected areas. This problem was noted by the plaintiff who then notified the defendant. The Defendant carried out an inspection and assessment of the situation and concluded that the cause of the crop failure was that the underground drip pipes were too small or the pressure therein was insufficient to adequately irrigate the affected blocks and this had to be changed and was changed by the defendant without any cost to the plaintiff. That there was a defect in the said irrigation system and that such was corrected by the defendant, is in my judgement, beyond doubt. It is also not in doubt in my view that by correcting the defect or incorrect installation or piping, the defendant accepted that it was the sole cause of the faulty installation and that it was liable or duty bound to do a proper installation. The plaintiff has thus established that the crop failed and either a complete replanting or partial planting or gap-filling had to be done. That disposes of the first leg of the inquiry under this heading.

[12] Annexure H, lists the names of employees and their wages who were hired to do the gap-filling on blocks 2 and 7. In all, thirty (30) persons were employed for a period of 7 days at the rate of E15.00 per day. Also included in this document is a sum of E4 500 for truck charges - I do not know whether this represents the hire charges for the truck to transport the 30 workers or the transport costs of conveying the seed cane from its suppliers to the plaintiff's fields. The other unexplained issue or inconsistency in this evidence is that the viva voce evidence by PW3 indicates that there was a complete replanting as opposed to gap-filling on block 2.

[13] There is yet another hurdle faced by the plaintiff regarding the amount claimed relating to this portion of the damages. The plaintiff is only able to say it purchased 66.6 tons of seed cane. The costs there of has not been stated. The total area either replanted and or gap-filled remains unexplained in the evidence. There is further nothing in the evidence to indicate that the 66.6 tons of seed cane was a fair and or necessary or

reasonable amount required to address the damage caused. These loopholes or deficiencies in the plaintiff's evidence prevent me from holding that the plaintiff has led the required evidence to establish a prima facie case upon which I could find in its favour.

[14] (b) The sum of E68,000.00 in respect of electricity charges. Regarding this claim, the plaintiff averred that the "defendant failed to install the pump correctly alternatively; defendant failed to install the pump as required by plaintiff by co-joining the plaintiffs pump to that of a neighbouring farm."
The evidence by the plaintiff is that for a period of eight (8) months after its irrigation system was commissioned, its pump in the pump house was being used to pump irrigation water for Leyodvwa Farmers Association as the irrigation system for the said Association was installed or assembled such that it could not work without the plaintiff's engine or pump being on. As a result of this, the plaintiff argues, its water pump was used, by the defendant, to do irrigation work for Leyodvwa Farmers Association without the consent or approval of the plaintiff. This arrangement resulted in plaintiffs water pump consuming more electrical power than the plaintiff actually needed or required. It was not until the plaintiff complained to the defendant about this that the defendant corrected this and the pumps were separated.

[15] Whilst the two pumps were joined as alleged, the average monthly electricity consumption by the plaintiff was a sum of E12,000.00. After the pumps were separated, this came down to E3 500.00 per month. Consequently, plaintiff claims that it is entitled to be compensated or refunded the difference between these two figures, over the relevant period, by the defendant.

[16] The Defendant has admitted that the two pumps were joined but says this was with the knowledge and consent or approval of the plaintiff.

[17] It is very difficult to understand why, if indeed the plaintiff did not know about or consent to this arrangement, it allowed this to go on for such a period - eight months. Mr Stephen Mavundla said the pumps were joined for a period of about 15 months. However, I think there is yet a clearer or more cogent reason why the plaintiff's claim can not succeed in this regard and it is this:

The evidence that has been led by the plaintiff is not sufficient to justify its claim. This evidence is solely based on the electricity bills -showing the amount of electricity being consumed during the period of eight months referred to on the one hand and the amount of electricity that was consumed by the plaintiff after the separation of the pumps.

[18] The plaintiffs irrigation system was installed at the end of 2001 but the actual irrigation of sugar cane began in early 2002 and about two months thereafter, Leyodvwa's pumps were installed. Not all the electricity bills for the period under consideration have been filed -only a sample have been filed. These bills are not helpful at all in advancing the plaintiffs claim herein. First, none of the bills indicate the number of hours within which electricity was being consumed. Secondly, in order to arrive at a fair and or accurate assessment and comparison of the bills for the two periods, the size of the fields or area that was being irrigated, the amount of water that was used in the process. One would , for instance, expect that there would be less need or no need at all, to pump water for irrigation where there have been substantial rains during a particular period. Again, one would expect that the amount of water needed for sugar cane would also depend amongst other things the stage or age of the sugar cane. When all is said and done, the plaintiff has totally failed to lead evidence that takes into account all the many factors and or variables that have to be filtered into the equation, in support of such a claim. Consumption by the plaintiff has not been shown to have been attributable solely to the pumps being joined or vice versa. Consequently, likewise on this claim, absolution from the instance must be granted.

[19] On its last but one leg of its claim, the plaintiff avers that it has

suffered damages in the sum of E97 800.82

> "As a result of defendant's failure and or refusal to separate the pumps, plaintiff had to hire an alternative company at a cost of E97 800.62 ... to separate the pump station and install a new pump."

This portion of the claim is linked to that of E7333.12 in respect of Engineering or consultancy fees paid to GG Engineers, for examining the faults on the pump supplied and installed by the defendant. According to the evidence, the sum of E97 800.62 is the cost of purchasing a new engine or pump and the installation thereof in the pump house. This is reflected in exhibit K. the actual cost of the pump is not indicated.

[20] The plaintiff's witnesses testified that the water pump developed faults and this fact was reported to the defendant. The Defendant was requested by the plaintiff to attend to these faults and rectify them but the defendant failed and thus the plaintiff had to remove the pump. When engineers at GG examined the pump, their advice was that the pump was too old and no spare parts for it were available in the market or more specifically in Johannesburg. It is this advise that prompted the plaintiff to buy a new one. The plaintiff had to pay a sum of E7 333.12 for these services and the plaintiff holds the defendant liable for it.

[21] In support of its case in this regard, the plaintiff avers in its particulars of claim that

"12 By reason of defendant's failure to attend to faults on the pump plaintiff had to engage the services of an engineering company at a cost of E7 333.12 ...to service the pump."

This is, of course, not entirely correct. The evidence led before me is that the Engineering company examined or inspected the pump and concluded that it could not be repaired as there were no spare parts for it available in the market. It did not service the pump.

[22] The plaintiff has, in its particulars of claim, made no allegation that the defendant was obliged to attend to the faults on the pump. The plaintiff, rather belatedly in its evidence under cross examination stated that the water pump broke down or developed unspecified faults within a period of twelve months of its installation and the defendant had granted a warranty

against breakages on it for that period. This being a claim for special damages, it had to be specifically pleaded in the plaintiff's particulars of claim. "Special damage must be specially pleaded and full particulars thereof must be supplied. If delictual compensation is claimed for special damage, it should in appropriate cases be alleged that the damage can be attributed to the defendant (for example since it was reasonably foreseeable). Where damages for special damage caused by breach of contract are claimed, it is necessary to allege that the damage was within the contemplation of the parties (or foreseen or foreseeable by them) at the time the contract was entered into and that it was made on the basis of particular circumstances which render the defendant liable for the payment of damages. A claim for damages other than the normal or legal measure constitutes special damages and it must be alleged and proved that it was within the contemplation of the parties (actually foreseen or foreseeable). A failure to make the necessary allegations in the summons where special damages are claimed may lead to a successful exception or an application to have the claim struck out" **(Law of Damages - PJ Visser and JM Potgieter, (Juta) 1993 at 433)** (Footnotes have been omitted by me).

In casu, in the absence of an allegation on or about the existence of a warranty in respect of the pump and the pump breaking down during the subsistence of such warranty, absolution from the instance has to be granted on this portion of the claim as well. I may add that even if such an allegation had been made in the Plaintiff's particulars of claim, the plaintiff would still have been expected or required to lead evidence to establish that the faults in the water pump fell within those covered by the warranty. I have not, in the present action, been told of the nature of the faults on the pump and their origin. This brings me to the next issue; the claim for E97 800.62 being the costs for purchasing and installing another engine.

[23] Plaintiff's evidence is simply that the water pump broke down; the defendant was notified and asked to attend to it, defendant failed; professional advice was sought and obtained from GG Engineering and a new water pump was purchased and installed. Before the court could come to the plaintiff's aid, it must of necessity know, the nature of the faults on the machine, their origin and extent. If, for instance, the breakdown or mechanical faults on the water pump were caused either negligently or deliberately by the plaintiff, then the defendant would not be held liable to compensate the plaintiff for them, as such would not generally, be covered

by a warranty. It seems to me logical that it may only be a breach of the warranty if it is covered by the warranty. We can only know or determine whether or not it is covered by the warranty if we know the terms of the warranty the nature of the damage, its cause or origin and its extent. In the absence of evidence on these issues no court, acting reasonably and directing its mind to the matter at hand could find for the plaintiff. The result is that absolution from the instance is hereby granted in this regard as well.

[24] For the foregoing reasons, absolution from the instance is granted with costs; such costs to include those of Counsel to be duly certified in terms of the rules of this court.

MAMBA J