IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 40/2021

In the matter between:

Inyatsi Construction Limited — Appellant
(Defendant in the High Court)

And

Sunla Investments (Pty) Ltd — Respondent
(Plaintiff in the High Court)

Neutral citation: *Inyatsi Construction Limited v Sunla Investments (Pty) Ltd* (CIV 40/2021) [2022] SZSC 27 (4 July 2022)

Coram: MAMBA, MASUKU AND VILAKATI AJJA

Date of hearing: 4 May 2022

Date of Judgment: 4 July 2022

Summary: Practice and Procedure-Duty of trial judge to evaluate evidence and make factual findings before pronouncing on the rights and liabilities of litigants

Practice and Procedure-trial court not making findings of fact-role of appellate court

Practice and Procedure-mutually destructive versions-when party who bears the onus will succeed-consequences of evenly matched probabilities

Engineering and Building Contracts-liability of employer for the conduct of independent contractor-test for

Law of obligations-concurrence of actions between action for breach of contract and the aquilian action-determining the remedy sought by litigant-pleadings decisive

Loss of profit-compensable in delict-requirements for

Judgment

VILAKATI AJA (MAMBA AND MASUKU AJJA Concurring)

INTRODUCTION

1. The appellant is Inyatsi Construction Limited, a company with limited liability incorporated in terms of the company laws of Eswatini. In this judgment I will refer to the appellant as Inyatsi.

2. The respondent is Sunla Investments (Pty) Ltd, a company with limited liability incorporated in terms of the company laws of Eswatini. At the time the cause of action in this matter arose the respondent carried on the business of a supermarket under the style 'save and smile supermarket'. I will refer to the respondent as Sunla.

3. Sunla was a tenant of Inyatsi. Inyatsi carried out building works on the property on which Sunla was a tenant. On 20 January 2012 Sunla instituted action proceedings against Inyatsi in the High Court alleging that Inyatsi carried out the building works in a way which caused them to lose profits. Sunla sought damages for the alleged loss in the amount of E 4 966 517.00 (Four Million Nine Hundred and Sixty Six Thousand Five Hundred and Seventeen Emalangeni).

4. Inyatsi opposed the action and filed a counterclaim for damages for breach of contract in the amount of E 738 650.00 (Seven Hundred and Thirty Eight Thousand Six Hundred and Fifty Emalangeni).

5. The matter proceeded to trial where Sunla led the evidence of one witness and Inyatsi led the evidence of two witnesses. On 10 August 2021 the High Court delivered judgment in which it awarded Sunla:

    5.1 Damages for loss of profit in the amount of E 4 646 517.00 (Four Million Six Hundred and Forty Six Thousand Five Hundred and Seventeen Emalangeni) less income tax and value added tax.

5.2 Interest on the sum of the judgment debt less tax calculated at the rate of 9% per annum from the date of issue of summons to the date of final payment.

5.3 Costs of suit.

6. In connection with the counterclaim the court below awarded Inyatsi damages in the amount of E 738 650.00 (Seven Hundred and Thirty Eight Thousand Six Hundred and Fifty Emalangeni) plus interest at the rate of 9% per annum from the date of judgment to the date of final payment and costs of suit.

7. Inyatsi appeals to this court as of right against the whole of the order which was adverse to it. That is the order referred to in paragraphs 5.1-5.3 above. Sunla has not cross appealed against the order awarding damages against it (paragraph 6 above). Consequently the quantum of damages and the interest thereon awarded by the High Court in relation to the counterclaim stands.

8. There are two principal issues which arise in this appeal. The first issue is whether the High Court was correct in concluding that Inyatsi had carried out the building works in a wrongful and culpable manner which caused harm to Sunla. The second issue is whether the High Court was correct in finding that Sunla had proven on a balance of probabilities that it had suffered damages for loss of profit in the amount of E 4 646 517.00 (Four Million Six Hundred and Forty Six Thousand Five Hundred and Seventeen Emalangeni).

THE FACTS

UNDISPUTED FACTS

9. The undisputed facts on the pleadings filed and the evidence led in the High Court were:

9.1 On 1 October 2005 Sunla entered into a written lease agreement with an entity known as Oxford Leasing Company (Swaziland) in terms of which Sunla was given the use and enjoyment of Shop Number 1 at what was then known as Tiger City Building, Trelawney Park, Manzini (hereinafter "the property"). The lease was to endure until 31 August 2015.

9.2 In 2008 Oxford sold the property to Motsa Investments (Pty) Ltd.

9.3 On 5 November 2009 Inyatsi acquired ownership of the property and adopted the 2005 lease.

9.4 On 27 April 2010 Inyatsi gave Sunla six months' notice to vacate the property. The notice was given in terms of clause 32.2 of the lease. Clause 32.2 gave Inyatsi the right to cancel the lease on 6 months' notice where it intended to rebuild or destroy the property.

9.5 Around May 2010, the precise date was not given in evidence, Inyatsi entered into a building contract with a contractor, Construction Associates (Pty) Ltd ("Construction Associates"), in terms of which the contractor would refurbish the property such that it housed a private clinic and the headquarters of Inyatsi.

9.6 On 19 July 2010 before the expiry of the six months' notice period Inyatsi instituted an eviction application against Sunla in the High

Court. The application was dismissed. An appeal to this court also failed. The judgment of this court in this regard is *Inyatsi Construction Ltd v Sunla Investments (Pty) Ltd t/a Save and Smile Supermarket* [2010] SZSC 4. This court held that Inyatsi had no cause of action before the lapse of the notice period.

9.7 In September 2010 Inyatsi moved eviction proceedings in the High Court against a different tenant of the property. The lease of the tenant was identical to the 2005 lease concluded by Sunla. Inyatsi relied on clause 32.2 to contend that it had validly cancelled the lease. The High Court held that clause 32.2 was inapplicable to the building works which Inyatsi had engaged the contractor to do. The High Court judgment in this regard is *Inyatsi Construction Ltd v Riveria Investments (Pty) Ltd* case number 3555/2010 delivered on 14 July 2011. There was no appeal against this judgment.

9.8 Sunla vacated the property in July 2011.

10. The upshot of the ratio in *Riveria* judgment is that Sunla had a lease valid until 31 August 2015.

DISPUTED FACTS

11. The disputed facts on the pleadings and on the evidence led before the court below were:

11.1 Whether Inyatsi dumped concrete rubble and builder's waste in front of customers' entrance to Sunla's supermarket.

11.2 Whether Inyatsi removed Sunla's signage directing shoppers to the supermarket.

11.3 Whether on several occasions Inyatsi turned off the power supply to Sunla's premises.

11.4 Whether Inyatsi drilled holes in the concrete support of Sunla's compressors causing breakage and adversely affecting Inyatsi's refrigerators.

11.5 Whether Inyatsi broke concrete above Sunla's supermarket resulting in rubble and dust particles ruining Sunla's stock and affecting the cleanliness of the shop.

11.6 Whether Inyatsi cut sewerage pipes above Sunla's supermarket causing sewerage waste to flood the supermarket's bakery.

11.7 Whether the conduct of Inyatsi caused Sunla to suffer loss of profit.

12. Inyatsi contended that it was not liable for any loss suffered by Sunla because the building works were carried out by Construction Associates which is a separate legal entity. This is a mixed question of law and fact which will be addressed later in this judgment. Inyatsi further contended that the lease agreement between the parties contained an exemption clause which excluded its liability for damages arising from repairs or building works. In the view which I take of this appeal it is not necessary to determine whether the exemption clause was applicable. This is because resolution of the disputed facts and a determination of liability for loss caused by Construction Associates are sufficient to decide the appeal.

Analysis of the evidence

13. The version of Michael de Souza for Sunla in essence was that Inyatsi was negligent in carrying out the building works in that it committed all the conduct listed in paragraphs 11.1-11.6 above. In connection with the damages allegedly suffered by Sunla, Mr de Souza testified that for the period 1 November 2008 to 30 September 2009 (11 months), the average sales of the business per month were E 253 000.00 (Two Hundred and Fifty Three Thousand Emalangeni) per month and his profit was 25% of the sales. Mr de Souza told the court that Sunla's profits were attributable to the fact that it was the only food retailer in its locality. He testified that he expected his profits to increase by 10% every year until the end of the lease in August 2015. Mr de Souza's version was that his profits declined from October 2009 until July 2011 when Sunla was allegedly forced to vacate the property by Inyatsi's wrongful and culpable conduct.

14. In business the meaning of profit is uncontroversial. Profit is the excess of total revenue generated by the business over the costs incurred in running the business during a specified period of time. Sunla placed reliance on till slips as proof of the profits it claimed to have lost. In argument Mr Nkomondze invoked the judgment of the High Court in *MT & MB (Pty) Ltd v Council of Swaziland Churches* [2002] SZHC 76 for the proposition that in an action for loss of profit that best available evidence must be led even though it might be

difficult for a court to assess the quantum of damages from such evidence. He argued that the till slips were the best available evidence of Sunla's loss profits. I do not agree. The relief sought before the High Court was damages for loss of profit. There must be evidence of the business's expenses and that these expenses were below the income generated by the business. Sunla did not lead any evidence of the expenses it incurred running the supermarket during the relevant period.

15. Inyatsi gave an entirely different version of the manner in which the building works were carried out and how busy the supermarket actually was. Mr Ernst Van Der Walt, who at the time of the trial, was production manager of Construction Associates testified that:

15.1 The rubble generated from the building was not dumped at the entrance of the supermarket but was taken to the sidewalk and removed daily. The entrance to the building was kept clear in case of emergencies.

15.2 Sunla's signage was not removed. Signage belongs to tenants and contractors do not touch signage.

15.3 The contractor did not turn off the power supply. Only the Swaziland Electricity Company (as the company was known at the time) could turn the electricity off.

15.4 He had no recollection of the contractor drilling next to compressors which affected the supermarket's refrigerators. The only area where drilling occurred was the lift shaft basement.

15.5 There was no breaking of concrete above the supermarket. The work done in that space was taking off floor and wall finishes. Breaking concrete would have resulted in huge vibration effects on the building.

15.6 There was one sewerage pipe in Sunla's ceiling void. The contractor did not do any work in the ceiling void while Sunla was in occupation of the property. Consequently any cuts to Sunla's sewerage pipe was not attributable to the construction.

16. The factual disputes concerning the building works can conveniently be briefly summarised as whether the building contractor engaged by Inyatsi carried out the works in a proper and workmanlike manner.

17. In connection with the loss of profit, Mr Van Der Walt and Ms. Zinhle Mbuyisa denied that business was booming in the supermarket. They testified that the supermarket was poorly stocked and it was struggling. They testified that a convenience store connected to a filling station on the property was better stocked and they often had to purchase items at the convenience store.

18. In its notice of appeal and in argument before us Inyatsi criticised the court *a quo* for pronouncing on the rights and liabilities of the litigants without determining the disputed facts by evaluating all the admissible evidence tendered during the course of the trial. The criticism was well-founded. Where material facts are disputed a trial

court is obliged to evaluate the evidence, make factual findings and justify the factual findings it has made (See the judgment of Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd & Another v Martell Et Cie and Others* 2003 (1) SA 11 (SA) at par 5).

19. Over time the courts have developed techniques to assist triers of fact in deciding which facts to accept, and which to reject. Former Chief Justice of South Africa M M Corbett in a paper titled *Writing a Judgment* published in (1998) 115 *SALJ* 116 said the following:

> "The resolution of disputed issues in a trial action is one of the most difficult tasks confronting a judge. Obviously, the judge will have seen and studied the witnesses while in the witness box and will have formed impressions from the demeanour. In the assessment of a witness's credibility, demeanour is undoubtedly a factor not to be ignored. On the other hand, I am somewhat skeptical of the ability of a judge (sometimes claimed) to divine the truth from the expression on a witness's face or the witness's hesitance in answering a question or apparent nervousness in the witness box. I do not say that those matters are not of importance. They often are. But there may be reasons other than mendacity or unreliability for an apparent poor demeanour, and this factor should be considered in the context of the evidence as a whole. ... factors of equal importance to and sometimes greater importance than demeanour are (i) the probability or improbability of the testimony seen against the background of the case as a whole; (ii) inherent contradictions in the evidence of the witness for which there is no discernible explanation, especially when the contradictions relate to the issues in the case; (iii) the contradiction of the evidence by other credible witnesses or by objectively indisputable facts, such as facts which are common cause, or are notorious, or are demonstrated by contemporary documentation; (iv) contradiction of the witness by his or her own extracurial statements or previous conduct; and (v) well-founded attacks upon the general character and credibility of the witness (where this is permissible).
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> "Fact-finding may, of course depend, wholly or partially, not on who was called to give evidence but who was not called. Failure to call a cardinal witness may be held against a party, and this factor may constitute part of the fact-finding process.

> "In order to make a particular finding of fact, the judge does not have to be completely convinced of the correctness of his finding: proof upon a preponderance of probability is what is required. Where the probabilities are so evenly balanced that no positive finding can be made on the evidence, and the fact in question is a crucial one, the case may have to be decided on the onus." (At 123-124)

20. An appeal court has to accept a trial court's findings of fact unless there is a demonstrable and material misdirection by the trial court (*R v Dhlumayo & Another* 1948 (2) SA 677 (A) at 705-706; *Mabuza v Registrar of Insurance & Retirement Funds*). This principle does not apply where the trial court made no findings of fact. In such an instance the appeal court is at large to assess the evidence anew and come to its own conclusions (*S v Carter* 2014 (1) SACR 517 (NCK) at par 6). In the case at hand the trial judge made no findings of fact. Consequently this court is free to assess the evidence afresh and come to its own conclusions.

21. The versions of the parties on the manner in which the building works were executed and the volume of trade in the supermarket are mutually destructive. The acceptance of one version must necessarily result in the rejection of the other. In *National Employers' General Insurance v Jacobs* 1984 (4) SA 437 (ECD) the court held that where there are two mutually destructive versions, the party who bears the onus can only prevail where he or she or it satisfies the court on a balance of probabilities that his or her version is true, accurate and therefore acceptable; and the version of the other party is false or mistaken and should be rejected. Where the probabilities are evenly

matched, the party who bears the onus can only succeed if the court believes him or her or it and is satisfied that their version is true and the version of their opponent is false (At 440 D-G).

22. In the case at hand Sunla bore the onus of satisfying the court on a balance of probabilities that its version was true and accurate and that the version advanced by Inyatsi was false or mistaken and fell to be rejected. Mr de Souza testified that the supermarket was well patronised before the commencement of the renovations. However none of the supermarket's customers were called to testify about their shopping experience before the renovations and during the renovations.

23. No evidence was placed before the trial court stating what the duties of a contractor to third parties are and whether the contractor acted in breach of those duties. On the oral and documentary evidence, in connection with the execution of the building works, led before the trial court I am not satisfied that the probabilities favour Sunla's version any more than they do Inyatsi's version. The probabilities are at best for Sunla, evenly matched.

24. On Sunla's version the supermarket's sales and their profit started falling in October 2009. The probabilities do not support Sunla's version that the decline in sales between October 2009 and May 2010 was attributable to the conduct of Inyatsi. Inyatsi became owners of the property in November 2009 and the building works at the earliest commenced in June 2010. Sunla's version in relation to the October 2009-May 2010 is improbable seen against the background of

the case as a whole. In connection with the period June 2010-July 2011, when Sunla vacated the property, no evidence of the supermarket's expenses was led.

25. Sunla's claim was not only for actual loss of profit but for prospective loss of business profit as well. The prospective loss of business covers the period after vacation of the premises and the time the loss would have come to an end. This period is August 2011-August 2015. Sunla was suing for frustration of an expectation that it would have made profit between August 2011 and August 2015. No evidence was placed before the trial court to quantify the profits which Sunla alleges it would have made in the four years.

26. Mr de Souza for Sunla was not truthful when he testified that the supermarket was the only food retailer in the area. Inyatsi's version which was not challenged in cross examination was that on the property there was a convenience shop associated with a filling station. Furthermore Inyatsi's version was that this convenience shop was, when compared to the supermarket, better stocked. In short Inyatsi attributed the decline in Sunla's business to a better performing competitor on the same premises. Inyatsi's version was not shown to be false or mistaken and that it falls to be rejected. I am therefore unable to say that on the probabilities Inyatsi's version is false or mistaken and falls to be rejected.

27. In summary I find that the probabilities are evenly matched in connection with whether the works were executed in a proper and

workmanlike manner. Secondly I find that there is no evidence of what Sunla's cost of sales were before the construction and during the construction.

The Applicable Law

28. A building contract is a contract in terms of which one party, called the builder or contractor, agrees to perform building work for another, called the employer or building owner (McKenzie *the Law of Engineering and Building Contracts and Arbitration* 5 Ed at page 1). A building contract is a contract for work and not a contract of employment. Therefore the builder is an independent contractor and not an employee. In the present instance Inyatsi was the employer and Construction Associates Ltd was the builder.

29. The general rule is that the employer is not liable for the acts of the builder. As is often the case in law, there are exceptions to this rule. Inyatsi's contention that it was not liable for the conduct of the independent contractor Construction Associates was presented as if the rule is absolute. This was erroneous in law.

30. One exception to the rule is that the employer may be liable where he or she employer engages an independent contractor to perform work which is by itself dangerous (McKenzie supra at page 27). In *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) Goldstone AJA (as he was then) stated that the liability of the employer where he or she has engaged an independent contractor

to perform dangerous work depends on answers to three broad questions which must be asked:

30.1 Would the reasonable person have foreseen the risk of harm in consequence of the work he or she employed the contractor to perform? If so;

30.2 Would a reasonable person have taken steps to guard against the harm? If so;

30.3 Were such steps taken in the case in question?

31. The court went on to say only where the answer to the first two questions is in the affirmative will a legal duty arise, the failure to comply with which can be the basis of the employer's liability.

32. At the hearing and in the heads of argument, there was much debate about whether Sunla's action was contractual or delictual. Mr Shongwe for Inyatsi argued that Sunla's claim was the aquilian action and Sunla had failed to prove all the elements of this action on a balance of probabilities. Mr Nkomondze's position was that Inyatsi had misunderstood his client's claim in that the claim was contractual.

33. The aquilian action is a delictual remedy which is available to a party who suffers a loss calculable in monetary terms which is caused by the wrongful and culpable conduct of another. The elements of the action are wrongfulness, fault either in the form of intention or negligence, causation and damage. Breach of contract occurs where a party to the contract does not perform the contract in the way agreed upon or not at all. A party who sues for damages for breach of contract

seeks to be placed in the financial position he or she would have been in had the contract been fulfilled.

34. The same wrongful conduct can constitute both a breach of contract and a delict. This is known as a concurrence of actions. The injured party can then elect whether he or she wants to file a contractual action or a delictual one or institute the remedies in the alternative. However the aquilian action is only available together with a contractual action where the conduct complained of, in addition to the breach of contract, also wrongfully and culpably infringed a legally recognised interest which is independent of the contract (See *Lillicrap, Wassenar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) 475 (A)). The pleadings determine the area of law in which the claim is framed.

35. In *Transnet Ltd v Sechaba Photoscan* 2005 (1) SA 299 (SCA) the primary issue was whether it was competent in law to claim delictual damages for loss of profits. In this case a tenderer was fraudulently denied a tender. The tenderer then sued in delict for loss of profit it would have made in three years if it had been awarded the tender. *Transnet* contended that the tenderer was suing to be placed in the position it would have been in had it been awarded the contract and that such a claim was only allowable in contract. The court held that there was nothing in principle which prevents a delictual action for loss of profits.

36. In its judgment the High Court stated that '... [Sunla] suffered loss of business due to the Defendant's renovations. What is not clear how

much the precise loss is.' Despite this finding the court below made a damages award in favour of Sunla. Mr Shongwe submitted that once the court could not find how much the precise loss was, it could not make a damages award in favour of Sunla. I agree with this submission. Loss of profit regardless of whether the claim is framed in contract or delict is measurable in monetary terms. If the precise loss of profit cannot be determined, the action cannot succeed.

37. In *Commander Umbutfo Swaziland Defence Force & Another v Themba Maziya* [2022] SZSC 14 delivered on 24 May 2022, this court cautioned against finding a defendant liable merely because the plaintiff suffered harm. The liability of a defendant must be established by admissible and cogent evidence on a balance of probabilities.

38. I turn next to consider the law applied to the facts.

The Law Applied to the Facts

39. It is convenient to start with the nature of Sunla's claim. The claim could have been pleaded in contract or delict or both in the alternative. In Sunla's particulars of claim there is no averment that Inyatsi acted in breach of the contract between the parties. A careful reading of the pleading shows that the claim was pleaded in delict, specifically the aquilian action. Consequently, Mr Shongwe's characterisation of the claim as a delictual one was correct. The upshot of this is that Sunla had to prove wrongfulness, fault, causation and damage on a balance of probabilities.

40. Inyatsi engaged an independent contractor to refurbish an entire building. This was dangerous work which posed the risk of harm to the public and any tenants who were occupying the building. A reasonable employer in the position of Inyatsi would have foreseen the risk of harm in consequence of the refurbishment it engaged Construction Associates to perform. Secondly a reasonable employer would have taken steps to guard against the harm. I found earlier in this judgment no evidence presented to the trial court of what those steps were and that Inyatsi failed to take such steps. Consequently Inyatsi's liability to Sunla was not established on a balance of probabilities. The High Court fell into error in finding that liability was proven. On this basis alone the appeal should succeed.

41. For the sake of completeness I consider the issue of damages. There simply was not an iota of evidence presented to the court below of Sunla's expenses and whether such expenses were less than the income generated by the business. The action was for loss of profit and not loss of income. Sunla had to prove it lost excess income over expenses in the period it was suing for. The loss of profits were not proven on a balance of probabilities. The High Court erred and misdirected itself in concluding that loss of profits was established.

42. For the aforegoing reasons the appeal succeeds and costs follow the event.

43. In the result the following order is made:

1. The appeal is upheld with costs.

2. The order of the High Court is set aside and substituted with the following:

"(a) The action is dismissed with costs.

(b) The counterclaim succeeds and the Plaintiff is ordered to pay the Defendant the sum of E 738 650.00 (Seven Hundred and Thirty Eight Thousand Six Hundred and Fifty Emalangeni).

(c) Interest at the rate of 9% per annum from the date of judgment to the date of final payment.'

MM VILAKATI

Acting Judge of Appeal

I agree, it is so ordered

M.D Mamba

Acting Judge of Appeal

I agree, it is so ordered

S M Masuku

Acting Judge of Appeal

Appearances

Mr M Shongwe of Magagula Attorneys for the Appellant

Mr M Nkomondze of Nkomondze Attorneys for the Respondent