IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 12/2022**

In the matter between

ATLANTA PRODUCTS (PTY) LIMITED **APPELLANT**

AND

SWAZI CABLES & LIGHTING (PTY) LIMITED **RESPONDENT**
t/a AUTO TECH SOLUTIONS

Neutral Citation: *ATLANTA PRODUCTS (PTY) LIMITED v SWAZI CABLES & LIGHTING (PTY) LIMITED t/a AUTO TECH SOLUTIONS (12/2022) [2023] SZSC 07 (06 MARCH, 2023)*

Coram : **M. C. B. MAPHALALA, CJ**
M.D. MAMBA JA
A. M. LUKHELE AJA.

Heard : 13 OCTOBER, 2022

Delivered : 06 MARCH, 2023

[1] Civil law- Law of contract- Written contract of hire. Terms and conditions of contract setting out the method upon which charges would be levied. Terms and conditions not clear and parties in dispute over these terms.

[2] Civil law- law of contract- Interpretation of terms and conditions of contract. Where terms and conditions ambiguous, extrinsic evidence on surrounding circumstances needed to assist in the interpretation where such terms are susceptible of more than one meaning.

[3] Civil law- Claim for damages for breach of contract- Repudiation of contract to be clear and unequivocal. Formula for quantification or assessment of damages discussed.

MAMBA JA:

[1] The Appellant is Atlanta Products (Pty) Ltd, a private company incorporated in accordance with the company laws of Eswatini.

[2] The Respondent is Swazi Cables and Lighting (Pty) Ltd, a private company incorporated with limited liability in terms of the company laws of Eswatini. Both parties or companies have their principal places of business in the Matsapha Industrial Sites.

[3] On 08 December, 2016, the parties duly entered into a written contract whereby the Appellant hired from the Respondent 4 forklifts. The duration of the agreement was thirty-six (36) months with effect from the date of delivery of the machinery or equipment to the Appellant. This would appear to have been immediately after execution of the contract.

[4] The hire charge for 2 of the forklifts, described as Hyster 2.5 Ton Gas was a sum of E60.00 per hour whilst the charge for the other 2 referred to as Hyster diesel 2.5 ton, was a sum of E55.00 per hour.

[5] It was a further term of the agreement that:

> '7.2 Hire is based on a double shift of 334 hours per month for a Gas-Electric-Diesel forklift. After 334 hours per month, a charge of E90.00 per hour applies to all forklifts unless stated otherwise on the hire agreement.
>
> 7.3 During the currency of the hire agreement, hiring charges must be paid by the hirer/customer monthly in advance for the period

from the time the equipment is delivered to the hirer/customer until the date the equipment is collected by the owner.

7.4 The first payment must be made upon delivery of the equipment.

7.5 The Hirer/customer acknowledges that the owner has fixed the hiring rate stated on the hire agreement on the basis of a certain period of hire and an agreed number of hours of usage per month.

7.6 Should the monthly hours of usage exceed the agreed number of hours (as evidence by hour meter on the equipment) the owner may charge the Hirer/customer an additional charge.

7.7 Accounts rendered by the owner for additional charge must be paid within 30 days of the date of the accounts.'

[6] Apparently, the first dispute between the parties surfaced in 2018. By letter dated 15 February 2018, the Appellant complained to the Respondent that the latter had over-charged the former in a sum of E303,334.00. This was in respect of statements or rental charges spanning from March 2017 to December of the same year. The essence of the complaint was that

'5.2 Instead of charging [for] usage hours, the [Respondent] charged the [Appellant] for production hours which included hours in which the forklifts were not used by the [Appellant]. . .'

This charge was denied by the Respondent and is the basis for High Court case 1018/2018

[7] It is common cause that in 2018, the Respondent successfully sued the Appellant for payment of a sum of E83,818.50 in respect of arrear rental charges for the months of December 2017 and January 2018. This was under High Court case 708/2018. This was followed by case 1645/2020, wherein the Respondent claimed against the Appellant, the sum of E1,726,780.00 for breach of contract. As a basis for the latter case, the respondent stated that:

'9.2 Since on or about February 2018, the [Appellant] repudiated the contract between the parties by abandoning the [Respondent's] machinery, and refusing to utilize the same without just cause. Instead the [Appellant] engaged machinery from third parties notwithstanding the subsistence of the contract of the lease between the parties.

As a result of the [Appellant's] breach above, the [Respondent] was constrained to repossess its machinery from the [Appellant's] premises on or about February 2018.'

[8] Based on the above allegations of breach of contract, the Respondent claimed a sum of E1,726,780 in respect of rental charges which [Respondent] would have earned in terms of the contract for the remaining period of 22 months of the lease.

[9] Cases 1018/2018 and 1645/2020 were consolidated for purposes of hearing. Judgment was handed down on 24 February 2022. The result or outcome was that the Appellant's claim for E303,334.00 was dismissed with costs whilst the Respondent's claim for E1,726,780.00 for breach of contract was granted, with costs. It is these judgments that are the subject of this appeal.

[10] In dismissing the Appellant's action, the trial Court held that

'[39]. . .It is clear that the plaintiff admitted that the forklifts would be in "usage" as per the wording of the lease agreement without

the engine or the hour "metre" running. That evidence coming from PW 2 who was the man on the ground at [plaintiff's workplace] as it was testified that PW1 resided in the Republic of South Africa, clearly supported the version of the defendant that the charges as per the terms of the hire agreement were premised on the production hours of the plaintiff and the forklift used and not on the engine running as it was contended on behalf of plaintiff.'

Finally, the Court held that the evidence showed that it was not the intention of the parties that the hours used to calculate the charges be those generated by the running of the forklift engine.

[11] The Court *a quo* granted the respondent's claim for breach of contract based on the ground that the defendant abandoned the Respondent's equipment in February 2018 and instead hired and used forklifts from TCM.

[12] In respect of case 1018/2018 the Appellant lists its grounds of appeal as follows:

'1.1 The Court *a quo* erred in law and in fact and/or misdirected itself in holding that the following [facts] or issues were common cause or were not in issue;

1.1.1 That the (reason) Respondent never invoiced the Appellant for . . . 334 hours in any of the months by reason that the Appellant never operated those hours in the given period;

1.1.2 That both parties were at *ad idem* that only forklifts that were used on a particular shift will attract a charge; and

1.1.3 That it was not the Appellant's case that the Respondent invoiced for all four forklifts irrespective of another they were used in a particular shift or not.

2.1 The Honourable Court *a quo* erred in law and in fact in not making an adverse finding against the respondent and or interpreting the agreement against the respondent as the drafter of the agreement, despite finding that the said agreement was ambiguous.

3.1 The Court *a quo* erred in law and in fact in finding that the ambiguity in the wording of the hire agreement necessitated that the intention of the parties, when they drew the contract, be ascertained from extrinsic evidence.'

4.1 The Appellant also avers that the Court a quo was in error in holding that a Toyota forklift was one of those hired or leased out to the Appellant.

The rest of the grounds of appeal are in the following terms:

'5.1 The Honourable Court *a quo* erred in law and in fact in finding that the Toyota forklift was used by the Appellant for an extended period beginning 28 February 2017 to 28 September 2017 and that the Appellant could not have used the Toyota forklift to be part and parcel of the hired forklifts, if a material term of the contract was that the charges will be based on the hour metre reading. The Honourable Court *a quo* ignored the fact that the Toyota forklift was not part of the leased forklifts in terms of the signed agreement, that the Respondent, itself gave the Appellant hours of the Toyota forklift when asked to furnish the hour mere readings of the forklifts.

6.1 The Honourable Court *a quo* erred in law and in fact in finding that the Appellant or "PW 1" did not raise a query after discovering that the Toyota forklift had no hour metre reading and such failure to raise a query, or the conduct of the Appellant is consistent with the Respondent's version on the formula for charges.

7.1 The Court *a quo* erred in law and in fact in finding that the Appellant or "PW 1" testified that the Appellant had no qualms with the invoices for December 2016 to February 2017 and further did not make discovery of the invoices of the said months by reason that the Respondent did not overcharge the Appellant for the said months of December 2016 to February 2017.

8.1 The Court *a quo* erred in law and in fact in finding that the Appellant did not dispute the invoices of December 2017 and January 2018, yet according to the undisputed evidence of the Respondent, the invoices of the said months reflected charges based on Appellant's production hours.

9.1 The Court *a quo* erred in law and in fact in finding that the evidence of "PW 2" proved or was an admission that the forklifts were in "usage", as per the wording of the lease agreement, without the engine or the "hour metre" running and such alleged admission by "PW 2" supported the version of the Respondent that the charges as per the terms of the hire agreement were premised on the intention that they will be based on the production hours of the Appellant.

10.1 The Honourable Court *a quo* erred in law and in fact in findig that the fact that there were no common books where both parties signed for the speedometer or hour metre (clock) recording and that the parties did not compare recordings at the end of each month for purposes of payment and the "PW 1" or the Appellant made payments to the Respondent on the basis of trust, was contrary to business acumen.

11.1 The Court *a quo* erred in law and in fact in finding that the Appellant and the Respondent, both had the intention that charges will be based on production hours, whose evidence could readily be available from not only management, but the labourer of the

Appellant as well, unlike the hour metre reading which needed each party's attendance.

12.1 The Court *a quo* erred in law and in fact in finding that the fact that Twelve (12) out of 56 (Fifty-Six) invoices reflected hours, and none reflected engine reading, clearly proves that it was never the intention of the parties in the lease agreement and the hire agreement that such engine combined with hourly reading will be used to calculate charges.

13.1 The Court *a quo* erred in law and in fact in finding that the Appellant did not disclose or divulge to the Respondent the purpose of requesting the engine reading of the forklifts and that the engine recordings furnished by the Respondent were only taken for purposes of servicing the respective forklifts.

14.1 The Court *a quo* erred in law and in fact in finding that the Appellant needed recordings that were taken on the same date in each and every month for purposes of proving an overcharge and that a random engine reading as it was done by the Respondent, led to an inaccuracy in calculating the overcharge.

WHEREFORE, may it please the above Honourable Court to uphold the grounds of appeal with costs.

The grounds of appeal against the Judgment of the Honourable Court *a quo* under Case No.1645/2020 are as follows:

15.1 The Court *a quo* erred in law and in fact in finding that there was no dispute on the Appellant's production hours and the number of forklifts used on a particular day, meaning that if the Appellant worked Thirteen (13) hours and utilised only Two (2) forklifts on a certain Monday, the Respondent then charged the Appellant for Thirteen (13) hours worked for the Two (2) forklifts that were used on that Monday.

16.1 The Court *a quo* erred in law and in fact in holding that and/or misdirected itself in not making an adverse finding against the Respondent, despite finding that the contract, which was drafted by the Respondent, was ambiguous or was partly supporting the version of the Appellant and partly supporting the version of the Respondent.

17.1 The Court *a quo* erred in law and in fact in finding that it was common cause that the Appellant operated a double shift which consisted of the day and night working hours, which constituted the Appellant's operation hours. The Court a quo ignored the fact that the Appellant did not operate double shifts throughout the year.

18.1 The Court *a quo* erred in law and in fact in finding that the parties firstly defined oil [. .] all type forklift, and secondly include the word "per hour", yet there was already the 334 hours in the main agreement, because the parties intended that only actual utilised forklifts should incur a charge, and the conclusion is that, in reading both the main agreement and the hire agreement, the charge should be E60.00 (Sixty Emalangeni) for a gas and E55.00 (Fifty-Five Emalangeni) per hour for the diesel forklift, per actually used forklift per Appellant's operation hours. An exclusion of the Appellant's operation hours, would mean ignoring the main agreement and only reading the hire agreement.

19.1 The Court *a quo* erred in law and in fact in finding that the Respondent never charged the Appellant for 334 hours in a given month because the Appellant never worked 334 hours in a month, despite operating both shifts and that for the Respondent to charge 334 hours per month without any evidence that the Appellant worked for such hours was to be tantamount to reading only Clause 7.2 without resorting to the hire agreement as per Clause 7.1of the main agreement.

20.1 The Court *a quo* erred in law and in fact in finding that the meaning of the phrases in Clause 7.6 of the agreement are that "monthly hours", are the operation hours of the Appellant, "of usage", per forklift actually used during those operation hours, "agreed number of hours" are the 334 hours and not beyond, "as evidence by the hour metre on the equipment", demonstrate that the parties intended that in the event the Appellant operated beyond 334 hours, then those hours falling outside 334 hours had to be read from the hour metre reading of the used forklifts and it was only then that the metre reading became necessary.

21.1 The Court *a quo* erred in law and in finding that it was impossible for the Respondent to charge the Appellant for hours as reflected in the forklift or metre reading and not according to operation hours, in light of the evidence of Mr. da Serra or the Appellant that, in about 5% of exceptional circumstances, the Appellant operated the forklifts with their engine not running, and the answer or conclusion being that the hour metre reading would only be read where the Appellant operated beyond 334 hours.

22.1 The Court *a quo* erred in law and in fact in finding that the Appellant withheld payments for December 2017 to January 2018 and after such withholding of payment, the Respondent made an election to file a Summary Judgment Application for the December to January rentals. The Honourable Court *a quo* ignored the fact that the withholding of the rentals was by consensus between the parties, leading up to the meeting of the 8th February, 2018.

23.1 The Court *a quo* erred in law and in fact in holding that the fact that in the meeting of the 8th of February, 2018, the parties discussed the overcharge and left the other matters, such as the new terms of contract to be attended after the repayment of the overcharge, weighs on the side of the Respondent that the Appellant was no longer prepared to honour the 2016 contract.

24.1 The Court *a quo* erred in law and in fact in finding that in the meeting of the 8th February, 2018, the Appellant had already formed the intention that it was no longer bound by the contract as demonstrated or in that all the options were put by Mr. da Serra or by the Appellant and the Respondent or Mr. Hlatshwayo did not participate in any of the options as he disputed the overcharge.

25.1 The Court *a quo* erred in law and in fact in finding that the options discussed in the meeting of 8th February, 2018 were only put by the Appellant to the Respondent and the one in particular, relating to the removal of the forklifts and hiring them elsewhere, was clear evidence or proof that the Appellant had repudiated the contract.

26.1 The Court *a quo* erred in law and in fact in finding that the Appellant breached the contract in that in February, 2018 the Respondent's forklifts were never utilised by the Appellant, not because February was a quiet month, but due to the fact that the Appellant had engaged forklifts from TCM. The Honourable Court *a quo* erred or misdirected itself in finding that the Appellant parked the Respondent's forklifts and opted to use forklifts from TCM, yet same were engaged by the Appellant in order to assist the Respondent's forklifts during the busy season, and such is clear proof that the Appellant had repudiated the hire agreement between the parties.

27.1 The Court *a quo* erred in law and in fact in finding that the Appellant breached the contract by virtue of the ease in or with which the Respondent was able to remove its forklifts from the premises of the Appellant, yet it was common cause that the Appellant maintained security in its premises and considering the fact that Mr. da Serra told Mr. Stewart to allow the Respondent or Mr. Hlatshwayo to take the forklifts as the Appellant was to pursue the overshare through the legal route.

28.1 The Court *a quo* erred in law and in fact in finding that the Appellant clamped the two (2) machinery or forklifts because it was complaining about the Respondent's removal of the forklifts or breach of the contract on the part of the Respondent, but the Appellant did so with the intention to recoup its overcharge from the two (2) forklifts and not to honour the 2016 contract.

29.1 The Honourable Court *a quo* erred in law and in fact in holding that the rule of procedure that the claimant must prove its profit by establishing expenses which ought to be deducted from the globular figure which is usually the remaining duration of the contract's turnover is a general rule, and that it is not in every case of breach of contract where the Respondent has to establish expenses to be subtracted from the remaining contractual sum figure in order to remain with profit.

30.1 The Honourable Court *a quo* erred in law and in fact in holding that it was clear from the contract signed between the parties that it was agreed that in the event of termination of the contract, the Plaintiff or the Respondent herein would be entitled to liquidated damages inclusive of costs and expenses for necessary repairs

and maintenance, and that the argument that the Respondent ought to have deducted such future repairs and maintenance expenses is contrary to Clause V (5) (e).

31.1 The Honourable Court *a quo* erred in law and in fact in holding that the Respondent only had to prove or establish breach of a contract, damages, causal link between breach and damages and foreseeability, and not prove or adduce any evidence regarding the Respondent's mitigation of its losses.

32.1 The Honourable Court *a quo* erred in law and in fact in holding that the Respondent's cause of action was entitled to succeed and/or that the Appellant was liable to pay the Respondent damages of E1,726.780.00 (One Million Seven Hundred and Twenty Six Thousand Seven Hundred and Eighty Emalangeni) 9% interest per annum and cost of suit.

[13] I have deliberately decided to list these grounds of appeal as they appear in the Notice of Appeal partly to illustrate that some of these grounds are strictly speaking not real grounds or basis for appeal but argumentative matters. For instance, the last so-called ground of

appeal is completely meaningless inasmuch as it basically says the Court *a quo* should not have awarded the Respondent's claim. It does not say why this should not have been done.

[14] Save for the issue on whether the Appellant had repudiated the contract or not, the main dispute between the parties is on the interpretation of the lease agreement and in particular on how the monthly charges ought to be calculated. The Appellant submitted or contended that the charges should be calculated based on actual hours worked as evidenced by or sourced from the actual equipment used. The Respondent interpreted the agreement differently. It stated that the calculations were to be based on a 334 hour per month, regardless of the actual hours worked or utilized, based on a "double shift system". Both sides relied on the terms and conditions of the contract, in particular clause 7.6 to 7.8.

Clause 7.6 has been cited in full in paragraph 4 above. Clause 7.8 grants the Respondent the right to increase the rental charges in proportion to any increase in the rate of inflation as determined by the Central Bank of Eswatini from time to time.

[15] The position or interpretation held by the Appellant was, on the papers herein, first communicated to the Respondent in a letter of demand submitted to the Respondent by the Appellant's attorneys. This letter is dated 15 February, 2018. In that letter, the Appellant informed the Respondent that it had been agreed between the parties that '. . . the charges for usage of the forklifts were agreed to be "charges for time used" as opposed to "charges for shift times." (See page 27 of the Record of Appeal). The Appellant's action filed under case umber 1018/2018 was based on this allegation. Again, the Respondent's plea was that there had been no over -charging inasmuch as the calculations were based or calculated on 334 hours per month.

[16] The dispute between the parties had to be resolved based on the interpretation of the terms of their written agreement, which was the covenant or contract regulating their business engagement. The Court *a quo* was alive to this fact. The Court came to the conclusions though that the contract was not very clear on how the monthly hire charges were to be calculated or compiled. It said the mere terms of the contract were, at first glance, capable of the two different meanings

advocated or propounded by the parties. Because of this lack of clarity or divergent views, the Court had to look at all the surrounding circumstances relevant to the signing and execution of the contract. Included in this enquiry is the conduct of the parties in carrying out or executing the contract, after signing it. This is an exception to the parole evidence rule. The Learned trial judge dealt with this issue as follows:

> '[30] I must point out that reading the contract between the parties, particularly clause 7 and the lease agreement, the wording does appear to somehow support the version of both parties herein. This is because both clause 7 and the hire agreement consist of the words *"per hour", "per month"* and *"usage"*. Only one phrase which happens to be bracketed contains the words *'as evidenced by the hour metre on the equipment.'* This phrase appear to support Plaintiff's case. However, the evidence by Defendant that the reason a cap of *"334 hours per month"* was reduced to writing as part of the contract was so as to enable Defendant to charge a different fee rate should Plaintiff operate beyond the ordinary shifts per month, cannot be ignored.

[31] Now what was the intention of the parties when they drew the contract? Was it to charge per the usage (actual hour engine running) of the forklifts or the usage as in the use of the particular forklift per shift? I am much alive to the general principles on interpretation of contract applicable in our jurisdiction. The first port of call is to give the wording of the contract its ordinary day to day meaning. As often said, the intention of the parties must be gathered from the words in their agreement as they are (literal or golden rule of interpretation). It is to the effect that unless the golden rule of interpretation would result in absurdity or ambiguity. I have already demonstrated above that at a cursory reading, there seems to be ambiguity in the wording of both the hire agreement and the general agreement as seen under clause 7 and the hire agreement. For this reason, I shall resort to the extrinsic evidence in pursuit of the parties' intention at the time they concluded the contract as guided by a plethora of case law.'

[17] In *Natal Joint Municipal Pension Funds v Endumeni Municipality 2012 (4) SA 593 (SCA)* a case cited to us by the Appellant, the Court stated the above rule of interpretation in the following terms:

> 'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract. Having regard to the context provided by reading the particular provision or provisions in the light of a document as a whole, and the circumstances attendant upon its coming into existence. Whatever the nature of the document, considerations must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges ought to be alert to and

guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument, is to cross the divide between interpretation and legislation. In contractual context, it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

See also *SwaziMed Medical Aid Fund v Medscheme Administrators and Another (1249/2018) [2018] SZHC 33 (05 March 2020).*

[18] In *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 at 352,* the Court explained the rule on extrinsic evidence as follows:

'The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not

admissible to contradict the language of the contract when it has a plain meaning.'

[19] I note that although the lease agreement specifically refers to four (4) forklifts being leased to the Appellant by the Respondent, it is common cause that at one stage the Appellant had also hired and was using a Toyota Forklift from the respondent. The hour metre of this machine was faulty and not working at all. Mr. da Serra, the Managing Director of the Appellant was, however, adamant that the charges would be calculated based on the hour metre that was installed on each machine used, which measured the time it operates. So the hourly rate would assist [the Respondent. . .[on] the time that we have used the machine and it would be fair for us as well. . . . So we do not pay for the machine when it stands: (Page 13 to 14 of the Record of Evidence Vo.1). Mr. da Serra also testified that the reason the parties inserted the period of 334 hours in the contract was to monitor the equipment against depreciation and was also an estimate of the number of hours worked each month.

[20] According to Mr. da Serra, the Appellant received the first machine in February 2017 and Appellant started using it around that time. The other 3 machines were received around March, 2017. On each invoice for each machine, the hours for which the invoice was being issued, were recorded.

[21] I have already quoted the pertinent clauses in the rental agreement. First, clause 7.2 provides that the hire is based on a double shift of 334 hours per month for each machine and that anytime thereafter, would be charged at E90.00 per hour. However, clause 7.3 stipulates that such charges must be paid in advance for the period from the time the equipment is delivered . . . until the date the equipment is collected by the owner.' When read together with clause 7.4 that decrees that the first payment must be made upon delivery of the equipment, these provisions do not seem to support the version that the charges were to be based on either production hours or actual usage by the Appellant. If payment is to be made on delivery, such charges would be imposed and paid before the hirer has started using the equipment.

[22] Whilst it is common cause that the Appellant operated a double shift at its business premises; a day and night; the hours for these shifts varied from time to time, depending on the work at hand. This fluid situation was clearly not amenable to advance payment. Again, the agreement does not state that the 334 hours laid down would be the minimum hours charged per month.

[23] It is common cause that the forklifts could be used by the Appellant without its engine running. Although this was said to be during limited times and for very specific tasks, this fact militates against the version propounded by the Appellant that the charges were to be calculated based on the hour metre reading on the machine. It is also common cause that one of the forklift, had no such metre or the existing one was non-functioning.

[24] Another piece of evidence submitted to Court, and again this was common cause, is that the Respondent had one of its employees at the Appellant's premises. His task or responsibility was to monitor the use of the Respondent's equipment and record the actual hours when

these machines were being used or utilised by the Appellant. Again, this evidence militates against automatic recording of such information through the use of the equipment in question. Both parties were, I think, in agreement that the stipulation of 334 hours was meant mainly for purposes of maintenance or service of the equipment. The other reason was to set out the rate at which charges beyond the 334 hours were to be calculated; namely at E90.00 per hour.

[25] One must also consider the fact that the Appellant did honour the initial invoices from the Respondent without demur and only complained that it was being overcharged much later. I am mindful of course that Mr. da Serra stated that he trusted Mr. Hlatshwayo and thus did not find it necessary to scrutinise each invoice when it was presented to him. There is nothing to gainsay this, but it does not advance the Appellant's cause for an over-charge. Additionally, the information used by Mr. da Serra to calculate the alleged over-charge, was the hour metre reading obtained from the equipment. Lastly, whilst Mr. da Serra testified that Mr. Hlatshwayo admitted and apologised for the inflated charges, Mr.

Hlatshwayo explained that he only apologised for the apparent misunderstanding between them. He did not admit any wrongdoing.

[26] For the above reasons, I cannot fault the judgment of the Court *a quo*. The Appellant, on a balance of probability, failed to satisfy the Court that it had been over-charged and therefore entitled to a refund thereof.

[27] The Respondent's claim for damages for breach of contract was solely based on the Respondent's assertion that the Appellant had, on or about 08 February, 2018, parked or "abandoned" the relevant equipment at its yard and did not use them. The Appellant used forklifts from TCM instead. The Court *a quo* held that the said abandonment was a confirmation of Mr. da Serra's statement to the Respondent that the latter must take the equipment and hire it out to someone else in order to get money to pay for the over-charge. This statement was made by Mr. da Serra to Mr. Hlatshwayo on 08 February, 2018.

[28] The Court *a quo* concluded that because Mr. da Serra in the meeting aforesaid insisted on the Appellant being refunded by the Respondent for the alleged over-payment, this was evidence showing that the Appellant 'was no longer prepared to honour the 2016 contract'. With respect, I cannot agree. Insisting on the refund is not synonymous with repudiation of the contract. The Respondent could have refused to make the refund and the contract would not be cancelled or terminated and the Appellant would pursue its claim in Court or some other forum.

[29] In *Horus Properties (Pty) Ltd v Mar and Dar Swazi GRC (Pty) Ltd & 2 Others (485/2020) [2020] SZHC 187 (21 September, 2020)* the Court had this to say on the issue of repudiation

> '[39] The test for repudiation of a contract or agreement is objective. In other words, the test is whether objectively assessed, the conduct of the 1st respondent in this case amounted to a fundamental or so serious a breach of the contract that a reasonable person in the position of the applicant would have been entitled to regard it as a repudiation of the contract and therefore to entitle him to cancel it. See *Street v Dublin 1961 (2) SA 4 (W), OK BAZAARS*

(1920) Ltd v Grosvenor Buildings (Pty) and Another [1993] ZASCA 56: 1993 (3) SA 471 (A). Again in *Datacolor International v Intarmarket (Pty) Ltd [2000] ZASCA 82: 2001 (2) 284*, the Court observed that:

'Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach.' At 294, the Court elaborated and said:

'The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable man placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a proper interpretation of the agreement) will not be forthcoming. The inferred

intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'

[40] In the circumstances of this case, I have no hesitation in holding that a reasonable person in the position of the applicant, faced with the acts complained of herein – being committed by the 1st respondent – would conclude that the 1st respondent was not willing to abide by the terms of the building contract and therefore such conduct justified the termination of the said contract. Consequently, the applicant was justified to cancel the agreement and apply for the prayers herein.'

[30] The *causa* or cause of action as pleaded by the Respondent in its particulars of claim reads as follows:

'9.2 Since on or about February 2018, the [Appellant] repudiated the contract between the parties by abandoning the [Respondent's] machinery and refusing to utilize the same without just cause. Instead the [Appellant] engaged machinery from third parties notwithstanding the subsistence of the contract of lease between the parties.

10. As a result of the [Appellant's] breach above, the [Respondent] was constrained to repossess its machinery from the [Appellant's] premises on or about February.'

So basically therefore, the case as pleaded by the Respondent was founded on the Appellant not using the Respondent's equipment at the relevant time. The Appellant was not restrained or prohibited from using other similar equipment. It is also clear from the above pleadings that the alleged breach was not implicit but implied. It was by conduct.

[31] The alleged repudiation was denied by the Appellant who averred that it was the Respondent who breached the contract by resorting to selfhelp in repossessing the relevant equipment from the Appellant.

[32] Following the disagreement between the parties, it was the respondent and not the Appellant that suggested that the existing contract be amended 'to have a basic or minimum charge'. (See page 155 line 13–19 of Vol.1). It is therefore not entirely correct to state that it was the Appellant who was bent on terminating the contract or amending it.

The Appellant only insisted on being refunded for the over-payment. The Appellant further insisted that this was the only issue on the agenda for the meeting on 08 February, 2018. This cannot by any stretch of the imagination be interpreted as a repudiation of the contract. On being asked who told him to take the relevant forklifts from the Appellant's premises, Mr. Hlatshwayo testified as follows:

> 'I was told by Nico [. . .] while we were in the meeting on the 8th of February, 2018 my Lady.
>
> . . .
>
> What was your attitude to that?
>
> It indeed broke my heart my lady. I was devastated and confused but then when the person has said take your machines, then there was nothing else I could do my lady, I just took the machines.' (Page 170 line 30-49, Vol.1). (Nico is of course Mr. da Serra).

[33] It is not insignificant to note that after Mr. Hlatshwayo returned to take the last 2 forklifts, he found them clamped or chained. Mr. Stewart Bisset "requested" him not to take the machines. In response to this request, Mr. Hlatshwayo told him:

"Mr. Stewart, after the deliberations I had with Mr. Nico da Serra the previous day, i.e., 08 February, . . . What then has changed because Mr. da Serra told me to take my machines which were in good condition and I will be able to get tenders or some work for the said machines my lady'.

He went ahead and drove the machines away. I think it is important to view this evidence in its proper context and perspective. That Mr. Hlatshwayo could hire out the forklifts to someone else was certainly not an instruction by Mr. da Serra. At most, it was a suggestion on how the respondent could source the money to refund the Appellant for the over-payment. There was no instruction from the Appellant that the contract was being rescinded or terminated. On the contrary, the message from Mr. Bisset was clear that Mr. Hlatshwayo should not repossess the machinery.

[34] The evidence of Mr. da Serra is clear on this point and this seems to confirm what was said by Mr. Hlatshwayo that the sole purpose of the meeting was to find a solution to the alleged over-payment. Mr. da Serra testified that he suggested to Mr. Hlatshwayo that he could sell

his Toyota forklift, or get a loan from the bank or even hire out his equipment to some entity. (See his evidence at page 192 lines 25 to 34 of the Record of Appeal).

[35] The alleged abandonment complained of occurred at the end of January or beginning of February 2018. The Appellant explained that these were always the quiet months for their business and this was known and accepted by the Respondent. Because of this fact, they did not need to utilize all their equipment. In addition, the TCM forklifts from Hyuandi had been hired by the Appellant in August 2017. This was also confirmed by Mr. Hlatshwayo in his evidence. Mr. Hlatshwayo further confirmed that in January 2018, three of the forklifts hired by the Appellant were not being used due to the fact that the Appellant did not require them in their operations at the time. It was the testimony of Mr. da Serra that the Appellant's strategy or plan was to have ten forklifts at their disposal; four from the Respondent and six from TCM.

[36] From the above narration and analysis of the evidence, it is plain to me that the equipment in question was never abandoned. It was merely parked at the Appellant's premises. There was also no instruction given to the respondent to repossess and remove its equipment from the Appellant's premises. Mr. Stewart Bisset unsuccessfully tried to convince Mr. Hlatshwayo not to remove the equipment from the Appellant's premises and possession.

[37] I have already referred above to the requirements of repudiation. The act of repudiation must be clear and unequivocal or unambiguous. There is no such evidence in this case. Infact the evidence, which is admitted by the Respondent, is that the Appellant, in the form of Mr. Bisset, tried to convince the Respondent not to remove the machinery from the Appellant's premises. It is also common cause that the Appellant clamped or chained the last 2 machines in an attempt to prevent the Respondent from removing them.

[38] For the above reasons, the Court *a quo* was in error in holding that the Appellant repudiated the contract. Infact it was the Respondent who voluntarily removed the said equipment from the possession of the Appellant. In doing so, the Respondent was indicating or signifying that it did not wish to be bound by the contract anymore.

[39] Two further points deserve mention in this appeal and it is this. First, in calculating or computing the quantum or measure of damages, the Respondent employed a wrong formula. It used the rental rate of E60 or E55 per machine and multiplied that by 334 hours over a period of twenty-two months. This presupposed that the Appellant was, during the currency of the contract being billed or charged for 334 hours per month for each machine. The Respondent frankly conceded the fact that even if the contract had run its course, it would not have made the amount claimed and awarded by the Court *a quo*. Again, the said Court was in error in making this award for damages. I am mindful of the contention by the Respondent that ". . . it was hoping to get a bigger job or tender in the months ahead and be in full operation for

334 hours a month.' (See page 198 lines 14-19 of Record of Appeal). This, however, should not burden the Appellant.

[40] Generally, in a case as the present, where the monthly charges vary, the aggrieved party may claim damages for breach of contract calculated on the mean or average of the monthly income received over a period of time multiplied by the number of months remaining in the contract. The flat rate which is based on the perceived monthly hours is arbitrary and incorrect.

[41] The second issue is that in its particulars of claim, the Respondent did not aver that it had accepted the repudiation by the Appellant and had consequently cancelled or terminated the contract. This is the second part regarding repudiation referred to in para 29 above and is a necessary averment in such a claim. The Respondent's claim was therefore assailable on this ground as well.

[42] Both parties have been partly successful in this appeal. The Appellant has succeeded in respect of the claim for damages for breach of contract whilst the respondent has been successful in defending the claim for a refund in respect of the overcharge. For this reason, I am of the view that each party be ordered to bear its own costs.

[43] For the above reasons, it is ordered as follows:

(a) The appeal against the judgment of the Court *a quo* in respect of High Court Case 1018/2018 is hereby dismissed.

(b) The appeal against the judgment of the Court *a quo* in respect of High Court Case 1645/2020 is hereby upheld. The decision of the Court *a quo* is hereby set aside and substituted with the following

> "The plaintiff's claim for damages for breach of contract is hereby dismissed with costs.

(c) Each party is ordered to pay its own costs of this appeal.

MAMBA
JUSTICE OF APPEAL

I AGREE

M. C. B. MAPHALALA
CHIEF JUSTICE

I ALSO AGREE

A. M. LUKHELE
ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: **ADV. P. ELLIS, SC (Instructed by Henwood and Company).**

FOR THE RESPONDENT: **MR. L. MANYATSI (Manyatsi and Associates).**