



# **IN THE HIGH COURT OF SWAZILAND**

CASE NO. 2010/2004

HELD AT MBABANE

BETWEEN

SWAZILAND DEVELOPMENT  
FINANCE CORPORATION...

PLAINTIFF

AND

CLEMENT JELE DLAMINI ...

DEFENDANT

**CORAM**

**AGYEMANG J**

**FOR**

**THE**

**PLAINTIFF:**

**Z. JELE ESQ.**

**FOR**

**THE**

**DEFENDANT:**

**S. GUMEDZE ESQ.**

**DATED THE 22ND DAY OF FEBRUARY 2010**

## **JUDGMENT**

In this action the plaintiff has sued the defendant for the following reliefs:

1. Payment of the sum of E218,953.23;
2. Interest on the aforesaid amount at the rate of 22% calculated from the day of summons to date of final payment;
3. Costs on attorney and own client scale including collection commission;
4. Further and/or alternative relief.

The plaintiff is a company established under the laws of Swaziland and the successor-in-title to the Enterprise Trust Fund an organisation that operated from 1996 until 2003. The defendant is an adult male Swazi of Mpofo, Swaziland.

In its pleading, the plaintiff alleged that a group called Sivumelwano Semaswati Association, with which the plaintiff had a contract for the repayment of sums lent to it by the plaintiff, had failed to honour the terms of the contract. The agreement, contained in exhibit A1 and the first schedule thereto: A2, was for the sum of E465,000 to be disbursed by the plaintiff to the Sivumelwano Semaswati Association, (hereafter referred to as the Association), in tranches. The loan was to carry an interest rate of seventeen percent, payable within five years. The first tranche to be disbursed was the sum of E180,000. In the end, only E172,015.70 was loaned out to the Association. The plaintiff pleaded that due to non-performance of its repayment obligation the Association had become indebted to the plaintiff for the sum of E218,953.23 which was the principal sum together with interest, as at 30<sup>th</sup> September 2003. This amount is the subject of the plaintiff's claim

against the defendant herein who on 3<sup>rd</sup> October 2001, executed a deed of suretyship for the fulfilment of all the Association's obligations to the plaintiff.

The plaintiff called two witnesses in support of its case.

In explanation, the Deputy Managing Director of the plaintiff: Dumsani Justice Msibi testified that the contract was in fact entered into by the plaintiff's predecessor-in-title Enterprise Trust Fund (hereafter referred to as the Fund), with the Association, an organisation based in the northern part of Swaziland of which the defendant was a member. He testified that the group loan was granted to that Association pursuant to a policy of the Swaziland Government to make credit accessible to Swazi small and medium enterprises. Thus loans could only be accessed from the Fund, a financial institution by groups made up of Swazi persons of good reputation and respectable in their communities who were desirous of accessing credit for commercial enterprise. To access credit, they would have to form an association which would apply for the loan according to the individual needs of its members. Accessing credit through the group he said, ensured a good repayment rate as members of the group through peer-pressure, monitored one another and ensured repayment. He testified that although the monies given out as loans were for the use of individual members of the group who had applied for certain sums of money for their projects, it was the group that was the borrower and was responsible for repayment. In casu, when the said Association applied for a loan and received an offer from the Fund per letter exhibit A for a loan of E465,000 to be loaned to it, a loan agreement exhibit A1 was signed between the Fund and the Association for that amount. By the said transaction, the defendant was to be the beneficiary of E180,000 and for that reason, offered the only

security requested for which was the execution of the suretyship agreement exhibit A4, for the repayment of the sum of E180,000 as well as any charges that may be added including interest and attorney and own client costs.

Pursuant to the loan agreement, the Association received the sum of E172, 105.70 which amount, to the knowledge of the plaintiff, was accessed by the defendant herein who wished to purchase a tractor. The said loan amount, was not repaid as required as only E13,100 was repaid by the plaintiff in the period, October 2001 to 31<sup>st</sup> March 2003. Thus the principal amount together with interest charges, less the repayment of E13,100 left an outstanding balance of E 218, 953.23.

This sum, being recoverable from the plaintiff under the suretyship agreement, was the subject of the plaintiff's claim against the defendant.

According to the witness, although the tractor was bought with funds loaned to the defendant through the Association and given to the defendant who was responsible for the payment of the monies disbursed, it was registered in the name of the plaintiff. It was thus the evidence of this witness that when the defendant failed to repay the money (save for E13,100), the plaintiff as successor-in-title to the Fund, consulted with the Association and upon the agreement reached in that consultation, took the tractor away from the defendant. He testified that the tractor was recovered by the defendant through self-help although in a legal action instituted by the defendant against the plaintiff, the court had made an order for the return of the tractor to him.

The case of the plaintiff was further supported by the Assistant Secretary of the Association and a neighbour of the defendant. The witness who informed the court that the Association was no longer in existence, alleged himself to

be well informed of the matters preceding the present suit. These matters were that the defendant who was advanced monies for the purchase of a tractor was unable to repay the loan. This he said, led to the repossession of the tractor. Although the witness at first alleged that the tractor was operational and was put to use by the plaintiff in his fields, he acknowledged during cross-examination that he never actually saw the tractor at the time it was returned; he only heard of the return and its subsequent sale. He alleged that between the said times, he saw the tractor being used for ploughing and delivering river sand.

The defendant in pleading, did not deny the claim of the plaintiff against him as surety for the repayment of the sums owed by the Association. Thus, he offered no evidence in rebuttal of the matters alleged by the plaintiff's witness in evidence. He however testified with regard to matters relating to his counterclaim which he said extinguished the plaintiff's claim.

These are the reliefs sought by the defendant as a plaintiff in reconvention:

1. Payment of the sum of E380,105.70;
2. Interest thereon at the rate of 9% per annum;
3. Costs of suit;
4. Any other and/or alternative relief.

In his evidence, the defendant (hereafter referred to alternately, as the counterclaimant) acknowledged that he borrowed money from the plaintiff for the purchase of a tractor. He alleged that the tractor was to be used for transporting sugarcane. Subsequent to this, the plaintiff bought the tractor for the defendant. He alleged that while he waited for the sugarcane project

which was to be carried out at Mpofu to begin, he entered into a contract with a group called Ayandza Emadvodza Farmer's Association for the tractor to be used for ploughing, transporting sugarcane and for weeding. The contract which was entered into was admitted in evidence as exhibit B, was to run for a period of five years. The defendant insisted that the plaintiff whose employee: one Banele Ginindza, worked with him to scout for work for the tractor, knew of the said contract. He alleged that per the said contract, the use of the tractor would have earned him about E500,000 which would have been used to repay the loan. It was the case of the defendant as a plaintiff in reconvention, that the money owed to the plaintiff for the purchase of the tractor, the subject of the plaintiff's claim, was not repaid because the plaintiff allegedly seized the tractor in a purported repossession, while it was out in the fields working on a pre-contract commercial arrangement with the Ayandza Emadvodza Farmers Association. He alleged that the tractor was returned after a court order and a detention period of over one year, in a state of malfunction. The period he said, was sometime in 2002 until 2004. He alleged also that the tractor was damaged in many places and that its lights, the plough, hydraulic pump and the planter were not functioning well and there were no tyres. The counterclaimant testified that the damage that he found on the tractor, was so extensive that he was advised by Agrimech, from whom the tractor was bought and to which he went for an evaluation, that it would cost E45,000 to repair.

The defendant who alleged that the tractor remained unrepaired because of this charge which he could not afford, admitted that he did not inform the

plaintiff of the damage or of the charge. He also acknowledged that he did not inform the Deputy Sheriff who handed same to him of it.

The crux of the defendant's case was that by reason of the plaintiff's act, he was unable to carry out the contract which he had with the Ayandza Emadvodza leading to a loss of projected income from that contract. He further alleged that the sugarcane project commenced three years ago and that sixty hectares had allegedly been cultivated under it.

The testimony of the defendant's witness was that as a member of the group: Ayandza Emadvodza, he was informed by the Committee members that the defendant had done some work for the group and that he himself had on occasion, seen this. He however did not indicate the period his testimony related to.

In its pleading to the counterclaim, the plaintiff denied the matters aforesaid.

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

1. Whether or not the plaintiff is entitled to its claim against the defendant upon his suretyship;
2. Whether or not the plaintiff wrongfully seized the tractor from the defendant;
3. Whether or not the tractor was returned unserviceable;
4. Whether or not the defendant lost income from the contract that could not be performed because of the plaintiff's act;
5. Whether or not the defendant is entitled to his counterclaim.

It seems to me that there is no controversy regarding the entitlement of the plaintiff to its claim against the plaintiff as surety, as it was not denied in pleading. Exhibit A4 the suretyship agreement under which the plaintiff's liability for the debts of the Association arose, was not challenged for lack of authenticity or other reason. Exhibit A4 thus stands as a solemn memorial of the assumption by the plaintiff of the debt due to the plaintiff from the Association calculated as principal sum and other charges including interest and attorney and own client costs.

The matters contained in the plaintiff's pleading regarding which evidence was led, and regarding which no evidence was offered by the defendant in rebuttal or challenge, therefore stand as proven. Although the defendant raised a special plea regarding inter alia, the capacity of the present plaintiff to sue upon a contract entered into by Enterprise Trust Fund when same had not been ceded to the plaintiff with the consent of the debtor, no facts were pleaded, no evidence led and no arguments were heard on it. It appeared to have been abandoned.

The plaintiff's claim against the defendant is thus hereby found to have merit, Indeed the defendant submitted to judgment.

With regard to the counterclaim, the first question to be answered is whether or not the tractor was wrongfully seized and detained by the plaintiff. Regarding this, the pleadings and evidence adduced by the parties differ: While the plaintiff as defendant to the counterclaim, alleged that the tractor was surrendered by the Association with which it entered into the loan contract, the defendant alleged that it was seized forcibly.



The burden of proof, on the preponderance of the probabilities, was on the counterclaimant who as the plaintiff in reconvention, had a burden to prove the matters he alleged and upon which his case was based. This was an alleged wrongful seizure and detention which allegedly led to loss of income.

The mutually destructive versions put forward by the opposing parties, regarding the event, required that the counterclaimant's version be demonstrated to be true and accurate while the plaintiff's version was false or mistaken, for him to succeed on his claim, see: per Eksteen AJP in ***National Employers General Insurance Co. Ltd v. Jagers 1984 (4)SA 199.***

Although the counterclaimant did not place in evidence the proceedings of the court case No. 422/2004 (the application he launched before this court when the tractor was taken from him), or other corroborative evidence regarding the seizure of the tractor, it seems to me that the admission by the plaintiff that it recovered the tractor when there was a default in repayment by the Association (or the defendant as the case may be), put the matter to no issue, leaving the allegation that the tractor was taken by the plaintiff without reference to the defendant, an established fact.

The Deputy Managing Director of the plaintiff, while giving a background to the plaintiff's claim, testified, that the Association was formed for its members to access funds and to facilitate repayment by the members who were the real beneficiaries of the loans. Indeed, contrary to the pleading of the plaintiff as defendant to the counterclaim in which it alleged a transaction with the Association for the latter's benefit rather than the defendant's, the witness acknowledged that *in casu*, the plaintiff knew at all material times, that the defendant was the real beneficiary of the loan. He also testified that the

plaintiff was aware that the tractor which was bought, was in the possession of the defendant who alone as beneficiary, was responsible for the repayment of the loan which would be effected through the Association. Indeed, as evidence of the counterclaimant's indebtedness to the plaintiff, the said witness tendered a statement of account which showed transactions regarding the purchase and maintenance of the tractor.

The said witness however, in line with the plaintiff's pleading, testified that the tractor was in fact registered in the name of the plaintiff and that the said registration was simply to "secure the position of the plaintiff". He did not explain what he meant by this in the light of the loan agreement which specified the receipt of sums disbursed in repayment of the loan, as what was due to the plaintiff under the contract, or the suretyship agreement which made the defendant liable to pay the loan upon default. This allegation in any case appeared to speak to no issue as it was not in pursuance of a defence of a claim of right.

I find, having regard to all the evidence that the plaintiff knew that recovery of the tractor had necessarily to be from the defendant for whom the money had been borrowed, and who had possession of the tractor, and not the Association, as it alleged in pleading. I find in consequence that when the plaintiff purported to repossess the tractor, it did so by taking it from the plaintiff who was in possession of it. I find also that the purported repossession was not pursuant to a claim of right thereto by the plaintiff, but was because the loan that was used to purchase the tractor remained unpaid. I find also that this was in spite of the fact that by contract, the loan

was to be repaid to the plaintiff by the Association, or by the defendant upon a personal suretyship.

In proof of the wrongfulness of the purported repossession by the plaintiff the defendant relied on the result of his application in Case No. 422/2004. The court in that suit made an order for the return of the detained tractor to the defendant. The existence of the said order was admitted by the plaintiff in pleading and in evidence, thus relieving the defendant of the burden of adducing evidence to establish that fact, see: ***Gordon v. Tarnow 1947 (3) SA 525 at 531.***

It is my view that in the light of the evidence adduced of the defendant's possession of the tractor bought for him with the loan advanced to the Association, and the recovery of the tractor from his possession for which an order was made by this court for spoliation, it sufficed for the defendant to testify that the recovery of the tractor was without his consent or per court order, for a prima facie case of a wrongful seizure, to be made see: per Stratford JA in ***Ex parte Minister of Justice: In re R v. Jacobson and Levy 1931 AD 466 at 478.***

The existence of the said uncontroverted matters constituting the prima facie proof of the matter alleged by the defendant, shifted the burden of adducing evidence to show that the purported repossession of the tractor from the counterclaimant was not wrongful onto the plaintiff who asserted thus, see: per Corbett JA in ***South Cape Corporation (Pty) Ltd v. Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 548***

The plaintiff's pleading that it was the Executive members of the Association that gave up the tractor voluntarily was not supported by any corroborative

evidence. Granted that the Association at the time of the hearing was no longer in existence, it cannot be denied that the plaintiff was able to call the Secretary of the Association as its witness to testify that the tractor was put to use by the plaintiff after its return. It is significant that the said witness, who had held office as Secretary of the Association, did not corroborate what is the crux of the plaintiff's defence to the counterclaim: that the tractor was not taken from the counterclaimant, but was a voluntary surrender by the Executive members of the Association.

The testimony of the Deputy Managing Director of the plaintiff did not help the plaintiff's case either for it rather went to support the case of the defendant that the tractor was taken without reference to him. In his words: "Members of the Association were consulted and they informed the plaintiff that they had done all in their power to get the defendant to honour his obligation without success... They looked up to the plaintiff to assist...In consultation with the members of the Association, it was agreed that the tractor be taken from the defendant. The tractor was indeed taken..."

This was no evidence of the voluntary surrender by the Association of a tractor in its possession that the plaintiff pleaded.

I find from all the evidence that the plaintiff which found itself unable to recover what it had loaned to the Association, took the tractor from the possession of the defendant the real beneficiary of the loan, forcibly and without legal process.

The said recovery was thus wrongful. Its detention was also wrongful. I hold the same to be a fact.

Was the tractor returned to the counterclaimant in a state of malfunction? It seems to me that the evidence does not support such an allegation. The counterclaimant alleged that the damage to the tractor when it was returned to him was extensive. Repair was allegedly quoted at E45,000. None of this was corroborated: not by a witness who saw the broken down tractor, by any of the persons who allegedly assessed the damage, by documentary evidence of the assessment which the counterclaimant, said he got from Agrimech, nor by his own conduct, for on his showing, he neither complained to the Sheriff who returned the tractor to him or to the plaintiff whose actions had caused the damage. His assertion that he complained to his lawyer is not borne out by the pleading drafted by his attorney as there was no mention of such damage. It seems to me that not only was the counterclaimant's allegation of damage not supported by any cogent evidence, but it was irrelevant, being a departure from his pleading in which he relied solely on wrongful seizure and detention of the truck as the matters giving rise to the counterclaim. The lack of evidence, in face of the denial by the plaintiff, and the evidence adduced by the plaintiff that the tractor was seen working delivering river sand and ploughing after its return, did not help the plaintiff's case. The allegation of a tractor returned in a state of disrepair appears to be an afterthought.

The defendant who has alleged that he lost income by reason of the wrongful seizure and detention of his tractor by the plaintiff, has relied on a contract between him and the Ayandza Emadvodza Farmers Association which was to begin on 30<sup>th</sup> September 2003 and was to run for five years. The authenticity of that contract was not challenged. It stands therefore of

evidence of the matters stated by the counterclaimant in that regard. It is common cause that the tractor was seized on the 15<sup>th</sup> of September 2003 so that it cannot be denied that the contract was not in operation at the time of the seizure. Even so, the contract had at the time of seizure, been executed by the parties and was in force at the time of the seizure although its operation had not begun. In the absence of evidence of intervening events, it is apparent that the wrongful seizure/detention of the tractor was the circumstance that prevented performance of the obligation of the counterclaimant in that contract: the proximate cause.

The loss of income must thus be recoverable from the plaintiff as the direct consequence of its act.

But for what period should the plaintiff be held liable? Although the counterclaimant insisted on recovery of the projected income for the contract period of five years: September 2003 to September 2004, it seems to me that the said claim would be tenable only in the situation wherein the tractor was taken away permanently, or it was proven that the remainder of the contract could not have been performed after the tractor was returned. I have held that there was no cogent evidence from which the court would find that the tractor was not functional, so that at the time of its return, it was impossible for the defendant to resume his obligations under the said contract. Although there was a termination clause for breach of the contract, the defendant adduced no evidence of such termination by the Ayandza Emadvodza Farmers Association, by reason of the non performance of the contract for the period of one year when it was detained. Indeed the evidence of the defendant's only witness which was that the defendant was seen working for the Ayandza

Emadvodza Farmers Association, may very well support the fact that the defendant having regained possession of the tractor, worked with it under the said contract. I say this, as that witness' testimony only related to this: that the plaintiff in his sight and to his information did work for the Ayandza Emadvodza Association, it did not indicate which period he did the work. Moreover, the defendant did not demonstrate, short of this, that it was impossible to secure comparable contract for the remainder of the contract term even if the said contract could no longer be performed for surely, the duty to mitigate his loss remained at all material times, . The plaintiff will thus be held entitled to recover not for the entire contract period of five years, but for the period during which he was deprived of the use of the tractor and so could not fulfil his obligation under the contract for that period. For what period will the defendant be held entitled to loss of income?

In his pleading and in testimony, the defendant did not supply the dates or the precise period when the tractor was out of his possession. There was no controversy however that 15<sup>th</sup> September 2003 was the date of the purported repossession by the plaintiff. Although the date of the return of the tractor to the defendant (as having come after August 2004 when the present suit was commenced) was in contention, there is no controversy over the fact that the tractor's return was after 28<sup>th</sup> April 2004: the date of the court order. The defendant's assertion during cross-examination that the tractor was kept for one and a half years: from 2002 until 2004, was actually contradicted by the uncontroverted matters in this case including that the purported repossession was itself in 2003 and not in 2002. It thus found no support from any evidence adduced. However, I take note that the contract with Ayandza

Emadvodza Farmers Association was a seasonal one, performable from time to time during the ploughing and harvest times, thus a yearly one. Although payment was expressed to be upon performance of each task from time to time, in the pleading of the plaintiff, the yearly projected income was calculated to be E38,600 upon the plaintiff's projected tonnage, that is, that remuneration would be on a yearly basis. By matters aforesaid, I hold that the first year of the contract which was to run from 30th September 2003 until September 2004 was lost as a result of the wrongful seizure and detention of the tractor by the plaintiff which prevented performance on the part of the defendant. I hold therefore that the loss of income suffered by the defendant should be calculated on the loss of one year's income under the said contract: the sum of E38,600 alleged in the defendant's pleading.

The counterclaim of the defendant includes a claim for the cost of the tractor. That claim would have been legitimate for replacement of a lost or damaged tractor. In the present instance where there is evidence acknowledged by the defendant that the tractor is in his possession, and I have not found that it was returned in a state of malfunction, no claim constituting a replacement value or for repairs will be allowed.

The defendant's counterclaim will thus also be allowed in the terms appearing hereafter.

The claim of the plaintiff succeeds.

Judgment is entered for the plaintiff for:

1. Payment of the sum of E218,953.23;
2. Interest on the aforesaid amount at the rate of 17% calculated from the day of summons to date of final payment.



The counterclaim by the defendant succeeds and judgment is entered on the counterclaim for:

1. Payment of the sum of E38,600 being loss of income for one year;
2. Interest thereon at the rate of 9% per annum calculated from September 2004 until the date of payment.

Parties to bear their own costs.

**MABEL AGYEMANG (MRS.)**

HIGH COURT JUDGE