`

IN THE HIGH COURT OF SWAZILAND

CASE NO. 4298/05

HELD AT MBABANE

BETWEEN

JOSEPH MATHUNJWA... PLAINTIFF

SWAZI MTN LIMITED… DEFENDANT

CORAM
AGYEMANG J
FOR THE PLAINTIFF: M.Z MKHWANAZI ESQ.

FOR THE DEFENDANT: S.V. MDLADLA ESQ.

DATED THE 20TH DAY OF APRIL 2010

JUDGMENT

By a simple summons sued out of the Registry of this court, the plaintiff is claiming the following reliefs against the defendant:

1. Payment of the sum of E108,771. 90;
2. Interest at the rate of 9% per annum;
3. Costs of suit;
4. Further and/or alternative relief.

The plaintiff is an adult male Swazi, resident at Mgungundlovu area, Northern Hhohho Region, Swaziland. The defendant is a company engaged in the business of providing telephone services in Swaziland, having its principal place of business at Mbabane, District of Hhohho, Swaziland.

Although in his pleading the plaintiff alleged that in June 2003 the employees of the defendant destroyed trees and branches of trees at the plaintiff's homestead, it was in fact common cause that it was in or about October 2003 that the defendant per a contractor, went onto the land of the plaintiff and carried out some work thereat.

It was the case of the plaintiff that he was approached on a certain day by certain persons regarding the use of land within his homestead. The land was required to be used as an access road (driveway) to a base station that the defendant intended to build at an area close to the plaintiff's homestead. It was the evidence of the plaintiff that the negotiations for the

use of his land commenced when after he had been summoned from his fields to his homestead, he found three men: one of African descent and two white men near his homestead. It was his testimony that the man of African descent: one Mr. Maseko, introduced the group as coming from the defendant and that they were going to construct a base station for the defendant on land close to his homestead. This land, the plaintiff had allegedly earmarked for the cultivation of wattle trees. The plaintiff alleged also that the men asked if he would permit an access road to be made through his homestead to the planned base station. By reason of the use of the land he had planned to use for his own gain, Mr. Maseko allegedly promised that the defendant would fence his land for him, he was also allegedly promised some monetary compensation for the use of the land for the construction of the driveway.

It was the further evidence of the plaintiff that having agreed to the proposed construction of the access road through his homestead, Mr. Maseko informed him that the defendant's work would be undertaken by a construction company. So it was that after he allegedly showed him the area for the construction of the road, he also showed the workers of the white man who later showed up to carry out the work. The plaintiff alleged that he started out on a good footing with the white man (hereafter referred to alternately as "the contractor" or "the independent contractor"), for he even agreed to permit the latter to use one of the rooms at his homestead for a fee. He alleged that having shown the contractor where the road should be constructed, on the day of the construction, he absented himself, arriving at his home after the work was done. It was the

evidence of the plaintiff that he found on that day that the construction had taken up more land than he had shown the contractor, resulting in the destruction of seventeen avocado trees about two to three years' old that he had planted in his homestead. The plaintiff complained also that the workers of the contractor lopped off five branches of fruit bearing avocado trees. It was the testimony of the plaintiff that he immediately complained about the damage to the workers of the contractor, and then attempted to inform the contractor of the damage; the contractor however, allegedly refused to grant him audience. So it was that he went to Mbabane to complain to Mr. Maseko about the damage to his trees. It was the evidence of the plaintiff further, that Mr. Maseko heard his complaint and on that day, went with him to his homestead for an inspection. The inspection over, Mr. Maseko allegedly told the plaintiff to report all further damage to the defendant. He also allegedly promised to inform the contractor that the defendant had hired for the work and who had in turn hired the contractor at site, as a subcontractor to carry out the work. Mr. Maseko allegedly further promised that the contractor would compensate the plaintiff for the damage to his trees. He allegedly added that if the contractor failed to give him compensation, the defendant would withhold the money due the plaintiff from what was due to the contractor and pay same to the plaintiff. The plaintiff alleged that thus assured, he returned to his homestead where three more incidents allegedly occurred. They were these: First, that the workers of the contractor destroyed a stay-wire that the plaintiff had used to secure his house from the winds. Secondly, that workers of the contractor had left a gate constructed by the contractor for

the plaintiff unlocked leading to a ravaging of his corn fields by cattle which entered the fields through the unlocked gate. Lastly, that a truck driven by the contractor's driver ran into the house of the plaintiff, hitting it and dislodging a brick about 500 millimetres form the ground, thus damaging the house. The first of these was not the subject of a claim in the present suit.

The plaintiff alleged that after making a report to the defendant per its employees, regarding the damage to his trees, to his fruit-bearing branches and to his house to, he was asked to get an estimate of the cost of repair of the damage. Thus did the plaintiff consult officials of the Ministry of Agriculture regarding the damage to his trees and the Ministry of Works for the damage to his house, for the said estimates. The plaintiff alleged that the defendant was however unwilling to pay what was due him as compensation assessed by those two institutions. Thus did the plaintiff commence the present suit for the reliefs herein.

The plaintiff's case was supported by two witnesses.

An employee of the Ministry of Agriculture, with some years' experience testified that when the plaintiff approached his office for an assessment of the damage to his trees, he went with another official: a horticulturist, to the plaintiff's homestead to assess the damage. This was because he alleged such assessment to be of a highly technical nature. He tendered in evidence, a document dated 17th December 2004, alleged to be under the hand of the two technical men who undertook the assignment of conducting the assessment. It was admitted in evidence as exhibit A. Taking the court through the findings recorded in that document, the

witness testified that the damage to the seventeen avocado trees was assessed at E76,500; the damage to the five branches said to amount to E1050. The damage to the trees and branches was thus said to be assessed at a total of E77,550. Damage allegedly done to the plaintiff's maize which was alleged to have been at silking stage was also assessed at E1,400.

Although this witness testified with aplomb concerning the nature of the damage and the expertise he used in arriving at his assessment, his evidence however did not stand the test under cross-examination. One such circumstance was this: that whereas he had stated positively that he went to the plaintiff's homestead less than a month after the damage allegedly occurred which declaration he said was based on his expertise to determine such things, he admitted latter that it could have been two months thereafter, and that he was in fact unsure of the period between the alleged damage and assessment. He could also not explain why exhibit A was dated 17th December 2004 when on his own showing, he had by then left his office for a new posting. Exhibit A, dated 17th December 2004 which he claimed to be his work inexplicably recorded the work of assessment to have been conducted on 9th July 2004. Although the witness claimed that the report contained in exhibit A was his work, its evidential value was placed in question as its authorship was uncertain and questions as to how they came to be in that document remained unanswered at the end of the cross-examination of the witness whose work it allegedly was.

The last witness for the plaintiff testified that as a Building Inspector, he had attended to the plaintiff's request for an assessment to be done on damage allegedly done to his house. The witness tendered in evidenced, a document which was admitted in evidence as exhibit B. In exhibit B, the witness who authored same alleged that "the damage (could) not be brought to perfection..." so that "it would be wise to connect it with horizontal beams to anchor it." The cost of doing this he said, was the sum of E28,000.

In his testimony, the witness alleged that the damage to the plaintiff's house though appearing small to the untutored eye, was in fact extensive as it occurred at the corner of the house which was a supporting wall. The house he said, had to be demolished and rebuilt at the estimated cost of E28,000. During cross-examination this witness' testimony was also fairly assailed for it was clear that he was not an entirely impartial technical man who had carried out his assignment dispassionately. An example of this was his insistence that the damage was caused by a truck when he admitted that there was nothing to indicate this from the scene except that the plaintiff who was his neighbour informed him of this. It seemed to me after the extensive cross-examination of this witness, that the findings contained in his report and in respect of which he gave his testimony may have been arrived at not entirely with an eye for technical correctness, but with pre-conceived ideas aimed at helping the case of the plaintiff.

It was the case of the defendant that it was not liable for the damage alleged by the plaintiff. Beyond denying vicarious liability for wrongful acts

of its employees, the defendant which denied the existence of damage as described or at all, further alleged in pleading that the work done in the homestead of the plaintiff was carried out by an independent contractor who was so authorised by the plaintiff himself.

The defendant called two witnesses in support of its case: the said Mr. Maseko (employee of the defendant), and Marius Smit of Towcon Civils. The latter was the sub-contractor of the contractor Plessay to whom the defendant had awarded the contract of constructing the base station and the access road thereto. He and his employees carried out the work of constructing the defendant's base station and the access road that passed through the plaintiff's homestead.

It was the evidence of the said Marius Smit that no trees or branches of trees were destroyed at the plaintiff's homestead, nor was any damage occasioned to the plaintiff's house. Recounting his version of the events, he alleged that prior to October 2003, he went with three gentlemen to an area close to the plaintiff's homestead for the purpose of surveying land suitable for the construction of an access road for a base station for the defendant. The said gentlemen were Mr. Volga and Mr. Maseko from the defendant and one Eric Hudson from Plessay, the main contractor for the project. He alleged that while the surveying was going on at a place close to the plaintiff's homestead which would mean the construction of an access road around the plaintiff's homestead, the plaintiff appeared by his fence and had a conversation first with Mr. Maseko in Siswati, and then himself in Fanakalo. He alleged that the prior conversation appeared to be a discussion that the access road to the base station be made through the

homestead of the plaintiff who would benefit from the use of an access road. This he said worked to the advantage of both sides for while it would be cheaper and easier for him to construct the road through the plaintiff's house (as the terrain they had been surveying was rocky, rough and prone to erosion), the plaintiff would have easier access to his fields. It was the evidence of the witness that the plaintiff showed him personally where the access road should be constructed.

The witness recounted that in October 2003 when he and his workers started their work, there were no employees of the defendant on site. He averred that the plaintiff it was who directed him verbally where exactly the road should be constructed.

He alleged that in the scraping of the road that took about one and a half hours, the plaintiff joined the witness to walk in front of the TLB machine that scraped the road, all the while, directing the course of the work. He alleged that when they got to an old car parked in the homestead, the plaintiff asked that it be moved and in fact directed where the contractor's workers were to push the vehicle. He denied the existence of trees along the route, or that the plaintiff put pegs to demarcate where the work should take place.

He alleged that beyond permitting the access road to run through his house, the plaintiff offered one of his rooms to house the contractor's workers at a fee. He recounted that on his part he promised to, and did put in two new farm gates for the plaintiff. He alleged further that when his truck driver reported to him that he had damaged a stay-wire used by the plaintiff to secure his house against strong winds, he replaced same on

the same day to the pleasure of the plaintiff. It was his evidence then that the plaintiff and his men had a good relationship until the day he and his men were leaving the construction site. On that day, the plaintiff, allegedly demanding more money for the rental of his room that was agreed upon, obstructed the movement of the contractor's truck. According to the witness, it was not until the threatened to run over the plaintiff's vehicle which he had used to block the exit that the plaintiff permitted the movement of the witness' truck out of the homestead.

He alleged that not only was he not informed of the said damage by the plaintiff while he was at site (as he learned of this from Mr. Maseko at the end of January 2004 which was after he and his men had finished their work and left), but that the allegation that his Salmo Magirus truck had caused damage to the plaintiff's house was not true, nor was it even probable. This he said was because the truck was about one and a half metres high whereas the damage was upon inspection, shown to be about at a height of about five hundred millimetres – the second row of blocks,.

The said Mr. Maseko testifying in further support of the defendant's case denied that the defendant had constructed its base station on the plaintiff's piece of land. He alleged that the defendant had in fact, in line with its policy of land acquisition, acquired the said piece of land which was Swazi Nation land, from the Chief of the area in which the base station was constructed. Regarding the use of land in the plaintiff's homestead, he recounted that on the day he first met the plaintiff, he had indeed been in the company of three persons: Barker the Radio Manager of the defendant, Eric Hudson of Plessay, the main contractor, and the

subcontractor who carried out the work: Marius Smit who gave evidence in support of the defendant's case. He testified that as Network and Radio Manager of the defendant whose duties included the oversight of construction and maintenance of network sites, he had been in the party that was surveying land for the construction of an access road to the base station to be constructed for the defendant. He alleged that it was while the group was pursuing this enterprise by using a wheel to measure the width of the road to be constructed, that the plaintiff came to stand by his fence. The witness then went to talk to the plaintiff to explain their presence in the area to him and what they were doing measuring the length of the driveway to be constructed next to his homestead. The plaintiff who allegedly discouraged them from making a road through that area as it was prone to erosion then allegedly suggested that the access road to be constructed through his homestead as that would be of benefit to him, giving him easier access to his fields.

It was the evidence of this witness that he thereupon called in the subcontractor, intending to tell him of the idea introduced by the plaintiff. The subcontractor however, joining them, started to speak Fanakalo with the plaintiff. At this point, the witness left them to their discussions as the plaintiff's offer had relieved him of his duty to show the contractor where to site the access road.

He alleged that he had no further involvement with the project, and was not present when the contractor started the work which was completed in December.

The witness further recounted that it was not until the 20th of January 2004, when the work had been completed and the contractor was no longer on site, that the plaintiff first made a complaint to him regarding the alleged destruction of his grass, fruit trees, some branches during the construction of the road, and of his house by a worker of the contractor. He alleged that when he questioned the plaintiff, the plaintiff admitted to him that he had been present when the work was done and furthermore, that he had not used any pegs to demarcate where he wanted the contractor to construct the road but that upon witnessing the alleged destruction of his trees which were about thirty centimetres high, he folded his hands in the knowledge that the defendant would compensate him for his alleged loss.

It was the further testimony of the witness that since he had to inform his superiors of the complaint, as a preliminary enquiry, he asked the plaintiff whether an offer to replace the trees with older trees would be acceptable to him. The witness also promised to inform the main contractor about the alleged damage for the contractor to compensate the plaintiff failing which the defendant would withhold what was due the contractor and pay same to the plaintiff. According to the witness, although the plaintiff was at first agreeable to the offer to replace the alleged damaged trees, he later turned same down and chose to have the damage assessed for the defendant to pay therefor. He alleged that a further complaint was made by the plaintiff regarding the careless act of workers of the electricity people who had allegedly left open his gates, a circumstance that resulted in goats going onto his fields to graze on his sweet potatoes.

According to the witness that the plaintiff also complained to him of damage allegedly caused by the contractor's truck his house. Regarding this, the witness testified that upon an inspection of the plaintiff's house, he found a minor dent thereat which appeared to be a defect that obtained from the time of its construction rather than damage recently done. This was besides the fact that the truck that was alleged to have caused the damage being about one and a half metres high, was much higher than the dent in the wall. These informed his opinion that the plaintiff's allegation of truck damage was improbable. He added that the contractor, during an inspection he subsequently carried out with him, flatly denied responsibility for the damage to the house.

Mr. Maseko testified further that apart from the complaints, the plaintiff made impossible demands of the defendant such as the demand that the defendant wire his house and connect electricity to his homestead clearly misapprehending the defendant's promise to connect electricity to the plaintiff's homestead once the plaintiff had done the wiring.

It was his evidence that it was because the plaintiff continued to make complaints to him that he handed over the matter to one Mr. Dlamini - the defendant's Chief Technical Officer. The handing over was after he had conducted an inspection with the said gentleman at the plaintiff's homestead and noted an attempt by the plaintiff to obscure the issues and bolster up his case by belatedly introducing pegs where the access road was.

At the close of the pleadings, the following stood out as issues for determination:

1. Whether or not the persons who worked at the homestead of the plaintiff were workers of the defendant;
2. Wither or not the said persons destroyed the trees, branches of trees and damaged the house of the plaintiff;
3. Whether or not the plaintiff suffered loss as pleaded;
4. Whether or not the defendant was vicariously liable for the said damage;
5. Whether or not the plaintiff is entitled to his claim.

In his closing submissions, learned counsel for the defendant raised a number of matters relating to the viability of the present suit by reason of matters he referred to as technical irregularities therein. Although they were not put to issue, it seems to me that prudence dictates that I have regard to them before I delve into a discussion of the matters in respect of which the issues are joined.

The first matter is the form in which the suit was commenced: by a simple summons. Learned counsel for the defendant contends that the action should have been begun by a combined summons in accordance with Rule 17 (2) instead of a simple summons provided for in Rule 17 (1) as this was not a claim for a liquidated demand.

Although there is undoubtedly some merit in the objection raised to the procedural regularity of the action if same had been raised timeously, it seems to me that the defendant acquiesced in the irregularity for he failed to apply to have the irregular summons set aside within fourteen days of his becoming aware of such irregularity (***Rule 30 (1) High Court Rules***), but took the further step of proceeding to file its answering papers when the plaintiff

filed his declaration subsequently. It cannot now lie in the defendant's mouth at this stage to complain of the irregularity. The purport of the said Rule 17 (2) which stipulates the requirement for the annexing of the statement of the material facts in line with the rules of pleading (Rule 18), is to ensure that at the outset, a person sued for inter alia, damages, may be given adequate information regarding the matters the claim is based on: "...It is used in those cases in which a declaration is in any event necessary whether the claim is defended or not, for example...claims for damages arising...a delict...or other illiquid claims". ***The Civil Practice of the Supreme Court of South Africa 4th Ed Herbstein & Van Winsen 397 (B).*** A failure to issue a combined summons on an illiquid claim although irregular, does not go to the root of the action and is saved by the inaction of the defendant or his acquiescence when he takes a further step after noting it. The instant objection, raised belatedly in closing submissions, after the claim is prosecuted, must be held to be untenable.

The second matter raises a discrepancy between the matters pleaded by the plaintiff and the claim contained in the simple summons. This is, that although the entire claim was stated to be for the sum of E108,771.90 said to be in respect of damage to the plaintiff's avocado trees, and maize crops. The declaration however includes damage to the plaintiff's house in the computation. Learned counsel's contention was thus the entire suit should be thrown out for irregularity by reason of the variance between the summons and the declaration in that the declaration contained a new cause of action.

It seems to me that the said argument is not tenable for the circumstance described by the learned counsel did not obtain at all as there was no

mention of a damaged house in the plaintiff's declaration. And indeed, even if there had been such, unless the defendant made a demonstration of such variance having occasioned embarrassment or prejudice to him, the "...Court will not pay any regard to a variation which does not embarrass the defendant, and of the subject ,matter of which there is sufficient indication in the summons" see per Wessels J in: ***Hermansberg Mission Society v. Minister for Native Affairs and Ors. 1910 TPD 832 at 837*** reproduced in *Herbstein v. Van Winsen (supra) 458 (II)*

Certainly, there was a discrepancy between the pleading which did not mention the alleged damage to the plaintiff's house, and the evidence the plaintiff led at trial. This will certainly go to the quality of the evidence led by the plaintiff, and the weight to be attached thereto.

Having said these, I move on to consider the issues raised in the suit.

Were the workers who constructed the access road for the defendant's base station servants of the defendant?

The evidence led in this court seems to be that the workers were not those of the defendant herein, but of an independent contractor who was known to the plaintiff and with whom the plaintiff dealt on site. The evidence of Mr. Maseko (who represented the defendant on the day that negotiations were made for the use of land in the plaintiff's homestead), was that the construction of the base station and the access road, was given to a contractor Plessay who as manager for the project, gave a subcontract to Towcon Civils Marius Smit's company. Evidence was led, that no employee of the defendant was at site and that when the plaintiff made his report of the occurrence of damage to his property to the defendant, it was not at site but at Mbabane where he found

Mr. Maseko. Mr. Dlamini with whom he dealt after Mr. Maseko was also found at Mbabane, although both he and Mr. Maseko went on site to inspect the damage complained of. The plaintiff relied on the first meeting at which the negotiation of the use of his land was made to say that there was an agreement between him and the defendant. Furthermore, he alleged that he believed the workers at site were children of the defendant. It is for this reason he said, that he believed himself entitled to compensation from the defendant for the damage he alleged. It seems to me however, that the evidence led showed that the plaintiff knew at all material times, that the work which was for the benefit of the defendant, was undertaken by the contractor at site. This is because on his own showing, not only did Mr. Maseko inform him that the work would be undertaken by a contractor, but that when the work was due to commence, a white man went to him and introduced himself to the plaintiff as the contractor whose construction company would carry out the work. Indeed, the plaintiff stated that the said gentleman told him the name of his construction company although he could not remember it on the day he gave evidence in court. His evidence was also, that he showed the contractor and his men where to make the access road and did not rely on what he had allegedly shown Mr. Maseko previously. Indeed, on the plaintiff's own showing, when he discovered the damage to his trees, he reported the matter to Mr. Maseko only because the contractor allegedly refused him audience. I must add that it was clearly because no representative of the defendant was at site that when the plaintiff made all his complaints to the defendant regarding the alleged damage to his trees, crops and house, he did so to Mr. Maseko at Mbabane and not at site.

It seems to me also from the evidence led that the plaintiff was aware that the men who worked with the contractor at site, and who were given accommodation by the plaintiff at a charge not to the defendant but to the contractor, were employees of the contractor. It was the evidence of the plaintiff that not only did he charge the contractor rent for the accommodation of his workers, but he physically restrained him from leaving the premises when the contractor's work was done and he was leaving the site finally. This was because the plaintiff believed the contractor owed him rent for the room in which his workers slept. If he had held the honest belief that the workers were employees of the defendant, it seems to me, seeing that the plaintiff knew where to direct his complaints, that he would not have acted so desperately when the contractor was leaving the site as a claim for rent could always be made against the defendant through Mr. Maseko. It seems to me that the allegation of the plaintiff that he believed the workers to be employees of the defendant was an afterthought, for his own conduct belied same.

I find then from the evidence led, that the workers at site who undertook the construction of the access road to the defendant's base station, were not employees of the defendant, but of the contractor, and that same was known to the plaintiff.

I hold the same to be a fact.

Did the workers found at the premises of the plaintiff damage seventeen young avocado trees and fruit bearing branches of avocado trees belonging to the plaintiff as well as his house?

The plaintiff's word that such damage existed was against the word of the contractor at site who denied same. It was the evidence of the plaintiff that although he showed the contractor and his men where the access road had to be, in his absence, the workers went beyond the demarcation (which he said had been made with sticks) to destroy his trees, about thirty centimetres high which he said were visible. His evidence was supported by the specialist from the Ministry of Agriculture who said he had had sight of the damaged trees, and the building inspector who went to inspect the damage to the house. The problems with the plaintiff's story include uncertainty regarding when the damage allegedly occurred. The plaintiff's evidence that he made the report the day after the damage occurred and while the contractor and his men were still at site, was contradicted by Mr. Maseko who said he received the complaint for the first time on 20th January 2004. The unchallenged evidence of the defendant's witnesses was that the entire work was concluded in December 2003 when the contractor left the site. The contractor's evidence that it was at the end of January 2004 that Mr. Maseko informed him of the complaint seems to tie in with Mr. Maseko's evidence that the complaint was received by him not while the contractor was still at site, but after he had left, that is, it must have been after December 2003. The evidence of the specialist from the Ministry of Agriculture, the plaintiff's witness, appeared to favour the same timeline also for he alleged that his team went on site around March or April 2004 to assess the damage. The assessment he acknowledged could have been done two months after the damage allegedly occurred. This piece of evidence renders it more probable than not, that the time of the report made by the plaintiff to Mr. Maseko was

within the January 2004 date that gentleman alleged, rather than before the completion of the works as the plaintiff alleged. It was thus unclear when exactly the damage if such existed, occurred. The question of the time of the occurrence was important because, the plaintiff alleged that the damage was caused at the very beginning of the works, the day after the contractor and his men went to the site. This was shortly after he had shown the contractor where the access road was to be. By the unchallenged evidence of the contractor, the work begun in October 2003 and ended in December 2003. If the damage occurred the day before the report was made to Mr. Maseko (as the plaintiff alleged) then there is a large gap in the evidence regarding period during which the damage to the trees may have occurred for Mr. Maseko's unchallenged evidence was that the plaintiff first made his report in January 2004. Would the damage then have occurred in October when the work begun, November, or December 2003 (while the contractor was at site) or January when the report was made to Mr. Maseko? The manifest uncertainty of this, challenges the allegation of the damage complained of. In the light of this, uncertainty thus surrounds the damaged trees which Mr. Maseko said were not produced by the plaintiff when he made his report to him and the two conducted an inspection, but were allegedly produced to the specialist some months thereafter. In this circumstance could it be said with any reasonable certainty that the trees upon which the report exhibit A was based, were the trees allegedly destroyed by the contractor in October, November, December 2003 or January 2004? The plaintiff had the burden to establish the existence of the damage on the preponderance of the

probabilities. It seems to me that the evidence led by the plaintiff fell short of the cogent evidence needed to do this.

The plaintiff's complaint that his house was damaged at the corner was supported by the evidence of the building inspector and was not negated by the evidence led on behalf of the defendant although both witnesses denied that the truck driver at site was responsible for the damage caused. Upon this the court might very well find that the allegation of damage to the corner of the plaintiff's house was established on the balance of the probabilities.

But even if the plaintiff had established that damage had been caused to his trees, fruit-bearing branches, maize crop and his house, he could not recover his loss from the defendant herein.

This is because the workers at site were to his knowledge (as I have found from the evidence led), employees of the contractor at site and not the defendant herein although their work was ultimately for the benefit of the defendant.

It is settled law that a defendant who employs the services of an independent contractor, may not be held for the negligent and/or wrongful acts of the independent contractor in the course of the execution of the work unless actually authorised by him ***Colonial Mutual Life Assurance Society v. MacDonald 1931 AD 412 at 436-437***. This is because an independent contractor is generally not considered the servant of an employer although if he interferes in the manner of the performance of the work or reserves the right to so interfere, a master/servant relationship may be imputed. Other exceptions to this general rule is in circumstances such as where the employer was also responsible for the wrongful act under a personal fault,

was under a non-delegable statutory or common law duty to perform an act and same is done in a wrongful or negligent way, see: ***Per-Urban Areas Health Board v. Munarin 1965 (1) SA 545;*** or where the work would have been undertaken by the employer himself at his peril, see: ***Minister of Posts and Telegraphs v. Johannesburg Investment Co. Ltd 1981 T.P.D. 253 at 257*** or the work is inherently dangerous as where an independent contractor is employed to undertake work on the highway which may pose a danger to users of the highway, see: ***Dukes v. Martinheusen 1937 AD 12.***

In determining whether a person is a servant of an employer (regarding whose wrongful acts the employer will be held vicariously liable) as opposed to an independent contractor, one has to have regard to the relationship between the persons. In a master/servant relationship, the employer dictates the work to be done by the employee but not the method of doing same. He exercises control in the work and may give orders in the manner of its performance, see: ***Performing Rights Society v. Mitchell [1924] 1 KB 762.*** With regard to an independent contractor, the employer will be interested only in the work to be done, that is the result, and not the manner in which it is carried out. The manner and means of performance is left to the discretion of the employed, see: ***Riverton Meat Co. v. Lancashire Shipping Co. (Pty) Ltd [1960] 1 All ER 193 CA*** Of course if the employer authorises or subsequently ratifies the wrongful act, it may be jointly liable with the contractor for it, see: ***Ellis v. Sheffield Gas Consumer's Co (1853) 2 E & B 767.***

In the present instance, before the work was undertaken, the plaintiff on his own showing was told by Mr. Maseko who introduced himself as coming from

the defendant and who informed the plaintiff that the work which was for the benefit of the defendant, would be undertaken by a contractor. The plaintiff talked with the contractor and his own evidence was that he showed the contractor where to construct the road, a recognition that the latter had discretion in the manner of the execution of the work. By all accounts, the contractor came on site with workers. It is the evidence of Mr. Maseko, testifying on behalf of the defendant as corroborated by the contractor, that there was never any employee of the defendant at site involved in the carrying out of the work.

That the plaintiff knew or had reason to believe that the workers at site belonged to the contractor and not to the defendant, is evident from matters in evidence, including the fact that he negotiated for payment of rent to accommodate the men in one of his rooms, not with the defendant who he believed was represented by Mr. Maseko, but with the contractor. Indeed so apparently persuaded was he of this state of affairs, that he demanded payment of rental to the point of preventing the contractor's departure from site when the contractor's work was finished and he was unhappy about the payment of rent as agreed between them. It seems to me that with the open lines of communication between himself and Mr. Maseko, the plaintiff would have expected to collect the rent from the defendant and would not have acted so desperately when the contractor was leaving the site, if he had honestly held the belief that the men were the defendant's employees. I find thus that although on the day the negotiations were entered into for the use of the plaintiff's land, Mr. Maseko from the defendant was present as well as others, the work was in fact and to the knowledge of the plaintiff, carried out

by the contractor who came on site and carried out the work per his own workers. That he was an independent contractor is manifest from the evidence led, that the work was carried out by the contractor's men, seven in all, and were supervised by the contractor and not the defendant. I hold the same to be a fact.

By the general rule of wrongful acts of independent contractors (and not being within the exceptions set out before now), the acts of the contractor and his workers that were committed in the course of their duty or were reasonable incidental to their work, was not attributable to the defendant. The defendant may thus not be held vicariously liable for the alleged acts of damage to the plaintiff's trees and fruit-bearing branches or to his house, for they were not committed by servants of the defendant, but if at all, were so done by the employees of the independent contractor at site.

It matters not then that Mr. Maseko received complaints from the plaintiff and promised some relief. He did not thereby ratify the wrongful acts for even in that circumstance, he promised to relay the information to the main contractor who he said would either pay the plaintiff, or be forced to do so when monies due it were retained by the defendant to meet the plaintiff's claim. From the uncontroverted evidence led, the matter pleaded by the defendant: that the plaintiff instructed the contractor where he should carry out the work did obtain. I must however say that had the evidence led by the plaintiff established that the workers at site were servants of the defendant, the fact that the plaintiff offered his land and instructed them as to where to construct the road would not negate liability where a wrongful act was done in the

course of the work unless his instructions occasioned the act, or he thereby knowingly and with full appreciation, assumed the risk.

I must at this point say that while the plaintiff may perhaps have been able to recover his loss from the contractor for his trees and branches and the house if he established that damage was truly occasioned to then by his servants while they were acting in the course of their employment, he may however not have been successful regarding the alleged damage to his crops. This is because the negligent act complained of, that is, leaving a gate unlocked before they went to sleep, could not be said to be reasonably incidental to the carrying out of the work for which they were employed.

In my judgment, the defendant who is not vicariously liable has been wrongly sued in this action and the action must thus fail.

The plaintiff's action is accordingly dismissed.

I have regard to the conduct of the defendant, particularly, Mr. Maseko who instead of referring the plaintiff to the contractor (who had been introduced to the plaintiff at the outset), took his complaints and involved himself in it all by conducting inspections upon the plaintiff's complaints and making promises of compensation (even if he indicated that same would be paid by the contractor). These may have given the plaintiff the unfortunate impression of the defendant's assumption of liability, leading to the institution of this action. It is for this reason that I will not order the plaintiff to pay the defendant's costs, see: ***Herbstein & Van Winsen (supra) 716 (D); also Chetty v. Louis Joss Motors 1948 (3) SA 329 also***.

MABEL AGYEMANG (MRS.)

HIGH COURT JUDGE