m **THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE **CIVIL CASE NO. 3278/2001**

In the matter between

MGABHIDLAMINI **PLAINTIFF**

VERSUS

SWAZILAND GOVERNMENT **DEFENDANT**

CORAM **SHABANGU AJ MR. P.R.**

FOR PLAINTIFF FOR **DUNSEITH MR. M.**

DEFENDANT **MABILA**

JUDGEMENT
10th February, 2004

The Plaintiff commenced proceedings before this court by way of action on 13 December, 2001. The relief which the plaintiff seeks in the summons is *"an order declaring that he is entitled to payment of the difference between the salary and*

emoluments of the Speaker of the House of Assembly on the one hand, and the salary and emoluments of an ordinary member of the House of Assembly on the other hand, from 1st April, 2000 to the date when the Plaintiff ceases to be a member of Parliament. " The Plaintiff further claims costs of the action and there is the usual prayer for further and or alternative relief.

It is common cause on the pleadings that the plaintiff was as at 15th March, 2000 duly appointed Speaker of the house of Assembly in the Parliament of this country. It is common cause further, on the pleadings, that the Plaintiff resigned as Speaker of the House of Assembly on 15th March, 2000. The dispute between the parties relates to the background facts which allegedly led the plaintiff to resign his office as Speaker of the House of Assembly. On his version of the background events the Plaintiff argues that he is entitled to the remuneration and emoluments which attach to the office of Speaker of the House of Assembly inspite of the fact that he vacated such office when he resigned on *i* 15th March, 2000.

In so far as the background of events allegedly leading to the resignation of the Plaintiff as Speaker relates, the following is common cause on the pleadings, namely:

(1) On 15th March, 2000 the Plaintiff was summoned to attend an urgent meeting at the conference room of the offices of the Constitutional Review Commission at Nkhanini in Lobamba near the Houses of Parliament.

(2) Other than the Plaintiff the meeting was attended by some persons who were also Cabinet Ministers at the time, namely Chief Maweni Simelane, Abednego Ntshangase, Dr Phetsile DIamini, Lutfo DIamini, Roy Fanourikis, Magwagwa Mdluli and John Carmichael who arrived during the course of the meeting.

There is a dispute on the pleadings and on the evidence as to whether the aforementioned Cabinet Ministers attended the meeting in their personal capacities or in their capacities as Cabinet Ministers. The Plaintiffs version is that the Cabinet Ministers attended the meeting in their official capacities as Cabinet Ministers. From this the Plaintiff develops

his case that whatever was said by the Cabinet Ministers during the meeting was said by them on behalf of Cabinet which in turn represented the Swaziland Government, which is Defendant in these proceedings. It is the defendants' version on the pleadings and on the evidence that the relevant Cabinet Ministers met with the Plaintiff in their personal capacities, and not as representatives of and or on behalf of the Defendant. In this regard I refer to paragraphs four and five of the Plaintiffs particulars of claim read with paragraphs two and three of the Defendants' plea.

"6. At the aforesaid meeting the aforesaid Cabinet Ministers, jointly and severally expressly alternatively impliedly alternatively tacitly represented to the Plaintiff that-

(3) *they were representing the Defendant;*

(4) *they were duly authorised to represent the Defendant.*

(5) *they had called the Plaintiff to the meeting to opportune him to resign as Speaker of the House of Assembly for the good of the country, to avoid political controvesy, to avoid the King dissolving Parliament, and to safeguard their own positions as Ministers of the I[st] Defendant;*

6.4 if the Plaintiff so resigned, his remuneration package as Speaker of the House of Assembly would be maintained for so long as he was a member of Parliament and that the Plaintiff would not be financially disadvantaged by his resignation. "

Then in paragraph seven to ten of the Plaintiffs particulars of claim, the Plaintiff pleads

as follows:

"7. The aforesaid representations were material and were made with the intention of inducing the Plaintiff to act thereon and the Plaintiff relying on such representations and relying in particular on the undertaking conveyed to him as set out in 6.4 above, was so induced to resign as speaker of the House of Assembly which he did on the 15"[1] March, 2000.

(6) *In the premises, the Defendant is contractually bound to pay the Plaintiff the salary and emoluments applicable to the office of the Speaker of the House of Assembly for the period from l[u] April, 2000 to the date the Plaintiff ceases to be a member of Parliament, notwithstanding that the Plaintiff has resigned as Speaker of the House of Assembly.*

(7) *The Defendant has repudiated its obligation and has failed and or refused to pay the Plaintiff the salary and emoluments applicable to the office of the House of Assembly as from the 1" April, 2000 notwithstanding due statutory demand.*

> *10. In the premises, the Plaintiff claims as an order against the Defendant declaring that he is entitled to payment of the difference between the salary and emoluments of the Speaker of the House of Assembly on the one hand, and the salary and emoluments of an ordinary member of the House of Assembly on the other hand, from 1st April, 200O to the date when the Plaintiff ceases to be a member of Parliament. "*

What follows thereafter is the plaintiffs prayer for relief formulated as stated above. The prayer does not contain a specific amount which is being claimed by the plaintiff. The relief sought is a declaratory order in these terms which I again set out;

> *"that he (i.e. the Plaintiff) is entided to payment of the difference between the salary and emoluments of the Speaker of the House of Assembly on the one hand, and the salary and emoluments of an ordinary member of the House of Assembly on the other hand, from 1st April, 2000 to the date when the Plaintiff ceases to be member of Parliament."*

The Defendants case as pleaded is that the relevant Cabinet "Ministers met with the Plaintiff in their personal capacities and never represented that they were representing the Defendant." In its plea the defendant avers in paragraph 4.2.4 that the plaintiff proposed to resign on condition that the remuneration package of Speaker to the House of Assembly would be paid to him for so long as he was a member of Parliament. The Defendant further pleads that the Plaintiff was informed that his proposal was a matter to be decided by the Cabinet. In paragraph 4.3 of the plea the defendant denies that there were representations made to the Plaintiff as alleged by him in paragraph six of the Particulars of claim.

Even though the Plaintiff make the statement by way of a conclusion to its particulars of claim to the effect that "the Defendant is contractually bound to pay the Plaintiff the salary and emoluments applicable to the office of the Speaker of the House of Assembly for the period from 1st April, 2000 to the date the Plaintiff ceases to be a member of Parliament," there is no agreement or contract alleged in the Plaintiff's particulars of claim other than the conclusion in paragraph eight of the said particulars of claim.

As already observed it is common cause on the pleadings (and on the evidence) that the Plaintiff who was the Speaker of the House of Assembly resigned from this office on 15* March, 2000. A person becomes the speaker of the House of Assembly on being elected to such office by the House of Assembly. (see SECTION 24 (1) OF THE ESTABLISHMENT OF THE PARLIAMENT OF SWAZILAND 1992). Subsections 4 and 5 of section 24 of the Establishment of the Parliament of Swaziland Order, 1992 provides for the circumstances under which die Speaker shall be obliged to vacate his office. In subsection five provision is made that he "may resign his office by writing under his hand addressed to the House and the office shall become vacant when writing is received by the clerk to the House." Ordinarily and prima facie at least it should follow that when the Speaker vacates his office, as the Plaintiff in these proceedings has done, he leaves behind all rights, duties and privileges including remuneration and emoluments which attach to that office. That should in my judgement be the result as a matter of logic and common sense of the vacation of the office by the Speaker. There would have to be special considerations entiding the Speaker to retain with him the remuneration and emoluments attaching to the office which he has already vacated. The question which arises therefore in this case is whether mere are any such special considerations from die Plaintiffs case as pleaded and generally as presented which would justify a conclusion that even though the Plaintiff had vacated his office as the Speaker of the House of Assembly, the defendant was still obliged, inspite of this to pay him the remuneration and emoluments attaching to the office which he had vacated. In an effort to answer this question it is necessary to analyse and attempt to understand plaintiff's case as pleaded and then as presented during the trial.

Even though the Plaintiff makes the statement by way of a conclusion to its particulars of claim to the effect that "the Defendant is contractually bound to pay the Plaintiff the salary and emoluments applicable to the office of the Speaker of the House of Assembly for the period from 1st April, 2000 to the date the Plaintiff ceases to be a member of Parliament, there is no agreement or contract alleged in the Plaintiff's particulars of claim other than the conclusion in paragraph eight of the said particulars of claim. In this manner the Plaintiff's case is pleaded in a very strange way. It is strange that there is no

agreement or contract pleaded yet the Plaintiff finds it appropriate to conclude in paragraph eight of his particulars of claim that "the defendant is contractually bound to pay the Plaintiff the salary and emoluments applicable to the office of Speaker of the House of Assembly for the period from l[sc] April, 2000 to the date the Plaintiff ceases to be a member of Parliament, notwithstanding, that the Plaintiff has resigned as Speaker of the House of Assembly." In so far as principles of pleading are concerned there is a distinction between pleading of a cause of action by making allegations of fact on me one hand and stating conclusions of law in a pleading. It is trite that to aver a legal conclusion or legal proposition without setting out the material allegations of fact from which that conclusion flows is bad pleading and such pleading may be struck out on the basis that it is irrelevant. ISAACS IN BECK'S THEORY AND PRINCIPLES OF PLEADING IN CIVIL ACTIONS **5th** EDITION AT PAGE **36** give the example of an averment in a pleading that a defendant is indebted to the plaintiff in a sum certain or that he is under a obligation to perform certain acts as illustrating the pleading of an , irrelevant conclusion. Whereas generally it is not permissible to plead a conclusion of law the court will not allow an objection arising therefrom if the material facts leading to that conclusion have been sufficiently set out in the pleading. Isaacs *supra* states this principle as follows;

> *"b. Pleadings should state facts and facts only, that is to say they should not contain a statement of either law or the evidence required to establish the facts...If, however, the facts are sufficiently set out the pleading of a conclusion of law cannot prejudice the opposite party and although it may represent bad pleading it is not so bad as to warrant a motion to strike out. The court will not encourage objections that are merely technical...The rule does not mean that when the facts have been sufficiently set forth a conclusion of law may never be drawn in a pleading. In most cases such a paragraph in a pleading is quite unnecessary except as provided by the rules. " SEE ISAACS SUPRA PAGE 35-7.*

See also : NATHAN, BARNET AND BRINK, UNIFORM RULES OF COURT 3rd Edition page 126. HERBSTELN AND VAN WINSEN, THE CIVIL PRACTICE OF THE SUPREME COURT OF S.A. 4th edition, page 450-52.

In explaining further the above named principle Isaacs states at page 36;

> *"As regards (b) above it is hardly necessary to enlarge upon the proposition that a pleading must contain facts and not law. The pleading of a legal proposition itself is no pleading at all. But the rule means more than that; it implies that the facts must be set out and it is for the court to say on a consideration o f the facts proved in evidence*

> ***whether they will or will not support a particular conclusion of law. Thus a bare allegation that a defendant is indebted to the plaintiff in a sum certain or that he is under an obligation to perform certain acts is not sufficient. The facts must be set out which reveal the nature of the transaction and the manner in which the defendant became indebted to the plaintiff or come under an obligation to him to perform the duty claimed. The mere statement of indebtedness is a conclusion to be drawn from the facts, and it is a conclusion of law...Unless the facts are set out which support or contradict the claim the pleader will therefore be pleading merely a conclusion of law. It is useless to aver a conclusion without stating the fact that will support it."*** my emphasis.

Applying the principles set out in the above quoted passage Isaacs *supra* the following is noteworthy. The question whether the defendant is contractually bound to pay to the plaintiff the remuneration he claims from the defendant is the legal question which the court will have to determine on a consideration of the material allegations of fact made in the pleading and the evidence (if such becomes necessary) tendered at the trial towards proving those allegations. In order for the plaintiff to succeed in his claim it is necessary and essential that he should set out material allegation in his particulars of claim, which allegations would if proved by evidence at die trial would justify the court in reaching the conclusion that the defendant is indeed contractually bound, as the plaintiff claims, to pay the remuneration claimed. The mere statement in the plaintiffs particulars of claim that "die defendant is *contractually bound* to pay the plaintiff the salary and emoluments attaching to the office of the Speaker of the House of Assembly..." is a conclusion which ought to be drawn from the allegations of fact of a properly pleaded agreement or contract. Normally the existence of a contract is pleaded by an allegation in the particulars of claim to the effect that on a specified date and at a specified place the parties entered into an agreement, the relevant terms of the agreement and the applicability of those terms to the particular right forming the basis of the claim. HERSTEIN AND VAN WTNSEN, THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA 4th EDITION AT PAGE 452 STATE;

> ***"A party who in his pleading relies upon a contract must state whether the contract is written or oral, and when, where and by whom it was concluded. In addition, if the contract is written, a true copy of the contract or of the part relied upon in the pleading must be annexed to the pleading. The precise date and place of conclusion of the contract must be given : such expressions as 'during or about' and 'at or near' are unacceptably vague. In an action based on a contract the material averments that must usually be made are the existence of the contract, the relevant terms of the contract and the applicability of those terms to the particular right forming the ex contractu basis of the claim. When a claim is based on the provisions of a detailed and***

> ***complex contract in which numerous clauses confer the right to payments determined in differing ways in different circumstances a greater degree of precision is required in pleading than in other contractual claims. "***

it is as a general rule not necessary' to plead the offer and acceptance because this is a matter for evidence. However as L.T.C HARMS, IN AJDVILER'S PRECEDENTS OF PLEADING 3rd edition at page 71 points out it may be necessary to plead the offer and its acceptance if the offer and acceptance are contained in different documents. It may also be necessary where the offer or the acceptance may be a matter of dispute. See also CGEE V. GNK SANKEY (pty) Ltd 1987 (1) SA 81 (A) 90. The conclusion that the defendant is contractually bound to pay the plaintiff the remuneration and emoluments which attach to the office of Speaker of the House of Assembly is therefore an irrelevant statement of a legal proposition which contributes nothing to the advancement of the plaintiff's case.

The other question which may arise in light of what I have just said is whether the legal proposition expressed by the plaintiff in paragraph eight of his particulars of claim, namely that "In the premises, the defendant is contractually bound to pay the Plaintiff the salary and emoluments applicable tc me office of the Speaker of the House of Assembly..." is not supported by or does not follow logically from the factual allegations made in paragraph six and seven of the Plaintiffs particulars of claim. What is pleaded in paragraphs six and seven (which paragraphs are quoted verbatim earlier in this judgement) is an alleged express or implied *representation* said to have been made by Cabinet Ministers, to the Plaintiff. From paragraph seven it is clear that what is being alleged is that the said representations induced the plaintiff "to resign as Speaker of the House of Assembly" on the 13di March, 2000. The allegation is not therefore that the representation induced the Plaintiff to enter into some specifically alleged agreement or contract with the defendant. Indeed the latter cannot be a possibility because the act of resignation by a person who is the Speaker of the House of Assembly is not a contractual matter, or to put it differently it is not a matter that depends on agreement. On the contrary the act of resignation by a Speaker of the House of Assembly from office and the consequences of such resignation is a statutory matter governed by section 24 (5) of the Establishment of the Parliament of Swaziland Order 1 of 1992. See also STEWART

WRIGHTS ON V. THORPE 1977 (2) SA 943 (A). There is therefore no logical link between the representations alleged in paragraphs six and seven of the Plaintiffs particulars of claim and the legal proposition contained in paragraph eight of the said particulars of *cl&im.* The Plaintiff's case therefore is not that the representation induced a contract. The contents of paragraph eight of the particulars of claim, wherein the plaintiff makes the statement that *in the premises, the defendant is contractually bound to pay the plaintiff the salary and emoluments applicable to the office of the Speaker of the House,"* bear no relationship to the *whole* pleading, stands disconnected therefrom, has no relevance and fails to advance the Plaintiff's case further from the point that the Plaintiff resigned as Speaker thus vacating his office as such and thus would ordinarily not be entitled to the salary and emoluments attaching thereto, unless there are special circumstances legally justifying that despite his resignation as Speaker he should still be entitled to retain this remuneration.

The next question which remains therefore is whether the Plaintiffs particulars of claim disclose a cause of action which may be a basis for holding the defendant liable to pay to the Plaintiff the remuneration claimed from the defendant, having regard to die alleged representation referred to in paragraphs six and seven of the said particulars of claim. As a matter of principle a representation *which* is not related to a contract may give rise to delictual liability. One of the essential requisites which must be alleged and proved in order for a representation to be actionable at all is that it must be false, (see L.T.C. HARMS, AIMLER'S PRECEDENTS OF PLEADINGS 3RD EDITION page215, J.F. COAKER & W.P. SCHUTZ, *WILLE* & MILLIN'S, MERCANTILE LAW OF *SOVTH* AFRICA 17th *edition,* page81. ISAACS, BECK'S THEORY AND PRINCIPLES OF PLEADING IN *CIVIL ACTIONS* page 240, GIBSON J.T.R. WILLE'S PRINCIPLES OF SOUGHT AFRICAN LAW, 7th *edition* pages 333-5) The representation is therefore normally referred to as a misrepresentation because it is false. It is also apparent from the textbooks that misrepresentations are usually classified into three categories in accordance with the state of mind of the representor or author thereof, as being either fraudulent, negligent or innocent in nature. Where the misrepresentation induces a contract it may not *only* entitle the misled party to avoid the

contract but it may also entitle the misled party to delictual damages under the *actio legis acquiliae* if the misrepresentation may be described as being either fraudulent or negligent. On the other hand a misrepresentation which is classified as innocent (and therefore not fraudulent or negligent) is not a delict, but may probably only be set up for the purpose of avoiding the contract if it is connected with a contract, (see SAMPSON V. UNION & RHODESIA WHOLESALE LTD (IN LIQUIDATION) 1929 AD 468 AT 480, FITT V. LOLTW 1970 (3) SA 73 (T). see also SONAP PETROLEUM (SA) (PTY) LTD V. PAPPADOGIANICS 1992 (3) SA 234 (A).

Other than being false the representation must relate to an existing fact as opposed inter alia to an opinion or " a future fact, such as performance to be made after the contract." (see GIBSON J.T.R supra page 334, L.T.C HARMS supra page 215., J.F. COAKER AND W.P. SCHUTZ supra page 80). FRIEDMAN J. in KERN TRUST (EDMS) BPK V. HURTER 1981 (3) SA 607 (C) at 610 referred to the case of the ADMINISTRATOR, NATAL V. TRUST BANK VAN AFRICA BPK 1979 (3) SA 824(A) and to the fact that Appellate Division recognised the existence in our law of a delictual action for damages based on negligent misstatements, outside the contractual field. From the headnote in the Trust Bank case *supra* there appears to be recognition in that case that the ground of action for damages for negligent misstatement which cause pure economic loss can and ought to be placed in the extended range of application of the *lex acquilia.* In this regard the headnote reads;

> ***"It can be accepted, from what different writers have written on the subject, that the right to compensation for pure patrimonial loss was recognised in the Roman Law in certain limited cases but that this right was still relative to a thing or corpus. It can also be accepted that in the Roman-Dutch law compensation for pure patrimonial loss was awarded in certain cases which indicates that Acquillian liability was extended beyond the Roman law boundary of damage to property ...The ground of action for damages for negligent misstatement can and ought to be placed in the extended range of application of the lex Acquilia."***

In essence therefore liability under the Acquilian action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably. Furthermore, it is now accepted that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely financial, is not a bar to the Acquilian

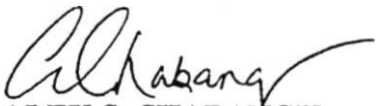
action. See CORONATION BRICK (PTY) LTD V. STRACHAN CONSTRUCTION CO (PTY) LTD 19S2 (4) SA 371 (D) and the authorities collected there. However, where the damages are in the form of pure economic (or financial loss) liability is for reasons of policy limited by a cautious approach whereby the courts seek to guard against limitless liability, in an undeterminable amount for an indeterminable time to an indeterminate class. See CORONATION BRICK case *supra*, ADMINISTRATED NATAL V. TRUST BANK *supra*. In short therefore for such liability to attach to the defendant in the present case the usually requirements for Acquilian liability must be satisfied, namely that there must be proof of (a) the wrongful act or omission (b) fault in the form of either negligence or dolus (c) causation of the loss by the defendant and (d) damages. It is clear from the Plaintiffs particulars of claim that there is no allegation of fault in the form of negligence or *dolus*. I may hasten to add at this stage that even if one has regard to the evidence adduced on behalf of the plaintiff at the trial there was no evidence of negligence or fault on the part of the defendant which would justify me to conclude that the defendant is liable as claimed by the plaintiff or even to conclude that a case is made out. Further, the statement complained of (the so called representation) is not shown to be false. A further striking feature of the plaintiff's case as pleaded is that there is not even an allegation that the representation was wrongful or unlawfully made. The allegations made by the Plaintiff in its particulars of claim do not disclose a cause of action for the relief claimed. The Plaintiffs case failed at the drawing board stage. In the manner the pleadings are formulated it is not easy to determine what case, if any, is disclosed on the pleadings. In the same way that the legal proposition the plaintiff makes, to the effect that the defendant is contractually bound to pay remuneration and emoluments which attach to the office of Speaker, he fails to advance his case further than the position already reached to the effect that as a matter of common sense and logic, the Plaintiff lost any entitlement to the remuneration and emoluments claimed when he vacated the office of Speaker and therefore left behind the said remuneration and emoluments when he vacated the said office. Plaintiffs case failed at the pleading stage. In other words no case at all was made even at the drawing board stage. My finding is that no evidence at all was led of unlawfulness and negligence, even at the trial. This is not surprising having regard to the nature of the

Plaintiff's case as formulated on the pleadings. However even if it may be stated that such evidence may be found to have been led during the trial this would not be the sort of case wherein I can say mat I am satisfied that there has been such a fuller investigation of these matters that there can be no reasonable ground for tfunking that further examination of the facts might not lead to a different conclusion. In any event I cannot and I should not take into account evidence of matters which have not been pleaded. Injustice my result if I were to take into account evidence of matters which have not been timeously and properly raised on the pleadings. In the recent yet unreported judgement in the matter of SPEEDY OVERBORDER SERVICES (PTY) LTD V. IRIS FIGUEREDO t/a PRESTIGE MARKETING EBgh Court case No. 2710/01, I had occasion to refer to the case of MIDDLETON V. CARR 1949 (2) SA 374 AD wherein the question was considered as to when is it appropriate for the court to have regard to evidence which seeks to establish in a civil case matters which have not been pleaded. In so far as may be relevant I refer once again to the dictum of SCHREINER J.A. in MIDDLETON V. CARR *supra* wherein the learned judge considering an appeal, observed;

> *"I turn now to ground (b), under which the appellant claims that failing proof of the express contract for remuneration at the rate of thirty pounds per month he is nevertheless entitled to payment at a fair or reasonable rate for the services which he rendered. The learned judge refused to make such an order in the appellants' favour because there was in the declaration no claim alternative to that based on the express contract and because even if there had been such a claim the evidence was insufficient to warrant a judgement for remuneration at any particular rate. The two points are not unconnected because, as has often been pointed out, where there has been full investigation of a matter, that is, where there is no reasonable ground for thinking that further examination of the facts might lead to a different conclusion, the court is entitled to, and generally should, treat the issue as if it has been expressly and timeously raised. But unless the court is satisfied that the investigation has been full, in the above sense, injustice may easily be done if the issue is treated as being before the court. Generally speaking the issues in civil cases should be raised on the pleadings and if any issue arises which does not appear from the pleadings in their original form an appropriate ammendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage or of avoiding a special order as to costs, on the courts' readiness at the argument stage or on appeal to treat unpleaded issues as having been fully investigated. "*

On the basis of the aforegoing I am unable to find that the Plaintiff has established a case which would justify the declaratory order claimed, namely that he is entitled in respect of the period after 15th March 2000 to the remuneration and emoluments which attach to the office of Speaker of the House of Assembly, notwithstanding his resignation from such office on the said date (i.e. 15th March, 2000).

In the circumstances the Plaintiffs action fails and is dismissed with costs.



ALEX S. SHABANGU

ACTING JUDGE