IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO.666/05**
In the matter between:

SWAZILAND AVIATION MANAGEMENT SERVICES (PTY) LIMITED **APPLICANT**

AND

THE MINISTRY OF PUBLIC WORKS AND TRANSPORT N.O. **1st RESPONDENT**
THE ATTORNEY GENERAL N.O. **2nd RESPONDENT**
THE ACCOUNTANT GENERAL N.O. **3rd RESPONDENT**

CORAM: MAMBA J

FOR APPLICANT: L. HOWE

FOR RESPONDENTS: MR J.S. MAGAGULA

JUDGEMENT
JULY 2008

[1] The Applicant is Swaziland Aviation Management Services (Pty) Ltd, a company duly registered and incorporated in accordance with the company laws of Swaziland and has its registered office at c/o Maphanga Howe Masuku Nsibande, 1st Floor Campus Crusade Building, Mahlokohla Street Mbabane and shall be referred to hereinafter as the Applicant.

[2] The 1st Respondent is the Ministry of Public Works and Transport, in its nominal capacity. The Attorney General is also cited herein as the 2nd Respondent and has also been sued in his

representative capacity as Principal Legal Officer for the Government of Swaziland.

[3] The 3rd Respondent is the Accountant General, as the person empowered to make payment for and on behalf of the Government of Swaziland.

[4] The following facts are either common cause or not disputed herein;

(a) On or about the 17th March 2001 the first Respondent, duly represented by the then incumbent Minister, T. Mlangeni and the Minister of Economic Planning sought to purchase a corporate aircraft to be used by the Head of State.

(b) Pursuant to or in furtherance of the above purpose, the two Ministers acting during the course and within the scope of their respective roles or capacities as Ministers of the Government of Swaziland, engaged and or appointed the Applicant as a Consultant in the quest to acquire the aforesaid Aircraft. As Consultant the Applicant inter alia had to

"6.1 investigate and advise on the possible acquisition of the appropriate corporate jet for the Head of State,

6.2. arrange visits of the said recommended aircraft by the (Applicant) for the Head of state in respective countries where the aircraft would be purchased,

6.3. arrange and advise the 1st [Respondent] on the various financial options available to it for purposes of purchasing the aircraft,

6.4. conduct and advise on the final selection of the aircraft and the

internal specifications of the design of the same and to liaise directly with the Head of State on the design, fixtures and fittings of the aircraft;

6.5. supervise the construction process of the aircraft with the chosen manufacturer;

6.6. set up the maintenance, operational, hangarage and regulation contracts for the aircraft;

6.7. source out the utilization of the aircraft from various operators; and

6.8. set up and train the aircraft crew and pilot required to operate the aircraft in terms of the manufacturers' standards."

(c) The contract was in writing. Detailed terms of Payment were agreed and stipulated in the agreement. It was further agreed that payments shall become due and payable by the 1st Respondent to the Applicant after 30 days upon presentation of a statement of account by the Applicant.

(d) The first statement of account for a sum of E732,749.05 was submitted by the Applicant to the 1st Respondent and was honoured by the latter.

(e) The plaintiff performed all its obligations in terms of the consultancy agreement and at the end of January 2003 presented its final statement of account in the sum of E 1 901, 102.70 to the 1st Respondent. This was followed by a written demand for same directed to the 2nd respondent on 18 May 2004. The first Respondent has failed and or neglected to pay this amount and hence these proceedings.

[5] First, the Applicant filed its claim by way of summons dated the 9th February 2005. The service of the summons on the

Respondents elicited from them a notice of intention to defend and a special plea filed by the 2nd Respondent. These are both dated the 14th March 2005.

[6] In its special plea the 2nd respondent avers that the Applicant's claim has been hit by prescription as stated in the Limitation of Proceedings Against Government Act 21 of 1972 inasmuch as, (i) the Applicant failed to file a demand within ninety (90) days from the date on which the debt arose and also failed to (ii) institute proceedings for the recovery of the debt within a period of 24 months from that date, as stipulated in the said Act. I digress from the narrative and observe that as the debt only became due after 30 days of presentation of the final statement of account to the 1st respondent, it must have become due and payable sometime in March 2003 regard being had to the fact that the statement of account was sent to the 1st Respondent "at the end of January, 2003". The period of ninety (90) days, within which a demand had to be made expired in July or August of the same year. Consequently, if the debt became due and payable in March 2003, the period of twenty-four months within which proceedings initiating the claim had to be instituted expired around March 2005. Therefore the claim or debt had not prescribed in February 2005, when the summons was issued. Nothing though turns of this analysis in this judgement as appears hereunder. I return to the narrative.

[7] Before the special plea could be heard by the court, the Applicant's attorneys held a meeting with the then incumbent

Attorney General Mr P.M. Dlamini and the dispute between the parties herein was "settled". The date of this meeting is not stated in the papers before me, but it was either before or on the 5th July, 2005, as in a letter "marked private and confidential" to the Attorney

> General dated that date, the Applicant's attorney stated as follows:
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> "2 We confirm the discussion between yourself, Mr Howe and Mr Masuku at your office where it was agreed that the matter had been settled. It was further agreed that all that required now is the method of making payment and enclosed herewith please find the full particulars of the Trust Account as agreed for the payment on behalf of client...
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> 3. Further it is agreed that in respect of the action proceedings all the necessary pleadings removing the matter will be filed by both parties in due course.
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> 4. It was advised and agreed with the parties concerned that the payments would be made within a reasonable time.
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> 5. We would like to take this opportunity to thank you for your assistance and trust that this matter is now settled and look forward to receiving payment as per the summons issued together with interest
>
> accordingly." (The underlining is mine to accentuate what was agreed upon).

[8] The terms of the agreement were confirmed by the 2nd Respondent in a letter dated the 8th July 2005 wherein the Attorney General wrote:

> "3...the agreement as set out in the said letter is hereby confirmed. We are in the process of securing the necessary funds which we envisage would be finalized within a reasonable time from date of this

letter. Kindly accept our apologies for the delay caused and trust all is in order."

[9] Notwithstanding the Respondents' undertaking to make payment as in the Applicant's summons, ie payment of the claimed sum of E l 901,102.70 plus interest thereon at the rate of 9% per annum a tempore morae and costs of suit, the Respondents failed to honour this undertaking and the Applicant, obviously thinking a reasonable time had expired, filed an urgent application against the respondents in an effort to enforce the terms of the agreement. The Applicant also sought an order committing the respondents to jail for a period of 30 days "for failing to comply with the court order." I do not know which is the court order referred to here.

[10] The Applicant argues that its application is nothing more than its desire to enforce the terms of the compromise made by the Attorney General or settlement reached between the parties. The Respondents, through their Counsel Mr JS Magagula who is Senior Counsel in the Attorney General's Chambers opposes the application on two grounds namely :

(a) the application is an irregular step as defined under rule 30 of the rules of court inasmuch as it has been filed before the special plea could be determined and

(b) the letter by the Attorney General does not constitute a compromise but is a total surrender or capitulation. (Very strong words indeed which I suspect are more appropriate in a military milieu).

I think it is fair to note here that the special plea was filed and signed by Mr Magagula herein and he professed his want of knowledge of the deliberations that were conducted by Attorney General P.M. Dlamini and the Applicant's Attorneys regarding the settlement stated in the letters referred to above.

[11] I now examine the law in this regard. I shall start with the second objection above as I think it provides the answer to the first objection. RH Christie in his book The Law of Contract in South Africa at 529 defines a compromise as the settlement of disputed obligations by agreement. This issue was in my respectful judgement extensively and sufficiently discussed in the case of **ABSA BANK LTD v VAN DE VYVER NO, [2002] 3 ALL SA 425 at 431** where the court held that

> "[15] There can be little doubt, in my respectful view, that in discussing a tender in the context of money sent in full settlement the learned Chief Justice was essentially, if not intentionally, referring to an offer of compromise. True, he had earlier in the judgement appeared to confine compromise to the case where the alleged debtor denied all liability but nothing suggests that he there intended to formulate a statement of universal application. There is, logically, no reason why compromise can not be offered and attained even where the debtor has no defence. In other words even if the entire alleged indebtedness is owing why can there not be settlement at a lesser figure? Moreover the learned Chief Justice concluded the discussion (at 650) with the observation that whether one was dealing with a tender or with payment coupled to a non-binding condition, was a question of the parties' intention as shown by their statements and conduct.
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> ...These views on the meaning of the relevant passages in the judgement of INNES CJ are supported, I consider, by the case of

> PATERSON EXHIBITONS (supra). There, liability was not denied; some liability was admitted; and the amount tendered equated to the full extent of the alleged debt. It was held (at 528B-D) that an offer of compromise had been made. And at 529b-C tender and offer of compromise were referred to as though they were one and the same thing. ...as a matter of language, and with regard to the two different situations in which it is employed, it is a question of fact whether the payment made is intended to affect a compromise or to pay an admitted liability."
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> (The reference to INNES
>
> CJ's judgement is to HARRIS v PIETERS 1920 AD 6441)

[12] From the above excerpt and in particular the reference to PATERSON Exhibitions case, it is clear that an agreement of compromise may be reached on the full amount claimed or demanded by the plaintiff. I do note that the reference to offer of compromise discussed in these cases was in relation to payment being made or tendered. No such payment was made in the present case but I see no reason why such a distinction or factor should make the situation different, more so where the Attorney General has unequivocally admitted every bit of the claim and has expressed the view that "we are in the process of securing the necessary funds which we envisage would be finalized within a reasonable time from date of this letter." I hold that this is an agreement of compromise and the objection fails.

[13] Once a compromise has been reached, the plaintiff can only sue or claim based on that agreement rather than the underlying cause, unless there is an express or implied term in the

agreement that a failure to comply with the terms of the agreement would entitle the plaintiff to revert to the original or underlying cause of action. See **JONATHAN v HAGGIE RAND WIRE LTD AND ANOTHER, 1978 (2) SA 34 at 38, PARAMOUNT STORES LTD v HENDRY (2) 1957 (2) SA 482 at 485 AND CACHALIA v HARBERER AND CO 1905 TS 457, MASSEY-FERGUSON (SA) LTD v ERMELO MOTORS LTD AND OTHERS, 1973 (4) SA 206 (TPD) AT 215.**

[14] In casu, the parties having entered into the agreement of compromise and the original cause of action having fallen away, the applicant was entitled, in my view, to apply for judgement based on that agreement. The rule 30 objection was in the circumstances irrelevant as it complained about the need to first determine the special plea. The special plea, however, related to the original claim in the summons or action and not the agreement of compromise. The agreement of compromise is being enforced by way of this application and the third respondent has been cited as a party obviously because he is the officer responsible for issuing payments on behalf of the Government. He is otherwise not cited as a party in the action.

[15] For the foregoing reasons, there is no merit in both objections by the respondents and such points are dismissed. Judgement is accordingly entered in favour of the Applicant in terms of prayers 3, 4 and 5 of the notice of motion dated the 21st day of November, 2005.

MAMBA J