CASE NO. **3676/08**

BETWEEN

THE PESCO SERVICES (PTY) LTD.. PLAINTIFF

THE COMMISSIONER OF POLICE... FIRST DEFENDANT

THE ATTORNEY GENERAL ... SECOND DEFENDANT

CORAM: **AGYEMANG J**

FDR THE PLAINTIFF: K. MDTSA ESQ.

FDR THE DEFENDANTS: **P. DLAMINI ESQ.**

DATED THE 19TH DAY OF AUGUST 2009

JUDGMENT

In this suit the plaintiff is seeking the following reliefs against the defendants:

1. Payment of the sum of E1.921.000.000;
2. Interest at the rate of 9% p.a. calculated from the date of the issue of summons until the date of final payment;
3. Costs of suit;
4. Further and/or alternative relief.

The facts of this case are sufficiently simple. The plaintiff is a limited liability company registered in 2001 under the laws of Swaziland. The first

defendant is the head of the Royal Swaziland Police and contractant in the contract, the subject of this suit. The second defendant is the legal representative of the first defendant, cited in that capacity. The matters that form a background to the relationship of the parties, and which culminated in the contract the subject of this suit are these: in AD 2002, the plaintiff was engaged to fumigate the premises of Mbabane Police Headquarters against ants and cockroaches on a work to order basis. This is to say when the plaintiff received written orders for certain work to be done, it would carry same out and receive payment therefor. Job cards were duly issued and signed, and invoices produced for payment. The parties continued in this relationship for the period AD 2002 through AD 2003. In August 2004, the parties, who wished to have a more consistent and formalised relationship, entered into a contract. That contract, contained in a document admitted as exhibit 2, (the original of the document exhibit 1 which purported to be the contract), was to operate from August 1, 2004, until 31 March, 2005. Being of a one-year duration, it was for treatment and fumigation against subterranean termites, ants, cockroaches and mosquitoes in six premises belonging to the Royal Swaziland Police at a monthly charge of E220.000 for two of its premises, and E 142,000 as a two-monthly charge for four of the premises. It is common cause that that contract having run its course, the first defendant and the plaintiff on May 1, 2005, entered into a written contract for the provision of services by the plaintiff herein.

The said contract was contained in a document admitted in evidence as exhibit 3.

The contract which was executed by representatives of the parties being: for the plaintiff, its Director Joseph Simon Ashers and for the first defendant, one P.M. Ndlangamandla, was said to be for the period of two years and seven months. The terms of the contract were these: the plaintiff was required to provide treatment/fumigation against subterranean termites and cockroaches on certain premises belonging to the Royal Swaziland Police: Matshapha Police College. In the Matshapha Police College generally, the plaintiff was to treat and fumigate against termites. In two kitchens at that premises, the plaintiff was required to treat and fumigate against cockroaches.

The work was to be undertaken every month and to be paid for under job cards signed and stamped with corresponding invoices submitted to the first defendant's office. In that regard, certain sums of money were set out as being the monthly sum owed to the plaintiff for the work the subject of the contract. For the work against termites, the sum of E83, 000 was set out as the monthly payment due, and E30, 000 for the work regarding cockroaches, a total of E113,000. It was a term of the contract, that it would be "binding from the date of commencement hereof and ...continue until the end of the contract period as above". The operation of the contract was to commence from May 1, 2005 and end on December 31, 2007.

The parties continued in this relationship created by the contract exhibit 3. The plaintiff worked as provided for under exhibit 3, carrying out fumigation sometimes four times in the week in the places specified in exhibit 3. In the execution of its

duties, the plaintiff, dealt with several officers of the first defendant including the said Mr. P Ndlangarnandla, Mr. Mkhaphili, Mr. Myeza and a lady called Barbara, who were responsible for seeing to problems encountered by the plaintiff in the execution of its duties, and also for paying it for work done under the contract. The plaintiff was paid for its work, as provided in exhibit 3, upon invoices produced. According to the plaintiffs witnesses, sometimes payment was delayed for three weeks to a month, at other times, payments were delayed as the first defendant was said to be waiting for the Government's budget. When payment was made, a photocopy of the contract was attached to the invoice and job card.

It is the case of the plaintiff as recounted by its member/Director that in or about July 2006, the first defendant repudiated the contract. The repudiation was done by P.M. Ndlangarnandla telephonically when he asked the plaintiff per its member/Director, to stop work. The reason the said gentleman gave was that the first defendant had no money to pay for the plaintiff's services. The plaintiff accepted the repudiation after its representative and Director held discussions with the said gentleman and asked the first defendant's representative to furnish it with a formal letter of repudiation. Although the first defendant's representative failed to do this, the plaintiff, no longer having access to the premises of the first defendant, stopped its work.

At the time of the repudiation by the first defendant, although the plaintiff had worked under the contract from May 1, 2005 until July 31, 2006, claims made by the plaintiff under nine invoices for a nine month period, that is: from November 30, 2005 until 31 July, 2006 were unpaid and thus outstanding. These unpaid invoices were admitted in evidence as exhibits 4,4A-4J.

The plaintiff at this time made a demand for payment of work done under the invoices exhibits 4, 4A-4J, a total of E1.017.000. This demand was later pursued by counsel, engaged by the plaintiff for the purpose per letters in respect of which some letters in reply were received by counsel. By a letter exhibit 5, the first defendant represented by the said P.M. Ndlangamandla acknowledged its indebtedness to the plaintiff for the said sumof E1.017.000.

At the end of the negotiations for the settlement of the said amount, evidenced by letters exchanged between the first defendant's office and the counsel for the plaintiff, (admitted as exhibit 6 series), a compromise was reached for the amount to be reduced to the sum of E950, 000. The deed of settlement produced following this, recited the said payment to be in respect of the claims made by the plaintiff for the provision of services to the first defendant under the contract which was brought to an end by the first defendant.

The said document which also expressed this payment to be in "full and final settlement of this matter" was made an order of the court by the consent of both parties. The said amount was duly paid by the defendants per cheque drawn on the Central Bank of Swaziland, and received by the plaintiff. The plaintiff, alleging that the payment of E950.000 was in respect of monies owed for services rendered under nine invoices and not in respect of any other claim of the plaintiff, has now commenced the present suit claiming damages for breach of the contract by the first defendant which claim the plaintiff seeks to have calculated on the unexpired term of the contract.

In the present claim, the plaintiff was said to have suffered loss which flowed from the repudiation of the contract by the first defendant which the plaintiff alleged to

constitute a breach of the contract between the parties. Although the plaintiff did not adduce documentary evidence in support of this alleged loss, testifying regarding such loss as its first witness, the plaintiffs member/Director in charge of marketing and supervision, alleged that the plaintiff had to terminate the services of seven of its employees. She added that the plaintiff had suppliers/creditors that had to be paid their due and were paid from monies borrowed by the plaintiff to meet the said expenditure. The plaintiff also, she said, from July 31, 2006 until December 2007, executed only a few jobs on a work to order basis, but did not obtain any contract comparable to the one the subject of the contract between the parties herein, with the result that the business of the company collapsed in December 2007, leaving the company in existence a mere shell.

The plaintiffs member/Director in charge of operations and accounts and signatory to exhibit 3, testified as its second witness. He corroborated the evidence of the first witness in every material particular regarding the entering of the parties into the contract after their previous work to order relationship, its terms, and the payment (including the delays therewith). He differed only in the frequency with which the plaintiff performed its obligations under the contract. Regarding this, he alleged that the task of treatment/fumigation was carried out daily in every month until the plaintiff was stopped. He added that because of the contract between the parties, the plaintiff concentrated everything on it with the result that the first defendant's repudiation without lawful cause led to loss including laying off of the plaintiffs staff and compensating them, paying creditors, and paying off a monthly sum of E8570 on a mortgage loan accessed for the purpose of acquiring an office for the plaintiff.

This witness also reiterated that the present claim was not included in the deed of settlement which was made an order of the court as that was negotiated for unpaid invoices for services rendered by the plaintiff. He alleged that the fact that the first defendant failed to pay the plaintiff for work done did not stop the plaintiff which was committed under the contract exhibit 3 from doing work under it. He alleged that when the first defendant repudiated the contract, the plaintiff remained ready and willing to proceed with the execution of its duties, and tendered its services in that regard by sending its member/Director to see the first defendant's representative. Thus even after the invoices were negotiated and settled in that deed of settlement, the plaintiff instructed attorneys to bring the present action for breach of the contract by the first defendant. The defendants offered no evidence.

Instead, the defendants relied on this sole defence: that the payment of E950.000 by the defendants in what was expressed to be a "a full and final settlement" in the deed of settlement made an order of the court, did away with any further claims upon the contract. At the close of the pleadings and in line with the pre-trial conference held between counsel for the parties, these issues arise for determination:

1. Whether or not the payment of E950, 000 to the plaintiff by the defendants constituted a full and final settlement of all claims between the parties arising out of the instant contract;
2. Whether or not the repudiation of the contract between the parties by the first defendant amounts to a breach thereof;
3. Whether or not the plaintiff is entitled to the amount claimed as the quantum of damages for breach of contract or at all.

The plaintiff has led evidence in substantiation of its claim, that it entered into a contract for the provision of services which contract was to be in force for the duration of two years seven months. Furthermore, that the duration of the contract was truncated when the defendant for no lawful excuse or cause, repudiated same. The defendants led no evidence in their defence. They did not deny the contract exhibit 3 nor did they deny the plaintiffs allegation that while it was still in force and in the process of execution by the plaintiff, the first defendant per his representative announced the intention not to perform the first defendant's obligation and asked the plaintiff to stop work. As aforesaid, the defendants chose not to call evidence in rebuttal of the plaintiff's case, contenting themselves with the argument that the plaintiff gave up its rights to make any further claims against the defendants after it negotiated and accepted payment of the sum of E950,000. The defendants' case is predicated upon the fact of the plaintiff receiving the said monies as well as the time for so doing. This is because the claim of the plaintiff for payment which resulted in the payment of the sum of E950.000 was made after the defendants terminated the services of the plaintiff. It was thus the case of the defendants that when the plaintiff accepted the said sum of money upon a deed of settlement setting out that the payment represented a full and final claim, it waived the right to bring an action for any further claim. But what do the facts of this case in respect of which no evidence in rebuttal was led by the defendants show?

The plaintiff adduced evidence that for a period of nine months that is, from November 2005 until July 2006, the plaintiff rendered services to the first defendant and in line with its contractual obligations, made out invoices for work carried out. It was the evidence of the two witnesses who testified in support of the plaintiffs case

that although the first defendant assumed the obligation to pay the plaintiff for its services, it often delayed performance of its obligation. The plaintiff however continued to render services in fulfilment of its obligation and continued to raise invoices for work done even though for that length of time: nine months, the first defendant delayed payment When the first defendant for the reason that it had no money repudiated the contract, the plaintiff started making a demand for monies owed to it for due performance of its obligations. It is a matter not in controversy that the defendants did not deny the first defendant's indebtedness to the plaintiff. In fact, by letter exhibit 5, the first defendant acknowledged the claim of the plaintiff for money owed to it in the sum of E1,017,000 for services rendered. The letters exhibit 6 series also clearly show that the parties at that point, were in agreement that it was the said money owed to the plaintiff that was compromised and reduced upon negotiation to the final figure of E950.000.

In the deed of settlement which was made an order of the court and under which the said sum of E950,000 was paid by the defendants and received by the plaintiff, it was recited in its preamble that the sum of E950,000 was the amount due and owing by the first defendant to the plaintiff upon a compromise reached on the sum of E1.017.000. The said sum of

E1.017.000 was described in that document as being "in respect of services rendered under a contract".

The question is this: whether the clause in that document "the payment to be made by the defendant constitutes a full and final settlement of the matter" precludes any further claim of the plaintiff such as the present claim which seeks damages for breach of contract. In my judgment, it does not.

It seems to me that the fact that the demand for payment was made by the plaintiff after the defendant's act of repudiation, did not change its character as a claim for monies already due and owing under the contract and so transform it into a claim for damages for foreseeable loss flowing out of the defendant's act, the matter canvassed by learned counsel for the defendants.

Learned counsel for the defendants has submitted that in accordance with the "once for all" rule, the present claim of the plaintiff ought not to stand. I find the invocation of the said maxim misguided, for the claim by the plaintiff for monies unpaid, did not arise as a consequence of the first defendant's act of repudiation, but rather out of an obligation assumed by the defendant under the contract exhibit 3, which became due as soon as the plaintiff rendered those services. The once for all rule requires that all claims arising out of a single cause of action be pursued at the same time. A plaintiff is not permitted to bring more than one action for damages on the same cause of action. Per Brand JA in ***Symington v. Preioria-Oos***

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Privaat Hospital Bedryfs (Pty) Ltd 2005 5 SA 550 " This rule is based on the principle that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such cause. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation".

The meaning of a "cause of action" is expatiated in the Chapter on Damages, Principles of Delict 3rd Ed. Van Per Walt & Midgley 227 at par 152 "The term "cause of action" describes the factual basis... which gives rise to a plaintiffs legal right to sue. ...A cause of action is determined by the material facts which need to be proved and, if different material facts are to be proved, then different causes of action arise". Although a claim sounding in delict, ***Green v. Coetzer 1958 2 SA 697*** elucidates this principle, for the plaintiff therein who sued successfully in respect of damage to his motor cycle was held to be unable to sue regarding personal injuries sustained in that incident in a separate action. *In casu,* the claim for E1,017,000 which was compromised to the reduced figure of E950.000 and was received by the plaintiff was not a remedy arising out single cause of action along with the present suit. It stood in its own category as a debt due, owing and acknowledged to be in respect of a specified purpose. A claim for a debt, (which it was) was a different cause of action from a claim for damages which is what the instant case is concerned with within the meaning of "cause of action" (supra). In my view, the satisfaction of that debt as a full and final payment of that claim, did not, in the absence of a clear expressed intention, compromise any other existing or future claim against the defendant arising out of the latter's conduct in the contract.

In pursuing that claim after the first defendant purported to terminate their contract, the plaintiff could not, in the absence of a clear, expressed intention to abandon any

other or further claim, be said to have limited itself to that claim as arising from their relationship. I am reinforced in my opinion by the instructive preamble to the deed of settlement under which the plaintiff received the negotiated sum of E950,000. The said preamble governing that deed, recited clearly that the settlement was in respect of money demanded by the plaintiff as payment for services rendered, stated to be in the sum of E 1,017,000. The record of the agreement that followed stated that the said sum of E950,000 represented payment for services rendered by the plaintiff under a contract. In my view, the clause in the deed of settlement "...the payment to be made by the defendant constitutes a full and final settlement *of this* matter" (my emphasis) could only refer to the claim recited in the preamble to the deed as amounting to E1.017.000, representing the claim by the plaintiff for services rendered under a contract which sum was negotiated to the reduced figure of E950.000.

What the plaintiff by accepting E950,000 in the full and final settlement waived or abandoned, was its right to the balance which was the difference between the claim of E1,017,000 and the sum accepted, and not every other claim arising out of the contract unconnected with the claim for services rendered,

Not only was the submission of learned counsel for the defendants that the insects had been eradicated thus the first defendant's repudiation, and furthermore, that the sum of E950.000 was envisaged by the parties as due to the plaintiff, not supported by the evidence, but it is actually contradicted by the clear expressed positions of the parties contained in the deed of settlement under which the sum of E950.000 was received by the plaintiff.

This circumstance is to be distinguished from where payment is accepted as full and final payment in abandonment of an outstanding balance, see: ***Harris v. Pieters 1920 SA 647 (AD).*** As aforesaid, the claim settled thus

stood in its own category as a debt due and owino in respect of services rendered. It did not preclude a claim for damages. As aforesaid, what was abandoned by the plaintiff was the difference between the original sum of E1,017,000 and the negotiated sum of E950.000 received by it. Loss arising out of the defendant's wrongful act of repudiation was not thus compromised in the absence of a clear, expressed intention.

In the circumstance, it seems to me that the plaintiff could not by receiving the sum of E950.000 paid under the deed of settlement, be said to have waived any other claim existing or future against the first defendant such

as the instant claim. I hold the same to be a fact.

The question then arises regarding the alleged breach of contract. Did the

act of repudiation by the defendant which was accepted by the plaintiff,

constitute a breach of contract for which the plaintiff may make a claim for

damages?

In my judgment, it did.

The plaintiffs evidence that in the middle of the execution of a contract, the first defendant repudiated same by stopping the plaintiffs work without lawful excuse was not denied, challenged or rebutted by contrary evidence.

The said circumstance in which one person intimates by word or conduct that he will not perform any or all of its obligations under a contract amounts to a repudiatory breach. The innocent party may then exercise his right to terminate the contract as an option. In the present instance, according to the plaintiffs unrebutted evidence,

the first defendant per its representative asked the plaintiff to stop work being done by the plaintiff in execution of a contract between them as there was no money to pay the plaintiff under the contract. Clearly therefore, not only did the first defendant per his representative announce to the plaintiff plainly that he would not perform his obligations under their contract which provided for monthly payments, but he prevented the plaintiff which had been told to stop work, from performing its obligation. Such conduct was a repudiation of the contract between the parties it was also a communication of impending mal-performance.

These amounted to a breach of contract for which the innocent party the plaintiff herein, may claim damages, see: ***Datacolor International (Pty) Ltd v. Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA; also Ullman Bros. Ltd v. Kroonstad Produce Co. 1923 AD 449***

In what sum are the damages due the plaintiff following the defendant's breach?

The plaintiff claims damages in the sum of E1.921.000.000, being the income that would have accrued to it if the contract had been performed. To establish its entitlement thereto, the plaintiff led evidence of the following: first of all, that the parties entered into a fixed term contract, ending 31/12/07. Furthermore, that in the contract the sums of money that would be paid on monthly basis (subject to the submission of invoices) were stated therein.

The plaintiffs witnesses also alleged that in reliance on the contract, the plaintiff incurred expenditure from suppliers of materials and that this had to be settled through loans accessed for the purpose following the termination of the contract by the first defendant. They alleged also that the plaintiff had accessed a loan for the acquisition of an office building upon which monthly mortgage charges were paid.

The termination of the contract they alleged, had affected the plaintiff, which now had no income to pay the monthly mortgage.

The plaintiffs witnesses averred further, that after the termination of the contract in respect of which the plaintiff had placed its entire focus, the plaintiff could not secure comparable contracts with the result that it had to lay off its workers while the two member/directors continued with small work orders they received from other outfits. In the end, the business of the company came to an end although the company as a shell remains in existence.

First of all, I will say that the evidence led on behalf of the plaintiff regarding loss suffered by reason of the termination, including the monies owed to suppliers for materials which it had to pay for although it could not continue with the work it had contracted to perform for the first defendant, the mortgage it had to pay although income expected under the contract was no longer available, the laying off of its workers and the consequent disbursement of funds for such termination of employment, would all have been recoverable as special damages where the circumstances bringing them about, having been pleaded and proven, could be said to be reasonably within the contemplation of the parties at the time of entry into the contract as flowing from non-performance of the first defendant's obligations, see: ***Shatz Investments Pty Ltd v. Kalovyrnas*** *1976* ***2 SA*** *545* ***A at 550,*** see also *per* ***Corhett JA in Holmdene Brickworks Pty Ltd v. Roberts Construction Co. Ltd 1977 3 SA 670 at 687 D-H.*** The plaintiff however did not plead any such circumstances. Nor was any evidence of specific loss or in what sum (as supported by documentary or other evidence), led even by the second witness for the plaintiff who described himself as one in charge of the plaintiffs accounts, on its behalf. The said pieces of evidence will thus not give rise to such an award. In the present

instance where the contract was for a fixed period that is until 31 December 2007, without a provision for termination by either party, and the monies due for each month in that period was fixed and included in the contract as due and owing to the plaintiff upon performance of its duties under the contract, the correct measure of damages should be the loss of expectation interest which is the position that the plaintiff would have stood to occupy if the contract had been properly performed, see per Innes CJ in ***Victoria Falls Transvaal Power Co. Ltd v. Consolidated Lanqlaaate Mines*** *Ltd* ***1915 AD*** *1* 22. The plaintiffs duty to mitigate its loss suffered as postulated in ***Holmdene Brickworks case (supra)*** was addressed in its lack thereof in the present instance, by its allegation that it could not secure comparable jobs between the time of the termination: August 2006, and 31 December 2007. This was not challenged or rebutted by the defendants who also neither pleaded nor led evidence showing lack of mitigation by the plaintiff as they ought, see per Corbett J A in ***Holmdene Brickworks*** case at ***689.*** For these reasons, I am minded to grant the relief sought by the plaintiff being the sum of E1.921.000.000, representing the contract sum for the unexpired term of the contract.

The plaintiffs claim succeeds and judgment is accordingly entered for the plaintiff for all the reliefs contained in the summons. Costs awarded to the plaintiff.

MABEL AGYEMANG

HIGH COURT JUDGE