IN THE HIGH COURT OF ESWATINI

Held at Mbabane **Case No.: 1819/2019**

In the matter between

ZUMCOOL INVESTMENTS (PTY) LTD

t/a ZUMCOOL AIRCONDITIONING **Plaintiff**

AND

BANDILE TSHABALALA **1st Defendant**

PHUMELELE MOTSA **2nd Defendant**

PROFESSIONAL SPECIALIST ENGINEERING

CONTRACTOR (PTY) LTD **3rd Defendant**

Neutral Citation: *Zumcool Investments (PTY) LTD Vs Bandile Tshabalala and 2 others (1819/2019) [2023] SZHC 31 (24th February 2023)*

Coram: **S.M. Masuku J.**

Date Heard: 7th and 8th February 2023

Date Handed Down: 24th February 2023

Summary

Fly note: *One of the basic principles governing the award of damages especially in aquillian action is that when compensation is assessed, consideration must be given to place the Plaintiff as far a possible in the same position he would have been, had it not been for the wrongful act causing it, him or her the injury.*

Two cardinal questions the Court must consider in assessing damages under any of the heads of damages; (i) what damages or damnum has been suffered or is to be suffered by the Plaintiff under the individual head and (ii) what amount of damages should he awarded to the Plaintiff as compensation of such damages?

Held: *That the Plaintiff succeeds in the circumstances of the case in its proof for extrinsic or (special damages) against the Defendants jointly and severally liable one paying the other to be absolved.*

JUDGMENT ON THE QUANTUM OF DAMAGES

S.M. MASUKU J

[1] On the 11th March 2022 this Court under the hand of B. Magagula J. issued an order dismissing the Defendants' defences for their failure to appoint new Attorneys of record within 10 (ten) days of the withdrawal by their erstwhile attorneys in terms of rule 16(4) of the High Court rules. The Court granted the Plaintiff leave to prove its damages by *viva voce* evidence.

[2] The effect of the order was that, judgment by default on the issue of liability favoured the Plaintiff. This Court was therefore only called upon to determine the quantum of Plaintiff's damages and these are the reasons for the judgment on the quantum as assessed.

[3] The Plaintiff, Zumcool Investments (PTY) Ltd t/a Zumcool Air conditioning is a duly incorporated entity in terms of the laws of the Kingdom of Eswatini, registered in the year 2010, as a supplier, installer and service provider of both domestic and industrial air conditioners. The Plaintiff's Managing Director is Andrew Mazulu Mkhonta (PW1).

[4] The 1st Defendant, is Bandile Tshabalala who was not only a director and co - shareholder with PW1 but was also a top professional employee of Plaintiff.

[5] The 2nd Defendant, is Phumelele Motsa who was a director and employee of the Plaintiff.

[6] The 3rd Defendant is a company duly incorporated in terms of the laws of Eswatini by the 1st and 2nd Defendants. Its incorporation was apparently done during the execution of the Plaintiff's contracts which saw the 1st and 2nd Defendants diverting the Plaintiff's work for their own benefit using the 3rd Defendant.

[7] The 1st Defendant was the project engineer of the Plaintiff from the year 2016 until he resigned in the year 2018. His duties *inter alia* included, scouting for jobs (tenders) doing designs, drawings and quantities for the Plaintiff. He was also a manger responsible for six technicians of the Plaintiff. He worked closely with the managing director of the Plaintiff (PW1). He was a trusted employee who was also in charge of marketing the Plaintiff's work.

[8] The Plaintiff's particulars of claim described the 1st Defendant as a Senior Executive within the Plaintiff's company who was at all times expected to conduct the plaintiff's business in good faith, honestly and not to conduct himself in any manner that is in conflict with his work in his office. It was said he owed the fiduciary duty to the company.

[9] The Plaintiff's cause of complaint is that whilst the 1st Defendant's employment contract subsisted he was instructed to propose a joint venture with IES Swaziland a company which was awarded a tender at the International Convention Center Hotel (ICC) for air conditioning. Instead of carrying out the instruction with IES Swaziland, the 1st and 2nd Defendants secretly incorporated the 3rd Defendant and proposed to work with IES the very same task they were meant to perform for the Plaintiff.

[10] The 1st and 2nd Defendants would sometimes during working hours use the Plaintiff's staff, equipment, tools and material to carry out the work

of 3rd Defendant to the prejudice of the Plaintiff, thus drawing secret profits. The Plaintiff alleged that the 1st and 2nd Defendant's action caused it economic loss amounting to E10 million. The Plaintiff sought to prove that amount at trial.

[11] The Plaintiff further alleged that it was awarded another tender by Sergeant Investments Company at Madlenya building Mbabane to install air conditioning and a cooling system. The 1st Defendant was assigned to design, price, carry out the quantities and act as project engineer on behalf of the Plaintiff.

[12] The 1st Plaintiff however is alleged to have wrongfully, negligent without due cause carried out the work in a substandard manner in order to jeopardize the contract so that his company, (the 3rd Defendant) can pursue the very same work that it later carried out upon the untimely termination of the contract by Sergeant Investments.

[13] The Plaintiff alleged that the contract between the Plaintiff and Sergeant Investment was eventually terminated and was pursued by the Defendants who were awarded the very same tender by Sergeant Investment. The Plaintiff further alleged that it suffered a loss in the amount of E900 000.00 (Nine Hundred Thousand Emalangeni) which would have been paid to it by the contract.

[14] In the premise the Plaintiff alleged that the 1st Defendant breached his fiduciary duty in the he failed to guard against conflict of interest, he failed to disclose that he was financially interested in the very same corporate opportunity that the Plaintiff was pursuing. Further that the 1st Defendant was dishonest by secretly incorporating the 3rd Defendant to render the same services as rendered by the Plaintiff when he was still employed by the Plaintiff. He thus failed to act in good faith as a prescribed officer for the Plaintiff and as a result the Plaintiff suffered another E20 million for breach of fiduciary duty by the Defendants.

[16] The matter came before this court for the determination of the quantum of damages , liability having been established by a default judgment. I allowed the Plaintiff to lead oral evidence following the order of the Court.

[17] I hasten to point out that the Plaintiff's prayers in the particulars of claim on the quantum does not set out neatly and succinctly the heads of damages that needs to be proved. There is E10 million which the Plaintiff claims as disgorgement of all secret profits for breach of fiduciary duty and E900 000.00 (nine Hundred Thousand Emalangeni) as loss incurred for breach of the 1st Defendant's duty of goods faith of employment and fiduciary duty (which in some aspects of the pleading is described as loss incurred on the Madlenya or Sergeant Investments tender).

[18] There is then E20 million for damages as a result of breach of fiduciary duty which perhaps should represent special damages. I find that the Plaintiff's pleading on the quantum of damages is unkempt, consequently it makes it very difficult for one to discern to the heads of damages that are to be examined and awarded.

THE LITERATURE

[19] Without placing too much burden on this judgment for quantum it is necessary for me to capture some of the guiding principles in our law of delict on the purpose , form and quantification of damages. It is must be recalled that the term civil claim may be defined as a claim for damages or compensation instituted in terms of our civil law by or on behalf of a person who suffered injury, loss or damages arising from someone else's action or failure to act. Central to the definition is that damages or compensation can be claimed where harm has been suffered. The damage (*damnum*) is described by Neethling et al (Neethling Potgieter Visser, Law of Delict (2006) 5th ed Lexis Nexis Butterwoth 196 as the detrimental impact upon any patrimonial or personal interest deemed worthy of protection by the law.

[20] The damnum, that is the loss suffered by the Plaintiff by reason of the negligent act (Olso Land Co.Ltd (see, citation below) The law of delict also recognizes damage arising from financial benefit that would otherwise have accrued such as loss of earnings or profits. For example

in Amler's Precedence of Pleadings, 6th ed p23 and with reference to Mallison V Tanner 1997 (4) SA 681 (T) the following is said:-

"An Agent who accepts or agrees to accept, a secret commission forfeits the right to remuneration and is liable in damages for any loss sustained by the principal and is furthermore , liable to account for any profit to principal"

[21] It is however only legally recognized patrimonial and non – patrimonial interest of a person or entity, that qualifies as damages. Although both patrimonial and non – patrimonial losses make up the damages, there are distinctive differences in the two concepts. Whilst patrimonial loss can be directly expressed in money and an objective criteria is used to ascertain the amount of damages (ie. Loss of earnings, loss of profits, medical and hospital expenses etc), non patrimonial or non – pecunary loss is more difficult to measure (Neethling *et al* (2006) at page 199 H) as it concerns the subjective feelings of the victim i.e. pain and suffering, emotional feelings etc. The latter is irrelevant in the matter at hand.

[22] One of the basic principles governing the awards of damages especially in *aquillan* action is that when compensation is assessed, consideration must be given to place the Plaintiff as far as possible in the same positon he would have been, had it not been for the wrongfull act causing him or her the injury. Two cardinal questions the court must consider in assessing damages under any of the heads of damages; (i) what damages or *damnum*, has been suffered or is to be suffered by the Plaintiff under the

individual head? and (ii) What amount of damages should be awarded to the Plaintiff as compensation of such damages?

[23] How this is achieved has been through an array of propositions, theories and arguments on the theoretical foundation of the assessment of patrimonial damages discussed in case law and academic discourse. A method referred to as *sum – formula* method suggest that patrimonial damages can only be determined by comparing the patrimony of a Plaintiff after the delict with the patrimonial position prevalent before the occurrence of damages – causing event. See Emeritus Professor, HB Klopper, Damages, 2017 Lexis Nexis at page 161 who states thus, " The determination of damages without this comparison in impossible and such comparison is acknowledged to be primary method of assessing damage arising from a damages – causing event."

[24] The *sum – formular* approach is trite law see, Transnet Ltd v Sechaba Photoscan (PTY) Ltd [2005] JOL 13495 (SCA), 2005 (1) SA 299 (SCA) 304. " The Court stated that; specifically with regard to delict, this Court has referred to the difference between the patrimonial position of the Plaintiff before and after the delict, being the unfavorable difference caused by the delict. It is now beyond question that damages in delict (and contract) are assessed according to the comparative method".

[25] The loss of income *in casu* emanates from the concept of financial loss arising from conduct which does not directly affect property or rights of personality but from pure economic loss recognized as compensable damages if such damage is not too remote. HB klopper (*supra*). See Olso land Co LTD v Union Government 1938 AD 584 590: "by the word damage is not meant the injury to the property but the d*amnum*, that is the loss suffered by the Plaintiff because of the negligent act". The negligent conduct of the Defendant may given rise to pure economic loss HB. Klopper (*supra* at page 186).

[26] The types of negligent conduct which do not affect the property or personality right of person are diverse. A 'prospective tender bargain dishonestly snatched away' has been noted as this type in Transnet Ltd (*supra)*. In *casu* Plaintiff is typically complaining about injury caused by its own employees the 1st and 2nd Defendants who used all its resources to snatch away the tendered business for their own benefit causing economic loss.

[27] Due to the relatively recent development of liability for pure economic loss (most reported cases in the South African jurisdiction were considered on exception there is very little guidance if any that I could find in our local jurisdiction. HB Klopper (*supra* at page191) Submits that the principles applicable to the assessment of patrimonial loss will, with adaptations, be applicable to pure economic loss of a patrimonial nature and that proof of such loss is dependant on the facts and circumstances of each case.

[28] To recover loss of earnings, the Plaintiff must be able to show that he would have earned such income but for the unlawfull and negligent conduct. See Rudman V Road Accident Fund (2002) 4 all SA 422 (SCA), 2003 (2) SA 234 (SCA).

[29] The Plaintiff has a duty to adduce sufficient evidence in order to enable the Court to exercise its discretion, based on the best evidence available and award an amount which it deems fair and reasonable. Should a Plaintiff fail to prove sufficient facts, there is no loss of action, but the Court in compelled to follow a conservative approach, favourable to the Plaintiff. See HB Klopper (*supra* page 97).

[30] The Plaintiff has *in casu* claimed damages which I have classified as extrinsic (special damages) arising from a breach of employment (contractual) duty by the 1st and 2nd Defendants to deliver to their best of ability, work that the Plaintiff was contracted to carry out .Instead they took the very same work given to the Plaintiff and gave it to the 3rd Defendant.

[31] Breach of contract constitute another wrongful conduct in civil law The success of Civil claims ex *contractu*, with a delict, depends very much on the act by that person (the contracting party) whose conduct, when measured, is found to be wrongful. See Minister of Safety and Security V Scott and Another [2014] ZA SCA 84, 2016 (6) SA 1 (SCA) at paras (37) to (38). Distinguished writers in Delict opined that there is no fundamental

differences between civil claim *ex contractu* as with delict. Whereas breach of contract constitute the non – fulfillment of a contractual personal right or an obligation to perform, a delict on the other hand, constitute the infringement of any legally recognized interest by another party. See Neethling *et al* (2006) 5-6 see also Visser *et al* (2003) 8 wherein the learned authors recognized breach of contract as a source of an action for damages for patrimonial loss. For case law, see Lillicrap, Wassenaar and Partners V Pilkington Brother (SA) PTY LTD 1985 (1) SA 475. Both remedies do have their own rules to render the wrongdoer liable *ex contractu* as well as *ex delicto*. In certain instances the same set of facts may in those instances give rise to both remedies being utilized.

[32] Damages on breach of contract are not presumed and a Plaintiff is only entitled to such damages as he/ she can prove. See Rhodesia Cold Storage and Trading Co. LTD V Liquidator Beira Cold Storage LTD 1905 (2) DAC 253. In order to recover damages, the Plaintiff must show that such damages are not merely speculative. Where damages are too speculative, the expenditure incurred, or honest measure of damages as shown by the evidence may be awarded. A Plaintiff is obliged to adduce sufficient evidence to enable a Court to assess damages failing which his /her claim for damages is set to fail see HB Klopper (supra at 305).

[33] This approach is a strict and harshier approach that is bound to bring cold comfort to the Plaintiff compared to an earlier approaches See Professor P.Q.R Boberg. The law of delict, Volume 1 (aquilian liability) page 533,

where he states "And so it is recognized that the trial Judge has a wide discretion to determine an amount fair to both parties – neither denying the Plaintiff just compensation nor pouring out "*largesse* from the horn of plenty at the Defendant s expense". (Per Holmes J in Pitt V Economic Insurance Co Ltd 1957 (3) SA 284 D at 287.

[34] PQR Boberg (*supra* at page 477) states that the "element of patrimonial loss, like other elements of acquilian liability, must be proved by the Plaintiff on a balance of probabilities. This requirement relates to the fact of damages, its quantum, particularly where it is prospective, may depend on various imponderables, some of which have a less than 50 percent chance of materializing. They are not ignored on that account, but are properly represented by contingency allowance of the same percentage as the chance of the event's occurring. Moreover a Plaintiff who has laid the best available evidence before the Court should not be non- suited merely because his loss is difficult to quantify: the Court must do the best it can with the material at hand..."

[35] The remoteness of damages in general damages and special damages is a vexing question in the determination of those damages which are attributable to breach of contract. A distinction is made between intrinsic or general damages and extrinsic or special damages. Intrinsic damages are generally recoverable as being damages that flow naturally and generally from the kind of breach of contract in question and the result of which the parties had forseen or of which the law presumes the parties

contemplates as a probable result of the breach. On the other hand, special damages are ordinarily regarded in law as being too remote to be recovered unless, in the special circumstances prevailing at the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from breach. The question of whether the contemplation of the parties suffices or whether more is required, the Courts have suggested that a test based predominantly on the current accepted concept of causation in delict be applied to deal with the determination of remoteness of contractual damages. See HB Klopper (*supra* at page 305-309).

EVIDENCE AT TRIAL

[36] What evidence did the Plaintiff lead to quantify its damages at trial? The Plaintiff called into the witness box its director Mr Andrew Mazulu Mkhonta (hereinafter referred to as "PW1") to prove the Plaintiff's damages.

[37] For the E900 000 (Nine Hundred Thousand Emalangeni) claim, it filed for breach by the 1st and 2nd Defendants for what it termed breach of duty of good faith, contract of employment and fiduciary duty for which I will classify as extrinsic (special damages).

37.1 PW 1 testified in his evidence in chief that the 1st Defendant was employed by the Plaintiff as project engineer responsible for all the company business procurement i.e. getting tenders, designing and drawing aircondition layouts, he was responsible for bill of quantities, liaising with clients and managing six technicians of the company. He

said the Plaintiff's business was to design, supply, install and fix air-conditions in both domestic houses and Industrial buildings. It would do contractors work and sometimes sub – contractors work.

37.2 He testified that the 1st Defendant had worked for the company for atleast two years before he resigned (i.e from 2016 -2018). He was entrusted with all the projects that are a subject matter of the claim. He was therefore a trusted employee of the company second in command and, he controlled adverts, marketing and was paid E17 000 (Seventeen Thousand Emalangeni) per month.

37.3 He testified further that during the period of his employment and unknown to the Plaintiff, the 1st and 2nd Defendant opened and operated the 3rd Defendant Company in direct competition with the Plaintiff. As it turned out all the jobs they lost during the tenure of the tenders or the contracts were taken over and completed by Defendants. They also used the Plaintiff's contract tools, equipment and time to execute the Plaintiff's contracts under the guise that it was for the Plaintiff when it was not. The Defendants also used the Plaintiff's staff of whom they ended up taking over to work for the 3rd Defendant.

37.4 Between 2016 and 2018, the Plaintiff won a tender and was employed by a company called Sergeant Investment to design and install air conditioners and cooling system at a building called Madlenya House

at Mbabane. He testified that this is one of the projects that through failure by the 1st and 2nd Defendants to respect the Plaintiff's contract, they breached their fiduciary duties, took away its work causing damages in the tune of E900 000 (Nine Hundred Thousand Emalangeni).

37.5 He testified that the Sergeant Contract sum was for a sum of E4, 101,193 -02. (4 million One Hundred and One Thousand One Hundred and Ninety three Emalangeni Two Cents) At the opening of his testimony he undertook to bring his quantity surveyor to prove to the Court the contract sums and also to bring payment certificates to prove what was paid to the Plaintiff during the tenure of the contract and what was outstanding. I must record that no other witness was brought in except PW1.

37.6 PW1 brought in two bundles of documents, the 1st bundle which was marked bundle "A" had proof of registration documents of the 3rd Defendant and other documents that were admitted were the registration documents. The rest of the documents were not introduced and this has not helped the Plaintiff to quantify its claim.

37.7 PW1 introduced a second bundle which was marked Exhibit "B" those were Tax invoices that were issued by the Plaintiff to Sergeant Investments for payments. The first tax invoice is dated 21st March

2018 was for E1 621 509-00 (One million Six Hundred and Twenty One Thousand Five Hundred and Nine Emalangeni) with E227 011.26 (Two Hundred and Twenty Seven thousand Eleven Emalangeni Twenty Six Cents) sales tax totaling to E1 848 520 -26 (One million Eight Hundred and Forty Eight Thousand Five Hundred and Twenty Emalangeni Twenty Six Cents) This amount was paid to the Plaintiff in full on the 16th April 2018.

37.8 The second tax invoice is dated 6th June 2018 for an amount of E500 000.00 (Five Hundred Thousand Emalangeni) plus sales tax of E70 000.00 (Seventy Thousand Emalangeni) totaling to E570 000.00 (Five Hundred and Seventy Thousand Emalangeni) . The Plaintiff was only paid on the 11/06/2018 an amount of E400 0000.00 (Four Hundred Thousand Emalangeni) leaving a shortfall of E170 000.00 (One Hundred and Seventy Thousand Emalangeni).

37.9 On the 25th June 2018 a third invoice is dated 25th June 2018 for an amount of E651 482.99 (Six Hundred and Fifty-One Thousand Four Hardened and Eight Two Emalangeni Ninety Nine Cents) plus E91 207.62 (Ninety-One Thousand Two hundred and Seven Emalangeni Sixty Two Cents) sales tax totaling E742, 690.61 (Seven Hundred and Forty Two Thousand Six Hundred And Ninety Emalangeni Sixty One Cents). The Plaintiff was only paid an amount of E200 000.00 (Two Hundred Thousand Emalangeni) on the 20/07/2018 leaving a shortfall

of E542 690 .61 (Five Hundred and Forty-Two Thousand Six Hundred and Ninety Sixty-One Cents).

37.10 On the 18th October 2018, the Plaintiff issued a tax invoice for E 1 275 736.09 (One million Two Hundred and Seventy Five Thousand Seven Hundred and Third Six Emalangeni Nine Cents) plus sales tax of E191 360.41 (One hundred and Ninety one Thousand Three Hundred and Sixty Forty One Cents) totaling E1 467 096.50 (One million Four Hundred and Sixty Seven Thousand and Ninety Six Emalangeni Fifty Cents). It was only paid E1 Million on the 6th August 2018 leaving shortfall of E275 736.09 (Two Hundred and Seventy Five Thousand Seven Hundred and Thirty Six Emalangeni Nine Cents).

37.11 PW1 testified that there was an additional amount of E906 000.00 (Nine Hundred and Six Thousand Emalangeni) added to the contract sum (variation). No proof was produced by PW1 to substantiate this assertion. It will not therefore be considered.

[38] When PW1 was asked why Sergeant Investment paid in shortfalls of the amount invoiced. He testified that it was because the 1st and 2nd Defendant had not done the work or had not performed to the client's expectations. The Defendants had gone ahead to invoice Sergeant Investment knowing very well they had not performed to the job specifications. He stated further that he was shocked to find out that the same work that they had not performed

was taken away from the Plaintiff by the 1st and 2nd Respondents to be carried out by the 3rd Defendant, a company they formed to take away Plaintiff's work.

[39] From the aforesaid, PW 1 concluded (on the Sergeant claim) by stating that the Plaintiff suffered special damages in the shortfall between the amount that the Plaintiff had invoiced being a total sum of E4 628 307.37 (Four million Six Hundred and Twenty Eight Thousand Three Hundred and Seven Emalangeni Thirty Seven Cents) less what was paid by Sergeant investment, the sum of E3 448 520.26 (Three million Four Hundred Forty Eight Thousand Five Hundred and Twenty Emalangeni Twenty Six cents) leaving an outstanding amount of E1 179 387.37. (One Million One Hundred and Seventy Nine Thousand Three Hundred and eight Seven Emalangeni Thirty Seven Cents).

[40] In an attempt to substantiate the disgorgement of secret profits for breach of fiduciary duty in the sum of E10 million which I also classify an extrinsic (special damages) PW1 testified in examination in chief that;

40.1 There was another tender during the period of 2016 -2018 that the Plaintiff won from microprojects where they had to install air conditioners at the Government medical stores in Matsapha. The project was for 6 million which went up to 7 million. PW1 however, did not at all provide any supporting documents either in a form of contract or the tender award with the alleged amounts.

40.2 He testified further that the Plaintiff started to work on the project and similarly the 1st Defendant was project managing the Plaintiff's work. He testified that whilst the work was progressing around September 2017, the Plaintiff's workers were most of the time not found on site. The 1st Defendant would occasionally disappear unaccounted for, Plaintiff's equipment was used and he found out later that the 1st Defendant was working on Plaintiff's project under the 3rd Defendant. The Plaintiff lost the job to the 3rd Defendant.

40.3 He testified that his company in a good years would make 10 million. There was however no evidence produced to prove that the year 2017 was the year the Plaintiff made no such profit. In any event, there was also no evidence to substantiate any damages the Plaintiff suffered for the micro project tender. Although there are insinuations that the Defendants snatched away the tender there was no evidence on how it was snatched away and at what cost.

[41] The claim for an amount of E20 million said to be damages is firstly disjointed in the pleadings as in some places eg paragraph 12 of the particulars of claim is said to be plain damages. But in the prayer is said to be damages as a result of breach of fiduciary duty. It makes it very difficult for the court to even classify it as either general damages or special damages. It was at any rate never substantiated by PW1 in evidence.

[42] In the circumstances of the case per the analysis of the authorities in quantifying patrimonial damages for economic loss especially the assessment of contractual damages, I find that the Court has a level of discretion to exercise between two extremes. The first being that the Plaintiff is obliged to adduce sufficient evidence to enable a Court to assess damages, failing which his or her claim for damages is set to fail. Aaron's Whale Rock Trust (*supra*) on the one hand the much softer approach by Prof PQR Boberg (*supra*) who state that a Plaintiff who has laid the best available evidence before the Court should not be non – suited merely because his loss is difficult to quantify: the Court must do the best it can with the material at hand.

[43] In taking the above into account together with the vexing question of remoteness of damages in assessing general and special damages I am inclined to award damages in the amount of E1 179 787.37 (One million One Hundred and Seventy Nine Thousand Seven Hundred and Eighty Seven Emalangeni Thirty Seven Cents) on the Sergeant Investment contract. The difference between the contract sum, what was invoiced and paid and what was not paid as a result of the damage caused action or inaction of the Defendants. This is one kind of damages that is not improbable and it tend to flow from the breach as a matter of cause. There is also evidence that was adduced, best as the Plaintiff would do in the circumstances where the 1st Defendant had taken away all the staff that were handling the records, and he took away most of the records including the contracts.

[44] As for the claim for the E10 million and E20 million respectively, the forma stands to fail as there was no sufficient evidence that was adduced by the Plaintiff to enable to court to assess the damages. All that was said was that there was a contract of E6 million which went up to 7 million. There was nothing to support this allegation and nothing was led to help the Court assess why the claim was placed at E10 million in the first place. The Plaintiff has dismally failed to prove this claim altogether.

[45] The latter claim for E20 million should suffer the same fate as the forma in that it should also fail in it's entirety. Besides that it is distorted in its nature for the Plaintiff could not even characterize it as whether it was a claim for general damages or special damages, it simple does have any link to the cause of action. No evidence was adduced to prove this amount altogether.

[46] The result is that, the Plaintiff succeeds in its proof for extrinsic or special damages, for the Sergeant Project or tender in the amount of E1 179 787.00 (One million One Hundred and Seventy Nine Thousand Seven Hundred and Eight Seven Emalangeni).

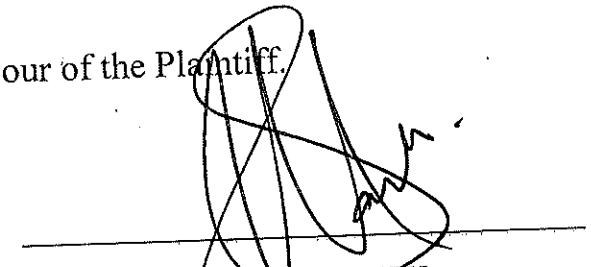
[47] In light of the foregoing conclusion the following order is made:-

[1] The Plaintiff is awarded the sum of E1 179 787.37 (On million One Hundred and Seventy Nine Thousand Seven Hundred and Eighty Seven Emalangeni Thirty Seven Cents) for extrinsic or special damages against

the 1st, 2nd and 3rd Defendants jointly and severally liable one paying the other to be absolved.

[2] Interest at the rate 9% per annum a *tempore morae* from date of judgment to date of payment.

[3] Cost in the ordinary scale in favour of the Plaintiff.



S.M. MASUKU
JUDGE - OF THE HIGH COURT

For Plaintiff: K.Q. Magagula of Sithole Magagula Attorneys

For Defendant: By default