IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 94/2007**

In the matter between:

GRAHAM RUDOLPH **Applicant**

and

MANANGA COLLEGE **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**M. SIBANDZE**
FOR RESPONDENT	**:**	**Z. JELE**

J U D G E M E N T 24/4/07

1. The Applicant was employed as Principal of Mananga College, a private school at Mananga near Tshaneni in the Lubombo District of Swaziland for a period of two years with effect from 1st April 2005.

2. In terms of the Applicant's letter of appointment dated 17th December 2004, the Applicant was to receive a monthly remuneration as set out

in an attachment to the letter. According to the letter of appointment read together with the attachment, gross monthly remuneration payable to the Applicant was as follows:

Basic salary	E30.000
Maid	500
Gardener	500
Car allowance	7500
	E38,500

3. The Applicant received other taxable benefits in kind, such as free accommodation, electricity, water, school fees and medical aid.

4. The attachment to the letter of appointment reflects that the monthly income tax payable by the Applicant on his total monthly package was E10,768. After deduction of tax and a small contribution towards school fees, the Applicant's net take-home monthly pay is reflected as E27,248.00.

5. The letter of appointment also records the Applicant's entitlement to an annual bonus equivalent to one month's basic salary; life insurance cover for an amount equal to four times his annual basic salary; and provident fund contributions by the College equivalent to twenty per cent of the Applicant's annual basic salary, free of tax.

6. It is common cause between the parties that during the negotiation of the Applicant's contract, it was agreed that the Applicant would receive a net monthly take-home pay of at least E27,000, and the remuneration package reflected in the letter of appointment was

structured inter alia to reflect this agreement.

7. In January 2006 a seven per cent increment was awarded to the Applicant, and in January 2007 a further six per cent increment was awarded.

8. On 25th July 2006, some seven months prior to completion of the two year contract, a formal contract was concluded between the parties extending the Applicant's employment at Mananga College for a further period from 1st March 2007 to 31st December 2008.

9. This renewal contract provides for a *"total basic salary at the rate of not less than E47191-90, inclusive of various allowances, and as determined by the Board at the time of the contract renewal."* The other benefits to which the Applicant was entitled in terms of the initial contract are retained in the renewal contract.

10. On the 29th January 2007, before the renewal contract came into operation the Chairman of the Board of Governors of Mananga College wrote to the Applicant referring to Article 6.1 of the renewal contract, which deals with remuneration. In his letter, the Chairman states:

"*Please show me, with calculations, how you arrived at the figure in the said quoted article. In the meantime the article will be suspended until further notice. It is therefore deemed null and void."*

11. Further correspondence which has not been included in the affidavits filed of record, apparently passed between the parties thereafter, in particular:

11. 1 a letter of explanation written by the Applicant on 31st January 2007; and

11.2 a reply from the Chairman of the Board accusing the Applicant of engineering the restructuring of his package, resulting in his overpayment.

12. On 20th February 2007 the Applicant tendered his written resignation in the following terms:

"In the circumstances , due to the unilateral breach of my contract of employment and the accusations of dishonesty I feel that I can no longer be reasonably expected to continue to be employed and I accordingly resign as Principal of Mananga College. I will serve four (4) months notice (equivalent to one term), terminating on 30 June 2007. I deem your action to constitute constructive dismissal."

13. The Respondent replied on the 22nd February 2007, to the effect that the Applicant's resignation is not accepted, and that he is suspended with immediate effect pending a disciplinary enquiry to be scheduled between 27th and 28th February 2007.

14. On the 13th March 2007,the Respondent wrote again to the Applicant stating as follows:

"1. Please note that your suspension will be on full pay.

2. Please further note that your salary will be adjusted to correct the overpayment as noted in the KPMG report effective from 1st February 2007. By copy of this letter, the Business Manager is requested to cause the adjustment such that it conforms with your letter of employment dated 17th December 2004 with its attachment to the offer of employment."

15. At the end of March 2007 the Respondent paid the Applicant a sum of E43,666-70 in respect of his gross remuneration. The pay slip reflects gross earnings as follows:

Basic salary	34026-00
Maid	567-10
Gardener	567-10
Car allowance	8506-50
	E43 666-70

16. On its face, the pay slip shows a shortfall of E3525-20 between the gross monthly remuneration payable in terms of the renewal contract and the gross remuneration actually paid for the month of March 2007.

17. The Applicant has applied to court on a certificate of urgency claiming an order:

17.1 That the Respondent be and is hereby ordered to pay the Applicant his contractual remuneration in accordance with the contract of employment "GR1" whilst Applicant's employment subsists.

17.2 That the Respondent be and is hereby order to refund the amounts unlawfully deducted from Applicant's salary for the period ended 31st March 2007.

17.3 Costs.

18. In his founding affidavit, the Applicant avers that in so far as the Respondent alleges that he engineered the restructuring of his remuneration package under the initial contract, which he denies, this has no bearing on the renewal contract, which entitles him to a fixed salary amount. The Respondent is not entitled to unilaterally vary his salary, particularly because it refused to accept his resignation and the pending disciplinary hearing involving charges of fraud has not yet been concluded.

19. Mr. Gilbert Ndzinisa, Chairman of the Respondent's Board of Governors has filed a comprehensive answering affidavit, in which he makes the following allegations.

19.1 The Board of Governors does not play an active role in the day to day operations of Mananga College, and they rely on information and advice furnished to them by the College management team, of which the Applicant as Principal is the leader.

19.2 When the renewal contract was negotiated, the Chairman mandated the Applicant to prepare the written document on the agreed terms. Regarding remuneration, it was agreed that the Applicant's package would be a continuation of his

package under the initial contract, subject to increments awarded.

19.3 The Applicant duly prepared the contract and inserted a gross remuneration figure, namely E47 191-90. The Chairman says that he queried this figure before he signed the renewal contract, but the Applicant represented to him that this figure was correct and had been verified. Relying on this representation and believing it to be true, Ndzinisa signed the contract on 25th July 2006.

19.4 After signing, Ndzinisa's doubts about the remuneration figure re-surfaced. He requested the Applicant for details on the computation, but this was not forthcoming. In January 2007 he decided to conduct an independent verification of the remuneration figure.

19.5 On being confronted with the unauthorized restructuring of his remuneration package, the Applicant resigned. The Respondent's auditors KPMG were furnished with the Applicant's pay slips and the initial contract, and they came up with a report on 4th February 2007. A copy of the report was produced in evidence. According to the report, the Applicant was overpaid by a sum of E108,104-00 during the course of his initial contract. The Applicant's basic salary for January 2007 should have been E34,026 after taking into account the two annual increments, but instead he received payment of E40 457 per the January 2007 payslip.

19.6 The Respondent refused to accept the Applicant's resignation and insisted that the Applicant attends a disciplinary enquiry on charges of financial misconduct involving allegations that he dishonestly restructured his contractual remuneration without the consent or authorization of the Board of Governors. That enquiry has not yet been concluded.

19.7 Ndzinisa caused the Applicant's remuneration for March 2007 to be paid on the basis of the computation contained in the KPMG Report instead of on the basis of the agreed remuneration contained in the renewal contract. He did so with the intention of preventing further unjust enrichment of the Applicant, and to ensure that the Applicant is remunerated at the rate which the parties intended, namely a continuation of the initial contract package subject to annual increments.

20. The Applicant has not filed any replying affidavit denying the facts deposed to by Ndzinisa. No objection was raised to the admission of the KPMG Report, which is not verified by any affidavit from the auditors. Ndzinisa states that the report confirms his own observations. In so far as the report sets out and analyzes figures obtained from the Applicant's own contract and pay slips, and the Applicant has not disputed these figures, the court will accept the report as a convenient arithmetical analysis. The court does however note that there is no proof that it was ever disclosed to KPMG that the parties agreed to a minimum net package of E27,000-00 under the initial contract.

21. In his affidavit filed in previous application proceedings regarding a

different albeit related dispute between the parties, the Applicant conceded that adjustments had been made to his remuneration package under the initial contract. These adjustments were made by the College's Business Manager after a new tax directive caused the Applicant's net salary to fall below E27,000. Further adjustments were subsequently made by the Assistant Business Manager.

22. According to the analysis contained in the KPMG Report, the adjustments to the Applicant's remuneration resulted in significant financial benefit to the Applicant:

22.1 The Applicant's basic salary was adjusted from E30 000 to E37 100 in July 2005, and his car allowance was reduced from E7 500 to E1 669. Since the calculation of end-of-year bonus was based upon basic salary, this adjustment of basic salary resulted in the Applicant being irregularly paid an annual bonus inflated by E6 508 in December 2005.

22.2 In January 2006, the Applicant's car allowance was increased to E8 025, whilst his salary was increased to E38,167. The authorized increment was 7%, but the adjustments resulted in the Applicant receiving an irregular increment of 19% over his remuneration in December 2005.

22.3 In December 2006, the Applicant was paid a bonus of E47 192 based on his total remuneration instead of his basic salary, resulting in a substantial overpayment.

22.4 In January 2007, the Applicant's basic salary and car allowance were increased by 6%. This increment was authorized by the Respondent but when applied to the irregularly inflated basic pay of 2006 it resulted in the Applicant's remuneration being further inflated.

22.5 The Respondent contributed twenty per cent of the Applicant's basic annual salary to a provident fund. The inflation of the basic salary naturally resulted in inflated provident fund contributions, to the Applicant's gain and the Respondent's detriment.

23. Leaving aside the overpayments of bonus and provident fund and focusing only on the adjustments to the Applicant's basic salary and vehicle allowance, it is readily apparent that the adjustments resulted in the Applicant's monthly cash remuneration being inflated far beyond mere compensation for an increase in his tax liability. As a comparative exercise, the court increased the Applicant's nett pay of E27,752 (salary and cash allowances less PAYE tax) shown in the package attached to the initial contract by the respective 7% and 6% increments. The resultant nett pay figure of E31,454 is substantially less than the E37,348 shown on the Applicant's January 2007 payslip (and incidentally it is also less than the nett amount of E33,089 shown on the March 2007 payslip). This exercise shows that the adjustments made to the Applicant's salary, if they were intended to maintain the minimum nett pay of E27000 plus increments, were flawed and operated to unjustly enrich the Applicant at the Respondent's expense.

24. It is not necessary for the court to express any opinion on the propriety

of the Applicant's remuneration being adjusted to cater for tax directives issued after the commencement of the Applicant's employment contract. It is however common cause that the Applicant was aware of these adjustments and he approved them. He did not inform the Board of Governors of the adjustments, nor obtain their consent. The Applicant asserts that he acted in good faith and accepted the benefit of the adjustments because they were done in order to ensure that he received the net amount promised to him when he signed the initial contract. Whether or not this is true, there can be no doubt that the Applicant endorsed a unilateral variation of his contractual remuneration, the same "self-help" for which he now condemns the Respondent.

25. It is common cause that the Applicant's remuneration under the renewal contract was to be a continuation of his remuneration under the initial contract, subject to the 2006 and 2007 increments. It is apparent from the analysis contained in the KPMG Report that the remuneration figure stated in Article 6.1 of the renewal contract is not a correct reflection of the remuneration to which the Applicant was entitled in terms of the common understanding of the parties.

26. In his affidavit filed of record in the previous application to court, the Applicant states with regard to the renewal contract as follows:

> "Before the Chairman, Mr. Gilbert Ndzinisa signed the contract "GR", he questioned the correctness of the salary reflected therein and I assured him that as far as I was aware the salary was correct, whereupon he signed the contract."

27. Later in his affidavit the Applicant states:

"On 5th *February, I again met with Mr. Ndzinisa who wanted calculations to prove how my salary was calculated. I showed him all my payslips and stated again that my package had not increased other than what was approved by the Board, 7% in 2006 and 6% in 2007"* (emphasis added).

28. The Applicant thus represented to the Chairman Gilbert Ndzinisa, both prior to and after he signed the renewal contract, that:

28.1 the remuneration reflected in article 6.1 was correct; and

28.2 his remuneration package had not increased beyond the increments approved by the Board.

These representations were false.

29. It is not necessary for the court to decide whether the Applicant knew, or should have known, that his representations were false - in other words, whether the misrepresentations were innocent, negligent or fraudulent. It is difficult to believe that the Applicant could have been unaware of the grossly irregular inflation of his remuneration by 19% in January 2006 instead of 7%. Nevertheless, this is a matter which may be left for determination by the disciplinary enquiry. Suffice it to say that the court is satisfied that the remuneration figure contained in Article 6.1 of the renewal contract does not correctly reflect the remuneration which was agreed upon by the parties during their discussion prior to the preparation and signature of the contract.

30. Mr. Nsibandze for the Applicant argued at the hearing that the

Respondent is precluded by the parole rule of evidence from leading evidence as to the discussions and intentions of the parties which preceded the signature of the renewal contract, and that the contract must stand as the sole record of the terms of agreement between the parties. It is however trite law that evidence extrinsic to the contract may be lead to prove that on account of fraud or common mistake the contract does not correctly reflect the terms upon which the parties intended to contract.

See **Weinerlein v Goch Buildings Ltd 1925 AD 282**
Meyer v Merchant's Trust Ltd. 1942 AD 253

31. The misrepresentation of the Applicant, namely that the figure correctly recorded the Applicant's initial remuneration package subject to the two annual increments approved by the Board, related to a material term of the contract and was clearly made with the intention of persuading Ndzinisa to sign the contract. We are satisfied that Ndzinisa relied on the Applicant's assurance, and was thereby induced to sign a contract reflecting a remuneration which he would otherwise not have consented to on behalf of the College.

32. In these circumstances, the Respondent has two legal remedies:

32. 1 the contract is voidable, and may be rescinded by the Respondent.

See **Hugo v Shandelier Hotel Group CC (in liquidation) & Another (2000) 21 ILJ 1884 (CCMA)**

Wille : Principles of SA Law (7th Ed) at 333-4.

or

32.2 the Respondent may enforce the contract on terms which correctly reflect the actual agreement between the parties.

See **Christie: The Law of Contract in SA (4th Ed) page 382 and the cases cited in note 69**

33. Mr. Jele for the Respondent argues that Ndzinisa repudiated the contract when he wrote to the Applicant on 29 January 2007 stating that Article 6.1 of the contract *"will be suspended until further notice. It is therefore deemed null and void."*

Mr. Jele argues that the Applicant accepted this repudiation on the 20th February 2007 when he resigned *"due to the unilateral breach of my contract of employment and accusation of dishonest",* and the contract was thereby rescinded.

34. It is by no means clear that Ndzinisa intended to repudiate the entire contract when he "suspended" article 6.1 "until further notice" and declared it null and void. It rather appears that his intention was to repudiate only the remuneration recorded in article 6.1.

35. Mr. Jele referred us to the dictum in the case of **Info DB Computers v Newby & Another (1996) ILJ 32 (W)** where the court stated – citing **Miller J in Stewart Wrighton v Thorpe 1974 (4) SA 67 (D) at 78 – 79** – that:

"… the repudiation of the contract by the Plaintiff in its vital respects

amounted to a repudiation of the whole contract and not only a portion thereof, and acceptance of such repudiation by the Defendant would terminate the contract as a whole."

36. Agreement as to terms of remuneration is one of the vital or essential elements of an employment contract.

-see **Wille & Millin : Merchantile Law of SA (18th Ed) at 349.**

It follows that the *effect* of Ndzinisa's rejection of Article 6.1 of the contract is to repudiate the whole contract, whether or not this was his intention.

37. The question remains whether this repudiation was accepted by the Applicant, thereby terminating the renewal contract.

In our view, it was not :

37.1 Ndzinisa declared article 6.1 null and void on 29 January 2007. Since the contract only commenced operating on 1st March 2007, this was an anticipatory repudiation of the contract.

37.2 The Applicant resigned on 20th February 2007, giving four months notice to terminate on 30 June 2007, i.e. four months after commencement of the renewal contract.

37.3 If the Applicant had intended to accept the repudiation of the renewal contract, such contract would thereby have

terminated and its operation would not have commenced at all. The Applicant's employment would have expired on termination of the initial contract by effluxion of time on 31st March 2007.

37.4 Instead, by giving four months notice, the Applicant clearly intended to hold the Respondent to the renewal contract which he required to commence and operate until 30th June 2007. Giving notice to expire four months into the term of the renewal contract is inconsistent with acceptance of a repudiation of the contract.

38. In our view, the legal effect of the Applicant's resignation on four months notice was to reject the Respondent's repudiation of the contract; to elect to enforce specific performance of the contract, at least for a period of four months; and to give one term's notice of termination of the contract. The Applicant's resignation has the effect of terminating the contract on 30th June 2007. Resignation is a unilateral act which does not require acceptance- see **Simon Dludlu v Emalangeni Foos Industries (IC Case No. 47/2004 at para 14.10** - so the Respondent's refusal to accept the resignation does not prevent the termination of the contract on the aforesaid date.

39. The conclusion of the court is that the Respondent's repudiation of the renewal contract was not accepted by the Applicant and did not result in rescission of the contract.

40. Indeed the court was surprised to hear Mr. Jele for the Respondent

arguing for the remedy of rescission, because both parties have manifested a clear intention to enforce the renewal contract:

40.1 The Respondent paid the Applicant for March 2007 after writing to him on 13th March 2007 to state that his salary would be adjusted to the correct figure; the Respondent is also persisting with its disciplinary action against the Applicant; and there is nothing in Ndzinisa's affidavit which suggests that he regards the renewal contract as cancelled.

40.2 The Applicant has tendered his services up to the end of June 2007, and he has come to court to enforce payment of the remuneration specified in article 6.1 of the renewal contract.

41. We accordingly reject Mr. Jele's contention that the renewal contract never came into operation because it was cancelled before its effective date of 1st March 2007. On the contrary, the contract commenced operating on 1st March 2007.

42. Since the renewal contract has come into operation and has not yet terminated, the Applicant is entitled to be remunerated during the four months period that the contract has left to run. The Applicant says he should be paid the remuneration reflected in Article 6.1 of the renewal contract.

43. The court has already held that article 6.1 of the renewal contract does not correctly record the remuneration agreed to by the parties, namely a continuation of the remuneration to which the Applicant was entitled

under the initial contract, subject to the authorised increments. To order payment of the amount in article 6.1 would mean perpetuating either an error or a fraud.

44. The Respondent has not counterclaimed for an order for rectification of the renewal contract to reflect the actual agreement of the parties as to remuneration, but this is not necessary: the Respondent can rely upon the error in the written contract as a defence without counterclaiming for rectification. It is sufficient if the Respondent has set out such facts as would entitle it to rectification.

See **Gralio (Pty) Ltd v D E Claassen (Pty) Ltd 1980 (1) SA 816 (A)** and **Christie (op. cit.)**

45. In our view it is irrelevant whether the error was due to both parties bona fide but wrongly believing the remuneration amount was correct, or due to the Applicant having intentionally misrepresented the correctness of the amount to the Respondent. In either case the Respondent may hold the Applicant to terms which correctly reflect the actual agreement between the parties.

See **Christie (op.cit.) at page 374 (note 34)**

46. There is no evidence that the Respondent has unlawfully deducted any amounts from the Applicant's March 2007 salary. The Respondent simply purports to be paying the Applicant the remuneration due to him in terms of the initial contract, subject to the authorized increments, as verified by the KPMG calculations.

47. In the premises, the Applicant has failed to establish that he has a

clear right to any of the relief prayed for in the notice of motion. The application stands to be dismissed. On the question of costs, there is no reason why the costs should not follow the event.

The application is dismissed with costs.

The members agree.

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PR DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT