



days from the day on which the debt became due;"

It is the Respondent's assertion that the Applicant's claim arises from a delict and as such the statutory notice ought to have been served on the Attorney General within ninety days from the day on which the debt became due.

The Applicant in the contrary has submitted that he was not obliged to give ninety days notice as his claim is founded on contract and not delict.

The only issue we should determine therefore is whether or not the debt the subject of this application is delictual or not.

Both the Applicant and the Respondent relied on the Law of Delict by Boberg Vol 1 1984 Ed. The author discusses the case of Pilkington Brothers (SA) (Pty) Ltd v Lillicnap Warsemaner & Partners 1983 (2) SA 157 (W), wherein at page 12 the learned author quoting from the judgement of Margo J. states:

"the test of delictual liability in the contractual setting is not whether there is an independent liability for breach of contract, but whether all the elements of delictual liability are present, including the legal duty to exercise due skill and care (even if such duty was assumed because of a contract), fault (intention or culpa in failing to discharge that duty), causation and damages of the kind recoverable ex delicto".

In this case the Applicant entered into a contract of employment with the Respondent. At all material times the Applicant was a head teacher at Sibusisweni High School, Manzini and continues to be employed as such by the Respondent.

On the 28th October 1996, the Applicant made a formal demand to the Respondent for payment of certain salary arrears arising from the Applicant being at the wrong salary grade for the period June 1986 to the date of the claim. The Respondent acknowledged that it was indebted to the Applicant for salary arrears in the sum of E26,509.90, and agreed to pay this amount to the Applicant.

The Respondent thereafter deducted a sum of E4,797.97 from its indebtedness to the Applicant and paid the Applicant the balance of E21,712.13. Such deduction is alleged by the Applicant to be contrary to the provisions of part V1 of the Employment Act of 1980 which Act governs contracts of Employment in Swaziland.

3

The Applicant claims his contractual entitlement and no more. He does not allege intentional or negligent breach of a legal duty to exercise due skill and care on the part of the Respondent neither does he claim patrimonial loss in respect of the contractual breach by the Respondent.

Although delictual and contractual liability may sometimes co-exist a party has a choice in the circumstances to found his claim on either. Whereas this claim is specifically pleaded to depend on a contract not only for its origin but also for its contents then the cause of action necessarily excludes any delictual liability that may have arisen in respect thereof since a party is held to stand or fall on its own pleadings.

It cannot be said then as has been argued by the Respondent that, in such circumstances, the claim is one of delict to the disadvantage of the Applicant. The existence of a collateral legal duty in delict and in contract should make no difference once a party as in this case has elected to found its case in contract.

Accordingly, the objection in limine is dismissed since the provisions to Section 2 (1) (a) of the limitation of legal proceedings against the Government Act applies only to claims arising from a delict.

The Respondent has withdrawn its defence on the merits and therefore, the application by the Applicant is allowed. Judgement is entered in favour of the Applicant in the sum of E4,797.00 with interest at 9% from the 28th October 1996 to date.

The members concur

NDERI NDUMA

INDUSTRIAL COURT PRESIDENT