

SOUTH AFRICA / JUDGMENT

Bodigelo v Public Investment Corporation Ltd (17573/08) [2010] ZAGPPHC 52 (2 July 2010)

[2010] ZAGPPHC 52

COURT

North Gauteng High Court, Pretoria

BEFORE

Msimeki

CASE / FILE NUMBER

17573/08

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG HIGH COURT, PRETORIA)

CASE

NO: 17573/08

DATE:

2/07/2010

In

the matter between:

KAGISO

GERALD BODIGELO PLAINTIFF

And

PUBLIC

INVESTMENT CORPORATION LTD DEFENDANT

JUDGMENT

MSIMEKI, J

INTRODUCTION

- [1] The Plaintiff instituted an action against the Defendant for payment to him by the Defendant of amounts representing remuneration of the nature contemplated in paragraph 3.4 of his particulars of claim and on the basis reflected in annexure "POC2" to such particulars of claim aggregating R 2. 345.534.00. The Defendant defended the action. The Plaintiff brought an application for summary judgment which the Defendant successfully resisted.

BRIEF SUMMARY OF THE BACKGROUND FACTS

- [2] The Defendant, according to the Chief Executive Officer of the Defendant, Mr Brian Molefe ("Mr. Molefe") is a juristic

person established in terms of section 2 of the Public Investment Corporation Act 25 of 2004. The Defendant has one shareholder namely the National Government of the Republic of South Africa duly represented by the Minister of Finance. The Defendant is the successor in title to the then Public Investment Commissioners. According to Mr. Molefe, the Defendant invests and manages, "on behalf of public sector entities' funds based on investment mandates set by each of the Respondent's clients and approved by the Financial Services Board, with which the Defendant is registered as a Financial Services Provider." The Defendant's organisational structure, according to Mr. Molefe, has two components which are:

1. The Asset Management Business which has four investment divisions comprising fixed income and dealing, equities, properties and the Isibaya fund.
2. Operations supporting the investments divisions. The pleadings reveal that the Plaintiff was employed by the Defendant as a junior manager: private equity and corporate finance with effect from 12 January

2004. The Plaintiff held the position until 1 December 2006, when he was promoted to a post of senior manager in the same division within the Isibaya fund. The Isibaya fund, according to Mr Molefe, was established by the Defendant pursuant to a decision which the Defendant's board took to diversify the Defendant's assets to include investments that provide infrastructure development, contribute to economic infrastructure and social responsibility. The Defendant manages 3.5% (the three comma five percent) of the total of the Government Employees Pension Fund's assets. Mr. Molefe reveals that the funding investments of the Isibaya Fund include equity, quasi equity and debt investments. The Defendant appoints a board representative to serve as a non-executive director ("nominee director") on the board of an entity which the Isibaya fund funded which is still indebted to the Defendant or the entity into which the entity funded has invested ("the counterparty"). All the funding/loan agreements, according to Mr Molefe, have this requirement. The nominee directors appointed by the Defendant to the counterparty boards, according to Mr. Molefe, come from the ranks of the employees of the Defendant. The Defendant avers that it charges fees such as 'Board fees' which are payable to the Defendant in accordance with the Defendant's Isibaya fund-policy and procedures manual said to be amended from

time to time and the latest of which is annexure "BM2" appearing on page 61 of the bundle to discovered documents. It is the Defendant's case that the Plaintiff, as the Defendant's employee, had been nominated by the Defendant to act as a non-executive director on the boards of the four companies that the Plaintiff refers to in paragraph 3.3 of his particulars of claim, and that in having been appointed as, and in performing his functions and duties as a non-executive director of the said companies, the Plaintiff performed his functions and duties as a manager : private equity and Corporate finance of the Defendant and that he was not entitled to payment of remuneration in addition to what is set out in annexure "DOC 1" to his particulars of claim. This, the Plaintiff disputes. It is the Plaintiffs contention that the Board fees and bonuses should be payable to him and not to the Defendant by the companies on whose boards he served.

THE ISSUE

- [3] The issue to be determined is whether the board fees and bonuses should be paid to the Plaintiff or the Defendant.

COMMON CAUSE FACTS

- [4] The following facts are common cause.

1. The Plaintiff was employed by the Defendant.
2. The Plaintiff at the time, served on four boards of the companies mentioned in paragraph 3.3 of his particulars of claim.
3. The Plaintiff had been placed on the said boards by the Defendant.
4. The Plaintiff, at the time, had been in the employment of the Defendant.
5. The Plaintiff had been placed there after having been so nominated and appointed by the Defendant.
6. The companies on whose boards the non-executive directors' served paid directors fees and bonuses.
7. The Defendant issued an instruction that the directors fees and bonuses in respect of the Plaintiff had to be paid to the Defendant

and not to the Plaintiff.

8. Such monies were paid into the Defendant's account.
9. Non-executive directors not employed by the Defendant retain the fees and bonuses paid directly to them.

- [5] The Plaintiff testified in support of his case and called no witnesses. Dr. D. Matjila ("Dr. Matjila") and Mr. Brian

Molefe ("Mr. Molefe") testified on behalf of the Defendant. The parties closed their cases whereafter I was addressed by their respective counsel, namely, Mr. Semanya on behalf of the Plaintiff and Mr. Bokaba on behalf of the Defendant.

[6] The Plaintiff in his testimony, confirms that he had been employed by the Defendant as a junior project manager. He confirms further that he later became senior project manager. He gave the court a brief summary of the nature of his work. He operated from the offices of the Defendant. He eventually was nominated and appointed as a non-executive board member on the boards of-

1. DCD - Dorbyl (Pty) Limited ("Dorbyl");
2. Blue Label Investments (Pty) Limited;
3. Kulungile Metals Group (Pty) Limited; and
4. Global Roefing Solutions (Pty) Limited where he looked after the interests of the Defendant. He specifically testified that he served on the boards at the instance of the Defendant and that his presence on the said boards had been at the behest of the Defendant. He also described the business of the Defendant explaining that the Defendant was an asset management Company which managed, inter alia, the Government Employees Pension Fund. The Defendant, according to him, funded various companies and that gave the Defendant the right to nominate a non-executive director to serve on the board of the entity that the Defendant funded. This would enable the Defendant to know if the money that it lent was used for what it was meant. He looked at the strategic issues of the funded company and that the company sustained itself going forward. He dealt with the issues which concerned him as the non-executive director but stated that he did not have to tell his senior of the decisions they took at the board meetings. Neither did he have to report on the activities of the company. This, in my view, appears a little strange particularly if regard is had to the fact that the Defendant had special interest in how the funded company progressed. He testified that his contract of employment did not provide for that. Payments flowing from his being a board member were made to the Defendant. He, however, at some stage questioned why the money had to be paid to the Defendant and not to him directly. He first raised this with his senior Mr. Tshepo Mahloele who was surprised to learn that the money was not paid to him direct as he was serving on the board of Telkom which was paying him directly. His senior was not called to confirm this and the evidence cannot be helpful. He again raised the issue with Albertinah

Kekana, the Chief Operating Officer who was not helpful either. He eventually raised the issue with Mr. Brian Molefe, the Chief

Executive Officer who informed him that he had needed to think about it. Nothing materialised. The last time he spoke to the CEO was when he was resigning and the issue fell away. He then resorted to legal action. None of the officers he spoke to told him that the board fees and bonuses had belonged to the Defendant. He dealt with e-mails between him and the officers of he

Defendant such as the e-mail on page 1 of the Bundle of Discovered Documents. The e-mails relate to the issue of the money. The e-mail of 30 May 2006 from him to Albertina Kekana deals with two issues, namely, the issue of indemnity and the issue of the board fees which he suggested be 'shared 50:50 between the nominee director and the PIC (the Defendant). Of significance is the e-mail from Mr Chris Ransome, the Chairman of Dorbyl, to the Plaintiff. The e-mail deals with the decision of Dorbyl to remunerate its non-executive directors. Paragraph two of the e-mail on page 3 of the Bundle states:

"Typically, the payment of non-executive directors' remuneration (after deduction of PAYE) will be made directly to the individual concerned with an IRP5 tax form being delivered to that person every year. In the event that an individual non-executive director requires this payment to be made to his employer or other entity, such director shall then inform DCD-Dorbyl of this whereafter appropriate alternative arrangements are to be made between the company and such director. "

One asks oneself a question as to why the Plaintiff would require the payment to be made to 'his employer' if the money was due to him.

He testified that his contract of employment does not state that the non-executive directors bonuses belong to the Defendant. The board meetings were held during weekdays with the permission of the Defendant. Such permission which according to the contract, was supposed to have been in writing was, however, not produced. The grievance hearing which was supposed to be heard dealing with the issues of the board fees and the bonuses was not proceeded with as the CEO had indicated that the matter had deserved to be resolved amicably. This, however, never happened. He resigned on 3 August 2007 and the Defendant accepted the resignation in its letter written by HR Manager, M Bezuidenhout. The issues of indemnity, board fees and bonuses was dealt with by the executive committee meeting on 8 June

2006. This appears on pages 58 and 59 of the Bundle to discovered documents. The Plaintiff testified that he had not attended the meeting; the contents of the extract from the minutes of the executive committee meeting held on 8 June 2006 had not been shown to him; he had not been given a copy thereof and that he had seen it for the first time when the document was given to him by his attorney. He had kept on raising the issue with the officers of the Defendant who had never intimated to him that the matter had been sorted out. He testified that the Isibaya Fund - policy and procedures manual is dated September 2006. The bottom of pages 62 to pages 84 reads:

"Policies and procedures manual - Isibaya (final), doc II January 2007."

He was referred to Board fees on page 74 whereupon he testified that he had never seen the document while he still worked for the Defendant. He was referred to page 96 of the Bundle and he testified that Tyalimpi was the head of Isibaya Fund. Paragraph (dd) deals with the rating that pertained to him. He was again referred to page 97 of the Bundle which is an e-mail from Ernest Loubser of Dorbyl which reflects that "R855.288.00 is bonus due to the PIC in respect of Kagiso Bodigelo."

He testified that he took the matter up with Albertina Kekana who advised him that the money had to be paid to the Defendant and that the issue would be considered when they sat for moderation rating. The witness was referred to page 99 of the Bundle and his response thereto was that it seemed bonus was paid in lieu of his performance and that the word "bonuses" was not mentioned. His resignation letter appears on page 100 of the Bundle.

He testified that page 134 is an e-mail from Mark Pamesky, the CEO of the prepaid company, a subsidiary of the Blue Label Telekom where he was an ex-director. The witness was cross examined. He confirmed that he was a salaried employee of the Defendant and that his relationship with his employer was governed by a written contract. He agreed that he would, in terms of the contract, 'devote the whole of his time and attention during the employer's normal business hours, and any additional time that may be required from time to time, exclusively to his assigned duties and functions'. Clause 10.2 provides:

"On occasion, owing to the nature of the Employee's position and the nature of the business and operations of the Employer, the Employee may be required to work such reasonable hours as may be necessary for the efficient performance of his duties, without any additional entitlement to remuneration, including on weekends and public holidays, and hereby agrees to do so."

He testified that he understood the contract. He agreed that he received bonuses from the Defendant. He also agreed that the letter on page 99 of the bundle dealt with his bonus and monthly salary for work that he did for the Defendant. He confirmed that he understood the contents of clause 24 of the contract of employment. He specifically testified that he had been nominated to sit on the boards as a non-executive officer while he was still an employee of the Defendant and while receiving a salary and bonuses from the Defendant. Their relationship was based on the contract of employment. He conceded that he sat as a board member at the behest of the Defendant. He testified that in terms of the Isibaya Fund - policy and procedures manual, fees were charged by the Defendant but that such was not the case while he was still employed by the Defendant. Referred to page 72 of the manual which deals with the fees, he testified that he had only seen the copy when same was given to him by his attorney. He was then referred to clause 17 on page 19 of the bundle and the board fees on page 74 of the bundle where it appears that the board fees are not payable to individuals but to the Defendant and his response thereto was that he was seeing that for the first time as no fees were charged during his time. He, however, agreed such was the position according to the documents. He testified, when asked about it, that he had never sent an invoice to the Defendant for board fees. He testified that he had been entitled to board fees and bonuses, over and above his salary and bonus. He conceded that he had suggested that the board fees be shared on 50:50 basis. He agreed that the minutes of

8 June 2006 had been subsequent to his proposal and that he understood the discussion referred to on page 58 of the bundle. He also agreed that his proposal was dealt with on page 59 of the bundle under (C). He, however, denied that he was called into the meeting and told of its outcome. He was referred to the second last paragraph of page 36 of the bundle which reads:

"It should also be noted that over and above the above average work that I perform for the PIC I contribute by bringing board fees (Kulungile Metals, BCD Dorbyl, Global Roofing Solution and Blue Label Investment) and non-executive board bonuses (DCD Dorbyl)."

and he agreed that he was not claiming directors fees but proposing that the Defendant should consider increasing his salary having regard to the contribution that he made by bringing in the board fees as a non-executive director. Told that that had been in line with the resolution of the Executive committee of 8 June 2006, he disagreed. He surprisingly, again agreed that he had wanted the Defendant to consider his contribution when the same question was repeated. He further agreed that that would take place when he was evaluated. He testified that he had not been privy to his evaluation. He was, however, forced to concede that he had been once he was shown pages 88, 91 and 92 of the bundle thereby contradicting his initial denial. He specifically told the court that he was no longer persisting with the denial. He thereafter admitted that his employment contract did not make provision for him to receive board fees and bonuses under the circumstances of his case as he sat on the boards of the companies while receiving salary and bonuses from the Defendant. He also admitted that the Isibaya manual does not provide for directors fees and bonuses payable to non-executive directors and that page 74 of the bundle only make provision for payment of such fees to the Defendant. He remembered that the resolution of the executive committee confirmed that. He confirmed that he and the Defendant had never agreed that he would receive board fees and bonuses while he was still employed by the Defendant. He finally conceded that his claim was based on the fact that the Defendant had received payment for the services that he had rendered while employed by the Defendant. The re-examination brought to light the fact that he was given a low mark when he was evaluated and that there had been no policy of Isibaya in place when he served as a board member or that such policy would have retrospective effect. The Plaintiff closed his case.

[7] The Defendant then called Dr. Matjila as its first witness. His testimony is briefly that he has been Chief Investment Officer since 1 April 2005. His duties entail being responsible for all the investment activities of the Defendant. He oversees the implementation of clients' mandates when monies entrusted to the Defendant are invested. He also sketched the business of the Defendant which is managing the assets of the government which includes managing the state pension fund as well as the unemployment insurance fund. The Defendant, in short, manages public funds. He explained what Isibaya fund is all about. Referred to page 61 of the bundle, he testified that that was the Isibaya fund - policy and procedures manual which governed the activities of Isibaya fund and which was first published in September 2006. The Plaintiff, according to him, has been employed by the Defendant as a junior private equity

analyst. He explained that the Defendant charges various fees for its work. He testified that employees of Isibaya got nominated to the board of the companies that were funded by the Defendant. The fees charged were reflected in the books as other income. The Isibaya fund falls under him. The executive committee consists of the Chief Executive Officer, Chief Operating Officer, Chief Investment Officer and Heads of Business Units. ("Departments"). The Executive Committee is responsible for operational matters i.e. the day to day running of the business. He was referred to the extract from the minutes of the Executive committee on pages 58, 59 and 60 of the bundle. He testified that he had attended the meeting which had discussed and resolved the issues that were tabled. He further testified that there was a committee whose assignment was inter alia to evaluate the investments and the investments in the Isibaya portfolio. The evaluation involves the non-executive directors who

provide the committee with valuable information. The Plaintiff did that too. According to him no one gets directors fees and bonuses.

The employees are paid in accordance with the employment contracts that they sign. He testified that he, too, did non-executive

directors duties for which he was not paid. This, he still does. The witness, when cross examined, conceded that he had been sitting in court when the Plaintiff testified. He agreed that the Defendant had representatives on its board. Referred to page 133 of the bundle he agreed that Telkom there tells the world how its finances look like; that T. D. Mahloele used to be the Plaintiff's senior; that he and the Plaintiff had been placed on its board and that the amounts reflected thereon had been received by the people whose names are shown there and that the correct position is that the amounts that are shown to have been received by the people whose names appear were actually received by the Defendant which had nominated them to serve on the boards. He testified that the first issue of the manual on page 61 of the bundle came out in September 2006 and that the Defendant had no policy before then showing that it could retain the fees of anybody. This included the period the Plaintiff did non-executive work for the Defendant. He agreed that the foot of page 62 of the bundle reflected the date of 11 January 2007. He agreed that the manual consists of 20 pages. He could not agree that the document had come about as a result of the issues that the Plaintiff had raised because the document had been in existence since 2006. He conceded that the document did not relate to the Defendant in its entirety or totality. He disagreed that someone's money (board fees) was retained without authority. According to him the employment contract clearly evidenced the exact state of affairs regarding the issue. He, however, conceded that the contract did not mention board fees. He also conceded that the contract did not refer to non-executive directors bonuses. He further conceded that the contract was signed in July 2006 while the policy came into being in September 2006. He again conceded that the money that came from Dorbyl had not come from the Defendant. The witness stressed that the Plaintiff was paid by the Defendant while he was on the board of Dorbyl. He conceded that the Dorbyl money was paid before the employee fixed-term employment contract was signed. He also conceded that companies paid company tax and not PAYE. He reiterated that the Plaintiff had been called to the Executive committee meeting on 8 June 2006. He would not

know why the Plaintiff kept on writing letters when he had been duly informed of the outcome of the meeting.

He reiterated that the Plaintiff had been duly informed of the outcome of the meeting. The version of the manual was according to him, never created to protect the big boys.

The re-examination revealed that no employee, since he joined the Defendant, had been paid board fees. There is equally no document

which shows that non-executive directors nominated by the Defendant are entitled to board fees. He testified that Ngwedzi is Albertina

Kekana, the Chief Operating Officer. The witness specifically testified that the monies which are said to have been received by the people mentioned on page 135 of the bundle were paid to the Defendant.

[8] The last witness for the Defendant was Mr. Molefe the CEO of the Defendant. He is highly educated with a string of qualifications. He joined the Defendant in 2003.

He had been Deputy Director General in the National Treasury. He explained the transition that took place from those days to the days of the Defendant. As CEO he is responsible for all the operations and technical investment activities of the Defendant. He had previously sat on the boards of various entities which he mentioned. The remuneration which he was supposed to receive while on those boards was paid to the Treasury. From the time he was with the Defendant the remuneration was paid to the Defendant. He did not receive remuneration outside his normal salary. He testified that the Defendant invests funds on behalf of the government. The Government Employees Pension Fund is the biggest fund they manage on behalf of the government. He explained the investment procedures to the court explaining that the Defendant deals with public funds. This includes nurses, teachers, policemen, magistrates and others who contribute to the fund. He explained what the Isibaya fund involves. He also serves on the board of Telkom SA and other companies at the behest of the Defendant.

Referred to page 135 of the bundle, he testified that the monies thereon shown were paid to the Defendant and not the people. Not to him either. He explained that the Plaintiff applied to join them when the employees were still the employees of the National Treasury. Mr. Semanya objected to two questions by Mr. Bokaba. The objection resulted in Mr. Bokaba intimating that an amendment would be forthcoming. Mr. Bokaba eventually abandoned the idea of the amendment. He testified that he chaired the Executive committee meeting on 8 June 2006. He repeated the issues that had been tabled for the meeting to deal with. These were insurance (indemnity), board fees and the bonuses. He had found it strange that Dorbyl was prepared to pay the board fees and bonuses as it intimated as that had been unheard of at the time. It was resolved that all board fees and bonuses should be paid directly to the Defendant. He requested that the Plaintiff be called into the meeting and be duly informed. That was done. He explained why the non-executive directors employed by the Defendant did not have to receive the board fees and bonuses.

Under cross examination, he conceded that as an employee of the Defendant he was not subject to Public Services Act. He further conceded that in terms of section 8 of PIC Act the board must control and not the Public Services Act. Told that Dr. Matjila had testified that before September 2006 there had been no policy which entitled the Defendant to take the board fees and bonuses of non-executive board members he answered that Dr. Matjila was a doctor of mathematics. He, however, testified that the Dr had erred if he had testified that the non-executive board members sitting on the boards had not been working for the Defendant. He then conceded that the said directors on the boards had been working for the companies and that they were remunerated for that. He denied that he had been evasive and difficult. He did not tell the court about the discussions he had with the Plaintiff because he had regarded that as insignificant. He testified that he had told the Defendant's employees of the application of the Public Investment Act to them. He did not know why the Plaintiff was not told by his lawyers that he had chaired the meeting and that the Plaintiff had been duly informed of the outcome. He conceded that it did not have to be resolved if there was a policy in place. He conceded that the Defendant employed non employees as directors and that they had no legal claim to their monies. He conceded that Kekana did not raise that there was already a policy in place. He disagreed that the Defendant had no right in law and in fact to retain the director's fees and bonuses. Re-examination revealed that the Plaintiff had had no agreement with the Defendant that he be paid directors fees. The Defendant closed its case.

[9] Both Mr. Semenya and Mr. Bokaba addressed me on the merits.

[10] When determining the issue it is always important to have regard to the evidence in its entirety. The contract of employment is paramount in that it governed the relationship between the parties. I will not in any way lose sight of the valuable documents which also have a bearing on the matter in the determination of the issue. Mr. Semenya in the main wanted to be shown the document which legally entitled the Defendant to retain the board fees and the bonuses paid to the Defendant in respect of the Plaintiff. The important clauses of the employment contract were referred to during the trial. It is important to again mention the some of them.

These are:

1. Clause 7 which deals with remuneration.
2. Clause 10 which deals with working hours.
3. Clause 11 which deals with responsibilities and duties. Clauses 11.1.7; 11.1.8; 11.1.9; 11.1.10; 11.1.11 and 11.1.13 are particularly important.
4. Clause 24 which deals with other remunerative work. This clause together with clause 11.1.8 are very important and need to be understood in their context.

[11] The evidence reveals that:

1. The common cause facts are as I have stated in paragraph 4 above.
2. The Defendant had an interest in the running of the companies that it funded. This is born out by the nomination by the Defendant of those who were to serve on the boards. The Plaintiff was one of them and Dorbyl is one such company.
3. The Plaintiff served on the boards of the 4 companies at the behest of the Defendant.
4. the Defendant when nominating the Plaintiff and appointing him to serve on the boards of the said companies had in mind the fact that the Plaintiff would still be working for it and that no additional remuneration would be paid to the Plaintiff for as long as he worked for the Defendant. It seems to me that the Defendant, placed the Plaintiff on the boards of the companies while retaining the rights and obligations contained in the contract of employment. This is evidenced by clauses 7.1; 10.2; 11.1.1; 11.1.3; 11.1.4; 11.1.5, 11.1.7;, 11.1.8; 11.1.9; 11.1.10; 11.1.11; 11.1.13; 11.2.1 and 24.
5. The Plaintiff did not misunderstand the employment contract. If he did not, surely one would have expected him to have dealt with what he did not understand at the very earliest opportunity particularly when the contract was concluded or shortly thereafter.
6. The Plaintiff understood and agreed that he be placed somewhere else while in the employment of the Defendant. He also understood and accepted that he would not receive additional remuneration over and above what he was paid by the Defendant. The e-mail of 29 June 2006 from the Plaintiff to Magda Bezuidenhout reveals that he had wanted the Defendant to consider the contribution that he made when he brought in the board fees when his salary and bonuses were considered by the Defendant. He so conceded under cross examination. This would happen when he would be evaluated. The evaluation would have been in line with the resolution of 8 June 2006.
7. The Plaintiffs contribution and performance was considered in the CEO's letter to the Plaintiff dated 12 June 2007 appearing on page 99 of the bundle. There is no evidence showing that the Plaintiff did not receive and accept the money referred to in the letter.
8. The Plaintiff was aware that he was not entitled to the board fees and the bonuses of the non-executive board members. Evidence in this regard is found in his e-mail of 29 May 2006 to Albertina Kekana. In issue number 2 on page 2 of the bundle, the Plaintiff is prepared to share the board fees with the Defendant. It is surprising that he comes with this proposal if one considers the fact that according to him, he and he alone is entitled to the board fees and the bonuses.
9. These aspects I have mentioned in paragraphs 1-8 above clearly demonstrate that the Plaintiff could not have laboured under any misapprehension, and in fact he did not.

10. The evidence of Dr. Matjila and Mr. Molefe whom I regard as good and reliable witnesses also evinces that the Plaintiff understood the employment contract and that, according to the contract, he would not be entitled to remuneration over and above what he was receiving by way of salary and bonuses from the Defendant.
11. The Executive committee met on 8 June 2006 and resolved as it did. This evidenced by the extract of minutes from the said meeting. Dr. Matjila attended the meeting and so did Mr. Molefe who chaired the meeting. Both witnesses testified that the Plaintiff was called into the meeting and given the outcome of the meeting.
12. That the e-mail from Ransome on page 3 of the Bundle is a little startling. Why would the Plaintiff decide that the non-executive

directors fees should be paid to the Defendant if the Defendant was not entitled thereto. This again shows that the Plaintiff knew that he was not entitled to additional remuneration over and above his salary and bonuses from the Defendant.

13. The Executive committee meeting merely confirmed what had been understood and accepted by the parties regarding the payment of the board fees and the non-executive board members bonuses.
14. Even if there had been no policy in place when Dorbyl made the payments to the Defendant in respect of the board fees and non-executive directors bonuses, the position, in my view, was very clear. The Plaintiff had not been entitled to the fees and the bonuses. The fact that the contract does not specifically refer to the board fees and the bonuses is, in my view, of no consequence.
15. The Plaintiff was not very bold and direct when he handled the question of board fees and bonuses. It is surprising why he did not deal therewith there and then when he was nominated and appointed as a board member. The need was not there because he understood the employment contract. This appears to be something that was considered by the Plaintiff after the employment contract was concluded and after the Plaintiff had been on the boards. One would have expected the Plaintiff to have, in so many words, told the Defendant that he was entitled to the board fees and the bonuses without even suggesting that the money be shared.
16. Additional remuneration (i.e. over and above what the Defendant paid the Plaintiff) needed an agreement between the parties which agreement should have been in writing. This much is clear because the board fees and bonuses constitute remuneration over and above the salary and bonus that the Plaintiff received from the Defendant. The Plaintiff appears to have been aware of this, hence he was prepared to share the money with the Defendant. On the other hand, because of his clear understanding of the employment contract, the Plaintiff asked the Defendant to seriously consider the contribution he made by sitting on the boards when his salary was considered. The Plaintiff does not seem to be someone who did not know his rights and obligations. 17. The Plaintiff appeared not to want to be helpful to the

court. He denied that he had been involved in his evaluation something which Mr. Bokaba quickly disproved forcing the Plaintiff to concede. His case is tainted with improbabilities. His evidence, therefore, cannot be relied upon. The cases that were cited, in light of the clear wording of the employment contract, in my view, do not seem to assist the Plaintiff either. The Plaintiffs claim, in the circumstances of the case, ought to be dismissed with costs.

[12] In the result, I make the following order:

The Plaintiffs claim is dismissed with costs.

M. W.MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 11 - 12 February 2010

For the Plaintiff: Adv. Semenya (S.C.) with Adv Clarke

Instructed by: Fluxman Attorneys

For the Defendant: Adv. Bokaba (S.C.)

Instructed by: Werksman Inc.

Judgment

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