

SOUTH AFRICA / JUDGMENT

Mlisa v South African National Space Agency and Another (2023/32341) [2024] ZAGPPHC 824 (1 August 2024) [2024] ZAGPPHC 824

COURT

North Gauteng High Court, Pretoria

BEFORE

S J R Mogagabe

CASE / FILE NUMBER

2023/32341

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023/32341

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

1 AUGUST 24

In the matter between: -

ANDISWA MLISA

Applicant

and

SOUTH AFRICAN NATIONAL SPACE AGENCY

First Respondent

CHAIRPERSON OF SOUTH AFRICAN NATIONAL

SPACE AGENCY

Second Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives via email and by uploading it to the electronic file of this matter on Caselines. The date of judgment is deemed to be 1 August 2024.

JUDGMENT

Summary: repudiation of a fixed-term contract of employment. Failure by defaulting party to comply with ultimatum to purge its breach and reinstate aggrieved party. Decision to reinstate preceded by the expiry of ultimatum and further conduct evincing or confirming termination of employment. Aggrieved party merely claiming a globular sum for damages. Assessment of damages – effect of failure of the aggrieved party to produce sufficient relevant evidence proving how such globular amount was computed to enable a court to assess her actual loss properly. Interpretation and application of South African National Space Agency Act 36 of 2008.

MOGAGABE AJ

INTRODUCTION

[1] This is a claim for contractual damages arising from the repudiation by the first respondent (SANSA) of the applicant's fixed-term contract of employment, in consequence of which the applicant claims damages arising therefrom against SANSA in the sum of R 6 476 515.52.

In essence, this matter revolves around the question whether a party to a contract, who has elected to abide by a repudiation and claim specific performance, may in the face of a persistent and unequivocal intention of the defaulting party not to be bound by the contract, change her or his election and accept the repudiation and sue for damages for repudiatory breach of such contract. I outline hereafter the background facts in order to appreciate the context that led to this application. However, before doing so, it is appropriate to provide the statutory framework in terms of which SANSA terminated the applicant's fixed-term contract of employment, as outlined hereafter.

APPLICABLE STATUTORY FRAMEWORK

- [2] The South African National Agency Act 36 of 2008 (the Act) governs the establishment, objects, and functions of SANSA. SANSA was established as a juristic person in terms of section 2(1) of the Act.
- [3] The objects of SANSA are contained in section 4 of the Act which amongst others include the promotion of the peaceful use of space; fostering research in space sites, communication, navigation, and space physics; advancing scientific, engineering, and technological competencies and capabilities through human capital development outreach programmes and infrastructure development and to foster international co-operation in space-related activities. The functions thereof are listed in section 5. SANSA's primary role is thus to ensure the peaceful use of space, implement any space programme in line with the policy determined in terms of the Space Affairs Act, and advise the Minister responsible for Education, Science and Innovation (the Minister) in respect of all space activities, and the

implementation and development of all space activities when so undertaken.

- [4] SANSA is governed and controlled in terms of the Act by a Board of directors. The Board consists of a chairperson, a CEO (as an ex officio member), and no less than 10 and not more than 15 members appointed by the Minister. The functions of the Board are listed in section 9 of the Act. For present purposes, the relevant parts thereof provide thus:

“9(1) The Board must perform any function imposed upon it in accordance with the policy direction issued by the Minister and in terms of this Act.

- (2) The Board must –
- (a) oversee the functions of the Agency [SANSA];
 - (b) ...
 - (c) ...
 - (d) notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objects of the agency.
- (3). The Board may, after consultation with the Minister, establish or disestablish organisational divisions of the agency.” (My emphasis)

- [5] Section 14 deals with the appointment of a CEO of SANSA. In terms of subsection (1) thereof, the Board must with the approval of the Minister, appoint a suitably skilled and qualified person as the chief executive officer, appointed for a term not exceeding five years. Subsection (5) thereof, provides that the CEO is responsible for the administration, general management, and control of the day-to-day functioning of the agency (SANSA), subject to the directions and instructions issued by the Board.

- [6] Section 15 deals with the employees of SANSA. For present purposes, the relevant part thereof reads:

“15(1) Subject to subsection (2), the chief executive officer –

- (a) must, on such conditions as she or he may determine, appoint such number of employees or receive on secondment such number of persons as are necessary to enable the Agency to perform its functions
 - (b) is responsible for the administrative control of the organisation and for the discipline of the employees and persons contemplated in paragraph ‘(a)’; and
 - (c) must ensure compliance with applicable labour legislation
- (2) The Board must approve –
- (a) the general terms and conditions of employment of the employees contemplated in subsection (1);

- (c) the structures for remuneration, allowances, subsidies and other benefits for employees contemplated in subsection (1) in accordance with the system approved by the Minister with the concurrence of the Minister of Finance.
- (3) The terms and conditions of employment contemplated in subsection (2)(c) must be broadly in line with the guidelines issued from time to time by the Minister responsible for the public service administration.”

FACTUAL BACKGROUND

- [7] In June 2017 the applicant was appointed as Managing Director: Earth Observation (“MD: Earth Observation”) for five years with effect from 1 October 2017 and terminating on 30 September
- 2022. This position was based on SANSA’s organisational structure which was effective and operational at the time of the applicant’s employment in 2017 (“the previous organisational structure”).
- [8] Pursuant to clause 14.2 of this contract, such appointment came to an end through the effluxion of time on 30 September 2022.
- [9] On or about 25 February 2022, SANSA’s CEO (Dr. Val Munsami) appointed the applicant, through a transfer, to the position of Executive: Commercial Services, for a fixed term period of five years effective from 1 March 2022 and terminating on 28 February 2027 (“the 2022 contract”). In doing so, Dr. Munsami was acting pursuant to the powers granted to him in terms of sec 15(1) of the Act. Nothing turns on this.
- [10] At the end of February 2022, SANSA’s CEO (Dr Val Munsami) vacated the position of CEO. As a consequence thereof, the Board appointed the applicant as Acting CEO for a period of six months with effect from 1 March 2022 to 31 August 2022. This acting appointment was extended from 1 September 2022 until the appointment of the CEO.
- [11] This position of Executive: Commercial Services was based on SANSA’s new business model and organisational structure approved by the Board in November 2020 (“the new organisational structure”). The implementation date thereof was 1 March 2022. This new business model and organisational structure were developed pursuant to the need to review SANSA’s service delivery model as so informed by the revised strategic plan for 2022-2025 including a culture survey and implementation plan.
- [12] In March 2021, the Board made a written submission to the Minister soliciting or seeking his endorsement or sanction of the new business model and organisational structure.

[13] The Minister responded thereto in writing in November 2021 to the effect that he approved the new business model, on condition that National Treasury agreed with the SANSA proposal. Further, the Minister requested the Board to provide an update(s) on the risk mitigation plan for the implementation of the new business model in six months i.e. by no later than May 2022. The relevant terms of the Minister's approval as per his letter are to the following effect:

"... I would like to approve the New Business Model on condition that National Treasury agrees with your proposal. I also wish the Chairperson of the Board to brief me in six months' time on the risks of rolling out the new business model will be mitigated and managed in line with the core mandate of SANSA." (my emphasis).[1]

[14] In January 2022, the Board of SANSA provided further clarity to the Department of Science and Innovation on, amongst other things, the new business model and organisational structure. In May 2022 the Minister in writing responded thereto, confirming his support for the commencement of the implementation of the new business model and assuring SANSA of the department's support regarding such initiatives, without attaching any conditions thereto. The relevant parts thereof read: (my emphasis)

"On the new business model, I accept the reasons that you have provided in the letter. I support that the implementation of the new business model commences. I also think that the pending institutional review can be of great assistance to SANSA as part of the risk mitigation that you have submitted to me."

I would also propose that we meet soon as agreed previously so that you may update me on the risks and mitigation plan that we have drafted and the progress on the implementation of the new business model. Please liaise with my office to set up the meeting. (my emphasis)

The Department of Science and Innovation (DSI) is committed to support SANSA on these initiatives."[2]

[15] The nett effect of such correspondence between the parties is that the new business model and organisational structure and the commencement of the implementation thereof were effected by the Board with the approval or endorsement of the Minister after the Board had consulted with the Minister or in consultation with the Minister.

[16] However, subsequent thereto, the Board of SANSA received a letter dated 15 February 2023 from the Minister, in terms of which the Minister raised the concern that SANSA had commenced with the implementation of the new business model and organisational structure (which he had approved or endorsed), without first submitting same to the National Treasury for approval and implementing same thereafter, and directed that SANSA should retain the previous organisational structure (i.e. the 2017 organisational structure) until the National Treasury approval process of the new developments is completed. The relevant parts of this letter read as follows:

“I also noted the changes made in the organisational structure and the addition of the Information and Communication Technology programme.

The revised organisational structure, the New Business Model and the Budget Programme Structure must be submitted to the National Treasury for approval first and implementation thereafter. The Department of Science and Innovation will engage SANSA with the purpose of submitting the said changes jointly to the National

Treasury. (my emphasis)

SANSA’s existing organisational structure must be retained until the National Treasury approval process of the new developments is completed. I have also noted with concern that the SANSA letter mentioned that the transition to the new structure is at an advanced stage. I hope that this relates to the preparations but not to have implemented the new structure.”[3] (my emphasis)

TERMINATION BY THE BOARD OF APPLICANT’S 2022 EMPLOYMENT CONTRACT

[17] On 20 February 2023, without the knowledge or unbeknown to the applicant, the Board held a meeting. At this meeting, the Board decided to terminate the applicant’s 2022 contract with effect from 22 February 2023, given the said letter received from the Minister to the effect that the implementation of the new business model and organisational structure was premature and required prior approval by National Treasury and as such the previous organisational structure (the 2017 organisational structure) must be retained until National Treasury approval is obtained, placing reliance on the “requirements of section (9)(3) read with section 15(2)(c) of the Act”. The reason or basis of the decision to terminate her employment contract is captured in para 30 of the replying affidavit as follows: “Because the adoption of the New Business Model was done without the required approval of the Minister of Finance, through National Treasury, the Board took the view that the implementation of the New Model and appointment of the applicant to a position in the New Model was unlawful and invalid.”[4]

[18] In consequence thereof, the Board maintained that the contract in terms of which she was appointed Executive: Commercial Services was invalidly concluded and thus null and void and thus terminated with immediate effect. For present purposes, the relevant parts of such letter are to the following effect:

“Subject: TERMINATION OF EMPLOYMENT

1. This serves to inform you that at this meeting held on 20 February 2023, the Board took a decision to terminate your employment with effect from 22 February 2023.
2. The Board was made aware of the following:

2.1 ...

2.2 That before the expiration of the abovementioned contract, you purportedly entered into a new five-year fixed term employment contract with the former CEO of SANSA, with effect from 01 March 2022 as the Executive: Commercial Services.

2.3 That your new appointment was based on the organisation's revised organisational Structure, New Business Model and New Budget Programme Structure.

3. However, the Board received a letter from the Minister of Science and Innovation ("the Minister") dated 15 February 2023, stating that the revised Organisational Structure, New Business Model and New Budget Programme Structure must first [be] submitted to National Treasury for approval prior implementation, and as such the existing Organisational Structure as depicted in figure 4 of the SANSA Strategic Plan 2020-2025 must be retained until National Treasury approval processes are completed, as per the requirements of section 9(3) read together with section 15(2)(c) of the SANSA Act. (my emphasis)
4. In view of the above, the Board has determined that the employment contract you entered into in terms of the revised Organisational Structure, in terms of which you were appointed the Executive: Commercial Services, was invalidly concluded and entered into by yourself and the former CEO, and as such, it is null and void. (my emphasis)
5. Please note that since your termination is with immediate effect, you are not required to serve notice as stipulated in clause 3.5 of SANSA's Termination, No-Fault Termination Policy ("the Policy"). Furthermore, as per clause 3.6 of the Policy, SANSA has resolved to pay you one month's salary in lieu of notice in addition to your last salary of February 2023.
6. ..."[5]

ELECTION BY THE APPLICANT TO ENFORCE THE CONTRACT AND DEMAND SPECIFIC PERFORMANCE (REINSTATEMENT)

- [19] On the same day of receiving the letter of termination on 22 February, the applicant via her attorneys of record wrote a letter to SANSA challenging the lawfulness of the termination of her employment contract based on the reasons advanced by SANSA for such termination, contending that such conduct (in the absence of legally valid reasons for the termination thereof) constituted a repudiation thereof on the part of SANSA. As such, she elected to abide by the contract (enforce the contract) and demanded specific performance (i.e. reinstatement of the employment contract (reinstatement to her position as Executive: Commercial Services) before close of business on 23 February 2023. In essence, the applicant gave SANSA an ultimatum/deadline to purge its repudiation and reinstate her contract before close of business on Thursday 23 February 2023. The relevant parts of such letter read:

"6.1 The reasons relayed by the Chairperson of the Board of SANSA, as contained in the termination notice, are not legally valid.

6.2 Our client [applicant] was provided with an employment contract that is not dependent on and/or conditional to the revised Organisational

Structure of SANSA, nor is this mentioned in the offer.

6.3 ...

6.4 That employment contract remains valid with its legal consequences, and neither SANSA nor the Board has the power to declare the employment contract as invalid and/or set it aside.

6.5 The terms and conditions of the employment contract do not allow for the termination thereof on the grounds that is(sic) being relied upon in terms of the termination notice.

6.6 ...

7. In light of the above, our client has instructed us to demand as we hereby do for following (sic):

7.1 that the termination notice that was communicated to our client on 22 February 2023, be retracted immediately.

7.2 a written undertaking from SANSA that our client will be reinstated as the Commercial Services Executive before close of business on 23 February 2023.

7.3 in the event that the above undertaking and reinstatement of our client is not provided as requested, we hold firm instructions to approach the High Court for appropriate relief ..." [6]

[20] On 23 February 2023, SANSA responded (via its Legal and Compliance Manager) in writing thereto, advising that they "are in the process of consulting internally and will provide her with our response to your demand on or before 3rd March 2023, close of business." [7]

[21] On 24 February 2023, the applicant (via her attorneys) responded thereto in writing, noting that her demand for reinstatement remained

unanswered and providing SANSA with "a final indulgence to comprehensively respond and/or comply with her demand by close of business on Monday, 27 February 2023...". More importantly, the letter recorded as per para 5 thereof as follows: "If your office fails to positively respond to our client's demand by Monday 27 February 2023 regarding the reinstatement of our client as requested, we hold firm instructions to approach the High Court for urgent relief regarding the unlawful termination of our client's

employment contract, and other ancillary relief which may be necessary" [8] (my emphasis). SANSA did not respond to such letter.

[22] On Sunday 26 February 2023, the applicant received a letter from SANSA's Human Resources Department (HR), outlining the exit process and requesting her to process exit-related forms including holding an exit interview with SANSA as well as signing an exit checklist form pertaining to returning SANSA's property. This letter was hand-delivered to the applicant. For present purposes, the following extracts thereof are relevant:

"Exit Process and Final pay

This exit document seeks to guide you through the process to be followed for your exit process. Following the Board's termination of employment letter, immediately terminating your employment with effect from 22 February. Please note that your exit process from SANSA will include the following: (my emphasis)

5 Exit interview:

- a) HR will contact you to arrange for an exit interview or send you an exit interview form to complete.

6 Exit checklist:

To ensure that SANSA property is returned, you are required to sign an exit checklist form after it has been processed by HR, ICT, Finance, Payroll & Facilities when they are satisfied that there are no outstanding property or items[9].

[23] SANSA failed to comply with the applicant's ultimatum, deadline or indulgence to respond to the applicant's demand by close of business on 27 February 2023. Furthermore, except for the said letter from HR, no communication or correspondence was received from SANSA on Tuesday 28 February 2023, regarding the applicant's demand for reinstatement.

[24] On Wednesday 1st March 2023 and on 2nd March 2023, SANSA in writing (via its attorneys of record) advised the applicant that the Board of SANSA had resolved to reinstate

applicant as the Commercial Services Executive and should resume her duties as such on 6th March 2023. The relevant parts of the letter of 1st March 2023 read:

"4. After rigorous deliberations, the Board of SANSA have (sic) resolved to reinstate your client as the Commercial Services Executive. Your client is to resume her duties on Monday, 6 March 2023.

5. In light of the above, SANSA will communicate with your client directly in respect of her return to work and the processes therein, on arrival at work."

[25] The relevant parts of the letter of 2nd March 2023 reads as follows:

"2. We confirm that your client will be resuming for(sic) duty on Monday, 6 March 2023.

3. Kindly be advised that Ms Mlisa should report to the Executive Boardroom at 09h00 for a meeting with Ms Sibongile Mazibuko, the

acting CEO. We request that you communicate the aforementioned to your client

accordingly.”[10]

[26] Applicant (via her attorneys) responded thereto by letter dated 3rd March 2023 in terms of which she inter alia, contended that the said letters were “vague and failed to address what her purported

reinstatement entailed ...” and that such letters “do not state whether she would be resuming her position within the existing organisational structure”, as well as questioning the failure to disclose “the purpose and agenda of the meeting with Ms Sibongile Mazibuko”. Furthermore, SANSA was informed that its conduct to terminate her employment contract was premature and unlawful and constituted a breach of contract by SANSA, which repudiation she had no choice but to accept and that as a result of such repudiatory breach and failure to comply with her demand for reinstatement by 27th February 2023, in consequence of which she claimed contractual damages against SANSA, in the sum of R6 476 415, 52 payable by close of business on 10 March 2023. For present purposes the relevant parts thereof read thus:

“6. Kindly be advised that our client’s demand dated 24 February 2023 sought a written undertaking from SANSA that she would

re-instated on or before close of business on Monday, 27 February 2023, but your client failed to adhere to this demand and instead

communicated via its HR Department the exist process with our client on 26 February 2023 and once again on 2 March 2023. This conduct

demonstrates that the purported reinstatement is not made in good faith.

7. Your client’s actions and conduct amounted to a premature and unlawful termination of our client’s employment contract, and the resultant breach of the employment contract, which has left our client with no other alternative, but to accept the repudiation of her employment contract.
8. Accordingly, we are instructed to inform you that our client has elected to accept the repudiation of her contract as a result of your client’s continued unlawful conduct leading to the unlawful and premature termination of our client’s contract without valid grounds, which amounts to a breach of contract.
9. Our client is hereby claiming contractual damages suffered a (sic) result of your client’s repudiation of the employment contract and the breach of contract, being the monetary equivalent of the remaining balance of her employment contract in the sum of R6 476 415,52 plus accruing annual leave (“damages”).
10. Accordingly, our client is providing your client with an opportunity to make payment in full towards the damages by close of business on 10 March 2023.”[11]

- [27] SANSA did not accede to the demand for payment of contractual damages. Instead, it responded thereto (via its attorneys) in terms of a letter dated 10th March 2023 marked “without prejudice” by SANSA. Applicant (via her attorneys) responded thereto by letter dated 14th March 2023[12] in terms of which she denied the contents of the said letter of SANSA. Furthermore, it was contended that her election to claim specific performance “would in any event have expired prior to SANSA’s attempt to purportedly reinstate her after she accepted the repudiation of her employment contract which was unlawfully terminated on 22nd February 2023” and persisted with her claim for damages to be paid by an extended final date of 16th March 2023, failing which she would approach the High Court for appropriate relief. Instead of complying with such extended date of payment of contractual damages, SANSA responded in terms of a letter dated 16th March 2023 in which it requested an indulgence to respond to the letter dated 14th March 2023 by 22 March 2023. However, SANSA failed to do so, in consequence of which the applicant launched the present application.
- [28] The respondents resist the claim essentially on the following bases. First, they deny any repudiation on their part of her contract of employment, asserting that same was invalidly concluded in violation of the provisions of sections 9(3) and 15(2)(c) of the Act, contending that as such the termination was lawful. Second, on the basis that as the applicant made an election to abide by the contract and claim reinstatement to her position as Executive: Commercial Services which demand was acceded to by SANSA, the applicant was bound by such election, with the attendant consequence of disentitling her to the relief so sought herein, contending that there is no evidence on the part of SANSA, evincing or demonstrating an unequivocal intention not to be bound by the employment contract. Furthermore, apparently in the alternative, it is contended that in the event of it being accepted that the terms of the exit policy letter by HR, evinced an unequivocal intention on SANSA’s part not to be bound by the contract, resulting in the applicant changing her election and claiming damages, her failure to communicate such change of election to SANSA was fatal to her claim for damages, as more fully dealt with hereafter.

REPUDIATION OF THE CONTRACT

- [29] As per the exposition of Corbett JA in Nash, a repudiation of a contract occurs in circumstances “where one party to the contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract”.[13] Where such repudiation occurs, the innocent party is entitled to elect to abide by the contract (reject the repudiation) and claim

specific performance or elect to accept the repudiation, cancel the contract and sue for damages, in which case such innocent party is inevitably bound by such election. In the event of the innocent party electing to accept the repudiation, and cancel the contract, the contract comes to an end upon the communication of the acceptance of the repudiation to the repudiating party and it cannot be revived or resiled therefrom. It is only in such instances that a claim for damages arises.[14]

[30] It is apposite to refer to the dicta of Nienaber JA in *Datacolor* to the effect that in ascertaining whether there was an unequivocal intention on the part of the defaulting party, not to fulfil its contractual obligations, “the emphasis is not on the repudiating party’s state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception.

The perception is that of a reasonable person placed in the position of the aggrieved party”[15]. As such, the test for repudiation is not subjective but objective. This being so, a repudiatory breach may be typified as a communication by the repudiating party, either by word or conduct and without any legal justification or lawful excuse demonstrating an unequivocal intention not to fulfil its contractual obligations.

[31] It is in the circumstances undisputable that an objective construction and assessment of the terms of the said letter by SANSA dated 22nd February, evinces a deliberate, clearcut and unequivocal intention on SANSA’s part to terminate forthwith (with immediate effect) the applicant’s employment contract, with the attendant consequences that with effect from 22 February 2023, her employment as Executive: Commercial Services, was terminated. This was done without any legal basis or legally valid reason in that the grounds that SANSA relies upon in terminating the employment contract are misplaced or misguided, for the reasons outlined hereafter.

ANALYSIS

reliance by SANSA on the provisions of sections 9(3) and 15(2)(c) of the Act

[32] It is appropriate at this juncture, to firstly deal with the provisions of sections 9(3) and 15(2)(c) of the Act, on which SANSA relies in terminating the applicant’s employment. These sections find no application herein. This is so, in that on a proper construction thereof, section (9)(3) enjoins the Board after consultation with the Minister to “establish or disestablish organisational divisions” of SANSA. It contemplates the “establishment or disestablishment of an organisational division” of SANSA, and not the changing, revision or review of the previous organisational structure and the replacement or substitution thereof with a “new business model and organisational structure”.

[33] Furthermore, there is no reference in this section enjoining the Board to seek the approval or sanction of the Minister of Finance or the National Treasury in respect of the changing or revision of the previous organisational structure of SANSA and the replacement thereof with

a new Business Model and Organisational Structure of SANSA, or for that matter in respect of the “establishment or disestablishment of an organisational division” of SANSA. Nor does this section enjoin the Board to consult with the Minister of Finance or National Treasury regarding the “establishment or disestablishment of an organisational division” of SANSA.

- [34] In any event, assuming without deciding (having regard to the fact that the term “organisational division” is not defined in the Act), that the changing or revision of the “previous organisational structure” of SANSA constitutes the “establishment of an organisational division” of SANSA, as contemplated in sec 9(3) of the Act, then and in that event, the establishment and commencement of the implementation thereof were done by the Board after consultation with the Minister and with the approval and endorsement of the Minister as outlined above. Accordingly, the purported reliance by SANSA on the provisions of section (9)(3) in terminating the applicant’s employment contract, is in the circumstances misconceived and misplaced.
- [35] Same applies to reliance on the provisions of section 15(2)(c) of the Act, insofar as it is contended that the applicant’s contract of employment was ultra vires and unlawful, having been concluded in violation of the provisions of section 15(2)(c). In developing this argument, it is asserted that as her contract was based on the new business model and organisational structure, SANSA adopted same without the approval of the Minister with the concurrence of the Minister of Finance. In doing so, SANSA acted in breach or violation of the provisions of section 15(2)(c), thus rendering the applicant’s contract of employment unlawful,

ultra vires and a nullity, hence the summary termination thereof. It boggles the mind as to SANSA placing reliance on the provisions of section 15(2)(c) in justifying the termination of the applicant’s employment contract, having regard to the fact that the entire section has nothing whatsoever to do with the establishment of a new business model and organisational structure of SANSA. On the contrary, the entire provisions of section 15 specifically deal with the employees of SANSA, inter alia their appointment and terms and conditions of their employment, HR policy, structures for remuneration, and employee subsidies, as set out therein.

- [36] Likewise, this argument is misguided or misconceived simply in that section 15(2)(c) does not apply to the changing or revision of the previous organisational structure of for that matter the “establishment or dis establishment of an organisational division” of SANSA. On the contrary, the provisions of section 15(2)(c) as outlined above, expressly authorise the Board to approve “structures for remuneration, allowances, subsidies and other benefits for employees contemplated in subsection (1) in accordance with a system approved by the Minister with the concurrence of the Minister of Finance”. (my emphasis). As

such, the changing or revision of the previous organisational structure of SANSA or for that matter the “establishment or

disestablishment of an organisational division” of SANSA does not require the Board to approve same, in accordance with a system sanctioned or approved by the Minister with the concurrence of the Minister of Finance or the National Treasury for that matter. In any event, a plain reading of this subsection clearly shows that the benefits expressly mentioned therein are restricted to or confined to employees contemplated in subsection (1) of section 15 and not nothing more. Subsection (1) in turn authorises the CEO to appoint on such conditions as she/he may determine, such number of employees or receive on secondment such number of persons, as are necessary to enable SANSA to discharge or perform its functions.

[37] Accordingly, reliance by SANSA on the provisions of sections 9(3) and 15(2)(c) of the Act, in justifying the termination of the applicant’s contract of employment is devoid of any substance, rendering the purported summary termination of her contract premature, wrongful and unlawful, with the attendant consequences that such termination without legally valid reasons or basis, constituted a repudiatory breach thereof. Any contention by SANSA asserting the lawfulness of such termination is in the circumstances misplaced and misconceived.

[38] The terms of the termination letter made it perfectly clear that the employment relationship between the parties had come to an end (albeit without legally valid reasons) with an immediate effect i.e. the termination of her employment contract was a *fait accompli*. As such, this constituted a repudiatory breach of the contract on SANSA’s part, entitling the applicant to make an election

regarding such repudiation.

ultimatum

[39] It is common cause that in terms of her letter dated 22nd February 2023, the applicant elected to enforce the contract and claim specific performance i.e. reinstatement of the employment

contract by SANSA. It is also common cause that as per such letter of demand, SANSA was given an indulgence or ultimatum to purge (remedy) its repudiation and reinstate the applicant by no later than close of business on 23rd February 2023. In response thereto, SANSA indicated as per its letter dated 23rd February 2023, that as it was “in the process of consulting internally about the matter and it will be able to respond to such demand on 3 March 2023”. In response thereto, the applicant by letter dated 24th February 2023, indicated that SANSA was given a “final indulgence to comprehensively respond thereto and/or comply with the

demand for reinstatement” by no later than close of business on Monday 27 February 2023.

[40] As such, this “final indulgence or extension” entails firstly that no further extension for the indulgence afforded to SANSA to purge its repudiation and reinstate the applicant by close of business on 27 February 2023, shall be granted. Secondly, such ultimatum/deadline entails that in the event of SANSA not complying with such ultimatum, the election to enforce the contract would cease to exist or remain extant. Thirdly, such ultimatum indicates that the

opportunity or indulgence afforded to SANSA to purge (remedy) its default/repudiation was not open-ended, entitling the SANSA to ignore same and choose to respond thereto at any time or any day suitable and convenient for it to do so. I point out that SANSA never raised any protestation relating to such

ultimatum/deadline nor is there any explanation let alone a reasonable one by SANSA explaining the failure to comply with such

ultimatum, or for that matter any indication as to when the decision by the Board to purportedly reinstate applicant was taken.

- [41] It is manifestly clear in the circumstances that the applicant's letter dated 24th February expressly or implicitly did not accede to SANSA's counter- offer to respond to such demand on 3rd March 2023. In other words, the counter- offer by SANSA (as per its letter dated 23rd February 2023) to respond to the demand for reinstatement on 3 March was not acceded to by the applicant.
- [42] It is manifestly clear on a proper construction of the letter dated 24 February that SANSA was given a "final extension" to reinstate applicant's contract of employment by no later than close of business on 27 February 2023.
- [43] It cannot be gainsaid that the main intention of the ultimatum/deadline was to afford SANSA an opportunity to purge its repudiation i.e. to reflect on its decision to unlawfully summarily terminate her contract of employment, having regard to the reasons or contentions advanced by the applicant in the letter dated 22 February 2023, and decide whether to accede to the demand for reinstatement, in compliance with such ultimatum/deadline. SANSA ignored such ultimatum without tendering any explanation for the failure to do so.
- [44] Such correspondence demonstrates that SANSA was initially given an ultimatum/deadline to reinstate applicant by no later than close of business on 23 February 2023, which deadline was later "finally extended" to Monday 27 February 2023, with the attendant consequence as outlined above. The nett effect of the failure by SANSA to comply with such ultimatum and reinstate the applicant by close of business on 27 February 2023 is as follows.
- [45] Firstly, it entails that the indulgence or opportunity afforded to SANSA to purge its repudiation and reinstate the applicant had ceased to exist or expired i.e. will no longer be operative or remain extant with the attendant consequences that such election to abide by the contract and seek reinstatement was no longer open for consideration and that any response from SANSA subsequent the expiry of the ultimatum would be unenforceable or have no binding force against the applicant. Secondly, it evinced a persistent and unequivocal intention on SANSA's part not to purge its repudiation and reinstate her i.e. not to be bound by the contract, (i.e not to fulfil its contractual obligations, when the time for performance arrived), entitling her to change her election and accept the repudiation and claim damages. Hence applicant contended as per para 6 of the letter dated 3rd March that Sansa "failed to adhere to her demand as per the letter dated 27 February for reinstatement

on or before close of business on Monday 27 February” and repeated in terms of the letter dated 14th March to the effect that her election to claim for specific performance (reinstatement) had “expired prior to SANSA’s

attempt to purportedly reinstate her after she accepted the repudiation of her employment contract”, entailed that the decision by SANSA purporting to reinstate her as per its letters dated 1st and 2nd March 2023, so communicated to her after the expiry of the ultimatum was in the circumstances unenforceable or not binding against her. In other words, the failure by SANSA to reinstate the applicant or to engage her regarding such reinstatement by no later than close of business on 27 February 2023, was in the absence of a lawful excuse or reasonable explanation therefor, fatal to SANSA’s purported reinstatement of the applicant, as per its letters dated 1st and 2nd March 2023 i.e. such failure evincing a persistent and unequivocal intention by SANSA not to be bound by the contract, rendered nugatory the decision taken by SANSA after the expiry of such ultimatum purportedly reinstating applicant to her position as Executive:

Commercial Services. In other words, the failure by SANSA to reinstate the applicant or to engage her regarding such reinstatement

by no later than close of business on 27 February 2023, was in the absence of a lawful excuse or reasonable explanation therefor, fatal to SANSA’s purported reinstatement of the applicant, as per its letters dated 1st and 2nd March 2023 i.e. such failure evincing a persistent and unequivocal intention not to bound by the contract rendered nugatory the decision taken by SANSA after the expiry of such ultimatum purportedly reinstating applicant to her position as Executive:

Commercial

Services, entailing that applicant in the face thereof, was at liberty to change her election, accept the repudiation and sue for

damages, based on the application of the principle of repentance.

[46] There are a plethora of cases pertaining to the application of the repentance principle. This principle is to the effect that notwithstanding the election by the aggrieved party to abide by the contract and claim specific performance, such party is entitled in instances where the defaulting party persists with its repudiation (when the time for performance had arrived and the defaulting party had failed to purge its repudiation), to change his or her election and reconsider his or her position by notifying the other party that he/she would no longer abide by the agreement (enforce the agreement), but would then regard such agreement as cancelled and sue for damages i.e. accept the repudiation, cancel the contract and claim damages. These cases are neatly summarised by Wepener J in Sandown Travel[16] and referred to by the Supreme Court of Appeal in Primat[17] and it is not necessary in the circumstances to rehash same, save where necessary.

[47] It is important to bear in mind that this repentance principle operates one way only i.e. in circumstances or instances where there is an anticipatory breach or repudiatory breach of a contract and the aggrieved party initially abided by the contract and claimed specific

performance, such aggrieved or innocent party, may at the time when performance in terms of the contract arrives and the defaulting party evinces an unequivocal intention not to be bound by the contract(i.e. not to fulfil his/her obligations in terms of the contract), the aggrieved party may change his or her mind and elect to accept the repudiation and sue for damages.[18]

- [48] The applicant contends that the letter dated 26 February 2023 (the exit policy letter) from SANSA's HR department, expressly informing her of the exit process to be followed consequent to the termination of her employment contract as per SANSA's letter dated 22 February 2023, evinced or demonstrated in the circumstances a persistent unequivocal intention on SANSA's part not to purge its repudiation and accede to her reinstatement (i.e. not to be bound by the contract), entitling her to change her election and accept the repudiation of the contract and claim for damages.
- [49] This document (exit policy letter) speaks for itself. To construe the contents thereof as otherwise than detailing or outlining the exit process to be followed by the applicant consequent to the termination of her employment as per the letter dated 22 February, would not only be equivalent to emasculating the terms and meaning thereof, but would also amount to doing extreme violence to the text, context and purpose thereof.
- [50] On the contrary, the terms of this letter to all intents and purposes evinced a persistent unequivocal and deliberate intention on SANSA'S part not to be bound by the terms of the employment contract (when the time for performance came) i.e. a persistent repudiatory breach not to fulfil its contractual obligations by reinstating the applicant to her position as Executive: Commercial Services). In short, it simply indicates an intentional and unequivocal refusal on SANSA's part to accede to the applicant's demand for reinstatement of the employment contract when the time for performance was due.
- [51] According to the applicant the reason that triggered the change of mind and election to accept the repudiation of the contract and claim for damages, was the said exit policy letter from SANSA's HR department expressly informing her of the exit process to be followed consequent to the termination of her employment contract, indicative or demonstrative of SANSA's unequivocal and deliberate persistence in not remedying its breach, hence changing her election, accepted the repudiation of the contract and claim damages, as so communicated to SANSA in terms of her letter dated 3 March 2023.
- [52] However, SANSA contends that in the absence of her failure to communicate to it such change of election, the applicant was bound by her election to claim reinstatement, which reinstatement was acceded to by SANSA in terms of its letters dated 1st and 2nd March 2023. Put otherwise, the failure by the applicant to notify SANSA of the change of her election was fatal to the relief sought

herein i.e. claim for damages.

[53] Insofar as it concerns the letters by SANSA dated 1st and 2nd March 2023 communicating SANSA's decision to reinstate the applicant in her position as Commercial Services Executive, the

applicant contends that such purported reinstatement was ineffectual being communicated after the expiry of the ultimatum or deadline

which she afforded SANSA to respond to her election to abide by the contract and claim reinstatement by no later than close of business on Monday 27 February 2023, as more fully outlined above. As such, the purported reinstatement by SANSA as per the said letters is unenforceable and not binding against her.

[54] I reiterate that the exit policy letter read with SANSA's letter of termination dated 22 February, constitutes in the circumstances, undisputable or irrefutable evidence of a persistent and unequivocal intention on SANSA's part not to be bound by the contract and reinstate the applicant. As such, it is important to highlight the fact that despite the letters by the Board of the 1st and 2nd March purporting to reinstate the applicant, this exit policy letter which rendered the termination of her employment contract as a *fait accompli*, was not retracted by SANSA. Nor does SANSA contend that it was unauthorised. On the contrary, SANSA acknowledges it and attempts to wish it away by asserting that the HR department wrote same, unaware of the engagement between the parties as evidenced by the aforesaid correspondence between the parties. Such feeble explanation cannot and does not do away with this exit policy document, particularly in that SANSA does not contend that it was unauthorised. In the circumstances, this exit policy letter in the absence of the retraction thereof, remains extant, operative and binding on SANSA.

[55] The decision by SANSA purporting to reinstate the applicant (as per the said letters of 1st and 2nd March) was preceded by the exit policy letter confirming or affirming the termination of her employment. This being so, in the absence of the retraction of this exit policy letter, the purported reinstatement of the applicant was in conflict with the termination

of her employment contract, as confirmed or affirmed by the exit policy letter, with the concomitant effect of rendering nugatory such purported reinstatement. This is so in that the decision by SANSA purportedly reinstating her, cannot in the absence of the retraction of the exit policy letter, be said to have superseded the confirmation by this exit policy letter of the termination of her employment contract. As such the decision by SANSA purportedly reinstating the applicant (as per the said letters of 1st and 2nd March) was rendered nugatory by the exit policy letter and unenforceable against the applicant, with the attendant consequence

of rendering effective the communication by the applicant to SANSA of the change of her election, acceptance of the repudiation and claim for damages, as per her letter dated the 3rd of March 2023.

[56] In any event, the decision by SANSA purporting to reinstate the applicant to her position of Executive: Commercial Services, was in the circumstances not genuine, mala fide and a sham, for the following reasons. Despite the decision to reinstate her to such position as per the said letters, SANSA conceded that the purported reinstatement of the applicant in her position as Executive: Commercial Services, could not have occurred or materialised, should the applicant have returned to work on 6 March, as so stipulated in these letters and instead proposed the following three scenarios that would have occurred, in the event of applicant returning to work on 6 March 2023:

[63.1] the National Treasury or Minister of Finance “could” subsequently have approved the new business model and new organisational structure (“first scenario”);[19] or

[63.2] in the event of National Treasury declining to do so, the applicant’s fixed-term contract would remain in place, however, the applicant would have been transferred to another position pursuant to the Transfer Policy of SANSA (“second scenario”).[20] I interpose to point out that the contention by SANSA in its answering affidavit and repeated by its counsel during argument to the effect that the employment contract makes no reference regarding the applicant being employed as Executive: Commercial Services (i.e contract is silent as her being employed as such), thus entitling SANSA to transfer her to any similar position within SANSA in accordance with this second scenario, is misplaced and unmeritorious. This is so, by virtue of the fact that in terms of the letter dated 25 February 2022 (to which was attached the contract of employment), authored by SANSA’s former CEO (Dr Munsami), the applicant was offered employment as Executive: Commercial Services, for a fixed – term period of five years with effect from 1st March 2022,[21] or

[63.3] if the parties could not agree on an alternative position, an amicable solution thereto would have been found by the parties in engaging in a section 189 consultation process in terms of the Labour Relations Act (“third scenario”).[22]

[57] It is manifestly and undoubtedly clear that all these scenarios are demonstrative of the fact that the purported “reinstatement” of the applicant on the part of SANSA (as per the said letters dated 1 and 2 March 2023), was in the circumstances, a “sham” or “hollow” decision, indicative of lack of bona fides on SANSA’s part. This is so, in that in essence, the actual reason that impelled SANSA to concede the inability or impossibility of reinstating her to the position of Executive: Commercial Services, was simply that such position had been rendered non-existent by virtue of the instructions of the Minister, directing the Board no longer to retain the new business model and organisational structure and instead revert to the 2017 organisational structure, having regard to the fact that she was employed such position in terms of the new business model and organisational structure. Hence, SANSA proposed the implementation of the said three scenarios, should she have returned to work by the 6th of March, as so stipulated in the said letters. This is indicative of the fact that when SANSA made the decision purporting to “reinstate” her as per these letters, SANSA to all intents and purposes knew or was aware that no such reinstatement of the applicant to

her position as Executive: Commercial Services would in the circumstances occur or eventuate being no longer in existence, with the attendant consequences that such purported decision to “reinstate” her constituted evidence of conduct evincing a persistent unequivocal intention on SANSA’s part not to fulfill its contractual obligations and reinstate applicant in her position as Executive: Commercial Services, in terms of the employment contract, entitling her to change her election. In the ultimate analysis, such conduct constitutes a disingenuous attempt on the part of SANSA to use such purported “reinstatement” as a ploy to implement the third scenario to retrench the applicant pursuant to the provisions of section 189 of the Labour Relations Act, as such position had become redundant, designed to achieve “damage control” on SANSA’s part. Such purported “reinstatement” being a “sham”, was not genuine, real or bona fide, with the concomitant consequence that the applicant was not bound by such “fake” reinstatement, taking into account that the applicant’s contract of employment was to render services as an Executive: Commercial Services and no other services. To hold otherwise, would be tantamount to countenancing an innocent party to be bound by a “fictitious or fake” reinstatement decision by the defaulting party, arising from the repudiation of a contract of employment. As such, the applicant was in the circumstances entitled to change her election and wrote the letter said communicating to SANSA her election (in the face of such persistent failure on its part to reinstate her to her employment position as aforesaid) to accept the repudiation and claim damages in the sum of R6 476 515.52, as per the terms of her letter dated 3rd March outlined in para [26] above.

DEFENDANT’S LIABILITY FOR DAMAGES

- [58] It is trite law that where a repudiation or breach of an agreement occurs, the innocent party in law has the choice (election) of either enforcing the contract or accepting the repudiation, cancel the contract, and sue for damages.[23]
- [59] It is also trite that the courts in matters of this nature, are entitled in the exercise of their discretionary powers to award damages rather than order specific performance of the contract. The exercise of such a discretion to award damages is subject to or depends on the particular circumstances of a case.
- [60] Such damages are awarded in lieu of specific performance which a court is entitled to grant. The damages are awarded as a surrogate for specific performance. It is important to point out that a claim or award of damages as a surrogate for specific performance has been consistently made in our courts and such a claim is competent in law. However, I am not inclined to award the applicant such damages in that she has failed to prove such damages, for the following reasons.

- [61] It is trite that the principle applicable in the assessment of the measure of damages for anticipatory or repudiatory breach of contract is that the innocent party should be placed in the position he would have occupied had the contract been performed by the defaulting party, insofar as that can be done by monetary award, subject to the discretion of the court. In this regard and to succeed, the claimant is required not only to plead but to prove such damages in the ordinary way as the authorities do not warrant a punitive assessment.[24]
- [62] In this case, the applicant has claimed damages in the sum of R6 476 515.22 plus accruing leave pay. There is no agreement between the parties concerning such damages. On the contrary, SANSA does dispute such damages so claimed by the applicant. [25]
- [63] However, despite merely pleading such a global amount, the applicant as required in terms of the law has failed to prove or quantify such damages to enable not only SANSA but the court to assess the correctness thereof. To this end, she has failed to state inter alia: the monthly salary she earned or annex a copy of her salary advise slip; whether such sum constitutes a gross or nett amount; whether the said sum includes or excludes the other benefits stated in the contract of employment; whether income tax in the form of PAYE had been deducted or taken into consideration in arriving at this globular amount; etc. All she did was to state that such globular sum represented the “monetary equivalent of the remaining balance of her employment contract”. In this regard, she has failed to specify the exact period of the remainder of the fixed term contract of employment in terms of which such a globular amount was calculated. She has also failed to specify the amount representing the “accruing annual leave” pay she is claiming. In law, it is undesirable if not incompetent for a court to embark on speculation and suppositions in assessing damages, in circumstances where there is no factual evidentiary basis or inadequate factual basis for doing so, and it being incompetent for a court to award an arbitrary approximation of damages in instances where a claimant has failed to tender relevant evidence and information for purposes of properly assessing her/his actual loss.[26]
- [64] In essence, then, the applicant has failed to produce factual evidentiary basis or sufficient relevant and necessary evidence or information proving how such a globular amount was computed and on what basis, to enable the court to properly assess her actual loss in this regard. To do otherwise will not only result in the court making an arbitrary award but would be tantamount to the court impermissibly embarking on conjecture in assessing the damages suffered.
- [65] As such, the applicant has failed to adduce sufficient evidence or information to substantiate her claim for damages, upon which I could make a finding regarding the correctness or propriety of the damages so claimed by the Applicant in the globular sum of R6 474 515.22 plus accrued annual leave i.e. could not grant judgment in favour of the Applicant in respect of the damages so claimed, flowing from the breach of her fixed-term contract of employment. Accordingly, the claim for damages cannot succeed and falls to be dismissed on this basis.

CONCLUSION

[66] In the light of the foregoing, I regretfully find that the applicant has not made out a proper case for the award of damages as a surrogate for specific performance based on SANSA's repudiatory breach of the applicant's fixed-term contract of employment.

[67] The applicant has achieved substantial success on the merits of the matter. I find no reason to depart from the rule that costs should follow the result.

ORDER

[68] Accordingly, an order of judgment is granted in the following terms:

[80.1] The decision of the Board of the first respondent (SANSA) taken on 20 February 2023, terminating the applicant's fixed-term contract of employment with the first respondent (SANSA), constituted a breach and repudiation of the applicant's fixed-term contract of employment.

[80.2] the applicant's claim for damages is dismissed.

[80.3] First respondent [SANSA] to pay the applicant's the costs of suit.

S J R MOGAGABE

Acting Judge of the High Court

Gauteng Division, Pretoria

Appearances: Counsel for the applicant: Grant Quixley (assisted by GSS Khoza) Attorneys for the applicant: Mohau Romeo Tsusi Law t/a MRT Law Inc Counsel for respondents: Tebogo Manchu SC Attorneys for respondents: Mothle Jooma Sabdia Inc. Date of Judgement: 1 August 2024.

[1] CaseLines FA 01-14 paras 32 and 33, 01-58, annexure AM5.1.

[2] CaseLines 01-14 to 01-15 paras 35 and 36, 01-62 to 01-63 annexure AM5.2.

[3] CaseLines 02-56 to 02-57 annexure HM7.

[4] Caselines 02-12 to 02-13 para 30

[5] Caselines 01-60 to 01-61 annexure AM 6.

[6] CaseLines 01-64 to 01-67 annexure "AM7"

[7] Caselines 01-68 annexure "AM8"

[8] Caselines 01-69 to 01-70 annexure AM 9.

[9] Caselines 01-71 to 01-72.

[10] Caselines 01-73 to 01- 76

[11] CaseLines 01-77 to 01-79.

- [12] Caselines 01- 80 to 01-81.
- [13] Nash v Golden Dumps (Pty) Ltd 1985
- (3) SA 1 (A) at 22D-H.
- [14] Nash at 22D-F; Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 1986
- (2) SA 537 (C) at 542E-F, Unreported judgement of the Supreme Court of Appeal in Dave Pretorius v Kenneth Bedwell (659/2020)
- [2022] ZASCA 4 (11 January 2022) para 10.
- [15] Per Nienaber JA in Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd [2000] ZASCA 82; 2001 (2) SA 284 (SCA) para 16; [15] Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality
- [2017] ZASCA 73 (1 June 2017), 2017 (5) SA 420 (SCA) para [29].
- [16] Sandown Travel (Pty) Ltd v Cricket South Africa [2012] ZAGPJHC (7 Dec 2012); 2012 (2) SA 502 (GSJ) paras 39 to 51
- [17] Primat fn 15 paras [12] to [28].
- [18] Merry Hill (Pty) Ltd v Engelbrecht 2008
- (2) SA 544 (SCA) para 550F-I; Sandown Travel paras [48] to [51]
- [19] CaseLines AA para 40 p98.
- [20] CaseLines AA para 41 p98.
- [21] Caselines AA 01-40 TO 01-42 annexure AM.3.1
- [22] CaseLines AA para 42 p99.
- [23] Christie: The Law of Contracts in South Africa, 8th Ed, p658,
- [24] Farmers Co-operative Society v Berry 1912 AD 343; Victoria Falls & Tvl Power v Consolidated Langlaagte Mines 1915 AD 1 at 22; Woods v Walters 1921 AD 303 at 310
- [25] CaseLines AA 02 -26 para 85.
- [26] Monument Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) at 118E

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