

SOUTH AFRICA / JUDGMENT

Mogale and Another v National Health Laboratory Services (JS958/2019) [2024] ZALCJHB 362 (13 September 2024) [2024] ZALCJHB 362

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JS958/2019

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FLYNOTES:

LABOUR – Damages against employee – Breach of contract – CEO and CFO of National Health Laboratory Services (NHLS) – Fruitless and wasteful expenditure – Irregular and unauthorised payments – Displayed severe negligence and incompetence, resulting in damage to NHLS – CEO should have been looking out for interests of NHLS – Exceeding delegations of authority – Former CEO to pay R22,135 346.70 to NHLS – Claims for unfair dismissal of CEO and CFO dismissed – Constitution, s 217 – Public Finance Management Act 1 of 1999.

THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
Case no: JS 958 /2019

In the matter between: JOYCE
MOGALE
First
Applicant
MASELLO
JOHANNA NNAMOKGWANE ZULU
(In
her capacity as the executrix of the estate of
the
late SIKHUMBUZO ZULU)
Second
Applicant
and
THE
NATIONAL HEALTH LABORATORY SERVICES
Respondent

Heard: 28 – 31 August 2023, 5 – 9 February and 25 March 2024
Delivered: 13
September 2024
This
judgment was handed down electronically by consent of the parties’
representatives by circulation to them via email.
The date for
hand-down is deemed to be 13 September 2024.

JUDGMENT

PRINSLOO, J

Introduction

- [1] On or about 1 September 2015, the First Applicant (Ms Mogale) was appointed as the Respondent’s (Respondent or NHLS) Chief Executive Officer (CEO) on a fixed-term contract of five years, expiring on 31 August 2020. On or about 16 March 2015, the Second Applicant (Mr Zulu) was appointed as the NHLS’ Chief Financial Officer (CFO) on a fixed-term contract of five years, expiring on 31 March 2020.
- [2] Ms Mogale was suspended from her services at the NHLS on 22 February 2017 and Mr Zulu was suspended on 23 February 2017. They received their respective notices to attend a disciplinary hearing on or about 4 April 2017.
- [3] The disciplinary hearing commenced and after some delay, caused inter alia by the appointment of a different chairperson, but prior to the conclusion of the disciplinary hearing, the NHLS abandoned some of the charges against Ms Mogale and Mr Zulu.
- [4] The disciplinary hearing ultimately proceeded on the following charges proffered against Ms Mogale:

‘Charge 5: Exceeding delegations of authority

You entered into and/or concluded the Service Level Agreement (“the SLA”) with Blue Future Internet and Surveillance (Pty) Ltd (“Blue Future”) for the amount of R 83 902 000.63 for the supply, maintenance and service of end-user computer hardware. The said amount being in excess of the Delegation of Authority delegated to you by the Board on 24 February 2016, which Delegation approved the tender for an amount of R 25 985 921.10.

In acting in the manner as set out above:

1. you contravened the provisions of the PFMA, in particular section 83(3);
- 1.25cm; margin-bottom: 0cm; line-height: 150%"> 2. you caused the employer to incur fruitless and wasteful expenditure in excess of the amount of R57 916 079.53;
3. you contravened the provisions of the NHLS’ procurement policy (“the procurement policy”);
4. you failed to perform your tasks and/or job responsibilities as the CEO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code and also as expected by the virtue of the position you hold; and
5. you were grossly negligent and/or derelict in performance of your duties as the CEO; and
6. you failed to apply your mind and consequently failed to act in the best interest of the employer.

Charge 6: Irregular payments made to service provider

You allowed and/or caused irregular and/or unauthorised payments to be made to Blue Future in the amount of R93 219 702.26 for the period April 2016 to September 2016.

1. you contravened the provisions of the PFMA in particular, section 83(3);
2. you contravened the provisions of the NHLS’ procurement policy;
3. you failed to perform your tasks and/or job responsibilities as the CEO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code, and also as expected by virtue of the position you hold;
4. you were grossly negligent and/or derelict in performance of your duties as the CEO; and
5. you failed to apply your mind and consequently failed to act in the best interest of the employer.

Charge 7: Irregular appointment of Afrirent:

You allowed and/or caused the irregular and/or unauthorised appointment of an entity called Afrirent (Pty) Ltd (“Afrirent”), as a service provider to the NHLS.

In acting in the manner as set out above –

1. you contravened the provisions of the national treasury regulation, in particular practice note 6 of 2007/2008;
3. you contravened the provisions of the PFMA, in particular section 57 and Regulation 32.2.4;
4. you caused the employer to incur irregular expenditure;
5. you failed to perform your tasks or job responsibilities as the CEO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code, and also as expected by virtue of the position you hold;
6. you were grossly negligent and/or derelict in performance of your duties as the CEO and;
7. you failed to apply your mind and consequently failed to act in the best interest of your employer.

Charge 8: Exceeding delegations of authority

You entered into and/or concluded the Service Level Agreement ("the SLA") with Afirent, for the amount of R79 691 269.33 for the leasing of motor vehicles for the NHLS. The said amount being in excess of your Delegation of Authority, which delegation is limited to an amount of R 20 000 000.00.

- 1.25cm; margin-bottom: 0cm; line-height: 150%"> 2. you contravened the provisions of the NHLS' procurement policy;
3. you contravened the PFMA in particular section 57;
 4. you failed to perform your tasks and/or job responsibilities as the CEO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code, and also as expected by virtue of the position you hold; and
 6. you failed apply your mind and consequently failed to act in the best interest of the employer.

Charge 9: Exceeding delegations of authority

You entered into and/or concluded an addendum to the Service Level Agreement with DV8 Consulting CC to amend the contract value to an additional amount of R 63 500 000.00 for the provision, maintenance and support of end-user MPLS VPN. The said amount being in excess of the Delegation of Authority delegated to you by the Board on 24 February 2016, which delegation approved the tender for an amount of R85 449 243.17, only.

1. you contravened the provisions of the PFMA, in particular section 83(3) as well as section 57(a) and (d);
3. you failed to perform your tasks and/or job responsibilities as the CEO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code and also as expected by the virtue of the position you hold;

5. you failed to apply your mind and consequently failed to act in the best interest of the employer.'

[5] The charges pursued against Mr Zulu were as follows:

'Charge 6: Irregular expenditure

You allowed and/or caused irregular payments to be processed to Blue Future Internet and Surveillance (Pty) Ltd, amounting to R93 219 702,26 during April 2016 to September 2016.

1. you caused the employer to incur unauthorised expenditure in excess of the amount of R57 916 079.53;
2. you contravened the provisions of the NHLS' procurement policy;
3. you contravened the provisions of the PFMA, in particular section 57;

1.25cm; margin-bottom: 0cm; line-height: 150%"> 4. you failed to perform your tasks and/or job responsibilities as the CFO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code and also as expected by the virtue of the position you hold; and

5. you were grossly negligent and/or derelict in performance of your duties as the CFO's; and
6. you failed to apply your mind and consequently failed to act in the best interest of the employer.

1. you contravened the provisions of the national treasury regulations, in particular treasury practice note 6 of 2007/2008;
2. you contravened the provisions of the NHLS' procurement policy);

1.25cm; margin-bottom: 0cm; line-height: 150%"> 4. you caused the employer to incur irregular expenditure;

5. you failed to perform your tasks and/or job responsibilities as the CFO diligently, carefully and to the best of your ability as required in terms of your contract of employment and/or in terms of the code, and also as expected by virtue of the position you hold;
6. you were grossly negligent and/or derelict in performance of your duties as the CFO and;
7. you failed to apply your mind and consequently failed to act in the best interest of your employer.'

- [6] Ms Mogale and Mr Zulu were found guilty on all the aforesaid charges and they were summarily dismissed on 2 May 2019. They subsequently referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and on 26 June 2019, a certificate of outcome was issued, recording that the dispute remained unresolved and that the dispute may be referred to arbitration. The Applicants duly requested that the dispute proceed to arbitration.
- [7] On 18 July 2019, the NHLS launched an application to the Director of the CCMA in terms of section 191(6) of the Labour Relations Act[1] (LRA) in which it sought an order to consolidate the dispute under case numbers GAJB 12642/19 and GAJB 12087/19 and to refer the said dispute to the Labour Court in terms of section 191(6) of the LRA read with Rule 33 of the CCMA Rules.
- [8] The Applicant opposed the application but on 30 July 2019, the CCMA issued the following

ruling:

‘The Section 191(6) application to refer the matter to the Labour Court is granted. Case No GAJB 12642/19 is hereby consolidated with case number GAJB 12087/19. The dispute is to be referred to the Labour Court.’

- [9] Subsequently, the Applicants launched proceedings in the Labour Court contesting the fairness of their dismissals and the NHLS has launched a counterclaim for damages, premised on the alleged breach of the Applicants’ employment contracts.
- [10] In essence, the issues to be decided are:
1. The Applicants’ case: Whether the dismissals of Ms Mogale and Mr Zulu were procedurally and substantively fair; and
 2. The Respondent’s case: Whether Ms Mogale and Mr Zulu acted in breach of their contracts of employment; and if so, whether the NHLS suffered the contractual damages claimed, as a result of the alleged breach(es).

The Applicants’ pleaded case

- [11] The Applicants’ statement of claim sets out the material background facts and records the issues to be decided as being, whether their dismissal on 2 May 2019 was procedurally and substantively fair and if it was unfair, the appropriate relief is to be determined.
- [12] In *Harmse v City of Cape Town*[2] (Harmse), the Labour Court considered the purpose of a statement of claim and held that:

‘[6] The statement of claim serves a dual purpose. The one purpose is to bring a respondent before the court to respond to the claims made of and against it and the second purpose of a statement of claim is to inform the respondent of the material facts and the legal issues arising from those facts upon which applicant will rely to succeed in its claims.

- [7] The material facts and the legal issues must be sufficiently detailed to enable the respondent to respond, that is, that the respondent must be informed of the nature or essence of the dispute with sufficient factual and legal particularity so that it knows what it is that the applicant is relying upon to succeed in its claim.'
- [13] In *South African Breweries (Pty) Ltd v Louw*[3], the Labour Appeal Court (LAC) held that the mantra expressed in a statement of claim where an applicant averred that his dismissal was both 'procedurally and substantively unfair', is a stock phrase that is hardly ever useful in communicating what exactly is the causa of the unfairness, which is what both Court and counsel need to know in order to address it. The terms of the pre-trial minute narrow the permissible grounds upon which the cause of action is to be presented.
- [14] In casu, the parties signed a pre-trial minute and the Applicants merely repeated their claim that their dismissals were procedurally and substantively unfair. The Applicants have not pleaded in any detail in what respect their dismissal was procedurally or substantively unfair, nor have they included such detail in the pre-trial minute.
- [15] A claim for procedural unfairness must be clear and substantiated as a dismissal can be procedurally unfair for several reasons such as that the employee was not notified about the charges, the employee was not afforded sufficient time to prepare for the hearing, was not allowed to call witnesses or to cross-examine the employer's witnesses, to mention but a few. It is not for this Court to speculate about the basis for a claim for procedural unfairness, it is the duty of the Applicants to tell this Court why they claim that their dismissal was procedurally unfair.
- [16] An applicant's pleaded case must be supported by evidence during the trial. As was held in *Harmse*:^[4]
- '[8] The rules of this court do not require an elaborate exposition of all facts in their full and complex detail – that ordinarily is the role of evidence, whether oral or documentary. There is a clear distinction between the role played by evidence and that played by pleadings – the pleadings simply give the architecture, the detail and the texture of the factual dispute are provided at the trial. The pretrial conference provides an occasion for the detail or texture of the factual dispute to begin to take shape. In terms of rule 6(4)(b) the parties in the pretrial conference must attempt to reach consensus on facts that are common cause, facts that are in dispute, the issues that the court is required to decide and the precise relief claimed.
- [9] Accordingly the rules of this court anticipate that the relief claimed might not have been precisely pleaded in the statement of claim filed. The rules of this court further anticipate that the factual matters at issue will be dealt with more fully and precisely in the [pretrial] conference. The rules therefore anticipate that the parties at the pretrial conference will have dealt in much more detail not only with the factual matters but also the legal issues. The statement of claim and response thereto foreshadow this activity but are not a substitute

for it. It is for this reason that the rule on pretrial conferences provides for reaching consensus on the issues that the court is required to decide.’

- [17] The Applicants’ claim that their dismissal was unfair must be considered against the backdrop that pleadings give the dispute its architecture and the evidence at the trial provides the detail and texture. The Applicants were legally represented throughout the disciplinary proceedings. Procedural issues should have been and were probably addressed during the proceedings because Ms Mogale has not adduced any evidence to the effect that the disciplinary hearing was procedurally unfair. No evidence was adduced to shed light on the Applicants’ claim that their dismissal was procedurally unfair and given the fact that no detail relating to

procedural (or substantive) unfairness was pleaded or introduced in the pre-trial minute, this Court cannot find any procedural

unfairness.

- [18] The Applicants claim retrospective reinstatement, alternatively maximum compensation. The effect of such a claim is that the Applicants believe that they should not have been dismissed as they were not guilty of the misconduct which they were found guilty and dismissed for, which renders their dismissal substantively unfair. Once again, the case for substantive unfairness was not pleaded in any detail.
- [19] Mr Zulu passed away before the commencement of trial proceedings and on 14 May 2021, he was substituted for Ms Zulu, in her capacity as executrix of the estate of the late Mr Zulu. Ms Mogale was the only witness who testified for the Applicants.
- [20] The express terms of the NHLS’ disciplinary and grievance procedure, which Ms Mogale conceded she was bound by and thus had to adhere to and comply with at the risk of dismissal, provide inter alia as follows:

‘4. BREACH OF DISCIPLINE (MISCONDUCT)

4.1 Employees are expected to comply in all respects with their contract of employment, applicable regulations, standing orders, provisions or practices which apply specifically at the workplace and to refrain from any conduct which would give just cause for discipline.

Annexure B

1. GROSS MISCONDUCT

Gross misconduct includes but is not limited to the following which may result in summary dismissal, suspension without pay, or a final written warning for first time offenders:

- ...
- Material breach of employment contract.

- Gross negligence.
- In breach of the NHLS' standards, rules, procedures and manager's lawful instructions.
- Making of and/or presenting false documents for personal gain.
- Altering or misrepresenting official NHLS documents.
- Dishonesty.

...'

- [21] It is clear from the Respondent's disciplinary policy and procedure that there is a duty on employees to comply in all respects with their contract of employment, applicable regulations, standing orders, provisions or practices which apply specifically at the workplace and to refrain from any conduct which would give just cause for discipline. The non-compliance with the aforesaid at the workplace, is specifically recorded as being misconduct. Furthermore, gross misconduct, which may result in summary dismissal, includes a material breach of employment contract and gross negligence.
- [22] In her testimony, Ms Mogale expressed the view that the criticism against her was very unfair as she was very thorough. According to her, this is a painful chapter in her life as she is accused of things she did not do, it turned her life upside down and she was waiting for 7 years to hear what she had done wrong. She testified that her life and that of Mr Zulu were turned upside down and they were destroyed and left without any livelihood.
- [23] Ms Mogale testified that both her and Mr Zulu's contracts recorded undertakings they contractually agreed to, including to act with due diligence and care in the performance of their functions and to familiarise themselves with the employer's policies.
- [24] She testified that she was headhunted to turn the NHLS around as it was technically bankrupt. In cross-examination, Ms Mogale confirmed that she was headhunted and that the curbing of costs was part of her mandate and that she presented that she had the necessary skills to do the job. She conceded that she reported to the Board of Directors (Board), that her instructions emanated from the Board and that in her contract of employment, her employer is defined as the NHLS, represented by the chairperson of the Board.
- [25] Ms Mogale was appointed as CEO from 1 December 2014. When she started, there was no permanent CFO. The post of CFO was advertised and Mr Zulu was appointed.
- [26] She confirmed that the NHLS renders services to the poor and if it was not frugal with its expenses, it could not render these services. If there was a waste of money, services could not be delivered and it was ultimately the poor that suffered the most.
- [27] Ms Mogale confirmed that she pleaded not guilty at her disciplinary hearing and that she showed no remorse for any wrongdoing.

[28] It was evident during the trial that Ms Mogale still showed no remorse – instead, she displayed an absolute inability to either accept responsibility or show some insight into what she did wrong. Her go-to positions were, on the one hand, to blame others for her conduct, and, on the other, to say that she was authorised and entitled to do what she did and that she did a splendid job.

[29] She testified that Mr Zulu, the CFO, Mr Motsepe, the head of supply chain management (SCM) and Mr Mthunjana, the legal manager, were all recruited and appointed after she was appointed as the CEO, and they were “key to her existence” in the NHLS because she knew nothing about the law or supply chain management. Ms Mogale testified that she did not have those skills,

and she relied on the CFO for finances, Mr Motsepe for supply chain and Mr Mthunjana for legal issues. She relied on them on a daily basis and she attributed much of her conduct to them or other, lower level subordinates, because she was advised by them or she accepted the information they had provided to her.

[30] In cross-examination, Ms Mogale however agreed that she had a duty to make sure that she complied with her contractual duties before she signed any contract and that she had to exercise due diligence, irrespective of what she was told by her subordinates. She further agreed that she knew that the NHLS had to comply with the Public Finance Management Act[5] (PFMA) and the Constitution of the Republic of South Africa, 1996 (Constitution) and she knew what her responsibilities in terms of the PFMA were.

[31] In her evidence, Ms Mogale made concessions or provided unacceptable explanations for her conduct, which were fatal to her claim of substantive unfairness.

[32] The evidence adduced showed that the Applicants were indeed guilty of the misconduct they were dismissed for. In my view, dismissal was an appropriate sanction. The misconduct the Applicants committed was of a serious nature, they occupied very senior positions and further, the nature of the services rendered by the NHLS is to serve the poor. The Applicants’ conduct did not assist the NHLS, which was in a dismal financial position, instead their conduct assisted and enriched the service providers. To make matters worse, the money spent was obtained from taxpayers’ contributions and Ms Mogale was headhunted to take control of the financial position and to curb expenses – she did just the opposite. This Court cannot find that their dismissal was substantively unfair.

[33] The evidence regarding the Applicants’ conduct and why it constituted serious misconduct, which informed the finding that their dismissal was substantively fair, will be dealt with *infra*.

The Respondent’s case

[34] The Respondent has instituted a counterclaim for damages against the Applicants due to breach of contract. The claims arose from Ms Mogale and Mr Zulu's respective conduct in relation to the awarding of contracts to three service providers: Blue Future Internet and Surveillance CC (Blue Future), Afirent (Pty) Ltd (Afirent) and DV8 Consulting CC (DV8) (the contracts). I will deal with them in turn.

The contracts of employment and the Applicants' obligations

[35] The first issue to be considered is the terms of the Applicants' contracts and the duties and obligations they contractually agreed to.

[36] The reporting structure was that Ms Mogale had to report to the Board and she attended all Board meetings and other Board committee meetings. Clause 14.1 of Ms Mogale's contract provided that she was a member of the Board by virtue of her office. The Board was effectively Ms Mogale's line manager. Mr Zulu reported to Ms Mogale and he also had a duty to follow instructions from the Board. As the CFO, he was employed by the Board

and attended all Board meetings, finance committee (Fincom) and audit and risk committee meetings.

[37] Professor Eric Buch, the chairperson of the Respondent's Board, was the first witness for the NHLS and he explained that:

'Firstly, you got a Board decision, and the Board decision overrides all. So, because the Board is the ultimate accounting authority, if the Board has made a decision of an amount someone cannot go and change that amount.'

[38] During cross-examination, Ms Mogale conceded that if her subordinates instructed her to do something contrary to the Board's decision, she would have had to follow the Board's instructions. If Mr Zulu or Ms Mogale had a concern about a Board policy or resolution, their route to addressing it, was to take the matter back to the Board.

[39] It is undisputed that Ms Mogale was headhunted by the Minister with a view to improving the financial health of the NHLS. In that respect, it was important for Ms Mogale to control costs. She represented and confirmed to both the NHLS and to the Minister at the time that she accepted her five-year fixed-term contract, that she had the necessary skills and capability to do the job.

[40] The Applicants concluded fixed-term contracts, and as the Respondent's cause of action is a claim for damages due to breach of contract, the terms of the said contracts and their duties, agreed to, are relevant.

[41] The express terms of the Applicants' contracts, which are the specific terms explicitly agreed upon and which set out the primary obligations, rights and expectations of each party, relevant for purposes of this judgment, are as follows:

41.1 Ms Mogale's fixed-term contract of employment provided that:

‘3. APPOINTMENT AND DURATION

...

3.4 This contract may be terminated by the NHLS prior to its expiry for reasons of misconduct, incapacity, operational reasons, or any other reason justified in law.

3.5 Should this contract be lawfully terminated prior to its expiry; the employee will have no claim for compensation or damages from the employer.

....

5. FUNCTIONS

5.2 The parties record and agree that the functions are intended to ensure the effective and efficient running of the employer’s business and that the failure to perform them at any time, timeously and professionally or performing them negligently can result in loss, damage or disruption to the employer’s business.

6. UNDERTAKINGS BY THE EXECUTIVE

6.1 For the duration of this contract, the Executive shall and undertakes to at all times:

- a) exercise due diligence and care in the performance of the functions.
- b) carry out all lawful, reasonable and fair instructions given to her by the employer.
- e) maintain the degree of efficiency which may reasonably be required by the employer and shall endeavour to keep herself up to date with all relevant developments in relation to the functions.
- f) be loyal and faithful to the employer and shall not do anything that may be seen to be against the interests of the employer.
- h) report to and liaise exclusively with and take instructions exclusively from the employer or its duly authorised representatives.
- i) familiarise herself and adhere to the employer’s code of conduct and other policies applicable to the employer’s employees (including but not limited to policies relating to benefits applicable to employees); not engage in any activity which would result in a conflict of interest with her functions;
- o) not conduct herself in a manner which discredits the employer.
- p) be under the direct control and supervision of the employer; and
- q) be able to take all reasonable steps to prevent any loss or damage to the employer, other employer’s employees and the employer’s assets;

7. WARRANTIES

7.1 The employee warrants that:

- b) She shall perform the functions with the necessary diligence, care and skill as may reasonably be expected by the employer having due regard to the nature of the functions.

14. FIDUCIARY DUTIES OF THE EXECUTIVE

14.2 In addition to any other applicable legislation, the following shall apply to the Executive: The executive will not ...

- d) Make improper use, in any manner whatsoever, of his position or of any information acquired by virtue of her position.'

41.2 The relevant express terms of Mr Zulu's fixed-term contract of employment were as follows:

'5. APPOINTMENT

The employer hereby appoints the employee as its Chief Finance Officer to perform the functions with effect from the effective date and for the duration of this contract subject to the prior submission by the employee of original certificates of academic and professional qualifications.

The employee shall be stationed at the designated office of the employer where the employee shall be provided with the requisite office accommodation and equipment deemed necessary for the employee to perform his obligations in terms of this contract.

The employee hereby accepts the employer's appointment on the terms and conditions set out in this contract.

7. FUNCTIONS

The employee undertakes to perform the functions with effect from the effective date in accordance with the terms and conditions set out in this contract.

The parties record and agree that the functions are intended to ensure the effective and efficient running of the employer's business and that the failure to perform them at any time, timeously and professionally or performing them negligently can result in loss, damage or disruption to the employer's business.

The functions shall at all times be performed at the employer's address recorded in this contract or such other place as may be required for the business of the employer.

The employer shall from time to time evaluate the performance of the functions by the employee, the results of which shall be taken into account in relation to the review contemplated in paragraph 11.3 below.

9. UNDERTAKINGS BY THE EMPLOYEE

For the duration of this contract, the employee shall and undertakes to at all times:

- exercise due diligence and care in the performance of the functions

- carry out all lawful, reasonable and fair instructions given to him by the employer
- maintain the degree of efficiency which may reasonably be required by the employer and shall endeavor to keep himself up to date with all relevant developments in relation to the functions
- be loyal and faithful to the employer and shall not do anything that may be seen to be against the interests of the employer
- report to and liaise exclusively with and take instructions exclusively from the employer or its duly authorised representatives
- familiarise himself and adhere to the employer's code of conduct and other policies applicable to the employer's employees (including but not limited to policies relating to benefits applicable to employees)
- not engage in any activity which would result in a conflict of interest with his functions
- not conduct himself in a manner which discredits the employer
- be under the direct control and supervision of the employer
- be able to take all reasonable steps to prevent any loss or damage to the employer, other employer's employees and the employer's assets; and
- not undertake any business activities which would in any way negatively impact on the performance of his functions.

10. WARRANTIES

The employee warrants that:

- he is duly qualified, experienced and competent to perform the functions; and
- He shall perform the functions with the necessary diligence, care and skill as may reasonably be expected by the employer having due regard to the nature of the functions.

Each party acknowledges, in entering into this contract, that they do not do so on the basis of and do not rely on any representation, warranty or other provision, whether expressed or implied, except as expressly provided in this contract, and all conditions, warranties or other terms implied by statutes or common law are excluded to the fullest extent permitted by the laws of the Republic of South Africa.'

[42] In addition to the contractual obligations set out supra, the Applicants had more duties and obligations in performing their functions, such as their adherence to specific policies and legislation.

- [43] Clause 14 of Ms Mogale's contract provided for her fiduciary duties and made provision for same to apply, in addition to any other applicable legislation. Ms Mogale testified that she was aware of the applicable legislation, which applied to her and Mr Zulu as senior employees, namely the PFMA and the Constitution.
- [44] Section 217 of the Constitution sets out five principles with which organs of State must comply when procuring goods and services, namely: fairness, equity, transparency, competitiveness and cost-effectiveness. If a contract is granted for the provision of goods or services by an organ of State, such as the NHLS, which offends any one of these five principles, it may be subject to attack on constitutional grounds.[6]
- [45] The Respondent's 'Supply Chain Management' (SCM) policy was adopted in terms of section 51(1) of the PFMA and its purpose was to outline the policy and guidelines in the planning, acquisition of goods and services, logistics, contract management and SCM performance of the NHLS. The Respondent's SCM and procurement processes are governed by specific Acts and regulations, including the Constitution and the PFMA. The SCM policy provides that all procurement activities must be executed in accordance with the Board's 'delegation of powers document' which established levels of authority and conditions to ensure control and responsibility and that any activity to be executed must be done in accordance with a delegation.
- [46] The SCM policy sets out the roles and responsibilities of specific NHLS officials, and relevant are those for the CEO and the CFO. It provides that:

46.1 Paragraph 10.2. of policy states:

'10.2.1 Chief Executive Officer (CEO)

The CEO shall:

- Monitor and recommend to the Board scheduled reports on the implementation of the SCM policy and the performance of SCM;
- Approve demand management plans for NHLS requirements;
- Appoint individual officials or bid committee members for thresholds approved by the board;
- Signing of award letters for bids recommended by the adjudication committees.

10.2.2 Chief Financial Officer (CFO)

The Chief Financial Officer is the custodian of the SCM policy and is responsible and/or accountable for:

- The implementation of the SCM policy and its procedures through adequate roll-out, communication and training;
- Effective demand management and supply chain planning;

- Effective sourcing and acquisition management operations;
- Approval of sourcing and contracting strategies as developed by the cross functional teams before a bid is published.'

[47] The SCM policy further provides that in terms of section 57 of the PFMA, all NHLS officials must ensure that the system of financial management and internal control is executed within each official's area of responsibility, that the effective, efficient and economical use of financial and other resources is performed in a responsible manner, that steps are taken to prevent irregular, fruitless and wasteful expenditure and that there is compliance with the provisions of the Act and delegations and instructions issued under section 57.

[48] Section 57 of the PFMA required the Applicants to observe the following:

- '(a) ... ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;
- (b) [be] responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;
- (c) ... take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;
- (d) ... comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and
- (e) [be] responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility.'

[49] The delegation of powers is also relevant as the SCM policy specifically provides that all procurement activities must be executed in accordance with the Board's 'delegation of powers document' which established levels of authority and conditions to ensure control and responsibility and that any activity to be executed, must be done in accordance with a delegation.

[50] In Annexure A to the SCM policy, the proposed SCM procurement thresholds were set out and it provided that for procurement above R 100 000 but not exceeding R 500 000, three written quotations should be obtained and the CFO was delegated to approve it. For procurement above R 500 000, a competitive bid process had to be followed and procurement above R 500 000 but not exceeding R 5 000 000 could be approved by the CEO and above that, Board approval was required.

- [51] The express provisions of the Respondent's delegation of authority, which was in effect before 13 September 2016, provided that Ms Mogale, in her capacity as the CEO, had no authority to incur or approve any operational expenditure above R 15 million without a recommendation from the Fincom and Board approval, and that she could not procure any capital expenditure over R 2 million without Board approval.
- [52] With effect from 13 September 2016, Ms Mogale was not authorised to incur operational expenditure in excess of Rb15 million without Fincom and Board approval and she was not authorised to approve capital expenditure above R 5 million without the Board's approval.
- [53] It is evident from the Applicants' contracts of employment that they agreed that the functions they were employed to perform were intended to ensure the effective and efficient running of the Respondent's business. They further agreed that the failure to perform them at any time, timeously and professionally or performing them negligently could result in loss, damage or disruption to the NHLS' business. The Applicants expressly agreed to inter alia exercise due diligence and care in the performance of their functions; to carry out all lawful, reasonable and fair instructions given to them by the employer; not to do anything that may be seen to be against the interests of the employer; to familiarise themselves with and adhere to the employer's code of conduct and other applicable policies; and to take all reasonable steps to prevent any loss or damage to the employer, other employees and the employer's assets.
- [54] Ms Mogale testified that she was headhunted, and her mandate was to "turn around the organisation". This is indicative of the fact that she recognised from the outset that she had an overall duty of due diligence, especially in relation to reducing costs and increasing value, according to sound business logic. In my view, by taking up the senior position of CEO, Ms Mogale was aware or at least ought to be aware of her responsibilities and contractual obligations.
- [55] During cross-examination, Ms Mogale admitted that it was her responsibility to familiarise herself with any updates made to the NHLS' policies and/or the delegation of authority and that the failure to do so would be her fault. As the CEO, she was obliged, independently, to know her delegation of authority limit.
- [56] It is axiomatic that if a subordinate indicated to either Mr Zulu or Ms Mogale something contrary to what their contracts of employment or the Board's resolutions, policies or applicable legislation required of them, they could not have complied with any contrary instructions, and if they did do so, there would be a material breach of their express duties and obligations, as agreed to in their contracts of employment.
- [57] In short: The express duties of the Applicants correlate with their common law duties and as senior employees, they were required to act in good faith, to serve the NHLS honestly, faithfully and diligently, and not to work against the NHLS' interests and not to do anything incompatible with the due or faithful discharge of their duties.[7] In exercising their duties, the Applicants were required to do so in terms of the express terms of their contracts and in

a manner which was not in conflict with the provisions of section 217 of the Constitution and the PFMA.

- [58] It is within the context of all the aforesaid that the question of whether the Applicants acted in breach of their contractual obligations is to be considered.

Breach of contract

- [59] The Respondent's claim for damages against the Applicants arose from Ms Mogale and Mr Zulu's respective conduct in relation to the awarding of contracts to three service providers, as already alluded to: Blue Future, Afirent and DV8.
- [60] The first question is whether Ms Mogale and Mr Zulu committed a breach of their respective contracts of employment in respect of the aforesaid service providers.

Blue Future

- [61] The Respondent put out an invitation for bids to be submitted for the "provision, maintenance and support of end-user computer hardware for a period of three years (desktops, laptops and associated peripheral devices, on-site labour and repair) under bid number RFB 027/15-16". The bid process started in September 2016 and Blue Future submitted a bid.
- [62] On 17 February 2016, Fincom requested the Board to approve the recommendation for the provision, maintenance and support of end-user computer hardware (desktops, laptops and associated peripheral devices, on-site labour and repair) and to award the bid to Blue Future for a period of three years for R 25 985 921.10. The Fincom approved a specific 'basket' of computers specifying an amount of R 73 598,80 as the total price per category and the exact amount for the total value of R 25 985 921.10.
- [63] The 'basket' was calculated as follows: standard laptop 1 - R 10 296.10; standard laptop 2 - R 13 580.20; executive laptop - R 17 560.90; desktop - R 7 960.90; thin clients - R 4 500; all in one - R 8 479.80; and desktop for power users - R 11 490.90. All the items listed in the 'basket' came to a total of R 73 598.80.
- [64] This amount was calculated as follows: 2 024 desktops at R 7 690.90 per item for a total of R 15 566 381.10; 670 laptops at R 13 812.40 per item for a total of R 9 254 040.00; and 259 thin clients at R 4 500 per item for a total of R 1 165 500.00. All these items together would cost R 25 985 921.10.
- [65] On 24 February 2016, the Board approved the bid for R 25 985 921.10, for the provision, maintenance and support of end-user computer hardware for a period of three years (desktops, laptops and associated peripheral devices, on-site labour and repair) and authorised Ms Mogale, in her capacity as CEO, to sign the necessary documents for the implementation of the approval, thus to execute it accordingly.

[66] Prof Buch testified that the Board's approval was the final and binding approval and that Ms Mogale could only sign documents for the amount approved by the Board. He vigorously disputed that Ms Mogale could sign anything or that she could approve any amount – there are levels of delegation and certain amounts could only be approved by the Board. It begs the question, if Ms Mogale had unlimited powers to approve any amount, why would the Board be approached for approval at all? Prof Buch illustrated that there was also a practice for the Board to approve any procurement above R 10 000 000.00, irrespective of the type of procurement.

He emphasized that he had been on the Board since 2012 and there was no such thing as the CEO having unlimited authority to approve expenditure.

[67] Once the Board has taken a decision or approved something, it becomes an instruction to the CEO to implement and the CEO must act within the Board's decision or approval.

[68] The NHLS's SCM policy provides that the CEO is responsible for signing award letters for bids recommended by the adjudication committee. However, the letter to Blue Future, confirming that the bid for the provision, maintenance and support of end-user computer hardware was awarded to Blue Future for a period of three years in the amount of R 25 985 921.10 (including VAT) was not signed by Ms Mogale as the CEO, but it was signed by the head of supply chain management on 26 February 2016.

[69] On 17 March 2016, Ms Mogale signed the service level agreement (SLA) between the NHLS and Blue Future. The following clauses are relevant for the purposes of this judgment:

'4.1. The delivery, installation, upgrading, serving and maintenance of the computer hardware combined shall not exceed R 83 902 000,63 (eighty three million nine hundred and two thousand rands, sixty three cents) including VAT, including service and maintenance, all necessary disbursements and preliminary costs.

4.2. The NHLS may change, modify or otherwise alter the terms and conditions of the award, as per the letter of award and acceptance of award.

4.3. The NHLS may over and above the fea (sic) mentioned on clause 4.1 place further orders for computer hardware with the service provider.'

[70] Prof Buch commented that the aforesaid clauses in the SLA, signed by Ms Mogale, are highly irregular because the Board approved R 25 985 921.10, yet Ms Mogale signed an SLA for R 83 902 000,63. Ms Mogale was not authorised to enter into any SLA which exceeded what the Board had approved because she had to and could only procure what was approved. If the tender amount or specifications were to be amended, it had to be submitted to the Board for approval. In this instance, the R 83 902 000,63 was never submitted to or approved by the Board, nor was a competitive bid process followed, as was required for a valid tender process.

[71] It is evident from the minutes of the Board meeting that Ms Mogale was authorised to sign all the necessary documents for the implementation of the Board resolution wherein the Blue Future tender for R 25 985 921.10 was approved. Prof Buch testified that the Board gave Ms Mogale a clear instruction and authority, but she did not follow it. Ms Mogale could only sign an SLA in accordance with the Board's approval, which she clearly did not do.

[72] Prof Buch further explained that the tender was very specific – it provided for the provision, maintenance and support of end-user computer hardware for a period of three years, including desktops, laptops and associated peripheral devices, on-site labour and repair. What was included in the SLA, was not the same as what was approved and the difference in value was R 57 916 079,53. It was more than double the mandated Board approval. He testified that Mr Zulu, as the CFO, would have been at

the Fincom and Board meetings where the Blue Future tender was approved and he knew very well what was approved. He too did nothing

to ensure compliance with what the Board approved.

[73] In cross-examination, it was put to Prof Buch that Mr Motsepe had requested R 83 902 000.63 as a 'basket amount' for Blue Future and an amount of R 25 985 921 for the Innovent leased equipment. Prof Buch disagreed with the proposition.

[74] He was referred to the minutes of the Fincom meeting of 16 February 2016 where it was resolved that the bid for the provision of maintenance and support of end-user computer hardware for a period of three years be awarded to Blue Future for the amount of R 73 508,80 (including VAT) for the total price per category and that this be recommended to the Board for approval. Prof Buch insisted that the Board approved R 25 million for the Blue Future tender, based on the number of categories to be purchased and the price per basket. He explained that the NHLS had to buy a certain number of products (desktops, laptops etc.) according to the need and the approval was based on the number of products needed, multiplied by the amount to be paid. The Board considered the number of devices needed and approved R 25 million for that – if the amount was not correct,

it had to be brought back to the Board for reconsideration and approval.

[75] It was put to Prof Buch that the Applicants' version was that the R 25 million was not intended to be the amount to be awarded to Blue Future, but it was intended for the cost of the IT equipment that had to be returned to Innovent. Prof Buch disagreed and reiterated that it was clear that the Board had approved an exact amount for the Blue Future tender. Prof Buch referred to the letter of award, addressed to Blue Future on 28 February 2016, which was signed by Mr Motsepe and which recorded that the bid for the provision, maintenance and support of end-user computer hardware was awarded to Blue Future for a period of three years in the amount of R 25 985 921.10 (including VAT).

- [76] Prof Buch was also referred to the SLA that Ms Mogale signed between the NHLS and Blue Future on 17 March 2016 for the delivery, installation, upgrading, serving and maintenance of the computer hardware, not to exceed R 83 902 000,63 (including VAT) and it was put to him that the Applicants' version is that the aim of the basket amount was to contract for 1000 baskets over three years. Prof Buch disputed this version and explained that the purchase of 1000 baskets was never discussed at the Board meeting, and that the NHLS would not buy 1000 baskets as that was not needed. The issue remained that Ms Mogale signed an SLA for an amount that was not approved by the Board and that she had no authority to do so and she failed to exercise due diligence when she signed the SLA and entered into an agreement for an amount the Board did not approve.
- [77] Prof Buch testified that when the NHLS became aware of the Blue Future irregularities, it requested a reconciliation of the amounts paid to Blue Future and it showed that a total amount of R 113 036 392.94 was paid to Blue Future. Considering the breakdown of the procurement and the amounts paid to Blue Future, it was clear that many items procured and paid for fell outside the scope of what was approved. Those items far exceeded the value which could have been approved by Ms Mogale, without obtaining Board approval and it could not have been procured without a proper tendering process being followed and without the necessary Board approval.
- [78] The chairperson of the disciplinary hearing, Adv. Cassim, found that Ms Mogale was guilty on the charge relating to Blue Future in that she wilfully disobeyed the Board resolution which mandated and authorised her to execute the approved Blue Future tender for the total amount of R 25 985 921.10.
- [79] Adv. Cassim also found Mr Zulu guilty on the charges he faced regarding Blue Future. He found that Mr Zulu, as the CFO, was the custodian of the employer's procurement policies and he was the responsible person to ensure that there was compliance with procurement processes and tender law principles. In the case of Blue Future, Mr Zulu took no steps to prevent the payment of R 93 219 701,26 in circumstances where the Board had approved the total amount of R 25 985 921.10. Mr Zulu was found guilty of dereliction of duty in the performance of his duties as CFO. Section

57 of the PFMA provides that the CFO is enjoined to take effective and appropriate steps to prevent any irregular and fruitless

expenditure and he failed dismally in this regard.

- [80] Prof Buch testified that Ms Mogale's contract of employment provided that she agreed that the functions she was to perform, were intended to ensure the effective and efficient running of the employer's business and that the failure to perform them at any time, timeously and professionally or performing them negligently could result in loss, damage or disruption to the employer's business. Ms Mogale was expected to exercise due care and diligence.

- [81] Prof Buch explained that Ms Mogale breached the terms of her contract, and she failed to comply with the provisions of the national treasury regulations, the NHLS' procurement policy, and the PFMA when she signed the SLA with Blue Future and caused the NHLS to spend almost R 90 million more than what was approved by the Board. She caused the NHLS to incur fruitless and wasteful expenditure and ultimately, she failed to perform her duties as CEO diligently and carefully as required in terms of her contract. Instead, her conduct was grossly negligent and she failed to act in the best interest of her employer.
- [82] According to Prof Buch, neither the CEO nor Mr Zulu, the CFO, took reasonable steps to ensure that the goods that were ultimately purchased, were indeed part of the original tender and were what was approved by the Board.
- [83] The NHLS called Mr Tashen Dokie as its second witness. He is the head of revenue within the finance department of the NHLS. He explained that in his position, he has access to the NHLS' Oracle financial system (Oracle) and he has access to the information stored in Oracle where purchase orders and payments to suppliers are loaded and stored. Mr Dokie referred to documents which showed the total amount of items purchased and paid in respect of the three contracts relevant for purposes of this judgment.
- [84] Mr Dokie testified that the total amount for orders placed with Blue Future was R 110 872 486.17, excluding VAT and the total payment made, including VAT was R 126 394 634.23.
- [85] In cross-examination, Mr Dokie explained the process followed – there is a purchase order, receipt and then an invoice. He explained that someone would take ownership of the goods ordered and confirm that it was received, whereafter the invoicing for the delivered goods would happen. He conceded that some items were indeed delivered, but he was unable to confirm the number or the nature of the items that were delivered but conceded that there may be receipts to confirm that the items were indeed received.
- [86] Ms Mogale testified that she saw the documents in the Blue Future tender after it went through the bid adjudicating committee (BAC) and a submission was made by the SCM to present it to Fincom. She went through the document before presenting it to Fincom on 14 February 2016 and she was satisfied that it went through all the required steps. According to Ms Mogale, there was no mention of the amount of R 25 million, but rather an amount of R 73 000 per category, and for bidding purposes, the 'per basket' price was used. She explained that she had signed the SLA for R 83 million, which was for 1 000 items per category, including VAT. She emphasized that they had to be prudent because the NHLS did not have money and that she was managing an entity that was technically bankrupt. Ms Mogale's version was that at the Board meeting, the R 25 million was discussed as money to be paid to Innovent and that Fincom had approved the R 73 000 per basket.
- [87] After the Board meeting and the Board's resolution, it went back to SCM. SCM would liaise with the end-user and the SLA was drafted by the legal department. After the SLA was drafted, it was sent to the CEO, with a memorandum, requesting her to sign the SLA.

- [88] Ms Mogale's evidence was that at the time of the ordering of the baskets, no one could determine the exact amount of items to be ordered and in cross-examination, she explained that she and her subordinates agreed to put it at 1 000 and she used the figure of 1 000 baskets, multiply it by R 83 000 and that was how she arrived at the amount of R 83 million. According to her, Fincom had approved R 73 000 per category and including VAT, it was R 83 000 per basket. The R 25 million mentioned was for goods returned to Innovent and she testified that she could not recall any discussion in the Board meeting that the R 25 million was for Blue Future.
- [89] On Ms Mogale's understanding, the NHLS would order 1000 x laptops 1, 1000 x laptops 2, 1000 x executive laptops, 1000 x desktops, 1000 x thin clients, 1000 x all-in-ones and 1000 x desktops for power users. The nett effect of Ms Mogale's reasoning would be an order for a total of 7 000 desktops and/or laptops.
- [90] Ms Mogale conceded during cross-examination that the terms of the Board resolution were very clear, that the Board never resolved that she could sign an SLA for R 83 902,63 and it never resolved that the R 25 million was for payment to Innovent. She further conceded that she knew that she was not authorised to sign an SLA for R 83 902,63 and that she did not comply with the Board resolution.
- [91] It was put to her that she intended to buy 1000 baskets when the NHLS has approximately 6 900 staff members, of which 5 310 are computer users. Ms Mogale agreed that the laptops included in the baskets were to be used by the executive managers, of which there are only 20. It was put to her that she ordered 7 000 laptops for 20 executive managers, which was a complete waste of resources, and that in circumstances where the curbing of costs was part of Ms Mogale's mandate. Furthermore, when the tender was submitted to Fincom, it was recorded that the NHLS had spent R 2 559 635.16 on new laptops in the past 12 months. In her disciplinary hearing, Ms Mogale conceded that the 1000 baskets to be purchased, was a 'thumb suck' figure.
- [92] Regarding clause 4.3 of the SLA, which Prof Buch explained did not comply with procurement practices, Ms Mogale testified that although the said paragraph may be labelled as reckless, the clause is a 'must-have' in the public sector where systems are rigid. There may not be time to advertise for a new tender and this clause served to ensure continuous service delivery.
- [93] In cross-examination, Ms Mogale conceded that the 'basket' content did not include items such as servers and switches, yet she approved purchase orders for servers, enclosures and switches to the value of R 17 383 062.00. She approved another invoice to the value of R 29 043 687.72 for goods which fell outside the scope of the tender. Her explanation was that the tender made provision for 'peripheral devices'. It was put to her that 'peripheral devices' do not include servers, switches etcetera and she responded that she did not know what was meant by 'peripheral devices', but she was guided by the end-users, who knew what was needed. Ms Mogale conceded that an item of R 29 million cannot be a 'peripheral'

device and that there was no tender for the other items, such as switches.

- [94] During her testimony, Ms Mogale insisted that in terms of the delegation of authority, she had the authority to sign the SLA for R 83 million, she did everything that was expected of her in terms of the PFMA and she had no doubt that she was comfortable with the amount she signed for. She was suspended in February 2017 and she had no control over what had happened after her suspension.
- [95] In cross-examination, Ms Mogale was referred to the delegation of authority and more specifically, where the delegation provided for the CEO to approve requisition or purchase orders to the value of less than R 15 million and anything above R 15 million had to be approved by the Board. In respect of capital expenditure, the CEO could approve requisition or purchase orders for less than R 2 million and above R 2 million had to be approved by the Board. Ms Mogale conceded that she was aware of this delegation of power.
- [96] There was a revised delegation of authority policy, dated 13 September 2016, from Mr Zulu to the Fincom, in which it was recorded that the CEO could approve capital expenditure below R 5 million and above R 5 million had to be approved by the Board and all operational expenditure below R 15 million could be approved by the CEO and above that required Board approval. Ms Mogale testified that she was not aware of the September 2016 delegation of authority document but conceded that she had a duty to familiarise herself with all the policies of the NHLS.
- [97] In my view, Ms Mogale acted in breach of her contract of employment when she signed the SLA for R 83 million. She disregarded her obligation of due diligence and her contractual obligations, including compliance with the applicable policies of the NHLS. This is so for the reasons set out below.
- [98] First, the text of the Board resolution of February 2016 is clear and unambiguous with regard to the category and quantum of goods and services required and it does not support Ms Mogale's version that the Board approved a 'basket' of goods or that R 25 985 921.10 was to be paid to Innovent. The Board Resolution clearly approved the Blue Future tender for R 25 985 921.10, including VAT and it does not even mention the amount of R 83 902 000,63, including VAT, nor did it state anything about Innovent. It is clear from the text of the Board resolution compared to the SLA that Ms Mogale signed that she acted in breach of the Board resolution. In fact, she conceded during cross-examination that she did not comply with the Board resolution.
- [99] Second, the fact that Ms Mogale signed the SLA, which represented that she had been duly authorised by the Board to do so, is an act of gross dishonesty. On her own version, she knew she was not authorised to sign the SLA for R 83 million.
- [100] Third, Ms Mogale's version, that she was exercising prudence and due diligence when she signed the SLA for R 83 902 000.63, cannot be accepted. Ms Mogale in her evidence conceded that each basket consisted of seven devices or items, wherefore 1000 'baskets'

would result in having 1000 of each type of device, thus a total of 7000 devices. It was undisputed that the NHLS has 6 900 employees, including cleaning staff, who did not require computers as well as night and day staff, who share the same computers used during their different shifts, in that the night and day staff would share devices with whomever was on the alternative shift. Therefore, at the time of her signing the SLA, the NHLS had only 5310 potential users of the 7000 devices Ms Mogale intended to procure, making her order in excess of more than 1690 devices. There was an excess in each category of 7000 computers as they were not needed by each category. There were only 80 managers, 20 executive managers and 2000 mobile staff at the time. There was no

need to order 1000 items of each device category. There was also no need to order the same number of devices for each category, which is what the basket system contemplates.

- [101] Fourth, Ms Mogale painted a picture of placing blind reliance on her subordinates and she merely granted their wishes and in doing so, she failed to exercise any of the oversight and due diligence required of her position. Indeed, it appears she did not even apply her mind to her contractual duties when signing an SLA that rubber-stamped an amount vastly in excess of the mandated amount and which required another Board approval. Ms Mogale in doing so, overruled an express Board instruction to her, which was to carry out the Resolution to sign an SLA for R 25 985 921.10, including VAT.
- [102] Fifth, Ms Mogale placed the NHLS at great risk by signing an open-ended contract, as provided for in clause 4 of the SLA, which allowed for the placing of further orders and change modification or alternation of the terms without going out to tender. These clauses were highly irregular and created the basis upon which the NHLS ultimately paid Blue Future R 113 306 392.94. This amount far exceeds what the Board had approved and what Ms Mogale was instructed and mandated to implement.
- [103] Equally, this Court finds that Mr Zulu materially breached his contract of employment by exercising no oversight over the series of contract irregularities that he participated in as well. Mr Zulu recommended the Blue Future SLA and recommended the payments to Blue Future. As the CFO, he would have known both were irregular and in breach of his contract, his fiduciary duties, the company policies and his duty of due diligence.
- [104] Considering the evidence before this Court, I accept that neither Ms Mogale nor Mr Zulu acted in the best interest of the employer, and their conduct in respect of Blue Future constituted not only serious misconduct but also a breach of contract.

Afrirent

- [105] The NHLS had entered into a lease agreement with Innovent Rental and Asset Management Solution (Innovent) on 1 August 2010, which agreement expired on 30 September 2014. Subsequent to its expiry, the said contract provided the NHLS with 29 vehicles, which were leased on a month-to-month basis, which expired on 31 March 2016.

- [106] On 9 February 2016, a submission for the provision of motor vehicles was made to the CFO and CEO, Mr Zulu and Ms Mogale. The submission sought approval from the NHLS to enter into a new leasing arrangement for a total of 193 new vehicles as well as the lease for 29 vehicles, due to expire on 31 March 2016. This amounted to a total of 212 vehicles. The proposal was recommended by Mr Zulu and approved by Ms Mogale.
- [107] On 4 March 2016, a tender was advertised through the NHLS' tender bulletin "for the lease of motor vehicle for the National Health Laboratory Services for a period of five years". The bid invitation contained the specifications of the vehicles and it set out the description of the vehicles, the quantity required,
- the department where it was required and the fuel type and it added up to a total of 197 vehicles. The tender closed on 15 April 2016 and Afirent submitted a bid for the leasing of motor vehicles for the NHLS.
- [108] On 18 August 2016, Mr Rainy Makino sent a memorandum to the bid adjudication chairperson requesting approval for the award of the leasing of vehicles to Afirent for a period of five years, for the amount of R 72 127 790.42. A memorandum recommending the award of said bid to Afirent was subsequently submitted to Ms Mogale for her approval. It was recommended by the BAC on 18 August 2016 and Ms Mogale supported the recommendation for the aforesaid amount and she approved and signed the memorandum.
- [109] On 26 August 2016, a letter of award was signed by Mr Motsepe, the head of SCM and was sent to Mr Senzo Tsabedze, the CEO of Afirent, confirming the award of bid RFP 001/15-16 in the amount of R 79 691 269.33. The award was subject to a contract to be drafted by the NHLS and an SLA agreement to be entered into between the NHLS and Afirent.
- [110] On 13 October 2016, Ms Mogale signed the SLA between the NHLS and Afirent and clause 4 of the SLA provided for a contract price of R 79 691 269.33.
- [111] It was put to Prof Buch that by the time Ms Mogale had signed the SLA, the tender went through a proper procurement process, which was confirmed by the compliance report issued by the head of risk management and internal audit and there was a letter to Ms Mogale, signed by the legal manager and Mr Motsepe, indicating that the CEO was requested to sign the SLA after the legal manager declared that he had drafted, negotiated and reviewed the SLA and that he was satisfied that there were no foreseeable legal risks that might emanate from the SLA. It was further put to Prof Buch that at the time Ms Mogale had signed the SLA, she had these assurances before her, all from officials who were better placed to express an opinion
- on the issues they had advised her on. The bid went through the bid evaluation committee (BEC), the BAC and the Fincom before it was sent to Ms Mogale for her approval and signature and her case is that she was permitted to place reliance on the aforesaid committees and officials.

[112] Prof Buch disputed this and testified that the CEO knew that she could not sign and approve contracts beyond R 10 million, for which she needed the approval of the Board and he insisted that the lease of vehicles should have been submitted to the Board and the Fincom of the Board. It was put to him that Ms Mogale was advised that this was an operating lease and in terms of the PFMA, the accounting officer has unlimited authority to sign for operating leases. Ms Mogale's version was that the Afirent tender was not referred to the Board for approval because it was an operating lease and she had the authority to approve it without Board approval. Prof Buch disputed the unlimited authority of the CEO and stated that the Afirent contract was deemed to be irregular, and it was set aside by the High

Court in subsequent litigation.

[113] Prof Buch highlighted that there was a difference of R 7 million between the amount approved by the BAC and recorded in the memorandum signed by Ms Mogale (R 72 127 790.42) and the amount recorded in the letter to Afirent and the SLA signed by Ms Mogale (R 79 691 269.33) which was not explained. He testified that the Afirent tender should have been approved by the Board and that the CEO had signed for something she had no authority to sign for. Even if it was approved by the Board, the contract price could not have been increased by R 7 million without approval and a sound reason to increase the amount. He further explained that the CEO signed documents and procured goods from Afirent without bringing it to the Board's attention. Furthermore, there was no compliance with the SCM policy and the delegation of authority.

[114] This issue was canvassed with Ms Mogale in cross-examination, and she explained that 'someone' had made a mistake. The first SLA prepared was indeed for R 72 127 790.42, but Afirent refused to sign as they indicated that they had tendered for R 79 million and that was what they wanted. According to Ms Mogale, the SCM acknowledged the error, and it was corrected. However, it was evident from the approval by the BAC, that the BAC recommended that the tender for R 72 127 790.42 be approved and Ms Mogale conceded that the BAC never approved the amount of R 79 million for the Afirent tender and that the alleged 'error'

was not remitted to the BAC and there was no proof that Afirent indeed tendered for R 79 million. Ms Mogale was of the view that

Afirent had tendered for R 79 million, because they informed her so and according to her, it would be unfair to award them a tender for R 72 127 790.42. She insisted that the BAC had made a mistake, but she never saw the tender that was allegedly so submitted and she never remitted it to the BAC to correct the alleged mistake.

[115] On 30 November 2016, Mr Motsepe signed an addendum to the SLA representing the NHLS with Mr Tshabedze, the CEO of Afirent. The addendum amended the SLA to the following effect:

‘4.1.1. The service provider will collect and dispose of the old NHLS vehicles as and when the service provider delivers the new vehicles; and

4.1.2. NHLS shall ensure that the vehicle titles pass to the service provider, any penalties and licensing of the said vehicles shall pass to the service provider on collection day and time without any consideration payable by the service provider to NHLS. Save for amendment in clause 4.1 above the remaining provisions of the Service Level Agreement shall continue of full force and effect.’

[116] Prof Buch testified that the implication of the aforesaid amendment was that the service provider would dispose of old vehicles, without any consideration of the value of the vehicles to be paid to the NHLS. He explained that the ‘old NHLS’ vehicles were the assets of the NHLS, and therefore assets of a state-owned entity and they could not have been removed and disposed of without any value being paid for it.

[117] On 13 December 2016, Ms Mogale signed a Master Rental Agreement (MRA) with Afrirent and she purported that she was duly authorised to sign the agreement with Afrirent. Clause 10 of the MRA, the excess usage clause, provided for the payment of an excess usage charge if the minimum usage has been exceeded and the excess usage charge, plus VAT, was payable in respect of each excess kilometre or hour.

[118] Prof Buch testified that the terms of the MRA and the clauses therein were highly prejudicial to the NHLS. In effect, 200 vehicles were ordered and contracted for when the NHLS never had this number of vehicles and needed only 80 vehicles, which means that 120 vehicles more were ordered than what was needed. The NHLS paid rent for cars that were not used. The cars so procured had a 2000 km per month limit and the NHLS paid penalties where the limit was exceeded. Prof Buch explained that this limit was exceeded very quickly due to the vast area serviced by the NHLS and the distances to be travelled between the areas.

[119] Prof Buch referred to the supplier payment history reports for Afrirent, which included a monthly schedule of vehicles, depicting the rate per kilometre, the number of kilometres, the monthly mileage, the excess mileage, the charges and the total cost per vehicle. The said reports indicate that the total payment made to Afrirent amounted to R 155 455 340.51.

[120] He also referred to the statements from Afrirent to the NHLS, which included the excess amount to be paid over and above the standard rental of the vehicles. These statements show that some vehicles did not move at all, recording zero mileage, but the rental for the vehicle was still payable and in other cases, where the vehicle did more than the 2000 km mileage, an excess penalties had to be paid. In short, some vehicles incurred penalties and others did zero mileage and there was absolutely no benefit for the NHLS in the contract.

[121] In cross-examination, Ms Mogale tried to blame the legal manager and the SCM unit for the fact that she had signed a contract wherein she committed the NHLS to the payment of heavy penalties, but she eventually conceded that as a person with an MBA degree, she

knew that she was committing the NHLS to pay penalties and that those penalties could run in the millions. In short, Ms Mogale's case was that she could not run the organisation single-handedly and many people were appointed to render support to her. Her view is that it was up to the legal manager to ensure that there was no risk and she cannot be blamed because she was told by the SCM that this was an operational lease.

- [122] Ms Mogale however conceded that this was an operational expenditure and she knew that her authority to approve such had a limit.
- [123] Prof Buch testified that for the period from June 2017 until June 2022, the NHLS had paid R 15 571 867.82 for excess kilometres travelled. For the period January 2017 until December 2021, the NHLS paid R 18 346 241.05 for leased vehicles that were not used. According to Prof Buch, this figure was a reflection of the fact that more vehicles were ordered than what was actually required.
- [124] He explained that the contract Ms Mogale had entered into with Afrirent was biased in favour of Afrirent, as Afrirent was paid the full rate for a vehicle that was barely used and a vehicle that travelled more kilometres (in excess of 2000 km), did not compensate for a vehicle that was underutilised and there was no agreement to average the usage and mileage of the vehicles. Ms Mogale, as the CEO, should have been looking out for the interests of the NHLS when she signed the contract with Afrirent and she should have avoided prejudicial clauses, but she failed to do that.
- [125] Ms Mogale, in signing the contract with Afrirent, bound the NHLS and it could not escape from the contract. Ms Mogale conceded that by the time the Board became aware of this lease, it was already committed to the payment of R 79 million.
- [126] Mr Dokie testified that a 'vehicle needs analysis' document was compiled in 2017 to determine whether the vehicles were in fact required or not. The document was compiled by taking a list of all the vehicles Afrirent had delivered to the NHLS and by preparing a needs analysis throughout South Africa of each of the facilities of the NHLS and it appeared that more vehicles were procured than what was indeed required.
- [127] Mr Dokie testified that from February 2017 to 30 May 2023, the NHLS paid R 155 455 340.51, including VAT, to Afrirent. He explained that for the period of five years, the total amount of penalties paid in respect of excess usage to Afrirent amounted to R 14 571 867.82 and the amount paid for vehicles with zero usage amounted to R 18 346 241.05.
- [128] Ms Mogale could not dispute the amounts to be paid to Afrirent for penalties or for the vehicles with zero usage.
- [129] Ms Mogale conceded that the Afrirent contract was not referred to the Board for approval but testified that she was asked by the SCM to sign the agreement, not to submit it anywhere. According to Ms Mogale, it was a lease contract to replace the current vehicles on lease with a full operating service lease. She verified whether it was the normal process and the SCM manager told her that she could sign the SLA, as it was in line with the

accepted practice. She was told that as the NHLS was not buying the cars, but leasing, it was an operating lease agreement which did not have to go to the Fincom or the Board and she saw no reason to doubt what she was told.

- [130] Ms Mogale testified that she had signed the MRA because the legal manager was satisfied with it and motivated that it be signed by the CEO and she had no reason to doubt his legal skills. She expected that the legal manager would identify and consider the pitfalls in the agreement. The SLA was prepared by the legal manager and Ms Mogale testified that she had no doubt that it was drafted by a skilled and knowledgeable person, who stated that there was no risk in the contract and in her mind, she was satisfied that it was a 'good contract' and that she did her job in signing the SLA.
- [131] When Ms Mogale returned from leave in January 2017, she and Mr Zulu were very surprised to find 29 new cars at the NHLS. She was shocked and called for a meeting with the CFO, Mr Motsepe, the legal manager and the CEO of Afrirent. The purpose of the meeting was to stop the lack of control and in the meeting, she made it clear that from that day on, no further cars were to be delivered to the NHLS without her involvement and without motivation. Ms Mogale and Mr Zulu were suspended on 22 February 2017. She testified that for the period between the meeting and their suspension, there were no further problems with the delivery of the cars, but after she was suspended, she was no longer allowed access to the NHLS' premises and she had no further role in the management of the cars under the Afrirent contract.
- [132] Ms Mogale never alerted the Board about the problem arising from the over-ordering or delivery of the vehicles.
- [133] Ms Mogale testified that in respect of the Afrirent contract, she did everything according to the book – the tender was advertised, all the necessary committees sat, she interrogated the process and her signing of the contract and she was given satisfactory answers. She followed all the NHLS' prescripts.
- [134] In cross-examination, Ms Mogale was referred to the High Court judgment of 21 August 2020 wherein the awarding of the tender for R 72 127 790.42, including VAT, to Afrirent on 26 August 2016, the subsequent SLA of 13 October 2016, the addendum of 10 November 2016 and the MRA of 13 December 2016 were declared constitutionally invalid. Ms Mogale confirmed that she had signed the SLA and the MRA which were declared constitutionally invalid.
- [135] The High Court found that, at the time the contracts were concluded, there was a limit on the value that the CEO could contract for without the approval of the Board and the tender valued at R 72 127 790.42 was above the CEO's delegated authority and in terms of the applicable policy, she had to get the Board's prior approval before awarding the tender and concluding the subsequent contracts related thereto. The failure to refer the tender to the Fincom and the CEO's failure to obtain Board approval was in disparity with the edicts of section 217 of the Constitution and accordingly, the awarding of the tender was declared

unlawful.

[136] In cross-examination, Ms Mogale conceded that the Afrirent contract was above her delegated authority, but she persisted with her version that she was told that she was allowed to proceed with the lease agreement without Board approval. It was put to her that she did not do a proper audit as to why the NHLS would need around 200 vehicles and she conceded that she did not do an audit, but she had no reason to doubt the report and the figures submitted by Mr Mthimkulu. She explained that the reason why she was concerned when she saw the 29 vehicles in January 2017, when in fact many more were ordered and were still to be delivered, was because “it is sometimes only when you physically see the goods delivered, that it hits you how much it is”.

[137] The NHLS submitted that the Labour Court should accept the findings made by the High Court to the effect that Ms Mogale’s conduct was irregular and submitted that the High Court disposed of Ms Mogale’s argument that she did not need the Board’s approval for an operational lease agreement.

[138] Ms Mogale was referred to the SCM policy, which provided that the procurement threshold for the CEO was above R 500 000 but not exceeding R 5 million, procurement above R 5 million required Board approval. Ms Mogale conceded that she was aware of the policy.

[139] In my view, Ms Mogale acted in breach of her contract of employment when she entered into the agreement with Afrirent and signed the SLA and MRA. She disregarded her obligation of due diligence and her contractual obligations, including compliance with the applicable policies of the NHLS. This is so for the reasons set out below.

[140] First, it is evident that Ms Mogale did not apply her own mind and that she relied on what she was told, without any process of independent verification. During her testimony in Court, she was surprised that ‘people wanted to mislead her.’ However, she conceded in cross-examination that no legal manager or SCM official had the authority to tell her to act outside her delegation of authority and that the Afrirent contract was not taken to the Fincom, where there could have been some financial oversight over the contract.

[141] Second, Ms Mogale conceded during cross-examination that she had indeed lacked authority to conclude the contracts with Afrirent and that her representation that she was duly authorised, had been dishonest.

[142] Third, Ms Mogale was reckless in concluding the penalty provision because she knew, or at least ought to have known, that the penalty clause would apply to vehicles that the NHLS needed and that would be used in excess of the penalty provision. She thus knowingly incurred substantial penalties for the NHLS. Ms Mogale sought no approval from the Board to incur such expenditure on behalf of the NHLS and acted in a grossly negligent and reckless manner. She did not consider the financial implications of the penalty clause

which should have been uppermost in her mind, especially given her claim that she was headhunted by the Minister to improve the

financial situation of the organisation. The evidence showed that the penalties paid by the NHLS were severe and substantial.

[143] Fourth, Ms Mogale conceded that she had indeed exceeded the delegation of authority granted to her and that she never took this matter to either Fincom or the Board. Neither of these authorities could exercise oversight over the transaction, let alone determine the financial implications. The effect of this was that the NHLS was left to a CEO who failed to approach the Fincom or the Board with a contract worth millions and who effectively eliminated the process of financial oversight and acted on what she accepted from her subordinates.

[144] Fifth, on Ms Mogale's own version, the memorandum awarding the bid to Afirent recommended an amount of R 72 127 790.42, including VAT, whereas she signed a contract for R 79 691 269.33, including VAT, which is R 7 563 478.91 more. The only explanation was that she did so because Afirent set the latter amount and refused to accept anything less because they

allegedly submitted a tender for the higher amount. In cross-examination, Ms Mogale conceded that a supplier is not entitled to a certain amount, just because they submitted a tender for it. The supplier is to be offered what is approved by the BAC and the Board and if the amount is not acceptable, the offer is to be rejected. Ms Mogale however acted as if she had the power to increase the amount to what Afirent wanted, without any proof that this was proper or without any process being followed. This is a clear indication that she was motivated to enrich the supplier despite the internal approval process not authorizing her to sign for such amounts.

[145] In short: Ms Mogale had no authority to conclude the SLA and the MRA without Board approval and she was reckless in concluding contracts with substantial penalty clauses that created financial risk to the NHLS.

[146] Considering the evidence before this Court, I accept that Ms Mogale is guilty of gross misconduct and materially breached each one of the material terms of her contract of employment in respect of Afirent.

[147] Equally, this Court finds that Mr Zulu materially breached his contract of employment by exercising no oversight and failing to comply with his fiduciary duties, the company policies and his duty of due diligence.

[148] Considering the evidence before this Court, I accept that neither Ms Mogale nor Mr Zulu acted in the best interest of the employer, and their conduct in respect of Afirent constituted not only serious misconduct but also a breach of contract.

DV8

- [149] Respondent put out an invitation for bids to be submitted for the provision of MPLS WAN services to the NHLS for a period of three years. The closing date was on 30 October 2015.
- [150] On 27 January 2016, a submission was made to the BAC to recommend the award of the aforesaid bid to DV8, for the amount of R 85 449 243.17, including VAT. Mr Zulu was the chairperson of the BAC and he knew what the approved and recommended amount was.
- [151] On 24 February 2016, a submission was served at the Board meeting for consideration and approval of the award of the bid to DV8 for the amount of R 85 449 243.17, including VAT. It was recorded that the submission served at the Fincom meeting held on 16 February 2016 and that approval of the bid was recommended. The Board resolved that the award of the bid for the provisioning of MPLS WAN services for a period of three years, for the amount of R 85 449 243.17 to DV8 was approved. The Board further authorised Ms Mogale to sign all documents necessary to implement the Board resolution. Ms Mogale attended this Board meeting.
- [152] On 26 February 2016, a letter of award to DV8 was signed by Mr Motsepe, confirming the award of the bid. In the award letter, it was recorded that the award was for the provision of MPLS WAN service for three years for R 85 449 243.17, including VAT.
- [153] On 19 April 2016, Ms Mogale signed an SLA with DV8, represented by Mr Kgotsaetsogile Kagiso Tiro for the amount of R 85 449 243.17, including VAT. The NHLS does not have any issue with the procurement process up until the signing of the SLA.
- [154] On 22 September 2016, the Head of IT: Governance, Mr Andrew Mukanya, sent a memorandum to Ms Mogale requesting approval for the consolidation of the expired MPLS to a single MPLS VPN contract managed by DV8, and to allow for the procurement of network-related equipment (e.g. switches, routers and cabling) for support and maintenance of the MPLS service. The memorandum was signed by Mr Mukanya, supported by the Chief Information Officer (CIO), Ms Tintswalo Shilowa, recommended by the Head of Legal Service, Mr Mthenjana as well as Mr Motsepe and Mr Zulu, and it was ultimately approved by Ms Mogale on 4 October 2016.
- [155] On 19 October 2016, Ms Mogale, who represented that she was duly authorised, entered into an addendum to the SLA already entered into between the NHLS and DV8, stipulating additional services for an additional amount of R 63 500 000.00. Clause 4.1 of the SLA was amended by varying the contract value from R 85 449 243.17 to the figure reflected in Annexure A of the addendum to the contract, which is the aforesaid amount of R 63 500 000.00. There is no specification of goods and no breakdown of goods, no quantities nor any specific equipment detailed. Moreover, the addendum had a right of extension for 12 months. It was common cause that no procurement process was followed for the additional goods and expenditure.

[156] The addendum amended clause 6.1 of the SLA by including the following services:

‘2.2.1 The provision of network related services and equipment including but not limited to switches, routers, datacentre network equipment and other services that may be required by NHLS in line with the Service Level Agreement and this Addendum.

2.2.2 The provision of services relating to Multi Protocol Label Switching (MPLS), Local Area Network (LAN), Wide Area Network, Hosting, VPN (Including Remote Connectivity) and other services that may be required by the NHLS in line with the SLA and this addendum.

[157] Prof Buch testified that the addendum signed by Ms Mogale allowed for the procurement of additional equipment, which was never submitted to the Board or approved by the Board. The annexure to the addendum provided for an open-ended description of goods and amounts. For instance, it provided for ‘equipment: switches, routers, cabling, racks etc.’ for an amount of R 50 million. Prof Buch emphasized that the goods must be specified, as well as the amount to be paid for each item and a description of ‘etcetera’ cannot be included in a government agreement.

[158] Prof Buch made it clear that Ms Mogale was not authorised to enter into an addendum and to enter into any agreement beyond the R 85 million that was approved by the Board. The assertion in the addendum that “Ms Joyce Mogale who holds the position of the Chief Executive Officer was duly authorised to sign representing the NHLS”, was not correct, because the Board had not granted its approval, either for the additional goods and services or the related amount. Ms Mogale could not sign off on something she was not authorised to do and she could not enter into an agreement to spend an amount without any specification of each item and the price. Prof Buch made it clear that the items should have been specified and listed, it should have been included in a bid specification and it should have been put out on tender. The additional procurement in the sum of R 63 million underwent no procurement process whatsoever.

[159] In cross-examination, it was put to Prof Buch that clause 4.4 of the SLA provided that “the NHLS may over and above the fee mentioned on clause 4.1 place further orders for hardware or services with the service provider”. As such, the request of 22 September 2016 to consolidate the expired MPLS contract into a single contract managed by DV8 was permissible in terms of the provisions of the SLA. Furthermore, the SCM advised that the further infrastructure that was required should be procured from DV8 as part of their existing contract with the NHLS. Prof Buch disputed this and responded that the problem with the addendum is that Ms Mogale did not have the authority to conclude the addendum to the value of R 63 million and that no process was followed.

[160] Prof Buch testified that although clause 4.4 allowed for an expansion, such a clause should not have been in the contract and he emphasised that an expansion of R 63 million was way beyond the authority of the CEO and that the addendum for R 63 million was irregular as there should have been a proper procurement process followed, which was not done.

- [161] In November 2017, the addendum was ratified by way of a settlement agreement between the NHLS and DV8. Prof Buch explained that the settlement agreement was damage control as the NHLS was in a fix because Ms Mogale had signed an irregular addendum for R 63 million. The IT network is part of the backbone of the NHLS. The NHLS would be in a fix if the Wi-Fi network were to go down, and to ensure business continuity, the NHLS tried to navigate the space and entered into a settlement agreement with DV8.
- [162] Prof Buch referred to the supplier payment history report for DV8, which shows that the total amount paid to DV8 was R 230 909 307.41.
- [163] In cross-examination, Prof Buch agreed that the purpose of the SCM policy was inter alia to provide checks and balances and that the said policy provides for different roles for different role players and that every role player must play their role to ensure compliance. Section 7 of the SCM policy provides for a 'cluster of responsibility' and Prof Buch explained that there are responsibilities in the supply chain and that if the CEO signed, she would be responsible for what she signed as the buck ultimately stops with the CEO. However, others in the chain who advised her incorrectly would also be accountable. He explained that every member of the BEC and BAC has a part to play to ensure compliance. The Board relies on the cluster of responsibility, but when the Board awarded a tender and approved it, it remained accountable for it.
- [164] Prof Buch testified that the NHLS took action against all responsible in the cluster of responsibility – Mr Motsepe and the legal manager were charged, but they resigned, the IT director resigned and the head of internal audit and risk management was dismissed, so were Ms Mogale and Mr Zulu.
- [165] Prof Buch emphasized that for Ms Mogale not to know what she did was wrong, is beyond belief as she should know that she could not sign an SLA for an amount far above what the Board had approved, that she could not sign a contract for R 63 million without Board approval and that she could not sign an addendum without a proper procurement process being followed.
- [166] It is evident from the line of cross-examination that Ms Mogale's position was that she was entitled to rely on others and in doing so, she did nothing wrong. Ms Mogale relied on the legal manager to review the contracts for legal compliance and all the contracts she signed, were drafted and reviewed by the legal section, she took lead from the person who was appointed to deal with the legal issues and the terms of the contracts. She depended and relied on the experts in the NHLS to deal with the legal issues and the contracts. Prof Buch testified that some issues in a contract are specialist legal issues, but others are clear and blatant and the CEO is expected to pick up on issues that are clear and blatant. He explained that the legal section would be responsible for the drafting and finalisation of the contract and examining the legal aspects of it, but the legal manager would not necessarily know the schedule to supply the goods, what the expected service standard would be or what would be reasonable in terms of the costs and turnover time. Such input should be

given to the legal section whereafter the contract is drafted.

- [167] It was put to Prof Buch in cross-examination that Mr Zulu, as the CFO, handled the finances and when he got confirmation from the SCM unit that everything was above board, it was reasonable for him to execute payment. Prof Buch responded that the CFO had a responsibility to check that everything was in order, he had a responsibility to oversee and he could not just assume that everything was in order – he had more responsibility than to take everything at face value and just make payment. The SCM unit fell under the CFO and he had a duty of due diligence and oversight, he could not simply sign documents and forward them to the CEO for approval and he could not blindly make payments.
- [168] Prof Buch reiterated that both the CFO and the CEO had a responsibility to check what they signed, approved and paid as some purchases fell outside the scope of the tender or what was approved by the Board and they should have picked that up as they could not blindly sign everything that was generated by the end-user or the SCM unit. The CFO and the CEO are ultimately responsible for ensuring that the SLA complies with the tender specifications and the law.
- [169] The chairperson of the disciplinary hearing found that Mr Zulu, as the CFO, was responsible for the management of the employer's procurement processes, but he failed dismally and he was party to an agreement to the prejudice of his employer. Adv. Cassim found that Ms Mogale undermined and rendered tender law principles nugatory, asserting that she had authority that she did not have, and she acted beyond her powers.
- [170] Mr Dokie testified that from 15 June 2016 to 22 July 2021, the NHLS paid the total amount of R 230 909 307.41 to DV8. He explained that the contract has an option clause to extend it beyond the termination date, which was not authorised and which led to its extension until July 2021.
- [171] Mr Dokie testified that DV8 rendered IT-related services but due to the lapse of time, it was difficult to verify if the services were indeed rendered.
- [172] Ms Mogale testified that after the signing of the SLA, Mr Andrew Mukanya, who was in charge of IT governance, wanted approval to consolidate expired tenders and to get more, in addition to the existing DV8 contract. She explained that DV8 implemented what they were appointed for, and they subsequently discovered that the NHLS system was too old to support the new system and the CIO reported the problem to Ms Mogale. Ms Mogale testified that they needed more money and she said that they should approach the Board, but it was not escalated to the Board because the IT committee understood the problem and was of the view that it could merely be added to the existing tender with DV8. She accepted that.

- [173] Ms Mogale made it clear that she signed the addendum, drafted by the legal manager, in her capacity as the CEO of a R 4 billion budget, with the necessary delegated authority. She disputed that she acted without care and due diligence and testified that she did not expect that the CIO or the legal manager would not be diligent.
- [174] In cross-examination, Ms Mogale conceded that for capital expenditure she needed Board approval, but in October 2016, she signed an addendum with DV8 for additional services of R 63 million, without following any procurement process. Her explanation was that there were discussions between the end-user and the SCM and they told her that they could not go out on tender when there was an SLA with DV8. This was so because other service providers would tender lower than DV8 and if another service provider were to be appointed, the DV8 installation would not work and at that stage, the NHLS had already spent R 85 million on DV8. It was put to Ms Mogale that the law required of her to be fair to other bidders and the answer she provided was indicative of her disregard for the law and her duties as CEO. She responded that the 'essential role players' shared their views and to her it made sense and she accepted it. She however conceded that no process was followed to give other service providers an opportunity to participate in a competitive process and this constituted a contravention of section 217 of the Constitution.
- [175] Ms Mogale conceded that the Board, the Fincom and the IT committee were also essential role players, but she did not take the addendum to any of them. She disagreed that the addendum for R 63 million was a blank cheque as a quotation was done, but in cross-examination, she agreed that there was no breakdown of the goods, no specification or quantity and that it was not itemised.
- [176] The description of items for R 50 million was "equipment: switches, routers, cabling, racks etc." with no specification of the goods or quantities or price per item. Ms Mogale responded that she did not know what 'etc.' was and it was put to her that she had signed a contract, not knowing what R 50 million was to be paid for and that she did not apply her mind to it, she had no idea of what would be purchased at what price and that this was in contravention of the Constitution and the PFMA. Ms Mogale reiterated that the end-users knew what the R 50 million was for, that she trusted the end-user in this regard and that she had no intention to defraud the NHLS. She explained that multiple tenders and contracts are tedious and overwhelming for the staff and lead to errors.
- [177] In cross-examination, Ms Mogale conceded that she was not authorised by the Board to sign the SLA or addendum, but she refused to concede that because she knew that she was not authorised, it was a false and dishonest statement that she was indeed authorised. She insisted that the document was drafted by the legal manager and she accepted it because it came from a skilled, qualified and trained person and she was not dishonest in stating that she was duly authorised, but rather trusting the legal officer.

- [178] Ms Mogale could not dispute Prof Buch's evidence that the NHLS was prejudiced because it could not cancel the contract with DV8, because DV8 was running the entire IT system and it left the NHLS in a compromised position. He explained that the NHLS was left in a fix and was forced to enter into a settlement agreement with DV8 to keep the system running.
- [179] It was put to her that Mr Zulu took no steps to prevent her from signing the contracts.
- [180] In my view, Ms Mogale acted in breach of her contract of employment when she entered into the addendum with DV8. Ms Mogale had no authority to conclude the additional contract without Board approval. She breached her contractual duties and the policies and prescripts relating to tender processes in doing so.
- [181] Ms Mogale acted outside her delegation of authority by not seeking the recommendation of the Fincom and by not obtaining approval from the Board for this transaction. When she signed this contract, she was aware that capital expenditure and operational expenditure both involved a procurement of goods process which required Board approval. In the subsequent contract that she signed – the addendum – the claim by Ms Mogale to the effect that she was duly authorised, was false.
- [182] Ms Mogale followed no tender process for the additional addendum amount, cutting out any other service providers who were not given the opportunity to compete, thereby eliminating an opportunity for NHLS to secure better value and services, something that she was employed to not only uphold but in fact to implement. Ms Mogale admitted in cross-examination that there was no fair and competitive tender process whatsoever.
- Consequently, the NHLS was prejudiced. Ms Mogale exposed the NHLS, when in fact she had to protect its interests.
- [183] Mr Zulu is equally culpable for recommending the additional contract without any tender process. As the CFO, he knew or must have known that this was highly irregular and at odds with his responsibilities and oversight duties.
- [184] Considering the evidence before this Court, I accept that Ms Mogale and Mr Zulu breached the material terms of their contracts of employment in respect of the addendum in the DV8 matter.

Obiter

- [185] This case shows how important it is to have skilled, competent and qualified people employed in key positions and how devastating the consequences are if a CEO or CFO is not up for the task.

- [186] In casu, it has been demonstrated that during their conduct relating to each of the three contractors, as discussed in detail supra, Mr Zulu and Ms Mogale failed to perform their duties effectively, efficiently and professionally, and instead displayed severe negligence and incompetence, resulting in damage to the NHLS. The issue of damages will be dealt with infra.
- [187] The Applicants dismally failed to carry out explicit Board resolutions and they blatantly disregarded the limitations contained in the delegation of authority. They breached their undertakings to carry out the lawful, reasonable and fair instructions of their employer and they failed to exercise due diligence and care in the performance of their functions. Both failed to take reasonable steps to prevent loss and/or damage to the NHLS and to act with the necessary diligence care and skill as may be reasonably expected by the NHLS, having due regard to the functions of their roles and the nature of its business.
- [188] The conduct of the Applicants undermined the whole framework and structure of tender law principles, emanating from section 217 of the Constitution. Ms Mogale's version regarding Blue Future is astonishing – the Board resolution was very clear on what was approved and Ms Mogale's understanding and interpretation thereof shows a concerning lack of her ability to read and understand a clear Board resolution. Her conduct with respect to Afrent and DV8 shows an inability to understand policies and delegations, alternatively, her conduct shows that she lacks the capacity to hold the position of CEO.
- [189] Mr Zulu, as the CFO and the custodian of procurement and other relevant policies, did absolutely nothing to prevent Ms Mogale from exceeding the limitations of her authority and to ensure that there was compliance with the relevant policies and processes. Mr Zulu failed to play the role of an effective and diligent CFO.
- [190] Ms Mogale as the CEO and Mr Zulu as the CFO, both presented that they were duly qualified, experienced and competent to perform their functions and they contractually agreed that they would perform their functions with the necessary diligence, care and skill as may reasonably be expected by the employer having due regard to the nature of the functions. The only thing they managed to do effectively and diligently, was to collect their salaries.
- [191] The Applicants displayed an ineptitude in performing functions which require the implementation of tender law, and the application of financial control, reducing costs and increasing value.

- [192] Ms Mogale testified that the criticism against her was very unfair as she was very thorough. According to her, this is a painful chapter in her life as she is accused of things she did not do, it turned her life upside down and she was waiting for 7 years to hear what she had done wrong. She testified that their lives (hers and Mr Zulu's) were turned upside down and they were destroyed and left without any livelihood. She also referred to the role of the media in destroying them.
- [193] The aforesaid lamentation is without merit. Ms Mogale's mandate was to "turn around the organisation", as she claimed in her evidence, and she was specifically head-hunted by the Minister, Mr Aaron Motsoaledi, for this purpose, it then follows that she recognised from the outset that she had an overall duty of due diligence, especially in relation to reducing costs and increasing value, according to sound business logic. She cannot pretend not to know why her life became a misery – maybe she saddled a horse she was unable to ride.
- [194] Ms Mogale was unable to acknowledge her role in creating her own misery – she was constantly shifting the blame, even onto the media.
- [195] The media plays an important role in exposing wrongs and reporting on them. If one finds oneself on the wrong side of what is exposed, it is not the media that is to be blamed for the consequences of such exposure.
- [196] In cross-examination, Ms Mogale admitted that it was her responsibility to familiarise herself with any updates made to the NHLS' policies and/or the delegation of authority, and that failure to do so would be her fault. She was obliged, independently, to know her delegation of authority limit and there was no need for her to rely on anyone to know this. Ms Mogale was required to exercise due diligence. If she required support or guidance, she should have approached the Board, instead of following the say-so of her subordinates.
- [197] Ms Mogale abdicated her responsibility to exercise due diligence, which was her contractual obligation, which she was not entitled to abdicate or delegate. She followed her subordinates and she acted on what they told her, without any question whether they had considered the financial implications of the contracts or whether they were even qualified to do so.
- [198] It is astonishing that the Board could approve the Blue Future tender for R 25 985 921.10, yet the total payment made by the NHLS, including VAT, was R 126 394 634.23, evidently far more than what was approved, was spent. The BAC recommended the award of a tender for R 72 127 790.42 for Afirent, yet the NHLS spent R 155 455 340.51, including VAT, on the Afirent tender. The Board approved R 85 449 243.17 for DV8, yet the total amount paid in respect of the DV8 tender was R 230 909 307.41. All this raises serious questions as to the financial controls in place at the NHLS, an entity that operates on state funds and which found itself technically bankrupt. It is clear that Ms Mogale spectacularly failed to curb costs, the very reason why she was head-hunted.

[199] It paints a concerning picture of an entity where control and accountability are inadequate or even non est and it raises serious questions as to the competence and skills of the management and other key employees of the NHLS. The way in which Ms Mogale, Mr Zulu and their subordinates operated and advised, reminds this Court of the proverbial blind leading the blind.

Damages

[200] The last issue to be decided is whether the NHLS suffered the contractual damages claimed as a result of the aforesaid breaches of contract.

[201] The damages claimed by the NHLS, as per the counterclaim is for R 236 410 971, made up as follows:

1. Blue Future: R 93 219 702.26;
2. Afrirent: R 79 691 269.22; and
3. DV8: R 63 500 000.00.

[202] This Court must, in considering the claim for damages, decide whether the damages were caused by the breach. The NHLS pleaded that it suffered damages as a result of the material breach of contract by the Applicants because had they performed their contractual obligations, the Applicant would not have suffered the damages.

[203] The inquiry into whether the damages were caused by the breach, is a two-stage inquiry – first into factual causation and then into legal causation. However, before this Court can consider the question of causation, it must first consider whether the damages claimed were proved.

[204] It is trite that damages must be pleaded and proved and cannot be presumed. If no damages are proved, none will be awarded. The onus is on a plaintiff to prove the quantum of damages suffered – put differently: the proved loss would constitute the damages.

[205] In *KwaZulu-Natal Tourism Authority & others v Wasa*[8], the LAC held that:

[32] ... The employee did not seek compensation based on her dismissal being unfair in terms of the Labour Relations Act (LRA), she sought damages in terms of the BCEA consequent upon a breach of contract. She instituted a civil claim for damages. Two issues arise in this respect. Firstly, she had to prove that she suffered damages as a consequence of the breach, that there is a link between the damages she suffered and the breach; and, secondly, the quantum of damages she actually suffered.

[33] The employee failed to provide any evidence whatsoever as to the loss she suffered as a result of her dismissal and, as such, even if she had proved that the employer had breached the employment contract, she would not succeed in obtaining any award.'

[206] In Roux v University of Stellenbosch and Others and a related matter[9], the University of Stellenbosch sued Mr Roux, a former director and employee, for damages arising from breaches of his employment

contract with the University. In dealing with the issue of onus, the Court held that the defendant must prove any reduction in the damages already proven by the plaintiff. The Court held as follows:

‘[11] ...

“The principle is well known that a plaintiff has the onus to prove the extent of his or her loss as well as how it should be quantified

(expressed in an amount of money). However, in terms of the correct approach to the collateral source rule, it does not relate to the assessment of damage but concerns the normative question whether the particular benefits have to be deducted from an amount of damages; in other words, its relates to the adjustment of an amount of damages in favour of a defendant. It would therefore be logical to accept that, once a plaintiff has proved his or her damage and quantified such loss, any subsequent reduction thereof in favour of the defendant is a matter that the latter has to prove. ...However, if the incorrect theory is adopted that the collateral source rule relates to the assessment of damage, it will be for a plaintiff to prove that particular benefits do not reduce his or her damage (and damages).”

In a nutshell, the plaintiff bears the onus to prove its damages on a prima facie basis. To the extent that the defendant claimed that the plaintiff obtained a benefit that must be taken into account in the overall quantification of the plaintiff’s damages, the benefit must be proved by the defendant (and therefore properly pleaded as held by the arbitrators), unless admitted by the plaintiff. Where the quantum of the benefit is uncertain the plaintiff is required to assist the court in the quantification of the benefit, to the extent to which the damages proved by the plaintiff must be reduced.’

[207] The Court held that any alleged benefit received by the plaintiff had to have been pleaded and proved by the defendant for purposes of quantification:

‘The initial arbitrator also found that Mr Roux had not pleaded that the money expended by Mr Roux had been used to acquire some asset, the value of which should been taken into account in assessing the damages. Absent that pleading and proof of the allegation it was not incumbent upon the University to prove “the nature, extent and value” of any benefit obtained as a result of the unlawful expenditure of the funds improperly allocated to the cost centres of the rugby club. I should point out though, that the “value” of the benefits related to the quantification of the damages as per Japmoco. The University would, if benefits were pleaded and proved have been required to have assisted the Initial Arbitrator in the quantification of the benefit.’[10]

[208] It is evident from the NHLS' claim that the damages claimed are R 93 219 702.26 for Blue Future, being the difference between what the Board approved and what was spent; R 79 691 269.22 in respect of Afrirent, where the entire contract was not approved by the Board; and for DV8, the damages claimed are R 63 500 000.00, being the value of the addendum.

[209] In their statement of response, the Applicants' answer to the NHLS' plea that it suffered damages of R 236 million, is a little more than a bare denial. They denied that they acted in breach of their employment contracts, they denied that the NHLS suffered the damages they claim or any damages at all and they accuse the Board of failing to take reasonable steps to mitigate against any potential damages.

[210] In my view, the damages suffered by the NHLS cannot be calculated or awarded as claimed. The damages cannot simply be the entire value of the Afrirent contract or the entire amount of the DV8 addendum.

[211] In *Pilanesberg Platinum Mines (Pty) Ltd v Ramabulana*[11], the LAC confirmed that an employee proceeding in terms of the Basic Conditions of Employment Act[12] must prove the damages she has suffered to obtain monetary relief and held that:

'With regard to damages, as I said earlier, there was a duty upon the respondent to prove the quantum of her damages — to simply

demand damages in the amount that she would earn until her retirement is totally misconceived. Damages in a breach of contract needs to be proved, she failed to prove any, nor does she allege that she has been out of work from the date of her employment being terminated. In the circumstances, had the respondent proved a breach, she would not in law be entitled to any relief.'

[212] The same principle applies in *casu*. The NHLS cannot simply demand damages in the exceeded amount of the Blue Future contract and the entire value of the Afrirent contract and the DV8 addendum. The damages must be proved.

[213] Prof Buch conceded in cross-examination that it was not the NHLS' case that it received no value from the over-expenditure with Blue Future or that it received no value from Afrirent and he confirmed that the expenditure was not declared as wasteful or fruitless expenditure. Prof Buch explained that the expenditure was declared as unauthorised expenditure. Ms Mogale had the authority to sign contracts and to bind the NHLS, but in the three instances, she did not have the authority to sign the contracts because she was going beyond her delegation of authority and there was no Board resolution to authorise her to contract as she did.

- [214] Prof Buch conceded that by the first half of 2017, the Board was aware of the irregularities with the three contracts. The Board became aware of the exceeding of the delegation of authority on the Blue Future contract in February/March 2017, and the irregular appointment of Afrirent and the R 63 million addendum for DV8 were known to the NHLS by April 2017, yet the first time a formal forensic report was requested in relation to the said transactions, was in August 2018.
- [215] He explained that in respect of Blue Future, the NHLS acted against the Applicants and Mr Motsepe, reported the matter to the National Treasury, SAPS and the SIU and the contract with Blue Future was cancelled and the litigation on that is still ongoing.
- [216] Prof Buch was not able to state that the NHLS did not receive the items that were paid for and Prof Buch conceded that the server was indeed delivered to and utilised by the NHLS.
- [217] Mr Doki conceded that on Blue Future, some items were indeed delivered, but he was unable to confirm the number or the nature of the items that were delivered but conceded that there may be receipts to confirm that the items were indeed received.
- [218] It is evident from the facts placed before this Court that there were serious irregularities and disregarding of prescripts and procedures in the Blue Future contract and that the Applicants played a central role in this. This goes to the issue of breach of contract and the consideration of damages is an entirely different and separate issue. Notwithstanding the breach of contract, there was no convincing evidence before this Court to show that the NHLS suffered damages and if damages were indeed suffered, the quantum of the damages was not proven in Court.
- [219] Both witnesses for the NHLS conceded that the NHLS received value from the over-expenditure on the Blue Future contract and that the expenditure was unauthorised, rather than wasteful or fruitless.
- [220] In respect of Afrirent, the NHLS claimed R 79 691 269.22 because the contract was not approved by the Board.
- [221] Prof Buch explained that if the Court was not inclined to grant the full amount as damages, the NHLS would seek damages for the discrepancy between what the BAC approved and the subsequent SLA signed by Ms Mogale, as well as the cost of the penalty clauses and the vehicles with zero mileage. The NHLS had to pay those costs because Ms Mogale agreed to a prejudicial penalty clause and she ordered more vehicles than what was required and the NHLS should not have to pay for that.
- [222] Ms Mogale's version was that the Afrirent SLA was for a maximum of R 79 million and only the vehicles needed were to be ordered, not vehicles for the full amount of R 79 million and in the event that the NHLS ordered fewer vehicles, it would not constitute a breach of contract. Furthermore, her case was that she took steps to mitigate the situation in January 2017 when she instructed that no further cars were to be ordered without proper motivation, which had to be sent to her. Ms Mogale was suspended in February 2017 and

her case is that she had no further control over the subsequent ordering of vehicles. Prof Buch was unable to shed light on whether the NHLS conducted any investigation to ascertain who had ordered the vehicles.

- [223] In respect of Afrirent, Prof Buch conceded in cross-examination that the Applicants were suspended in February 2017 and that by the time they were suspended only 29 vehicles were delivered. He was not aware of the steps taken by Ms Mogale, prior to her suspension, to prevent more than 29 cars from being delivered. He confirmed that after Ms Mogale was suspended in February 2017, she was not allowed to return to the premises and to perform her duties, she had no further control over the ordering of the vehicles subsequent to her suspension.
- [224] There was High Court litigation regarding Afrirent and the NHLS tried to set aside the agreement. The NHLS had to apply for condonation because of the delay in bringing the application. The application was launched on 4 October 2017, but the case was finally disposed of only in August
2020. The Judge in the said matter lambasted the NHLS for the delay of more than one year in launching the application and when the matter was finally adjudicated in 2020, it was held that the Afrirent SLA was constitutionally invalid, but due to the delay in launching the application, the Court refused to set it aside and the NHLS was held to the agreement.
- [225] In my view, the NHLS is entitled to the following damages in respect of the Afrirent contract: the BAC approved the amount of R 72 127 790.42 for the tender and instead of contracting for the amount approved by the BAC, the amount recorded in the letter to Afrirent and the SLA subsequently signed by Ms Mogale was increased to R 79 691 269.33. The difference was R 7 563 478.90. Prof Buch testified that even if the Afrirent tender was approved by the Board, the contract price could not have been increased by R 7,5 million without approval and a sound reason to increase the amount.
- [226] This issue was canvassed with Ms Mogale in cross-examination, and she explained that ‘someone’ had made a mistake. The first SLA prepared was indeed for R 72 127 790.42, but Afrirent refused to sign as they indicated that they had tendered for R 79 million and that was what they wanted. According to Ms Mogale, the SCM acknowledged the error, and it was corrected. The approval by the BAC was for R 72 127 790.42 and Ms Mogale conceded that the BAC never approved the amount of R 79

million for the Afrirent tender and that the alleged ‘error’ was not remitted to the BAC and there was no proof that Afrirent indeed tendered for R 79 million. Ms Mogale was of the view that Afrirent had tendered for R 79 million, because they informed her so and according to her, it would be unfair to award them a tender for R 72 127 790.42.

- [227] I am satisfied that Ms Mogale acted in breach of her contractual duties and obligations when she entered into the SLA and singlehandedly increased the amount approved by the BAC with R 7,5 million, without approaching the Board or the BAC, without perusing the tender allegedly submitted by Afirent and verifying the claim that a mistake was made, without following any due process, without being authorised to increase the tender amount and without any sound business rationale to do so.
- [228] Ms Mogale's breach and conduct caused the Afirent tender to be increased by R 7,5 million when there was no basis in law or business to increase the tender. She never pleaded or testified that the tender amount was increased because the value to be received by the NHLS was also increased and that there was a nexus between the increased amount and the value and the benefit for the NHLS. Her version was in fact shocking – she increased the amount, all by herself, because Afirent wanted more and she believed that it would be unfair not to give them what they wanted. She conceded before this Court that a service provider is not automatically entitled to the amount it tendered for, yet she increased a tender to give a service provider what it wanted, without any process or justification.
- [229] There is no evidence before this Court to show that the NHLS received an increased value or benefit to the tune of R 7,5 million. The only evidence is that the amount was merely increased and this Court accepts that the NHLS suffered damages by paying an increased amount without receiving a corresponding increased benefit and this was caused by Ms Mogale.
- [230] I am further of the view that the NHLS is entitled to the damages it suffered as a result of the penalty clause that was included in the Afirent SLA. Ms Mogale failed to execute her duties diligently and in the best interest of the NHLS, as she contractually agreed to do, when she agreed to a penalty clause that was severely prejudicial to the NHLS.
- [231] In cross-examination, Ms Mogale tried to blame the legal manager and the SCM unit for the fact that she had signed a contract wherein she committed the NHLS to the payment of heavy penalties, but she eventually conceded that as a person with an MBA degree, she knew that she was committing the NHLS to pay penalties and that those penalties could run into millions. Ms Mogale, as the CEO, should have been looking out for the interests of the NHLS when she signed the contract with Afirent and she should have avoided prejudicial clauses, such as the penalty clause, which she knew could cause the NHLS to pay millions in penalties, but she failed to do that.
- [232] The NHLS had paid R 14 571 867.82 penalties in respect of excess usage to Afirent over the period of the contract. This amount was not disputed by Ms Mogale.

[233] Ms Mogale attempted to argue that most of the expenditure in the form of penalty payment as a result of the SLA she signed with Afrirent occurred after she was suspended and therefore there is a break in the chain of causation, and that her conduct is therefore not the cause of the losses that are claimed. The argument cannot be accepted because the evidence discloses that Ms Mogale approved the lease of vehicles from Afrirent to the value of R 79 million and she signed the SLA wherein

she increased the tender by R 7,5 million to the benefit of Afrirent and she agreed to the penalty clause which was included the SLA she signed.

[234] Ms Mogale agreed to the penalty clause, and she was aware of the consequences thereof and that it would apply for the full duration of the Afrirent contract. Ms Mogale was the signatory of the contract and it cannot be disputed that without her signature, no payments could have been approved.

[235] In respect of the claim for leased vehicles that were not used, I am not convinced that the NHLS has made out a case for damages against the Applicants. The evidence showed that Ms Mogale tried to put measures in place in January 2017 to curb the ordering of vehicles and it was undisputed that after she put the measures in place, the situation improved. However, she was suspended in February 2017 and it was common cause that after her suspension, she had no control over the vehicles that were ordered and Prof Buch could not answer as to who was responsible for the ordering of the excess vehicles after February 2017. The contract with Afrirent did not compel the NHLS to order all the vehicles and the ordering of vehicles after February 2017, is something the NHLS should have managed better. The NHLS should have put measures in place to limit the number of vehicles and to ensure that vehicles that were not needed, were not leased from Afrirent. In my view, Ms Mogale is not to be blamed for this.

[236] In terms of DV8, the NHLS claims damages of R 63,5 million. The claim is based on the fact that Ms Mogale signed the addendum for R 63,5 million without following any prescripts or processes and without authority. Prof Buch stated that there were several losses but that the NHLS was unable to quantify those. He further explained that the addendum was subsequently ratified and that there was a settlement agreement between the NHLS and DV8.

[237] In the event that this Court does not agree with the claim for R 63,5 million, the NHLS' claim is limited to the loss it was able to quantify. Prof Buch explained that it would be for the difference between the pricing of Hewlett-Packard (HP) and Cisco. The same equipment was available from HP for R 307 455.00 but it was purchased from Cisco for R 582 000.00, with an additional amount of R 68 000.00 payable as annual costs. The NHLS paid R 650 000 to Cisco when it could have paid R 307 455.00 to HP, thus R 342 545.00 more for the same equipment because there was no competitive bidding and none was required due to the open-ended vague terms of the addendum Ms Mogale signed. Prof Buch emphasized that a proper procurement process had to be followed and the fact that it was

not done, had put the NHLS at risk and caused it to pay more for items.

[238] In my view, the Applicants failed in their contractual duties and obligations and Mr Zulu, as the CFO, failed to act as the custodian of the procurement process. As a result, no competitive procurement process was followed and the addendum that was signed by Ms Mogale did not comply with the prescripts and was indeed a vague and open-ended contract, which was open to abuse and risk.

[239] The NHLS was able to prove its damages as aforesaid in that it paid more for equipment than it should have and had a proper process been followed, the NHLS would have been in a less prejudiced and compromised position. The Applicants are both liable for this damage suffered by the NHLS.

Costs

[240] The last issue to be decided is the issue of costs.

[241] There are two claims before this Court – an unfair dismissal claim under the LRA and a counterclaim for contractual damages.

[242] Mr Boda for the NHLS submitted that Ms Mogale should be ordered to pay the costs of the unfair dismissal claim as she has caused the Respondent to incur costs for a matter which does not have merit.

[243] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[244] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and mala fides, unreasonableness and frivolousness are factors justifying the imposition of a costs order.

[245] In *Zungu v Premier of the Province of KwaZulu-Natal and Others*[14], the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.

[246] This is a matter where this Court has to strike a balance.

[247] The generally accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation.

[248] In *Public Servants Association of SA on behalf of Khan v Tsabadi NO and Others*[15], it was emphasized that:

‘...unless there are sound reasons which dictate a different approach, it is fair that the successful party should be awarded her costs. The successful party has been compelled to engage in litigation and compelled to incur legal costs in doing so. An appropriate award of costs is one method of ensuring that much earnest thought and consideration goes into decisions to litigate in this court, whether as applicant, in launching proceedings or as respondent opposing proceedings.’

[249] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success. I am mindful of the fact that the Applicants referred their case to the CCMA and that it was an application by the NHLS which caused the unfair dismissal case to be adjudicated by this Court and not the CCMA.

[250] The NHLS on the other hand elected to invoke this Court’s jurisdiction under section 77(3) of the BCEA, a jurisdiction that the Court exercises concurrently with the civil courts.

[251] The LAC has held[16] that when this court exercises its jurisdiction under section 77(3) of the BCEA, as it does in this instance, the rule established by section 162 of the LRA to the effect that costs do not follow the result and must be determined by reference to the requirements of the law and fairness, does not apply. The rule to be applied in proceedings such as the present is that costs follow the result, save in exceptional circumstances.

[252] Mr Boda submitted that both Ms Mogale and Mr Zulu should be ordered to pay the cost of the counterclaim, jointly and severally. Mr Goosen for the Applicants submitted that the NHLS’ claim be dismissed with costs.

[253] In casu, the Applicants were partially successful in defending the NHLS’ claim for damages and the NHLS was partially successful in its claim for damages. In the present circumstances, the interests of justice and fairness will be best served by making no order as to costs.

[254] In the premises, I make the following order:

Order

1. The Applicants’ claim for unfair dismissal is dismissed;
2. In respect of DV8, Ms Mogale and Mr Zulu’s estate are jointly liable to pay to the NHLS R 342 545,00 (three-hundred and forty-two thousand, five-hundred and forty-five rand) which is the difference between the price paid to CISCO and which could have been secured from Hewlett-Packard;
3. In respect of Afrirent, Ms Mogale is liable and has to pay the NHLS the total amount of R 22 135 346.70 (twenty-two million, one hundred and thirty-five thousand, three hundred and forty-six rand and seventy cents) made up as follows:

3.1. The difference between what the BAC approved and which Ms Mogale was recommended to sign and what she did sign, which was R 7 563 478.91 (seven million, five hundred and sixty-three thousand, four hundred and seventy-eight rand and ninety-one cents);

3.2. The penalties that were levied due to Ms Mogale's signing of the addendum to the contract containing the penalty clause, which amounts to R 14 571 867.82 (fourteen million, five-hundred and seventy-one thousand, eight hundred and sixty-seven rand and eighty-two cents).

4. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate C Goosen

Instructed by: B J Erasmus Pieterse Attorneys

For the Respondent: Advocate F A Boda SC

Instructed by: Cliffe Dekker Hofmeyr Inc Attorneys

[1] Act 66 of 1995, as amended.

[2] [2003] ZALC 53; (2003) 24 ILJ 1130 (LC) at paras 6 - 7.

[3] [2017] ZALAC 63; (2018) 39 ILJ 189 (LAC).

[4] Harmse supra at paras 8 - 9.

[5] Act 1 of 1999, as amended.

[6] It is contra bonis mores and unlawful to grant a contract that breaches section 217 as in Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC [2009] ZASCA 66; 2010 (1) SA 356 (SCA) at para 26.

[7] Randwater v Stoop and Others [2012] ZALAC 32; [2013] 2 BLLR 162 (LAC).

[8] [2016] ZALAC 35; (2016) 37 ILJ 2581 (LAC).

[9] [2023] ZAWCHC 81; [2023] 3 All SA 248 (WCC) at para 11.

[10] Ibid at para 31.

[11] [2019] ZALAC 60; (2019) 40 ILJ 2723 (LAC) (Ramabulana).

[12] Act 75 of 1997.

[13] Ramabulana supra at para 32.

[14] [2018] ZACC 1; (2018) 39 ILJ 523 (CC) at para 24.

[15] [2012] ZALCJHB 17; (2012) 33 ILJ 2117 (LC) at para 176.

[16] See: Baise v Mianzo Asset Management (Pty) Ltd [2019] ZALAC 42; (2019) 40 ILJ 1987 (LAC).

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