

SOUTH AFRICA / JUDGMENT

Moyo v Old Mutual Ltd and Others

(34004/19) [2022] ZAGPJHC 20; [2022] 4 BLLR 371 (GJ) (31 January 2022)

[2022] ZAGPJHC 20

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wright

CASE / FILE NUMBER

34004/19

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO: 34004/19

Reportable: No

Of interest to other

judges: No

Revised: Yes

31 January 2022

In

the matter between:

PETER

MTHANDAZO MOYO

PLAINTIFF

and

OLD

MUTUAL LTD

FIRST DEFENDANT

OLD

MUTUAL LIFE ASSURANCE

SECOND DEFENDANT

COMPANY

(SA) LTD

TREVOR

MANUEL

THIRD DEFENDANT

OTHER
DEFENDANTS
FOURTH to FIFTEENTH DEFENDANTS

JUDGMENT

– APPLICATION FOR ABSOLUTION - WRIGHT J

1. On 31 March 2017, pursuant to a written agreement Mr Moyo the plaintiff was appointed CEO of Old Mutual Emerging Markets Ltd. The appointment was effective 1 June 2017. Mr Moyo took up his position. Subsequently, under clause 1.2 the position became that of CEO of Old Mutual Ltd, the first defendant.
2. The second defendant is a related company in the Old Mutual fold. The pleadings, the documentation and the witnesses in their oral evidence refer, for the most part simply to “Old Mutual” and I shall do the same. For present and practical purposes, nothing turns on the specific difference in identity between the first and second defendants.
3. The third to fifteenth defendants are and have been directors of Old Mutual at the relevant times. Unless the context indicates otherwise, I shall include the director defendants in my references to Old Mutual. The current CEO of Old Mutual, Mr Williamson is not a party to this action.
4. On 17 June 2019, Old Mutual terminated Mr Moyo’s employment by giving him six months’ written notice. Whatever differences there had been between Mr Moyo and Old Mutual prior to the termination were immediately compounded and much litigation flowed. The dispute was widely covered in the media.

THE PLEADINGS

5. Before me is an action in which Mr Moyo pleads three breaches by Old Mutual of the employment and related agreements. In short, he says firstly that he had been wrongly suspended on 23 May 2019 without a hearing. Secondly, his employment was wrongfully terminated in the letter of 17 June 2019 after Old Mutual had failed to give him a hearing and accused him publicly of gross misconduct. Thirdly, Old Mutual breached an alleged implied term of the employment agreement that Old Mutual would not victimise Mr Moyo for having made protected disclosures. The first protected disclosure is alleged to be the revelation by Mr Moyo of a triple conflict of interest by the third defendant, Mr Manuel who is the Chairperson of Old Mutual. The second protected disclosure is alleged to be that Old Mutual paid for the private legal fees of Mr Manuel in certain litigation.
6. The impact of these alleged breaches is pleaded on behalf of Mr Moyo to entitle Mr Moyo to re-instatement, alternatively to damages in the sum of R230 million in respect of lost earnings, bonuses, share incentives and related sources of lost remuneration. This is the first claim.

7. The second claim is based in delict “ in the execution of the contractual relationship between the parties “and is also in the sum of R230 million, the cause of action being an alleged breach by Old Mutual of section 159 of the Companies Act 71 of 2008 and section 3 of the Protected Disclosures Act 26 of 2000 by victimising Mr Moyo on account of his disclosures. In short, Section 159 of the Companies Act protects employees where they make whistleblowing disclosures in good faith and in reasonable circumstances.
8. The third claim is based in delict and relies on the wrongdoing alleged above and on allegations that Old Mutual, together with the other defendants violated the right to dignity of Mr Moyo by making racial, xenophobic and Afro-phobic slurs against him. The basis for this claim is alleged to consist in the defendants’ referring to Mr Moyo’s Zimbabwean origins, casting aspersions on his professional integrity, giving false reasons for his termination, portraying him as dishonest and unethical, falsely representing that he was party to a delay in the payment of certain preferential dividends to Old Mutual, falsely claiming that certain dividends on preference shares had not been declared when in fact they had, making misleading statements about what Mr Moyo had said to the Board of Old Mutual and suggesting that Mr Moyo had lied when he had said that the Chair of Old Mutual, Mr Manuel was out to get him. Mr Moyo claims R20 million in this claim.
9. In their plea, the defendants deny wrongdoing and deny having made most of the allegedly defamatory statements. In their responsive statement under the Commercial Court Directives they plead that the allegations they did make were made truthfully and in the public interest and were justified in the circumstances.
10. In an exchange of pre-trial documents, Mr Moyo appears to have limited his case regarding dignity impairing statements to those having been made in a Johannesburg Stock Exchange SENS statement issued by Old Mutual on 18 June 2019 and statements made in a radio interview on 1 July 2019 by Mr Paul Baloyi, the sixth defendant.
11. The defendants raised the defences of res judicata and issue estoppel, read with the principle of stare decisis in their responsive statement under the Commercial Court Directives. The litigation between the parties had started when Mr Moyo launched an urgent application for his re-instatement soon after his employment had been terminated. Mashile J found for Mr Moyo, ordering re-instatement. That order was set aside on appeal to a Full Court which found that the termination of employment had been lawful.

THE TRIAL

12. Mr Moyo was represented by Mr Mpofu SC, Mr Ngcukaitobi SC, Ms Motloenya-Modise and Ms Gaba briefed by Mabuza attorneys. The first two defendants were represented by Mr Maleka SC and Ms Mayet briefed by Bowmans. The directors of Old Mutual were represented by Mr Trengove SC and Ms Rajah briefed by Bowmans.

13. Before the trial started, Mr Mpofu abandoned the main claim for re-instatement. He did so as the current CEO of Old Mutual, Mr Williamson had not been joined as a party to the action.
14. The defences of res judicata, issue estoppel and the principle of stare decisis remain to the balance of the claims. This is because the particulars of claim are framed to allege that all claims pleaded after the main claim for re-instatement rely at least partly on the wrongdoing pleaded above them. The suspension of 23 May 2019 and the termination on 17 June 2019 remain part of the alleged wrongdoing as a basis for all claims.
15. It was agreed that the witness statements filed for all witnesses before the hearing would have no evidential value until the witness had testified, including cross-examination.
16. It was agreed that there would be no splitting of issues.
17. The action is a mixture of traditional pleadings under the Uniform Rules and the Judge President's Directives in the Commercial Court. The particulars of claim were signed on 27 September 2019. The plea was signed on 30 October 2019. The matter was designated as a Commercial Court matter on 19 March 2020. Thereafter, various requests for further particulars and admissions were made and answers given by 29 September 2021.
18. On 27 September 2021, through my clerk, I ordered that full witness statements for all witnesses, expert and lay be prepared and given to the other side. I specified, in line with the Commercial Court Directives that examination in chief would consist in each witness confirming her statement. On 17 November 2021, Mr Moyo delivered his full witness statements and statement of case and on 10 December 2021 the defendants delivered their responsive statement and then their full witness statements.
19. Chapter 6.2 of the Commercial Court Practice Directive of 3 October 2018, requires any party wishing to lead evidence at the trial outside that contained in a witness statement to make written application to the judge. Under Chapter 5.2, the leave of the judge is required before a party may lead evidence outside the witness statement. Under Chapter 2.8, all proceedings in the Commercial Court will be subject to management by the court.
20. At the outset, before any evidence had been led, Mr Mpofu indicated that he wished to lead the evidence of Mr Patel, who is not a defendant and for whom Mr Mpofu did not have a witness statement as Mr Patel had not wished to consult with Mr Moyo's legal team.
21. I understand the practical difficulties faced by Mr Moyo and his legal team. That does not take away from the obvious purposes of the applicable Commercial Court directives, which is to do away with the element of surprise and shorten proceedings. Another consideration is that, regarding Mr Patel, the defendants' legal team may have wished to modify their witness statements consequentially, depending on what the Mr Patel might have said in evidence.

22. One accepts that most if not all trials involve at least some degree of surprise at some stage in the proceedings. This is inevitable even in a closely regulated trial in the Commercial Court. However, on balance it would have been unfair to the defendants if I had allowed Mr Patel to be called without more. The prejudice to the defendants, with reference to the Commercial Court directives is manifest.
23. The question was resolved by agreement as set out below.

WITNESSES

24. Mr Moyo testified. His evidence was consistent with his views as set out in the chronology below.
25. Mr Blair, a management consultant in remuneration testified, saying that Mr Moyo's loss is R213 047 198, calculated from 1 July 2019 until a date in 2023 when Mr Moyo would have retired. Mr Blair said that he calculated no loss between 23 May 2019, when Mr Moyo was suspended and the end of June 2019, that is some thirteen days after the letter of dismissal of 17 June
2019. Mr Blair calculated Mr Moyo's loss from 1 July 2019 onwards. Mr Blair confirmed that Mr Moyo received R4.2 million by way of salary from 1 July 2019 for the next six months. This figure is not included in the R213 047 198. This figure is before the application of tax.
26. Mr Patel testified. His evidence finds context in the chronology below. I allowed Mr Ngcukaitobi to call Mr Patel even though no witness statement had been prepared for Mr Patel. Instead, by agreement between the parties a list of questions was sent by Mr Moyo's legal team to Mr Patel on the first day of trial and Mr Patel answered these questions the next day while the trial proceeded.
27. Mr Patel had been an Old Mutual employee and the Old Mutual nominee on the Board of NMT Capital from a date that preceded Mr Moyo's becoming CEO of Old Mutual. The significance of NMT Capital is dealt with below. Mr Patel resigned as an employee of Old Mutual and as a non-executive director of NMT Capital on 31 August 2018. Mr Patel was aware of the relevant shareholders' agreement and that it "provided for certain conditions relating to the declarations of dividends." Mr Patel did not report any conflict of interest or impropriety on the part of Mr Moyo to Old Mutual. Mr Patel could not recall voicing any objection to the declaration of ordinary dividends by NMT Capital. Mr Patel could not recall if he voiced any governance concerns to Mr Moyo.
28. After these three persons had testified, Mr Mpofu closed his case. Mr Maleka and Mr Trengove applied for the absolution of the defendants from the instance. The test is whether or not a court could find for Mr Moyo on the evidence presented.

29. I set out below, a chronology of the main facts which shows with sufficient clarity what happened and when. It is not necessary for me to set out further the evidence of any witness. The evidence of Mr Moyo is encapsulated in the chronology. The evidence of Mr Blair and Mr Patel is dealt with above. The picture emerges from the chronology.
30. The documents in the lengthy trial bundle, many of them of an accounting nature, do not always distinguish with perfect clarity between Mr Moyo's direct ownership of twenty percent of the ordinary shares in NMT Capital, on one hand and on the other hand, his indirect ownership of a percentage of ordinary shares in NMT Capital via one or more of Mr Moyo's own investment companies. In some instances, the author of a document runs together the direct and indirect ordinary shareholdings of Mr Moyo in NMT Capital. Reference is made in the documents, interchangeably to Mr Moyo benefiting by R23 million, R30 million or R30,6 million and other figures. Nothing turns on this.
31. For the sake of simplicity, I shall limit my findings below to references only to Mr Moyo's dividends received directly as owner of twenty percent of the ordinary shares in NMT Capital.

CHRONOLOGY OF MAIN FACTS

32. 25 January 2005 – Old Mutual and a company then known as Amabubesi, but later to be called NMT Capital and four individual persons, including Mr Moyo conclude an agreement styled “ Amabubesi Preference Share Subscription agreement “. Under this agreement, Old Mutual subscribed for preference shares in Amabubesi and would be entitled to redeem those shares five years hence. Under clause 1.2 of Schedule 1 to the Amabubesi agreement, Old Mutual was entitled to dividends paid by Amabubesi

prior to other shareholders, be they ordinary or otherwise preferential. Clause 1.2 expressly stipulated that “ No dividends may be paid on ordinary shares before all arrear preference dividends have been paid. “ Mr Moyo held twenty percent of the ordinary shares in NMT Capital at all material times.

33. 10 April 2010 – At the request of Amabubesi, Old Mutual in writing extends the redemption date by eighteen months. Old Mutual does so, expressly stating in its letter that it has agreed to the extension after having regard to the signed, audited financial statements of Amabubesi for the year to 30 June 2009. The effect of this extension is that Amabubesi need not pay Old Mutual for the latter's preferential shares until 10 October 2011. It is unclear what happened on or about 10 October 2011 regarding extensions but nothing turns on this.
34. 13 May 2013 – Old Mutual grants Amabubesi a further extension, for three years and one month, that is to 13 June, 2016.
35. 31 March 2017 – employment agreement between Mr Moyo and Old Mutual.
36. Under clause 3.2, Mr Moyo undertakes to do everything reasonably necessary and ancillary to the performance of his functions as CEO.

37. Under clause 3.3, Mr Moyo undertakes to perform his duties faithfully and diligently.
38. Under clause 3.6, Mr Moyo acknowledges that he needs to work in an effective and integrated team with senior people in Old Mutual and that interpersonal compatibility is an inherent and essential requirement.
39. Under clause 4.1.3, it is a condition of employment that any involvement or interest in any other business that may have a bearing on the employment be disclosed by Mr Moyo.
40. Under clause 5.1, detail is required to be disclosed by Mr Moyo of shareholdings and directorships where any conflict of interest could or may appear.
41. Under clause 5.2, Mr Moyo consents to his business interests as set out in Addendum A and B to the employment agreement being made public by the Board of Old Mutual where the Board determines that such disclosure would be appropriate or required.
42. Under clause 5.3, Mr Moyo is required to notify the Board in writing of any actual or potential conflict of interest within seven days.
43. Under clause 12.1, Mr Moyo acknowledges that his appointment is based on trust and mutual respect.
44. Under clause 12.2.1, Mr Moyo shall display total honesty and integrity.
45. Under clause 12.2.3, Mr Moyo shall at all times act in the best interests of Old Mutual.
46. Under clause 12.8, Mr Moyo shall refrain from any action which may harm the good name, reputation or brand of Old Mutual.
47. Under clause 22.4, Old Mutual shall only use or disclose information concerning Mr Moyo's race or ethnic origin with his consent or in limited lawful circumstances.
48. Under clause 23.1, Mr Moyo acknowledged that he shall be subject to Old Mutual's discipline, grievance and related procedures in place from time to time.
49. Under clause 24.1.1, the agreement may be terminated by either party on six months' written notice. Clause 24.1 reads " This contract of employment may be terminated as follows: 24.1.1. By either party providing 6 (six) months' notice to this effect, in writing, to the other party, subject to clause 24.3. " Clause 24.3 provides for the return to Old Mutual of property of Old Mutual and related matters. Clause 24.1.1.1 allows Old Mutual to elect whether or not Mr Moyo is to work during his notice period.
50. Under clause 24.2, Old Mutual may terminate the employment in various circumstances set out. Some of these circumstances require notice, others not.

51. Under clause 25.1.1, where allegations of misconduct or incapacity have been raised against Mr Moyo, Old Mutual will be entitled, within its sole discretion, to decide whether or not to hold an internal disciplinary enquiry or to proceed instead via the pre-dismissal arbitration procedure contemplated in Section 188A of the Labour Relations Act 66 of 1995.
52. In Addendum A to the employment agreement, Mr Moyo discloses his 26.66% interest in NMT Capital, that is the new name of Ambubesi and his 25.33% interest in NMT Group, a company related to NMT Capital.
53. Under Addendum A, Mr Moyo may receive dividends in respect of his holdings in NMT.
54. Under Addendum A, any conflict resulting from Mr Moyo's position as non-executive director of NMT will be dealt with by the Chairperson of Old Mutual or in terms of clause 25.2 of the employment agreement, which clause deals with arbitration.
55. Under Addendum A, Mr Moyo acknowledges that the best interests of Old Mutual take precedence over NMT's interests.
56. Addendum B is styled Protocols Document and caters for conflict of interest. Under clause 3.2, directors of Old Mutual are obliged to disclose any potential conflict as soon as becoming aware of it.
57. Under clause 4.3, Mr Moyo acknowledges that the existence of NMT may cause a conflict of interest or the perception of such conflict between himself and the interests of Old Mutual.
58. Addendum C deals with policies, standards and procedures. It includes a clause 2, headed Code of Ethics which recognises that Old Mutual's public reputation is one of its most important assets and that it is committed to achieving the highest standards.
59. Under clause 3, a conflict of interest is defined as a situation in which private interests or personal considerations may affect or may be perceived to affect an Executive's judgment in acting in the best interests of Old Mutual.
60. Clause 4.3 of the disciplinary code of Old Mutual, includes the words "In the case of misconduct that may result in dismissal, a formal disciplinary enquiry MUST be held."
61. Clause 4- Suspension – This clause, which appears after clause 4.3, states that suspension is at managerial discretion, subject to considerations of fairness. It specifies that "Suspension pending a disciplinary enquiry is on full pay with the usual benefits". The clause provides that an employee may be suspended "pending an investigation or disciplinary enquiry wherein the suspected/alleged offence is misconduct of a serious nature".

62. 22 August 2017 – Mr Kuhn, a general manager at Old Mutual certifies that R258 million was due by NMT Group to Old Mutual as at 30 June 2017. He further certifies that of this amount, R138 million was for preference share capital, R85 million was for preference share dividends and that R34 million was for arrear preference share dividends as at 30 June 2017. He certifies further that as at 22 August 2017, no preference share dividends or arrear preference share dividends were paid by NMT Group to Old Mutual.
63. 22 August 2017 – Mr Kuhn certifies that as at 30 June 2017, certain amounts were due by Amabubesi Capital Travelling to Old Mutual. These were, R9 million for preference share capital, R6 105 127 for preference share dividends and R2 478 193 for arrear preference share dividends, giving a total of R17 million arrears. He certified that no preference share dividends or arrear preference share dividends were paid by Amabubesi Capital Travelling by 22 August 2017.
64. 22 August 2017 – Mr Kuhn certifies that as at 30 June 2017, NMT Capital owed Old Mutual R46 million for preference shares, R13 million for preference share dividends and R1.2 million for arrear preference share dividends. He certifies further that Old Mutual had received no preference share dividend or arrear preference dividend from NMT Capital after 30 June 2017 and by 22 August 2017.
65. 6 December 2017 – NMT Capital sends a letter to Old Mutual saying that a certain investment made by NMT Capital in a particular company had not yielded the required return and that in effect NMT Capital would not be able to redeem preference shares in favour of Old Mutual or pay preference dividends as it was admittedly obliged to do. The letter states that in order to save the particular company “from total collapse” certain shares had to be sold. The letter acknowledged that Amabubesi owed Old Mutual R17.8 million as an “ amount outstanding “ and stated that there were no reasonable prospects of this amount being recovered by Amabubesi. The letter then contained a proposal by NMT Capital that it pay Old Mutual R3.1, that Old Mutual writes off R17,8 million and releases NMT Capital as guarantor for the obligations of Amabubesi to Old Mutual.
66. 31 January 2018 – the redemption date for the preference shares in NMT Capital is by agreement extended to 30 June 2018. Mr Moyo signs the extension agreement. This is the third and last extension of time for the payment by NMT Capital to Old Mutual of money relating to preference shares.
67. 16 February 2018 – NMT Capital holds a Board meeting.
68. 19 February 2018 – NMT Capital, in a letter to Old Mutual, admits that accumulated interest on certain specified deals amounted to R4.8 million and asks Old Mutual to write off this amount. The letter also suggests that an admitted debt of R8 million to Old Mutual be paid out of dividends received by Old Mutual from NMT Capital. NMT Capital also asks Old Mutual to freeze all future interest.

69. 22 February 2018 – NMT Group sends Old Mutual a letter admitting a debt of R267 million by NMT to Old Mutual. The letter states that the debt had been R138 million but had grown to R267 million because of interest. The letter admits that the current valuation of NMT Group is negative in the amount of R122 million. The letter admits an inability to service interest.
70. 8 March 2018 – NMT Capital declares an ordinary share dividend of R10 million payable that day. Mr Moyo, as a twenty percent shareholder in the ordinary shares in NMT Capital receives R2 million. This excludes any indirect benefit to Mr Moyo via his related company or companies.
71. 23 March 2018 – minute of a meeting of the Related Party Transaction Committee of Old Mutual – Mr Moyo is present and the RPT Committee approves the assumption by Old Mutual of the guarantee obligations of Old Mutual plc relating to the managed separation of Old Mutual and Old Mutual plc. In 2016 Old Mutual plc delisted from the London Stock Exchange and then, in 2018 listed on the Johannesburg Stock Exchange. Old Mutual was advised by Rothschild, a company of which Mr Manuel was Chairperson. Rothschild received fees for its advice to Old Mutual on the managed separation. This has relevance to the question of whether or not Mr Manuel was triple conflicted in relation to the managed separation. Mr Manuel held senior positions in Old Mutual, Old Mutual plc and Rothschild.
72. 27 March 2018 – The board of Old Mutual approves the RTP Committee decision. Mr Moyo leads the discussion and signs the guarantee under which Old Mutual assumes the obligations of Old Mutual plc.
73. 27 March 2018 or thereabouts – The Old Mutual prospectus and pre-listing statement relating to the managed separation shows clearly that Rothschild was an advisor to the transaction and that Mr Manuel discloses his directorship in Rothschild. This disclosure is made directly above the disclosure by Mr Moyo of his directorships in various companies, including NMT Capital.
74. 8 April 2018 – memo of NMT Capital from its Executive Chairman to the directors of NMT Capital referring to two meetings with Old Mutual and to letters from Old Mutual rejecting certain proposals by NMT Capital. The memo states that one of Old Mutual's concerns is that Mr Moyo is a related, that is conflicted party.
75. 20 April 2018 – Mr Moyo and the other directors accept responsibility for the correctness of the Old Mutual pre-listing statement. This statement shows Rothschild as an advisor on the managed separation of Old Mutual from Old Mutual plc. It also contains the statement that Old Mutual has agreed to provide a guarantee to Old Mutual plc.
76. 8 May 2018 – a boardpack is circulated within NMT Capital in anticipation of an upcoming meeting of directors. In paragraph 9 of the minutes of a previous board meeting held on 16 February 2018 it is stated that “ We also need to find resolution on the debts with Old Mutual and the IDC. We are in discussions with Old Mutual and IDC in this regard.” The boardpack, in chapter 10, last bullet point, contains the statement that “ There are outflows that are

expected but not yet confirmed. Therefore, we have not included them as part of the budget. These include Amabubesi Traveling Surety – OM preference shares of R17m, R10m for Blue Sky investment, R5m for Solar Project and R5.1m for Falconmere capital call.”

77. The boardpack includes the Management Accounts for NMT Capital as at 31 March 2018. Note 10 includes “ Preference Dividends Payable “ in the amount of R128 million.
78. The boardpack includes Management Accounts as at 30 June 2018. Note 19 lists “ Other Financial Liabilities “, that is, according to NMT Capital’s Statement of Financial Position, part of NMT’s non-current liabilities. Preference share dividends are described as payable to Old Mutual in the amount of R17,4 million.
79. The boardpack includes the Consolidated Annual Financial Statements of NMT Capital as at 30 June 2018. The Statement of Financial Position includes “ Dividend Payable “ of R71,4 million. Note 19 includes the statement that “ 46 Cumulative Preference Shares are payable to Old Mutual Life Assurance Company South Africa Limited in terms of the preference share agreements. Cumulative Redeemable preference shares are payable to Old Mutual Life Assurance Company South Africa Limited – the terms and conditions are being revised.” The note goes on to add that “ SS Ntsaluba, TA Tlelai and MP Moyo have bound themselves as surety and co-principal debtors for the fulfilment by the company of its obligation to redeem the Cumulative Redeemable Preference Shares “.
80. Note 34 records that during the year to 30 June 2018 certain dividends were paid, including R23 million to Old Mutual and R18.4 million to Mr Moyo. It is recorded that a dividend of R26 million was received by NMT Capital from Amabubesi.
81. The boardpack includes a document headed ‘ NMT Capital Cash Budget for the 12 months ending 31 July 2019 “. A debt of R157 million is listed as owing to the IDC.
82. 30 June 2018 – the last day of the extended time for NMT Capital to pay the arrear preference share dividends to Old Mutual.
83. 1 July 2018 – The Insurance Act 18 of 2017 commences. Under section 38(1)(e), Old Mutual may not extend the time for repayment of the preference share dividends in NMT Capital without the approval of the Prudential Authority.
84. By 3 July 2018 – NMT Capital receives R311 million from the sale of its shareholding in Growthpoint.
85. 3 July 2018 – NMT Capital holds a special Board meeting. Mr Moyo chairs the meeting. The agenda includes a recommendation that “ R37m of the proceeds will be utilised to settle OM debt which will improve our balance sheet...” and “ R104m will be distributed to shareholders as dividends..”
86. It is minuted that “ R37m was allocated to debt repayment, including Old Mutual preference shares for NMT Capital and Amabubesi Travelling.”

87. The boardpack includes the statement that as at the 4 July 2018 Board meeting of NMT Capital, R157 million was reflected as owing by NMT Capital to the IDC under a guarantee.
 88. An NMT Capital document, placed before the Board of NMT Capital on 4 July 2018 and dealing with the proposal of what to do with the Growthpoint dividend received by NMT Capital, reflects a nil distribution to the IDC.
 89. 11 July 2018 – NMT Capital declares an ordinary share dividend of R105 million. Mr Moyo receives R21 million, as twenty percent shareholder in the ordinary shares. This excludes any indirect benefit to Mr Moyo via his related company or companies. NMT Capital does not pay preference dividends owing to Old Mutual of R65,9 million.
 90. 4 September 2018 – NMT Capital writes to Old Mutual acknowledging that if Old Mutual does not further extend the redemption date of the preference shares then these shares would need to be classified as current liabilities in the books of NMT Capital. NMT Capital asks Old Mutual to extend the redemption date by another three years.
 91. 24 October 2018 – NMT Capital pays to Old Mutual R20 million of R65,9 million payable relating to preference shares.
 92. 7 February 2019 – Old Mutual’s Related Party Committee holds a meeting and notes “ the complexity arising from the contractual terms of Mr Moyo’s employment contract “ , “ OM has already taken c. R100 million loss in NMT Group” and that “ NMT Capital appears to have paid ordinary dividends (R10 million in March 2018 and R105 million in July 2018) to its shareholders in breach of the terms of the PSA, which explicitly prohibits the payment of ordinary dividends before all arrear preference dividends
- were paid to OMLACSA. This breach was remedied when arrear preference dividends were paid to OMLACSA in October 2018.” The meeting noted further that “ Mr Moyo has received ordinary dividends of c. R30 million in the same year...”
93. Another note is that “ .. Mr Moyo receives dividends, the OMLACSA PSA is breached and an agreement is reached with the IDC. The Committee could not determine whether this amounts to coincidence, negligence or wilful intent and whether the conduct of attempting to compromise with creditors would be deemed to be an act of insolvency. “
 94. Late February 2019 or possibly late March 2019 or thereabouts – Mr Ntsaluba, the chairman of NMT Capital asks Mr Moyo if he is aware that Old Mutual wanted ”to get rid of” Mr Moyo. Mr Ntsaluba explains to Mr Moyo that NMT Capital had asked Old Mutual for funding and that Old Mutual had answered “ in an unusual way” by getting its lawyers to send a letter to NMT Capital in which letter it was suggested that something was wrong.
 95. 6 March 2019 – extract from the minutes of the Corporate Governance and Nomination Committee of Old Mutual. It records, among other things that “ Mr Moyo provided background to legal expenses expended on behalf of the Chairman...In summary Old Mutual took the position to defend primarily to protect its brand and reputation...” and that “

as an aside, it was noted that legal fees in the Zondo commission, were for the Chairman's account." It was noted further that " NMT Capital may have been insolvent at the time of the declaration of the ordinary dividend, given the preference share funding and respective guarantees in place in NMT Capital. "

96. 11 March 2019 – Mr Du Toit of Old Mutual emails Mr Moyo advising him that Mr De Klerk of Bowmans attorneys would contact Mr Moyo regarding information sought by Old Mutual to enable Old Mutual to assess NMT Capitals' request for a further extension of time within which to pay the preference share dividends.
97. 18 March 2019 – Mr De Klerk of Old Mutual emails Mr Ntsaluba of NMT Capital asking for relevant information and documents relating to NMT Capital insofar as it concerns Old Mutual.
98. 22 March 2019 – Mr Moyo signs the Annual Financial Statements of Old Mutual for the year to 31 December 2018.
99. 11 April 2019 – Mr Moyo emails Old Mutual and undertakes to give it some of the requested information if he has it.
100. 17 April 2019 – Old Mutual's attorneys write to NMT Capital, referring to the information held by NMT Capital and needed by Old Mutual to assess the requests made by NMT Capital to Old Mutual, in essence asking for time to pay. The letter includes the statement that " neither we nor Old Mutual are convinced by your suggestion that the information requested may not be readily available or that you may not have resources to attend to its collation."
101. 17 April 2019 – NMT Capital, in the person of Mr Ntsaluba replies to Bowmans noting " that you cast aspersions on my integrity.."
102. 23 April 2019 – NMT Capital or NMT Group sends an email to Old Mutual containing a draft agreement prepared by NMT Group. Under this suggested draft, Old Mutual would subordinate its claims against NMT Group. The draft contains admissions by NMT Group that it owes Old Mutual R277 million. Old Mutual does not accept the request.
103. 24 April 2019 – meeting of Old Mutual Corporate Governance and Nomination Committee. It is noted that there are legal and governance concerns including that " Mr Moyo played a key role in the payment of ordinary dividends (totalling R115 million from NMT Capital, before servicing the preference

dividends payable to OMLACSA; he chaired the meeting of the NMT Capital Board in which the major portion of these ordinary dividends

was declared. Mr Moyo was directly involved in the negotiations which led to the settlement of the loan advanced to NMT by the IDC, which settlement agreement resulted in a write-down of some R100m by the IDC, whilst ignoring a guarantee in place. This despite NMT having drawn down R300m on their investment in Growthpoint. The quality of the underlying assets in NMT was of concern, and was exacerbated by the refusal of NMT to provide further information on such. “

104. 26 April 2019 – Mr Ntsaluba of NMT Capital writes to Old Mutual advising that he has forwarded draft responses to the information sought by Old Mutual and that he will attend to finalise the responses.
105. 30 April 2019 – Mr Moyo emails Mr Manuel, the Chairperson of Old Mutual, stating among other things that it is common knowledge that “ NMT asked for some dispensations from Old Mutual. I never involved myself in any of those discussions. I however mentioned to NMT that I do not believe that they should be asking for some of these dispensations particularly regarding NMT Capital and the so called Zelpy companies. I even mentioned this to one Old Mutual person that I did not believe that the request should be entertained.”
106. 1 May 2019 – Minute of board meeting of Old Mutual recording that the day before, Mr Moyo had called Mr Manuel asking for information about Old Mutual’s loss of confidence in Mr Moyo.
107. 7 May 2019 – Ms Anele Mukhodobwane of NMT Capital emails Mr Moyo about why NMT Capital paid the preference dividend late, stating “ In July 2018 the board of directors passed a range of resolutions including a distribution to the shareholders as well as the payment of the OML Preference Dividends. The ordinary dividends were paid to all shareholders in July 2018. However, the negotiations between OM and NMT regarding the extension of the Preference Share Redemption date in respect of NMT Capital, Amabubesi Travelling (Pty) Ltd (Travellinck) and other proposals were underway. NMT had proposed that the payment of the Preference Dividend be paid after these negotiations were concluded, which OML rejected on 19 October 2018. Immediately after this feedback from OML, the Preference Dividend of R20m was paid on 24th October 2018. “
108. 8 May 2019 – Mr Moyo emails Mr Manuel and others, stating among other things that, “ I never involved myself on the detailed dealings between Old Mutual and NMT since I started as NMT CEO. I know that NMT has had some requests relating to the NMT Capital Prefs, NMT Group Prefs, and Travellink. I have had no dealings on any of these. For a long time up to last year Old Mutual had a director on the NMT board. This was the CFO of OMIG who had been appointed long before I joined Old Mutual”. This director was Mr Patel.
109. Mr Moyo states further that “ Until it had been brought to my attention I did not know that the preference share dividend was not paid at the time of the ordinary

dividend was paid... It is worth noting that when a big dividend was declared, I was at the meeting and I made sure that there was provision made for Old Mutual pref dividends. I could not do, or be expected to do anything more than this as I am not an executive at NMT. No one from Old Mutual raised the delay in payment with me. As said there appears to be reason why this happened. “

110. 16 May 2019 – Mr Manuel writes to Mr Moyo noting the serious concerns that Old Mutual has with Mr Moyo’s apparent conflict of interest and affording Mr Moyo an opportunity to counter and to do so with documents.
111. 21 May 2019 – Mr Moyo writes to Mr Manuel stating that “ The arrear dividends were always planned to be redeemed from the proceeds of the Growthpoint Distribution, given the amount outstanding. They were indeed paid out of the distribution” and “ In the event of a balance still outstanding in the preference shares due by NMT to Old Mutual, the plan was to extend the redemption period. There was nothing to suggest that, this would not be extended in
2018. Prior to this there had been extensions in 2010, 2013 and 2017. “ Mr Moyo states further that “ The Old Mutual nominated director on the NMT board always knew that the plan was to repay the full amount of the arrear preference dividends out of the Growthpoint distribution. He was present at the meeting where I presented my thoughts (as then CEO of NMT) on the application of the Growthpoint proceeds. “ Mr Moyo states also “ I do not know why the reason why the executives of NMT decided to hold back the payment of arrear preference dividends to Old Mutual.”
112. 23 May 2019 – Old Mutual Board meeting minute records that Mr Moyo was present for part of the meeting, was given an opportunity to explain his side of the story and that he did so. After Mr Moyo then left the meeting, the Old Mutual board resolved to separate “amicably” from Mr Moyo.
113. 23 May 2019 – Mr Manuel suspends Mr Moyo by letter, citing a material breakdown in the relationship of trust and confidence. The letter states that the suspension is “ pending further decision”.
114. 24 May 2019 – Old Mutual issues a Sens notice advising that there has been a material breakdown in trust and confidence between Old Mutual and that Mr Moyo has been suspended.
115. 27 May 2019 – Mr Moyo gives a radio interview, setting out briefly his position.
116. 29 May 2019 - Old Mutual’s attorneys write to Mr Moyo, referring to his having given a number of public interviews in breach of his employment agreement and asking him to desist.

117. 14 June 2019 – Mr Moyo’s former attorneys, Fluxmans draft a letter but do not send it, to Old Mutual’s attorneys stating among other things that Mr Moyo does not wish to exit his employment and that his foreshadowed dismissal is a foregone conclusion. The letter states further that Old Mutual’s attitude is based on Mr Moyo’s intention to disclose that Old Mutual significantly contributed to Mr Manuel’s personal legal expenses. There is no mention of any expected roll over of the preference dividend, or the expectation that the dividend received by NMT Capital from Growthpoint would be used to pay preference dividends or that Old Mutual is victimising Mr Moyo for his whistleblowing of Mr Manuel’s alleged triple conflict.
118. 17 June 2019 - Mr Manuel writes to Mr Moyo terminating his employment. The letter states that the reason for termination is breakdown of trust and confidence based on the declaration by NMT Capital of ordinary dividends prior to payment of preference share dividends in breach of the agreement to that effect. Mr Manuel says that Mr Moyo benefitted personally in the amount of R30,6 million. Mr Manuel states that Mr Moyo chaired the meeting at which an ordinary share dividend of R105 million was declared at a time when preference dividends had not yet been paid. Mr Manuel says that Mr Moyo has been unable to provide an acceptable explanation. Mr Manuel refers to the public interviews given by Mr Moyo after his suspension. Mr Manuel says that it is fair to terminate Mr Moyo’s employment without notice but that Old Mutual has resolved to terminate the employment under clause 24.1.1 of the agreement of employment.
119. 18 June 2019 – Old Mutual issues Johannesburg Stock Exchange Sens notice, saying that Mr Moyo has been given notice of termination for conflict of interest, referring to the dividends issue and stating that Mr Moyo has been unable to give an acceptable explanation.
120. 19 June 2019 or close thereto – Mr Moyo, through his new attorneys, issues a typed response to an Old Mutual statement. Mr Moyo says, among other things that “ There is nothing in the contract requiring the preference share redemption to happen before a dividend is paid, contrary to any assertions made. “
121. 19 June 2019 – Mr Mabuza gives a radio interview in which he says, among other things that he suspected that the problem was caused by Mr Moyo having raised an ethical issue, namely the payment by Old Mutual of the personal legal fees of Mr Manuel. Mr Mabuza accuses Old Mutual of having acted unlawfully.
122. From 19 June 2019 onwards, more particularly from 1 July 2019 for six months – Mr Moyo is paid R4.2 million as salary while not being allowed to work.
123. 27 June 2019 – Mr Moyo launches an urgent application in which he seeks, in Part A of the application re-instatement and asks, in Part B that the directors of Old Mutual be declared delinquent.

124. 1 July 2019 – This is the date pleaded by Mr Moyo. In fact it was 2 August 2019. Mr Paul Baloyi, the sixth defendant gives an interview to CNBC, in which he says that Old Mutual would not take Mr Moyo back as Old Mutual has lost confidence in him. Mr Baloyi refers to Mr Moyo's conflict of interest. Mr Baloyi says that Mr Moyo broke his agreement and that the narrative by Mr Moyo in the media is false.
125. 30 July 2019 – Mashile J hands down judgment in the urgent application, re-instating Mr Moyo.
126. 21 August 2019 – Old Mutual sends a letter to Mr Moyo, terminating Mr Moyo's employment for the second time "Without detracting from the June notice".
127. 22 August 2019 – Mr Mabuza, in a radio interview says that Old Mutual is self-destructing and that the second termination by Old Mutual is a circus.
128. 22 August 2019 – Mr Mabuza, in a different radio interview says that the move by Old Mutual to terminate Mr Moyo's employment for the second time, before judgment in the urgent application is "beyond ridiculous and corporate madness, a textbook example of contempt of court."
129. 22 August 2019 – Open letter from Old Mutual board to shareholders. The letter states, among other things that Mr Moyo benefitted personally from the payment of ordinary share dividends before payment of preference share dividends. The letter sets out broadly Old Mutual's position as recorded above.
130. 14 January 2020 – The Full Court sets aside the order of Mashile J. The termination of employment on 17 June 2019 is held to be lawful.

MAIN FINDINGS

131. The chronology of facts shows that ordinary dividends were paid by NMT Capital before preference dividends were paid. This was in breach of the agreement not to do so. Mr Moyo benefitted directly and personally, to the extent of R2 million from the declaration of the R10 million ordinary dividend on 8 March 2018 and R21 million from the payment of the R105 million ordinary dividend on 11 July 2018 when preference share dividends were not yet paid. Mr Moyo chaired at least one meeting when the distribution of ordinary dividends was made. Mr Moyo is a highly qualified, experienced businessperson at the top of the corporate ladder. His defence that he was a non-executive person at NMT Capital at the relevant times does not hold water. At a minimum, he had a strong contractual duty to keep his eye on the ball and to make sure that the relevant agreements were not breached. Mr Moyo, in his email to Mr Manuel on 30 April 2019 candidly stated that NMT Capital should not have made the requests to Old Mutual which it made.

132. It is no defence for Mr Moyo that Old Mutual had a person, Mr Patel on the Board of NMT Capital whose job it was to keep a lookout. It is irrelevant what Mr Patel knew or did not know and what he told Old Mutual or did not tell Old Mutual. None of the agreements, nor any of the relevant facts suggest that Mr Moyo was relieved of his obligations on the basis that Mr Patel was the agent of Old Mutual for the receipt of information by Old Mutual.
133. As time passed, Mr Moyo found himself pressed more and more between the time needed by NMT Capital to pay preference dividends and his own contractual obligations. NMT Capital was pressed for cash, at least until it received R311 million from the sale of its shares in Growthpoint, by the latest 3 July 2018. Mr Moyo hoped that Old Mutual would keep deferring the evil day. He used the extra time provided by Old Mutual, until 30 June 2018, plus the few days from then until the declaration of the R105 million ordinary share dividend on 11 July 2018 to receive ordinary dividends of R23 million from NMT Capital for his own personal benefit. But at the same time, his contractual and disclosure obligations hung over his head. The squeeze placed Old Mutual in a position where it was entitled to act as it did.
134. The declaration by NMT Capital of an ordinary share dividend in the amount of R105 million when it had the cash to pay the full amount then owing on the preference shares of R65,9 million, in breach of a strict agreement, is difficult to understand and impossible to justify. At a minimum, it was in breach of contract for Mr Moyo to proceed on an assumption that Old Mutual would keep extending the date for redemption of the preference dividends.
135. Mr Moyo had an extra incentive to keep a close watch on the declaration of dividends by NMT Capital. His own family trust had bound itself as surety to Old Mutual for the debts arising out of the preference share obligations of NMT Group, a company related to NMT Capital.

THE FIRST ALLEGED BREACH

136. The first breach relied on by Mr Moyo is the alleged unlawfulness of the suspension of Mr Moyo on 23 May 2019. On the facts, the suspension was warranted as a matter of substantive law. Mr Moyo had breached his employment and related agreements and benefitted personally in doing so. Mr Moyo was aware, by the latest the end of February 2019 that Old Mutual had serious concerns about him. It was at the end of February 2019 or late March 2019 or thereabouts when Mr Ntsaluba asked Mr Moyo if he knew that Old Mutual wanted “to get rid of” him because of matters relating to NMT Capital. From Mr Du Toit’s email of 11 March 2019 alluding to upcoming questions from Mr De Klerk of Bowmans up and until 23 May 2019, Mr Moyo had ample opportunity, which he used, to put his side of the story. Mr Moyo’s email to Mr Manuel on 30 April 2019 is one example.

137. Clause 4 of the Disciplinary Code relating to suspension appears in its terms to confine suspension to a situation where a disciplinary hearing is going to take place. As at 23 May 2019, the date of suspension, Old Mutual had not made up its mind whether or not to charge Mr Moyo. This is apparent from the words “ pending further decision” in the letter of suspension immediately after the mention of suspension.
138. It would appear that Old Mutual relied for its decision to suspend Mr Moyo without a formal hearing before the suspension, on the words “ An employee may be suspended under the following circumstances (not an exhaustive list): ... where the continued presence of the employee on the premises could jeopardise ... the functioning of the office or result in prejudice to Old Mutual. “ As recorded in the chronology, suspension was at managerial discretion.
139. Given that Old Mutual never relied on its right to terminate for breach, the suspension never preceded an enquiry that actually took place. In any event, no damages, special or general flowed from the suspension.

THE SECOND ALLEGED BREACH

140. The second breach relied on by Mr Moyo is the alleged unlawfulness of the termination on 17 June 2019. The letter of termination, in express terms says, in paragraph 13, “ Nevertheless, to mitigate the adverse effect on you of the termination of your employment, the Board has resolved to terminate your employment on notice as provided for in clause 24.1.1 of your contract of employment.“ This, in my view makes it clear that the employment ended by the exercise by Old Mutual of its right to terminate on notice, just as Mr Moyo could have done had he so wished. One of the obvious purposes of clause 24.1.1 is to allow either side to terminate on six months’ notice and thereby avoid a debate about fault.
141. Clause 4.3 of the disciplinary code does not assist Mr Moyo on the question of termination. It clearly applies only where dismissal is dependent on prior wrongdoing. It does not apply where Old Mutual grounds its termination on clause 24.1.1 to terminate on six months’ notice without fault on the part of Mr Moyo.
142. The second notice of termination, given on 21 August 2019 had no legal effect, given the finding that the first notice of termination was lawful. The second termination letter contained the words “ Without detracting from the June notice”.
143. These findings put paid to the main claim’s alternative for damages.

THE THIRD ALLEGED BREACH

144. The third breach is based on an implied term that Old Mutual would not victimise Mr Moyo for making protected disclosures. I shall assume in favour of Mr Moyo, but without deciding the question, that the employment agreement included the alleged implied term.

145. The main facts show that there was no impropriety by either Mr Manuel or Old Mutual regarding the alleged triple conflict on the part of Mr Manuel. At all relevant times, Mr Manuel had disclosed what he had to, Mr Manuel was absent from meetings when he had to be absent, the Board of Old Mutual knew what it needed to know and consciously, lawfully and reasonably decided to assume the guarantee obligations of Old Mutual plc to give effect to the managed separation.
146. Mr Moyo, on 27 March 2018 had signed the guarantee under which Old Mutual assumed the relevant obligations of Old Mutual plc. This guarantee had been at the heart of Mr Moyo's assertion that Mr Manuel was triple conflicted.
147. Similar considerations apply to the decision by Old Mutual regarding the payment of certain legal fees of Mr Manuel to protect the good name of Old Mutual.
148. Neither Old Mutual, Mr Manuel nor any director of Old Mutual had any reason to hide anything. Mr Moyo played a significant role in approving the decisions on which he later blew the whistle.
149. It is clear that the steps taken by Old Mutual, Mr Manuel and the directors and employees of Old Mutual were measured, restrained and based only on objective facts and after Mr Moyo had been given ample time and opportunity to explain his side of the story. It cannot be said that on the evidence, Mr Moyo was in any way a victim of any kind. Mr Moyo was not a whistle blower. Mr Moyo's decision to blow the whistle appears to be based more on an afterthought, when the shoe began to pinch regarding the payment of preference dividends than on an objectively based need to disclose alleged wrongdoing by Mr Manuel, Old Mutual or its directors.
150. In these circumstances, Mr Moyo has not demonstrated that he had reason to believe, as opposed to actual belief, such as to bring himself within the definition of a person making a "disclosure" as defined in section 1 of the Protected Disclosures Act. The word "disclosure" is not defined in the Companies Act. However, section 159(3)(b) of the Companies Act requires a reasonable belief on the part of the potential whistle blower that what is to be disclosed "showed or tended to show" wrongdoing as defined. It seems therefore that both the Protected Disclosures Act and the Companies Act require an objectively assessed correct basis as a launch pad for the further application of either Act.
151. Claim 3 is for loss of dignity caused at least partly by alleged defamatory statements. There is no evidence supporting this claim. This claim, pared down in Mr Moyo's answer to the directors' request for further particulars, limits the defamatory allegations to:
 - a. what was stated in that part of the Sens notice of 18 June 2019 which mentions the conflict of interest of Mr Moyo relating to the declaration of ordinary dividends of R115 million, his own benefit in the sum of R30,6 million and that the ordinary dividends were paid contrary to the agreement not to pay ordinary dividends until preference share dividends had been paid.

- b. the answers by Mr Baloyi, the sixth defendant in his interview on 2 August 2019.
152. Old Mutual was obliged to issue the Sens notice under the Rules of the JSE as it related to something which might affect the share price of Old Mutual. The Sens contains no more than a bland, measured and reasonable setting out of objective facts, pursuant to a legal duty to do so. In the public spat that followed termination, it was Mr Moyo who was direct, forceful and combative. Mr Baloyi, in his interview with CNBC on 2 August 2019 spoke lawfully, reasonably and fairly.
153. The third claim falls to be dismissed.

CONCLUSION

ON THE MAIN ISSUES

154. Mr Moyo has failed to produce any evidence on which it could be held that Old Mutual has done anything wrongful.
155. I make no credibility finding against any of the three persons who testified. In the main, my task has been to examine whether or not Mr Moyo's interpretation of events amounts to causes of action as he alleges. For the reasons stated above, Mr Moyo's case is not one which could lead to a finding for him.

RES JUDICATA, ISSUE ESTOPPEL and STARE DECISIS

156. The abandonment by Mr Moyo of his main claim for re-instatement did not do away with the need to deal with res judicata, issue estoppel and stare decisis. This is because the alternative claim for damages in the main claim is premised on the alleged unlawfulness of the termination. The subsequent claims rely, as pleaded, at least partly on the alleged wrongfulness pleaded in the preceding claims.
157. The requirements for the defence of res judicata are the same parties, the same matter and the same cause of action. It was common cause between the parties that the slight difference in the parties before the Full Court on appeal and in the present action would make no difference to this question. The main issue decided by the Full Court was that the termination on 17 June 2019 was lawful. The present claim for damages for wrongful termination is the obverse of the now abandoned main claim for re-instatement. Both are predicated on the alleged wrongfulness of the termination on 17 June 2019. The requirements for res judicata are met. It follows that the defence of issue estoppel, a relaxed discretionary form of res judicata are fulfilled. I am bound by the decision of the Full Court with which I respectfully agree.
158. This finding provides a defence to all claims to the extent that they rely on wrongful termination of employment.

COSTS

159. Both sides employed two senior and two junior counsel, in my view a reasonable precaution, given the issues, the number of documents and their complexity, the need to canvass related litigation, the amount involved, the issues at stake and the importance to both sides of the case.

ORDER

1. The defendants are absolved from the instance.
2. The plaintiff is to pay the defendants' costs, including those of two senior and two junior counsel.

HEARD : 17 January 2022 – 27 January 2022

JUDGMENT

: 31 January 2022

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