

SOUTH AFRICA / JUDGMENT

RFS Administrators (PTY) LTD v Samons and Others (JS 641/17) [2022] ZALCJHB 110 (30 August 2022)

[2022] ZALCJHB 110

COURT

Labour Court Johannesburg

BEFORE

Moshwana

CASE / FILE NUMBER

JS 641/17

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

CASE

NUMBERS: JS

641/17

In

the matter between:

RFS
ADMINISTRATORS (PTY) LTD
Applicant
and
SEAN
LINDO
SAMONS
First Respondent
MARINETT
DE FORTIER
Second Respondent
MARIE
JANSEN VAN RENSBURG
Third Respondent
NATIONAL
PENSION FUND FOR MUNICIPAL
WORKERS
("NPFMW")
Fourth Respondent
NATIONAL
FUND FOR MUNICIPAL WORKERS

("NFMW")
Fifth Respondent

Heard: 15 – 19 August 2022

Delivered: 30 August 2022

Summary: Section 77 (3) of the Basic Conditions of Employment Act, No. 75 of 1997 referral. The applicant alleges a breach of an oral employment contract, alternatively a breach of a Human Resources Policy accepted by the respondents on 14 August 2014. It seeks a remedy of disgorgement on the basis that its alleged employees earned extra income from entities it had "seconded" them to. In the alternative, it seeks damages based on the alleged breach of contract or conditions of employment. A section 77 (3) claim is a civil claim and the principle of costs following the results finds application. The section is reserved for any matter concerning a contract of employment. A party seeking to claim a remedy of disgorgement must prove all the elements applicable to the remedy. If the remedy arises from a breach of a contract, the party claiming it must prove (a) the alleged contract; (b) breach of that contract; and (c) the causal connection between the breach and the remedy of disgorgement.

A party seeking contractual damages must prove and quantify the damages allegedly suffered by it. The loss or damage must be because of the breach. The applicant failed to prove the existence of an employment contract upon which the remedy of disgorgement may be predicated. Similarly, the applicant failed to establish the employment contract upon which the alleged contractual damages are predicated. Held: (1) The applicant's claim is dismissed. (2) The applicant to pay the costs of the proceedings.

JUDGMENT

MOSHOANA, J

Introduction

[1] As an opening gambit, the parties to this dispute generated about nine lever-arch files of documents[1]. Such created an impression that the matter is factually complex. The transcript of these proceedings shall demonstrate that not all the documents were referred to in evidence. It must follow that those documents that were not referred to in evidence were irrelevant to the dispute. Barring the fact that the applicant's primary relief (disgorgement) is not one that is customarily sought in the Labour Court, the dispute is nothing but an ordinary breach of contract claim. It is a referral made in terms of rule 6 of the Rules for the Conduct of Proceedings in the Labour Court. The referral is made in accordance with section 77 (3) read with 77A (e) of the Basic Conditions of Employment Act[2] (BCEA). In terms of section 77 (3) the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. Section 77A (e) mainly deals with the issue of the relief. In precise terms, the relief sought by the applicant is couched in the following terms:

"1. Payment in the sum of R492 000.00 as against the first respondent, being for money received by the first respondent from the fourth and fifth respondents during the period 1 July 2013 to 31 May 2016. As well as

payment in the sum of R317 967.95. Payment of interest a tempore morae. Payment of costs on a punitive scale.

2. Payment in the sum of R78 356.84 as against the second respondent. Payment of interest a tempore morae. Payment of costs on a punitive scale.
3. Payment in the sum of R104 602.65 as against the third respondent. Payment of interest a tempore morae. Payment of costs on a punitive scale."

[2] All the respondents cited in this matter duly oppose this claim. This Court received viva voce evidence from five witnesses. Two of whom, namely Mr Du Plooy (Du Plooy) and Mr Mphahlele (Mphahlele) testified on behalf of the applicant. Three of whom, being the first respondent (Mr S L Samons) (Samons); the second respondent (Ms M De Fortier) (Fortier); and the third respondent (Ms M Jansen Van Rensburg) (Van Rensburg) testified in their own defence. There was no relief sought against the remainder of the respondents; namely the National Pension Fund for Municipal Workers and the National Fund for Municipal Workers; hereinafter collectively referred to as the 'Funds'. For the purposes of this judgment, it is not necessary to recount all the evidence tendered in this Court. The main witness for the applicant was Du Plooy. The evidence of Mphahlele was of little or no value to the applicant's case.

Background

facts and evidence.

- [3] Inasmuch as the witnesses gave a detailed background to the dispute, this dispute turns on two periods; namely after September 2011 and June 2013. There is no dispute that Samons, Fortier and Van Rensburg

(the employees) were in the employ of the applicant, RFS Administrators (Pty) Ltd (RFS) effective from different periods. It is also not in dispute that at some point the employees were 'seconded' to the Funds in order to perform some functions, which may be described as "the Principal Office functions". Relevant to this dispute on or about 1 July 2009, RFS's predecessor entered into an administration agreement with the Funds. On 25 August 2011 a similar agreement, which was to commence on 1 September 2011 was concluded between the Funds and the RFS. Key to this dispute is clause 4.11 of the previously mentioned

administrative agreement. It provided thus:

"4.11 Principal Officer, Secretarial Services and Meetings

The ADMINISTRATOR (RFS) will as part of this agreement and fees referred to in terms of clause 6.2[3] remunerate the Principal Officer, the FUND Secretary and Personal Assistant to the Principal Officer. The persons as above shall be appointed by the FUND with the approval of the ADMINISTRATOR and the FUND shall notify the REGISTRAR of the appointment of the Principal Officer.

- [4] On or about 25 July 2011, and prior to the abovementioned administrative agreement concluded on 25 August 2011, Samons penned an important missive to the Executive Committee of the Fund. In effect, he raised a concern about the independence of the office of the Principal Officer of the Fund. After having sketched the relevant background he stated amongst other things that:

"To further eliminate the concern of my independence and to change the procedure in line with the operation of how the bigger competitive funds operate, the Executive Committee has requested that I consider changing my employment contract to also be directly with the fund. I have agreed to such, on condition that my benefits and conditions at least remain the same. I attach hereto a draft employment agreement for consideration."

- [5] On 3 August 2011, Samons attended the Exco meeting of RFS. Importantly, the minutes of that meeting recorded the following:

"6 Principal Officer Employment Contract

SS (Samons) informed the meeting that the trustees are adamant that the Principal Officer should be employed by the fund and not by the administrator as is currently the case. The stated reason is independence. The salary administration will still be done by RFS.

- [6] On the version of Samons, that is when he resigned with his last day of service as 31 August 2011. On Du Plooy's version the above recorded was given for information purposes only and it was simply

ignored by the Exco of RFS.

- [7] As indicated earlier on 25 August 2011, the new administrative agreement was concluded. Of significance, on the same date, Samons concluded an employment agreement with the Funds. Later on, on 14 August 2014 Samons signed a document styled Human Resources Policy. On the same day, he signed a document styled Addendum to the HR Policy. Of significance, the addendum recorded the following:

"The conditions contained in this addendum supersedes the conditions contained in the RFS Administrators (Pty) Ltd HR Policy and is specific to employees seconded to the office of the Principal Officer for National Fund for Municipal Workers (NFMW)."

- [8] Van Rensburg and Fortier also signed the document styled Human Resources Policy and the addendum on the same date. Du Plooy gave detailed evidence that RFS had paid remuneration of the employees and handled almost all human resources functions in respect of the employees. The employees do not dispute that. They effectively state that such an arrangement arose because of clause 4.11 of the administration agreement.
- [9] It remained undisputed that around 2013, Fortier was transferred from RFS and was provided with an appointment letter for the Funds. Persistently, Du Plooy testified that the employees remained in the

employment of RFS. Whilst the employees and Du Plooy are in agreement that for the period 2009 up to and including 31 August 2011, there was an employment relationship at the back end of the so-called "secondment agreement", Du Plooy on the one hand persistently testified that that employment relationship persisted until 29 February 2016 for Fortier and Van Rensburg and until May 2016 for Samons. The version of the employees is that on 1 September 2011, Van Rensburg and Samons ceased employment, and Fortier ceased employment in 2013.

- [10] Both Fortier and Van Rensburg tendered resignations letters to RFS. On Du Plooy's version, the resignation letters spelled the end of the employment relationship. On the version of both, as advised, the letters sought to terminate the human resources services, which were rendered pursuant to clause 4.11 of the administration agreement.
- [11] Around 2015, the trustees of the Funds took resolutions to remunerate the employees some bonuses. The amounts now claimed by RFS were paid as bonuses to the employees. On Du Plooy's version those amounts were received secretly and without the consent of RFS. As confirmed by Mphahlele, the finance department of RFS was aware of the payments since RFS was administering payments on behalf of the Funds. On the evidence of Du Plooy, the payments were received in breach of the employment contracts alternatively the provisions of the HR Policy. Had he known that the employees received the bonus payments, he would have not paid them salaries for three months. On or about 18 August 2017 RFS referred the

present dispute in terms of section 77 (3) of the BCEA to this Court for adjudication.

Argument

- [12] This being a trial action, the Court listened to oral submissions immediately after the delivery of viva voce testimony and extensively debated with the legal representatives of the parties. Both representatives sought to be afforded an opportunity to finalise their written submissions. Indeed, on 22 August 2022, both representatives armed this Court with very useful written submissions to aid this Court to pen this judgment. Only the salient points will be addressed in this part of the judgment. The rest of the submissions shall be referred to as and when it becomes essential in the body of this judgment.
- [13] In summary, Mr Mosam SC appearing with Ms Odendaal for RFS correctly submitted that the key issue in this matter is whether there was an employer and employee relationship between RFS and the employees at the time they received the bonus payments from the Funds. Relying on the decision of the Supreme Court of Appeal in the matter of Ganes and Another v Telecom Namibia Ltd[4], Mosam SC correctly submitted that an employee owes an employer a duty of good faith. That duty encapsulates a duty not to make secret profits in the course of the employment by virtue of holding a position as an employee. Correctly, an employer is entitled to claim from an employee a profit made secretly. After placing an interpretation on certain recordal of the minutes, he submitted that the contention that Samons resigned from RFS should be rejected.
- [14] With regard to the two ladies, he submitted that because they sent the resignation letters, they remained employees of RFS until 2016. To a large degree, Mosam SC emphasised that the evidence of Du Plooy was unchallenged. Because of which he drew certain conclusions. He turned to the HR Policy. He quibbled with the word supersede as employed in the addendum and submitted that all it meant to convey is an amendment of the HR Policy.
- [15] With regard to the payments to the employees by the Fund, he placed emphasis on the fact that RFS did not give consent to receive the payments and such fact remained undisputed. With regard to the key question of the existence of an employer and employee relationship, he placed reliance on the decision of the Labour Appeal Court in SITA (Pty) Ltd v CCMA and others[5]. He sought to apply the test in SITA on what he labelled 'unique factual matrix' of this case. Thus, he emerged with a submission that the employees remained the employees of RFS and they were such at the relevant time.
- [16] In disputing the resignation of Samons, he placed reliance on section 37
- (4) of the BCEA which requires notice of termination of employment to be in writing. He placed reliance on the decision of TAWU and others v Natal Co-operative Timber Ltd[6]. He referred to the employment contract of Samons as a 'purported contract of employment'. He submitted that the terms of that employment contract are in direct breach with the secondment agreement.

- [17] With regard to the remedy of disgorgement, he placed reliance on the case of *Phillips v Fieldstone Africa (Pty) Ltd* and another[7]. He emphasised the lack of consent by RFS. He ultimately submitted that the employees breached their fiduciary duty, which is a breach arising from an employment contract[8], in particular the secondment agreement. Ultimately, he submitted that RFS is entitled to disgorgement of the profits received by the employees. He made no pertinent submissions on the issue of damages.
- [18] On the other hand, Mr Van Der Walt SC who appeared on behalf of the employees addressed the key issue of employer and employee relationship. He submitted that the definition of an employee in section 1 of the BCEA is of significance. He submitted that over analysing insignificant inconsistencies like the lack of formal letter of resignation would serve no purpose at all. He submitted that based on the overall objective assessment of the facts, the probabilities are that the employees were in the employ of the Funds when the undisputed bonus payments were made.
- [19] With regard to the remedy of disgorgement, he submitted that two elements must exist in order to successfully claim the remedy; namely
- (a) fiduciary relationship; and (b) the profit must have been made in secret. He submitted that the employees did not owe a fiduciary duty and there was no element of secrecy when the payments of the bonuses were made. He addressed the damages issue and submitted that the payments to the employees did not constitute damages. There was no causal nexus established between the alleged breach and the damages. Ultimately, he submitted that RFS failed to prove its claim and the claim must be dismissed with an ordinary costs order, since the Labour Court sat determining a civil claim.

Evaluation

- [20] As outlined above this is a typical breach of contract claim. In terms of the pre-trial agreement between the parties, this Court is called upon to determine effectively three issues; namely;

1 Whether the first, second and third respondents, at all times material to the payments, which form the subject matter of the applicant's claim were employed by the applicant;

2 If it be found that a contract of employment did in fact exist between the applicant and the first, second and third respondents, at the time the aforesaid payments were allegedly made by the fourth and

fifth respondents to the first, second and third respondents they were made and received in breach of such employment contracts, and as such whether they constituted secret profits, and whether or not the applicant is entitled to claim such payments as damages suffered by it.

3 Whether in any event the applicant gave its free consent in respect of any payments made by the fourth and fifth respondents to the first, second and/or third respondents.

4 Whether the applicant's claims have been instituted purely in an attempt to harass the respondents[9].'

[21] In order to decide these issues, it is important to make a sojourn to the statement of case and response ("pleadings").

The applicant's stated case.

[22] For the purposes of this judgment, the relevant portions of the statement case provides as follows:

"12. During or about November 2007, the applicant represented by C J du Plooy and First respondent acting personally, concluded an oral agreement of secondment in terms of which the applicant seconded the first respondent to the Funds to perform the functions of Principal Officer of the Funds. Notwithstanding such secondment, the first respondent remained an employee of the applicant on the following express, alternatively, implied, further alternatively, tacit terms:

12.1 ...

12.2 ...

12.3 ...

12.4 The first respondent would not without the applicant's permission be entitled to earn any further remuneration or bonuses from the Funds.

16. During or about May 2013, the applicant represented by C J du Plooy and second respondent acting personally, concluded an oral agreement of secondment in terms of which the applicant seconded the second respondent to the Funds to perform the functions of a professional assistant to Principal Officer (first respondent) of the Funds. Notwithstanding such secondment, the second respondent remained an employee of the applicant on the following express, alternatively, implied, further alternatively, tacit terms:

16.1 ...

16.2 ...

16.3 ...

16.4 The second respondent would not without the applicant's permission be entitled to earn any further remuneration or bonuses from the Funds.

20. During or about 2001, the applicant represented by C J du Plooy and third respondent acting personally, concluded an oral agreement of secondment in terms of which the applicant seconded the third respondent to the Funds to perform the functions of a secretary of the Funds. Notwithstanding such secondment, the third respondent remained an employee of the applicant on the following express, alternatively, implied, further alternatively, tacit terms:

20.1 ...

20.2 ...

20.3 ...

20.4 The third respondent would not without the applicant's permission be entitled to earn any further remuneration or bonuses from the Funds.

[23] In respect of all the employees, RFS alleged as an alternative to the alleged terms that they agreed to the HR Policy that contained an obligation to declare any interest in any other organisation that could potentially offer them financial benefit. With regard to the breach, RFS alleged that the employees breached their employment contract by accepting the additional remuneration. In the alternative, they breached clause 4 of the HR Policy by failing to declare that they received additional remuneration.

[24] Regard being had to the stated case, the applicant is bound to a case to the effect that in receiving the bonuses, the employees breached the oral terms of the employment contract, in particular that as employees, they would not without permission be entitled to earn any further remuneration or bonuses from the Funds, alternatively that they breached the HR Policy by failing to declare those remunerations.

Respondents' response.

[25] It is cardinally important to point out that in the Labour Court there are no pleadings in action proceedings contemplated in Rule 6. Thus, a statement of response does not assume a shape or character of a plea in terms of the Uniform Rules and it is not a plea. Rule 6 (3) of the Labour Court Rules defines a response as a document containing the same information required by subrule (1). In terms of subrule (1)

(b) (ii) and (iii), what is required is a clear and concise statement

of the material facts on which a party relies. The statement must be sufficiently particular. A clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular. On the other hand rule 22

(2) of the Uniform Rules provides that the defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies. It is true that this is a civil matter, however, it is a matter initiated in the Labour Court and not the High Court. Throughout the trial, Mr Mosam SC kept on reminding this Court and the respondents that they are bound by their pleadings. As stated above, there are no pleadings in a stricto sensu in the Labour Court.

- [26] In the Labour Court, what binds the parties before a trial resumes is the consensual document called a pre-trial minute[10]. It constitutes an agreement out of which neither party may resile. Since the statement of response is not a plea, it was not required of the respondents to, admit, deny, confess or avoid any of the material allegations made by the applicant. Therefore, it cannot be correct to remotely suggest that the terms of the oral agreement alleged by RFS are admitted. As one of the legal issues, the respondents clearly and concisely stated that the first issue that arises is whether or not an employment contract existed at the relevant times between the parties. Inasmuch as Mr Van der Walt SC for the respondents made a legal concession that, the terms of the oral agreement have been admitted from 2009 – 2011 and not thereafter, that legal concession is wrong in as far as the statement of response read with the pre-trial minutes is concerned. Accordingly, it is not binding on this Court. What the statement of response spectacularly allege is that on 1 September 2011, both Samons and Van Rensburg ceased to be employees of RFS. In respect of Fortier the employment relationship ceased on 1 June 2013.
- [27] A pre-trial document is a crucial document pre-hearing of evidence. Although the parties in this matter were admirably and expertly represented, they failed to dextrously set out facts which are common cause as required by rule 6 (4) (b) (ii) of the Labour Court Rules. In the Court's view, the pre-trial minute filed in these proceedings is woefully deficient. Nowhere has it been set out as being common cause the terms of the oral agreement as alleged by RFS. If RFS wished an admission of the alleged terms to be common cause, it should have insisted on its recordal as such in the pre-trial minutes. Having not done that, it behoved RFS to establish the contract it predicates its claim on and all its terms through evidence. As it shall be demonstrated later, the applicant's only relevant witness, Du Plooy failed to discharge the onus to establish the oral agreement and its terms.

Was there an employment relationship at the relevant time?

- [28] In order to answer this question, owing to the fact that the applicant invoked the jurisdictional powers of this Court under section 77 (3) of the BCEA, this Court must have regard to the definition of an employee in section 1 of the BCEA. In terms thereof, an employee means any person excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer and "employed" and "employment" have a corresponding meaning.
- [29] In relation to RFS, after the so-called secondment, it does not appear that the employees fitted the definition of an employee. Although both parties were content with referring to what became in 2009 as a secondment, actually, Samons was appointed statutorily and effectively no longer carried on with the legal functions he was appointed for, for the benefit of RFS. In performing the statutory functions, Samons effectively worked for the Funds and not RFS. Similarly, when Van Rensburg and Fortier started performing functions for the Funds, they ceased to fit the definitional requirements of an employee. To be an employee, that person must (a) work for another person (RFS) and (b) must receive remuneration in

return for the work or (c) must assist in carrying on or conducting the business of an employer (RFS). On the uncontested evidence, the Principal Officer office served the Funds and not the service provider (RFS) of the Funds. In terms of section 8 (1) of the Pensions Fund Act[11], a fund is obliged to have a Principal Officer.

- [30] This Court agrees with Mr Van der Walt SC, that in effect what RFS did was labour broking as opposed to a secondment. Labour broking happens when a Temporary Employment Services (TES) provides labourers to client companies on a temporary basis. Grammatically, the term secondment means a temporary transfer of an official or worker to another position or employment. It is actually an agreement between the employer and the host (another entity) in terms of which an employer is allowed to assign an employee to another organisation for a specified duration for the purposes of developing good business relationships, enhancing an employee's particular skill set or for sharing the particular expertise of that employee with the host company. Nevertheless, on the uncontested evidence, and as clause 6.2 of the administration agreement provides, the fee payable to RFS by

the Funds is for the Standard Administrative and Accounting Services. It became common cause that out of the fees the salaries of the employees was payable. This evidence simply implies that the employees received or were entitled to receive remuneration from the Funds. Clause 4.11 of the administration agreement makes it plain that the fees encapsulate the remuneration of the employees.

- [31] The fact that RFS paid remuneration to the employees administratively does not suggest that the employees received their remuneration from RFS. Du Plooy testified that the 1.2% constituted its income. Based on 6.1 what must be regarded as an income of RFS should be the Standard Administrative and Accounting services. Either way, in terms of clause 4 of the employment contracts of Samons, the Funds were liable to pay him remuneration.
- [32] The conclusion this Court reaches is that on the evidence before it, the employer and employee relationship ended when the employees worked for the Funds and were remunerated or entitled to be remunerated by the Funds. The fact that administratively, RFS managed the finances and the human resources requirements of the Principal Officer's office does not suggest that the employment relationship continued.

Was there a fiduciary relationship?

- [33] As indicated above, Mosam SC submitted that the fiduciary relationship arises from the secondment agreement. According to Du Plooy, the secondment agreement was an oral one. He became extremely ambivalent when he testified about the terms of that oral agreement. As indicated above, this Court is not satisfied that a true secondment agreement came into being. The general principle is that for fiduciary duties to arise, there must, within the particular relationship concerned, be specific contractual obligations, which

the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the

contractual obligations.[12] The Court of Appeal in *Helmut Integrated Systems v Tunnard*[13] stated that it is now commonplace to observe that not every employee owes obligations as a fiduciary to his employer.

[34] The prevailing view therefore is that all employees do not necessarily or automatically owe fiduciary duties to their employers. Circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary[14]. Whether an employee has placed himself or herself in a position where he must act solely in the interest of his employer will depend on the terms of employment and the nature and purpose of the employee's functions, duties, and responsibilities. In casu, the office of the Principal Officer is statutory in nature and solely serve the interests of the Funds.

[35] Under the circumstances, it cannot be said that RFS placed any form of reliance[15] on the employees serving as an office of the Principal Officer for the Funds. On the facts of this case, RFS failed dismally to demonstrate a fiduciary duty on the part of the employees. In September 2011 and June 2013 respectively, the employees severed the umbilical cord between themselves and RFS. Accordingly, they owed no fiduciary duties to RFS.

Was there a contract of employment at the relevant dates?

[36] It is worth emphasizing that an employer and employee relationship may exist without an employment agreement. An employment agreement is concluded for the purposes of setting out the terms of an employer and employee relationship. Although an oral agreement is acceptable in law, a written agreement is preferable since it makes proving of the terms much easier. RFS alleges an oral agreement. Thus, it bears the onus to prove the existence of the oral contract and its terms.

The elements of a cause of action for breach of contract are (a) the existence of a contract and (b) the breach of a term of that

contract. On establishing the existence of the contract, Du Plooy testified about the secondment agreement in 2007 in respect of

Samons. He testified that the terms of that secondment agreement were that Samons must go over to the Funds, act in good faith, and there was no additional remuneration for him. With regard to the ladies (Fortier and Van Rensburg), he referred to the same oral secondment agreement and terms. Later in his testimony, he vaguely alluded to an oral employment contract its terms being that the employees are not entitled to earn extra income and if they do, they must pay it over to RFS.

- [37] On the version of Du Plooy, the alleged contracts (secondment and employment) and their alleged terms continued until February 2016 and May 2016 respectively. On the employees' version, the oral employment and secondment agreements ended on 1 September 2011 and 1 June 2013 respectively. Although Du Plooy was not sufficiently challenged on the alleged oral contracts and the terms thereof, the respondents disputed the existence of any employment contract after 1 September 2011 and 1 June 2013 respectively. In this regard, this Court is faced with two conflicting versions. The only way to resolve the conflict is to employ the technique suggested in *Stellenbosch Farmers' Winery Group Ltd and another v Martell and Cie SA and others*[16]. Before this Court ventures into that balancing exercise, it must be stated that the onus lies on RFS to establish the existence of a contract and its terms – he who alleges must prove[17]. In order to sue based on a contract, such a contract must be extant.
- [38] In law, there are about six instances where a contract may be regarded as having been terminated. Those are; (a) where one party is in breach of contract entitling the other party to cancel the agreement (repudiation); (b) where one party is entitled to rescind by reason of the other party's misrepresentation, undue influence or duress (rescission);
- (c) where a contract is void by reason of mistake, non est factum – that is not my doing; or Statute; (d) where the parties agree to bring the contract to an end (mutual discharge); (e) where the contract provides for termination in the event of force majeure (force majeure); and (f) where some unforeseen event prevents the parties from performing the contract (frustration).
- [39] On the facts of this case, it is clear that the employees must have repudiated their alleged employment contracts or there was a mutual termination thereof. When the Exco of RFS was informed that the Principal Officer should be employed by the Funds, by word and by deed, the employees unequivocally

demonstrated an intention to not be bound by their employment contracts with RFS. On 25 July 2011, Samons indicated that he had

already agreed to the suggestion of the Executive Committee of the Funds to change his employment contract. It is settled law that

resignation is a unilateral act that does not require acceptance by an employer party[18]. The decision of *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[19] remains the leading authority when it comes to what repudiation of an agreement is. The Court there held:

'Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming...The conduct from which the inference of impending non-performance is to be drawn must be clear-cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is

a ‘serious matter’ ...requiring anxious consideration and – because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments – not lightly to be presumed.’

[40] The most common cause of discharge or termination is performance. Where there is a clear-cut impending non-performance, the other party performing in that manner indicates unwillingness to be bound by the agreed terms. It is indeed so that repudiation affords the aggrieved party an election to either accept the repudiation cancel and sue for damages or insist on performance and where necessary seek the remedy of specific performance. When the actions of Samons and the other employees became clear to no longer be bound by the agreed terms, Du Plooy simply ignored the situation and did not insist on specific performance. It was clear that regard being had to the conduct of the employees that they do not intend to repent from their evinced intention to no longer be bound to the employment terms with RFS. The Supreme Court of Appeal (SCA) in *Basson and Others v Hanna*[20], stated the following:

“[19] Objectively viewed, Basson’s actions after 7 June 2007 constituted conduct from which the only reasonable inference that could be drawn was that he did not regard himself bound by the agreement and that he was not prepared to perform its terms[21].

[41] Accordingly, this Court must accept that the employees repudiated the oral employment contracts and Du Plooy must have accepted the repudiation, since he did not insist on specific performance, despite the conduct of the employees objectively viewed evincing unequivocally not to be bound by the contractual arrangements with RFS. Termination happened in law. Repudiation happens by deed or conduct. Even though Samons did not submit a formal written resignation, by his conduct – agreeing to the proposal of the Executive Committee, verbalising his intention at the Exco meeting and concluding a written contract of employment with the fund – he clearly evinced an intention to not be contractually bound to RFS. Section 37 (4) of the BCEA does not suggest that for termination to happen same must be in writing only. The section deals with notification as opposed to an act of termination.

[42] Where an employer like RFS, is faced with persistent repudiation, it seems foolhardy in my view, for that employer to hold a view that the employment relationship persists. Particularly in an instance where the employee no longer performs the functions beneficial to an employer. It is undisputed that from 1 September 2011, Samons and Van Rensburg no longer performed services for the benefit of RFS. It is also undisputed that from 1 June 2013, Fortier no longer performed services for the benefit of RFS. Most importantly, other than being a conduit, RFS was not remunerating or contractually obliged to remunerate the employees. No reasonable employer can accept an employment relationship where the employer does not consume services. It must be so that by failing to perform services for the benefit of RFS, the employees unequivocally demonstrated by deed and conduct to no longer be bound contractually. As indicated, repudiation puts the innocent party to an election. Making of an election happens in my view by conduct or by word. On the facts of

this case, when Du Plooy approved that the employees be appointed by the Funds, the COO transferring Fortier, RFS was making an election to accept what was a clear repudiation of the employment arrangement. The law is clear and undisputed that an election once made cannot be retracted.[22] Having once elected to treat a contract as having been repudiated by the other party, the aggrieved party cannot of his own volition

revive his right to treat the contract as still being in force.[23]

[43] On the probabilities, the version of the employees that on 1 September 2011 and 1 June 2013, the employment contracts terminated is supported by other objective evidence (the contract of employment signed by Samons on 25 August 2011, the transfer and the appointment letters in 2013, RFS approved their appointment by the Fund as set out in clause 4.11 of the administration agreement and that the employees did not perform any functions for the benefit of RFS). On the other hand, it is improbable that the so-called secondment agreement continued after 2011 and 2013 respectively. Surely if Du Plooy had wished to keep the terms of the employment agreement alive, he could have rejected the idea of the Executive Committee of the Fund the moment he got wind of it, which was on 3 August 2011. The transfer letter of Fortier signed by the COO of RFS makes it plain

that the position is transferred to the Principal Officer of the Fund. Nowhere does the transfer letter state that the terms of the oral employment agreement with RFS remains intact.

[44] This Court must deal with the issue of the “resignation” letters by Van Rensburg and Fortier. It is because of their resignation letters that Du Plooy testified that they remained

employees of RFS until 2016. It is common cause that at the time the resignation letters were penned, the pair were exclusively performing functions for the Funds. Resignation is a unilateral act on the part of an employee terminating an employment relationship or contract. The authorities have it; it requires no acceptance by an employer. Logic dictates that where an employment relationship or contract terminated earlier, terminating it again must be regarded as a step pro non scripto. In *Arafdien v Soeker*[24] the Court usefully suggested that a meaningless term must be regarded as pro non scripto. In *Arafdien*, an offer to purchase contained a term that the offer must be accepted before a stipulated time. At the time the offer was made, the stipulated time had passed. The Court correctly held that that term containing a passed stipulated time must be regarded as pro non scripto as it became meaningless.

[45] There is a saying that certain things are only worth the paper written on them. This expression simply implies that although it has been written down and seems official, it is in fact worthless because what has been promised will not be done. The pair promised that by the end of February 2016 they will terminate their employment with RFS. That promise could not have seen the light of day because at the time when the promise was made, there was no longer an employer and employee relationship between the pair and RFS. Elsewhere[25], RFS had given a legal undertaking that the persons (Principal Officer, Secretary and Personal Assistant) shall be appointed by the Fund with its approval. It must be stated that the support staff (Secretary and Personal Assistant) are not statutory

appointments.

When RFS approved their appointment, that simply meant it approved that they shall work for the Funds. Any argument to suggest that the provisions of clause 4.11 does not suggest termination of employment is rejected.

[46] The pair testified that they penned the resignation letters in order to signify their intention to terminate the human resources services, which were still provided by RFS at that time. Mosam SC sought to make a riveting hoo-ha about the contents of the minutes of the board of trustees of the Fund held on 19 February 2019. The minute recorded the following:

“4.4.2 Employment agreements: NFMW staff

It was resolved that

(i) Entering of employment agreements between the fund and Ms Jansen van Rensburg and Ms M de Fortier be approved, subject to the following:

1 Following of normal compliance processes in respect of agreements.

2 The employment conditions and remuneration will be on the same basis as their current employment with RFS Administrators.”

[47] Mosam SC placed heavy emphasis on the words “current employment with RFS Administrators”. Factually as at this stage, the appointment of the two ladies was made to the Funds with the approval of RFS, in 2011 in respect of Van Rensburg and in 2013 in respect of Fortier. As a matter of fact, as at that time, the pair signed the HR Policy and the addendum. As at that time, the arrangement was that RFS pays the employees’ remuneration on the strength of the extant administrative agreement. The matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[26] informs us that contextual interpretation requires taking into account the prevailing circumstances when the document was created.

In the context of this meeting, relied upon by RFS what was current was the HR Policy and the remuneration arrangement and not employment with RFS. Interpreting the words underlined above selectively without taking into account the context certainly leads to an absurdity.

[48] Accordingly, the version of the pair that when they penned the resignation letters they aimed at terminating the HR and remuneration service is more probable. The version of Du Plooy that it was only then that they ended their employment relationship with RFS is improbable, regard being had to the provisions of clause 4.11 and the letters in

2013. Since it is improbable, it must be rejected as such.

Was there a breach?

[49] Mr Van der Walt SC submitted that RFS failed to prove any breach. I agree. A breach happens when the agreed terms are not complied with. Where the obligations (terms) no longer exist, there can be no speak of a breach. Breach of what? Once the obligations (terms) are discharged there can never be a case of breach.

Conclusions on the existence of a contract of employment

[50] Based on the evidence presented in this Court RFS failed to discharge the onus to prove the existence of an employment contract at the relevant time. Thus, there was no obligation on the employees to not accept the bonus payments from their employers, the Funds.

The alternative claim based on the HR Policy and the addendum.

[51] The case alleged by RFS is that the employees breached the provisions of clause 4 of the HR Policy dated 14 August 2014. It became common cause that when ink fell onto paper in respect of this HR Policy, the oral employment contract had ended between RFS and the employees. It is indeed so that at the time ink fell onto paper, the alleged offending payments, which were not to be earned, in terms of the defunct employment contract, were not made yet.

[52] RFS conjured up a case and alleged that by failing to declare the payment so received the employees breached the HR Policy. The veritable question becomes, what was the status of the HR Policy appertaining the employees before me?

[53] In answering this question this Court, as it must, must depart from a premise that on 14 August 2014, there was no longer an employer and employee relationship between RFS and the employees neither was there extant and valid employment contracts. Ordinarily human resources policies form part of employment contracts. The policies deal with employment conditions. Therefore, this policy is indeed a strange one, as in extraordinary. The primary rule of interpretation is to consider the language, grammar and syntax contained in any document. There is no dispute that the COO of RFS drafted this document. Therefore, on application of the contra proferentem rule, if the wording is incurably ambiguous, RFS must suffer because it had the power to make the meaning plain.[27] This Court takes a view that the words employed in the policy and the addendum do not obdurately suffer from incurable obscurity.

The meaning is plain, lucid and perspicuous.

[54] On the face of the policy, there occurs the following words:

“The policy stipulated and contained in this document is applicable to employees of the following companies:

Retirement Fund Solutions Holdings (Pty) Ltd...

RFS Administrators (Pty) Ltd...

RFS Home Loans (Pty) Ltd...

[55] Thus, in order for the document to find application there must be an employer and employee relationship between a particular employee and any of the named companies. Simply on the wording set out above, the HR Policy finds no application to the employees before me, since they were on the preponderance of probabilities not employees of any of the listed companies.

[56] The parties involved in this matter were alive to the above conundrum with regard to the employees at the Fund. In an attempt to resolve the conundrum, an addendum to the HR policy was generated. The addendum, amongst others provided as follows:

“Addendum to HR Policy

Employees seconded to the NFMW

August 2014

The conditions contained in this addendum supersede the conditions contained in the RFS Administrators (Pty) Ltd HR Policy and is specific to employees seconded to the office of the Principal Officer for National Fund for Municipal Workers (NFMW).”

[57] During the cross-examination of Du Plooy, Mr Van der Walt SC was cowed into taking the foot off the pedal by an objection raised by Mosam SC to the effect that the employees’ “pleaded” case demonstrated some admission of the applicability of the HR policy onto the employees. Although Van der Walt SC abandoned this perfect line of cross-examination, this Court takes a view that the alleged “pleaded” case does not demonstrate an admission. The statement of response reveals the following material fact:

“26.6 The first, second and third respondent plead that a proper construction of the HR Policy read in the context of ... the addenda signed by...indicates that the effect of the addenda was to make the HR policy applicable as between the fifth respondent as Employer and the ... as the fifth respondent’s employees, and not as between the applicant and the ... as employer and employees respectively.”

[58] What the employees did was to place their own construction on the relevant documents. Interpretation of any document is a matter of law as opposed to fact. Thus, it becomes the duty of a Court of law to do that and not defer to the interpretation of the parties[28]. The Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and others*[29] suggested a unitary approach where context, the text and purpose are to be considered holistically and simultaneously.

[59] The text uses the word supersede. The grammatical meaning of that word is to take the place of a thing previously in authority or use. The context is such that at that time, there was no longer an employer and employee relationship between RFS and the employees. However, RFS continued to provide human resources support for the Fund as the Fund was not equipped to do so. This on the strength of the administration agreement. It seems clear that the intended purpose of the HR Policy and the addendum was to regulate conditions of

employment. It is unheard of for a non-employer to regulate employment conditions of a non-employee.

- [60] The conclusion to reach on application of the unitary approach suggested by the Constitutional Court, is that the HR Policy did not apply to the employees and was indeed superseded by the addendum in so far as the “seconded employees” are concerned. This conclusion makes it unnecessary for this Court to have regard to the provisions of clause 4 of the HR Policy. An argument that the addendum sought to amend the HR Policy is rejected. The word supersede does not mean amend on any benign interpretation.
- [61] In the unlikely event that this Court is wrong, clause 4 in the main deals with declaration as opposed to prevention of having interest. RFS suggests that the employees were obligated to declare the financial benefit they received from the Funds. Once more, application of the unitary approach is key. The text clearly provides that the obligation of an employee is to declare interest in an organisation that potentially offer financial benefit. It was no secret that the employees were placed or to be placed at the Fund. In addition, it was no secret that the Fund may in paying the salaries to the employees offer a financial benefit (performance bonuses) to them. In fact, Du Plooy testified that if any bonuses were to be paid, they would arise from the 1.2% fees. Similarly, the context was such that the employees were exclusively plying their trade to the Funds and no one else. Their performance was evaluated by the Funds. Their salary was paid by RFS as a conduit using the money of the

Funds. Accordingly, it must have been within the contemplation of the Funds, RFS and the employees that if the employees surpass their performance, they may be rewarded for that. On RFS’s case, the applicable HR Policy provides in clause 18.8.5.2 that remuneration is one of the elements related to the performance evaluation. It does contemplate payment of a reward based on the principle of affordability and company performance.

- [62] Quintessentially, it must be axiomatic that when RFS accepted the obligation to remunerate in clause 4.11, it accepted that such remuneration has as one of its elements performance evaluation that may lead to a financial reward. Thus, it cannot be said that the employees breached clause 4 of the HR Policy. Clause 4 deals with a potential as opposed to fact. Potential means having or showing the capacity to develop into something in the future. The potential to earn a bonus has always been there. RFS has the wrong end of the stick on this one. There was no obligation in clause 4 to declare that remuneration was received. The obligation is to declare the potential. As pointed out it is more probable than not that at some point the remuneration would encapsulate bonus payments if earned through performance and not some secret devious means.
- [63] Accordingly, the conclusion to reach is that the HR Policy is inapplicable to the employees and if applicable, clause 4 thereof has not been breached by the employees. The alternative claim must, as it should suffer the same fate.

Secret profits and disgorgement

- [64] In the pre-trial minutes, the question is styled as (a) whether the payments constituted secret profits and (b) whether the RFS gave its free consent in respect of any payments made to the employees. In the joint practice note for trial RFS introduced disgorgement as a remedy.
- [65] The first question to deal with is whether the payments constitute secret profits. Van Der Walt SC submitted that the payments do not constitute secret profits on the basis that RFS officials were aware of the impending payments. In English law, a secret profit is a profit made by an employee who uses his employer's premises and business facilities in order to engage in unauthorised trade on his own behalf. A common example is a bar manager who purchases beer from a brewery in his own right and sells it in the bar in competition with, or in preference to, that of his employer. The profit the bar manager makes is a secret profit[30].
- [66] There is a marked difference between a bonus and a profit. Bonus is a form of remuneration. By definition bonus means a sum of money added to a person's wages for good performance. Section 1 of the BCEA defines remuneration to be any payment in money or in kind or both in money and in kind, made or owing to any person in return for that person working for any other person. On the other hand, a profit is a financial gain, especially the difference between the amount earned and the amount spent. What occurred in this instance does not fit the definition of a profit let alone a secret profit. As indicated earlier, it was within the contemplation of RFS that the employees may be rewarded for exceptional performance. The fact that RFS did not give free consent does not suggest that the payments amount to secret profits. This Court doubts that the earning of a bonus based on performance requires any free consent, even in an instance where an employee has been seconded to another employer.
- [67] Faced with secret profits, the remedy available to an employer is known as disgorgement. It is a remedy requiring a party who profits from illegal or wrongful acts to give up any profits he or she made because of his or her illegal or wrongful conduct. This remedy was implanted into our legal system by English law. It is not an independent cause of action but a remedy for breach of contract.

Customary remedy for a breach of contract is compensation, usually measured in the form of expectation damages[31]. This means the plaintiff is generally entitled to be placed in the same situation, with respect to damages as if the contract had been performed.

- [68] Disgorgement is a measure of relief based solely upon the defendant's profits rather than the plaintiff's loss. In other words, if the payments amount to secret profit, all RFS needs to show is not its actual patrimonial loss but that the employees made a gain or profit. It is an exceptional remedy, available where a plaintiff has shown that ordinary remedies of contract law are inadequate to protect and vindicate his or her contractual right.

[69] An English case that explains the remedy properly is that of Attorney General v Blake[32]. In this case, Mr George Blake, a former member of the UK's Secret Intelligence Service, in 1989 entered into a contract to publish a book of state secrets that he had undertaken never to reveal, thereby breaching his contractual undertaking. By the time of publication of the book, the information was no longer confidential and its disclosure caused no loss to the Crown. Therefore, no compensatory damages could be awarded to vindicate the government's contractual right nor to deter and denounce the wrong committed by the defendant. Lord Nicholls explained that:

"Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise"[33]

[70] In Atlantic Lottery Corporation Inc v Babstock[34] the Supreme Court of Canada, per Brown J, penning for the majority stated the following:

"[59] ...I say this, first because disgorgement is available for breach of contract only where, at the minimum other remedies are inadequate. Circumstances of inadequacy arise when the nature of the claimant's interest is such that it cannot be vindicated by other forms of relief. This may arise where, for an example, the plaintiff's loss is "impossible to calculate" or where the plaintiff's interest in performance is not reflected as purely economic measure... Where, as here, the argument is that the quantum loss is equal to the defendant's gain, but the plaintiff would simply rather pursue disgorgement, a gain-based remedy is not appropriate.

[61] Disgorgement for breach of contract is exceptional relief; it is not available at the plaintiff's election to obviate matters of proof..."

[71] I plentifully agree with the sentiments expressed by Brown J. Actually, disgorgement is not an alternative remedy for breach of contract. A primary remedy for breach of contract is an order for specific performance. As its alternative is a claim for contractual damages. Disgorgement becomes a remedy sui generis. It does not arise out of choice in order to obviate matters of proof.

[72] Karakatsanis J wrote a minority judgment in Babstock[35]. He opined thus:

"[123] The overarching question in awarding disgorgement for breach of contract is whether, in all the circumstances, other remedies would not adequately protect or vindicate the contractual right."

[73] The learned Justice went further and concluded that:

"[155] As Ernest J. Weinrib has recognised in the compensatory context, causation connects the plaintiff and defendant... The same reasoning requires a causal link between a wrong and a gain.

- [156] In the context of a breach of contract, it is similarly important to connect the breach to the gain to be disgorged... Applying a “but-for-the-breach” standard ensures a causal connection between the quantum of gain and the plaintiff’s right.
- [157] All this means that the plaintiffs need to provide some methodology that is ‘sufficiently credible or plausible to establish some basis in fact for the commonality requirement’, that is, a realistic prospect of assessing class-wide monetary relief in the aggregate...”
- [74] Once more, I plentifully agree with the sentiments expressed by the erudite Justice. The breach alleged by RFS is simply that the employees agreed not to earn extra income and in breach, they did earn extra income. As a point of departure, this extra income does not constitute a profit that would have accrued to RFS. In other words, had the employees not earned an extra income, RFS would not have earned those bonuses for itself. Thus, there is a serious disconnect between the alleged breach and the gain made. There can be no legal basis to suggest that in performing exceptionally in order to earn an extra income, the employees competed with RFS. Although the employees did not strenuously challenge this oral term, this Court takes a view that it was an ex post facto creation in order to attempt a remedy of disgorgement.
- [75] Similarly, the breach of clause of 4 of the HR Policy does not give rise to a disgorgement relief. Had the employees declared the potential financial benefit, they would still not earn anything themselves. Once they earn it, they have no obligation to declare the earnings. Once more on application of the but-for test, had the employees failed to declare the potential there is no gain to have been made.
- [76] In conclusion, this Court opines that the remedy of disgorgement is not available to RFS. Moreover, RFS failed to suggest any methodology that this Court may employ to connect the alleged gain and the alleged breach. For all the above reasons, the claim for the disgorgement relief is bound to fail.

Contractual Damages claim.

- [77] In law, damages are a surrogate for performance. It is awarded in lieu of specific performance for the aggrieved to claim the objective monetary value of the agreed performance, which is not received as a result of the aggressor’s breach.[36]
- [78] Accordingly, the aggrieved must establish that the loss was caused by the aggressor’s breach and that the loss was not too remote. The aggrieved bears the onus of proving the extent of the loss. As a general principle where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it[37].

[79] In *Commonwealth v Amann Aviation (Pty) Ltd*[38], Deane J set out the principle that must apply in assessment of damages and said:

“The general principle governing the assessment of compensatory damages in both contract and tort is that the plaintiff should receive the monetary sum which, so far as money can represent fair and adequate compensation for the loss or injury sustained by reason of the defendant’s wrongful conduct.”

[80] Damages in contract seeks to place a plaintiff in the position, which would have occurred had the breach not happened.[39] In *casu*, the only testimony presented by Du Plooy in proving the loss is that, had he known that the employees received bonuses, he would not have paid them for an equivalent of three months. As indicated earlier, even if the employees did not breach the alleged term of not earning extra income, RFS would not have been in a position to receive any compensation for itself. On Du Plooy’s version, the term was such that the money so earned must be paid to RFS. Logically, if the employees earn no extra income, there will be nothing to be paid to RFS. By not earning extra income, in order to respect the term of the alleged contract, which is the performance required of them, RFS does not accrue any pecuniary advantage. The situation would have been different, if the clause allowed them to earn extra money but obliged them to pay it over to RFS. In that situation failure to pay over the money as contractually obliged (performance) would certainly lead to a loss, which is the equivalent of the money so earned.

[81] With regard to the alternative claim of the breach of clause 4 of the HR Policy, performance equates declaration of potential financial interest. If an employee fails to declare a potential interest, it is too remote a damage that should an employee achieve financial reward, then the reward is the equivalent of the failure to declare. Such damages would not have been within the contemplation of the parties when they contracted. Clause 4 does not prevent an employee to have financial interest; all it requires is the declaration of the potential. There is no monetary value that can be attached to a failure to declare. If there is any, the onus rests on RFS to show that monetary value and it has failed to do so before me.

[82] Accordingly, the conclusion this Court reaches is that RFS failed to discharge its onus to prove the contractual damages. Accordingly, its claim for damages must fail.

The issue of costs

[83] This is a civil matter and not a labour matter. Accordingly, the principle of costs not following the results does not find application. This Court disagrees with a submission by Mosam SC that the principle in *Zungu v Premier of the Province of KwaZulu-Natal and Others*[40] applies in *casu*. RFS invoked the provisions of section 77 (3) of the BCEA since the dispute involves or concerns an employment contract. In terms of this section, the Labour Court has concurrent jurisdiction with the civil Courts. Thus, it can be said that the Labour Court in hearing this matter, exercises its civil jurisdiction as opposed to the LRA jurisdiction. In order to demonstrate the point, the parties before me could have comfortably debated this matter in the High Court. Now that they are in the Labour Court, this Court is not hearing a “labour matter” but a civil matter. In the Labour Court, the

Constitutional Court decreed indiscriminately that the ordinary rule of costs following the results does not apply. Conversely, if these selfsame parties were in the High Court the ordinary rule would have applied with relative ease. Recently the Constitutional Court in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others*[41] judgment decreed that the exclusion of the ordinary rule finds expression in the provisions of section 162 of the LRA.

- [84] It may be competently argued that section 162 operates for matters under the banner of the exclusive jurisdiction of the LRA. I suppose, the Constitutional Court should with absolute certainty clarify what is meant by labour matters. However, there is some indication when the following, as said by the Court in *UPSCO*, is heeded:

“[31] ...The crisp point I am making rather, is this: when costs orders are too readily made against those who seek to vindicate their constitutionally-entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action. That would cultivate unlawfulness and be inimical to the foundational value of the rule of law underpinning our democratic order.

- [32] It is therefore imperative for our democracy that the doors of labour dispute resolution be kept wide open for litigants to air their grievances, so that unlawful industrial action, and all its potential consequences, is generally avoided. That accords with the scheme of the LRA, which contemplates industrial action only where no other avenues are readily available. The rule against automatic costs orders is an integral part of that scheme in that it ensures access to labour dispute resolution

institutions and no doubt enlarges the width by which the doors of those institutions are kept open.”[42]

- [85] It must be indisputable that in the above quoted; reference is made to the Labour Court as a specialist labour disputes resolution body. Involved herein is a contractual dispute as opposed to a labour dispute. This Court must assume that the rule of no automatic cost orders does not find application in contractual disputes[43]. What obtains is the ordinary rule of costs following the results. This rule is grounded on the principle that a successful party must not be deprived of its success costs. It is a principle that is constitutionally defensible. The employees achieved outright success. In my view, their opposition of this claim was warranted and reasonable.

- [86] For all the above reasons, the following order is made:

Order

1. The applicant’s claim is dismissed
2. The applicant to pay the respondents’ costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr A Mosam SC and T Odendaal

Instructed by:

J F Mare Attorneys, Pretoria.

For the Respondents:

Mr T van der Walt SC

Instructed by:

Nysschen Attorneys, Gallo Manor.

[1] Too many trees died in vain.

[2] Act 75 of 1997.

[3] Clause 6.2 reads “Fees for the Standard Administrative Services shall be an amount equal to 1.20% (ONE comma TWO ZERO PERCENT) of the total monthly salaries of all the members of the FUND, inclusive of VAT thereon.”

[4] 2004 (3) SA 615 (SCA).

[5]

(2008) 29 ILJ 2234 (LAC).

[6]

(1992) 13 ILJ 1154 (D).

[7] 2004 (3) SA 465 (SCA).

[8] In support of the submission, he relied on *Rand Water v Stoop and others*

[2013] 2 BLLR 162 (LAC).

[9] No evidence was tendered in support of this allegation. It seem irrelevant to the case of either of the parties before me.

[10] See: *Telkom SA SOC Ltd v Van Staden and Others*

(2021) 42 ILJ 869 (LAC) at para 16.

[11] No. 24 of 1956.

[12] University of Nottingham v Fishel

[2000] ICR 1462. See also Kathy Idensohn: Some Issues in Relation to the Incidence of Common Law Fiduciary Accountability in Relationships of Employment

(2022) 43 ILJ 1.

[13]

[2006] EWCA Civ 1735 para 37.

[14] Fishel at 1496.

[15] See Volvo Southern Africa (Pty) Ltd v Yssel 2009

(6) SA 531 (SCA).

[16]

[2002] JOL 10175 (SCA).

[17] Pillay v Krishna and Another 1946 AD 946.

[18] See: Toyota SA Motors (Pty) Ltd v CCMA and others

(2016) 37 ILJ 313 (CC).

[19]

[2000] ZASCA 82; 2001 (2) SA 284 (SCA) at p. 294 F – 295 B.

[20] 2017 (3) SA 22 (SCA) at para 19.

[21] See also: Nash v Golden Dumps (Pty) Ltd 1985

(3) SA 1 (A) at 22D-F.

[22] See: Culverwell and another v Brown 1990 (1) SA 7 (A), Nash v Golden Dumps (Pty) Ltd 1985

(3) SA 1 (A) and Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality 2017 (5) SA 420 (SCA).

[23] See: Macnaughton v Stone 1949 Can LII 117 (ON SC), Saunders v Multi Builders Ltd 1981 CanLII 768 (BC SC).

[24] 1982 (2) SA 570 (C).

[25] Clause 4.11 of the administration agreement.

[26] 2012 (4) SA 593 (SCA).

[27] Zietsman v Allied Building Society 1989 3 SA 166 (O) 177D-E.

[28] University of Johannesburg v Auckland Park Theological Seminary and others 2021 (6) SA 1 (CC).

[29] 2021 (6) SA 1 (CC).

[30] See: Lister v Stubbs

(1890) 45 Ch D 1, CA.

[31] See: Bank of America Canada v Mutual Trust Co 2002 SCC 43.

[32]

[2001] 1 AC 268 (HL).

[33] Ibid at page 285.

[34] 2020 SCC 19.

[35] Atlantic Lottery Corp. Inc v Babstock, 2020 SCC 19.

[36] See: Erasmus, Gauntlet and Visser “Damages” in LAWSA 7 para 45.

[37] See Hadley v Baxendale

[1854] 9 Ex 341 [156 E R 145] 16.

[38]

[1991] HCA 54; (1991) 174 CLR 64 at p. 116.

[39] See: Monarch SS Co Ltd v A/B Karlshamns Oljefabriker

[1949] AC 196 and Robinson v Harman [1848] EngR 135; (1848) 1 Ex 850 at 855.

[40]

(2018) 39 ILJ 523 (CC).

[41]

[2021] 12 BLLR 1173 (CC).

[42] Ibid at para 31.

[43] See: Skinner and others v Nampak Products Limited and others

(2021) 42 ILJ 838 (LAC) at para 47.

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