IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No.: 2019/22791

In the matter between:

PETER MTHANDAZO MOYO	Applicant
and	
OLD MUTUAL LIMITED	1st Respondent
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED	2nd Respondent
TREVOR MANUEL	3rd Respondent
THE NON-EXECUTIVE DIRECTORS OF OLD MUTUAL LIMITED	4th to 16th Respondents
NMT CAPITAL	17th Respondent

APPLICANT'S HEADS OF ARGUMENT

"*Suspension is the employment equivalent of arrest*" –

Professor Halton Cheadle[1]

INTRODUCTION

1. One of the main issues in this matter is the constitutional imperative to protect whistleblowers, in the broader fight against corruption and

[1] Quoted by Van Niekerk J in Mogothle*, Premier of the North West and Another* 2009 (4) BLLR 331 (LC) at para 31

irregular conduct in the workplace. This imperative talks to the constitutional values of good, effective, transparent, accountable governance and ubuntu-botho.

2. This imperative will be dealt with by reference to section 3 of the Protected Disclosures Act 26 of 2000 ("the PDA") and section 159 of the Companies Act 71 of 2008 ("the Companies Act"). Copies of these provisions will be made available to this Honourable Court.

3. Wallis AJA, as he then was, explained the importance of the PDA as follows in the case of *City of Tshwane Municipality v Engineering Council of SA*:[2]

> "*According to its long title the purpose of the PDA is to make provision for procedures in terms of which employees in both the private and the public sectors may disclose unlawful or irregular conduct by their employers or by other employees and to provide for the protection of employees who make such disclosures. The preamble records that employees bear a responsibility to disclose criminal and any other irregular conduct in the workplace, and that employers have a responsibility to take all necessary steps to protect employees who make disclosures from reprisals as a result of making such disclosures. All of this is located within the constitutional imperative of good, effective, accountable and transparent government in organs of state. Section 3(1) of the PDA states as its objects the protection of an employee who makes a protected disclosure from any occupational detriment; the provision of remedies for those who suffer an occupational detriment in*

[2] 2010 (2) SA 333 (SCA) at paragraph 33

consequence of having made a protected disclosure and the provision of procedures to enable an employee, in a responsible manner, to disclose information concerning improprieties by his or her employer. Whilst it was submitted to us that the purpose was to have the subject of a disclosure investigated, and no doubt it is hoped that will flow from disclosures, that is not a stated purpose of the PDA. It recognises that disclosures are frequently not welcome to an employer and seeks to protect the employee who makes a protected disclosure from retribution from their employer in consequence of having made a protected disclosure." (Emphasis added)

4. It is important to point out up front that in terms of section 1 of the PDA:

   4.1 "disclosure" is defined to include that "*a person has failed or is likely to fail to comply with any legal obligation to which that person is subject*" and/or that such a matter "*has been, is being or is likely to be deliberately concealed*"; and

   4.2 "*occupational detriment*" is defined to include "*being dismissed, suspended, demoted, harassed or intimidated*."

5. In this case we are dealing with two such occupational detriments namely a suspension and a dismissal. It will be demonstrated that, to the extent that necessary, all the other elements of the PDA, read with section 159 of the Companies Act, have been satisfied.

6. With the above in mind, the operative section of the PDA is section 3 thereof, which clearly provides that:

> "*No employee or worker may be subjected to an occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.*"

7. As discussed hereunder, the impact of section 159(2) and (6) of the Companies Act is firstly, that the disclosure need not be "protected" (although, in this case, this element has also been satisfied) and secondly, that the onus in respect of the element of causation shifts to Old Mutual.

8. Broadly speaking, this matter concerns three broad categories of rights namely rights falling under the common law, the statutory provisions referred to above in the interest of whistleblowing, and lastly the Constitution.

9. It needs to be emphasised that, although interrelated in that they arise from the same factual matrix, these are three distinct legal grounds, the *prima facie* establishment of any one, or more or all of them would be sufficient to satisfy the requirements of interim relief.

10. In a nutshell the relief which will be sought in part B is similar to the relief sought and obtained in this court the recent case of *Chowan v Associated Motor Holdings (Pty) Ltd and Others*,[3] *per* Meyer J wherein it was confirmed that the commission of occupational detriments in breach of section 3 of the PDA constituted wrongful conduct for the purposes of delictual liability alternatively a basis for contractual

[3] 2018 (4) SA 145 (GP)

damages. It was held that such delictual damages were claimable under both the *Lex Aquilia* and the *actio iniuriarum*. It seems more likely that, as in the Chowan case, part B will also have to be conducted by way of trial action.

11. The applicant asks for interim relief, pending further claims in part B of the application. We submit that a proper case has been made for the interim relief sought.

11.1 A very strong *prima facie* case has been made out.

11.2 The harm is plain and irreparable. Both in respect of the inherent dignity of the applicant and the irreparable harm in respect of the applicant's reputation and prospects of finding employment.

11.3 The balance of convenience favours the applicant.

11.4 Any other relief would render the orders sought academic. A claim for damages in due course is not an answer either. Similarly, a claim for reinstatement in the ordinary course is not adequate relief. What is necessary, is immediate, effective relief to halt the egregious, unlawful and unconstitutional conduct of Old Mutual, the impact of which is ongoing, continuous and increasing with every day that passes.

12. We commence with the existence of a prima facie right.

***PRIMA FACIE* RIGHT**

13. The requirements for interim relief are well established and have often been restated as follows: An applicant must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and immanent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other satisfactory remedy (at para 41).

14. The applicant's *prima facie* right flows from several sources, namely the common las (contract), statutes (the Protected Disclosures Act and the Companies Act) and the Constitution. Each of these is developed in turn. It will be argued that in respect of each category (a) clear right(s) has/have been established and, at the barest minimum, a *prima facie* right(s), even if open to some doubt.

CONTRACT

15. Three submissions are made in respect of the contractual cause of action.

15.1 First, the applicant is entitled to a specific procedure before his contract of employment can be terminated. This procedure was not complied with. Consequently, the termination amounts to unlawful repudiation of the agreement.

15.2 Second, Old Mutual has failed to establish a factual basis for the termination. It does not matter if Old Mutual can show that there was a breach of the contract in one way or the other by the applicant, which is in any event denied. The fact of the matter is that any breach, constituting misconduct on the part of the applicant must be dealt with in terms of the agreed procedure. Old Mutual's attempts to prove misconduct must be rejected. This court is not the correct platform to conduct a disciplinary enquiry on behalf of Old Mutual. Old Mutual must be directed to conduct itself in accordance with the provisions of the contract, and charge the applicant with misconduct.

15.3 Third, any "conflict of interest" is covered in a specific addendum to the employment contract. That addendum requires an arbitration procedure in the event of a dispute. Old Mutual failed to follow the arbitration route.

16. Before we deal with these issues, we must first address the true reasons for the termination. This is to counter the version of Old Mutual, which suggests that the termination was on notice. Assessing the true reason for the termination is not dependent on the subjective say-so of the employer. It is an objective exercise.

True reasons for termination

17. In *Kroukamp v SA Air Link (Pty) Ltd*,[4] Zondo JP (as he then was) took the view that the determination of the real reason for the dismissal of an employee is an objective exercise. He stated

> *"Having regard to the reasons that I have found to have been the dominant or principal reasons for the appellant's dismissal and the provisions of the Act that I have referred to above which I have found the respondent to have breached in dismissing the appellant, I am satisfied that the appellant's dismissal was automatically unfair."*.

18. Furthermore, the learned judge president continued

> *"However, even if the reasons that I have found to constitute the dominant or principal reason or reasons for the dismissal did not constitute the principal or dominant reasons for the appellant's dismissal, I would still find that the dismissal was automatically unfair if such reasons nevertheless played a significant role in the decision to dismiss the appellant*" (at paras 102 to 103).

19. As such, it is submitted that the correct analysis is the determination of the true, genuine, objective and principal reasons for the termination of employment. That determines whether or not the contractually stipulated procedure should have been followed.

20. We submit that the true given reasons for the termination were misconduct. The *ex post facto* rationalisations by opportunistically relying on termination on notice must be rejected.

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[4] (2005) 26 ILJ 2153 (LAC)

20.1 In paragraph 61, of the founding affidavit the applicant explained that towards the end of April 2019, he discovered that there was a view that he had breached certain protocols in relation to the late payment of the preferential dividend and the non-repayment of the capital loan by NMT to Old Mutual (page 25, para 61).

20.2 In this regard, he wrote an email to the Chairperson of the Board of Old Mutual, the third respondent, Mr Trevor Manuel, setting the record straight. He explained the correct facts and denied that he had acted in any way inconsistent with the interests of Old Mutual (pages 124 to 125 Annexure "PMM8").

20.3 The matter of whether or not the applicant had acted contrary to the interests of Old Mutual was referred to the Old Mutual Related Party Transaction Committee, the Corporate Governance and Nominations Committee, the *Ad Hoc* Committee and ultimately the Board. During that period, between 7 March 2019 and the suspension of the applicant on 24 May 2019, a board member informed the applicant that Mr Manuel was *"gunning for*" the applicant and bullying other directors to pursue the NMT matter for inexplicable and ulterior purpose.

20.4 Notably this allegation is not meaningfully denied. At paragraph 172 of the answering affidavit, the deponent refers to meetings that she attended. But she cannot testify on behalf of each and

every board member. Mr Manuel's own denial about this bullying incident simply does not take the matter any further, as it is plainly self-serving (page 242, para 172.2). One cannot seriously rely on the denial of the alleged bully or harasser as to whether there was indeed bullying or harassment by him or her.

20.5 On 16 May 2019, Mr Manuel wrote a letter to the applicant. The letter is crucial as it dispels any notion that the termination was not for misconduct (the letter is at page 126):

20.5.1 First, the letter referred to distributions of ordinary dividends by NMT Capital in March 2018 and July 2018 which it claimed were in breach of the preference shares subscription agreement between Old Mutual and NMT.

20.5.2 Second, the letter claimed that the issues raised a significant conflict of interest and suggested a failure by the applicant in respect of his fiduciary duties as a director.

20.5.3 Third, the letter specifically accused the applicant of breaking *"the terms of your contract of employment, by giving preference to your own interests, above that of OMLCSA."*

21. The mandate of the Ad Hoc Committee, it was suggested, was to evaluate *"whether by this conduct the interests of Old Mutual had been prejudiced, and whether your conduct suggests a conflict of interest between your benefits as a non-executive director of NMT, and those of your responsibilities as CEO and Executive Director of Old Mutual Limited*" (emphasis added) (at page 127). It is clear that at the root of the alleged breakdown in the relationship was the issue of misconduct.

22. The applicant replied at length and in full to this charge of conflict of interest. He denied the conflict, explained the background and made it clear that the matter had always been known to Old Mutual (at pages 130 to 131).

23. The applicant was then suspended. The suspension letter stated that the reason for the suspension was, amongst others, *"a material breakdown in the relationship of trust and confidence"* (at page 132).

24. When old Mutual sought to explain its reasons for suspending the applicant, publicly, it relied on the alleged *"conflict of interest*" (at page 143).

25. In addition to the reasons of misconduct resulting in conflict of interest, breakdown of trust, the applicant was also raised by the attorneys of Old Mutual based on his public utterances allegedly designed to put pressure on Old Mutual and to cause it harm. It was alleged that these public utterances were additional grounds for summary termination of the employment contract. No basis was set out why the applicant was

accused of trying to cause harm or put pressure on Old Mutual. The reality, of course, was that the applicant was perfectly entitled to respond to public statements made by Old Mutual which had the effect of maligning the applicant's reputation.

26. Through his attorneys, the applicant explained that he had committed no misconduct and there was no factual basis to the allegations of a breakdown in the relationship of trust and confidence. He challenged Old Mutual to bring forth its disciplinary hearing and prove its case (at page 135 to 138).

27. The letter of dismissal should dispel any lingering notion that the reason for the termination was not misconduct related. It makes it abundantly clear that the *"reason*" for the termination was the alleged misconduct of the applicant. The letter states at paragraph 4

> *"The reason for the Board's decision to terminate your employment is that there has been a complete breakdown in the relationship of trust and confidence between you and the Board. This breakdown in trust and confidence has its origin in what we have referred to in engagement with you as "the NMT matters", and the manner in which you have dealt with those matters both in your engagements with the Board prior to your suspension, and in your conduct following your suspension.*
>
> *At the heart of the concerns, as you know, was your role in the declaration of ordinary dividends by NMT Capital in breach of obligations to Old Mutual under preference share funding arrangements. The resultant benefit to you and your own personal investment company was R30,6 million. These*

> *dividends were declared in breach of Old Mutual's rights as preference shareholder, since arrear preference dividends were unpaid at the time and, at the time of the second dividend declaration, the preference share capital was redeemable. You chaired the board meeting of NMT Capital at which the second ordinary dividend of R105 million was declared. You have been unable to provide an acceptable explanation for your actions.*
>
> *…*
>
> *Following the decision to suspend you on 23 May 2019, the Board has given further careful consideration to the NMT matters, including the various responses that you have provided. The breakdown in trust and confidence that precede your suspension on 23 May 2019 was aggravated by your conduct in the days following your suspension, when you gave a number of public interviews to the print and broadcast media which breached your obligations under your contract of employment, the Old Mutual Media Rules, your fiduciary duties to Old Mutual and the terms of the your suspension. These actions caused further harm to the relationship between you and the Board, and brought Old Mutual into disrepute"* (at pages 269 to 272).

(Emphasis added)

28. It is accordingly clear that the true, dominant, principal, objective reason for the termination is the alleged misconduct on the part of the applicant. He is accused of two types of misconduct. The first is the pre-suspension misconduct and the second is the post-suspension misconduct. In respect of the pre-suspension misconduct, the applicant is accused of a conflict of interest emanating from the manner in which he dealt with the repayment of the preferences shares to Old Mutual.

In relation to the post-suspension misconduct, the applicant is accused of bringing the name of Old Mutual into disrepute.

29. The question which follows is what is the contractually stipulated procedure to be followed where an employee in the position of the applicant is accused of misconduct. It is not relevant that the applicant contract could equally also have been terminated on notice.

30. The fact is that the applicant's termination had as its actual principal and/or dominant cause misconduct. Hence, where the termination is for misconduct there is a contractually stipulated procedure.[5] We submit that this is governed by the contract of employment, read together with the disciplinary code. We deal with this issue next.

<u>The disciplinary code is incorporated in the contract of employment</u>

31. The law on this issue is settled.

32. The approach taken by Old Mutual in this case has elided the very issue of whether there has been a breakdown in the relationship of trust. The breakdown that is alleged is said to have been caused by the misconduct of the applicant. Yet, by simply terminating his contract on the basis of the alleged breakdown, Old Mutual has failed to

[5] It is crucial to keep a distinction between a case of termination where the cause is misconduct and a case of termination for no misconduct but on notice, such as *Gama v Transnet and Others* [2018] ZALCJHB 452 at paras 41-43, where the court makes clear that an employee could have a right to a pre-dismissal disciplinary enquiry where the termination is for misconduct. In that case, however, the court found that the dismissal was not for misconduct. In this case, unlike the *Gama* cased, it is abundantly clear that the dismissal is for misconduct. The letter of termination places this beyond any doubt

establish the misconduct which constitutes the factual substratum for the breakdown in the trust relationship.

33. The issue was dealt with by the Labour Court in *Motale v Citizen Newspaper*.[6] The court concluded

> *"The second respondent, having made the unexplained and unjustified leap from accusing the applicant of misconduct to simply assuming he was guilty thereof then decided that this constituted an irretrievable breakdown in the relationship between the applicant and the first and second respondents. This not only ignored the applicant's contractual right to be treated in accordance with the disciplinary procedure with regard to the applicant's guilt or otherwise. The second respondent simply assumed that as a fact the relationship had broken down. A conclusion unsurprisingly shared by the third respondent.*
>
> *One of the difficulties in the procedure adopted by the second and third respondents in their desperate attempt to avoid the issue of deciding on whether or not the applicant was guilty of the misconduct was to decide as a fact that the trust relationship had broken down. They appear simply to have elected to disregard the applicant's alleged misconduct that was initially put to him as being the cause of the breakdown of the employment relationship".* (Emphasis added)

34. Precisely the same issue here. At the beginning, the applicant was accused of misconducting himself in the way in which he treated the conflict of interest. Rather than establishing whether in fact he did commit misconduct Old Mutual jumped to conclusions that there had

[6] [2017] 5 BLLR 511 (LC)

been a breakdown in the relationship with trust. Yet the breakdown that is alleged has its genesis in the misconduct. But contractually, he should be subjected to a disciplinary enquiry where it is alleged that the termination is linked to misconduct.

35. Simply put, the breakdown is the outcome and the underlying cause thereof is misconduct. In the present case, gross misconduct was alleged.

36. In cases of alleged misconduct the contract of employment should be read together with the disciplinary code. This was the finding in *Solidarity & Others v South Africa Broadcasting Corporation*.[7] The Labour Court held

> *"As in **Ngubeni's** and **Dyakala's** cases above it is plainly also the case in this instance that in terms of clause 20 of the applicants contracts of employment and clause 1.5 of the SABC Disciplinary Code and Procedure, the disciplinary code and procedure is incorporated in the provisions of their contracts. Further, on a plain reading of the disciplinary code and procedure, it is clear that before an employee may be dismissed they should be subjected to an oral disciplinary hearing presided over by a chairperson or a panel which will hear evidence and representation, reach a verdict on the question of guilt and consider further representations, if necessary on the issue of an appropriate sanction before imposing one.*". (Emphasis added)

[7] (2016) 37 ILJ 2888 (LC)

37. In the present case, it is common cause that clause 23 of the employment contract specifically incorporates the disciplinary code. In terms of the contract, the applicant should have been taken through the disciplinary procedure.

38. This was the same finding in a case incidentally where Old Mutual was the respondent, namely *Somi v Old Mutual*. *Africa Holdings.*[8] On facts not too dissimilar to the present, in the sense that no enquiry was conducted prior to the termination, the court held the following:

> "*[33] It has not been disputed that the respondent's policies, including the IR Policy and Procedure on Incapacity and Poor Work Performance have been incorporated into the applicant's employment contract in terms of clause 12 of the employment contract.*
>
> *[34] In terms of the IR policy, the respondent was required to conduct an enquiry before dismissing the applicant on the ground of poor work performance. It is common cause that the respondent stopped the incapacity inquiry before it could be completed. This in essence means that no enquiry was held prior to the termination of the employment contract of the applicant. It also means that the applicant's employment contract was terminated in breach of the provisions of the employment contract read with the IR policy.*
>
> *[35] The respondent contended in the alternative that it was entitled to terminate the applicant's employment contract under the provisions of clause 21.4 of the employment contract which provides that, "the employer can summarily terminate the contract…" In my view, this defence cannot be sustained with*

[8] (2015) 36 ILJ 2370 (LC)

regard to the facts of this case. As should appear from the above discussion the dominant and clear reason for the termination of the applicant's contract which was done without notice, was on the basis of her poor work performance. It needs to be emphasised that this could only have been done by affording her the right to a hearing before the dismissal."

39. The principles of contract have recently been restated. In *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality*,[9] the SCA affirmed the two principles. A repudiation occurs when one party elects unlawfully by words or by conduct that it no longer wishes to be bound by the contract.

40. Repudiation may take the form of a party purporting to terminate a contract when it has no lawful basis to do so (*Primat* at para 22).

41. The second principle is that where there is a repudiation, the aggrieved party may elect to accept the repudiation and sue for damages in which case they will be bound by that election. But they may also elect to abide the contract and claim specific performance. The aggrieved party must choose between these remedies and is bound by his/her election (at para 23).

42. Old Mutual purports to terminate the contract. But in reality it is resiling from or repudiating its contractual bargain. It has no right to do this. The applicant is entitled to accept the repudiation, in which event, the

[9] 2017 (5) SA 420 (SCA)

contract comes to an end. But he is also entitled to reject the repudiation and to insist on the specific performance of his terms of contract.

43. In this instance, the applicant is insisting on the full performance of the terms of contract, including where misconduct is alleged, to be taken through a disciplinary enquiry, as was agreed in writing by the parties upon his employment.

44. Specific performance is also competent and appropriate. In *Cliff v Electronic Media Network (Pty) Ltd*,[10] it was held that even when services are of a personal nature, and it may mean compelling and unwilling employer to reinstate his/her erstwhile employee that would be appropriate (see also *Santos Professional Football Club (Pty) Ltd v Igesund & Another)*.[11]

45. Insofar as the court has a common-law discretion in respect of specific performance pertaining to contracts for the rendering of personal services, it is respectfully submitted that the present case presents an opportunity for the development of the common law, in terms of section 39(2) of the Constitution, to the effect that it is inequitable to hold that in such situations, the victim should invariably be the one to be denied specific performance of the contract while the alleged perpetrator benefits from the consequences of his or her own breach solely on the grounds that the perpetrator is more senior in the hierarchy of the

[10] [2016] 2 All SA 102 (GJ) at para 35
[11] 2003 (5) SA 73 (C)

employer organisation. This is consistent with a finding recently made by the Labour Court in the case of *Ngubeni v The National Youth Development Agency and Another,*[12] where the court stated:

> "*Further, I would add that where the court is faced with a choice where one interpretation of a contractual provision is more likely to be consistent with any fundamental right established by the Constitution than any competing interpretation, the former should prevail. Section 23 of the Constitution guarantees, amongst other rights, the right to fair labour practices. The courts have on a number of occasions held that this right extends to a right not to be unfairly deprived of work security, and that a requirement of fair procedure is an integral element of that right.*"

Applying the principles of the contract to the facts

46. The termination is for cause. The specific cause has been chosen by Old Mutual to be misconduct. Old Mutual is not allowed to blow hot and cold. It cannot approbate or reprobate at the same time. It has chosen to terminate the agreement for misconduct.

47. A termination for misconduct is completely inconsistent with a termination on notice. The two cannot exist at the same time. Once the reason for termination is misconduct, there are contractual consequences that follow.

48. The disciplinary code is expressly incorporated into the contract of employment. Clause 23.1 of the contract provides that *"the executive*

[12] [2014] 35 ILJ 1356 (LC)

acknowledges that he shall be subject to the employer's discipline, grievance and related procedures in place from time to time" (at page 103). This is not denied in the answering affidavit.

49. The code is instructive.

49.1 It provides that the employer's right to discipline is generally accepted in terms of the Labour Relations Act and the common law and will be applied in the event that an employee commits misconduct. From the outset, the code does not make it optional whether to follow it or not. It makes it clear that in the event that an employee commits misconduct the code will be followed.

49.2 The code explains what misconduct is. It is behavior that is a breach of the disciplinary code, the employment contract or other unacceptable behavior.

49.3 Thus, the very issue that the applicant is charged with here namely the breach of his terms of employment contract and conduct subsequent to is suspension is within the scope of the code and constitutes misconduct.

49.4 The code also defines what a suspension is. A suspension occurs where it is pending the outcome of an investigation or pending a disciplinary enquiry. A suspension, in other words cannot be done pending *" a decision"*, the nature of which is not defined.

49.5 The code also specifies that in the case of misconduct proceedings the employer's version must be the more probable in respect of what happened. Plainly, the code envisages a procedure by which each party will present its version, subject to testing by the other and a resolution would be reached. What it does not envisage is that Old Mutual will simply accuse the applicant of misconduct and without establishing the objective existence of such misconduct, unilaterally jumped into the conclusion that there has been a breakdown in the relationship of trust and dismiss the applicant.

50. Clause 25.1.1 is also important. (At page 104). It states that where the allegations of misconduct or incapacity are raised, the employer will be entitled within its discretion to decide whether or not to hold an internal disciplinary enquiry or to proceed instead via the predismissal arbitration procedure contemplated in section 188A of the Labour Relations Act 66 of 1995.

51. Even in terms of this clause, there is no provision that where there are misconduct allegations the employer can simply dispense with an enquiry altogether. The two options that are given is an internal disciplinary enquiry, which obviously must take place in terms of the disciplinary code or a pre-dismissal arbitration procedure under the auspices of the CCMA. There is no procedure of arbitrary termination on the whim of Old Mutual.

52. Finally, the basis for summary termination that is mentioned at clause 24.2.1 is that the executive must *"be guilty of misconduct"* in the first place. But not any misconduct will justify summary termination. It is the type of misconduct *"which would entitle the employer, in law and or equity, to summarily dismiss"* the applicant. Thus, even where misconduct is established as a fact, termination does not follow automatically. Termination is only appropriate where the employer is entitled in law and or equity to summarily terminate. In other words, in the case of serious or gross misconduct.

53. It is therefore clear that instances of misconduct are strictly regulated by the disciplinary code and the contract of employment. It is also clear that this case is about misconduct. There is no basis on which Old Mutual can terminate, where the principal ground for termination is misconduct but at the same time refuse to adhere to the terms of the contract.

54. The attempts at suggesting that the termination was a no-fault termination, purely on notice simply stand to be rejected. The termination is based on specific reasons. The contract regulates the manner in which the applicant must be dealt with where those reasons are to be invoked.

55. There is of course a further problem. The employer has reserved for itself the right to label the cause of the termination as misconduct for ulterior, punitive reasons. It is to deprive him his employment benefits,

since he would be treated as somebody who has been terminated on the grounds of misconduct. This deliberate hedging of the reasons for termination is an abuse of power and is deserving of censure by this court.

56. The letter of termination also specifically invokes a separate reason for the termination, namely "*any <u>other</u> lawful or fair reason*". It is axiomatic that the lawfulness and/or fairness of such a termination also stands to be objectively determined and cannot depend on the subjective view of one of the parties.

57. It is not an answer to state that a hearing would not have changed the outcome. The "*no-difference*" principle is not part of our law. Recently, the Constitutional Court addressed itself to this very issue. In *Psychological Society of South Africa v Qwelane and Others*,[13] the Constitutional Court explained the purpose of procedural fairness:

> *"[33] …It is trite that at common law and in terms of the tenets of natural justice, hearing the other party – audi alteram partem – is an indispensable condition of fair proceedings. As Donaldson LJ put it in Cheall:*
>
> > *"[N]atural justice is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'."*

[13] 2017 (8) BCLR 1039 (CC)

> *[34] The principle is underpinned by two important considerations of legal policy. The first is recognising the subject's dignity and sense of worth. Second, there is a more pragmatic consideration. This is that audi alteram partem inherently conduces to better justice. Milne JA summarised both considerations in South African Roads Board. He said the application of the audi alteram partem principle:*
>
> > *"has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power."*[14]

58. We also show that the alleged breakdown in the relationship of trust and confidence is manufactured.

No breach of contract

59. At page 211 in paragraphs 123 to 127, Old Mutual has pinned its colours to the mast. It is contended that there are specific *"factors that led to the breakdown"* in the trust and confidence relationship. These, on a proper assessment, ultimately boil down to decisions taken on 4 July 2018.

60. The facts in relation to what transpired at that meeting are alleged fully by the applicant in the founding affidavit. The notes of that meeting appear at pages 120 to 121. This was a meeting of the Special Investments Committee of NMT Group (Pty) Ltd. Amongst the

[14] *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at paras 33 – 34.

attendees was Mr M Patel. He is the representative of Old Mutual to the Board of NMT. That is because Old Mutual is a shareholder in NMT. Therefore, its interests are looked after, primarily through Mr Patel. As the representative of Old Mutual, Mr Patel could raise any issue that he felt was contrary to the interest of Old Mutual.

61. In fact, Mr Patel was under a positive duty to disclose any conflict of interest which may have arisen in respect of the applicant. Addendum "A", at page 19 thereof, clearly stipulates that:

> "*The director(s) appointed by the Company to the NMT Board shall be required to disclose to the Chairperson of the Company, any conflicts in respect of the Executive's position as non-executive directors of NMT.*"

62. Similarly, paragraph 8.4 of Addendum "B" prescribes as follows:

> "*As part of their terms of reference and nomination, the OM Nominated Directors shall be required to provide feedback to the Nominations and Governance Committee (i) following their attendance of any board meeting of the NMT Group from time to time or (ii) on an ad hoc basis. In the event that any matter comes to their attention in relation to which a conflict of interest, or the perception thereof, arises in relation to the Executive. In the interests of transparency and to facilitate proactive management of conflicts, the Chairperson of OMEM and the Chairperson of the Nominations and Governance Committee shall maintain an open line of dialogue with the OM Nominated Directors, including by way of information engagement from timed to time.*" (Emphasis added)

63. In light of such clearly defined duties, this court would be entitled to draw the inference that no such conflicts in fact did arise.

64. Item 4 of that meeting is crucial as it sets out the issues. There were funds available for distribution flowing from an investment made by NMT to Growthpoint. It was proposed that R105 million should be declared as a dividend to the shareholders. This was supported. Mr Patel, the representative of Old Mutual also supported it. It was noted that NMT would be able to meet its commitment and carry out its objectives as a going concern for the twelve months following the distribution. R37 million was allocated for Old Mutual as debt repayment and payment for preference shares for NMT. R36 million was reserved for operations for the next three years. Old Mutual would in addition receive its ordinary dividend which amounted to R27 million. Any shortfall would be rolled over as per usual practice, which would be negotiated by management.

65. According to the applicant, there was no risk either to Old Mutual or to NMT as a result of this arrangement. Although the negotiations delayed with the payment to Old Mutual only being made in October, the applicant's uncontradicted version is that this was not known to him and could not be foreseen. This is especially so in the light of the fact that this was part and parcel of a pattern of previous practice.

Alleged solvency concerns

66. In the answering affidavit, Old Mutual repeatedly refers to an apparent threat to the *"solvency of NMT Capital"*. It is submitted that Old Mutual simply never raised any solvency concerns at the time of the termination. This concern was not cited as a ground for suspension or termination at all.[15]

67. No doubt, if the solvency of NMT was at issue, it would have been included in the suspension and termination letters.

68. The complaint about solvency of NMT is unfounded on the facts. Its entire basis is annexure "EMK5" (at page 295). But with respect, that letter dated 4 September 2018 does not support the claim that NMT was facing liquidity or solvency challenges.

    68.1 Paragraph 3, which appears to be what Old Mutual relies on simply states that *"the above will directly affect the solvency of the company which would result in NMT being unable to use its balance sheet for funding purposes"*.

    68.2 That simply referred to the possibility of the preference shares being classified as a current liability, which would automatically affect the levels of solvency, from an accounting point of view. This did not mean that NMT was not able to meet its liabilities as they fell due. Construed in its proper context, the intended reference was to the liquidity of NMT, and not to its solvency.

[15] The latter appears at page 269 of the Record

69. The balance of the letter makes it clear that the company remained in a financially healthy state:

69.1 For instance, as soon as Old Mutual agrees to extend the redemption preference shares NMT would pay R20 million to settle all outstanding preference dividends and arrear preference dividends that had accumulated since 2008.

69.2 The letter also makes it clear that one of the main goals of the company would be to clean the balance sheet as the company had encountered difficulties with financiers when sourcing for funding in the past.

69.3 The letter also noted

> *"We are proud to say that we have also resolved one of our biggest issues with the IDC regarding Amabubesi BSR Holdings, which held shares in Basil Read Limited. In this regard, an amount of over R100 million was owed to the IDC and we have agreed to settle the debt on terms favorable to NMT Capital. The agreements to this effect will be finalized in the next few weeks."*

69.4 The letter also noted at paragraph 6 that NMT had been paying ordinary dividends to Old Mutual in the past three years and has declared and paid approximately R30 million in the past three years to Old Mutual.

70. Even if there were indeed solvency concerns, which is denied, this is not a matter that could be placed at the door of the applicant. The Old

Mutual representative director would have been duty bound to raise it. He did not. In fact, it is common cause that he supported all the decisions taken at the meetings.

Further complaints

71. It is alleged that the applicant should have approached the Board Chair or Nominations Committee to disclose the NMT Capital ordinary dividends.

72. But this ignores the fact that the facts were never concealed from Old Mutual. It was disclosed to each and every board member of NMT, including the Old Mutual representative Mr Patel, that Old Mutual received the dividend. But there was also no reason why this approach, extraordinary as it seems was made. It is also an allegation made in the answering affidavit, and was not raised with the applicant beforehand.

73. It is also claimed that somehow the applicant should have taken steps to ensure that the arrear preference shares dividends were paid. But this is precisely what is stated at paragraph 4 of the letter of 4 September 2018 (at page 295). No reason appears in support of the allegation that the applicant should have treated the alleged R65.5 million current liability to Old Mutual as at 30 June 2018 as an amount in fact due to Old Mutual. No evidence is presented as to how this amount was arrived at.

74. Plainly then, there is no basis for the allegation of a breakdown in the relationship of trust flowing from the way in which the applicant dealt with the NMT matter.

75. We deal with the third contractual basis.

Any conflicts of interests related to NMT were subject to arbitration

76. Old Mutual made the employment contract subject to certain addenda, two of which regulated the issue of conflict of interest, which was disclosed at the commencement of the employment relationship.

77. Addendum "A" provides that

> "*Any conflict resulting from the Executive's position as a non-executive director of NMT will be dealt with by the Chairperson of the company and/or in terms of clause 25.2 of the Executive's contract of employment.*"

78. This clause does not purport to give Mr Manuel carte blanche authority to terminate the employment contract. He is not the employer. Old Mutual is. Rather, the meaning of this clause is that in the event of a disagreement about issues of conflict, these must be dealt with via an independent procedure contemplated in clause 25.2 of the contract.

79. Clause 25.5 of the contract provides for the arbitration procedure. This procedure was not complied with in this case. We submit that the failure to follow the arbitration procedure is fatal.

80. The fact of the matter is that any breaches of the Old Mutual/NMT agreement is not a breach of the employment agreement. The protocols regulate the breaches by NMT. These cannot result in the termination of the employment agreement.

81. The repudiation was plainly illegal. The applicant is entitled to reject it and to insist on the specific performance of his contract of employment. If a case is made for discipline on the grounds of misconduct, that case should be put to the applicant for his answer. Old Mutual cannot avoid that issue by first accusing the applicant of misconduct and then jumping to the conclusion after following no process that he is guilty of misconduct. There is accordingly a strong prima facie case made out that Old Mutual has breached the terms of the contract of the applicant.

82. Moreso when Old Mutual seeks to rely on the alleged misconduct to effect a forfeiture of financial benefits or so-called clawback against the applicant. Old Mutual cannot have it both ways.

83. We deal next with conflict of interest on the part of Mr Manuel.

IMPROPER MOTIVE FOR THE TERMINATION

Mr Manuel's conflicts

84. We have shown the purported reasons by Old Mutual to be baseless. Now we show why there is improper motive.

85. The applicant has alleged a conflict of interest on the part of Mr Manuel. He has set out the facts from about March 2018 when he

raised the conflict of interest on the part of Mr Manuel. The nature of the conflict was a multibillion Rand commercial project known as Managed Separation, which involved the delisting of Old Mutual plc from the London Stock Exchange and its listing as Old Mutual Limited on the Johannesburg Stock Exchange.

86. One of the aspects of this exercise was a transfer of a large liability or obligation to the value of R5 billion from Old Mutual plc to Old Mutual Limited. One of the companies that stood to benefit from this project was Rothschild which stood to gain hundreds of millions of Rands in fees as one of the transaction advisors (at page 31 paragraphs 88 to 92). This is not denied and it is accordingly common cause.

87. The problem was that Mr Manuel was a director of Old Mutual PLC, Old Mutual Limited and Rothschild. He is the Chairman of both Old Mutual Limited and Rothschild. He is therefore the subject of a clear conflict of interest involving all three entities hence the use of the phrase "*triple conflict of interest*".

88. The applicant raised his objections to Mr Manuel about the impropriety of his participation in the discussions surrounding the proposed take over of the Old Mutual PLC liability. According to the applicant Mr Manuel ignored and failed to act on these concerns despite the seriousness of the transgression. He apparently, continued to participate in the deliberations on the matter. The applicant alleges

that it was from this point onwards that the attitude of Mr Manuel changed (at page 32 paragraphs 93 to 97).

89. Worryingly, these serious allegations are dealt with in the most casual manner in the answering affidavit.

90. First, the respondents claim that the decision to terminate the employment contract was based not on the grounds alleged by the applicant, but on different grounds. But this is not to say that the allegations made by the applicant themselves are untrue.

91. In paragraphs 185.4 of the answering affidavit is it alleged that Mr Manuel declared his conflict and took no part in the *"decision."* But this allegation does not in any way address the fact that he was present when the deliberations were heard by Old Mutual Limited and indeed by Old Mutual PLC despite the fact that a company of which he is the chair Rothschild stood to benefit hundreds of millions from the transaction which involved another company that he was the chairperson of, namely Old Mutual Limited.

92. What is curious, of course, is that Mr Manuel has not produced a single piece of paper that illustrates his disclosure of interest. Even if the said disclosure was made, his duty went further. He was duty bound to recuse himself. Remaining in the room was in clear breach of that duty.

93. Mr Manuel's denial is most peculiar because it provides no facts other than the vague and ambiguous statement that he *"declared the conflict and took no part in the decision"*. This must mean that he either participated in the deliberations but did not vote or that he remained in the room and did not participate. Either way, he breached his duty to recuse himself.

94. In the circumstances, where a person of Mr Manuel's standing is accused of such material wrong doing, it would be expected that he would at the very least provide proper and detailed facts to substantiate is denial. His failure to do so is telling.

95. The deponent to the answering affidavit is the company secretary. Her core function is the compilation and custodianship of the minutes of the board, whose inclusion would have greatly assisted the court by reflecting exactly how Mr Manuel apparently declared the conflict and did not participate in the decision, although it appears that he participated in the deliberations. As such, there is no explanation why those minutes, if they are available, are not simply made available to the court.

96. It is therefore submitted that there has been no proper denial of the case made out in the founding affidavit to the effect that Mr Manuel had what has been described as a *"triple conflict of interest"* and nevertheless failed to recuse himself from any direct or indirect

participation in the outcome of the discussion regarding the assumption of the contingent liability.

97. According to the trite rules in opposed applications, where such a material allegation is not squarely and properly met with a denial with sufficient detail, it must be accepted as common cause, upon which a finding of fact ought to be made in favour of the applicant.

98. The accusation that the applicant participated in the decision, supported the assumption of liability by Old Mutual Limited and voted accordingly misses the point.

98.1 The applicant had no conflict of interest. Mr Manuel by contrast was conflicted.

98.2 The applicant had no duty to recuse himself from anything. Mr Manuel did. The accusation about a failure of the applicant to recuse himself is accordingly a smoke screen. The issue really is about Mr Manuel.

99. These facts can safely be accepted:

99.1 Mr Manuel had a clear conflict of interest in chairing Old Mutual, a client, and Rothschilds, the service provider;

99.2 Mr Manuel did not recuse himself; and

99.3 Mr Manuel has failed to establish that he declared the conflict of interest.

100. If these facts are true, they provide a clue as to why a seemingly innocuous transaction involving NMT has been blown out of proportion and used as a false basis to push the applicant out of his employment. The same applies to the attempt at suppressing the whistleblowing efforts of the applicant, as we deal with below.

101. Mr Manuel's conduct was in clear breach of section 75 of the Companies Act.

102. The rest of the respondents who are directors dismally failed to discharge their duties to the companies by allowing Mr Manuel to participate in the deliberations or to remain in the room.

103. The real object of the recusal requirement is to avoid the conflicted director influencing the decision. Moreso when that director also happens to be the chairman which is an inherently powerful position in any board. Mr Manuel seemingly does not appreciate this important fact.[16]

104. What makes this breach of corporate governance particularly serious and intentional is that Old Mutual, correctly, imposed the duty of recusal on the applicant in similar circumstances.

105. Clause 4.4 of the Protocols document provides that:

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[16] Similar allegations have recently been made about Mr Manuel's failure properly to recuse himself by remaining in the room when he had a declared conflict of interest in *Manuel v Economic Freedom Fighters and Others* (13349/2019) [2019] ZAGPJHC 157 (30 May 2019), a matter which is currently the subject of an SCA petition for relief to appeal

> "*The Executive confirms that he shall, in accordance with section 75 of the Companies Act, recuse himself from participating in any deliberation or voting on a matter in respect of which a conflict of interest resulting from the NMT interests is identified.*" (emphasis added)

106. Similarly, clause 6.2 thereof provides that:

> "*Unless advised otherwise by the Nominations and Governance Committee, the Executive shall refrain from participating in any deliberation or exercising any vote on any matter under consideration by any board of directors within the Old Mutual Group, in respect of which such conflict of interest, or the perception thereof, has arisen.*" (emphasis added)

107. It is therefore respectfully but strongly submitted that it is the height of unlawfulness for Old Mutual to seek to judge the applicant by a different standard of corporate governance and ethical conduct from Mr Manuel and the rest of its board. This matter and its legal implications will be dealt with more extensively in oral argument. Suffice to state that what we are dealing with here is something even more serious than the requirement of recklessness. It is a wilful and intentional breach of the law.

108. In this regard, it will also be remembered that it is the version of the respondents that Mr Manuel exactly knew and did the right thing when the matter of the legal fees was on the table at the meeting of 6 March 2019. At paragraph 36.3 of the answering affidavit, the following is clearly stated:

> "*The Board Chair had, as may be expected, recused himself from the meeting while this item was discussed.*"

109. Mr Manuel ought properly to have similarly recused himself when the board was discussing the contingent liability issue in respect of which he had a triple conflict of interest. He failed to do so.

Old Mutual victimised the applicant for whistleblowing

110. The applicant has dealt with the whistleblowing allegations extensively in the founding affidavit. His case, in summary, is that he is being punished for insisting that the coverage of legal fees of Mr Manuel must be disclosed and that Mr Manuel should not have participated in or influenced in any way the decision in respect of which it is common cause he (Mr Manuel) suffered from a triple conflict of interest.

111. At paragraph 98 of the founding affidavit the applicant states

> *"The last straw for Mr Manuel seemed to be the most recent incident when, in or about February / March 2019, I told him that I intended to raise another objection with the Board, via the Nom Com, regarding the improper non-disclosure of a payment amounting to millions of Rands, which was paid by Old Mutual in respect of is legal fees for his much publicized legal battle relating to the Guptas and their associates. This matter had absolutely nothing to do with old Mutual. It was highly irregular and improper not to disclose it to the Old Mutual shareholders, who knew nothing about it. Mr Manuel tried to dissuade me from doing so"* (at pages 32 to 33).

112. The applicant states that his recommendation that this should be disclosed to the shareholders was not implemented. He asserts that it was compulsory to disclose it because it was in the form of remuneration in the hands of Mr Manuel. It is trite that directors' remuneration must be publicly disclosed in the annual financial statements of a public company. It would therefore had been improper not to disclose it as some form of remuneration for Mr Manuel.

113. At paragraph 186, the respondents deal with the allegation. They say that the decision to pay the legal fees was taken in 2017. It was duly raised and discussed in the nominations committee in the absence of Mr Manuel and was disposed of.

114. The problem, however, is the following

114.1 Old Mutual does not deny that the legal fees were paid by Old Mutual for the benefit of Mr Manuel, not Old Mutual.

114.2 Old Mutual does not deny that the fees were not disclosed as remuneration paid to Mr Manuel.

114.3 Old Mutual does not deny further that these fees were never disclosed to the shareholders.

115. Moreover, there is no confirmation that the matter was in fact raised by the applicant with Mr Manuel that it was necessary to <u>inform the shareholders</u> about these fees which were being paid by Old Mutual.

Finally, there is no denial that the payment of these fees related to a matter that had nothing to do with Old Mutual.

116. These allegations and the casual manner in which they have been answered fall squarely under section 159 of the Company's Act 71 of 2008. That section, it would be recalled, deals with protection for whistleblowers.

116.1 First, section 159 does not replace the protection provided for in terms of the Protector Disclosures Act 26 of 2000. It supplements it. In terms of section 159(3) the section applies to a disclosure if it is made in good faith to amongst others a director of a company.

116.2 Second the person making the disclosure must reasonably believe at the time that the information shows or tends to show that the company or director or prescribed officer is contravening the Company's Act or is failing to comply with any statutory obligation to which the company is subject or contravenes any other legislation in a manner that could expose the company to an actual or contingent risk or liability, or is inherently prejudicial to the interest of the company.

117. Both of these elements are clearly met. The information disclosed by the applicant is in fact true. The failure to disclose a conflict of interest on Old Mutual's own version is a breach of a law. So is the failure to

cause Mr Manuel to recuse himself in the face of the triple conflict of interest.

118. In terms of section 159(5), a person making a disclosure may not be.

119. But section 159(6) is most vital. It states that

> *"Any conduct or threat contemplated in subsection 5 is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence n support of another reason for engaging in the conduct or making the threat."*.

120. What this means, in plain terms is that the onus of proof rests with Old Mutual, as long as prima facie the applicant can illustrate that he has made a disclosure that will qualify for protection. Old Mutual, has failed to rebut the presumption that falls on it. It has not produced satisfactory evidence that there is no link between its disciplinary against the applicant and the protector disclosures. It has taken a high-handed and dismissive attitude in respect of his allegations.

121. We submit that the allegations must be taken to have been established and therefore the suspension and the termination constitute breaches of the Companies Act.

122. Given the absence of a genuine reason for the occupational detriments (ie both the suspension and/or the dismissal) and given the true sequence of events, the inference is irresistible that the real underlying

cause for the suspension and subsequent dismissal was the making of the disclosures.

123. The attempts by Old Mutual to dispute causation by suggesting that the alleged conflict on the part of the applicant was raised in August 2018, that is before the disclosures were made, is transparently obfuscation and deception and ought accordingly to be rejected out of hand.

124. A close examination of the facts will reveal that the alleged conflict on the part of the applicant was only raised towards the end of April 2019, ie only after the “last straw” incident dated February / March 2019. The causal chain therefore remains intact.

125. We deal then with the suspension.

UNLAWFUL SUSPENSION

126. It is trite that a decision to suspend an employee has implications for their reputation hence, as quoted at the beginning of this document, Halton Cheadle has correctly described suspension “*the employment equivalent of arrest*”.

127. It also implicates their dignity, which on its own is a breach of the Constitution, particularly section 10 which provides for the right to dignity. In aggravation, the suspension in this case received extensive publicity via media coverage. This was not as a result of what the applicant did. The media coverage was instigated by Old Mutual.

128. In the case of *Chowan v Associated Motor Holdings (Pty) Ltd & Others* (*supra*), it was held that the breaches of statutes like the Protected Disclosures Act and conduct that impairs an employee's dignity can constitute a self-standing claim under the Constitution. Although, of course, the *Chowan* case involved a trial, but is necessary for the present matter is to show that the applicant has a *prima facie* claim that can be similarly pursued in a trial in due course. We submit that the *Chowan* case is a strong authority for the claim of impairment of dignity to be pursued in due course.

129. Quite apart from issues relating to the inherent dignity of employees affected by unlawful suspensions, it is now established that an employee must be afforded an opportunity to be heard before they are suspended. The law on this is crisply explained in the case of *South African Municipal Workers Union obo Matola v Mbombela Local Municipality*,[17] where the following appears

> *"It is of course well established approach in our law that an employer would be justified in suspending an employee for serious misconduct allegations or whenever it is clear that the employee may pending the investigation of discipline interfere with witnesses or information relevant to the investigation. However, before taking a decision to suspend the employer is enjoined by the principle of natural justice to afford the employee the opportunity to be heard. In other words the employer has a duty to show that there exists justifiable reason for suspending an employee.*

[17] (2015) 36 ILJ 1341 (LC) at paras 25 to 26

> *The procedure to follow in compliance with the requirements of natural justice is for the employer to call on the employee to show cause why he or she should not in light of the seriousness of the allegations made against him or her should not be suspended. In this respect the allegations made against the employee must be set out in sufficient detail to enable the employee to respond to the allegations and make submissions as to why the employer should not in the circumstances suspend him or her*".

130. This procedure was not followed. The employee was simply informed that he was being suspended. But in addition, the employee here was told that he was suspended pending a decision. The language of the code, which we have shown is compulsory was completely ignored. The fact that the code says that an employee may only be suspended pending the outcome of an investigation or pending a disciplinary hearing was ignored in totality.

131. So we submit that the suspension had the triple effect impacting negatively on the dignity of the applicant, breaching his rights to procedural fairness, and violating his contractual rights to be suspended only pending an investigation or alternatively pending a disciplinary enquiry.

132. Old Mutual has relied on the case of *Long v South African Breweries* (Pty) Ltd.[18] This matter is not directly on point. It does not lay down a general rule that pre-suspension hearings are to be dispensed with, as

[18] (2019) 40 ILJ 965 (CC)

Old. Mutual contends. Rather, its finding is modest and fact specific. The full passage reads:

> *"[25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound."*

133. Crucially, therefore, it still remains the case that there must be a fair reason for the suspension of an employee. The absence of a fair hearing may be countenanced where "*the suspension was precautionary and did not materially prejudice the applicant".* In this case there is grave prejudice in the suspension. The suspension was also not for the purposes of investigation. Old Mutual could obtain all the facts that it needed while the applicant remained in his position. The suspension was also pending an unspecified *"decision".* This cannot be within the contemplation of the finding in the *Long* judgment.

134. Finally, in respect of the Part B relief to declare the third to sixteenth respondents to be delinquent directors, in terms of section 162 of the Companies Act, it is respectfully submitted that in the totality of the circumstances, more than a *prima facie* case has been made.

BALANCE OF CONVENIENCE

135. Having acted unlawfully it lies clearly in the mouth of Old Mutual to say that the applicant must tolerate the consequences of its illegality until Part B. The applicant is entitled to effective relief if he has a prima facie case. It would be quite wrong to expect him to remain suspended while Part B is being pursued.

136. The only effective remedy against the unlawful and victimising conduct of Old Mutual is his interim reinstatement. Even if the applicant were to be placed on a lawful suspension, the consequences of the conduct by Old Mutual would remain intact. That means that Old Mutual will be rewarded for acting illegally. That flows contrary to constitutional norms. It will be recalled that the main thrust of the applicant's complaint is that he has complained about instances of victimisation. If this is so it would be wrong to allow that nature of victimisation to persist without adequate judicial relief.

137. The applicant is also protected by section 9 of the Constitution. Particularly, section 9(2) imposes legislative obligations to advance persons that are previously disadvantaged. The legislative framework under which this takes place is now the Broad Based Black Economic Empowerment Act 53 of 2003. The conduct of Old Mutual negatively impacts on Black entities such as NMT as by insisting on unreasonable demands. Their progress is thwarted. We submit that it may additionally constitute unfair discrimination.

138. This case presents the classical situation in which the broader public interest beyond the parties themselves ought to be taken into account in assessing the balance of convenience.

139. The balance of convenience clearly favours the hearing of the application at this stage.

IRREPARABLE HARM

140. There are several grounds on which irreparable harm is alleged. Firstly, harm suffered by the applicant ion reference to his dignity is ongoing harm. It must be addressed effectively and immediately. If the applicant has no case, it must be dealt with urgently. But if he does have a strong case, there is no reason to keep him waiting. He is entitled to relief now.

141. Another level of harm is the fact that the applicant is not receiving an income from Old Mutual, when contractually he should be. But the harm is also irreparable because Old Mutual may fill the position of Chief Executive Officer. If the position is filled on a permanent basis, the applicant's own position would have been frustrated and this litigation pointless. There is therefore definite irreparable harm that requires the application to be dealt with immediately.

UBUNTU - BOTHO

142. In respect of the merits of this application, we finally deal with an important and relevant topic, which cuts across the broad issues of the

victimisation of whistleblowers, the interpretation of common-law contracts and the alleged constitutional violations (with specific reference to the value of human dignity). That is the topic or subject of ubuntu – botho which, in our respectful submission, ought properly to be taken into account in the overall assessment of this matter.

143. In addition to the dictum of Mokgoro J, in *S v Makwanyane*,[19] which is quoted at paragraph 139.5 of the founding affidavit,[20] it would be appropriate to end with the following apposite dictum of Jajbhay J (Horn and Victor JJ concurring) from the Full Court decision of this division in *The SABC / Mpofu* case:[21]

> "[62] History has bestowed on our generation in our country the gift of a rare opportunity to manage our freedom as a nation and to nurture it towards its maturity. This obliges all of us as citizens of this country to speak, and to act in very special ways. Section 1 of the Constitution informs us that:
>
> > "*The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
> >
> > *human dignity; the achievement of equality and the advancement of human rights and freedoms.*"
>
> This means that there are in existence dominant values as well as an ethos that binds us as communities to ensure social cohesion.

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[19] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 at paras [308] and [311]
[20] Page 45 of the Record
[21] *South African Broadcasting Corporation v Mpofu* (2009) 4 All SA 169 (GSJ) at paras 62-66 (with due apologies for the length of this quotation)

In South Africa we have a value system based on the culture of ubuntu.

[63] This in effect is the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. Ubuntu speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection. Ubuntu is a culture which places some emphasis on the commonality and on the interdependence of the members of the community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be part of. In South Africa ubuntu must become a notion with particular resonance in the building of our constitutional democracy. All directors serving on state-owned enterprises must take cognisance of these factors in the determination of their duties as directors. Ubuntu manifests itself through various human acts and behaviour patterns in different social situations. This was clearly lacking when the determination to suspend the respondent was made. The actions of the chairperson as well as her other Board members were made in haste whilst they were "*upset*". To my mind, Tsoka J was correct when he concluded that "*the conduct of Mkonza falls short of a director who should act independently, without fear or favour, openly with integrity and honesty*".

[64] Integrity is a key principle underpinning good corporate governance. Put clearly, good corporate governance is based on a

clear code of ethical behaviour and personal integrity exercised by the board, where communications are shared openly. There are no opportunities in this environment for cloaks and daggers. Such important decisions are not made in haste or in anger. There must be ethical behaviour in the exercise of dealings with fellow board members. These dealings must be dealt with in such a manner so as to ensure due process and sensitivity.

[65] The objective of developing African leadership philosophy and values is consistent with the constitutional values of ubuntu-botho. In the case of *Dikoko v Mokhatla* **2006 (6) SA 235**, Sachs J said: *"Ubuntu-botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past: (See the Epilogue to the interim Constitution, extensively discussed in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* **[1996] ZACC 16**; **1996 (4) SA 671** *(CC)* **(1996 (8) BCLR 1015)** *at para* **[48]**). *In present-day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution. As this court said in Port Elizabeth Municipality v Various Occupiers* **[2004] ZACC 7**; **2005 (1) SA 217** *(CC)* **(2004 (12) BCLR 1268):**

"*The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."*

[66] Ubuntu-botho is deeply rooted in our society. These values should assist in informing corporate decisions made by directors in state owned enterprises. Proper and constructive dialogue would enable better outcomes in the decision making process. Heated and impetuous decision making is the stuff of irrational outcomes. This must be avoided. This form of governance is underpinned by the philosophy of ubuntu-botho. The time is right to incorporate the views of umuntu ngumuntu ngabantu in the King code of good governance."

144. Although that matter concerned a corporatised organ of state, it is of equal application to a public company, such as Old Mutual, by proposing the applicability of the King Code to such companies, the entire trust of the court's dictum was to remove the distinction between public sector and private sector entities.

COSTS

145. It is respectfully submitted that in view of the ulterior and improper motives which accompanied the respondents' conduct and behaviour coupled with the objectionable nature and content of the answering affidavit, as detailed in the relevant portion of the replying affidavit, this is an appropriate case for the court to signal its displeasure by mulcting the respondents with a punitive order of costs.

CONCLUSION

146. In the circumstances, part A should be granted.

147. Alternatively and if the court is not minded to grant reinstatement at this stage, it would be appropriate to set aside the termination and to return the parties to the status quo prior to the termination, where the applicant was on suspension. That way Old Mutual may be directed to follow an internal disciplinary hearing if it so chooses or alternatively to await part B.

DC MPOFU SC
TN NGUKAITOBI
S GABA
Chambers, Sandton
16 July 2019

LIST OF AUTHORITIES

1. *Chowan v Associated Motor Holdings (Pty) Ltd and Others* 2018 (4) SA 145 (GP)
2. *City of Tshwane Municipality v Engineering Council of SA* 2010 (2) SA 333 (SCA)
3. *Cliff v Electronic Media Network (Pty) Ltd* [2016] 2 All SA 102 (GJ)
4. *Gama v Transnet and Others* [2018] ZALCJHB 452
5. *Kroukamp v SA Air Link (Pty) Ltd* (2005) 26 ILJ 2153 (LAC)
6. *Manuel v Economic Freedom Fighters and Others* (13349/2019) [2019] ZAGPJHC 157 (30 May 2019)
7. Mogothle*, Premier of the North West and Another* 2009 (4) BLLR 331 (LC)
8. *Motale v Citizen Newspaper* [2017] 5 BLLR 511 (LC)
9. *Ngubeni v The National Youth Development Agency and Another* [2014] 35 ILJ 1356 (LC)
10. *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA)
11. *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC)
12. *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665
13. *Santos Professional Football Club (Pty) Ltd v Igesund & Another* 2003 (5) SA 73 (C)
14. *Solidarity & Others v South Africa Broadcasting Corporation* (2016) 37 ILJ 2888 (LC)
15. *Somi v Old Mutual*. *Africa Holdings* (2015) 36 ILJ 2370 (LC)
16. *South African Broadcasting Corporation v Mpofu* (2009) 4 All SA 169 (GSJ)