REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

30/7/2019 pp
DATE SIGNATURE

CASE NO: 22791/2019

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

JUDGMENT

MASHILE, J:

INTRODUCTION

Reference to the Respondents in this judgment excludes the 17th Respondent. The 17th Respondent will be referred to as NMT.

1. The Applicant was the Chief Executive Officer ("CEO") of the First Respondent. Their relationship is governed by a contract of employment ("the contract"). On 23 May 2019, the First Respondent suspended the Applicant and on 17 June 2019, it dismissed him. Central to this matter are two issues. firstly, whether or not the dismissal was in terms of the provisions of Clause 24.1.1 of the contract as maintained by the Respondents. Secondly, the applicability of the Protection of Disclosures Act 26 of 2000 ("PDA". Offended by the First Respondent's invocation of Clause 24.1.1 and considering that before dismissing him, the First Respondent was obliged to adopt and apply the provisions of Clause 25, the Applicant, on urgent basis, launched this application seeking interim relief pending institution of a damages claim within sixty days of the date of the order of this Court. The relevant prayers of the notice of motion read:

    1. "Dispensing with the normal rules and hearing this application as one of urgency in terms of Rule 6(12)(a);
    2. Temporarily reinstating the applicant in his position as Chief Executive Officer of the first respondent;
    3. Interdicting the first to seventeenth respondents from taking any steps towards appointing any person into the position of CEO of Old Mutual;
    4. ...;
    5. ...;
    6. ...;
    7. Costs of the application in the event of opposition, on the attorney and client scale
    8. Further, alternative and/or appropriate relief (including leave to supplement the papers in respect of Part B)"

2. When concluding his argument, Counsel for the Applicant mentioned that the Applicant were not insistent on prayers 4, 5 and 6. This accounts for their omission from the prayers that I have quoted from the notice of motion above. As a preliminary issue, I need to add that while the Respondents have gone to great lengths to demonstrate that the Applicant had a conflict of interest and that he had

committed misconduct and the Applicant asserting the contrary, this Court is not sitting to determine whether the Applicant did or not. The court will be determining what I have referred to as being central to this matter in paragraph 1 above and what should have transpired upon the Respondents raising allegations of misconduct and/or conflict of interest on the part of the Applicant.

FACTUAL BACKGROUND

3. In March 2018, the Applicant, in good faith and for no personal gain raised his concerns regarding the chairperson's triple conflict of interest. This conflict of interest concerned the position of the chairperson in the First Respondent, Old Mutual PLC and Rothschild. The background as to how the Applicant believed the chairperson came to be conflicted is that there was a large multibillion rand commercial project, known as 'Managed Separation' involving the delisting of Old Mutual PLC from the London Stock Exchange and the proposed listing of the First Respondent on the Johannesburg Stock Exchange.

4. One of the aspects of this exercise involved the proposed transfer of a massive liability or obligation, valued at more than $400 million, which translated into approximately R5 billion from Old Mutual PLC to the First Respondent. One of the companies which stood to benefit the most from the realisation of the Managed Separation project was Rothschild, which stood to gain millions of rand in fees as one of the transaction advisers.

5. The chairperson was a director of all the companies mentioned in paragraph 3 above. He was simultaneously a director of Old Mutual PLC, the chairman of the First Respondent and the chairman of Rothschild. As such, he would have been a subject of the three actual and/or potential conflicts between these entities. The Applicant openly protested to the chairperson about the impropriety of his participation in any discussions regarding the proposed assumption or takeover of the Old Mutual PLC (contingent) liability, which was in the nature of a guarantee in favour of an American company.

6. The serious nature of the transgression notwithstanding, the chairperson ignored and failed to act on the Applicant's objections. He proceeded to participate in the discussion of this matter. The Applicant believes that from that point onward, he noticed his relationship with the chairperson going sour. He tried to explain to the

chairperson that it was nothing personal. This failed to restore their ruined relationship. According to the Applicant, this was followed by other inconsequential incidents, which were by and large petty.

7. In February or March 2019, the Applicant advised the chairperson that he intended to raised another objection with the board through NomCom. The Applicant's objection this time related to improper non-disclosure of a payment amounting to millions of rand paid by the First Respondent in respect of the chairperson's legal fees. These legal fees related to his legal battle with the Guptas and their associates. The Applicant believed that failure to disclose the payment to the shareholders of the First Respondent was highly irregular and improper. The Applicant ignored the chairperson's attempts to discourage him to raise the objection.

8. In March 2019, The Applicant went ahead and put the matter on the agenda of the NomCom. The chairperson who is also a member of NomCom was asked to recuse himself, which he did. The NomCom resolved not to implement the Applicant's proposal. The Applicant's motivation of the adoption of his proposal was that it was compulsory to disclose it to the shareholders because the expenditure amounted to a form of remuneration to the chairperson. Following this incident, the Applicant experienced the chairperson unleash open and hostile treatment toward him.

9. There were other incidents and exchange of correspondence between the two parties but in this Court's view the letters of 16 May and the response thereto dated 21 May 2019 written by the chairperson and the Applicant respectively set the tone of the parties' dispute. For this reason, I am of the opinion that I should reproduce them in full below beginning with the chairperson's letter of 16 May 2019. It reads:

> "The NMT Matter
> I am writing to you on behalf at the OML & OMLACSA Board Ad Hoc Committee which met with you on 2 May 2019. In that meeting, we indicated that the Related Party Transactions Committee had been asked, on behalf of the Corporate Governance and Nomination Committee (Nomcom), to develop a course of action to consider the various requests from NMT and the related governance concerns which had been raised.
> The RPTC engaged with you and the NMT Group of Companies through various interactions, facilitated by Bowman's attorneys. Since 7 March 2015. These interactions were to secure information to assist the Nomcom with the various

commercial request, from NMT, but also to assist Nomcom to consider the corporate governance concerns raised.
The RPTC recommended a certain course of action to Nomcam, which then made recommendations to the OML and OMLACSA Boards, that met in a joint session on 1 May 2019. The subcommittee which met with you on 2 May 2019 placed the various issues with you and to which you responded in that meeting, and also in subsequent engagements with me personally, and on email to the Committee.
Central to the matters being considered is the declaration and distribution of ordinary dividends by NMT Capital in March 2018 and July 2018. Both distributions occurred in breach of the preference share subscription agreement in place between NMT Capital and OMLACSA, firstly by ignoring the arrears in preference share dividends at these respective distribution dates, and secondly, in July, also capital payments due to OMLACSA.
These are the issues we, as a committee, placed before you in the meeting on 2 May 2019- In your response to the issues raised, we listened carefully and made copious notes. We also gave you the benefit of the doubt, and accepted your representations during our discussions. This was our mandate from the Boards, because in its collective wisdom the Non-Executive Directors were of the view that these matters result in a significant conflict of interest *and* suggest a failure *by* you to discharge your *fiduciary* duties as a director of OMlACSA and OML. The seriousness of the issue required that we sought verification by a detailed examination of documents available to us. These documents include, but not limited to correspondence, reports and minutes. In summary, there is dear evidence that Ordinary dividends were declared and paid without sufficiently providing for and servicing the OM Preference shares as required in terms of agreements with OM. There is at SO further information that this was done without the consent of OM. We are of the view that you have provided insufficient information to convince us that your actions at the time of these infringements would, under scrutiny, absolve you of responsibility.
At the conclusion of this examination, the Ad Hoc Committee remains of the view that you have breached the terms of your contract of employment, by giving preference to your own interests, above that of OMLACSA. We have been charged by the Board to evaluate whether by this conduct the interests of the Old Mutual have 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 the CEO and an Executive Director of Old Mutual Limited. Whilst we find the information that we have perused compelling, we would wish to afford you an opportunity to counter this with documents that we may not have been able to access.
We are due to reply to the Board and therefore request that you respond to these matters, verified with documents which substantiate your version of events, as to why we should not reach the conclusions above by Sunday evening (being 19 May 2019].
Yours sincerely

Trevor A Manuel"

ion behalf of Paul Bafcryi, Stewart van andPinky Moholi)
(OML and QMLACSA Boa?c Subcommittee)

10. As stated earlier, equally worthy of reproduction in full is the Applicant's response letter dated 21 May 2019. Its contents are set out below:

"TREVOR A. MANUEL cc. PAUL BALOYI, STEWART VAN GRAAN AND PINKY MOHOLI

Dear Trevor

I acknowledge receipt of correspondence addressed to me dated 16 May 2019 dealing with allegations that I have misconducted myself in my position as CEO of Old Mutual Limited. The correspondence received concerned itself with NMT Capital, not NMT Group. I accordingly restrict my response to NMT Capital.

Executive Summary

1. The arrear preference dividends were always planned to be redeemed from the proceeds of the Growthpoint Distribution, given the amount outstanding. They were indeed paid out of the distribution. There can never be an impression created that I was working against Old Mutual regarding payments to Old Mutual. My own submission as CEO of NMT at the time and as Chairman of the meeting point to a willingness to make payment to Old Mutual. **Exhibit 1 and 2 - Minutes of meeting Board meetings March 2017 and July 2018**

2. There has been an impression created that the directors of NMT never intended to pay anything to Old Mutual. This is further from the truth. At the time of the Growthpoint distribution, they paid a total of about twenty three million rand (R23 million) in arrear preference dividends and loan redemptions due by the so called Zelpy Companies to Old Mutual. These are the companies that hold their personal investments. The entire dividends received out of the Growthpoint distribution and their share of the ten million rand (R10 million) dividend distributed in March 2018, were paid over to Old Mutual. Surely this can't be the behaviour of people that are not interested to make any distribution to Old Mutual. **Exhibit 3. Schedule of Old Mutual, Zelpy, Old Mutual Balances**

3. In the event of a balance still outstanding in the preference shares due by NMT to Old Mutual, the plan was to extend the redemption period. Old Mutual had always agreed in the past to extend the redemption period. There was nothing to suggest that, this would not be extended in 2018. Prior to this there had been extensions in 2010, 2013, and 2017. **Exhibit 4 - Previous Extensions**

4. The Old Mutual nominated director on the NMT board always knew that the plan was to repay the full amount of the arrear preference dividends out of the Growthpoint distribution. He was at the meeting where I presented my thoughts (as then CEO of NMT) on the application of the Growthpoint proceeds. **Exhibit 2 and 5**

5. I have found this process very strange and stressful, in that there was an investigation, judgment and a recommendation to the OML Board without anyone ever talking to me. I find it strange in that when I have been asked questions by Trevor, he always tries to prove that all my answers are wrong. His letter to me also clearly has that tone

6. I have been an executive of NMT since May 2017, and have never acted in that capacity. The actions of NMT executives outside of board meetings are not mine. I reject any notion that suggests that I have not acted in line with the Protocols agreement. It is a pity in that in the discussions, the actions of the NMT executives have been attributed to me. The Protocols document that governs any conflicts that may arise between myself and Old Mutual is clear on this. I cannot act in any way other than as a non-executive director, something I have observed. The Protocols agreement does not seek to manage the relationship between Old Mutual and NMT, neither does it put me in a position to represent Old Mutual at NMT. The protocols agreement is clear that this is the domain of the Old Mutual nominated director. I

have never sought to influence the NMT nominated director nor the Corporate Finance team to behave in a way that favours NMT. **Exhibit 6 - Protocols AgreementOld Mutual NMT relationship**

Old Mutual has been a 20% shareholder in NMT Group from about 2004/2005. In addition to its ordinary shareholding in NMT, it subscribed for preference shares of about forty six million rand (R46 million) in value.NMT Capital as an investment holding company typically keeps very little cash. It is for this reason that the preference dividends will be in arrears until a big liquidity event. In the last few years the big liquidity event was the sale of the NMT holding in Growthpoint. It is the reason why the arrear preference dividends were planned to be settled out of the Growthpoint proceeds. This had been the plan since the time that I worked on the transaction.

The minutes of a meeting in March 2017, show this intention, **Exhibit 1.** At that time we planned to pay more than just the arrear preference dividends. The meeting of July 2018, which I chaired after the proceeds were received, also talks about a number higher than just the arrear preference dividends. These minutes suggest that there was always an intention to pay the arrear preference dividends out of the Growthpoint distribution. I would have hoped that on inspection of the documents, whoever did the investigation would have construed that I always looked after the interests of Old Mutual.

I did not know the reason why the executives of NMT decided to hold back the payment of arrear preference dividends to Old Mutual. It has now been brought to my attention that when the objection was raised by Old Mutual, NMT took active steps to pay the preference dividends of twenty million rand (R20 million) 5 days later on 24 October 2018. This was the action of the executives, not of the non-executive directors. I have not been an executive of NMT since May 2017. **Exhibit 7 - Email from NMT CFO**

Twenty percent of NMT is held by 3 "Zelpy" companies. I own one of these 3. Old Mutual advanced eight million rand (R8 million) to each of these to buy out previous shareholders that owned 20% in the company. This was by way of preference shares. At the beginning of 2018, these companies each owed Old Mutual about twelve million rand (R12 million). The entire proceeds that were received by these companies from the March 2018 and July dividends were paid over to Old Mutual. My portion of this was seven million six hundred and sixty six thousand rand (R7.66 million). This again just proves a clear intention of looking after the Old Mutual interest, contrary to the notion that has been created. This cleared about 60% of the dues to Old Mutual. In total the three companies paid twenty three million to Old Mutual.

A question has been raised about the ten million dividend paid in March 2018. NMT was in the final stages of the Growthpoint realisation and a proposal was made by the executive, to pay Old Mutual one amount that would at least clear the arrear preference dividends following the receipt of the Growthpoint proceeds. It was on this understanding that the ten million rand (R10 million) dividend was approved. It is worth noting that the Old Mutual appointed director also supported this. Nothing was done without Old Mutual's knowledge.

Protocols Agreement

I have behaved totally in accordance with the Protocols agreement. I have never found myself in a position where I was conflicted and worked against the interests of Old Mutual. If anything, I have been on the extreme in looking after the interests of

Old Mutual. I asked the CFO of NMT not to request write offs of interest on the Zelpy loans as I felt the Zelpy companies could afford to pay this.

I have never interfered with the Old Mutual executives that looked after the Old Mutual interests in NMT.

I have never played an executive role in the affairs of NMT. Although the NMT offices are just over two kilometres from my house, I doubt that I have been there more than five times since June 2017, when I joined Old Mutual.

I therefore find it bizarre that I am accused of not abiding by the Protocols agreement.

"The Board Investigation"

I find it strange that two board committees carried out this investigation and found me guilty without ever talking to me. I can only assume that there was a motive that was less than noble.

A lot of these questions could have been answered by engaging with me in a process that did not take more than a couple of hours. I wonder how much has been spent on legal fees on some straight forward issues.

I am concerned that my representations seem to be constantly challenged. For example, it is alleged that I chaired a meeting that decided not to pay Old Mutual, notwithstanding that I have clarified this. The meeting in question actually made a recommendation that sought to pay Old Mutual more than the arrear preference dividends. He made a statement that the arrear preference dividends were at some point sixty six million rand (R66 million). I do not know this to be true. His letter to me clearly makes a pronouncement about my "guilt" where in essence I must prove my innocence.

Conclusion

All my actions have always been in the interest of Old Mutual, even when I stood to benefit financially.

I hope this clears what I believe and feel is a wrong and unfounded view of me.

All my rights are reserved.

Regards Peter Moyo"

11. The Respondents provided funding support to NMT as follows:

R5.5 million ordinary shares

Preference share capital	R46
Private Equity Fund	R150

The relationship between NMT and the First Respondent is regulated by a preference subscription shares agreement the material terms of which I may refer from time to time in this judgment.

12. In June 2017, the Applicant was appointed as the CEO of the First Respondent in terms of a permanent contract. The contract was to endure until his retirement at the age of sixty-one, which is still approximately four and a half years away. Some of the salient provisions of the employment contract are:

12.1. Clause 23 stipulates that the Applicant's employment is subject to the Employer's discipline, grievance and related procedures in place from time to time;

12.2. Clause 24 provides that the employment contract may be terminated, *inter alia*, for any lawful and fair reason, including being guilty of misconduct, other than those specified in the contract, namely notice, retirement and/or a ground specified in the Labour Relations Act;

12.3. Clause 25.1 states that where allegations of misconduct or incapacity have been raised against the Applicant, the First Respondent will be entitled, within its sole discretion, to decide whether or not to hold an internal disciplinary enquiry or to proceed instead via the pre-dismissal arbitration procedure contemplated in section 188A of the LRA;

12.4. Clause 28.2 lays down that the employment contract supersedes and replaces any documents offering employment, accepting employment and/or appointing the Applicant which do not form part of the written contract;

12.5. Clause 8 specifies that in terms of the Applicant's remuneration and benefits, he is entitled to a Total Guaranteed Package plus participation in the First Respondent's incentive scheme, in which participation or non-participation was at the discretion of the First Respondent;

12.6. Clause 12.2.3 read with Clause 14 lays down that the Applicant *would* at all times act in the best interests of the First Respondent and its stakeholders and not engage in behaviour and/or work or other activities which may result in a conflict of interest arising between the parties;

12.7. Clause 22.3 provides that generally and subject to certain specified exceptions, the First Respondent is prohibited from communicating the Applicant's personal information to third parties without his consent.

13. The Applicant's shareholding and directorship in NMT were provided for in protocols or addenda ("the protocols"), which are an integral part of the contract as Addendum 'A' and 'B'. The objective of the protocols was to regulate, govern and/or obviate any possible conflicts of interest between the Applicant's interests at NMT and those of the First Respondent. The material terms of the protocols were:

13.1. To provide guidance for the identification, monitoring and management of any conflict of interest which may arise between the Applicant and interests of the First Respondent and its associated companies;

13.2. To stipulate that the best interests of the First Respondent would always take precedence over the Applicant's personal interests in the NMT Group;

13.3. To specify that any conflict of interest would be brought to the attention of the First Respondent's Nominations and Governance Committee;

13.4. To prescribe the procedure to be followed to disclose to the First Respondent once the Applicant has become aware that a conflict of interests has arisen;

13.5. To compel the First Respondent appointed director to disclose any conflicts of interest on the part of the Applicant which may arise;

13.6. To determine and permit the Applicant to receive dividends and other distributions in respect of his shareholding in NMT;

13.7. To prescribe that any conflict arising from the position of the Applicant as non-executive director of NMT will be dealt with by the chair of the First Respondent's board *and/or in terms of clause 25.2 of the employment contract.*

14. Over and above the protocols, the First Respondent had a nominee or representative director who sits on the NMT board. The director is entrusted, among others, with the duty of looking after the interests of the First Respondent in NMT. The director would also report back to the First Respondent on any issues

which arise at NMT requiring its attention. The First Respondent's representative director was Mr Mobasheer Patel ("Patel"), a trained accountant. Patel was an experienced and senior executive of the First Respondent with a profound understanding of financial issues.

15. It was not disputed that Patel had not at any stage indicate in any meeting or correspondence to NMT that a conflict of interests had ever arisen in his presence or otherwise. He was present at all the relevant board meetings and supported all relevant NMT board resolutions. Patel voted the same way as the Applicant did on all the issues.

16. In terms of the underlying relationship agreements, the sequence for the distribution of dividends, once declared, is supposed to be:

16.1. Debt capital repayments in the form of preference dividends to the First Respondent, including, where applicable, (arrear) preference dividends; and

16.2. Ordinary shareholders dividends.

17. In practice and since 2010, the redemption of the Old Mutual preference dividends had been deferred by agreement for a continuous period of almost ten years to date. An example of the First Respondent consenting to a deferment of the redemption date of the preference shares is contained in its letter of 19 April 2010 to NMT. This communication was in line with the provisions of the Preference Subscription Shares Agreement. To protect itself against any possible adverse effect that could arise from the deferments, the First Respondent was entitled to acquire further ordinary shares upon non-repayment of the preference dividends or to take any of the protective measures agreed to by the parties.

18. It was understood and agreed by all parties that the repayment of arrear preference dividends would be significantly reduced upon the happening of liquidity events over time. The 2018 liquidity event was the payment to NMT of the proceeds of the sale of its BEE stake in Growthpoint, which stake had been acquired in the furtherance of the country's BEE or economic transformation agenda, including the de-racialisation of ownership patterns.

19. On 4 July 2018, the Applicant chaired an NMT board meeting held in Bryanston. The meeting was attended by all four NMT directors, including Patel. Part of the

discussion concerned declaration of a dividend and distribution thereof among all the shareholders. It is common cause that there was no dissenting voice regarding how the dividends were to be distributed and the amounts specified in the minutes. It was specifically agreed at the meeting that, *inter alia*:

19.1. The realisation of NMT's investment in Growthpoint beapproved;

19.2. A R105 million dividend be declared;

19.3. NMT should meet its commitments and carry on as a going concern for (no less than) a year after the agreed distribution;

19.4. R37 million be allocated to debt repayment, which mainly constituted the First Respondent preferential dividends;

19.5. Any shortfall would be rolled over in the usual manner, to be negotiated by management; and

19.6. The First Respondent would, in addition, receive its ordinary dividend, which amounted to R27 million.

20. The Applicant alleges that he had recently discovered that, unbeknown to him and, as he has subsequently gathered, the other non-executive directors too, there was an undue and unexpected delay in the payment of the preferential dividend and that it was in fact only paid in October 2018 and within five days after demand had been made by the First Respondent, which effectively prevented the happening of the (redemption) event contemplated in clause 1.12.4 of the Preference Subscription Shares Agreement. This information was never communicated to the non-executive directors.

21. The information that NMT would negotiate a deferment of the payment of the preference shares to the First Respondent in line with established practice was divulged to the non-executive directors in a board pack which preceded the meeting. According to the Applicant, none of the non-executive directors had predicted that the First Respondent would resist the proposal and how long the resultant impasse would last. As such, no updates were ever given to the non-executive directors and none was necessary in terms of previous experience.

22. Once the news of the delay had reached the Applicant, he made enquiries in response to which he received a letter dated 7 May 2019 from one Anele Mukhodobwane of NMT describing reasons therefor. It was stated in the letter that both parties were responsible for the protracted negotiations. It was only upon the breakdown of negotiations that the executive directors duly paid out the preferential dividend to the First Respondent. In effecting the payment, they did so in adherence with the binding procedures prescribed by the parties in the Preference Subscription Shares Agreement.

23. In January 2015 and March 2016, total dividends of R6.6 million and R10 million were respectively declared. In both cases, the ordinary dividends were paid out before the arrear preference share dividend was paid to the First Respondent. In March 2018, NMT paid R10 million and in July 2018 it paid R105 million. The Applicant alleges that he heard for the first time towards the end of April 2019 that rumour had it that he had breached the protocols in relation to the late payment of the preferential dividend and the non-repayment of the capital loan.

24. In a letter dated 30 April 2019 addressed to the chairperson of the First Respondent, the Applicant explains that there was a specific decision to pay the preferential dividend to the First Respondent. The decision was appropriately communicated to management and that he was not aware of the delay in doing so nor did he think that any of the non-executive directors were. The Applicant believed that it was the chairperson who was of the firm view that he had acted contrary to the provisions of the protocol.

25. He clarified that this was distinctly not so especially because:

25.1. The Board had specifically decided to pay the preferential dividends and any delays in doing so were attributable to management and/or processes in which he was not involved;

25.2. He was told that the preferential dividend had subsequently been paid in October 2018;

25.3. No prejudice was foreseeable or in fact suffered by the First Respondent, which had also been a beneficiary of the ordinary dividend paid; and

25.4. There was no legal, moral or ethical basis upon which the acts or omissions of NMT could be attributed to him as an individual director.

26. The matter was subsequently referred to the Related Party Transactions Committee ("**RPTC**") of the First Respondent, which thereafter referred and reported it to the Corporate Governance and Nominations Committee ("**NomCom**"). It was later elevated to an Ad Hoc Committee and eventually to a board decision. The Board would have been the one that concluded that the Applicant should be suspended and thereafter dismissed.

ISSUES

27. I have already indicated that the principal issue to determine is whether or not the First Respondent was correct to invoke the provisions of Clause 24.1.1 of the contract in circumstances where it has manifestly and unequivocally furnished reasons that include misconduct and/ or conflict of interest on the part of the Applicant. The Applicant must succeed if the First Respondent's reliance on Clause 24.1.1 was misguided when dismissing him. The second issue has to do with the applicability of the PDA.

ASSERTIONS OF THE RESPONDENTS

28. The Respondents have contended that the Applicant was properly suspended albeit without a prior hearing of any sort. The subsequent dismissal, it was argued, was in terms of Clause 24.1.1 and as such, legitimate as it did not require them to follow the procedure laid down in Clause 25.1.1 or 25.2. The Respondents further argued that they were not compelled to embark on the procedure described in either one of those clauses because even though the transgressions pertained to misconduct or conflict of interest, they utilised Clause 24.1.1.

29. Insofar as the Protected Disclosures Act[1] ("**PDA**") is concerned, the Respondents argue that the Act does not envisage the type of disclosure and the occupational detriment referred to in this matter. Broadly for now, the assertion is that no causal link exists between the disclosures and the suspension and/or dismissal. The

[1] 26 of 2000

Respondents are persistent that they raised their concerns about the conduct of the Applicant's management of his personal relationship as a non-executive chairperson of NMT and as CEO of the First Respondent well before he made the alleged disclosures.

30. With regard to the specific performance sought by the Applicant, the Respondents assert that while it is primary it remains a discretionary remedy, which may not necessarily be the most suitable in this matter. The Respondents' argument in this regard is inspired by the fact that the Applicant has indicated that the relationship between him and the Board is estranged. If this is the position, continues the argument, how can he expect to work with a Board whose relationship with him is on bad terms?

ASSERTIONS OF THE APPLICANT

31. The Applicant's contention is that the contract guarantees him of a definite process before the Respondents can terminate his contract. The Respondents have failed to observe the procedure laid down in the contract. As such, the termination constitutes unlawful repudiation of the contract. The Applicant also argues that the Respondents have failed to demonstrate a factual basis for the termination as contemplated in Clause 24.

32. The Applicant says that any contravention of the contract amounting to misconduct on his part must be dealt with in terms of the agreed procedure prescribed in Clause 25.1.1. He argues that the Respondents should be compelled to comply with the terms of the contract and be directed to charge the Applicant with misconduct. Any conflict of interest involving the Applicant is covered in the contract. The contract insists on an arbitration procedure in the event of a dispute, which the Respondents have not obeyed.

33. The Applicant argues further that the true reason for his suspension and subsequent dismissal was prompted by his disclosures of the chairperson's impropriety. The steps taken by the Respondents in dismissing him were therefore motivated by an ulterior purpose. If the Applicant has committed a misconduct, he must be subjected to the procedure prescribed in Clause 25 of the contract.

34. The Applicant remained adamant that the provisions of the PDA and the Companies Act 71 of 2008 ("the Companies Act") find application in this matter and contends that his dismissal is causally connected to the disclosures that he made, the Respondents' assertions to the contrary notwithstanding. The facts reveal that his dismissal is causally connected to the disclosures that he made, the Respondents' assertions to the contrary notwithstanding. Accordingly, he is steadfast that the Respondents have contravened the PDA read with the Companies Act, which should entitle him to the relief that he seeks.

35. While the Applicant does not dispute that specific performance is a discretionary remedy, he maintains that to determine whether or not it is an appropriate remedy in any given situation, a court ought to assess the merits of each case to arrive at an answer. There is a plethora of case authority justifying that position, adds the Applicant. The fact that the relationship between the Applicant and the Board may turn out to be adversarial should not on its own deter a court from ordering specific performance where required.

LEGAL PRINCIPLES AND APPLICATION

36. It is trite that a litigant seeking interdictory interim relief ought to satisfy a court of the existence of a *prima facie* right, apprehension of irreparable harm, balance of convenience and lack of a satisfactory alternative remedy. Below follows a discussion on each of these requirements.

PRIMA FACIE RIGHT

37. In this regard, the degree of proof required to establish a *prima facie* right has been formulated as follows:

37.1. The rights can be *prima facie* established even if it is open to some doubt;

37.2. Mere acceptance of the applicant's allegations is insufficient but weighing up the probabilities of conflicting versions is not required;

37.3. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to decide whether, with regard to the inherent probabilities and

the ultimate onus, the applicant should on those facts obtain final relief at the trial;

37.4. The facts set up in contradiction by the respondent should then be considered and if they throw serious doubt on the applicant's case he cannot succeed.[2]

38. A court has a discretion whether or not to grant a temporary interdict. Thus, in *Messina (Transvaal) Development Co Lid v South African Railways and Harbours*[3] 7929 AD 7 95 at 215 to 216 Curlewis JA said:

> *In an application for an interim interdict pending action, the Court has a large discretion in granting or withholding an interdict.* Where there is merely a possibility, not a practical certainty, of interference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. *And the Court is entitled to and must regard the possible consequences, both to the applicant and to the respondent, which will ensue if an interdict be granted or withheld.* [My underlining]

39. The Applicant's *prima facie* right derives from his contract with the Respondents. However, how the Respondents terminated the contract has remained contentious throughout the life of this matter. The Respondents believe that their invocation of Clause 24.1.1 is justified notwithstanding their reference of the manner in which the Applicant had committed misconduct. Clause 24 is headed, Termination, and provides:

> "24.1 This contract of employment may be terminated as follows:
>
> 24.1.1 By either party providing 6 (six) months' notice to this effect, in writing, to the other party, subject to clause 24.3. Where such notice is provided:

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[2] *Webster v Mitchell* 1948 1 SA 1186 (W); see also *Gool v Minister of Justice* 1955(2) SA 682 (C)
[3] 1929 AD 195 at 215-216

24.1.1.1 The Employer may, at its sole discretion, elect whether the Executive should work during this period of notice. Notwithstanding this, the Employer shall pay the Executive for the 6 months' notice irrespective of whether the Employer has required him to work or not.

24.1.1.2 Should the Executive give notice in terms of clause 24.1.land request that the Employer waive the notice period, the Employer may exercise its discretion in this regard. Should the Employer agree to such waiver, the Executive shall be paid only up to and including his last day of actual work.

24.1.2 Upon the Executive reaching the normal retirement age as determined by the Employer, or at an agreed earlier retirement age, at which point this Agreement shall terminate and the Executive shall commence retirement.

24.1.3 By the Employer on the basis of the grounds regarded as valid in the Labour Relations Act Number 66 of 1995, with or without the notice period as set out in clause 24.1.

24.1.4 For any other lawful and fair reason."

40. The contract contemplates various ways in which the employment relationship can be terminated. The procedure prescribed for each is logically different. Thus, in the case of a 'no-fault' termination under Clause 24.1.1, no reason need be given and a simple incompatibility would suffice. In this manner a party can circumvent the hostile and protracted procedure that may unfold in the case of Clause 25. Where a party chooses to furnish reasons for the dismissal, especially in those circumstances where such reasons may be devastating to the other party, such as the present, then invariably *audi alteram partem* rules ought to find application. Clause 25 is headed, Arbitration, and it reads:

25.1 **"Pre-dismissal arbitration**

25.1.1. Where allegations of misconduct or incapacity have been raised against the Executive, the Employer will be entitled, within its sole discretion, to decide whether or not to hold an internal disciplinary enquiry, or to proceed instead via the pre-dismissal arbitration procedure, contemplated in Section 188A of the Labour Relations Act number 66 of 1995, and subject to the Executive's remuneration at the time being equal to or above that stipulated in section 6(3) of the Basic Conditions of Employment Act, the Executive hereby consents to such pre-dismissal arbitration in terms of section 188A of the Labour Relations Act.

25.1.2. ...

25.1.3. ...

25.1.4. ..."

Clause 25.2 is headed, 'Arbitration by a private organisation', and it provides as follows:

"25.2.1 The Executive agrees that disputes, which would normally be referred to the CCMA for conciliation and then arbitration, may, in the sole

discretion of the Employer, be referred to a private dispute resolution organisation for Arbitration. Alternatively such disputes may, in the sole discretion of the Employer, be referred for Arbitration to one or more specific Arbitrator/s for private dispute resolution. In these circumstances the parties must agree on the specific Arbitrator/s. The Employer will select 3 panellists from a nationally recognised panel of arbitrators. The Executive will choose one of the three to hear the dispute.

25.2.2 The Employer shall inform the Executive of its intention to invoke clause 25.2.1 where the Executive has referred a dispute to the CCMA for conciliation and deadlock has been reached.

25.2.3 Where a dispute is referred to a private dispute resolution body for Arbitration as contemplated in clause 25.2.1, should the parties fail to reach agreement on the Arbitrator, the parties agree that the Director of such Organisation shall nominate an Arbitrator."

41. Addendum 'A' whose provisions I describe below, could or should have triggered the application of Clause 25.2. The addendum reads:

> "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;"

42. Notwithstanding that the Applicant has been accused of having a conflict of, interest in that he is alleged to have declared a dividend in both March and July 2018, as a 25% shareholder and being one of four directors on the NMT Board, it is inconceivable that he had the power to effect the declaration of the dividend resulting in the alleged conflict of interest.

43. This, however, is irrelevant to the extent that Addendum "A" is very clear that any conflict resulting from the position of the Applicant as a non-executive director of NMT would be dealt with by the chairperson of the First Respondent and/or in terms of Clause 25.2 of the contract. If the Applicant was indeed conflicted, the question is why was the matter not dealt with as described in Addendum "A"?

44. Apart from being accused of having had a conflict of interest, the Applicant has also been accused of having committed a gros misconduct. Clause 25.1.1 is explicit what ought to happen once an employee is accused of misconduct. Strangely, instead of dealing with the Applicant's misconduct as directed in Clause 25.1.1, the Respondents, probably disliking the procedure prescribed in Clause 25.1.1 or Addendum 'A', invoked Clause 24.1.1. It is nonsensical and of course disengenious to condemn a person of having a conflict of interest or committing a misconduct only to turn around and state, as the First Respondent's chairperson did in one of his letters, that the same person had done nothing wrong.

45. To the extent that *Somi v Old Mutual Africa Holdings (Pty) Ltd*[4] dealt with the employer invoking a 'no fault' clause such as Clause 24.1.1 in circumstances where the employee was, in reality accused of misconduct, it is indistinguishable from this matter. The Labour Court rejected the employer's attempt to invoke Clause 21.1.1, which is similar to Clause 24.1.1 on the ground that it was manifest that the employer relied on misconduct as having given rise to the breakdown in the trust relationship.

46. In those circumstances, it was held that the employer was obliged to follow its disciplinary code which had been incorporated into the employment contract. A similar approach was adopted in *Motale v The Citizen 1978 (Pty) Ltd and Others.*[5] In the present case the disciplinary code too has been incorporated into the contract. In this regard Clause 23.1 of the contract specifically provides: "*The Executive acknowledges that he shall be subject to the Employer's discipline, grievance and related procedures in place from time to time.*" In this respect too, the Respondents have disregarded the applicability of the disciplinary code to the contract.

47. The Respondents argued that this Court should follow what the court decided in *Gama v Transnet SOC Limited and Others.*[6] In so saying, they argue that the court was faced with similar facts and Clause 15 invoked by the employer in *Gama* is 'on all fours' with Clause 24. I agree that the clauses are similar in both instances but disagree that their similarities enjoins me to adopt the same approach as did the court in that matter. The facts that led the court in the *Gama* matter to decide as it did are radically dissimilar from the present case.

48. Firstly, the employee in Gama was issued with a letter of suspension calling upon him to show cause why he should not be suspended. He made representations to the employer and he was not suspended. Secondly, the employer subsequently issued him with a termination notice as envisaged in Clause 15 of their employment contract, which clause is similar to the instant case, calling upon him to show why his employment should not be terminated.

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[4] (2015) 36 ILJ 2370 (LC)
[5] [2017] 5 BLLR 511 (LC)
[6] (J3701/18) [2018] ZALCJHB 348 (19 October 2018)

49. Instead of furnishing such reasons as he was required, the employee launched an urgent application. The court did not come to his assistance but directed that the matter be referred to arbitration as per the provisions of their employment contract. In the interim, the employer dismissed him following which he approach the court again alleging that the dismissal was unlawful. The employee failed to persuade the court that the invocation of Clause 15 was invalid as he could not demonstrate that there was an order preventing the employer not to dismiss him pending arbitration and that the arbitrator would have reinstated him.

50. The above is fundamentally not the same because in this matter the letter did not invite the Applicant to show cause why he should not be suspended. Furthermore, in his letter of 21 May 2019, he made it clear that he was contesting all the accusations levelled against him by the chairperson in the letter of 16 May 2019. The *Gama* case is as such, different from the case under consideration and for that reason, I decline to follow in its footsteps.

51. Since I have mentioned the question of suspension, perhaps it is appropriate to dispose of it here. The Respondents referred me to the case of *Long v South African Breweries (Pty) Ltd and others*[7] and a related matter as authority that an employer does not have to give an employee a hearing prior to suspension. A distinction is made in the *Long* matter that where a suspension is precautionary and with pay, the employer does not have to give the employee a pre-suspension hearing. The suspension in this case is inimitable because it was not pending investigation to be conducted by the Respondents and must therefore be unlawful.

52. The dismissal of the Applicant, in my opinion, demonstrated that the Respondents no longer considered themselves bound by the terms of the contract. That act presented the Applicant with two choices – to accept the repudiation and sue for damages or to reject it and sue for specific performance. In this case, the Applicant has elected to sue for specific performance. Mindful that an act of repudiation must be assessed subjectively, there cannot be any other interpretation of the action of the Respondents, objectively or subjectively, it was a repudiation. In the result, I am satisfied that the Applicant has established the

[7] 2019 (5) BCLR 609 (CC)

existence of his *prima facie* right, which if not protected he will suffer irreparable harm.

APPREHENSION OF IRREPARABLE HARM IF THE INTERIM RELIEF IS NOT GRANTED

53. This entails a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the Applicant.[8] Irreparable harm or loss is the loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable. The loss need not necessarily be any financial loss, it may consist of an irremediable breach of the applicant's rights.[9]

54. The Respondents' submission in this regard was that the Applicant will be instituting an action for damages within sixty days of the date of the order of this Court, is adequate to establish that the Applicant will not suffer any irreparable harm. That could be correct if one were to limit irreparable harm to financial loss but since irreparable harm can assume different shapes, the attitude of the Respondents stands to be rejected. It is patent that the Applicant's reputation, being a high profile employee continues to suffer as a result of suspension and subsequent dismissal without a hearing. This is no different from the *Cliff* matter where the court stated at paragraphs 27 and 28:

> "There is merit in Cliff's submissions that he has a reasonable apprehension of suffering irreparable harm. A defamation action in due course or even a declaration of the unconstitutionality of M-Net's termination of Cliff's contract will not address the reputational damage that Cliff is suffering at present. The interim relief sought is the only satisfactory remedy that would go some way in addressing this issue.
>
> To see where the balance of convenience lies, a Court must weigh the prejudice suffered by Cliff if the relief is refused as against the prejudice M-Net will suffer if the relief is granted. It is not an answer to say that he is the author of his own misfortune. The prejudice that Cliff will suffer has been dealt with. Essentially, his brand is jeopardised and tainted. The view that his tweet was racist, either rightly or wrongly, will gain traction. The fact that another Court may pronounce on this in due course does not address the immediate damage which is suffered without due process having been followed in his dismissal."

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[8] *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969(2) SA 256 (C)
[9] *Braham v Wood* 1956 (1) SA 651 (D) at 655B; see also *Cliff v Electronic Media Network (Pty) Ltd and another* [2016] 2 All SA 102 (GJ) at Paragraph 27.48

55. As such, I am satisfied that the Applicant will no doubt suffer irreparable harm if this Court does not grant the interim relief that he seeks. That is to say that the fear of irreparable harm occurring if the relief is not granted has been established.

BALANCE OF CONVENIENCE

56. Here the court must weigh the prejudice to the Applicant if the interim interdict is refused against the prejudice to the Respondents if it is granted.[10] The enquiry is whether or not the Applicant can obtain adequate redress in some other form of ordinary relief or an alternative legal remedy.[11]

57. Usually this will resolve itself into a consideration of the prospects of success in the main action and the balance of convenience. The stronger the prospects of success, the less need for the balance of convenience to favour the applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour him.[12]

58. Here I should point out that although the Applicant has indicated that he will be instituting an action within sixty days of the date of the order of this Court, such an action will not address what he is currently suffering. The interim relief is meant to cure the period between the order and the outcome of the action.[13] I am therefore constrained to conclude that the balance of convenience favours that the interim relief be granted to the Applicant.

NO ALTERNATIVE ADEQUATE REMEDY

59. In the minority judgment of Jafta J in the *Masstores*[14] case in the Constitutional Court, it was stated at paragraph 104 of the judgment that:

> "Since a final interdict is taken to be a drastic remedy, our law affords courts a discretion to grant or refuse it. A court is likely to refuse an interdict if there is an ordinary remedy which may give the applicant adequate protection. The mere existence of other remedies is not enough to tilt the scale against the granting of an interdict. The other remedy which must be ordinary, should afford protection that is equally or more effective to the one provided by an interdict..." [Own underlining]

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[10] *Breedenkamp v Standard Bank of South Africa Ltd* 2009(5) SA 304 (GSJ) at 314G; see also and *Lieberthal v Primedia Broadcasting (Pty) Ltd* 2003 (5) SA 39 (W) at 43F
[11] *Camps Bay Residents and Ratepayers Association v Augoustides* 2009(6) SA 190 (WCC) at 195I- 196A
[12] *Breedenkamp* fn 11 above
[13] *Cliff* fn 10 above
[14] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC); see also *Cliff* at para 27

60. While there is clearly an alternative remedy, the answer to the question whether or not such remedy is sufficient to address the Applicant's rights which have been violated by the Respondents' dismissal of him remains in the negative. As I have mentioned earlier, the damage to his reputation is extant and the only way to cure this is to accede to his appeal for an interim relief. As in the case of the other requirements for an interim relief, I am satisfied that the Applicant has made a case that he does not have alternative adequate remedy.

APPPLICABILITY OF PDA

61. Logic dictates that I should be turning my attention to discussing whether or not it would be proper to grant specific performance. However, I thought I should tersely attend to the applicability of the Protected Disclosures Act to which I have referred above. Here the main argument of the Respondents, as I understood it, was that the Act could not be invoked because of lack of causality. My treatment of the issue must be understood in the context that I am taking causality to have been the only stumbling block between the parties.

62. The Respondents would let this Court believe that the issue concerning the Applicant's conflict of interest arose well before he made the disclosures. In short, this is factually misguided. The Respondents might have been holding meetings as early as January 2019 but it was not until retrieval of certain documents from archives of NMT during or at the end of April that they learnt of the alleged conflict. The discovery of the alleged conflict therefore came well after the disclosures. For this reason, the connection is apparent – disclosure followed by alleged conflict and then the occupational detriment. On the understanding that causality was the only issue, I find that the Applicant should be protected.

URGENCY

63. Lastly, it was indicated to this Court that urgency was contested. However, this came at the time when argument on the merits was advanced. As such, I would have been compelled to deal with the matter anyway. The assertion by the Respondents was that for as long as the Applicant has an adequate alternative remedy, urgency cannot exist. The need to dwell on this has been obviated by this Court's finding that the remedy available is not sufficient. Once that finding has

been made, it is inexorable to conclude that this matter ought to be heard as a matter of urgency.

INTERIM RELIEF SOUGHT IS IN REALITY FINAL

64. The Respondents also submitted that pragmatically the order sought is not interim but final. The basis of this contention was that if the Applicant is left with four and half years before retirement and assuming that he is reinstated and he subsequently institutes an action as promised, taking into consideration court processes including appeal, it is probable that by the time the matter is finalised, the Applicant would have stepped down already. Understood in this manner, the relief sought is final. The answer to this predicament was summed up by Counsel for the Applicant who stated that there would never be interim interdicts in those instances where the remaining period is twelve months. I need say no more.

SUITABILITY OF REINSTATEMENT

65. In this regard, I need to point out that it is trite that each case must be assessed on its own merits.[15] The Respondents contended that specific performance was not the most suitable in this situation especially because, if reinstated, the Applicant and the Board will have to work together to advance the interests of the Respondents. I do not think that this contention has a firm ground and I say so because if either party does not work to promote the interest of the Respondents, it will be immediately obvious. That could attract numerous forms of redress. In the case of the Applicant, it might in fact lead to justifiable dismissal.

COSTS

66. Both parties have argued for punitive costs on the attorney client scale in the event of success. Having regard to the facts of this matter I do not think that either party would deserve punitive costs in the event of losing to the other. Accordingly, costs will be assessed at the scale as between party and party.

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[15] *Somi* and *Motale* cases *supra*

CONCLUSION

67. The conclusion that the Respondents first accused the Applicant of conflict of interest and misconduct and then denied him of the procedures laid down in the contract, specifically clause 25, is unavoidable. Having done so, they then invoked Clause 24.1.1, which in reality had nothing to do with the situation that they faced with the Applicant. The point is Clause 24.1.1 was incorrectly applied and the dismissal cannot be justified on that ground. Both the suspension and subsequent dismissal were unlawful.

ORDER

68. Against that background I make the following order:

1. **"The normal rules are dispensed with and this application is heard as one of urgency in terms of Rule 6(12)(a);**
2. **Pending the hearing of Part B, the Applicant is temporarily reinstated in his position as Chief Executive Officer of the first respondent;**
3. **The First to 17th Respondents are interdicted from taking any steps towards appointing any person into the position of CEO of the First Respondent;**
4. **The Respondents are ordered to pay the costs of the Applicant including those occasioned by the employment of two Counsel;**
5. **The Applicant is granted leave to supplement the papers in respect of Part B.**

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

Date Heard	: 18 July 2019
Date of Judgment	: 30 July 2019
Counsel for the Applicant	: **D.C. Mpofu SC**
	T. Ngcukaitobi
	S. Gaba

Instructed by	: **Mabuza Attorneys**
Counsel for the 1st to 16th Respondents	: **N. H. Maenetje SC** **R. Tulk**
Instructed by	: **Bowman Attorneys**