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	First Respondent
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED	Second Respondent
TREVOR MANUEL	Third Respondent
THE NON-EXECUTIVE DIRECTORS OF OLD MUTUAL	Fourth to Sixteenth Respondents
NMT CAPITAL	Seventeenth Respondent

FIRST TO SIXTEENTH RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. The applicant was a chief executive officer of the first respondent ("*Old Mutual*") until 17 June 2019. He was highly paid.[1]

2. The applicant was employed in terms of a written contract of employment ("*the contract*").[2]

3. It is common cause that as a chief executive officer under the contract, "*maintaining the trust and confidence of the Board*" of Old Mutual was crucial.[3] This duty, which is implicit at the high level at which the applicant was employed, is given express content in clause 3.7 of the contract. This clause records that:

> "*3.7. The Executive acknowledges that because of the senior nature of his appointment, it is also essential that his senior colleagues, other senior employees of the Company and the Group, the Chairperson of the Board and/or the Board of the Employer have confidence in his performance and as such the Executive acknowledges that confidence in his performance forms an inherent and essential requirement of his appointment and continued employment with the Employer*."[4]

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[1] Answering Affidavit ("*AA*") p 170 para 12.
[2] PMM4 p 86.
[3] AA p 171 para 13.1; Replying Affidavit ("*RA*") p 375 para 56-57: the applicant only contests whether or not that trust and confidence had been eroded when his contract of employment was terminated.
[4] PMM4 p 87.

4. The importance of the relationship of trust and mutual respect is also reflected in clauses 12.1 and 12.2 of the contract, which deal with inherent requirements of the position.[5]

5. The contract contains a termination clause, namely clause 24.[6] Clause 24.1.1 is relevant to the present application. It provides as follows:

> "***24. Termination***
>
> *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:*
>
> *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 24.1.1 and 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.*"[7]

6. Clause 24.3 that is referred to in clause 24.1.1 quoted above sets out the practice that is adopted upon the termination of employment for whatever

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[5] PMM4 p 91.
[6] PMM4 p 103-104.
[7] PMM4 p 103.

reason.[8] It details what the applicant had to do once his employment was terminated.

7. It is plain from the express and clear terms of clause 24.1.1 of the contract that:

7.1. it gives both Old Mutual and the applicant the right to terminate it on notice; and

7.2. it does not prescribe, require nor limit the grounds upon which either Old Mutual or the applicant could terminate it on notice.

8. On 17 June 2019, Old Mutual gave the applicant a notice of termination of employment ("*the Notice*").[9] Paragraph 1 of the Notice states the following:

> "*1. The purpose of this letter is to give you notice of a decision of the OML & OMLACSA[10] Boards ("the Board") to terminate your employment in terms of the provisions of clause 24.1.1 of your contract of employment*."[11]

9. The Notice explains that the applicant would be paid for the notice period and would not be required to perform any further work.[12] The first to sixteenth respondents explain in their answering affidavit that the applicant

[8] PMM4 p 104.
[9] EMK1 p 269.
[10] This is a reference to the second respondent.
[11] EMK1 p 269.
[12] Para 2 p 269.

will shortly be paid a gross amount of approximately R4 million for the 6 months' notice period.[13]

10. In paragraphs 4 to 11, the Notice explains the reason for the decision to terminate the contract. It concludes at paragraph 11 that the applicant had been given a fair opportunity to engage with the Board and to respond to the concerns raised with him, and that the necessary relationship of trust and confidence between the applicant and the Board had broken down completely.[14]

11. In paragraphs 12 and 13 of the Notice, Old Mutual explains that:

    11.1. the conduct of the applicant could provide a fair reason for terminating the contract in terms of clauses 24.1.3 or 24.1.4 of the contract;

    11.2. but that, in order to mitigate the adverse effect on the applicant of the termination of employment, the Board resolved to terminate the contract on notice in terms of clause 24.1.1 of the contract.

12. In his replying affidavit, the applicant appears to contend that Old Mutual was not entitled to terminate the contract in terms of clause 24.1.1 because the conduct complained of against the applicant could also constitute

[13] AA para 12.3 p 170.
[14] EMK1 p 271 para 11.

misconduct. He appears to contend that in those circumstances Old Mutual was obliged to terminate the contract following a disciplinary hearing or pre-dismissal hearing as envisaged in clause 25.1 of the contract.[15] We will demonstrate below that this submission has no merit at all.

13. It is against this backdrop that the merits of the applicant's urgent interim relief application, under Part A of the notice of motion, should be assessed.

14. The applicant makes it clear in his founding affidavit that this urgent application is only concerned with the relief sought under Part A.[16] The relief under Part B is to be sought in subsequent proceedings.[17]

15. In his replying affidavit, the applicant makes it clear that the subsequent proceedings will be by way of action and not motion.[18]

16. At the time when the applicant launched the present proceedings, on 27 June 2019, he had 4 and half years left to his contract.[19] If temporarily reinstated, it will be long before Old Mutual is able to appoint a new chief executive officer as he will be instituting Part B by way of action proceedings.

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[15] EMK1 p 104.
[16] Founding Affidavit ("*FA*") para 13 p 8 and para 117 p 38.
[17] FA para 118 p 38.
[18] RA para 68 p 377.
[19] FA para 38 p 16.

PART A RELIEF SOUGHT

17. Pending the hearing and determination of the Part B relief, which is to be sought in action proceedings, the applicant seeks the following substantive relief:

> "*2. Temporarily reinstating the applicant in his position as Chief Executive Officer of the first respondent;*
>
> *3. Interdicting the first to [sixteenth] respondents from taking any steps towards appointing any person into the position of CEO of Old Mutual;*
>
> *4. Declaring the suspension of the applicant on 23 May 2019 to be prima facie unlawful, unconstitutional and/or null and void;*
>
> *5. Declaring the dismissal of the applicant on 17 June 2019 to be prima facie unlawful, unconstitutional and/or null and void;*
>
> *6. Declaring that, as a result of prayers 4 and 5, the following constitutional rights of the applicant have been prima facie violated by the respondents:*
>
> *6.1. the right to human dignity in terms of section 10 of the Constitution;*
>
> *6.2. the right to freely practice his chosen trade and/or occupation in terms of section 22 of the Constitution; and*
>
> *6.3. the right to privacy*."[20]

18. There is no relief sought to declare the directors of Old Mutual (i.e. the fourth to sixteenth respondents) as delinquent directors or to have them removed as directors. Such relief will only be determined in the action proceedings that

[20] Notice of Motion ("*NoM*") p 2.

are to be instituted with respect to the Part B relief. This is relevant to the issue of their misjoinder.

19. The throwaway line in the applicant's replying affidavit that *"[i]t is quite acceptable to appoint an interim board*" and references made to section 172(1)(b) of the Constitution[21] make no sense at all and have no place nor any legal basis under Part A.

20. The consequence is that the applicant wants this Court to reinstate him as the chief executive officer of Old Mutual pending the outcome of Part B relief that is to be sought in action proceedings, in circumstances where he has made significantly disparaging remarks against all fourteen non-executive members of the Board and wants them all declared delinquent under the Companies Act.[22]

21. Let alone that the facts upon which the applicant will rely in the action to have all fourteen directors declared delinquent are unlikely to meet the stringent requirements of section 162 of the Companies Act, his conduct in these proceedings makes it plain that no relationship of <u>trust, confidence and mutual respect</u> is left between him and the Board. It has broken down completely.

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[21] RA para 101 pp 385-386.
[22] Companies Act, 71 of 2008.

22. The Board will be in place during the period when the applicant is reinstated as the chief executive officer of Old Mutual pending the outcome of his Part B action. But the applicant will, simultaneously, be actively litigating against the Board whose trust, confidence and mutual respect he is required to keep in terms of the contract (for example, clauses 3.7, 12.1 and 12.2).

23. It is plain that any temporary reinstatement (which will in effect be permanent given the length of time that action proceedings will take to be finally concluded) cannot at all constitute an appropriate remedy and cannot be granted.

24. If reinstatement is not granted, it follows that Old Mutual ought not to be restrained from filling the position of chief executive officer pending the final determination of Part B. Its business would be significantly prejudiced by the inability to fill the position permanently. In any event, the applicant has no right under any law for such a restraint to be granted against Old Mutual.

SUMMARY OF OLD MUTUAL'S SUBMISSIONS

25. We submit below that the application should be dismissed with costs, including the costs of two counsel, for the following reasons in summary:

25.1. The application is not urgent. The applicant will get appropriate relief in due course if he succeeds under Part B. This is plain from a proper consideration of the purpose of the application as set out in paragraph 15 of the founding affidavit.[23]

25.2. Old Mutual lawfully terminated the contract in terms of clause 24.1.1. This clause did not preclude Old Mutual from relying on a breakdown in the relationship of trust and confidence in terminating the contract.

25.3. Clause 24.1.1. of the contract is not contrary to public policy. Its enforcement was also not contrary to public policy in the circumstances. The applicant does not even attempt to make out a case to the contrary in his founding affidavit, choosing instead to list a number of constitutional rights that he contends were infringed.

25.4. There is no legal basis upon which to develop the common law in order to introduce a requirement of fairness in clause 24.1.1 of the

[23] At p 9.

contract or to make reinstatement an automatic remedy under the common law of contract.

25.5. There has been no breach of any constitutional rights or the PDA[24] justifying the Part A relief sought.

25.6. Even if the applicant were able to demonstrate that some right of his was infringed by the termination of the contract, which is contested, temporary reinstatement and an interdict to stop the filling of the position of chief executive officer of Old Mutual is not appropriate and cannot be granted at all, especially in the current circumstances. The applicant has no legal basis to assert such a remedy as of right.

25.7. The issue of the lawfulness of the suspension is academic in light of the termination of employment. In any event, no case is made out on the relevant authorities that the suspension was unlawful.

25.8. The applicant has failed to meet the other requirements for interim relief.

25.8.1. He will suffer no irreparable harm because he has an effective alternative remedy. The Part B relief is such an effective and

[24] Protected Disclosures Act, 26 of 2000.

alternative remedy which will, if successful, fully compensate him for whatever harm he contends he has suffered. It is clear from paragraph 15 of the founding affidavit read with the replying affidavit that the applicant wants to pursue a damages claim.

25.8.2. He does not require interim relief of any kind to preserve the right to institute the damages claim and to recover all the damages that he is entitled to in order to compensate for any harm that he is able to prove.

25.8.3. The balance of convenience does not favour the applicant. It is clear from his founding affidavit read with the replying affidavit that if he is reinstated temporarily, he wants the Board to be removed. Admittedly he cannot function with the current Board. But he has not sought the removal of the Board under Part A. Reinstating him will therefore result in dysfunction, whereas not reinstating him and permitting Old Mutual to fill the position of chief executive officer will result in stability. On the other hand, if the applicant succeeds under Part B he will recover the damages that he is able in law to prove.

25.8.4. The declaratory relief under paragraphs 4 to 6.3 of the notice of motion is final relief and requires proof of a clear right. The Court cannot grant declaratory orders in the interim. The Part B relief that is claimed does not include these declaratory orders – further showing that they are final relief. In any event, even if considered interim as claimed, the applicant has not made out a proper case for the declaratory orders to be granted.

25.8.5. There is a misjoinder of the fourth to sixteenth respondents in these Part A proceedings.

26. We submit below that the facts of this case justify a punitive costs order. The misjoinder of the fourth to sixteenth respondents is also relevant to this issue.

27. We make our further submissions under the following headings:

27.1. The application is not urgent.

27.2. The termination of contract was lawful. Under this heading we will also address the enforceability of clause 24.1.1 and the absence of any legal basis to develop the common law to introduce a requirement of fairness into this clause.

27.3. No constitutional rights or the PDA infringed.

27.4. Temporary reinstatement is not an appropriate remedy.

27.5. The other requirements for interim relief are not met.

27.6. The declaratory orders constitute final relief.

27.7. The misjoinder of fourth to sixteenth respondents.

27.8. Special costs order.

27.9. Conclusion.

THE APPLICATION IS NOT URGENT

28. One of the absolute requirements in urgent applications is why an applicant will not be afforded substantial redress in due course. Failure to satisfy this requirement would justify striking off the matter from the roll.[25]

29. It is clear from the Part B relief that is to be sought by way of action, as well as paragraph 15 of the founding affidavit,[26] that the applicant will be afforded substantial redress in due course.

30. Permanent reinstatement (under Part B) would mean that the contract is treated as never having been broken. The contract will be restored and any amount due would be part of the applicant's entitlement.[27] Added to this the claim for any damages suffered on all the potential causes of action identified in respect of Part B, the applicant will be afforded substantial redress in due course.

31. The mere allegation that constitutional rights have been infringed does not render the matter urgent.[28]

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[25] *Moyane v Ramaphosa and others* [2019] 1 All SA 718 (GP) para 33. The Court referred to *Luna Meubels Vervaardigers* (*Edms*) *Bpk v Makin* 1977 (4) SA 135 (W) at 137F–H.
[26] At p 9.
[27] *De Beer v Minister of Safety and Security/Police and another* [2013] 10 BLLR 953 (LAC) para 27.
[28] *Moyane v Ramaphosa and others* [2019] 1 All SA 718 (GP) para 33; *Hotz and others v University of Cape Town* 2018 (1) SA 369 (CC) at para 15.

32. For the above reasons, there is no basis made out why the applicant should be permitted to jump the queue.

33. The Court may strike the matter off the roll or dismiss it with costs on the merits.

34. We turn to submissions in support of a dismissal with costs.

THE TERMINATION OF CONTRACT WAS LAWFUL

35. Clause 24 of the contract, the termination clause, provides for termination under various circumstances:

35.1. The first is termination on notice by either Old Mutual or the applicant on 6 months' notice, and no reason or process is prescribed (clause 24.1.1).

35.2. The second is upon reaching the normal retirement age (clause 24.1.2).

35.3. The third is on the basis of grounds regarded as valid under the LRA, with or without notice (clause 24.1.3).

35.4. The fourth is termination for any other lawful and fair reason (clause 24.1.4).

35.5. The fifth is for the specific reasons listed under clauses 24.2.1 to 24.2.7 and which exist without limiting the generality of the right to terminate conferred by clause 24.1 (clause 24.2).

36. The import of clause 25.1 of the contract relates to where Old Mutual raises allegations of misconduct or incapacity and wishes to terminate employment (summarily or with notice) on the basis of a finding that the employee is

guilty of such misconduct or suffers the alleged incapacity (for example, clauses 24.1.3, 24.1.4, 24.2.1 and 24.2.3). In those circumstances, Old Mutual has to follow the process under clause 25.1 read with the Disciplinary Code.[29] The Disciplinary Code requires a formal disciplinary process in respect of misconduct that may result in dismissal.

37. This means that formal charges of such misconduct would have to be preferred against the employee, calling the employee to a formal hearing. No such formal charges were preferred against the applicant in this case, calling him to a hearing because Old Mutual terminated the contract in terms of clause 24.1.1 of the contract.

38. Clause 24.1.1 does not incorporate the requirement of fairness that the applicant would otherwise enjoy under the LRA. He has abandoned reliance upon the LRA.

39. The applicant's contention is legally incorrect that there was a breach of a common law right because his:

> "*… dismissal [was] not accompanied by the commonly accepted right to face my accusers in a disciplinary hearing*".[30]

[29] PMM21 p 391.
[30] FA para 129 p 41.

40. There is no such common law right. It could only exist if clause 24.1.1 contained an express or implied term to subject the applicant to a disciplinary hearing prior to the termination of the contract on notice.

41. It is clear that clause 24.1.1 does not contain such an express term. No case is made out in the founding affidavit for an implied term either. As the SCA made clear in *Transman*, it was the duty of the applicant not only to plead a contractual claim but also to prove facts from which a contended term could be inferred.[31] This was not done.

42. Furthermore, such a term cannot not be imported into clause 24.1.1. by developing the common law. Such a contention was rejected by the SCA in *South African Maritime Safety Authority v McKenzie*:[32]

> *"[55] I do not think that any of the cases I have referred to can be said to have decided authoritatively that the common law is to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices. It is uncontroversial that the LRA is intended to give effect to that constitutional right and I see no present call, certainly not in this case, for the common law to be developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act). The obiter dictum in Gumbi, which has been reiterated without elaboration, and without apparent consideration of the matters that have been dealt with in this judgment, cannot be considered to be authoritative.*
>
> *[56] In my view, the interpretation given to the cases mentioned goes further than the judgments warrant and they provide no obstacle to the correctness of the analysis set out above. That*

[31] *Transman v Dick and another* [2009] 3 All SA 183 (SCA) paras 28-30.
[32] *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA).

analysis concludes that, in so far as employees who are subject to and protected by the LRA are concerned, their contracts are not subject to an implied term that they will not be unfairly dismissed or subjected to unfair labour practices. Those are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to those rights. The present is yet another case in which there is an attempt to circumvent those rights and to obtain, by reference to, but not in reliance upon, the provisions of the LRA an advantage that it does not confer. It is precisely similar attempts that, in my view, occasioned the recent jurisdictional debate in cases such as Chirwa, Makhanya and Gcaba.

[57] In both Constitutional Court decisions concerns are expressed that the cases before the court involved attempts to circumvent the LRA. That seems to me to have been a correct perspective but the problem is resolved once it is recognised that we are not concerned with jurisdictional issues but with the substantive rights of the parties. Thus in Wolfaardt the issue was the plaintiff's entitlement to the benefit of the full fixed term for which he had contracted. In Chirwa and Gcaba it was whether the conduct complained of constituted administrative action. All three claims were advanced on a basis that placed them within the jurisdiction of the High Court, but in the latter two the claims were without merit because they did not involve administrative action.

[58] In the present case the issue is whether Mr McKenzie's contract contains a term implied by law as pleaded by him. That is a question within this Court's jurisdiction and, in my view, the answer is that it does not. What creates difficulties is when the merits of a claim are confused with the jurisdiction to deal with it. Once it is shown that claims such as the present one or those in Chirwa and Gcaba are without merit they will no longer be pursued in any court and one suspects that the jurisdictional quagmire will prove to be nothing more than a muddy puddle that should have been avoided had the parties focussed on the merits of the claims rather than trying to avoid them by way of jurisdictional challenges. In the present case there was nothing wrong in Mr McKenzie pursuing his claim in the High Court. However, it is not a good claim and the only viable claim he could have brought based on those allegations had to be pursued, as indeed it was, before the CCMA.

[59] That conclusion suffices to justify a finding that the second of the special pleas should have been upheld on the basis, not that it raised a question of jurisdiction, but on the footing that it placed in dispute and required a decision on the merits of Mr McKenzie's contention that his contract of employment was

> *subject to a term that it would not be terminated without just cause. That contention is without merit*." (Emphasis added)

43. Old Mutual was entitled to terminate the contract under clause 24.1.1 for loss of trust, confidence and mutual respect because that clause does not prescribe the reason for termination, nor does it preclude reliance upon loss of trust, confidence and mutual respect as a reason for termination.

44. The above approach has been approved and followed in other comparable cases, such as *Joni v Kei Fresh Produce Market*[33] where there was also a termination clause that was set out in clear and unambiguous terms. The defendant was granted absolution from the instance on the basis that the plaintiff had failed to demonstrate a *prima facie* right to the relief based on a claim for damages arising out of an alleged unlawful termination of a fixed term contract. The Court held as follows:

> "*e) I accept that if no termination clause was present the right of termination would be restricted in terms of the common law but there is a termination clause present here that is set out in clear and unambiguous terms.*
>
> *f) In Lottering v Stellenbosch Municipality Cheadle AJ held at page 4 as follows:*
>
> > *"If the contract is for a fixed term, the contract may* ***only*** *be terminated on notice* ***if there is a specific provision permitting termination on notice during the contractual period – it is not an inherent feature of this kind of contract and accordingly requires specific stipulation****". (my emphasis)*

[33] *Joni v Kei Fresh Produce Market* (2018) 39 ILJ 2405 (ECM).

g) In this case the agreement specifically provided for termination on one calendar months' notice.

h) There was a notice of termination served on the Plaintiff, the notice for termination is undated but the Plaintiff has not raised the fact that this notice did not comply with the terms set out in the agreement or failed to constitute a one calendar months' notice.

i) There was no restriction placed on the grounds upon which the contract could be terminated.

j) The Defendant in this case provided the Plaintiff with the reasons for termination being that of operational requirements.

k) It is clear that in this agreement there was no closed lists of grounds upon which an agreement could be terminated by giving one month's notice.

l) Clause 10.2 of the agreement cannot be restrictively interpreted to exclude the possibility of retrenchment and is indeed wide enough to cover this situation such inclusion would not be against public policy.

m) The implementation of the terms of the clause in this instance is not unjust or inequitable. (If indeed this court would be able to go into those grounds).

n) Clause 10.3 of the agreement is not applicable to this situation as it speaks about summary termination which would in all likelihood deal with instances of gross misconduct or material breaches of the agreement that warrant immediate termination thereof.

12. The Plaintiff has unfortunately failed to demonstrate a prima facie right to the relief sought. She has failed to demonstrate that her contract was wrongfully and unlawfully terminated. The agreement was lawfully terminated in accordance with the provisions of the agreement."

45. In *Gama v Transnet SOC Limited,*[34] the Labour Court dealt with a termination clause on notice. Unlike clause 24.1.1 of the contract, the termination clause in *Gama* not only provided for a 6 months termination

[34] *Gama v Transnet SOC Limited*, Case no. J370/18 (22 November 2018), unreported.

notice, but provided in clause 15.3 that "… *nothing in this clause or this contract shall exempt Transnet from following fair pre-dismissal procedures as and when required in terms of applicable legal principles and/or legislation*".[35]

46. The Labour Court held *inter alia* as follows:

> "*[42] It may be so that the Applicant has a contractual right to a disciplinary hearing, but in casu it is evident that the Board has not terminated the Applicant's employment for misconduct, but rather for loss of trust and confidence in his ability to manage Transnet. The Applicant has not shown a prima facie right to a disciplinary hearing in circumstances where his employment is terminated for reasons other than misconduct and he has not crossed the first hurdle to establish that he has a prima facie right*."

47. The present is an even weaker case for the applicant.

47.1. He definitely has no contractual right to a disciplinary hearing in relation to termination in terms of clause 24.1.1 of the contract.

47.2. The Board expressly terminated the contract for loss of trust and confidence (and mutual respect) and not misconduct.

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[35] At para 3.

47.3. The applicant has not demonstrated a *prima facie* right to a hearing where his employment is terminated for reasons other than misconduct.

48. As we have submitted above, the applicant has made no case whatsoever that clause 24.1.1 of the contract, or its enforcement under the circumstances, is contrary to public policy. This is the proper approach to assessing contracts under the Constitution and not by listing various rights under the Constitution, which were allegedly infringed.[36] Absent a case based on public policy, Old Mutual was entitled to enforce the clause.

49. In any event, the enforcement of the clause could never be contrary to public policy, where a highly placed executive such as the applicant is equally given the right by the clause to terminate the contract on 6 months' notice.

50. If the Court were to reject all of the submissions above and find that fairness was required, we submit that the applicable standard of fairness was met on the facts. That standard cannot, under contract, be more stringent than that under the LRA. The Labour Court has endorsed an informal approach to procedural fairness under the LRA. That standard requires an investigation

[36] The SCA summarized the applicable principles in *AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae)* [2019] 1 All SA 1 (SCA) para 27. See also *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) para 28-30; *Bredenkamp and others v Standard Bank of SA Ltd* [2010] 4 All SA 113 (SCA) para 47-51.

by the employer into any alleged misconduct by the employee; an opportunity for the employee to respond after a reasonable period with such assistance that he might require; and a decision by the employer that is notified to the employee (preferably in writing). In effect, this means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.[37] It does not insist on formal charges, the leading of evidence, etc, as if emulating the criminal justice model.

51. On the established facts, Old Mutual investigated the concerns that led to the breakdown in trust and confidence and afforded the applicant a reasonable opportunity to address them prior to taking the decision to terminate the contract. The applicant took the opportunity to respond to the concerns and his responses were considered before the decision to terminate was taken.[38]

[37] *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC) at 838 and following.
[38] See *inter alia* AA para 109 p 207 – para 134 p 218.

NO CONSTITUTIONAL RIGHTS OR PDA INFRINGED

Constitutional rights

52. The applicant lists in paragraph 139 of the founding affidavit about five rights that he contends have been infringed.[39]

53. There is no merit in the contentions made at all (let alone that they reflect an incorrect approach to assessing the constitutional validity of the enforcement of a contractual entitlement under clause 24.1.1 of the contract).

54. The first right is to equality as more specifically set out in the BBBEE Act.[40] Despite the highly charged language used in his replying affidavits, the applicant concedes that he is not a beneficiary of the BBBEE Act.[41] Other than reliance on the BBBEE Act in line with the principle of subsidiarity,[42] no case for unfair discrimination based on race is made out in terms of section 9 of the Constitution. There is no reliance at all placed on the Equality Act.[43]

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[39] FA pp 44-46.
[40] Broad-Based Black Economic Empowerment Act, 53 of 2003. FA para 139.1 p 44.
[41] AA paras 154.2-154.3 p 228; RA para 47.10 p 373, paras 102-105 p 386.
[42] *My Vote Counts NPC v Speaker of the National Assembly and others* 2015 (12) BCLR 1407 (CC):

> "*[69] The principle provides that one may not rely directly on the Constitution in the face of legislation designed to give effect to it; one must treat the Constitution as subsidiary to the legislation. But the crucial point is that the principle operates only if the legislation is not under constitutional attack*. …"

[43] Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

55. The second right is to human dignity in terms of section 10 of the Constitution.[44] Reliance on *Dey*[45] is misplaced. That concerned a dignity claim, which the applicant is still to institute under Part B. There is nothing inimical to a highly paid executive's dignity for Old Mutual to enforce clause 24.1.1., which has not been shown to be contrary to public policy, nor its enforcement in the circumstances of this case.

56. The third right is freedom of trade, occupation and profession in terms of section 22 of the Constitution.[46] This must relate only to the first part of section 22, i.e. that every citizen has the right to choose their trade, occupation and profession freely because Old Mutual is not purporting to regulate the practice of any profession. The content of the section 22 right

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[44] FA para 139.2 p 44.

[45] *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC) para 154:

> "*[154] Our common law recognises that people have different claims for injuries to their reputation (fama) and to their own sense of self-worth (dignitas). Both are affronts to the rights of personality, and although the Bill of Rights does not always draw sharp lines between the two, the distinction is important to our new constitutional order. It illuminates the tolerance and respect for other people's dignity expected of us by the Constitution in our public and private encounters with one another. We may be deeply hurt and insulted by the actions of others, in calling or portraying us as what we have chosen, freely, not to be, or to keep private, even though we are not defamed. It may be that the personal insult or injury may not be considered, in the public eye, as something that harmed our reputation. But within limits our common law, and the Constitution, still value and protect our subjective feelings about our dignity. It is this difference between private and public esteem that explains, in our view, why Dr Dey cannot succeed in his defamation claim, but must do so in his dignity claim*." (Emphasis added)

[46] FA para 139.3 p 45.

was considered in *Affordable Medicines*.[47] It is difficult to understand what is being claimed under this right by the applicant. Section 22 does not guarantee the occupation of a position – let alone in a private entity such as Old Mutual. In any event, the termination of the applicant's employment does not prevent the applicant at all from practising his long and chosen career as a business executive. He is free to do so in other entities, such as the seventeenth respondent. The Constitution envisages that employees may be dismissed and that is why it provides protection under section 23 of the Constitution, which has been given effect to by the LRA. The applicant has chosen to abandon that protection. Dismissals under the LRA cannot be considered unconstitutional because of section 22 of the Constitution. Sections 22 and 23 of the Constitution have to be read in harmony with each other.

57. The fourth right is privacy in terms of section 14 of the Constitution.[48] It is difficult to understand how reliance on this right could impugn the termination of the contract. First, highly placed and paid executives like the applicant must expect their affairs to be made public in the regulatory reporting that their employers are required to make. Secondly, any disclosure

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[47] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) paras 61-66.

[48] FA para 139.4 p 45.

of information complained would have happened after the termination. How such a disclosure could render the termination itself unlawful boggles the mind.

58. The fifth right is ubuntu and good faith dealings.[49] The Bill of Rights does not guarantee such rights. The references to statements made in *Makwanyane*,[50] which were made in the context of interpreting the Bill of Rights, are wholly unhelpful. The relevant question here is what rights protected by the Bill of Rights have been infringed.

The PDA is not properly invoked and does not apply

59. The alleged protected disclosure is set out in paragraph 133 of the founding affidavit.[51]

    59.1. The nub of the applicant's contention is that the "*failure to disclose the payment of hefty legal fees, could expose the company to a contingent risk and was inherently prejudicial to the company. It was also improper and flagrant breach of the Companies Act and the applicable corporate governance principles*."[52]

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[49] FA para 139.5 p 45.
[50] *S v Makwanayane and Another* 1995 (3) SA 391 (CC) paras 308 and 311.
[51] FA p 42.
[52] FA para 133.4 p 42.

59.2. The applicant claims to have made the disclosure to the Nominations Committee[53] in accordance with Old Mutual Whistle-blowing policy ("*the Policy*"), annexure PMM15.[54] He does not specify the date when the disclosure was made.

60. The Policy states that it "*guides you on how to raise concerns about possible unlawful and unethical conduct or breaches of company Policy in a safe way*".[55]

61. The applicant makes vague allegations that he is advised that it will be argued that the detailed requirements of the PDA were met in the totality of the circumstances.[56] Then he jumps to alleging victimisation as a result of the disclosure – i.e. the detriment that he allegedly suffered.

62. This pleading is wholly inadequate in order to invoke and justify the protections under the PDA.

62.1. First, it is unclear on what factual and legal basis the alleged disclosure meets the definitional elements of "*protected disclosure*" in section 1 of the PDA. Is it a disclosure in terms of sections 6 or 9 of the PDA?

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[53] FA para 133.1 p 42.
[54] FA para 133.5 p 42. PMM15 p 141.
[55] PMM15 p 141.
[56] FA para 134 p 42.

62.2. Second, if it is a disclosure made in terms of section 6, it must be for reporting or remedying the impropriety concerned, as envisaged in section 6(1)(a). But the first to sixteenth respondents have proved that the payment of legal fees in the circumstances did not constitute an impropriety and carried the support of the applicant, which is common cause.[57] Given the common cause facts, the applicant now contends that his complaint was not about the payment of the legal fees per se but the "*non-disclosure of the payments*".[58] This is, with respect, an unsustainable claim for three reasons:

62.2.1. First, it contradicts the basis of his claim in the founding affidavit that the payment of hefty legal fees could expose the company to a contingent risk and was inherently prejudicial to the company. Further that the payments were also improper and constituted flagrant breaches of the Companies Act and the applicable corporate governance principles.[59]

62.2.2. Secondly, the minutes of the Nominations Committee concerning the payment of the legal fees makes it clear that:

"*It was further agreed that advice should be obtained in*

[57] AA paras 31-33 pp 177-178; RA p 377 para 65.
[58] RA para 66 p 377.
[59] FA para 133.4 p 42.

respect of the requisite disclosure in the Annual Financial Statements, if required."[60] (Emphasis added)

62.2.3. The agreement referred to above, which was also approved by the Board, included the applicant whereas the third respondent had recused himself.[61] The applicant subsequently approved the annual financial statements of the company.[62]

62.2.4. Third, and most importantly, in light of the minutes of the Nominations Committee, there could be no bona fide disclosure of information that constitutes impropriety as per the definition of "*impropriety*" read with that of "*disclosure*" under the PDA.

62.2.5. Whatever the legal obligation existed in relation to the disclosure of the payments of the legal fees, the agreement recorded in the minutes of the Nominations Committee, and its subsequent implementation, make it abundantly clear that none of the organs of the company "*has failed, is failing or is likely to fail to comply with any legal obligation*" to which the organs were subject to; nor that any of the other elements of the

[60] EMK2 p 273.
[61] AA para 36.5 p 181.
[62] AA para 36.8 p 182.

definition of "*disclosure*" were met.

62.3. Third, if it is a disclosure in terms of section 9 of the PDA, none of the conditions of that section are met and no case is made out in the founding affidavit that they are met.

62.3.1. First, it is impossible that the applicant could have made the purported disclosure in the reasonable belief that the alleged information disclosed was true because there was no impropriety or unlawfulness in the payments made, which carried his support.

62.3.2. Secondly, none of the conditions in section 9(2) are met. They are not even addressed in the founding affidavit.

62.4. Fourth, no causality is established between the alleged disclosure and the termination of the contract (or indeed the suspension). There are two aspects to this issue: the chronology of events, which is the only aspect that the applicant focuses on in his replying affidavit,[63] and the evidence of the first to sixteenth respondents that the alleged disclosures did not feature at all in relation to the decisions to suspend the applicant and to terminate his contract. Both of these must be

[63] RA paras 70-71 p 378.

determined on the first to sixteenth respondents' version in terms of the *Plascon Evans* rule.[64] This Court confirmed this approach in a Full Court appeal in *Damane v Central Energy Fund*.[65]

62.4.1. First, the first to sixteenth respondents set out the sequence of events from paragraph 36 of their answering affidavit.[66] The sequence of events disproves the applicant's claim that the termination of the contract (and his suspension) was the direct result of his purported disclosure.

62.4.2. At best for the applicant, there is a dispute of fact regarding the sequence of events. But the presence of a dispute of fact in motion proceedings counts against him and cannot support interim relief based on the PDA.

62.4.3. Secondly, the evidence of the first to sixteenth respondents is that the issue of the legal fees was not connected at all with the decision to terminate the applicant's contract (or to place him

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[64] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[65] *Damane v Central Energy Fund* (A5048/2012) [2013] ZAGPJHC 71 (15 March 2013):

> "*19. The appellant, having chosen to proceed by way of an application, the matter fell to be decided upon the familiar principles set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) … . That means that the respondent's version trumps the applicant's allegations, where they cannot be rebutted (at 634E- 635B)*."

[66] At pp 180 and following.

on suspension) and the discussions held relating to this. That evidence does not constitute a mere denial of the applicant's allegations in this regard. It is extensive evidence given by persons that were present at the relevant meetings and include the role players.[67] It cannot be rejected out of hand as per *Plascon Evans.*

62.5. We submit that on the body of evidence that is before the Court, no causal connection between the termination of the contract and the alleged protected disclosure is demonstrated, even on a *prima facie* basis. The opposite is demonstrated.

63. It follows that allegations made in relation to the PDA cannot form the basis for the interim relief sought, purportedly to advance the objectives of the PDA.

[67] AA paras 93-134 pp 201-218.

TEMPORARY REINSTATEMENT IS NOT AN APPROPRIATE REMEDY

64. The authorities are clear on two issues:

64.1. First, reinstatement, the applicant's primary remedy in the notice of motion, is a discretionary remedy that cannot be asserted as of right (even under the LRA).[68] Fabricius J said so in *Moyane,*[69] a case that the applicant says his attorneys were familiar with at all times:[70]

> "*[36] The primary relief that applicant seeks is reinstatement. He has not demonstrated and cannot demonstrate such a right. It is a discretionary remedy even in Employment Law, which does not even apply on the present facts. However, even if applicant was able to demonstrate that his contract of employment was terminated unlawfully, an order for reinstatement would not automatically follow in instances where it is firstly discretionary, and secondly, where a special relationship of trust exists between the employer and employee. In the present matter a special relationship of trust must exist between the President and the Commissioner of SARS. The President must implicitly trust the particular Commissioner that he will properly, conscientiously and lawfully carry out the functions assigned to him under the provisions of section 9 of the SARS Act. It is clear in the present instance, that this relationship has broken down irretrievably. The President has lost all confidence in the applicant and justifiably so. The reasons emanate clearly from the third respondent's interim report. There is however another important reason: applicant has attacked the integrity and dignity of the President on a number of occasions, and such attacks, given the present context, and the President's actions, are particularly reprehensible. It is clear that the applicant has no respect for neither the institution of the Office of the President, nor the first respondent*

[68] Without deciding finally crucial issues relating to the dismissal. See also *De Beer v Minister of Safety and Security/Police and another* [2013] 10 BLLR 953 (LAC) para 27.
[69] *Moyane v Ramaphosa and others* [2019] 1 All SA 718 (GP).
[70] RA para 55 p 374 where he tries to distinguish *Moyane*'s case from the present on the basis of incorrect reasoning, and invokes morality.

> *personally. He has accused the President of abdicating his powers to administer. He alleged that the President violated his oath of Office. He avers that the President has waged a co-ordinated assault on his constitutional right. He submits that all the President's actions were part of a "pre-rehearsed script". He says that the President was motivated by ulterior and improper motives. At the same time however, as I have said, he has ignored the quagmire that SARS had sunken into under his leadership. He offers no explanation, gives no evidence, refuses to co-operate in any respectable and meaningful way, and seeks to undermine and defame at every possible opportunity. I will refer to this topic again when I deal with the question of an appropriate cost order.*" (Emphasis added)

64.2. Second, specific performance in the form of re-instatement is not appropriate in circumstances where there is a breakdown of trust between an executive manager of a company and its Board. Contractual damages or alternative remedies are more appropriate in those circumstances. Prinsloo J said so in *Gama*:[71]

> "*[47] In my view, specific performance in the form of re-instatement is not appropriate in circumstances where there is a breakdown of trust between an executive manager of a company and its Board. Contractual damages or alternative remedies are more appropriate in those circumstances*."

65. There is simply no basis to develop the common law to the contrary.[72]

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[71] *Gama v Transnet SOC Limited*, Case no. J370/18 (22 November 2018), unreported.
[72] FA para 119 p 38.

66. The first to sixteenth respondents have provided cogent and sufficient evidence to support the loss of trust, confidence and mutual respect in the applicant.[73] The objective facts justify the loss of trust, confidence and mutual respect. The applicant's contentions in paragraph 23 of his replying affidavit make no sense:

> "*23. My stance in this regard is simply that there was no objective basis for such a breakdown, that it was manufactured for ulterior motives and that it in any event, it does not automatically follow that, if there is indeed such a breakdown, it must always be the victim who must lose his job*. …"[74]

67. Embedded in this paragraph in the replying affidavit is:

67.1. the continuing accusation that all non-executive members of the Board acted against him for ulterior motives;

67.2. the contention that it is the Board that must be dismissed, and he must remain;

67.3. an inability to appreciate that it is him who contracted on the basis that trust, confidence and mutual respect with *inter alia* the Board is crucial.

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[73] AA paras 12-40 pp 170-186.
[74] RA para 23 p 366.

68. The objective facts support the loss of trust, confidence and mutual respect by the Board in the applicant. It is indeed the Board's value judgment that matters in the first instance on whether trust, confidence and mutual respect has been lost. The value judgment is based on the objective facts. Those have been set out at length in the first to sixteenth respondents' answering affidavit.[75]

69. In any event, the applicant's founding and replying affidavits provide ample proof that there is no trust, confidence and mutual respect that remains between him and the Board.[76]

70. The applicant has no legal right to assert with regard to the filling of the position of chief executive officer pending the outcome of his Part B relief.

    70.1. Even if the applicant succeeds in the Part B relief he may not be reinstated as re-instatement is a discretionary remedy.

    70.2. If the applicant does not get reinstated in the interim, as he shouldn't, Old Mutual cannot be exposed to the prejudice of not having a permanent chief executive officer appointed.

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[75] And summarized at *inter alia* AA paras 123-126 pp 211-217.
[76] AA paras 35-35.2 pp 179-180.

70.3. Even in employment law the employer is entitled to fill the relevant position whilst facing an unfair dismissal claim. The employer does so at its peril, but cannot be prevented from doing so by way of an interim interdict.

70.4. The applicant has alternative remedies, already foreshadowed as part of its Part B relief to be sought in future action proceedings.

THE OTHER REQUIREMENTS FOR INTERIM RELIEF ARE NOT MET

71. The applicant has effective alternative remedies in Part B,[77] as was also pointed out in *Moyane*[78] and *Gama*.[79] He requires no interim relief to secure those remedies.

72. He will, in consequence, suffer no irreparable harm if interim relief is not granted. Irreparable harm is not just his right to institute proceedings for the Part B relief.[80] In *Afriforum*,[81] the Constitutional Court described the requirement for irreparable harm as follows:

> "*[55] Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already. To gain a better understanding of the relevance or appropriateness of Afriforum's best efforts to meet this requirement, it is necessary that the meaning, nature or essence of harm be explored.*
>
> *[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily, the harm sought to be prevented through interim relief must be connected to the grounds in the main application*."

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[77] AA para 194 pp 263-264.
[78] At para 37.
[79] At para 47.
[80] *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene)* 2012 (11) BCLR 1148 (CC) para 50.
[81] *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (9) BCLR 1133 (CC).

73. Future harm related to the loss of his position will be fully restored if he succeeds in obtaining permanent reinstatement. This will also assuage any alleged harm under the PDA if he succeeds in showing any breach of the PDA, which he has failed to establish on a *prima facie* basis. Reputational harm has already been suffered. To the extent that there may be ongoing harm in this regard, he will be entitled to an award of damages if he is successful under Part B.

74. It is clear then that the applicant will not suffer any irreparable harm if interim relief is not granted.

75. The balance of convenience does not favour the applicant.[82]

76. Reinstating the applicant in the interim will cause dysfunction as he litigates against all the non-executive directors, which will also cause Old Mutual reputational harm. Not re-instating him will not cause him irreparable harm because, if successful under Part B, he will recover his damages. This will also assuage his hurt feelings. He may even sue for defamation to assuage any reputational harm. This will not be a "*pyrrhic victory*".

[82] AA para 195 pp 264-265.

77. If interim reinstatement is granted but the applicant is unsuccessful in his action proceedings, which might take years to conclude, nothing is said about what is to happen to the monies that will be paid to him in that time.[83]

78. In light of the absence of a *prima facie* right to the relief sought, as well as the further requirements for interim relief, the application should be dismissed with costs on the merits.

THE DECLARATORY ORDERS CONSTITUTE FINAL RELIEF

79. The declaratory orders in paragraphs 4 to 6.3 are final in effect.[84] Those in paragraphs 4 and 6 are not even linked to any final relief sought under Part B.

80. The applicant does not really dispute this or put up any cogent legal argument to the contrary.[85]

81. In any event, and as submitted above, there is no legal basis for the grant of the declaratory orders at all.

82. The suspension relief is academic. Nothing practical will result from a declaration under paragraph 4 of the notice of motion. The applicant has

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[83] *De Beer v Minister of Safety and Security/Police and another* [2013] 10 BLLR 953 (LAC) para 33-35.
[84] AA para 135.7 p 220.
[85] RA paras 100-101 pp 385-386.

served his suspension and his contract has now been terminated. The only remedy that will have any practical effect relates to the termination of the contract. In any event, the applicant relies on incorrect legal principles to support the declaratory relief in relation to his suspension. The correct legal position is that set out in *Long* by the Constitutional Court.[86]

[86] *Long v South African Breweries (Pty) Ltd and others and a related matter* 2019 (5) BCLR 609 (CC) para 24.

THE MISJOINDER OF FOURTH TO SIXTEENTH RESPONDENTS

83. It is submitted that the fourth to sixteenth respondents were not necessary parties[87] to the Part A application which is the only application that is before the Court for hearing and determination on an urgent basis. All that is before the Court regarding the fourth to sixteenth respondents is that they might face action proceedings for their declaration as delinquent directors in future (under Part B).

84. No order is sought under Part A regarding the alleged delinquency.

85. The applicant's reply takes this issue no further. He says:

> "*77. I am advised that the misjoinder point is bad in law. It would be unfair of me to allege that the directors ought to be dealt with in terms of section 162 of the Companies Act and be declared delinquent directors, even at a prima facie level, without citing them and granting them the opportunity to have their say on that issue*."

86. The reply misses the point. There is no order under Part A that is sought in terms of section 162 of the Companies Act. This Court does not have to make any findings against the fourth to sixteenth respondents under section 162 of the Companies Act in the Part A relief.

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[87] *Judicial Service Commission and another v Cape Bar Council and another* [2013] 1 All SA 40 (SCA) para 12.

87. The joinder of the fourth to sixteenth respondents was unnecessary and inappropriate, and constitutes a misjoinder.[88] The decisions in respect of which relief is sought under Part A are decisions taken by the company acting through the Board. Once the company was cited, there was no necessity to join the individual non-executive directors.

88. In that regard, this Court was correct in *Gama*[89] where it said:

> "*[117] In my view it would be setting an undesirable precedent if a Board decision was challenged by requiring each and every member of the Board to either admit or deny allegations concerning decisions taken by the Board. A Board operates on principles of majority rule. In many cases these decisions are taken in closed session. Whilst there may exist exceptional circumstances where such a course ought to be left open to a litigant, I am satisfied that in the present case no such grounds have been disclosed*."

[88] AA para 45 p 187.
[89] *Gama v Transnet Limited and Others* (09/38956) [2009] ZAGPJHC 75 (7 October 2009).

SPECIAL COSTS ORDER

89. A special costs order is warranted for the following reasons:

89.1. The applicant was aware that he could not obtain re-instatement. He says in his replying affidavit that the principles in *Moyane* were known to his attorneys, on whose advice he brought the application.

89.2. The spurious and disparaging allegations made by the applicant and that are pointed out by the first to sixteenth respondents in their answering affidavit justify a special costs order.[90]

89.3. The misjoinder of the fourth to sixteenth respondents.

[90] AA paras 35 and following, p 179 and following.

CONCLUSION

90. In the circumstances, we submit that the application should be dismissed with costs, including the costs of two counsel, alternatively, struck from the roll with costs.

91. We submit that this Court is justified in making a special costs order in all the circumstances of this case.

NH MAENETJE SC

R TULK

CHAMBERS, SANDTON

15 JULY 2019

LIST OF AUTHORITIES[91]

1. *De Beer v Minister of Safety and Security/Police and another* [2013] 10 BLLR 953 (LAC) para 27, 33-35
2. *Moyane v Ramaphosa and others* [2019] 1 All SA 718 (GP) paras 33, 36 and 37
3. *Luna Meubels Vervaardigers* (*Edms*) *Bpk v Makin* 1977 (4) SA 135 (W) at 137F–H
4. *Hotz and others v University of Cape Town* 2018 (1) SA 369 (CC) at para 15
5. *Transman v Dick and another* [2009] 3 All SA 183 (SCA) paras 28-30
6. *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) paras 55-59
7. *Joni v Kei Fresh Produce Market* (2018) 39 ILJ 2405 (ECM) paras 11-12
8. *Gama v Transnet SOC Limited*, Case no. J370/18 (22 November 2018), unreported paras 3 and 47
9. *AB and another v Pridwin Preparatory School and others (Equal Education as amicus curiae)* [2019] 1 All SA 1 (SCA) para 27
10. *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) para 28-30
11. *Bredenkamp and others v Standard Bank of SA Ltd* [2010] 4 All SA 113 (SCA) para 47-51
12. *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC) at 838 and following
13. *My Vote Counts NPC v Speaker of the National Assembly and others* 2015 (12) BCLR 1407 (CC) para 69
14. *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae* 2011 (6) BCLR 577 (CC) para 154
15. *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* 2005 (6) BCLR 529 (CC) paras 61-66
16. *S v Makwanayane and Another* 1995 (3) SA 391 (CC) paras 308 and 311
17. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[91] In the sequence cited in the heads of argument.

18. *Damane v Central Energy Fund* (A5048/2012) [2013] ZAGPJHC 71 (15 March 2013) para 19
19. *National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene)* 2012 (11) BCLR 1148 (CC) para 50
20. *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (9) BCLR 1133 (CC) para 55-56
21. *Long v South African Breweries (Pty) Ltd and others and a related matter* 2019 (5) BCLR 609 (CC) para 24
22. *Judicial Service Commission and another v Cape Bar Council and another* [2013] 1 All SA 40 (SCA) para 12
23. *Gama v Transnet Limited and Others* (09/38956) [2009] ZAGPJHC 75 (7 October 2009) para 117