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'
SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION

1. The parties exchanged heads of argument late on 16 July 2019. We deliver these supplementary heads of argument to address matters in the applicant's heads of argument that we could not have anticipated when we prepared our main heads of argument and based on the case pleaded in the founding affidavit. This case has shifted somewhat in the applicant's main heads of argument, and sometimes in an impermissible manner.

2. We address the following topics:

    2.1. The contractual cause of action.

    2.2. The cause of action under the PDA.

    2.3. Alleged improper motive for termination.

    2.4. Unlawful suspension.

    2.5. Interim reinstatement.

    2.6. Conclusion

THE CONTRACTUAL CAUSE OF ACTION

3. This is dealt with from paragraph 15 of the applicant's heads of argument.

4. In this part of his heads of argument, the applicant contends that he was entitled to a specific procedure before his contract was terminated, which Old Mutual failed to follow and the termination amounts to unlawful repudiation; Old Mutual failed to establish a factual basis for the termination (i.e. breach for misconduct), following the agreed procedure; and any "*conflict of interest*" is covered in the addendum to the employment contract and Old Mutual should have followed an arbitration clause to address it.[1]

5. The applicant goes on to cite a number of Labour Appeal Court and Labour Court judgments dealing with the true and fair reason for termination (and following a fair procedure). He also refers to *Somi v Old Mutual Africa Holdings,*[2] which dealt with summary dismissal for incapacity. He then contends that the failure to follow the contractual procedure constitutes repudiation, entitling the applicant to elect to enforce the contract, which he does in these proceedings.

6. All of these contentions avoid the fact that the letter of termination reflects a clear and unambiguous election by Old Mutual to terminate the employment contract on notice in terms of clause 24.1.1.

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[1] At paras 15.1-15.3.
[2] At para 38.

7. Clause 24.1.1 confers a reciprocal right on Old Mutual and the applicant to terminate the employment contract on 6 months' notice.

8. As the Labour Court said in *Lottering & others v Stellenbosch Municipality*:[3]

   8.1. "*Unlike the notification of termination in the form of the cancellation of the contract for material breach, which requires a determination of whether or not the termination is permissible on those grounds, the notification of termination on notice does not require any justification. It is sufficient of itself*".[4] (Emphasis added)

   8.2. Termination on notice is not a breach or repudiation of the contract but an exercise of a right conferred by the contract.[5]

9. The reason that the exercise of a right conferred by the contract could never constitute a repudiation is because repudiation under the law of contract only happens:

> "*[16] "Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to 'repudiate' the contract ... Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of*

[3] *Lottering & others v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC).
[4] At para 17.
[5] At para 19.

> *repudiation and rescission to the party who has repudiated ...*"[6] (Emphasis added)

10. The clause allowing for termination on notice constitutes "*lawful grounds*" for termination and there can be no repudiation where the clause is complied with.

11. The fact that termination on notice does not require a determination of whether or not the termination is permissible on grounds that might justify cancellation for a material breach – in this case based on misconduct – distinguishes it from dismissals under the LRA, which require a fair reason, following a fair procedure.

12. The applicant is correct that under the LRA an employer cannot conclude that there is an irretrievable breakdown in the relationship of trust without going through a procedure to determine the underlying grounds, such as misconduct. That is the point of the case of *Motale* cited at paragraph 33 of the applicant's heads of argument.

13. But the citation of *Motale* and the submissions made in consequence are all unhelpful because this is not a case of unfair dismissal under the LRA. The

[6] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A).

applicant has expressly disavowed reliance on the LRA. The same applies to the other case that the applicant cites.

14. If the applicant wants to rely on fairness as an express or implied term of clause 24.1.1 of the employment contract, he should have pleaded and proved such a case, which he has woefully failed to do, even on a *prima facie* basis. We have addressed this in our main heads of argument.

15. Reliance on an arbitration clause in the addendum to the employment contract fails for two reasons:

    15.1. It ignores the clear entitlement to terminate on notice in terms of clause 24.1.1 as submitted above and in the main heads of argument.[7]

    15.2. It proceeds from a clear misinterpretation of the relevant clause in the addendum. The interpretation is offered at paragraphs 77 and 78 of the applicant's heads of argument.

16. The interpretation that the clause in the addendum quoted at paragraph 77 of the applicant's heads of argument mean that an issue related to conflict of interest on the part of the applicant must be dealt with in terms of "*an*

[7] The interpretation sought to be adopted by the applicant would render clause 24.1.1 *pro non scripto*. If his argument is correct, the employer would never be able to invoke clause 24.1.1, contrary to the maxim *verba sunt intelligenda ut res magis valeat quam pereat*: *Vesagie NO v Erwee NO* [2014] ZASCA 121 paras 9-10; *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) para 70.

independent procedure contemplated in clause 25.2 of the contract", namely the arbitration procedure, is at odds with the clear language of the provision and is incorrect.

17. The Court cannot disregard the clear language of the provision and make a new contract for the parties.[8] The applicant puts up no evidence that should justify a meaning that departs from the clear language of the provision.[9]

18. The quoted clause in Addendum A of the protocols provides that:

> "*any conflict resulting from the [applicant'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*".

19. The use of the disjunctive makes it clear that there are two options available:[10]

    19.1. The chairperson can deal with such a conflict alone.

    19.2. The chairperson can deal with such a conflict and also follow the provisions of clause 25.2.

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[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) para 18.
[9] See *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA) para 13 for the obligation of such a party.
[10] *Brink v Premier, Free State* 2009 (4) SA 420 (SCA) para 12; Ira P Robbins "'And/or' and the Proper Use of Legal Language" (2018) 77 *Maryland Law Review* 311 at 328-330.

20. This is reinforced by the next bullet point in Addendum A which requires directors of Old Mutual appointed to the NMT Board to disclose to the chairperson of Old Mutual any conflicts in respect of the executive's position as a non-executive director of NMT.

21. There is no basis to suggest that the first interpretation is precluded at this *prima facie* level.

22. The quoted clause must also be read in the context of the Protocols as a whole, including Addendum B. A contextual reading is required.

23. Addendum B of the Protocols, at page 113, makes it clear that:

    23.1. The Nominations and Governance Committee of the Board shall have principal oversight over and responsibility for managing conflicts of interests as contemplated and applying and enforcing the Protocols.

    23.2. The Nominations and Governance Committee functions as a sub-committee of the Board, and shall adhere to the governance framework, processes and procedures generally applicable to the Board.[11]

[11] At paras 5.1 and 5.2 p 114.

24. Clauses 6.1 to 6.3 of Addendum B further detail the role of the chairperson and the Nominations and Governance Committee. Significantly, the applicant undertakes in clause 6.3 to adhere to any determinations made by the Nominations and Governance Committee from time to time as to the appropriate course of action in managing any conflict. This is the preferred route than compulsory arbitration under clause 25.2 of the employment contract as the applicant now contends.

25. Both Addenda A and B are incorporated into the employment contract in terms of clause 30.[12]

26. The applicant has, in the circumstances, failed to make out a case under contract for the relief that he seeks.

27. In the main heads of argument we have dealt with why the applicant cannot look to the LRA or the Constitution to develop the common law so that he is entitled to the relief that he seeks.

CAUSE OF ACTION UNDER THE PDA

28. In the main heads of argument we have dealt with the failure of the applicant to properly invoke the provisions of the PDA and prove that they are met.

[12] At p 108.

We have also addressed in that context the issue of the causal connection required to be proved – between the alleged protected disclosure and the detriment suffered.

29. The applicant commences his heads of argument with a somewhat generalised and emotive reference to *City of Tshwane Municipality v Engineering Council of SA*.[13] The key difference between the applicant's case and that in *City of Tshwane* is that Wallis AJA (as he then was) evaluated the facts and found that all the requirements of the PDA were met, including the clear causal connection between the protected disclosure and the detriment. This is not the case with the applicant's case.

30. The applicant's founding affidavit, which is required to contain the pleading of the cause of action and the evidence on which he relies for relief, simply fails to allege facts that satisfy the requirements of the PDA. We refer to our main heads of argument in this regard.

31. Realising the difficulty, the applicant now (at paragraphs 119-120 of his heads of argument) latches onto section 159(6) of the Companies Act and contends that the respondents bear the onus to disprove that the suspension

[13] *City of Tshwane Municipality v Engineering Council of SA* 2010 (2) SA 333 (SCA).

and termination of contract where the result of the alleged protected disclosures. There are a number of problems with this belated approach:

31.1. First, although the applicant listed section 159 of the Companies Act at paragraph 110 of his founding affidavit (at page 36), he did not even quote section 159(4) to (7). He further did not even notify the respondents of his reliance on section 159(6). It is impermissible in such circumstances for the applicant to now rely on this section in the heads of argument. He ought to have identified it in the founding affidavit and indicated precisely in what respects he relies upon it in order for the respondents to have a fair opportunity to address the case based on that section.

31.2. It is clear, however, from the underlined portions quoted at paragraph 110 of the founding affidavit that the applicant wished to rely on the underlined portions in support of what he alleges at paragraph 133 of the founding affidavit (at page 42). Those underlined portions do not include section 159(6).

31.3. Secondly, he has not pleaded in the founding affidavit what bona fide disclosures he made to the entities listed in section 159(3)(a), and

made in terms of section 159 of the Companies Act, and which he reasonably believed met the requirements of section 159(3)(b).

31.4. Thirdly, the liability referred to in section 159(4) is irrelevant for present purposes as the termination of contract does not fall into the categories listed there.

31.5. Fourthly, whatever the consequences of section 159(6) in relation to reversing any onus, the only remedy that section 159(5) entitles a person who successfully proves that he made a disclosure falling within the ambit of section 159 is "*compensation from another person for any damages suffered*" and not interim relief of the kind sought in this application. Reliance on section 159 would then only be relevant to the Part B relief. This is also clear from section 159(1) that the section is not intended to substitute protections under the PDA but to add to them, hence the entitlement to compensation as opposed to a mere protection against occupational detriments under the PDA.

31.6. Fifthly, the applicant has simply not proved the requirements of section 159(5)(a) and (b).

32. The applicant's case is then just limited to the PDA.

33. In our main heads of argument we dealt with the allegations made at paragraph 133 of the founding affidavit (at page 42) and submitted that what is alleged fails to meet the requirements of the PDA. One of those requirements is causality under the PDA (even as per *City of Tshwane*).

34. We make additional points below.

Alleged improper motive for termination

35. The applicant submits at paragraph 88 of the heads of argument that the chairperson of the board ignored his concerns regarding his participation in the OML transaction.[14] The applicant alleges that the chairperson continued to participate in the deliberations on the matter. He further contends that because the chairperson has not produced written proof of the declaration he made, it must be assumed that he did not declare his conflict and continued to participate in deliberations. The applicant points to paragraph 36.13 of the answering affidavit.[15]

36. The <u>first</u> point to be made is that this alleged conflict of interest on the part of the chairperson of the Board was not raised as a basis of a case under the PDA. It was only raised to show that there was an improper motive to the

[14] Assumption of contingent liability by OML.
[15] At p 184.

termination of the applicant's contract. This is clear from paragraphs 87 to 97 of the founding affidavit.[16] This complaint also does not feature at paragraph 133 of the founding affidavit where the PDA claim is particularised.[17]

37. It follows that whatever breaches are alleged in relation to this conduct have no bearing on the PDA cause of action.

38. The second point is that the facts at paragraph 36.13 of the answering affidavit constitute direct evidence, are confirmed by the chairperson under oath and are not refuted. Argument is not a replacement for evidence.

39. The third point is that the applicant's recount of the facts in the heads of argument on this issue is wholly incomplete and ignores material facts.

39.1. The facts set out at paragraphs 36.10 to 36.12 of the answering affidavit are common cause.[18] The applicant does not deny them at all at paragraphs 72 and 73 of his replying affidavit. Those facts show that the Related Party Transaction Committee (RPTC) was established precisely to deal with the OML transaction; the RTPC took the relevant decisions subject only to regulatory and exchange

[16] At pp 30-32.
[17] At p 42.
[18] At pp 183-184.

control approvals; and the chairperson declared his conflict of interest in relation to the Board decision and did not take part in the decision making. The chairperson did not form part of the RTPC and its meetings on the Old Mutual transactions.

39.2. The applicant sets out no basis to suggest that the chairperson, after declaring his conflict of interest in relation to the Board decision referred to at paragraph 36.13 of the answering affidavit nevertheless participated in the deliberations regarding the decision to be taken. It is only argumentation with no supporting facts. Had this been the applicant's case, he ought to have provided the evidence in his founding affidavit to enable the respondents to answer to it. He did not and it is impermissible for his counsel to make such arguments with no factual basis.

39.3. The conduct of the chairperson above is clear compliance with the law or substantial compliance with it, which the law upholds. It is definitely not "*the height of unlawfulness*" that the applicant suggests at paragraph 107 of his heads of argument.

39.4. In any event, and contrary to the applicant's contentions to the contrary, there is no basis on the facts before this Court, at this stage

of the proceedings, to support the contention that the applicant was dismissed as a form of reprisals against his concerns regarding the chairperson's involvement in the OML transaction.

40. What is clear is that there is no protected disclosure made under the PDA with regard to the OML transaction.

The legal fees

41. The case for the applicant on this issue has undergone several changes and is plainly inconsistent and unsustainable.

42. At paragraph 133 of his founding affidavit (at page 42), the applicant alleged that the "*payment of the hefty legal fees, could expose the company to a contingent risk and was inherently prejudicial to the company. It was also improper and in breach of the Companies Act and the applicable corporate governance principles*".

43. No particularity whatsoever was given as to which provisions of the Companies Act and applicable corporate governance principles the applicant referred to that had been breached. The closest that one could get by guessing was to the listing of section 159 of the Companies Act and the unexplained underlining of several of its provisions at paragraph 110 of the founding affidavit (at page 36). This is woefully inadequate pleading and of the type

that this Court decried in *Moyane*, which is cited in our main heads of argument.

44. The applicant also alleged at paragraph 101 of the founding affidavit that:

> "*The [Nominations and Governance Committee in March 2019] once again resolved not to implement my proposal that the expenditure be disclosed, despite my motivation that it was compulsory to do so, inter alia, because it amounted to a form of remuneration in the hands of Mr Manuel*".[19]

45. All of the above allegations and contentions are simply baseless.

46. The facts set out by the respondents in the answering affidavit, which the applicant cannot dispute, show the following:

46.1. The payment of the legal fees in issue was at the initiative of Old Mutual and not the chairperson. The applicant himself explained the decision to incur the legal expenses and that he had approved the litigation in 2017.

46.2. The Nominations and Governance Committee supported what had occurred – i.e. the approval of the litigation by the applicant and the payment of the legal fees.

[19] At p 33.

46.3. The decision was subsequently approved by the full Board on 8 March 2019.

46.4. The chairperson recused himself at all these meetings.

46.5. Part of the decision of the Nominations and Governance Committee was to obtain advice regarding the disclosure of the expenses in the company's annual financial statements. This was done, and the applicant signed off on the annual financial statements.[20]

46.6. The payment of the legal fees was approved because this served the interests of Old Mutual. Otherwise, they would not have been approved.[21]

47. Seeing that the so-called protected disclosure no longer has a legal basis to afford him protection because, in light of the facts summarised above, it would be spurious to continue to contend that the payment of "*the hefty legal fees, could expose the company to a contingent risk and was inherently prejudicial to the company*" and was "*also improper and in breach of the Companies Act and the applicable corporate governance principles*", in reply the applicant narrowed down his attack as follows:

[20] AA paras 36-36.8 pp 180-182.
[21] AA paras 31-32 p 177.

> "*65. I fully admit having supported the payment of the legal fees. I always insisted, though, that a distinction needed to be made between the funding provided for the Mokonyane/Water Affairs case, in which Mr Manuel was implicated in his capacity as an Old Mutual director, and the Gupta related case, which had nothing to do with Old Mutual.*
>
> *66. Nevertheless, it is true that I did not oppose the payment of the legal fees. My only objection related to the non-disclosure of the payments, which goes against all acceptable notions of transparency and corporate governance*".[22] (Emphasis added)

48. It would be obvious to any reader that the contentions quoted above make no sense at all.

48.1. In line with notions of transparency and corporate governance that the applicant alleges without particularising, the Nominations and Governance Committee did not ignore whatever issues the applicant might have raised about disclosure. Instead they agreed (with the applicant in obvious concurrence) to obtain appropriate advice from the auditors regarding disclosure.

48.2. This was done and the annual financial statements were approved in line with the advice obtained. The applicant approved the annual financial statements without demur.

48.3. There is plainly no impropriety here as defined in the PDA.

[22] At p 377.

UNLAWFUL SUSPENSION

49. We have submitted in our main heads of argument that this complaint is academic and that there is no case made out in any event. We have referred to recent Constitutional Court authority and not Labour Court judgments that preceded the Constitutional Court authority.

50. We submit further that the applicant has not pleaded any term of his contract of employment that entitles him to relief in respect of the suspension. He does not say that there is a clause in his employment contract that entitled him to a hearing before he was suspended. As for reasons, these were furnished. This is clear from the suspension letter itself[23] and the explanation furnished in the answering affidavit.[24] The application in this regard falls to be determined on common cause facts because it is for final relief.[25]

51. To the extent that the applicant's complaint is in essence that his suspension was unfair, his remedy lies in the LRA, which he has abandoned.

INTERIM REINSTATEMENT

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[23] PMM11 p 132.
[24] AA paras 119-120 pp 210-211.
[25] *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] 2 All SA 243 (SCA) para 26.

52. With regard to holding a party to a contract in the case of repudiation, "*[a]s a general principle, this choice is unfettered, but if the contract is one in respect of which specific performance will almost certainly not be granted, such as a contract for personal services, the innocent party will effectively have no choice but will have to accept the repudiation, cancel and claim damages*."[26] We accept that this is discretionary as the cases show.

53. The position regarding interim reinstatement under the LRA is no different. We have addressed this in our main heads of argument. There is simply no basis to develop the common law in this regard when the statutory protections under the LRA are consistent with the Constitution but also only offer reinstatement as a discretionary remedy. It does not matter who the victim is.

54. The cases that the applicant cites in support of temporary reinstatement in this case are unhelpful.

    54.1. *Cliff v Electronic Media Network (Pty) Ltd*[27] is wholly distinguishable. The dispute there related to whether or not there was a contract in place between the parties (written or oral). There was no contention

[26] Christie's *The Law of contract in South Africa* 6th edition at 562-3. As adapted of course.
[27] Cited at para 44 of the applicant's heads.

that if such an agreement existed, it had been cancelled.[28] The Court said M-Net could still cancel the contract on notice.[29] Here the contract has been cancelled on its terms. The reason for cancellation is a loss of trust, confidence and mutual respect. It is not appropriate to grant temporary reinstatement in such circumstances and on the facts of this case. We have referred to other authorities in this regard in our main heads of argument.

54.2. *Santos Professional Football Club (Pty) Ltd v Igesund & another*[30] is also distinguishable. It was not a case of an ordinary contract of employment, whereas the present is.[31] It was also not an order sought against an employer. The Court was asked to declare that a contract was binding and to allow the applicant to proceed to enforce his contract against an unwilling employee who wished to earn more money in a new position.[32] The Court found that there would be no inequity in obliging the first respondent to adhere to his contract.[33]

54.3. There will be inequity in the present case in reinstating the applicant temporarily pending the final determination of his Part B relief

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[28] At para 23.
[29] At para 34.
[30] Cited at para 44 of the applicant's heads of argument.
[31] At p 76.
[32] At p 79.
[33] At p 85.

because he will be litigating against all fourteen non-executive members of the Board to have them declared delinquent directors under section 162 of the Companies Act. During that time the applicant and the non-executive directors will be serious adversaries in a clearly highly publicised fight and aggressive cross-examination by both protagonists. This real likelihood only needs to be stated to appreciate that there can be no working relationship based on trust, confidence and mutual respect during that time as required by the terminated contract. Old Mutual will be the real loser. This is the singular fact that undermines the applicant's contentions that temporary reinstatement will be appropriate on the present facts. They are like the facts in *Moyane.* It is not an answer to ask that the applicant be reinstated but placed on suspension. It is not even the case the respondents were called upon to meet.

CONCLUSION

55. The Part A relief must be dismissed with costs, including the costs of two counsel as submitted in the main heads of argument.

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R TULK

CHAMBERS, SANDTON

17 JULY 2019

LIST OF AUTHORITIES[34]

1. *Lottering & others v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC)
2. *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2001] 1 All SA 581 (A)
3. *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ)
4. *Vesagie NO v Erwee NO* [2014] ZASCA 121
5. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) para 18
6. *G4S Cash Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and Another* 2017 (2) SA 24 (SCA) para 13
7. *Brink v Premier, Free State* 2009 (4) SA 420 (SCA)
8. Robbins, Ira P. "'And/or' and the Proper Use of Legal Language" (2018) 77 *Maryland Law Review* 311
9. *City of Tshwane Municipality v Engineering Council of SA* 2010 (2) SA 333 (SCA)
10. Christie's *The Law of contract in South Africa* 6th edition at 562-3
11. *National Director of Public Prosecutions v Zuma (Mbeki and another intervening)* [2009] 2 All SA 243 (SCA) para 26

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