



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

CASE NO: 21046/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[23 MAY 2022]

.....
SIGNATURE

In the matter between:

THEMBEKILE KUNENE-MSIMANG

First Applicant

SIMBARASHE MANDINYENYA

Second Applicant

KEVIN MASUPE

Third Applicant

PALESA MOTEKASE

Fourth Applicant

PHUTI MULATEDZI

Fifth Applicant

KENNETH RACOMBO

Sixth Applicant

and

**REGIONAL TOURISM ORGANISATION OF
SOUTHERN AFRICA**

First Respondent

**SOUTHERN AFRICA DEVELOPMENT
COMMUNITY**

Second Respondent

DR STERGOMENA LAWRENCE TAX

Third Respondent

SELMA ASHIPALA MUSAVYI

Fourth Respondent

TEOFILUS NGHITILA

Fifth Respondent

LILLY RAKORONG

Sixth Respondent

DR SEM SHIKONGO

Seventh Respondent

*This application was heard virtually, and the Judgment is handed down electronically.
The deemed date of the delivery of the Judgment is 23 May 2022.*

J U D G M E N T

NEL AJ

INTRODUCTION

- [1] In this opposed application the Applicants seek an order, *inter alia*, compelling the First Respondent (“RETOSA”) to make payment of various amounts of money, in respect of each Applicant, which amounts of money the Applicants allege are contractually due and owing to them.
- [2] The Applicants were employees of RETOSA.
- [3] The Applicants’ employment with RETOSA was terminated.
- [4] The Applicants’ claim for the monetary amounts is based on written Separation Agreements which the Applicants contend were concluded between each of the Applicants individually and RETOSA.
- [5] The Applicants also seek an order that RETOSA pay the costs of the Application.

[6] The Applicants seek no relief as against the Second to Seventh Respondents.

[7] RETOSA has opposed the relief as sought by the Applicants.

BACKGROUND AVERMENTS

[8] During the period from April 2007 to June 2007 each of the Applicants individually concluded written Fixed Term Employment Contracts (“the Fixed Term Contracts”) with RETOSA, for a period of five years.

[9] On 8 May 2018 the Board of RETOSA recommended and initiated the closing down of RETOSA due to its dire financial situation.

[10] The Applicants were advised by way of a letter dated 12 June 2018, received from the Fifth Respondent, being the Chairperson of RETOSA (“Mr Nghitila”), that RETOSA had decided to initiate the closing of RETOSA due to its dire financial situation, and that the Employment Contracts of the Applicants were to be terminated with effect from specified dates.

[11] Termination letters were sent to each of the Applicants by RETOSA during October and November 2018.

[12] The termination letters, attached to the Founding Affidavit as annexures, refer to a letter dated 12 June 2018, when the Applicants were informed of the decision taken by the RETOSA Board to recommend and initiate the closing of RETOSA given its dire financial situation. The recommendation would be made to the Second Respondent, the Southern African Development Community (“the SADC”).

[13] In paragraph 5 of the termination letters it is recorded as follows:

“In recognition of the termination of your employment contract, you are hereby offered 24 months remuneration separation package. This will be paid in parts due to cashflow challenges, but preferably not exceeding a six (6) months’ period from this offer ...”

- [14] The termination letters appear to be signed by Mr Nghitila (the then Chairperson of the RETOSA Board).
- [15] In paragraph 7 of the termination letters, it is recorded that a Separation Agreement is attached to the termination letter for the signature of the Applicants, in order to process the payments.
- [16] In the Founding Affidavit it is alleged that despite mention being made of a Separation Agreement, RETOSA elected to utilise the termination letters once signed by each of the employees as containing the terms and conditions agreed upon between the parties for termination of employment and separation. It is contended that the termination letter must therefore be read with the Separation Agreement in respect of each Applicant.
- [17] It is not clear why such allegation is made, as the Applicants appear to rely on the terms set out in the Separation Agreements for the relief sought. In addition, there is an Entire Agreement clause in the Separation Agreement, recording that the Separation Agreement *“... constitutes the entire agreement between the parties in regard to the subject matter hereof...”*. The allegation however does not appear to be relevant to any particular issue in this Application, and its relevance was not addressed in the Applicants’ Heads of Argument, or during the hearing of the Application.

- [18] It is alleged that the Applicants accepted the terms of the termination letters “... and consensus on same was reached between the Applicants on one hand and the Respondents on the other”. There is no identification of which of the Respondents reached consensus with the Applicants, or whether it was all of the Respondents. The manner in which the paragraph is framed, it appears to be contended that all of the Respondents reached consensus with the Applicants. Such allegation cannot be correct.
- [19] Separation Agreements were then concluded between RETOSA, apparently represented by the Fifth Respondent, with each of the Applicants.
- [20] In the preamble to the Separation Agreements it is recorded that RETOSA is represented by Mr Nghitila (the Fifth Respondent), and that he is duly authorised and competent to conclude the agreement in his capacity as Chairperson of the Board of RETOSA.
- [21] In terms of clause 3.1 of the Separation Agreements it was recorded that a consideration, equating to a 24 months’ remuneration severance package, a relocation allowance and an accrued gratuity would be paid to the Applicants by RETOSA.
- [22] It was recorded that the severance package would be payable in instalments, dependent on the cashflow of RETOSA, but within six months from the commencement date. The commencement date is defined as meaning 31 October 2018.
- [23] The copies of the Separation Agreements attached to the Founding Affidavit were not signed by Mr Nghitila or any other representative of RETOSA. The

explanation set out by the Applicants in such regard is that the Separation Agreements were not signed by RETOSA, but that each and every one of the Separation Agreements were accepted by RETOSA and the remaining Respondents, on the basis that RETOSA honoured its commitments as provided for in each of the Separation Agreements to the Applicants in part. The conclusion of the Agreements is not contentious, as RETOSA has admitted the conclusion of the Separation Agreements, but it is not admitted that the Separation Agreements were “*accepted*” by the remaining Respondents. The payments do not evidence such allegation, as contended for by the Applicants .

[24] The Applicants allege that on the Respondents’ version, RETOSA is liable to effect payment to the Applicants.

[25] The Applicants refer to a letter from Mr Tafa of Armstrongs Attorneys in support of the allegation that on the Respondents’ own version RETOSA is liable to effect payment to the Applicants.

[26] In a letter dated 15 May 2019 addressed to the Chairperson of the SADC the Applicants’ request the SADC to honour its contractual obligations in terms of the Separation Agreements. This is of course in contradiction to the relief sought in the Notice of Motion and the allegations contained in the Founding Affidavit to the effect that it is RETOSA that is indebted to the Applicants rather than the SADC.

[27] A further letter was sent by the Applicants’ attorneys to all of the cited Respondents, setting out that the Applicants claim payments in terms of the Separation Agreements “*from yourselves*”, creating further confusion as to

which person or entity is contractually liable to make payment to the Applicants.

[28] The response by Mr Tafa of Armstrongs Attorneys was to the effect that all of the Applicants were employees of RETOSA, and were not employed by the SADC, and that accordingly the Applicants have no claim against the Second, Third, Fourth and Fifth Respondents.

[29] In a letter dated 5 August 2019, sent by the Applicants' attorneys, it is recorded that the Applicants "*...considered the legal position of each and every defendant [the cited Respondents] prior to the issue of the summons and will accordingly continue to proceed against all of the listed defendants*".

[30] In the same letter it is recorded that the Second, Third, Fourth and Fifth Respondents "*... are ultimately the parties responsible for the decision to terminate the employment of, and pay severance benefits to, our clients ...*".

[31] I refer to this correspondence purely in considering the contention that on the Respondents' own version RETOSA is liable to make payment to the Applicants, and not in considering whether RETOSA is ultimately liable or not liable to make payment to the Applicants.

[32] There is no indication in any of the items of correspondence emanating from the legal representatives of the Respondents that an admission or concession was made that RETOSA is liable to make payment to the Applicants.

[33] The allegation in paragraph 72 of the Founding Affidavit, to the effect that on the Respondents' own version RETOSA is liable to effect payment to the

Applicants, is therefore not supported by any “*version*” as contained in correspondence or any other document, that was made available to me.

THE APPLICANTS’ CONTENTIONS

[34] In addition to the Applicants’ allegations as set out above, the Applicants contend that valid Separation Agreements were concluded between the Applicants and RETOSA, that a portion of the severance packages, equating to twelve and a half months of the packages has already been paid to the Applicants by RETOSA, and that RETOSA has not denied that the amounts claimed by the Applicants are due and payable.

[35] The Applicants contend that at no stage whatsoever has RETOSA denied that it is liable to effect payment of the amount claimed to the Applicants.

[36] The Applicants also contend that there is an amount of R 5 901 541.07 available in the bank account held by RETOSA with the Standard Bank of South Africa Limited, and accordingly that RETOSA is able to pay the amounts as claimed by the Applicants.

[37] Such contention is required, as the Applicants state that it was a term of the Separation Agreements that payments would be made to the Applicants when RETOSA was in a financial position to do so.

[38] The Applicants also contend that on the Respondents’ own version, RETOSA is obliged to make payment as claimed. I have already dealt with such contention above.

[39] The Applicants contend in conclusion that RETOSA is obliged to pay the amounts claimed, and that the relief as sought in the Notice of Motion should be granted.

THE FIRST RESPONDENT'S CONTENTIONS

[40] RETOSA contends that the Separation Agreements were concluded without the necessary authority required (including the authority of the SADC) to conclude such Separation Agreements and that the Separation Agreements were concluded on an *ultra vires* basis.

[41] RETOSA contends that it is objectively impossible for RETOSA to perform in terms of the Separation Agreements due to RETOSA's financial difficulties, and that it was similarly impossible to perform at the time of the conclusion of the Separation Agreements. RETOSA contends that on such basis the Separation Agreements "*are a nullity*".

[42] RETOSA also contends that the severance terms, as set out in the Separation Agreements far exceed the monetary severance the Applicants would be entitled to in terms of the Labour Laws of South Africa.

[43] A point of misjoinder is raised by the Respondents, in terms of which it is contended that the Third to Seventh Respondents have been mis-joined.

[44] Aligned to the point of misjoinder is the Respondents' contention that this Court does not have the necessary jurisdiction to hear any claim as against the Third to Seventh Respondents.

[45] RETOSA contends that the Applicants should renegotiate proper, authorised and appropriate severance packages on the basis that the Separation Agreements constitute a nullity.

[46] RETOSA contends that it is in the process of undergoing a liquidation or winding-up, and that the funds held in the bank accounts of RETOSA must make provisions for other creditors, in addition to the Applicants.

[47] RETOSA also contends that the Applicants' attorneys of record, Dewey Hertzberg Levy Incorporated, is conflicted, and should not be representing the Applicants.

THE ISSUES TO BE DETERMINED

[48] In terms of the Joint Practice Note, only three issues are identified as requiring determination, being:

[48.1] The effect on the Applicants' claims of RETOSA's resolution to wind itself up;

[48.2] Whether RETOSA's payment obligations in terms of the severance packages amount to objective impossibility of performance by RETOSA, or undue hardship to it; and

[48.3] Whether the Court should exercise its discretion in the circumstances to grant an order for RETOSA's specific performance in terms of the severance packages.

[49] The Practice Notes filed individually on behalf of the Applicants and the Respondents respectively, refer to additional issues of dispute that require determination.

[50] At the hearing of the Application, it became clear that none of the defences raised by the Respondents in their Answering Affidavit were abandoned, and that all of the issues that appear from the affidavits filed required determination, and not only those issues identified in the Joint Practice Note.

[51] In the circumstances, I intend to deal with the various issues raised in the affidavits and in argument in the following sequence:

[51.1] Whether the Applicants' attorneys are conflicted.

[51.2] Whether there was a misjoinder of the Third to Seventh Respondents.

[51.3] Whether this Court has the jurisdiction to hear any claim as against the Third to Seventh Respondents.

[51.4] Whether the Fifth Respondent (Mr Nghitila) or RETOSA had the required authority to conclude the Separation Agreements.

[51.5] Whether it is objectively impossible for RETOSA to perform in terms of the Separation Agreements.

[51.6] Whether the severance packages defined in the Separation Agreements far exceed what the Applicants would be entitled to in terms of South African Labour Laws.

[51.7] Whether new severance packages should be renegotiated.

THE FIRST ISSUE: CONFLICT OF INTEREST

[52] RETOSA submitted that there was a clear conflict of interest in respect of the Applicants' attorneys acting on behalf of the Applicants in this Application, in circumstances where the same attorneys previously represented RETOSA in respect of a lease agreement dispute.

[53] Such submission arises from a report prepared by the Third Applicant, wherein it is recommended that Dewey Hertzberg Levy Inc be retained to "... *conclude the landlord matter through the SADC legal unit*".

[54] It was submitted on behalf of RETOSA that the Applicants' attorneys were well aware that the settlement of the lease agreement was as a result of the financial difficulties being experienced by RETOSA, and would have been aware that the decision of RETOSA to close was as a result of the same financial difficulties.

[55] On behalf of the Applicants, it was submitted that the Applicants' attorneys, whilst availing themselves to provide assistance to RETOSA, were ultimately not involved in any capacity in respect of the settlement of the lease agreement dispute, and that the parties to the lease agreement settled such dispute amongst themselves.

[56] In the matter of *Wishart and Others v Blieden N.O. and Others*¹, Gorven J (as he then was) considered the issue of conflict of interest in respect of legal

¹ 2013 (6) SA 59 (KZP).

professionals in great depth, including considering the position in English law, American law, Canadian Law, Australian law and South African law.

[57] After a careful consideration of the approaches to the issue of conflict of interest in the various foreign jurisdictions the Court considered the position in South African law and found the applicable test to be the following²:

“In essence the dictum of Stegmann J and the requirements set out in Bolkiah mean that a former client would need to prove that:

- (1) confidential information was imparted or received in confidence as a result of the attorney-client relationship;*
- (2) it is relevant to the matter at hand; and*
- (3) the interests of the present clients are adverse to those of the former client.”*

[58] In the matter of *Wishart and Others v Justice P Blieden N.O. and Others*³ it was held that the South African law affords protection to the former client of a legal practitioner so that such practitioner would be precluded from acting against a former client where the practitioner has confidential information about the former client that may be misused.⁴

[59] In the matter of *Wishart and Others v Blieden N.O. and Others*⁵ the Supreme Court of Appeal upheld the decision of Gorven J, and reiterated at para [48] that the heart of a client’s right to be protected against a formal legal representative taking the other side is the possible misuse of confidential information.

² At [39]. See also: *American Natural Soda Ash Corporation and Others v Botswana Ash and Others* [2007] 1 CPLR 1 (CAC) at 11; *Monsanto South Africa (Pty) Ltd and Another v Bowman Gilfillan and Others* [2011] ZACAC5 (18 August 2011); *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 426 to 427.

³ 2014 (4) All SA 334 (SCA).

⁴ See also *Van der Walt v The Magistrate of the District Court Hoopstad* 2019 JDR 1701 (FB).

⁵ 2020 (3) SA 99 (SCA).

[60] It is clear that the third requirement, being that the interests of the present client are adverse to those of the former client has been established by RETOSA, in that the Applicants' attorneys are in this application representing parties whose interests are clearly adverse to those of RETOSA.

[61] Whilst it appears from the affidavits filed and the submissions made to me at the hearing of the Application, including instructions taken during the hearing, that although the Applicants' attorneys offered to assist RETOSA in respect of the negotiations relating to the settlement of a lease agreement dispute, the services of the attorneys were ultimately not called upon.

[62] In the circumstances, and whilst it was submitted on behalf of RETOSA that the Applicants' attorney would have been aware of RETOSA's financial difficulties, it has not been established that any confidential information was imparted to the Applicants' attorneys, and that such confidential information is relevant to this Application. The financial difficulties of RETOSA were disclosed to the Applicants, and would not constitute confidential information.

[63] The first and second requirements as referred to by Gorven J have accordingly not been established.

[64] In the circumstances, I find that there is no conflict of interest in respect of the Applicants' attorneys representing the Applicants in this application.

[65] In the matter of *Wishart and Others v Blieden N.O. and Others*⁶, the Supreme Court of Appeal was requested to consider whether it is part of South African

⁶ 2020 (3) SA 99 (SCA).

law that a Court has the inherent jurisdiction, in circumstances where a legal representative acts against a former client, in the absence of the possession of confidential information, whether a Court may restrain such conduct where it undermines the administration of justice.⁷

[66] The Supreme Court of Appeal did not make any finding in such regard, holding that it was not necessary to do so, having regard to the facts of that matter.

[67] Even if the inherent jurisdiction principle is part of South African law, the involvement of the Applicants' attorneys would not, in this particular matter, undermine the administration of justice.

THE SECOND ISSUE: MISJOINDER

[68] Misjoinder is the joining of several plaintiffs/applicants or defendants/respondents in one action/application in circumstances which the law does not sanction. The essence of the objection of misjoinder is that the wrong plaintiffs/applicants are suing, or that the wrong defendants/respondents are being sued.

[69] Whilst the issue of misjoinder was not specifically argued during the hearing of the Application, it was raised in the Answering and Replying Affidavits, and accordingly must be considered and determined.

[70] RETOSA's complaint is that the Third to Seventh Respondents should not have been joined in the Application, and that their joinder amounts to misjoinder.

⁷ At paras [35], [40] and [50].

[71] Whilst the Third to Seventh Respondents were cited as respondents in the Application no relief is being claimed against such Respondents. The Applicants cited such Respondents on the basis that they form “*the association known as*” RETOSA in conjunction with the SADC. RETOSA is however described in the Founding Affidavit as “*an intergovernmental organisation duly constituted by the*” SADC. The allegations are contradictory, but such contradiction is not relevant to the issue of misjoinder.

[72] There was clearly no reason to cite the Third to Seventh Respondents, as no relief is sought as against such Respondents, and they are not cited on the basis that they have any interest in the Application.

[73] The Third to Seventh Respondents are alleged to have been directors on the Board of RETOSA, and if so, were acting in their representative capacities, and not in their personal capacities. The Applicants contend that RETOSA is a Voluntary Association with a separate legal identity.

[74] The *in limine* aspect of misjoinder in respect of the Third to Seventh Respondents is accordingly upheld.

THE THIRD ISSUE: LACK OF JURISDICTION

[75] RETOSA raised in its Answering Affidavit that this Court does not have the necessary jurisdiction to hear any claim as against the Third to Seventh Respondents.

[76] Whilst I am in agreement that I do not have jurisdiction to determine any claims as against the Third to Seventh Respondents, no relief is sought as against the Third to Seventh Respondents, and the issue raised is moot.

[77] The citation of the Third to Seventh Respondents as parties has already been dealt with above, under the heading "*MISJOINDER*".

THE FOURTH ISSUE: LACK OF AUTHORITY

[78] In the Answering Affidavit the Third Respondent states that the Separation Agreements were concluded on an *ultra vires* basis, and without the necessary consultation or consent of the SADC member states.

[79] It is also alleged in the Answering Affidavit that the conclusion of the Separation Agreements was not authorised, and that the Separation Agreements were a nullity.

[80] In support of such allegations the Third Respondent refers to the meeting held on the 13th and 14th of August 2019 where it was resolved that law experts should be appointed "*to negotiate an affordable offer with the former employees of RETOSA*".

[81] It is specifically alleged in the Answering Affidavit that the severance packages are invalid and unenforceable, as the offers made to the Applicants were unauthorised, as they did not have the consent or approval of the member states to the SADC.

[82] It is accordingly clear from the contents of the Answering Affidavit that it is contended that not only the offers made to the Applicant by Mr Nghitila, but

the conclusion of the Separation Agreements by RETOSA, were not authorised.

[83] The crux of the Respondents contention relating to the issue of lack of authority is that neither Mr Nghitila nor RETOSA was empowered to have made the decision to offer severance packages to the Applicants or to conclude Separation Agreements, without the consent or approval of the SADC.

[84] In the Replying Affidavit the Applicants contend that each of the Separation Agreements were concluded and signed by the duly appointed Chairperson of the RETOSA Board, being Mr Nghitila. Such contention is not correct, as none of the Separation Agreements were signed by any representative of RETOSA. As already set out above, RETOSA however admits the conclusion of the Separation Agreements.

[85] The Applicants further allege that Mr Nghitila, in his capacity as the Chairperson of the Committee of Tourism Ministers, clearly had the authority to conclude each of the Separation Agreements on behalf of RETOSA. The basis for such contention was not explained, and the positions of Chairperson of the Board of RETOSA and Chairperson of the Committee of Tourism Ministers are clearly distinct positions.

[86] In the Replying Affidavit, the Applicants also allege that the Mr Nghitila's authority is "*endorsed*" by the payments already made to each of the Applicants in terms of the Separation Agreements, and that none of the payments would have been made if Mr Nghitila lacked authority to conclude the Separation Agreements. There is however no detail or allegations

whatsoever, from either of the parties, relating to how the payments were made, who authorised the payments, or where the payments emanated from specifically.

[87] Authority is a unilateral act by which one person or entity empowers another person or entity to act on his or its behalf. Authority is therefore the power to perform a juristic act on behalf of another person or entity. The person performing the act only represents the other person or entity if he has the necessary authority to do so. The determination of the issue of authority is naturally dependent on the facts of each case.

[88] If an agent or representative had no authority to contract on behalf of the principal, no contract can come into existence.

[89] Authorisation can be conferred on a person or entity in general or specific terms, either expressly or tacitly. Tacit authority normally relates to acts that are necessary in the ordinary course of business of the entity, for the efficient and proper execution of the representative's instructions.

[90] It follows that if a person purports to contract on behalf of a principal without the necessary authority to so contract, the principal is not bound or liable to the contracting party.

[91] Tacit authority can also arise, having regard to trade usage or acts that are in a business sense, necessary for the efficient execution of a representative's instructions.

[92] At the commencement of the hearing of the Application I enquired from the parties' counsel whether the issue of authority could be determined on the

affidavits, or whether there should be a referral to oral evidence in respect of such aspect.

[93] The Applicants' counsel advised me that the issue of authority can be resolved on the papers, and that no referral to oral evidence would be sought.

[94] RETOSA's counsel similarly advised me that RETOSA would not seek a referral to oral evidence, and that the Respondents will rely on the *Plascon-Evans* rule in respect of the issue of authority.

[95] The Applicants' counsel then took instructions, and advised me that his instructions were to proceed with the Application on the papers, and that the denial of authority was misplaced.

[96] In the circumstances, and insofar as the Applicants seek final relief, the evidentiary test to be applied is that as set out in the matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints*⁸, as read with *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁹.

[97] The *Plascon-Evans* "rule" is essentially that where disputes of fact have arisen on affidavits, a final order may only be granted if the facts alleged by an applicant that are admitted by a respondent, together with the facts as alleged by a respondent, justify the granting of such order.

⁸ 1984 (3) SA 633 (A) at 634H-I.

⁹ 2008 (3) SA 371 (SCA) at paras [12] and [13].

[98] There are exceptions to the general rule, for example where the respondent's allegations or denials are so far-fetched or untenable that the Court is justified in rejecting them, merely on the contents of the affidavits.¹⁰

[99] In the Applicants' Heads of Argument, it is submitted that each of the Separation Agreements were concluded on behalf of RETOSA by Mr Nghitila. As already set out above, the Separation Agreements were not signed by Mr Nghitila (the Fifth Respondent) and the submission is accordingly not entirely accurate. I am however aware of the Applicants' submissions that the Separation Agreements were concluded, having regard to the contents of the termination letters, the unsigned Separation Agreements, and the payment of certain instalments to the Applicants. The conclusion of the Separation Agreements is however not in dispute. What is in dispute is whether the conclusion of the Separation Agreements was authorised.

[100] The submission was also made in the Applicants' Heads of Argument that Mr Nghitila has not denied that the Separation Agreements were concluded on behalf of RETOSA by him, and nor has he deposed to any affidavit or put forward any evidence in this matter in response to the Applicants' claim. Whilst it is correct that Mr Nghitila has not deposed to any affidavit denying his lack of authority, similarly there is no affidavit by Mr Nghitila alleging that he did have the authority as alleged by the Applicants.

[101] It is also submitted in the Applicants' Heads of Argument that RETOSA's defence is that the Separation Agreements were concluded by RETOSA

¹⁰ *Plascon-Evans, supra*, at 635C.

without it having the necessary authority to do so. The references provided in support of such submission are paragraphs 11 and 12 of the Answering Affidavit. It is set out in such paragraphs that the Separation Agreements were concluded without the necessary authority or consent of the SADC member states and that the conclusion of the Separation Agreements was not authorised.

[102] It is however conceded in the Answering Affidavit that the Separation Agreement were concluded, and that RETOSA offered severance packages to the Applicant. In explanation of such concessions, it is alleged in the Answering affidavit that it is not admitted that the offers were authorised.

[103] Whilst there is some confusion in the Affidavits and the Heads of Argument as to the issue of lack of authority, and the role of Mr Nghitila, it became clear during the hearing of the Application that the Respondents contend that Mr Nghitila (or any other representative of RETOSA) and RETOSA were not authorised by the SADC to make the offers contained in the termination letters, and were not authorised to conclude the Separation Agreements. The Respondents' stance is that the consent and authority of the SADC was required for such acts.

[104] It is submitted in the Applicants' Heads of Argument, in respect of the issue of authority, that the extract of the minutes of a meeting held on 13 and 14 August 2019¹¹ does not assist RETOSA, on the basis that the reliance by RETOSA on the wording set out in the extract is misconstrued.

[105] The wording referred to is the following:

¹¹ Annexure "AA1" to Answering Affidavit.

“(iv) *the urgent appointment of affordable law experts who practice Roman Dutch Law within Member States to negotiate an affordable offer with the former employees of RETOSA.*”

[106] The submissions made are based on an interpretation of what the wording could mean, and it is submitted on behalf of the Applicants that the wording could imply an intention to reduce the offer already “*enshrined*” in the Separation Agreements, that the Resolution does not resolve to terminate the already concluded Separation Agreements, nor does the resolution deny the validity of the Separation Agreements already concluded.

[107] In further support of such interpretation, it was submitted that each of the Separation Agreements were concluded and signed by the duly appointed Chairperson of the RETOSA Board. As already set out above, such submission is not correct.

[108] In the Answering Affidavit it is set out that the reference to “*negotiate an affordable offer*” is a reference to the conclusion of appropriate separation agreements and packages with the Applicants, having regard to what RETOSA can afford. It is also pointed out that the Resolution was only taken in August 2019, more than a year after the “*unauthorised*” Separation Agreements were concluded.

[109] The submissions made on behalf of RETOSA was that the extract clearly referred to the intended future conclusion of separation agreements, after negotiations through legal representatives.

[110] The Applicants’ submissions relating to authority conclude on the basis that Mr Nghitila, as Chairperson of the Committee of Tourism Ministers, and

Chairperson of RETOSA must have had authority, or at worst, ostensible authority to conclude each of the Separation Agreements.

[111] The Applicants attached the RETOSA Charter to the Founding Affidavit. It is clear from the Charter that RETOSA was established by the SADC Member States in order to commercially develop tourism in the region of Southern Africa.

[112] In terms of the Charter, RETOSA is a permanent body “*and a legal entity of*” the SADC.

[113] Whilst it is clear from the Charter that RETOSA has the capacity to conclude contracts, the Chairperson is only empowered to negotiate agreements, contracts and related legal instruments “*approved by the Board*”.

[114] The Chairperson is therefore not entitled to conclude any agreements that are not approved by the Board of RETOSA.

[115] There is no clear indication in any of the affidavits that the Board of RETOSA approved the conclusion of the Separation Agreements. This aspect is however not determinative of the issue of authority, as it is the lack of consent by the SADC that the Respondents rely on.

[116] It is set out in the Answering Affidavit that the Separation Agreements were concluded without the necessary consultation or consent of the SADC Member States and were therefore concluded on an *ultra vires* basis.

[117] The Applicants allege that the Third to Seventh Respondents are either directors or representatives of RETOSA. The Applicants allege that the

Third to Seventh Respondents, sitting as the Board of RETOSA, decided on 8 May 2018 to recommend and initiate the closing of RETOSA.

[118] The termination letters of 31 October 2018 and 30 November 2018 signed by Mr Nghitila appears to have been written on behalf of the Board of RETOSA, in that it is recorded in such letter that the RETOSA Board appreciates the contributions of the Applicants.

[119] The Third Respondent, who is described as the Executive Secretary of the SADC, and who the Applicants allege is a Board member of RETOSA, denies that the severance packages were authorised, and denies that the Separation Agreements were authorised.

[120] The Third Respondent also alleges that the Separation Agreements were not authorised, and did not have the consent or approval of the SADC Member States, through the Council of Ministers.

[121] The Third Respondent, if she was indeed a Board Member of RETOSA, as alleged by the Applicants should know if the severance packages and the conclusion of the Separation Agreements were authorised. The Third Respondent denies any such authorisation.

[122] The Applicants stated in the Replying Affidavit, as already set out above, that the Minute of the meeting of 13 and 14 August 2019 does not record a denial of the validity of the Separation Agreements, that there is no Resolution to terminate the concluded Separation Agreements, and that it indicates an intention to approach the Applicants with a view to amending the existing terms of the Separation Agreements.

[123] The Respondents' version, being that the SADC Council Ministers were not aware of the severance packages or the Separation Agreements, and only decided at that meeting in August 2019 to commence the negotiation of affordable offers with former employees, is the more plausible version, having regard to the clear wording recorded in the Minute. The Applicants interpretation of the wording is entirely speculative.

[124] In the Replying Affidavit, the Applicants allege that each of the Third to Seventh Respondents knew of and were responsible for the conclusion of the Separation Agreements. The Third Respondent would then be in a position to confirm whether or not the severance packages and Separation Agreements were authorised. As set out, the Third Respondent denies that the severance packages and Separation Agreements were authorised.

[125] A party can still be bound to a contract, even if the contract was unauthorised, if the act was ostensibly performed on behalf of the principal. This would require the principal to have led the other party to reasonably believe that the person who represented the principal had the necessary authority to act on behalf of the principal, and that the other contracting party relying on such belief acted to his detriment.¹²

[126] In such circumstances, the aspect of liability is based on ostensible or apparent authority. It has been held that such authority is nothing more than an application of the doctrine of estoppel by representation.¹³

¹² *Hoskin Employee Benefits (Pty) Ltd v Slabe* 1992 (4) SA 183 (W).

¹³ *NBS Bank Limited v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA). But, see: *Makate v Vodacom* where it was held that the concept of estoppel by way of representation was distinct from the concept of ostensible authority. Estoppel was defined as being the rule precluding a principal from denying that the principal gave authority to the agent, while ostensible authority was defined as being the power to act as agent was indicated by representations or circumstances. It was also held that the fact that the representation giving rise to ostensible authority may also form the basis of estoppel did not mean that

[127] In the Applicants' Heads of Argument it was raised that Mr Nghitila had the necessary authority to conclude the Separation Agreements or, at the very least, the Applicant could rely on ostensible authority.

[128] In the *NBS Bank* matter, (see footnote 13) it was held that ostensible authority flows from the appearances of authority created by the principal, but the appearance or representation, must have been created by the principal itself. The fact that another holds himself out as the principal's agent cannot, of itself, impose liability on the principal. And it is not enough that an impression was created as a result of the representation. It is also necessary that the representee should have acted reasonably in forming that impression.

[129] The Applicants in this Application are not outside parties contracting with RETOSA but had intimate inside knowledge of the workings of both RETOSA and the SADC.

[130] Whilst I am of the view that the authority of Mr Nghitila to contract on behalf of RETOSA was not established in the Founding Affidavit, the Respondents are not relying on the lack of authority of Mr Nghitila in contending that the conclusion of the Separation Agreements were unauthorised. The Respondents have accepted that the Separation Agreements were concluded as between the Applicants and RETOSA but are relying on the lack of authority of RETOSA to have concluded the Separation Agreements without the consent or authorisation of the SADC.

[131] In respect of the issue as to whether the conclusion of the Separation Agreements by RETOSA, without the consent or authorisation of the SADC,

the two concepts should be collapsed into one.

was valid, it was submitted on behalf of the Applicants that RETOSA was a voluntary association and an autonomous body that had the necessary authority to conclude the Separation Agreements. It was submitted that RETOSA did not require the consent or authority of the SADC to conclude the Separation Agreements, and that RETOSA was entitled to have concluded the Separation Agreements.

[132] Applicants' counsel referred to Article 14 of the RETOSA Charter, which Article stipulates the powers of the Board of RETOSA in the event of the liquidation, dissolution or winding-up of RETOSA. In terms of Article 14.1.1 RETOSA is entitled, by way of a Board Resolution to dispose of all of the assets of RETOSA, subject to certain limitations, but including payments to the employees of RETOSA "*... in accordance with their entitlement as provided for in the terms and conditions of service and in terms of their conditions of employment.*"

[133] There is no evidence of such a Board Resolution being taken, and the contents and conclusion of the Separation Agreements did not arise from the Applicants terms and conditions of service, or from their conditions of employment.

[134] The Respondents' counsel submitted that no mandate to make payment of a severance package equating to 24 months remuneration exists.

[135] It is clear from the RETOSA Charter that RETOSA is a voluntary association. However, it also appears from the Charter that RETOSA is not an entirely independent body. In the Preamble it is recorded that RETOSA was established by the SADC Member States, in order to, *inter alia*, promote

tourism. In Article 1 of the Charter (paragraph 2) it is recorded that RETOSA will be a legal entity of the SADC. In Article 4.3 it is recorded that RETOSA is a legal entity and institution of the SADC.

[136] The RETOSA Charter does not entitle RETOSA to conclude severance packages and Separation Agreements that are not in accordance with the relevant employees terms of employment or conditions of service. The conclusion of the Separation Agreements cannot fall under the category of the ordinary business of RETOSA.

[137] The conclusion of the Separation Agreements clearly required the approval, consent and authorisation of the SADC. The SADC did not grant such consent, approval or authorisation.

[138] In the letter of 5 August 2019, the Applicants themselves allege that the SADC (and the Third, Fourth and Fifth Respondents) are the parties responsible for the decision to pay severance packages. This clearly supports the Respondents' version that the authority of the SADC was required.

[139] I accordingly find that the Separation Agreements are invalid, for lack of authority.

[140] Although the issue of ratification was not specifically raised, I have considered whether the payment of the instalment amounts equating to an amount of 12 and a half months of remuneration could constitute a ratification of the conduct of Mr Nghitila and RETOSA, thereby validating the Separation Agreements.

[141] Ratification occurs when a principal adopts or ratifies an unauthorised act, which ratification can take place by conduct, including action or silence and inaction, if a principal has a duty to speak.

[142] There is no indication that the payments that were made to the Applicants were made with the knowledge of the Board of RETOSA, or the Board of the SADC. It is not even clear from the contents of the affidavits that Mr Nghitila was aware of the payments being made. As I indicated above, there is simply no detail surrounding the payment of the amounts equating to 12 and a half months of remuneration.

[143] In the circumstances, it cannot be found that the payments of the amounts to the Applicants constitute a ratification of the validity of the Separation Agreements, thereby negating any unauthorised conduct.

[144] I accordingly find that the Separation Agreements are invalid and unenforceable.

THE REMAINING ISSUES

[145] As I have found that the Separation Agreements are invalid and unenforceable, there is no need to consider and determine the other issues raised.

THE ORDER

[146] In the circumstances, I make the following order:

[145.1] The Application is dismissed.

[145.2] The Applicants, jointly and severally, are to pay the costs of the Application.

G NEL
[Acting Judge of the High Court,
Gauteng Local Division,
Johannesburg]

Date of Judgment: 23 May 2022

APPEARANCES

For the Applicants: Adv R Goslett

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For the Respondents: Adv T Motau SC

Adv S Mohapi

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