IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 6464/17P

In the matter between:

SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND **Plaintiff**

and

BONGANI CYPRIAN MAPHANGA **Defendant**

ORDER

The following order is issued:

1. Judgment is granted against the defendant in favour of the plaintiff for:
   1.1. Payment of the sum of R 270 074.22;
   1.2. Interest thereon at the rate of 10.50 % from 3 August 2016 to date of final payment both days inclusive;
2. The claim in reconvention is dismissed with costs.
3. The defendant is directed to pay the plaintiff's cost of suit. Each party is to bear its own costs for 10 September 2019.

JUDGEMENT

Henriques J:

Introduction

[1] The plaintiff instituted action in which it claims payment of the amounts of R270 074.22 from the defendant being the overpayment of salary he received for the months of August and September 2016 and R4 649.00[1] in respect of tools of trade. The basis of the plaintiff's claim in respect of the overpayment of salary is that on a proper construction of the defendant's employment contract with the plaintiff, his employment terminated on 3 August 2016, he continued to receive a salary for the months of August and September 2016. On termination of the contract he was required to return the tools of trade loaned to him.

[2] The defendant defended the action and instituted a counterclaim for payment of R13,2 million from the plaintiff. It is perhaps useful at this juncture to detail the pleadings in the matter to contextualise the issues and what follows hereinafter in the somewhat detailed judgement.

The pleadings

[3] In the defendant's initial plea dated 28 July 2017, he pleaded that he was appointed for the dual positions of Executive Chairperson (EC) and Chief Executive Officer (CEO) of the plaintiff. The term of office of the Chairperson was in line with that of the Board of Trustees and the term of the CEO was for an indefinite period. The claim in

[1] At the commencement of the trial on 9 September 2019, Mr Rall SC who appeared for the plaintiff on that occasion indicated that the parties had reached agreement on the claim for the tools of trade and the only claims which had to be adjudicated upon related to the repayment of the sum of R270 074.22 in respect of the overpayment of salary and the defendant's claim in reconvention.

reconvention dated 28 July 2017 filed simultaneously with the initial plea, contained similar allegations and indicated that the plaintiff repudiated the defendant's contract of employment by unilaterally purporting to terminate the contract on 25 October 2016 and had failed to pay the defendant his salary.

[4] The defendant's amended plea dated 14 November 2017, constituted a bare denial. The amended claim in reconvention dated 6 December 2017, included an allegation that the plaintiff had terminated the defendant's contract of employment 'without cause' and he was thus entitled to payment for the remaining period of his term of employment until retirement in the sum of R13,2 million.

[5] The plaintiff elected to replicate to the defendant's amended plea despite the fact that it was not properly before the court in terms of Rule 28.[2] It pleaded that the defendant's employment was terminated by it 'for cause' in line with the provisions of clause 4.7. of the employment contract.

[6] In the plaintiff's amended plea to the defendant's claim in reconvention dated 19 April 2022[3] it pleads that the appointment of the defendant as CEO was by virtue of his appointment as Chairperson of the Board and the salary of R1.2 million was the total combined salary for both roles as Chairperson of the Board as well as CEO of the Fund[4]. In addition, the plaintiff admits[5] that the contract stated that the appointment as CEO was for an indefinite period but denies that this was the true agreement and/or intention of the parties when the contract was concluded. It was the intention of the parties that the appointment of the defendant as CEO was inextricably linked to and was consequent upon his appointment as Chairperson of the Board.

[7] The subsequent conduct of the parties particularly that of the defendant demonstrates that they understood the operation of the employment contract would last for the period that the defendant was appointed as Chairperson of the Board. This understanding was consistent with the conduct of the defendant in that he failed to report

[2] Pages 39 to 41 Plaintiff's index to pleadings dated 20 April 2022
[3] Pages 47 to 53 Plaintiff's index to pleadings dated 20 April 2022
[4] Reference to 'the Fund" is to the plaintiff being the South African Local Authorities Pension Fund.
[5] At paragraph 2.4

for duty and failed to render his services as CEO after the term of the previous Board expired on 3 August 2016.

[8] In the alternative, in the event of the court accepting that the appointment of CEO was separate from that of Chairperson of the Board, the termination letter referred to the termination of the defendant's employment pursuant to the dissolution of the previous Board and the defendant ought to have but failed to render his services as CEO to the plaintiff after 3 August 2016.

[9] In addition, the plaintiff denies that the termination of the contract was without cause and pleads that the termination of the employment of the defendant in his capacity as both Chairperson of the Board and CEO was in line with the true intention of the parties to end as a consequence of the term of the Board coming to an end. In addition, the defendant's employment with the plaintiff terminated as a consequence of a letter of termination and constituted an acceptance of the defendant's prior repudiation of his employment contract.

[10] The defendant's repudiation occurred on 3 August 2016 when he last reported for duty in the capacity of CEO and by his subsequent conduct in not reporting for work for the month of August, September and October 2016 when the termination letter was issued thereby expressing his intent to no longer be bound by the agreement between the parties.

[11] In failing to report for duty the defendant breached the following clauses of the employment agreement in that:

(a) he failed and/or refused to perform his duties and functions in terms of the agreement (clause 3.1);

(b) he did not work 40 hours a week (clause 7); and

(c) he did not render services whilst based at the head office of the Fund situated at 12 Fredman Drive, Sandton (clause 8).

[12] This conduct of the defendant expressed an unequivocal intention to no longer be bound by the employment contract and consequently constituted a repudiation of the employment contract, alternatively a breach of a material and fundamental term of the

employment contract entitling the plaintiff to accept the defendant's repudiation from the date on which it arose.

[13] At the commencement of the trial I was advised that the defendant admitted receipt of the amount claimed in the summons of R270 074.22 for the period 3 August 2016 to 30 September 2016. He, however disputed liability to refund the plaintiff such amount. The parties confirmed that a contract of employment was concluded between them in terms of which the defendant was employed as EC of the Fund in line with the term of office of the Board of Trustees. The defendant accepted that his term of office as EC terminated on expiry of the term of office of the Board of Trustees of the Fund but did not accept that his term of office as CEO also terminated then as well.

[14] However, the defendant indicated that he was employed in a dual role, that of EC of the Fund as well as CEO. The contract of employment also related to his role of CEO which was on a permanent basis for an indefinite period of time. Evidence would have to be led of the circumstances surrounding the conclusion of the contract.

[15] The parties jointly sought an order in terms of Rule 33(4) of the Uniform Rules of Court, for the court to determine the aspect of liability in respect of the overpayment and the plaintiff's liability for payment of the counterclaim, quantum to stand over. It was also agreed that the defendant would testify first in relation to his counterclaim.

[16] In addition at the outset it was agreed that bundles of documents could be utilised which were marked accordingly. The usual admissions applied relating to the status of the documents in the bundle save that it was admitted that the Rules of the Fund published in terms of section 13 of the Pension Funds Act were binding on the fund, its members and its officers and the parties before court in this matter.

Issues

[17] The issues for determination are the following:

(a) what were the circumstances surrounding the appointment of the defendant at the time of the conclusion of the contract of employment-was the defendant employed as both the EC and CEO of the Fund which terms of office aligned with the term of

the Board of Trustees or was the appointment as CEO for an indefinite period of time?

(b) Was the defendant's employment terminated 'without cause' as envisaged in clause 4 of the contract of employment, and is the defendant entitled to succeed in his counterclaim?

(c) Did the defendant repudiate the terms of his contract of employment?

(d) Allied to (c) is whether the plaintiff accepted such repudiation.

[18] In its plea to the claim-in-reconvention, the plaintiff submits there are three reasons why the claim-in-reconvention ought to be dismissed and is unsustainable in law namely:

(a) the contract of employment came to an end through the effluxion of time;

(b) in the alternative, the defendant repudiated his contact of employment which repudiation was accepted by the plaintiff; and

(c) the claim for damages is in law limited to the notice period that the plaintiff would have had to give the defendant on termination of his employment.[6]

[19] Pivotal to the determination of the plaintiff's claim as well as the defence to the claim in reconvention, the court is required to interpret the employment contract concluded between the parties. Key to the interpretation of the agreement are the definitions of the terms Executive Chairperson (EC), and Office of the EC, and whether the parties intended and/or agreed to create a further position of Chief Executive Officer (CEO) distinct to that of EC.

[20] Both parties at the trial of the matter led evidence on the context and circumstances under which the contract was concluded. The defendant himself elected to testify and the plaintiff led the evidence of a former board member and trustee of the plaintiff. Based on the evidence both the plaintiff and defendant submit that the contract favours the interpretation suggested by them.

[21] I propose to briefly summate the evidence presented at trial.

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[6] During oral argument Mr Peter acknowledged that this would only apply if the plaintiff failed on grounds (a) and (b) and was related to the quantum of the defendant's counterclaim.

Summation of the evidence

[22] The defendant initially testified in isizulu, however elected to testify in English. He confirmed that he was initially employed at the Msunduzi Municipality in 1988 when he became a member of the plaintiff. In terms of the rules of the Fund he was nominated as a Trustee of the Fund and served on the provincial structures of the Fund from 1988 until 2000 when he was elected onto the National Board of Trustees by the KwaZulu-Natal Provincial Committee of the Fund.

[23] At the National Board of Trustee's level he was then elected as chairperson of the Finance and Investments Committee for a period of five years from 2001 until 2006. In his capacity as chairperson of such committee he was responsible for a turnaround strategy to increase the level of funding of the Fund thereby increasing the amount available to members of the Fund. His term of office came to an end in 2006 upon the expiry of the term of office of the Board of Trustees.

[24] The Board had to be reconstituted and the process of elections commenced for the next five year period from 2006 until 2011. In 2006 when the new board of trustees was elected he was elected as chairperson. At the time he was still employed by the municipality. He served on the board on a part time basis and same was conditional on his employer releasing him from time to time to attend to Fund matters.

[25] When the new Board of Trustees was established, it embarked on a strategic planning session which became his responsibility. A decision was then made that he ought to be employed by the Fund on a permanent basis to advance the strategy of the board. Although he was employed by the Msunduzi municipality on a permanent basis, he was released to perform the duties of the Fund full time and the Fund would reimburse the municipality for his salary on presentation of an invoice. This arrangement continued until the expiry of the term of office of the board in 2011.

[26] He was re-elected for the third time on to the board of trustees in 2011, however his employer, Msunduzi Municipality which was under administration at the time, would not release him on a permanent basis to perform the duties at the Fund, despite numerous attempts to persuade the municipality and even intervention by the union SANWU. As a consequence, he was then approached by the plaintiff to be employed on a permanent

basis. In order to give effect to this decision an amendment to the rules of the Fund would have to be made.

[27] He testified that this decision to offer him permanent appointment followed on a process of negotiation between the Deputy Chairperson of the Fund and its attorneys Thipa attorneys and necessitated a rule amendment. The rule amendment took a considerable period of time. Only once the rule amendment had been effected, did he resign from the municipality and take up employment at the Fund.. He testified that the position that was created was a dual position, he was a trustee and chairperson of the Board but the position also incorporated that of chief executive officer.

[28] He did not need to conclude a contract of employment as chairperson of the Board as this was an elected position and he could hold it for a period not in excess of five years and was aligned to the term of office of the Board of Trustees. The CEO position was not an elected position and was a permanent position, hence he had to conclude a contract of employment with the plaintiff.

[29] To sum up, his relationship with the Fund was twofold. The first being of a member of the Fund by virtue of him becoming a member and making contributions to the Fund, he became eligible for appointment as an officer bearer of the Fund and eventually through elections became chairperson of the Fund. The second role being that of CEO had to be regulated by means of an employment contract and although a permanent position was made terminable by either party.

[30] During cross-examination of the defendant the following emerged:

(a) He concluded a contract of employment with the plaintiff effective 1 September 2013 and he was appointed as EC to focus full-time on the business of the Fund. The position of EC encompassed a dual role being that of Chairperson and CEO of the Fund contemplated in the Task Team report.

(b) He accepted that the words ‘indefinite term’ were not synonymous with ‘forever’ and his employment could be terminated.

(c) There was really no distinction between the duties of a CEO and chairperson of the board.

(d) he acknowledged that his term of office as trustee and chairperson of the fund ended on 3 August 2016;

(e) when the term of the Board ended in 2016 there were no elections in all the provinces which resulted in no new National Board of Trustees being appointed in the stipulated time period as a result of which the Financial Services Board (FSB) acting in terms of s 26 of the Pensions Fund Act appointed an interim board of which he was not a member.

(f) his employment as CEO was terminated without cause by the interim board in terms of a termination letter dated 25 October 2016 and he did not seek his reinstatement consequent thereon as although same was without cause he regarded such termination as 'lawful'

(g) when he submitted his forms withdrawing from the pension fund the documents reflected his reason for doing so as 'end of contract'. He had initially completed the forms and reflected dismissal as being the reason for the withdrawal. However, the principal officer did not agree with this as the reason for withdrawal. A new reason was inserted which was 'end of contract" and he accepted this as he resigned the form with the new reason.

(h) he did not relocate to Johannesburg once permanently appointed to the Fund. Despite the terms of the contract of employment he did not regard himself as having to physically be present to work from the Fund's head office in Sandton five days a week during normal office hours. A practice had developed allowing him to work from home in Pietermaritzburg.

(i) the rules of the Fund were amended to define an EC as a person or trustee who had been appointed in terms of rule 2.7.2. to focus full time on the business of the fund and whose appointment is regulated in terms of a service level agreement (rule 1.24) and provided that the EC shall hold office in line with the term of office of the board of Trustees (rule 2.6.3.).

(j) the rules of the Fund make no reference to or provision for the position of CEO and only refer to an EC. The rules set out the term of office of the EC and the

service level agreement or contract of employment cannot alter the rules of the Fund and in the case of a conflict between them the rules of the Fund take preference.

(k) The various minutes of the board of trustees meetings from 17 and 18 November 2011 until November 2012 reflect discussions concerning and EC and principal officer. There are no discussions concerning separate roles of EC and CEO and discussions concern salary packages for EC and principal officer only. No separate discussions of salary packages for dual role which EC performed either.

(l) The board of trustees minutes do not reflect any discussion or distinction between the roles of EC, CEO and Chairperson of the Board. In accordance with the rules of the fund the Board appointed an EC and principal officer.

(m) The minutes of the board of trustees reflect him only recusing himself from certain of the meetings not all of them at which these discussions concerning his appointment and that of the principal officer occurred.

(n) Once the Board's term of office ended on 3 August 2016, the functions previously performed by him as CEO were done by the principal officer. Having regard to the Pensions Fund Act and rules of the Fund the principal officer's role is that of the CEO of the Fund when no Board is in place.

(o) He owed a fiduciary duty to the Fund.

[31] That then was the evidence of the defendant.

[32] Hendry Collins who served on the board of the plaintiff as a trustee since 1990 ceased being a board member in July 2021. He testified that he attended board meetings and was familiar with the discussions and resolutions taken by the board as well as the rules of the Fund. He confirmed that at a board of trustee's meeting held on 23 and 24 February 2012[7], despite him not being in attendance, among the items on the agenda was a progress report in respect of the secondment of the national chairperson, the defendant to the plaintiff on a fulltime basis.

[7] Plaintiff's index to general bundle, volume 4, pages 47 and 48

[33] The defendant was excused from the meeting when this item was discussed. It was reported that a response was still awaited from the defendant's employer and the matter had outstanding since 2011 without any progress. The board of trustees then resolved that a task team be appointed to investigate the possibility of appointing the defendant and Mr Kgakane as full-time employees of the plaintiff at the highest level and that the task team provide a comprehensive report with firm recommendations for the approval by the board at the next board of trustees meeting.

[34] He was one of the persons appointed to the task team which was to investigate their appointment on a permanent basis working full-time for the plaintiff but for a term of office which would align with the term of office of the board of trustees being a five year period. He confirmed being present at a further board of trustees meeting held from 22 to 24 August 2012. Item 57 of the minutes of that meeting reflect the investigation done by the task team in relation to the secondment and appointment of the defendant. The minutes reflect that the report of the task team had been circulated under confidential cover at the meeting and discussed at a closed trustee session.

[35] After a lengthy discussion the board of trustees at its meeting resolved that a rule amendment relating to the appointment of the EC and principal officer on a fixed term full time basis be approved, that the terms of their office be in line with the term of office of the board of trustees, that the fixed term contracts be negotiated and concluded for the positions of EC and principal officer subject to ratification by the board of trustees and the deputy chairperson of the board of trustees together with attorneys Thipa Inc be mandated to finalise the contractual issues in respect of their fixed terms of appointment.

[36] The minutes also reflect that he, although a member of the task team requested that his objection to the board resolutions be noted notwithstanding the fact that he had been part of the task team and had been supportive of the workings and findings of such task team. The reasons for this was that the task team's discussions and investigative report made a recommendation that their appointment be in line with the rules of the Fund

namely that the appointments must coincide with the term of the board of trustees. The problem with the recommendations was that the task team could not make a final recommendation regarding their full-time employment as there were no KPA's and KPI's. The task team could not make a final recommendation without the KPA's and KPI's and without knowing what their individual functions would be and/or the cost implications to the Fund.

[37] Paragraph (d) of the resolutions confirmed that Ekuseni Consultants were mandated to furnish expert advice on the KPA's and KPI's as well as a remuneration package for the EC and principal officer respectively. Items 53 and 57 pursuantly record that the rules did not provide for the positions of principal officer and EC to be permanent appointees on a fulltime basis and consequently a rule amendment was necessary. In addition, he confirmed that the report of the task team was returned and did not form part of the meeting pack.

[38] The 1 October 2012 report of Ekuseni was tabled at the board of trustees meeting of 22 to 24 November 2012. The KPA's and KPI's in such report were accepted and the salary packages of R1,2 million and R950,000 per annum for the positions of EC and principal officer respectively were approved. This was all subject to the rules amendment being approved by the FSB.

[39] He was also present at a board of trustees meeting held on 23 to 25 May 2013 in which the chairperson of the finance committee Mr Mohlala tabled a report proposing that the board of trustees review its previous decisions relating to the permanent appointment of the EC and principal officer. Mr Mohlala, like him, was concerned that there was insufficient information presented to the board in order for it to have made a decision. The contracts of employment had not been negotiated and he was concerned about the financial impact of these permanent appointments on the budget of the Fund.

[40] After much discussion and deliberation, the finance committee had passed a vote of no confidence in respect of its chairperson Mr Mohlala. At the board of trustees meeting it was resolved that the FSB had approved the rule amendment for the positions of EC and principal officer. The previous resolutions of the Board be proceeded with to make

such appointments of EC and principal officer as the rule amendment had already been submitted to the FSB and the FSB had approved such amendment.[8]

[41] He confirmed that the rules amendment catered for the position of an EC in clause 1.2.4 of the Rules and defined such EC as a person or trustee who had been appointed in terms of rule 2.7.2 to focus full-time on the business of the Fund and the EC's appointment was regulated in terms of a service level agreement concluded between the Fund or trustees and such person. In addition, clause 2.6.3 of the rules provided for the EC to hold office in line with the term of office of the board of trustees. He confirmed that this is what was submitted to the FSB for the rule amendments to take place.

[42] Item 45 of the minutes of the meeting[9] record that the appointment of the EC and principal officer on a full-time basis to the Fund had been approved by the FSB and a progress report would be tabled at the next meeting once Thipa Inc attorneys had followed up with the FSB in respect of the approval of the submitted rule amendments.

[43] The subsequent meeting of the board of trustees held on 22 to 23 August 2013[10] had as one of its items, item 37 which related to an update in respect of the appointment of the EC and principal officer. A report was provided indicating that negotiations in respect of the employment contracts for both these positions were in the final stages and it was resolved that Mr Kgope conclude the employment contracts with the EC and principal officer with the effective date being 1 September 2013.[11]

[44] He testified that the mandate given to Kgope was to conclude an employment contract pursuant to discussions relating to the salary for such positions, the KPA's and the term of office for these positions to coincide with the term of office of the board of trustees in terms of the amendment to the rules of the board. He confirmed that having regard to the contract of employment clauses 1.1, 2.2.6, 2.2.8 accorded with the amendments to the rules of the Fund and the resolutions taken at the board meetings.

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[8] Page 118 plaintiff's index to general bundle, volume 5
[9] Page 124 plaintiff's index to general bundle, volume 5
[10] Pages 126 to 141 plaintiff's index to general bundle, volume 5
[11] Pages 135 and 136, Minutes of the Board of Trustee's Meeting held on 22 to 23 August 2013, plaintiff's index to general bundle, volume 5.

[45] In respect of clause 1.1, it refers to the defendant as being appointed to the position of EC of the Fund, clause 2.2.6 defines and employee as being the defendant. The definition of an EC in clause 2.2.8.means a person appointed to focus full time on the business of the Fund. This was in keeping with the discussions that such EC performed a dual role, that of CEO as well as chairperson of the Fund and that having regard to the contract of employment, the reference to EC referred to the dual roles which is regulated by the service level agreement and the rules of the Fund.

[46] Although clause 4.2 of the contract of employment referred to an 'indefinite term' and no term was specified, it was always the understanding that this was subject to the other clauses in the agreement as well as the rules of the Fund being that the term of office as EC and CEO were aligned with the term of office of the board of trustees. This would be in line with clause 4.6 of the agreement which reflected that the term of office of the EC aligned with the term of office of the board of trustees.

[47] Mr Collins confirmed that reference to a dual function or dual roles and the use of the word 'employee' referred to the EC who would be the chairperson of the Fund as well as the CEO. Both roles would involve the chairperson being an employee of the Fund. When asked to comment on the defendant's evidence that the chairperson of the Fund cannot be employed as he occupied that office by virtue of elections, he indicated that the use of the word employee in this context meant a full-time employee of the Fund but the person is not employed on a full-time basis but on the basis of a contract of employment.

[48] The EC cannot be an employee of the Fund but a CEO can be an employee. Consequently, this is why they combined the roles to allow his appointment as EC. He confirmed that the intention behind the rule amendment was for him not to be appointed solely as the CEO of the Fund. He confirmed that one cannot read clauses 4.2, 4.3 and 4.6 in isolation, they have to read together. Clause 4.6 provided that the appointment would be in line with the term of office of the board of trustees as the rules of the Fund do not provide for the role of CEO hence the reason why the EC referred to the dual role of chairperson and CEO.

[49] The minutes of the Board of Trustee's meeting held on 13 to 14 March 2014[12] at item 8 thereof reflected the review of terms of office for chairpersons of committees. The meeting pack included an extract from the rules of the Fund effective 1 July 2010 which stated that the term of office for all committees of the board chairpersons, provincial chairpersons, deputy chairpersons of all committees and other office bearers of the board would only be for a period of two and a half years. The first two and a half years term of office ended in February 2014 and it was appropriate for the renewal of all chairpersons and deputy chairpersons' mandate going forward.

[50] In addition, it noted that in 2013 the board of trustees took a resolution to appoint the principal officer and board chairperson for the remainder of the board's term of office. Similarly, item 13 of the agenda[13] confirmed that the appointment of the EC and principal officer had been finalised. What this meant was that the EC and principal officer had agreed to the terms of the employment contracts and that the defendant had been appointed on a permanent basis coinciding with the term of office of the board of trustees.

[51] He confirmed that because the terms of office were in line with the term of office of the board of trustees, their terms of office would end when the board of trustees' term ended. The EC reported to the board of trustees and would continue to occupy the post until such time as the term of office of the board of trustees ended and his employment contract was in line with that.

[52] Employees of the Fund were based at and executed their duties at SALA House in Sandton, Fredman Road. He confirmed that consultants are employees employed on a contract basis and that they executed their duties outside of the province. Full time employees of the Fund would exercise their duties in the office where they had been based, for example if they were appointed in Eastern Cape there is a SALA office in the Eastern Cape. Where there were no offices, the employees were required to perform their duties at the SALA head office in Sandton.

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[12] Pages 142 to 159, plaintiff's index to general bundle, volume 5
[13] Page 148, Minutes of the Board of Trustees on 13 to 14 March

[53] This aspect of where services were to be rendered was pertinently dealt with in the contract of employment at clause 8.7. The Eastern Cape office had an employee appointed permanently there. The defendant was employed on a permanent basis to the Fund and had to perform his duties on a daily basis at Fredman Drive which is the head office of the Fund in Sandton. He confirmed that the defendant's term of office ended in May 2016.

[54] He confirmed that the term of office of the board ended in May 2016 and because there was no board in place, at the last board meeting of trustees, the board ceased to exist at the end of May 2016. All board members knew that their term of office had lapsed and that they needed to participate in elections. There were no mandates given to any board members to action any business of the Fund after the end of May 2016. He confirmed that although the rules of the Fund say that the term of office of the board of trustees is five years and their term of office ended in May 2016, the rules also make provision for the finalisation of any work of the former board of trustees within three months of the end of the term of office, hence the reason for the date of August 2016 being relevant.

[55] This the defendant clearly knew of having regard to correspondence addressed by him to the FSB on 11 August 2016 for an interim board to be appointed. He confirmed that when the term of office of the board of trustees ended at the end of May 2016 elections were not timeously conducted in terms of Rule 2.3.1 of the rules of the Fund. This was brought to the attention of the FSB who in turn then appointed members to an interim board to perform functions as set out in the letter dated 22 September 2016 from the Registrar of Pension Funds of the FSB to the principal officer Mr Kgakane.

[56] Mr Collins confirmed during the course of his evidence that he was appointed as a board member to the interim board of trustees as is evident from pages 24 to 25 of volume 6 which is the index to correspondence. The effect of this, he testified, was that the EC was no longer in office and a new interim board was appointed which was to elect a chairperson at the first meeting of the interim board. He confirmed that as a member

of the interim board of trustees, there was no correspondence from the defendant indicating he is tendering his services as CEO of the Fund and nor did he make any approaches to the interim board of trustees to tender services and neither did he attend physically at the offices of SALA at Sandton to say he was reporting for work. During the period for which the interim board was appointed, the defendant did not report for duty at SALA house in Sandton.

[57] During cross-examination he confirmed that any amendments or changes to the agreement had to be reduced to writing. That the term 'indefinite term' could not be interpreted to mean 'permanent' as one had to read it subject to clauses 4.4, 4.5 and 4.6 and the rest of the agreement as well as the rules of the fund. One could not read the clauses in isolation. The term of office was in line with the term of office of the board of trustees as stipulated in clause 2.4.6.. The post of EC and CEO was a single position at a fixed remuneration and the reference in the rules to sitting allowances did not apply to the Chairperson.

[58] The letter of 25 October 2016 was sent to the defendant as even though his employment with the Fund had terminated, the interim board became aware of the fact that the administrator had not stopped the payment of the defendant's salary and it was sent to regularise the position. That then was the evidence presented.

[59] The parties were given an opportunity to present written submissions and oral argument. I am indebted to them which assisted greatly in the drafting of the judgment. Although Mr *Khumalo* was given an opportunity to deliver further written submissions he declined to do so.

Analysis

[60] Before dealing with the evidence presented around the circumstances which led the appointment of the defendant as EC and the interpretation to be accorded to the written agreement/contract of employment it is necessary to set out in detail the approach

of our courts to the interpretation of documents. It is against these authorities that this court must interpret the agreement.

The legal position in respect of the interpretation of contracts

[61] The interpretation of documents, be it contracts, wills or statutes, had been in a state of flux and were often misinterpreted and misapplied. The Supreme Court of Appeal (SCA) has, however, settled the law in a number of decisions which I deal with hereinafter.

[62] The initial approach to the interpretation of contracts was summarised and dealt with by Joubert JA in *Coopers & Lybrand and others v Bryant*[14] as follows:

'The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...;

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[63] Wallis JA expressed the rule in relation to interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[15] as follows:

'…The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the

[14] *Coopers & Lybrand and others v Bryant* 1995 (3) SA 761 (A) at 768A-E.
[15] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Emphasis added, footnotes omitted.)

[64] In the same judgment, the SCA also warned against a court discerning the meaning of words used by others and not of imposing their own views of what would have been sensible for other persons to say. In addition, at paragraph 24 of the judgment, a warning was also sounded to ascertain the meaning of words from reading them in context:

'The sole benefit of expressions such as "the intention of the legislature" or "the intention of the parties" is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretive spectrum. At the one end, they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the "ordinary grammatical meaning" or "natural meaning" of the words used seen in isolation, to be followed in some instances only by resort to the context. At the other, they beguiles judges into seeking out intention free from the constraints of the language in question, and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same.' (Footnote omitted.)

[65] Then at paragraphs 25 and 26 the Court remarked:

'[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was view differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that appearance to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.' (Footnotes omitted.)

[66] Following on the decision in *Endumeni* was the decision in *Bothma-Batho Transport (Edms) BPK v S Bothma & Seun Transport (Edms) BPK*[16] in which, after quoting the summary in paragraph 18 in *Endumeni* which reflects the current state of

[16] *Bothma-Batho Transport (Edms) BPK v S Bothma & Seun Transport (Edms) BPK* 2014 (2) SA 494 (SCA) para 12.

South African law, Wallis JA again with reference to the quotation from *Coopers & Lybrand* stated that:

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly, it is no longer helpful to refer to the earlier approach.' (Footnotes omitted.)

[67] The approach of the SCA referred to by Wallis JA is aligned to and emanates from the approach that pertains in England and Wales such as in *Rainy Sky SA and Orsd v Kookmin Bank*[17]*.* Wallis JA quotes from Lord Neuberger's judgment where he said the following in relation to the correct approach to the construction of contracts to be the following:

'…that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant.'

[68] Having regard to the line of English decisions referred to, the English courts seem to adopt the approach that if the language is capable of more than one construction one chooses the construction it seems most likely to give effect to the commercial purpose of the agreement.

[69] Following on from *Endumeni* and *Bothma & Seun*, the evidentiary difficulty that flowed from the misinterpretation and misapplication by litigants of the decision in *Endumeni* was summarised by the SCA in *Tshwane City Metropolitan Municipality v Blair*

[17] *Rainy Sky SA and Orsd v Kookmin Bank* [2011] UKSC 50.

Atholl Home Owners Association[18] and *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others.* [19]

[70] At paragraphs 61 and 62 of the judgment in *Tshwane City* the court remarked as follows:

'It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided. It is also correct that the distinction between context and background circumstances has been jettisoned. This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*…stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically, akin to the unitary approach.' (Footnotes omitted.)

[71] Unterhalter AJA explained in *Capitec*[20] as follows:

'… interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.'

[72] I agree with the approach adopted by the full bench in *V v V*[21] in which the court dealt with the interpretation of contracts. The judgment summary provides a useful synopsis of the approach followed namely:

'The ordinary meaning of the words used, when limited to the clause itself, must yield to the intention of the parties as expressed in the balance of the contract as a whole, the purpose for which they were introduced and the factual matrix in which the document came into existence. To

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[18] *Tshwane City Metropolitan Municipality v Blair Atholl Home Owners Association* 2019 (3) SA 398 (SCA) at para 61

[19] *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA)

[20] *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) at para 51

[21] *V v V* (A 5021/12) (2016) ZAGPJHC 311 (24 November 2016).

interpret the document otherwise would result in absurdity and not make commercial sense in the context of the relationship established by the parties.'

[73] After consideration of the judgments in *KPMG Chartered Accountants (SA) v Securefin Ltd & another*[22]and *Endumeni* Lewis JA writing for the Court in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[23] at paragraphs 27, 28 and 30 and 35 held the following:

'[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretive process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. *KPMG*, in the passage cited, explains that parole evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between the background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.

[28] ...A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.'

[74] At paragraph 30, quoting Lord Clarke in *Rainy Sky*, the Court held the following:

'Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) 545 at 551, which I consider useful.

"Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the

[22] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para39
[23] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA).

reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language."'

[75] At paragraph 35 the Court continued:

'The argument that the words of the document, signed…on 14 October 2004, must be examined only linguistically, and that the genesis of the document, subsequent conduct and other facts relevant to the conclusion of the contract be ignored, is directly contrary to the decisions of this court cited above, and many others. But, as I have said, the issue here is not what the parties intended their contract to mean, but whether they intended to bind themselves contractually. That inevitably requires an examination of the factual matrix – all the facts proven that show what their intention was in respect of entering into a contract: the contemporaneous documents, their conduct in negotiating and communicating with each other, and, importantly, the steps taken to implement the contract.'

[76] Consequently, I agree with the submission of Mr *Peter* [24] that the latter aspect of the above quote requires a consideration and inclusion of evidence of the way both parties have carried out the contract in the interpretation process. This is because it gives an indication of the parties' common understanding of the contract's meaning.

[77] This would also be consistent with the approach mentioned in *V v V* at paragraph 25 where it was held as follows:

'The issue of the parties subsequent common conduct did not arise for consideration in *Novartis* and the other cases referred to in that decision. It is however well established that such evidence is admissible since it amounts to an objective demonstration of how the parties conducted themselves, without objection, in implementing the terms of the contract. It also amounts to conduct against interest, conduct evidencing consensus as to the application of the agreement (much in the same way as subsequent verbal confirmation as to their mutual understanding of the terms) and objective evidence of their common understanding as to the terms of their agreement at the time of its conclusion.'

[24] Who subsequently appeared for the Plaintiff when the trial resumed in May 2022.

[78] The authorities make it clear that courts are inclined to favour the interpretation of contracts which give a reasonable, sensible and business-like meaning and give effect to transactions and agreements seriously concluded over those that result in invalidity if the contract is reasonably amenable to such a construction. In addition, there is well established authority that a court may depart from the ordinary meaning of words in order to avoid absurd results.[25] This approach has been endorsed by Wallis JA in *Endumeni* at paragraph 25 quoted hereinbefore.

[79] The exposition of the quoted authorities dispositively deals with the position that an absurd or unbusinesslike interpretation of an agreement simply cannot prevail.

The relevant clauses of the agreement and their interpretation

[80] It is necessary to set out the relevant portions of the agreement[26] concluded between the plaintiff and the defendant which was signed on 10 September 2013 at Sandton with an effective date of 1 September 2013. The deputy chairperson of the board signed the contract on behalf of the plaintiff and the defendant signed as employee. The parties are *ad idem* the written contract is what governs the relationship between them.

[81] As indicated at the commencement of the judgement, certain clauses in the agreement and certain definitions are integral to the interpretation to be ascribed to the agreement. Section 2 of the agreement sets out the definitions assigned to words and expressions in the document. Section 2.2.8 defines an 'Executive Chairperson' to mean 'a person or Trustee who has been appointed in terms of Rule 2.7.2 to focus full-time on the business of the Fund and whose appointment is regulated in terms of a service level agreement concluded between the Fund and Trustee or such person.'

[82] Section 3 deals with the appointment of the employee as EC and 3.1 specifically refers to the fact that the Fund appointed the employee to the position of Executive Chairperson of the Fund to perform the dual role of Chairperson and Chief Executive Officer

[25] *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A) and *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A).
[26] Contract of employment between the plaintiff and defendant, plaintiff's index to general bundle, pages 1 to 23

of the Fund as contemplated in the Task Team Report. The functions and duties are described in annexure 'A' to the agreement. Clause 3.1 provides that such duties and functions may be amended from time to time by agreement. Clause 3.2 is of relevance and reads as follows 'The Employee agrees to perform in the assigned position and serve the Fund as Executive Chairperson or, subject to the Fund Rules, in such capacity of comparable status as the Fund may require, having regard to the operational needs and requirements of the Fund and the Employee's ability and capacity to fulfil such requirements.'

[83] The term of office and termination of service is dealt with in clause 4 of the agreement and it is apposite to set out the contents of clause 4 in its entirety given the dispute between the parties relating to the interpretation of the agreement and the basis of the counterclaim.

'4. **TERM OF OFFICE AND TERMINATION OF SERVICE**

4.1 In respect of the Executive Chairperson's appointment as Chairperson of the Fund, such appointment shall be in line with the term of office of the Board of Trustees provided for in the Fund Rules, subject to the provisions of Clauses 4.4, 4.5, 4.6 and 4.7 hereof and the provisions of the Labour Relations Act, Basic Conditions of Employment Act, and other applicable legislation.

4.2 The Executive Chairperson's appointment as Chief Executive Officer of the Fund is for an indefinite term, subject to the provisions of Clauses 4.4, 4.5, 4.6 and 4.7 hereof and the provisions of the Labour Relations Act, Basic Conditions of Employment Act, and other applicable legislation.

4.3 In the event that the Board does not re-elect the Executive Chairperson to the position of Chairperson of the Fund, upon expiry of the current term of office as Chairperson or any further term of office as Chairperson following re-election, the Executive Chairperson shall continue to be employed and fulfil the role of Chief Executive Officer of the Fund in terms of this Agreement. In such instance, the Executive Chairperson shall assume the title of Chief Executive Officer.

4.4 This Agreement may be terminated by the Employee by giving 6 (six) calendar months' written notice to the Fund.

4.5 This Agreement may be terminated by the Fund by giving 6 (six) calendar months' written notice to the Employee, which termination is subject to the provisions of the Fund Rules where applicable, the Labour Relations Act, Basic Conditions of Employment Act, and any other applicable legislation.

4.6 In the event that the Employee's employment be terminated by the Employer during the term of employment (which is in line with the term of office of the Board of Trustees(-)

4.6.1 without Cause, or

4.6.2 the Employee becomes disabled in terms of the Fund Rules, or

4.6.3 the Employee dies during the contract period,

the Employer shall refund the Employee for the remaining period of the term of employment. The fixed remuneration and bonus payable in terms hereof for the remaining term of employment, shall be taken into account in determining the amount to be refunded to the Employee.

4.7 In the event that the employment of the Employee is terminated by the Employer for Cause or in the event that the Employee decides to terminate this Agreement, no monies will be refunded to the Employee.'

[84] Clause 2.2.4 defines 'cause' to mean 'the termination by the Fund of the Employee's employment for misconduct, including but not limited to poor performance. It is specifically recorded that 'Cause' shall not include termination for operational reasons and/or capacity (excluding poor performance)'.

[85] Clause 6 of the agreement provided for the defendant to earn an annual basic pensionable salary of R1.2 million per annum. Clause 7 provided for the employee to work a minimum of 40 hours per week and also acknowledged that given his position the defendant may be required to work beyond the working hours of the Fund including Saturdays, Sundays and public holidays. Clause 8 of the agreement provided that during the term of employment the defendant would be based at the head offices of the Fund situated at 12 Fredman Drive, Sandton except for services which would be rendered during business trips as when reasonably necessary. Clause 8 imposed the obligation on the Fund to furnish office space and equipment, technical, secretarial and clerical

assistance to the defendant and other such facilities and services as may be reasonably necessary and suitable to his position to enable him to perform the duties required of him in an efficient and professional manner at the head office.

[86] It emanates from the evidence of both the plaintiff and defendant that the rules of the South African Local Authorities Pension Fund had to be amended to give effect to the defendant's appointment as employee. The revised rules gave effect to the appointment of the EC to hold office in line with the terms of office of the board of trustees.[27] Clause 2.7.1 provided for the board of trustees and members of committee to elect a chairperson and vice chairperson from the members who would hold office for a period prescribed in rule 2.6.2 or such other period as the trustees may from time to time decide.

[87] Clause 2.7.2 provided that the board of trustees may appoint a person to be the chairperson of the board of trustees and may also appoint the chairperson of the board of trustees as an EC provided that the board of trustees concluded a service level agreement with the EC.

Submissions of the parties

[88] The respective submissions of the parties were canvassed in oral argument as well as the written heads of argument submitted. In essence the defendant relied on the parole evidence rule and indicated that the extrinsic evidence of the plaintiff namely the evidence of the resolutions and board minutes was inadmissible. Once the court excluded such evidence all the court was left with was the evidence of the plaintiff which was admissible provided it did not contradict the terms of the agreement.

[89] Relying on the principles enunciated in *Endumeni* the agreement referred to both EC and CEO and the court must therefore accept that the defendant was appointed as EC which comprised two roles namely that of EC which was for a fixed term which term ended when the term of office of the Board of Trustees ended and that of CEO which continued and was a permanent position.

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[27] Clause 2.6.3, page 29, plaintiff's index to general bundle, volume 1.

[90] The plaintiff terminated the employee's employment as CEO without cause and is thus liable to compensate him for the remaining period of employment until his retirement and he must thus succeed in his counterclaim.

[91] Regrettably *Mr Khumalo* despite being given several opportunities to do so during oral argument could not indicate to the court how his submissions in relation to the applicability of the parole evidence rule and the principles of interpretation as enunciated in *Endumeni* ought to be applied by the court when interpreting the agreement. He also could not assist the court in indicating which of the evidence presented on the resolutions and minutes of board meetings the court ought to disregard and consider despite being given an opportunity to do so in argument and despite being given an opportunity to supplement his written heads of argument in this respect which he declined to do.

[92] The plaintiff submitted that if there is a dispute about the admissibility of extrinsic evidence and reliance is placed on the parole evidence rule the Constitutional Court in *University of Johannesburg* is applicable and says that context is everything and the court must err on the side of caution and admit such evidence and not limit itself to the words of the agreement only.

[93] The plaintiff submits that the defendant's counterclaim must fail as on a proper construction and interpretation of the agreement, the position of EC, which catered for the dual appointment of Chairperson of the Fund and CEO came to an end through the effluxion of time. The sole intention was to appoint him to the position of EC hence the rule amendment.

[94] The rules of the Fund give effect to the agreement being signed. It is only once a rule amendment takes place to give effect to the position of EC are the terms of the agreement negotiated and the agreement signed. The board minutes are consistent in that they only refer to the appointment of EC on a fulltime basis not on a permanent basis. Clause 4.3 is inconsistent with these minutes and resolutions taken namely that the defendant was employed on a full time basis for the term of office of the board of trustees.

[95] The only way for him to perform duties on a full-time basis as employee is to appoint him as CEO. The position of Chairperson of the Board is an elected position. It could never have been the intention of the plaintiff to elect office bearers but be saddled with a CEO ad infinitum to conduct the business of the Fund. The agreement can never supercede the rules of the Fund which is to cater for the business of the Fund.

[96] Consequently, the agreement ended through the effluxion of time. The plaintiff submits that the claim in reconvention cannot succeed as the agreement was terminated with cause as the defendant repudiated the agreement.

The parole evidence rule and the admissibility of extrinsic evidence when interpreting the agreement.

[97] I propose to deal firstly with the defendant's submission that the parol evidence rule applies and that this court cannot apply the rules of interpretation as enunciated in *Endumeni* and the line of authorities when interpreting the agreement. The court must exclude all extrinsic evidence presented during the trial specifically that in relation to the resolutions taken by the Board of trustees at its various meetings and the minutes of these meetings.

[98] The Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*[28] considered the interplay between the need to allow extrinsic evidence to determine the context in which a contractual provision appears and the relevance of the parol evidence rule. The Constitutional Court followed the process of interpretation as enunciated in the line of SCA cases and considered the law and emphasised the importance of considering the context and purpose of a contractual provision when interpreting a contract.

[99] It stated as follows[29]:

[28] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC)
[29] At para 68

'Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence.'

[100] In my view, the effect of the decision in *University of Johannesburg* is that a court should err in favour of admitting all extrinsic evidence and this approach would not affect the application of the parol evidence rule. What has become evident from the decisions is how our courts have struggled to balance the conflict between the need to allow extrinsic evidence in order to understand the context in which an agreement has been concluded and the restriction placed on the admission of extrinsic evidence by the parol evidence rule.[30]

[101] In the decision of *KPMG Chartered Accountants*[31] the SCA attempted to reconcile this conflict by explaining that the parol evidence rule remains part of our law but must be used as conservatively as possible as evidence may be admissible to contextualise a document to establish the factual matrix or purpose. The SCA in *Silostrat (Pty) Ltd and Others v Strydom NO and Others* [32] summarised the principles to be followed from the judgements in *KPMG*, *Endumeni* and *City of Tshwane* regarding the interplay between the admission of extrinsic evidence to provide context to an agreement and the parol evidence rule as follows:

'Central to the interpretation of legal documents is the principle that meaning must be attributed to the words used by the parties in the document. Although evidence of context is admissible as an interpretative aid such evidence may not be led to alter the meaning of the clear and unambiguous words used in an agreement'.[33]

[102] The Constitutional Court endorsed the view that there was no limit as to the amount or type of contextual evidence that may be adduced and it is for a court to determine the weight to be placed on such evidence. At para 67 of the Constitutional Court judgement the court held the following:

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[30] *City of Tshwane* at paragraphs 62 and 63
[31] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39
[32] *Silostrat (Pty) Ltd and Others v Strydom NO and Others* [32] [2021] ZASCA 93
[33] At paragraph 43

‘This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded.’

[103] What has been emphasized in all the decisions of the SCA and which has been endorsed by the Constitutional Court is that **context is everything** (my emphasis). Consequently, this court must err on the side of admitting the evidence in order to properly interpret the context and purpose of the contractual provisions. To do so will lead to a business-like and sensible meaning being attributed to the contract of employment.

The interpretation to be ascribed to the agreement concluded between the parties

[104] I align myself with the principles set out in paragraphs 61 to 79 relating to the manner in which agreements must be interpreted. Of importance when interpreting the contract is to guard against considering the ordinary meaning of words used, limited to the particular clause itself. The intention of the parties must be considered as expressed in the balance of the contract as a whole, the purpose for which they were introduced and the factual matrix in which the document came into existence. Therefore, the interpretation which the defendant contends for, namely that one must only consider the particular clause in isolation, is an incorrect approach.

[105] An analysis of the evidence presented is necessary. The minutes of the board meetings refer to the position of EC as do the resolutions and the contract of employment. The position of the defendant was that of EC. When the defendant testified he did not make use of any documentation and relied solely on his oral evidence in support of his contention that he was appointed to the positions of EC and CEO employed by the Fund on a permanent basis.

[106] In essence, he testified that:

(a) the plaintiff approached him to be employed on a full-time basis. The only bar to his employment on a full-time basis was that there had to be an amendment to the

rules which governed the pension Fund, such rule amendment was subsequently approved and he then commenced with full time employment with the Fund;

(b) the position created was a dual position which covered both his elected position as trustee and chairperson of the board of trustees and his employment as CEO. Because the position of a chairperson was an elected position he did not need to sign a contract of employment with the board of trustees but only needed to do so to regulate the employer and employee relationship insofar as it concerned his position as CEO;

(c) the Fund would not have been able to employ him full time as a chairperson as this was an elected position;

(d) when he was appointed as EC he had served on the board of trustees for 13 years and was fully aware that his term as chairperson of the board of trustees would run concurrently with the term of office of the board and could not be a permanent position.

[107] During the course of cross examination the following evidence emerged. In relation his understanding of the term “indefinite term” in the contract of employment, the defendant testified that he understood it to mean that the contract would exist until terminated by either party in terms of clause 4.3 alternatively until retirement. He also confirmed that the contract of employment between him and the Fund had been terminated and accepted that it had come to an end. In addition he acknowledged that the contract of employment for the position of EC combined both the offices of chairman of the board as well as CEO officer of the Fund.

[108] In respect of the circumstances which led to the rule amendment for the position of EC, the defendant testified that he was not aware of how this came about as he was not part of the meetings and was excused from the meetings when discussions on this took place but as far as he was aware for him to be appointed on a full time basis the Fund had to create the position of executive chairperson.

[109] When it was suggested to him that the amendment to the rules was necessitated to regulate his full time employment with the Fund and consequently his contract of employment could not usurp or alter the rules of the Fund he accepted this but sought to qualify his answer. He testified that although he accepted that his contract of employment could not amend the rules of the Fund, the rules did not refer to the position of CEO. During the course of the defendant's evidence he constantly referred to what the board of trustees wanted and what it wanted to achieve when it considered his full-time employment to the Fund and as a consequence, he agreed that the minutes of the various board meetings would be relevant specifically those meetings where the issue was raised.

[110] During the course of cross-examination of the defendant, the minutes of several board meetings were canvassed where the issue of the appointment of the defendant as chairperson as well as the creation of the post of principal officer as a permanent position was discussed. This was also canvassed during the course of the plaintiff's witness', Hendry Collins evidence. It became evident from canvassing the contents of the various minutes of the board that the minutes did not reflect that a separate and permanent appointment of a CEO was discussed. What was consistently canvassed and discussed at all times during the board meetings was the appointment of an EC which role covered both the position of chairperson and CEO on a fixed term basis and consequently, because the minutes did not discuss the possibility of appointing a CEO on a permanent basis that could never have been the intention of the board.

[111] In response to this proposition the defendant indicated that if the board in concluding the contract of employment with him acted outside the minutes and its mandate he could not be held responsible for this. In response to this, it was suggested to him that if the board acted contrary to its mandate and the rules and legislation he as chairperson owed the board a fiduciary duty to act in the best interests of the Fund and consequently it was incumbent on him to correct any wrong doing or obvious error. His response was that he could not be held responsible for mistakes made by the board of trustees.

[112] When questioned by *Mr Peter* asked as to who he reported to as CEO the defendant testified that he reported directly to the board that is all of the trustees. When

it was pointed out to him that in August 2016 there was no board of trustees in existence for him to report to, he indicated responded that he would have reported to the interim board established by the FSB. When it was pointed out to him that the FSB only established the interim board in September 2016, he indicated that whilst there was this hiatus it did not mean that his duties ceased.

[113] Additionally, when questioned as to what work he performed in August 2016, he confirmed that he was dealing with stakeholders and compliance issues having been mandated by the previous board of trustees. When questioned as to why he did not communicate his appointment as CEO to the FSB, rather surprisingly he testified that once the Registrar of Pension Funds had made a decision that everyone vacate their positions, no one could challenge that decision, not even a CEO as the registrar was acting in accordance with s 13 of the Pension Funds Act.

[114] During the course of the trial the defendant was served with a request for further particulars which required him to provide copies of all work performed during the months of August and September 2016. It is common cause that the plaintiff served a notice in terms of Rule 35(3) on the defendant on 29 April 2022 in which it sought the defendant to provide 'all e-mails proving work done at the Plaintiff by the Defendant from 3rd August 2016 to 25th October 2016.' The defendant was required to state under oath where the documents were and to make such documents available.

[115] It is further common cause that during the course of his cross examination the defendant was asked to produce the documents. He testified that he had provided some of the documents but not all were provided as he misunderstood the contents of the Rule 35(3) notice. It became evident that none of the documents requested to substantiate the work he did and the services he rendered in August and September 2016, when the board was not in office were supplied. He could not provide any proof of the work done when he testified that he tendered his services in August and September to the Fund.

[116] The emails which he had produced in response to the Rule 35(3) notice were canvassed with him during the trial, and it became evident the series of emails did not disclose work done and once again he indicated that he misunderstood the request. He also testified that he did not approach the interim board appointed by the FSB to tender

his services as CEO and the reason for this was because he was not invited to any meetings and was excluded.

[117] What emerged from the evidence and correspondence presented was that elections had taken place in certain of the provinces. A 'board' had been appointed and when the defendant wrote to the FSB, he proposed four names including himself to serve as an interim board. This proposal was not accepted by the FSB as the elections were not held in compliance with the rules of the Fund.

[118] The defendant testified in response to the suggestion that he had breached his contract of employment by failing to report for work, that he could work from home and that a practice had developed that employees could work from home as they were all based in different provinces.

[119] The defendants evidence must be viewed against that tendered by Hendry Collins specifically in relation to the resolutions taken at various board meetings and the position of EC.

[120] The defendant did not impress me as a witness. During the course of cross-examination he was extremely antagonistic and unco-operative and reluctant to answer questions and propositions put to him. Often a question and/or proposition had to be repeated three times and still he would refuse to respond. I agree with the submission of Mr *Peter* that his evidence was contrived and self-serving and he was inconsistent and contradicted himself in a number of respects. This is demonstrated by inter alia the following. He acknowledged that he knew the rules of the fund, and how the rule amendment came about and what it served to regulate namely the dual role of chairperson and CEO. However, when pressed for a concession in light of his own evidence and the contents of the board minutes and the terms of the contract itself, he testified that the rules did not speak of a CEO and the appointment of CEO was beyond the scope of the rules.

[121] When questioned as to who he would have reported to when the previous board of trustee's term expired he said the interim board. When he was questioned pertinently as to when and whether in fact he had tendered his services to the interim board when it was appointed, his flippant response was that the interim board did not invite him to any

meetings. He was steadfast in his assertions that he continued to work for the fund in August and September 2016. However he was forced to concede that despite service of a Rule 35(3) notice, he did not produce any proof of having tendered or actually performing any work despite being pertinently called upon to do so. He had to eventually concede that the emails which he provided did not substantiate his allegation or constitute evidence that work had been done for the Fund.

[122] What stood out for me and signified his dishonesty was his disavowal of the contents of the minutes of the board meetings and that he bore no knowledge of what was discussed specifically in relation to his appointment as EC to perform dual roles. He remained steadfast that he was not present for these discussions and would excuse himself from the meetings, yet that he did so on every occasion is not borne out by the minutes.

[123] Whilst I accept that at times during the course of the meeting of the board of trustees he may have been excused, he was the chairperson of the Board and the minutes of the previous board meeting were circulated and adopted at the next meeting of the board of trustees. He would thus have had sight of these minutes despite him being excused in his capacity as chairperson. All the minutes produced reflect his signature thereon as reflecting an accurate record of the particular meeting.

[124] In addition his dishonesty is corroborated by the fact that during his evidence and cross- examination he consistently referred to the intention of the board to ‘absorb’ him on a full-time basis. Even though he reluctantly accepted that the registrar could not be challenged after having made a decision when it was suggested to him that the registrar had directed correspondence wherein it was mentioned that any action taken on behalf of the fund after 3 August 2016 was invalid and as such to the extent that he did so, he did not have any authority and thus did not validly engage with stakeholders of the fund, he then changed his evidence to testify that he did not understand the words ‘no action’ to mean that nothing could be done by him.

[125] The evidence of the defendant does not support or corroborate his version of the interpretation to be attached to the specific clauses in the employment contract, specifically clauses 4.2 and 4.3.

[126] Essentially what the defendant and Mr Khumalo want this court to do is to consider those clauses in isolation which falls foul of the rules of interpretation and construction imposed by the decision in *Endumeni*[34] and other like decisions. On a proper construction and interpretation of the agreement having regard to the relevant background and circumstances, the parties' subsequent conduct specifically having regard to the evidence of Hendry Collins a former board of trustee member and also the minutes of the various board meetings, it is apparent in my view that what was envisaged by the parties was for the defendant's appointment to be as EC. Such position of EC comprised dual roles- that of chairperson and CEO. His appointment as CEO would have enabled him to be appointed on a full time basis to attend to Fund business.

[127] The appointment of EC was for a fixed period that is both his position as Chairperson and CEO was for a fixed period to align with the term of office of the Board of Trustees. His position of EC was regulated by the rules of the pension fund which in turn regulated the term of office for that position. That much is clear. On the probabilities no amendment to the rules would have been necessitated had the parties intended otherwise. A rule amendment was necessary which was conceded by the defendant in order for his appointment to be effected and for his term of office to be brought in line with the rules of the pension fund.

[128] It was never envisaged that the defendant would be employed on a permanent basis. That much is clear from the resolutions taken at the board meetings. Any other interpretation in my view would result in an absurdity and an unbusiness-like meaning being attributed to the contract of employment. The only issue in my view which arises for this court to consider within the context of considering the proper construction and interpretation of the employment agreement are clauses 4.2 and 4.3. In my view one cannot look at the clauses in the employment contract in isolation and although the defendant testified concerning clause 4.2 this was not specifically pleaded in the claim in reconvention. Having regard to clauses 4.2 and 4.3 these are at variance with the whole body of the agreement and the rules of the fund which specifically regulate the agreement

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[34] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).

and which was specifically amended. These clauses contradict the minutes of the various board of trustees meetings which led to the rule amendment which regulated the appointment of the executive chairperson. If this court were to interpret clauses 4.2 and 4.3 in isolation disregarding the underlying context and circumstances as testified to, the entire contract it would lead to an absurd and unbusinesslike interpretation of the agreement which this court is not prepared to do.

[129] In addition I align myself with the decision in *Attorney-General Transvaal Appellant v Additional Magistrate for Johannesburg Respondent* 1924 AD 421 at 426 which is authority for the proposition that words inserted into an agreement through inadvertence or error can be held to be insensible when an absurdity would follow from giving effect to the words as they stand.[35]

[130] This is demonstrated by the Fund being responsible to effect payment for the balance of the agreement or ad infinitum in the event of the death of the defendant. It is simply not what was contemplated by the parties. That is what would result from the defendant's interpretation.

The alternative defence, that of repudiation of the agreement by the defendant

[131] A second issue which this court must decide as an alternate defence to the counterclaim is the aspect of the repudiation of the contract. The defendant contends that the contract was terminated without cause whereas the plaintiff contends it was terminated with cause. The effect of clause 4.3 of the employment contract means that if the contract has been terminated with cause the defendant cannot succeed in his counterclaim.

[132] It is trite that an employer may terminate a contract of employment where the conduct of an employee amounts to either a repudiation of the contract, or a breach of a material term of the contract of employment. The leading authority on repudiation is that of the SCA in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*[36] in which in a

[35] At 426
[36] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA)

unanimous judgement dealt fully with the principles relating to a repudiation of contract. The minority judgement of Scott JA agreed with the majority of Nienaber JA relating to the legal principles at paragraph 37 of the judgement. The court found that repudiation consists of two parts namely the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention to no longer be bound by an agreement and secondly the act of the adversary 'accepting' the breach. The SCA acknowledged that repudiation is a breach in itself [37] and expressed its disapproval of the language frequently used in prior decisions of offer and acceptance in the context of repudiation.

[133] At paragraph 1 of the judgement Nienaber JA held the following:

'Both the analogy and the language of offer and acceptance, a legacy from England, have on occasion been deprecated by this court. The better view is that repudiation is a breach in itself that the court's 'intention' does not in truth have to be either deliberate or subjective but is simply descriptive of conduct heralding non- or malperformance on the part of the repudiator; and that the so-called "acceptance", although a convenient catchword, does not "complete" the breach but is simply the exercise by the aggrieved party of his right to terminate the agreement' (case references omitted).

[134] The court in *Datacolor* had cause to consider whether the plaintiff's letter of termination constituted a repudiation of the agreement with the defendant. In considering this at paragraph 16 the court held the following:

'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 repudiation and rescission to the party who has repudiated...[38] This is the conventional exposition of the operation of the doctrine of repudiation leading to rescission with its emphasis on the guilty party's intention and the innocent party's

[37] At 287J

[38] Per Corbett JA in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F.

acceptance. At the same time this court has repeatedly stated that the test for repudiation is not subjective but objective.'

[135] Further the court held:

'The emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The test is whether such a notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming. The inferred intention accordingly serves as the criterion for determining the nature of the threatened actual breach.'

[136] Further at paragraph 18 the court held the following:

'The conduct from which the inference of impending non- or malperformance is to be drawn must be clear cut and unequivocal, i.e. not equally consistent with any other feasible hypothesis. Repudiation, it has often been stated, is "a serious matter" requiring anxious consideration and - because parties must be assumed to be predisposed to respect rather than to disregard their contractual commitments - not lightly to be presumed.'

[137] The plaintiff's witness, Mr Collins testified that he had been appointed to the interim board by the FSB. He confirmed that the defendant did not report to the Sandton office for the work prior to the appointment of the interim board and also did not report to the interim board once it had assumed office. During the course of cross examination the defendant was shown communication which he had written on 11 August 2016 about the end of term of the board as well as the appointment of a new interim board.

[138] He was aware that an interim board had to be appointed but also initiated the engagement. He testified that he had held a meeting with the FSB and was requested to draft that correspondence. At all material times in my view he knew of the pending appointment of an interim board. In line with the decision in *Datacolor* I must approach the question of repudiation from the position of the interim board. When the interim board assumed office it was not approached by the defendant at any point contending to be the

CEO of the board and neither did he report on the activities he had undertaken in the interim period until August 2016 when there was no board appointed.

[139] The evidence of Mr Collins was that the termination letter was sent to the defendant due to the fact that from the time the term of office of the previous board had expired the defendant had not and could not have undertaken any work on behalf of the plaintiff and therefore was not entitled to receive a salary. The defendant was requested during the course of his evidence on a number of occasions to indicate what work he had done and in addition was asked to produce all the work he had done from 3 August 2016 by way of the Rule 35(3) Notice. That he did not perform any work and was unable to produce all the work that he had done was not challenged by him and was confirmed in my view during the course of cross examination.

[140] In addition, what emanated from the defendant's evidence was that he did not report to the head office to tender his work. Clause 6 of the agreement makes specific reference that employees of the fund had to work from the Sandton offices which is where the head office of the Fund is based. Collins directly contradicted the defendant's evidence that a practice had developed allowing employees of the Fund to work from home.

[141] In fact, his evidence was that there was no practice which developed allowing employees to work from home and that is also inconsistent with the terms of the contract of employment. He confirmed that all Fund employees except for specific consultants were based at the head offices of the Fund in Sandton. As a result, in my view, relying on the decisions and principles set out in *Datacolor* the plaintiff has proved that the defendant's conduct amounted to a repudiation of the contract which repudiation the plaintiff accepted.

[142] Consequently, in terms of clause 4.3 of the contract of employment the defendant's employment was terminated with cause and consequently the counterclaim must fail.

[143] To sum up, the plaintiff has established its claim for repayment of the salary paid to the defendant for the months of August and September 2016. What emerged from the evidence, is that the defendant was not entitled to payment as the three month period within which the business of the former board had to be completed expired by 3 August

2016. In addition the evidence was that the administrator had failed to stop the salary payments to the defendant.

[144] In addition, the defendant was also not entitled to payment as his employment had been terminated for cause.

[145] The defendant's counterclaim likewise cannot succeed as on a proper construction of and interpretation of the agreement he was appointed as EC to serve the dual roles of Chairperson of the Fund and CEO. The term of office of EC (both roles) terminated when the term of office of the board of trustees ended. His appointment as CEO could not have been for an indefinite period.

[146] In addition his employment was terminated for cause and consequently he is not entitled to payment until retirement.

Costs

[147] The trial of the matter was enrolled for hearing on several occasions and adjourned. The presiding Judges dealt with the costs occasioned when the matter was postponed. The trial eventually proceeded before me on 9 and 10 September 2019. The trial commenced on 9 and 10 September 2019, on which date it was not completed and was adjourned sine die with the costs of 10 September 2019 reserved. It was then enrolled for hearing from 3 to 6 May 2022.

[148] When the defendant testified he did so largely from memory and referred to minutes of board meetings and discussions and resolutions taken at such meetings. In light of his evidence on 9 September 2019, counsel for the plaintiff requested the minutes of such meetings from the plaintiff. A bundle of documents was provided which the defendant's legal representative indicated he had seen before. The matter was rolled over until 10 September 2019 to afford the plaintiff's counsel time to canvass them and take instructions.

[149] On 10 September 2019, I was advised that the defendant was objecting to the use of the documents and a formal application would have to be brought for the late discovery

of the documents. As a consequence, the trial was adjourned and the costs of 10 September 2019 were reserved.

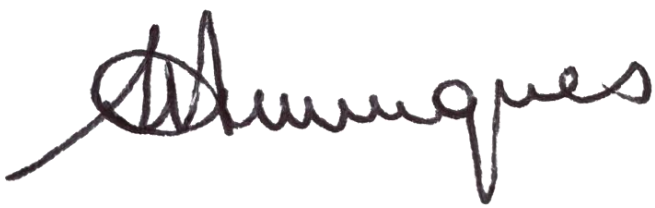
[150] Both counsel who appeared on the resumed hearing indicated that they were entitled to costs if successful. Neither one of them addressed me on the application referred to on 10 September 2019. In my assessment however, the use of the documents was crucial in respect of the context in which the employment contract came about. One would have expected the defendant to have discovered these documents as well.

[151] In my view there is no reason to depart from the normal rule in relation to costs and the successful party ought not to be deprived of their costs. As the parties did not specifically address me on the reserved costs and advise me of the application alluded to on 10 September 2019 it is appropriate that each party bear their own costs of 10 September 2019.

Order

[152] In the result the following order is issued:

1. Judgment is granted against the defendant in favour of the plaintiff for:
   1.1. Payment of the sum of R 270 074.22;
   1.2. Interest thereon at the rate of 10.50 % from 3 August 2016 to date of final payment both days inclusive;
2. The claim in reconvention is dismissed with costs.
3. The defendant is directed to pay the plaintiff's cost of suit. Each party is to bear its own costs for 10 September 2019.



Henriques J

Case Information

Date of Hearing	: 9 and 10 September 2019, 3 to 6 May 2022
Date of Judgment	: 11 April 2023

Appearances

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This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 11 April 2023.