

Reportable:	YES/ NO
Circulate to Judges:	YES/ NO
Circulate to Magistrates:	YES/ NO
Circulate to Regional Magistrates:	YES/ NO



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

**Case no: 241/19**

**KENEILWE LYDIA SEBEGO**

**PLAINTIFF**

**AND**

**PREMIER OF THE NORTH WEST PROVINCE**

**1<sup>ST</sup> DEFENDANT**

**ADMINISTRATOR FOR THE OFFICE OF**

**THE PREMIER**

**2<sup>ND</sup> DEFENDANT**

**NORTH WEST PROVINCIAL GOVERNMENT**

**(ADMINISTRATION)**

**3<sup>RD</sup> DEFENDANT**

**Summary:** Specific performance- employment agreement- unlawful repudiation of a fixed term contract of employment- damages- effect of oral agreement- failure of defendants to present rebutting evidence to confute plaintiff's evidence- absence of evidence to prove counterclaim-effect thereof. Discretion of court to order specific performance- defendant ordered to perform in terms of the redetermination agreement( Annexure A ) to the amended particulars of claim.

## ORDER

- (i) The defendants are to within **twenty (20)** court days from the date of this judgment apply in the prescribed manner to the South African Revenue Service for an Income Tax Directive in respect of the income tax payable by the plaintiff on the gross amount of R3 390 775.50 due to her in terms of the redetermination agreement which is titled settlement agreement.
- (ii) Payment of the amount of income tax directed by it to the South African Revenue Service.
- (iii) Payment of the Government Employees Pension Fund of the pension fund contribution payable in respect of the abovementioned amount due to the plaintiff, as prescribed in terms of the Rules of the Fund, within **twenty (20)** court days from the date of this judgment.
- (iv) Payment of the balance due to the plaintiff after deduction of the income tax liability and pension fund contributions of the plaintiff referred to (ii) and (iii), above within **twenty (20) court days** from the receipt of the income tax directive from the South African Revenue Service.
- (v) Interest on the balance referred to in prayer (iv) calculated from 1 November 2018 at the prescribed *mora* rate until date of final payment.
- (vi) Costs of the suit, on the High Court scale as between party- and- party, to be taxed, jointly and severally the one paying the other to be absolved.

## JUDGMENT

**REDDY AJ**

### **Introduction**

- [1] The plaintiff, in the main, claims' specific performance by the defendants of their obligations in terms of the termination of an employment agreement and in the alternative, because of the unlawful repudiation of her fixed term contract of employment, suffered damages in the amount of R3 124 010. 40. The action is defended.
- [2] The special plea relating to jurisdiction, as pleaded by the defendants, had been adjudicated on *via* Rule 33(4) of the Uniform Rules of Court ("the Rules"), and was dismissed with costs on 19 October 2022. At the close of the evidence on 31 May 2023, this Court acquiesced to the submission of written closing submissions, which the plaintiff submitted on 12 July 2023 and defendant on 21 July 2023. The parties agreed that the action may be adjudicated in the absence of oral argument.

### **The plaintiff's version**

- [3] The plaintiff was employed for a fixed-term period of five (5) years in the capacity of Director General of the North West Province. Resultantly, the plaintiff was also the Head of Department of the Office of the Premier. The material terms of the written contract of employment needs no further elucidation, save as to conclude that it forms part of the particulars of claim.
- [4] In terms of the written contract, the fixed term of service of the contract of employment commenced on 1 July 2015 and would through the effluxion of time terminate on 30 June 2020. Regarding the direct reporting line, the plaintiff was overseen by the Premier at the time, Mr S Mahumapelo, who was succeeded by Professor TJ Mokgoro(Mokgoro), the second defendant.
- [5] Central to the plaintiff's main cause of action was the redetermination clause of her employment contract. Clause 4.1.5. of the plaintiff's contract of employment, provides for termination by means of a "redistribution agreement" initiated by the employer, which in broad allows for the whole or a *pro rata* portion of an employee's future remuneration to be paid out in exchange for the early termination of service.
- [6] In the exercise of his discretion, the Minister of Public Service and Administration created a Senior Management Service, which comprised of most of the senior managers in the public service from the level of Director-to-Director General. The terms and conditions of the Senior Management Service would be contained in the "The SMS Handbook", more pertinently Chapter 8. The

plaintiff fell within the perimeters of Chapter 8, whilst serving in the capacity of Director General to the third defendant.

[7] In June 2018, the National Government invoked section 100(1)(a) and (b) of the Constitution of the Republic of South Act 108 of 1996, which enjoined it to intervene in the administration of the third defendant. This intervention caused the appointment of an Administrator, Mr Mpanza (“Mpanza”), to the Office of the Premier. The appointment of Mpanza impacted on the duties and responsibilities as well as the reporting line of the plaintiff. As a result, the plaintiff would perform such tasks as at the behest of Mpanza, on an *ad hoc* basis to whom she would also report. The appointment of Mpanza resulted in the plaintiff being superfluous. To this end, the plaintiff tendered her written resignation as Director General on 16 July 2018 to Mokgoro.

[8] The letter of resignation was handed to Mokgoro personally in his office. Mokgoro, on considering the letter of resignation, asked whether the plaintiff would be amenable to a redetermination of her contract of employment *in lieu* of resignation. The plaintiff retorted, indicating that she would prefer a redetermination of her contract. Mokgoro acquiesced to taking the preference of the plaintiff for a redetermination of her contract further and revert. Later, a short message service (SMS) was sent from Mokgoro. The SMS reads as follows:

**“Good Morning DG, I am on my way to Tshwane & I should settle your matter today, apology for the delay.”**

- [9] To place the resignation letter in full context regarding the time frames that governs the resignation from employment, the minimum notice period of a resignation was four (4) weeks as evinced by Regulation 69(1)(a) of the Public Service Regulations 2016. The effective date of resignation of the plaintiff was 1 August 2016, which axiomatically did not adhere to the peremptory four (4) week notice period, as set out in Regulation 69(1)(a). Notwithstanding the truncated notice of resignation, the plaintiff continued in her role after the end of July 2018 as per the directive of Mokgoro, who was of the view that the *status quo ante* would prevail pending the possible redetermination of her contract of employment.
- [10] On 2 August 2018 Mokgoro, approached the plaintiff while she was in her office. Mokgoro expressed a view of wanting to discuss the redetermination of the plaintiff's contract of employment. Mokgoro returned the letter of resignation, which contained a manuscript endorsement accepting the plaintiff's resignation. Notwithstanding the latter endorsement, Mokgoro double backed, unequivocally indicating that the plaintiff's resignation would be disregarded. To this end, the plaintiff was at liberty to dispose of the resignation letter as it would have no force or effect.
- [11] Acting on Mokgoro's stance, notwithstanding Mokgoro's conversance with redetermination agreements, the plaintiff suggested Advocate Marabe, ("Marabe"), a Director Legal Services in the Office of the Premier, who was *au fait* with the standard terms of redetermination agreements joined the discussion. Marabe did so. Marabe was mandated to craft a standard redetermination agreement for signature by the plaintiff and Mokgoro. In the drafting of the redetermination agreement,

Marabe enlisted the assistance of Ms Michael, Chief Director: Corporate Management in the Office of the second defendant, to confirm the accuracy of the financial aspects.

[12] The redetermination agreement as crafted by Marabe was presented to the plaintiff on 3 August 2018, who signed same. Marabe presented the redetermination agreement to Mokgoro on 6 August 2018 for his signature. Mokgoro, acutely aware of the signed redetermination agreement, indicated that he was to consult with the Minister of Public Service and Administration. Whilst awaiting feedback from Mokgoro, the plaintiff continued to render services under Mpanza. But for a reconsideration of the redetermination agreement, the plaintiff's contract would have run its course until 30 June 2020.

[13] On 6 August 2018, Mokgoro transmitted the following SMS amongst others:

“ ..... Ausi, this is to confirm I have received the document from Advocate Marabe and now have to consult with MPSA”.

[14] After this SMS, there was no further communication from Mokgoro.

[15] On 17 August 2018, Mr Mpanza transmitted the following email:

**“SUBJECT : NOTIFICATION OF RESIGNATION I.R.O YOURSELF DR K.L SEBEGO**

Following the discussion with the Premier, on the subject of your resignation the following information have come to light.

“As per the letter of your resignation submitted to the Premier on the 16<sup>th</sup> July 2018, your resignation comes into effect on the, 16<sup>th</sup> August 2018, which marks the 30 days calendar notice since the submission of your resignation.

The Premier also states that your resignation was accepted, and this was communicated back to you via the letter dated 24<sup>th</sup> July 2018.

The Premier also instructed that I should alert the human resources section, to proceed with all aspects relating to your personal benefits as well as the retrieval of tools of trade that belongs to State.

Sincerely

Sibusiso Mr Mpanza

NW Office of the Premier

Administrator: Section (100) (1) (B)”

[16] In the plaintiff’s view, the contentions of Mpanza were inaccurate, as her earlier resignation did not find application and she continued to be employed past the 16 August 2018, which would have been her last day of service as per Mpanza’s letter. On 31 August 2018, Mokgoro organized a farewell function. This symbolic farewell function brought on the stark realisation that Mokgoro had no intent to honour the redetermination agreement nor the remaining term of her fixed term contract which would terminate on 20 June 2020. The plaintiff did not return to work after 31 August 2018.

[17] The plaintiff was paid a salary in respect of September 2018, although an amount of R 96 879.30 of the September 2018 payment constituted the plaintiff’s annual thirteenth cheque, relating to the plaintiff’s previous twelve (12) months service. Legal ping-pong followed between the plaintiff’s legal team and the



defendants, which eventually culminated in the following from the defendants:

“The attached documents refer. The exit from the Public Service of the former Director General, should be treated as a resignation effective from 31 August 2018. Please direct the relevant Unit to process accordingly.”

### **The defendants' version**

**[18] The defendant elected not to present any evidence.**

Consequently, a traversing of the amended plea of the defendants is peremptory to ascertain a sense of the dispute. It is apparent from the reading the plea, that the defendants plea conflicts with the basic principle that one does not plea evidence, but facts. Regurgitation of a plethora of *communiqués* in pleadings leads to a prolixity of pleadings. This contention holds equally true for the pleading of the law.

[19] The defendants admits that the plaintiff commenced her duties in terms of a contract of employment on 1 July 2015. However, it was denied that the plaintiff had fully performed her obligations as evinced in the contract of employment. To this end, the plaintiff resigned almost a month after the first defendant was placed under administration. No settlement agreement was entered into between the plaintiff and the second defendant. The plaintiff was to serve a notice period effective from 1 August 2018 to 31 August 2018.

[20] The defendants admit that the plaintiff and the second defendant had engaged in a settlement agreement to redetermine the plaintiff's employment contract. The engagement in this redetermination of the plaintiff's settlement agreement was invalid *void ab initio*, as the plaintiff was now *functus officio*, having

voluntarily terminated her employment relationship with the second defendant. The only standing employment relationship was for the plaintiff to serve the notice period and to process the handover. Communications which followed, centred on the effective resignation of the plaintiff from 31 August 2018.

[21] On 2 October 2018, the third defendant issued a *communiqué* drawing the plaintiff's attention to an overpayment of a salary for the month of September 2018 amounting to R156 944.46, which formed the basis of the defendants' counterclaim.

[22] The defendants admitted that the plaintiff did sign the settlement agreement on 2 August 2018, assuming that the settlement agreement was discussed prior to the resignation of the plaintiff as required by law. It was obligatory for the second defendant to have complied with the Public Service Act, the Public Service Regulations, and the Senior Management Handbook. (SMH)

[23] In respect of the alternative claim, the plaintiff claims damages due to the repudiation of her contract of employment by the defendants, which damages constitute the value of her remuneration which she would have earned in respect of the period 1 October 2018 to 30 June 2020, the latter date being the expiry date of the five (5) year fixed-term contract of employment. The *quantum* of the plaintiff's claim had been amended during the trial proceedings without any objection from the defendants to an amount of R 3 390 775 .50.

## Plaintiff's written submissions

- [24] Mr Hitge contended that the defendants had not pleaded that there was a lack of consensus between the parties regarding the terms of the redetermination agreement, nor had such a proposition been suggested to the plaintiff during cross-examination.
- [25] No statutory formalities had been prescribed in terms of either the Public Service Act 1994, or in terms of the Public Service Regulations 2016, or in terms of paragraph 23.6 of Chapter 8 of the SMH as a validity requirement.
- [26] Mr Hitge submitted that the reduction of the agreed terms of the termination agreement to writing, had been for record purposes only and the absence of the signature of Mokgoro on the recordal of the agreed terms of the redetermination agreement, does not affect the validity thereof.
- [27] Addressing the legal position regarding formalities as a prerequisite for the validity of an agreement, is that in the absence of statutory provisions to the contrary, the party who alleges that an informal contract was not intended to be binding until reduced to writing and signed, carries the onus of proving an agreement that legal validity should be postponed until the due execution of a written agreement. Mr Hitge referred to *Goldblatt v Fremantle* 1920 AD at 128-129, *Woods v Walters* 1921 AD 303 at 305, *De Bruin v Brink* 1925 OPD 68 at 73, *Pillay v Shaik* 2009 (4) SA 74 (SCA) at paragraphs [50] to [51], to reinforce this point of law.
- [28] Mr Hitge was of the view that Mokgoro was seized with the necessary authority to enter into a redetermination agreement. The

intervention by National Government did not denude the powers of Mokgoro to enter into a redetermination agreement. To this end, Mr Hitge placed reliance on *Premier of the North West Province and Others v Kagisano Molopo Local Municipality* CIV APP FB 01/2020 at paragraphs [30] – [35].

[29] It was conceded that in terms of paragraph 23.6(8) of Chapter 8 of the SMH, the Minister of Public Service and Administration must be consulted on the fairness of the proposed severance payment to be made to the outgoing Head of Department. This consultation was not synonymous with approval, so it was reasoned. It was submitted that the envisaged consultation between Mokgoro and the Minister of Public Service and Administration did take place as alluded to by Mokgoro. Placing much store on *Sutter v Scheepers* 1932 AD 165 at 173 -174, *Motloung and Another v Sheriff Pretoria East and Others* 2020 (5) SA 123 (SCA) at paragraphs [9] to [14], Mr Hitge asserted that even if it was hypothetically accepted that no such consultation had occurred between the latter, such omission cannot possibly result in the redetermination agreement being visited with nullity, because the provisions of paragraph 23.6. (9) are couched in a positive language and there is no sanction added in case the consultation were not to take place. Therefore, there is a presumption in favour of an intention to make the provision only directory.

[30] To this end, the need for a consultation with the Minister had a singular aim, namely for the benefit of an employee party to the redetermination agreement, to permit the Minister to make input regarding the fairness of the proposed severance package payable to the Head of Department that fell for consideration. The nub of

this contention being that the consultation requirement does not affect the cogency of the redetermination agreement.

[31] The Treasury approval had been cohered to, as the version of the plaintiff was that the North West Provincial Treasury assisted the Office of the Premier in the computation of the amounts payable to the plaintiff in terms of the redetermination agreement.

[32] Accordingly, the decision of Mokgoro to enter into a redetermination agreement was purely an executive decision. It axiomatically followed, that Mokgoro did not require the approval of either the Minister or Mpanza. Therefore, it was submitted that the redetermination agreement is extant, valid and binding. As a result, the plaintiff is entitled to specific performance by the defendants under the redetermination agreement.

### **The defendants' written submissions**

[33] As alluded to, *supra*, the defendant did not present any rebutting evidence. Mrs Dibetso-Bodibe, elected to make legal suggestions to attempt to implode the version of the plaintiff during cross examination. The use of the phrase “**settlement agreement**” in the written submissions is confusing, given the evidence that a redetermination agreement was being considered. I however follow the diction as per the written heads.

[34] It is averred that no settlement agreement was entered into between the parties as the plaintiff had already resigned on 16 July 2018, which was duly accepted by Mokgoro.

[35] On 2 August 2018, the plaintiff and Mokgoro engaged in an alleged settlement agreement, which according to Mrs Dibetso- Bodibe, was invalid *ab initio* given the fact that the plaintiff was *functus*

*officio*, seeing that she voluntarily terminated her employment relationship with the Office of the Premier. The shredding of the duly authorised resignation letter, whether on instruction or own accord, can never be part of government administrative processes. It was submitted that the letter of resignation was never shredded, as same was forwarded by Mokgoro to Mpanza, accompanied by a directive that the resignation be submitted to the Human Resource Department for processing.

[36] Assuming that the settlement agreement was discussed prior to the resignation of the plaintiff as required by law, the plaintiff and Mokgoro were parties to the Implementation Protocol. That being the case, the argument ran that since the Office of the Premier had been placed under administration, Mpanza had to be an integral party to this proposed settlement agreement.

[37] The redetermination of the employment contract of the plaintiff inevitably required of Mokgoro, in his capacity as Executive Authority, to first comply with certain prerequisites, namely the Public Service Act, The Public Service Regulations, and the Senior Management Service Handbook( SMH), before the drafting of the settlement agreement.

[38] In terms of the Public Service Act , it is peremptory for the Premier to consult with the Minister of Public Service and Administration as the custodian of establishing norms and standards for the public service, and also responsible for making regulations, determinations and directives ensuring that special benefits awarded to Heads of Departments, accord with public interest as to the fairness of the issues at hand and whether the decision to settle is in accordance with section 3(1) and (2) of the Public

Service Act. Further thereto, a determination involving expenditure from revenue shall be made in consultation with the Minister of Finance. These absolute prerequisites were not adhered to.

[39] Citing, *Oppressed ACSA Minority 1 (Pty) Ltd and Another v Government of the Republic of South Africa and Others* (898/2020) [2022] ZASCA 50 (11 April 2022) in which the following is stated:

[33] However, as correctly submitted on behalf of the Minister, compliance with the authorisation requirements was a fundamental necessity for consent to an order in the terms proposed in the settlement agreement. Neither ACSA's legal representatives nor its Board Chairman, CEO or CFO, either individually or together had the authority to give such consent. And the unauthorised agreement could not be legitimised through a court order. The submissions on behalf of the appellants that they were entitled to rely on some authority, 'whether actual or ostensible', by ACSA's 'representatives' and legal representatives who consented to the order, was unsustainable. There could be no basis for ostensible authority, when, on the day of the hearing of the s 163 application, ACSA's legal representatives said that they had been instructed to seek a postponement." (Footnotes omitted).

[40] In the premises, relying on *Oppressed ACSA Minority 1*, it was averred that the settlement agreement signed by the plaintiff even if it was co-signed by Mokgoro, would remain invalid and not capable of being legitimized through an order of court for the failure to comply with the legal requirements of prior consultations with the Ministers mentioned.

[41] Extracting from a wealth of authority, Mrs. Dibetso-Bodibe submitted that an authorized agreement could not be legitimized through a court order. For an order to be competent and proper it must relate directly or indirectly to an issue or *lis* between parties. See: *Eke v Parsons* (CCT214/14) [2015] ZACC 30; 2015 (11)

BCLR 1319 (CC); 2016 (3) SA 37 (CC), *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* (CCT91/17) [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC), *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (328/97) [1998] ZASCA 14; 1998 (2) SA 1115 (SCA); [1998] 2 All SA 325 (A); 1998 (6) BCLR 671 (SCA) *Mohamed and Another v President of the Republic of South Africa and Others* (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

[42] Importantly, section 12 (4) of the Public Service Act had to be complied with to ensure that the severance package was paid in the public interest, and that the Minister of Finance had to first approve the said expenditure. In any event, this scenario is not applicable given the fact that the settlement agreement was merely an afterthought, as plaintiff duly resigned and have become *functus officio*.

[43] In respect of the settlement agreement, it was asserted that the main objective of the settlement agreement is misguided in law, since Mpanza assumed the role of an Accounting Officer for the purposes of “mending” the negative financial situation within the Department.

[44] In sum, the plaintiff resigned voluntarily; the plaintiff became *functus officio*; and no employment relationship existed thereafter. This signals the subsidence of the plaintiff’s action.

[45] In dealing with costs, the contention was that there is no reason why the defendants should not be indemnified for the costs that they have been compelled to incur to oppose the ill-conceived



claim. The only cost order in the opinion of Mrs Dibetso-Bodibe that will indemnify the defendants, is a cost order on attorney own client scale, which are to include costs of counsel.

### **The law**

- [46] The standard of proof in a civil case is the well-known preponderance (balance) of probabilities. This requires of the party on whom the onus lies, to be successful, to satisfy the court that he/she is entitled to succeed on his/her claim or defence. See: *Pillay v Krishna* 1946 AD 946 at 952- 953, *Van Wyk v Lewis* 1924 AD 438 444). According to Voet (22.3.10) the position is: **“He who asserts, proves, and not he who denies, since a denial of a fact cannot naturally be proved, provided that it is a fact that is denied, and that the denial is absolute.”**
- [47] The word “onus” in this context, refers to the duty which is cast on the litigant in order to be successful, of finally satisfying the court that he/she is entitled to succeed on his/her claim or defence, as the case may be. This is the meaning of the word in its true and original (primary) sense. In this sense, the onus never shifts from the party upon which it originally rested. (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) 548A-B).
- [48] In a secondary sense the word means the duty cast upon a litigant to adduce evidence to combat a *prima facie* case made by the opponent. In this sense, the onus refers to the burden of adducing evidence in rebuttal. This may shift or be transferred during the case, depending upon the measure of proof furnished by the one party or the other. (*South Cape Corporation (Pty)Ltd v Engineering*

*Management Services (Pty) Ltd* 1977(3) SA 534(A) at page 548A-B)

- [49] In *Galante v Dickinson* 1950 (2)SA 460 (A) Schreiner JA said:  
“It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident, that one which favours the plaintiff as opposed to the defendant” .
- [50] The legal principles of adjudication in actions remain trite. A legal manoeuvre not to tender rebutting evidence does not absolve a plaintiff from establishing a *prima facie* case. A *prima facie* case entails a combination of a factual matrix which falls with legal principles of the action, which the plaintiff avers. If uncontroverted by the defendants’ evidence, such a case would have become conclusive proof of the plaintiff’s case.
- [51] In the process of the formation of a probable mosaic of factual evidence, common cause factors are indispensable to this part of the enquiry. Common cause facts may be established by a formal admission of same, or by an informed decision not to taint material facts by way of cross examination or the presentation of rebutting contrary factual evidence. Such an informed decision goes some way to determine the probative value of the evidence of a witness, *in casu* the plaintiff.

[52] The redetermination agreement presented to the plaintiff for signature by Marabe contained standard redetermination terms. The financial contents of the proposed redetermination agreement had been prepared with the assistance of the North West Provincial Treasury. Furthermore, the erstwhile resignation tendered by the plaintiff had been consensually withdrawn and that Mpanza sent the repudiation letter on 17 August 2018.

### ***Analysis***

[53] I intend to deal with the analysis under three components namely, the redetermination agreement, the alternative claim for damages and the counterclaim.

### **The Redetermination Agreement**

[54] First and foremost, what falls for adjudication is whether the redetermination agreement had come into existence and, if so, did it comply with the set-out fundamentals. Mr Hitge contends that in the main the redetermination agreement did come into being. It is indisputable that the plaintiff tendered her written resignation letter on 16 July 2018. It is incontrovertible, in the absence of rebutting evidence, that Mokgoro inquired from the plaintiff whether she would entertain a redetermination of her contract *in lieu* of resigning, to which the plaintiff indicated a willingness. Mokgoro undertook to consider the matter and revert.

[55] On 2 August 2018 Mokgoro acting of his own accord, made his way to the office of the plaintiff, whereat Mokgoro wanted to discuss the redetermination agreement with the plaintiff. Mokgoro

returned the letter of resignation which contained a manuscript inscription accepting the resignation of the plaintiff.

[56] Notwithstanding the manuscript endorsement, Mokgoro did a *volte-face* indicating that the tendered resignation would be disregarded, and that the plaintiff was at liberty to “**shred same, as it would no\_longer apply**”. The details of the redetermination agreement would be negotiated. There is no dispute of the role played by Mokgoro , Marabe, and Miss Micheal in the crafting of the redetermination agreement. None of the latter were called to confute the core factual account provided by the plaintiff, which speaks volumes, notwithstanding their exclusive personal knowledge of the matter. The plaintiff signed the proposed redetermination agreement on 3 August 2018, with Miss Micheal signing as a witness. The collateral facts examined objectively conjure with the plaintiff’s account.

[57] Inasmuch as the defendants did not present any evidence, what seems to have conveniently escaped the defendants is that Mokgoro and the plaintiff entered into an oral agreement, which formed the basis of the rejection of the resignation of the plaintiff. There is no contestation that verbal (oral) agreements does not form part of our law of contract, with notable exceptions. An exposition of the law on verbal agreements is not purposeful at this juncture and need not detain this Court. Based on this oral agreement a written agreement was drafted which formed the basis of the redetermination agreement.

[58] Without embarking on a path of repetition and belabouring the point, the plaintiff's resignation was rejected. The signed redetermination agreement evinces same. The discarding of the resignation letter of 16 July 2018, and the redetermination agreement signed by the plaintiff on 3 August 2018, ineluctably proves the intention of the parties, namely, to enter into a redetermination agreement. A cursory examination of the comparable dates leads to the ineluctable inference, that the resignation letter and the redetermination agreement could not contractually coexist for palpable reasons.

[59] The automatic consequence of the rejection of the plaintiff's resignation was **but for** a conclusion of the redetermination agreement, would not have resulted in the plaintiff being contractually jettisoned, as the plaintiff would still have been reliant on the original contract of employment, which was resurrected by the repudiation of her resignation by Mokgoro.

[60] Notwithstanding, the redetermination agreement was signed by the plaintiff, and unsigned by Mokgoro, the redetermination agreement exists. Resultantly, the plaintiff contends that she is entitled to performance in *forma specifica* in terms of the redetermination agreement that forms Annexure B to the amended particulars of claim (which is titled settlement agreement).

[61] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 616 states:

'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these

remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.' (Footnote omitted.)

[62] Our law is replete with cases where it was held that if one party to the agreement repudiates the agreement, the other party at his/her election, may claim specific performance of the agreement or damages in *lieu* of specific performance and that his/her claim will in general be granted, subject to the court's discretion. See : *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Woods v Walters* 1921 AD 303; *Shill v Milner* 1937 AD 101; *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A); *Rens v Coltman* 1996 (1) SA 452 (A).

[63] From the presented evidence, the plaintiff and Mokgoro had reached consensus on 2 August 2018 as regards the terms of the redetermination agreement. Afterward, the redetermination agreement was reduced to writing by Marabe. Essentially, the oral agreement was reduced to writing. The absence of the signature of Mokgoro does not affect the legality of the redetermination agreement. See: *Goldblatt v Fremantle* 1920 at 128-129, *Woods v Walters* 1921 AD 303, *Pillay v Shaik* 2009(4) SA 74 (SCA) at paragraphs [50] – [51].

[64] To my mind, Mokgoro was empowered to enter into the redetermination agreement, notwithstanding the section 100 intervention by National Government. To this end consultation was only required with the Minister of Public Services and Enterprises, as confirmed through SMS communication with the plaintiff. Regarding the input from Treasury, the role played by Marabe and Miss Micheal is unassailable.

[65] A court is enjoined with a judicial discretion whether to order specific performance. Each case must be adjudicated in the light of its own circumstances. See: *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378G. An assessment of the conspectus of the evidence leads to the inescapable conclusion that the plaintiff has cross the threshold for this Court to order specific performance of the redetermination agreement.

[66] I now shift focus to the second component.

### **The alternative claim for damages**

[67] In terms of the indisputable facts, the resignation of the plaintiff had been withdrawn by Mokgoro. The unassailable evidence of the plaintiff reiterates same. There is no evidence to gainsay the plaintiff's evidence, a point which has been accentuated repetitively. The defendants made an informed decision to proceed in the absence of presenting rebutting evidence. Quintessentially, the plaintiff had provided conclusive proof of the withdrawal of her resignation. The collateral uncontested facts and documentary evidence reinforces this.

[68] Notwithstanding the withdrawal of her resignation, Mr Mpanza sent a written communication to the plaintiff on 17 August 2018, indicating unequivocally that the defendants were intent not

honouring the contract of employment. No mention was made of the contractual conduct of Mokgoro in the retraction of the plaintiff's resignation. Excessive reliance was placed on the manuscript endorsement by Mokgoro of the acceptance of the plaintiff's resignation, without addressing the relevance of the redetermination agreement. It is impossible to consider the redetermination agreement as a standalone. Rationally, there must be a *nexus* between the resignation of the plaintiff and the redetermination agreement. The plaintiff testified to the repudiation of her resignation by Mokgoro, as the overwhelming reason for the written redetermination agreement coming into existence.

[69] The absence of a lawful cause for the repudiation of the contract in the pleadings is telling. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for the plaintiff to plead a particular case and seek to establish a different case at the trial. [See: *Minister of Agriculture and Land Affairs and Another v De Klerk and Others* [2014] 1 All SA 158 (SCA) at para [39]; *Gusha v Road Accident Fund* 2012 (2) SA 371 (SCA) at para [7]; *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G-H also reported as 1993 (2) All SA 179 (A) and *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198]

[70] In *Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 (2 June 2017) at paragraphs [28-29], the following is stated:

“[28] ...One knows that such address can never be a substitute for pleadings. *In any event, it did not serve to forewarn the Respondent of the evidence that would eventually be relied upon. What is important is that the pleadings should clarify the general nature of the pleader's case. They are*



meant to mark out the parameters of the case sought to be advanced and define the issues between the litigants. In that regard, it is a basic principle that a pleading should be so framed as to enable the other party to fairly and reasonably know the case they are called upon to meet. These requirements in respect of pleadings are the very essence of the adversarial system. The prime function of a judge is to hear evidence in terms of the pleadings, to hear arguments and to give his decision accordingly. In *Imprefed (Pty) Ltd v National Transport Co* 1993 (3) SA 94 (A) at 107G-H, it was stated: 'At the outset, it need hardly be stressed that: "The whole purpose of pleadings is to bring clearly to the notice of the Court and the parties to an action the issues upon which reliance is to be placed. (*Durbach v Fairway Hotel Ltd* 1949(3) SA 1081 (SR) at 1082.)

[29] The degree of precision required obviously depends on the circumstances of each case. As a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation...." [See also: *Yannakou v Apollo Cub* 1974 (1) SA 614 (A) at 623-624]

[71] In *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898 F-J, and although somewhat lengthy, is instructive of a Court's role in these circumstances ( emphasis added):

"As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves

*have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation ....*

*Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference that the parties have chosen and specified in the pleadings. In the adversary litigation system, therefore, the parties set the agenda for the trial by their pleadings, and neither party can complain if the agenda is strictly adhered to. In such agenda, there is no room for an item called "any other business" in the sense that points other than those specified in the pleadings may be raised without notice." [See also: Trope v South African Reserve Bank 1992 [3] SA 208 (T): at 210G – J:*

*"It is, of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264, the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars, and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18(12)) amounts to an irregular step, a greater degree of the particularity of pleadings is required. No doubt, the absence of the opportunity to clarify an*

*ambiguity or cure an apparent inconsistency, by way of further particulars, may encourage greater particularity in the initial pleading.”*

[72] From my standpoint, the plaintiff would probably have succeeded in the alternative claim for damages as well. I now turn to address the final component, namely the counterclaim.

### **The Counter Claim**

[73] The defendants raised a counterclaim. That being so, it was expected of the defendant to provide full particularity of the material facts that underscore its claim. This would enable a court to consider the nature and the grounds of the counter claim. The counterclaim must be based on facts and not simple averred calculations in the pleadings. See: *Chamfer Technical Products (Pty) Ltd v Soil Fumigation Services (13424/02) [2002] ZAGPHC 40 (3 December 2002)*. To my mind, the defendants have not succeeded in proving their counterclaim. It must therefore be dismissed.

### **Costs**

[74] It is trite that costs are at the discretion of the court. The general practice is that the successful party should generally be awarded costs. There is no reason to deprive the plaintiff of her costs.

### **Order:**

[75] In the premises, I make the following order:

- (i) The defendants are to within **twenty (20)** court days from the date of this judgment, apply in the prescribed manner to the South African Revenue Service for an Income Tax Directive in respect of the income tax payable by the plaintiff on the gross amount of R3 390 775.50 due to her in terms of the redetermination agreement which is titled settlement.
- (ii) Payment of the amount of income tax directed by it to the South African Revenue Service.
- (iii) Payment of the Government Employees Pension Fund of the pension fund contribution payable in respect of the aforementioned amount due to the plaintiff, as prescribed in terms of the Rules of the Fund, within **twenty (20)** court days from the date of this judgment;
- (iv) Payment of the balance due to the plaintiff after deduction of the income tax liability and pension fund contributions of the plaintiff referred to (ii) and (iii), above within **twenty (20) court days** from the receipt of the income tax directive from the South African Revenue Service.
- (v) Interest on the balance referred to in prayer (iv) calculated from 1 November 2018 at the prescribed *mora* rate until date of final payment.
- (vi) Costs of the suit, on the High Court scale as between party-and- party, to be taxed, jointly and severally the one paying the other to be absolved.

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**A REDDY**

**ACTING JUDGE OF THE HIGH COURT  
OF SOUTH AFRICA  
NORTH WEST DIVISION, MAHIKENG**

**APPEARANCES:**

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Adv Hitge

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**Date of Hearing:**

29-31 May 2023

**Written Heads submitted by plaintiff :** 12 July 2023

**Written Heads submitted by defendant:** 21 July 2023

**Date of Judgment:**

15 November 2023