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[3] **THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**
[4] **JUDGMENT**

[5] Case No: 128/2013

[6] Reportable

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[8] In the matter between:

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[10] PUBLIC INVESTMENT CORPORATION LTD APPELLANT

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[12] and

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[14] KAGISO GERALD BODIGELO RESPONDENT

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[17] Neutral citation: *Public Investment Corporation v Bodigelo*
(128/2013) [2013] ZASCA 156 (22 November 2013)

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[19] Coram: Lewis, Tshiqi, Majiedt and Pillay JJA and Swain AJA

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[21] Heard: 11 November 2013

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[23] Delivered: 22 November 2013

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Summary: Respondent, as part of his employment with appellant, nominated as non-executive director to boards of companies in which appellant held an interest – claimed payment of directors’ fees – trial court held that respondent failed to discharge onus of establishing his entitlement to fees and bonuses – on appeal full court held onus on appellant to establish entitlement to payments which it failed to discharge – in a further appeal held that fact that respondent was obliged to exercise

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an unfettered discretion *qua* director did not affect his obligations *qua* employee in terms of his employment contract with appellant – onus on respondent to establish entitlement to the payments which he had failed to do – appeal upheld – order of trial court dismissing respondent’s claim reinstated.

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[31] **ORDER**

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[34] **On appeal from:** North Gauteng High Court, Pretoria (Mavundla J, Makgoba J and Mabuse J sitting as a court of appeal from the decision of Msimeki J as court of first instance):

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[36] 1 The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel as well as the reserved costs.

[37] 2 The order of the court of first instance that ‘the plaintiff’s claim is dismissed with costs’ is reinstated.

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[40] **JUDGMENT**

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[42] **SWAIN AJA (LEWIS, TSHIQI, MAJIEDT AND PILLAY JJA** concurring):

[43] The respondent, Mr Kagiso Bodigelo (Bodigelo) was formerly employed by the appellant, the Public Investment Corporation Ltd (PIC) as a junior (and later senior) manager: private equity and corporate finance, in terms of a written fixed-term employment contract, until his resignation on 3 August 2007.

[44] The PIC invested moneys on behalf of public sector entities including the Government Employees Pension Fund and appointed certain employees, including Bodigelo, as non-executive directors to the boards of companies in which it had invested. This was to ensure that the funds it invested were spent for the agreed purpose and to participate in the management of these companies to ensure the security of the investment.

[45] Bodigelo was appointed by PIC as its nominee and on its behalf to represent PIC on the boards of four companies, namely DCD-Dorbyl (Pty) Ltd, Blue Label Investments (Pty) Ltd, Kulungile Metals Group (Pty) Ltd and Global Roofing Solutions (Pty) Ltd (the companies). The companies paid directors' fees and bonuses for the services rendered by non-executive directors such as Bodigelo. These fees and bonuses were paid by the companies directly to PIC on the instructions of PIC.

[46] Bodigelo contended that he was entitled to payment of these directors' fees and bonuses and unsuccessfully sought to recover the sum of R2 345 534 from PIC before the court of first instance. On appeal to the North Gauteng High Court, however, he was successful. The order of the court of first instance was set aside and substituted by an order directing PIC to make payment of the sum of R2 345 534 to Bodigelo together with *mora* interest and costs, which were to include the costs of two counsel. The appeal is with the leave of this court.

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[47] A consideration of Bodigelo's particulars of claim and the defence of PIC, as raised in the pleadings, is central to the resolution of the present appeal. This is so because in the court of first instance Msimeki J appeared to find on the evidence that Bodigelo had failed to discharge the onus of proving that he was entitled to payment of the disputed directors' fees and bonuses. The full court, however, after initially finding that Bodigelo 'had to establish the cause of action' then found that because it was not disputed that Bodigelo was a non-executive director to the companies, with the approval of PIC, who knew that there were directors' fees and bonuses to be paid to Bodigelo, had the consequence that Bodigelo 'had prima facie established the cause of action'. The full court then concluded 'in the circumstances, the respondent [PIC] bore the onus to prove on a balance of probabilities its defence to the plaintiff's claim' adding that PIC 'had to prove that it was entitled to appropriate for itself the aforesaid amount'. The full court then went on to hold that PIC was accordingly obliged to lead evidence showing it was entitled 'to appropriate to itself' these payments and that 'there was no evidence at all placed before the Court a quo' in this regard.

[48] The only cause of action as pleaded by Bodigelo was that he became entitled, as a director of the companies to remuneration, including bonuses payable by the companies to their non-executive directors in the amount claimed. Bodigelo alleged further that on the instructions of PIC, these amounts were paid by the companies to PIC and not to Bodigelo. It was then alleged that:

[49] 'In receiving the aforesaid amounts the defendant accordingly received such amounts for and/or on behalf of and for the benefit of the plaintiff.'

[50] It was alleged that PIC was accordingly obliged to make payment to Bodigelo of these amounts.

[51] PIC in its plea admitted that it had instructed the companies to make payment of these amounts to it, averring that it was entitled to do so. The

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entitlement to issue such an instruction was alleged to arise from the fact that Bodigelo was not entitled to receive these payments for his personal benefit because he performed his functions as a director of the companies as a nominee and employee of PIC and as part of his functions and duties as manager of private equity and corporate finance of PIC.

[52] It is therefore quite clear that Bodigelo bore the onus of proving on a balance of probabilities that PIC received the payments 'for and/or on behalf of for the benefit of' himself and that as a consequence PIC was obliged to make payment of these amounts to himself. The fact that PIC alleged that Bodigelo was not entitled to receive these payments because, in performing his functions as a director, he did so as the nominee and employer of PIC, did not alter the incidence of the onus of proof resting upon Bodigelo to establish his entitlement to the payments. Nowhere in his pleadings, or in evidence, did Bodigelo set out the basis of his entitlement. He did not allege a right to directors' fees pursuant to any contract with any of the companies on whose boards he sat (there was no contract between Bodigelo and any of the companies). And he did not allege a right arising from his employment contract with PIC to receive such payment.

[53] Bodigelo's cause of action was thus one based solely upon the receipt of the payments in terms of a relationship of agency between PIC and himself. The allegation that the funds were received by PIC 'for and/or on behalf of and for the benefit of the plaintiff' can be interpreted in no other manner. As submitted by counsel for PIC, however, no allegation is made of any agreement concluded between PIC and Bodigelo creating a relationship of agency. In addition, the allegation by Bodigelo that the payments were made by the companies to PIC 'on the instructions of' PIC is admitted by PIC. It is accordingly common cause on the pleadings that the companies acceded to 'the instruction' and accordingly agreed to make payment of the amounts to PIC.

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[54] Payment is a bilateral juristic act, which requires the meeting of two minds. See *Burg Trailers SA (Pty) Ltd v Absa Bank Ltd* 2004 (1) SA 284 (SCA) para 7. Bodigelo accordingly bore the onus of proving that the companies in making the payments to PIC did so in its capacity as Bodigelo's agent, to honour an obligation owed to Bodigelo by the companies. Bodigelo would also bear the onus of proving that PIC accepted the payment as agent for Bodigelo, in discharge of an obligation by the companies to make payment to Bodigelo. No evidence was given by Bodigelo that the payments were made to PIC and received by PIC as agent for Bodigelo. The cause of action of Bodigelo is based simply on the premise that because he was entitled to the payments and PIC was not, PIC accepted the payments as agent for Bodigelo without any regard being had to the nature of the agreement concluded between the companies and PIC for payment to be made directly to PIC. The evidence led on behalf of PIC was that it was entitled to payment of these amounts and consequently it was for this reason that it instructed the companies to make payment directly to it, to which request the companies acceded. It is therefore clear on the evidence that payment was made by the companies to PIC as principal and not as agent for Bodigelo. Bodigelo accordingly failed to discharge the onus of proving the pleaded cause of action based upon agency.

[55] The argument advanced by Bodigelo's counsel was, however, that the onus was on PIC to justify its retention of the payments due to Bodigelo, in accordance with the pleaded defence of PIC, namely that Bodigelo performed his function as a non-executive director in the companies, as a manager: private equity and corporate finance of PIC. This argument assumes that Bodigelo was entitled to receive the payments as against PIC simply because he was a non-executive director on the boards of the companies. It also assumes the existence of a pleaded cause of action by Bodigelo, valid in law, which asserts the entitlement to receipt of these payments by himself as against PIC. As I have said, no such cause of action exists in Bodigelo's particulars of claim.

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[56] However, if, for the purposes of examining this argument, it is assumed that the cause of action advanced by Bodigelo in his particulars of claim is not simply one based upon agency, but as one in which reliance is placed upon an alleged entitlement to payment from the companies by Bodigelo as against PIC, then the onus in this regard rested upon Bodigelo. This is because PIC placed in issue Bodigelo's entitlement to receive these payments as against PIC. The allegation by PIC in its plea that Bodigelo at all times acted as an employee *vis-a-vis* PIC and the admission that the companies paid directors' fees and bonuses to persons who acted as directors on their boards did not result in PIC attracting the onus of proving its entitlement to receive the payments as against Bodigelo.

[57] An examination of the evidence reveals that Bodigelo failed to discharge such an onus. Bodigelo conceded in evidence that there was no agreement between PIC and himself that he would be entitled to board fees and directors' bonuses payable to him, in respect of services rendered by him as a non-executive director on boards on which he sat at the behest of PIC. In addition, although the employment contract between Bodigelo and PIC does not expressly deal with the entitlement to directors' fees earned by Bodigelo, there are a number of provisions in the agreement which do not support an entitlement on the part of Bodigelo to receive these payments. Bodigelo was required to work without additional remuneration outside of normal working hours and PIC would refund to Bodigelo his out of pocket expenses incurred in respect of his employment. In addition, Bodigelo was obliged to devote his whole time and attention to his assigned duties and functions, during normal business hours and at any additional time that may be required of him. He would not be employed or engaged in any other business or other remunerative work without PIC's prior written consent. No allegation was made by Bodigelo, or evidence led that such written consent was sought or given. The evidence established that it was a normal incident of Bodigelo's employment with PIC that he would be required to serve as a non-executive director on the boards of companies in which PIC had invested.

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[58] Counsel for Bodigelo, in attempting to show that PIC was not entitled to the payments, submitted that in contrast to PIC's pleaded defence that in performing his functions as a non-executive director, Bodigelo acted as an employee of PIC, the witnesses of PIC in the form of Dr Matilja and Mr Molefe conceded that in performing such functions Bodigelo was not doing the work of PIC. However, when the evidence in question is examined the statements relied upon were clearly made in relation to individuals who were not employees of PIC being nominated by PIC as non-executive directors to boards of companies in which PIC held an interest.

[59] In addition, by reference to the decision in *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 163F, counsel for Bodigelo submitted that the defence pleaded by PIC that Bodigelo at all times acted as an employee of PIC was bad in law. Although it is clear, as decided in *Jorgensen*, that a director appointed as a nominee to represent certain shareholders or interests within a company, is obliged to exercise his or her discretion unfettered by such interests, this does not mean that Bodigelo could not perform his functions as a director in the context of his employment with PIC. A distinction has to be drawn between the unfettered exercise of a nominated director's discretion *qua* director and his adherence to the terms of an employment contract with the entity that nominated him or her as a director, which has no bearing upon the exercise of that discretion. In this regard, Bodigelo stated that the reason he was placed on the boards of these companies was to ensure that the money advanced by PIC was used for the purpose for which it was intended. In addition, he was to ensure that the companies sustained themselves in the future to protect PIC's investment. The full court accordingly erred in concluding that Bodigelo 'could not have been acting in such directorship as an employee of the respondent' in reliance upon this authority.

[60] Simply put, in performing his functions as a non-executive director on the boards of the companies, Bodigelo did so as an employee of PIC. In terms

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of the assumed cause of action Bodigelo bore the onus of proving that he was entitled, as against PIC, to the fees and bonuses payable by these companies to directors. Bodigelo failed to discharge this onus. The full court accordingly erred in holding that an onus rested upon PIC to prove its entitlement to the payments in question and that it had failed to discharge this onus.

[61] At the hearing of the appeal counsel for Bodigelo advanced two additional causes of action in support of the appeal. These were the *rei vindicatio* and the *actio ad exhibendum*. Not only were these causes of action not pleaded, but they were bereft of any relevance in the circumstances of this case.

[62] As regards the costs, counsel for PIC asked that the costs of two counsel be awarded. This was not on the basis of the complexity of the matter, but because of its importance to PIC as a result of the number of employees of PIC presently nominated as non-executive directors on the boards of companies. In addition, he asked that all of the reserved costs be included in the order. Counsel for Bodigelo did not oppose the grant of such an order.

[63] In the result the following order is granted

[64] 1 The appeal is upheld with costs, such costs to include those occasioned by the employment of two counsel as well as the reserved costs.

[65] 2 The order of the court of first instance that 'the plaintiff's claim is dismissed with costs' is reinstated.

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K G B SWAIN

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ACTING JUDGE OF APPEAL

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[73] APPEARANCES:

[74] FOR APPELLANT: S A CILLIERS

[75] (WITH HIM K G MONYANDU)

[76] EDWARD NATHAN
SONNENBERGS , SANDTON

[77] WEBBERS, BLOEMFONTEIN

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[80] FOR RESPONDENT: I A M SEMENYA

[81] (WITH HIM A L PLATT)

[82] FLUXMANS INC, JOHANNESBURG

[83] LOVIUS BLOCK, BLOEMFONTEIN