IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, EAST LONDON

CASE NO. 1406/18

In the matter between:

MZUKISI MAKATSE **Plaintiff**

and

NATIONAL LOTTERIES COMMISSION **Defendant**

JUDGMENT

STRETCH J.:

[1] On 1 March 2017 the parties entered into a written employment contract by virtue of which the defendant effectively appointed the plaintiff as its Eastern Cape grant agreement officer. On 10 August 2017, the defendant appointed the plaintiff as its Eastern Cape monitoring and evaluation officer under the terms and conditions of service which the parties had agreed to on 1 March 2017 by virtue of the aforesaid contract of employment.[1] It is contended on the plaintiff's behalf that this was a permanent appointment.

[1] This was pursuant to a restructuring of the defendant in terms of which a board decision was taken to discontinue the position of grant agreement officer and to substitute it with the post of monitoring and evaluation officer with effect from 1 August 2017.

[2] According to the plaintiff he received email instructions from senior officials of the defendant based in Pretoria (Ms Marais and Mr Chuene) on 3 and 4 August 2017, instructing him to effect payment approval for a grant of R6 054 220,00 to the Thato Community Crisis Centre ("Thato") for the Buyelekhaya annual music festival ("the festival"). He refused to comply, alleging that the payment was irregular and that his immediate supervisor, Ms Hugow, had instructed him not to approve the payment as the project was being processed by the defendant's Gauteng provincial office.

[3] On 4 August 2017 he was given a notice of precautionary suspension, calling upon him to give reasons, by 7 August 2017, as to why he should not be suspended due to alleged complaints about his general attitude and behaviour and his overall ability to carry out his duties. He was also instructed to pack up and vacate the workplace forthwith.

[4] It is the plaintiff's version that he submitted his reasons on 7 August 2017, with due reference to the aforementioned irregularities. On 10 August 2017 he was notified in writing that he was suspended on full pay, pending investigations and a possible disciplinary hearing.

[5] On 15 August he referred a dispute of unfair suspension to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). On 27 October 2017 the defendant presented him with a charge sheet for a disciplinary hearing set down for 13 November 2017 ("the first hearing"). On that day the hearing was postponed to 18 December 2017 due to the non-availability of someone to chair it.

[6] On 18 December the hearing proceeded and was adjourned to 9 and 10 January and 9 February 2018. In the interim, and on 2 February 2018, the plaintiff was notified to attend another disciplinary hearing ("the second hearing") on 14

and 15 February to answer charges relating to media reports about the alleged irregularities which he had raised.

[7] The first hearing continued on 9 February and was adjourned to 20 and 21 February for the submission of written argument, and to 23 February for the presentation of oral submissions. On 12 February, the defendant summarily dismissed the plaintiff in respect of the charges which formed the subject matter of the second hearing which was due to commence two days later, effectively rendering moot the finalisation of the first hearing.

[8] On 14 February the plaintiff referred an unfair dismissal dispute to the CCMA, which he subsequently withdrew. On 5 April 2018 the parties agreed to settle the unfair suspension dispute which had been referred to the CCMA on 15 August 2017.

[9] The plaintiff contends that his summary dismissal without the second hearing amounts to repudiation (which repudiation he does not wish to have reversed) and is an unlawful breach of his employment contract with the defendant, the relevant clauses of which read as follows:

> '3. This Agreement is subject to the Basic Conditions of Employment Act (Act No. 75 of 1997) ("the BCEA") as amended, as well as any terms and conditions contained in this Agreement. Subject to section 4 of the BCEA, in the event of a conflict between the BCEA and the Agreement, the provisions of the BCEA shall take precedence.
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> 5.1 Disputes arising from the interpretation of any signed Agreement between the parties shall be adjudicated by an independent third party who shall be an attorney or advocate with no less than 5 (five) years' experience.

5.2 Should the Employee commit an act of misconduct of a serious nature that warrants a disciplinary hearing, the Employer shall convene a disciplinary hearing by appointing a suitably qualified person as a prosecutor and chairperson respectively.

5.3 The person to be appointed as a prosecutor and chairperson respectively, shall be an attorney or advocate with no less than 5 (five) years' experience.

5.4 A person appointed as a prosecutor shall, within reasonable time after his/her appointment as a prosecutor formulate and present a charge sheet to the Employee.

5.5 The charge sheet shall contain the description of the alleged misconduct with sufficient information to enable the Employee to prepare for his defence.

5.6 The charge sheet shall also inform the Employee of the following rights:

5.6.1 The right to submit a written reply to the prosecutor or give oral evidence at the commencement of the enquiry;

5.6.2 The right for the Employee to represent himself, be represented by a fellow Employee or legal representative of choice;

5.6.3 The right to make opening statement, give evidence and either personally or through the chosen representative, call witnesses, submit any documentation or exhibit, cross-examine any witnesses called by the Employer, inspect any documentation and/or exhibit and to make closing argument.'

[10] In seeking to quantify the damages which he has suffered as a result of the alleged breach and repudiation, the plaintiff avers that he was earning R586 897,00 per annum when he was dismissed, and that he would have continued to render remunerated services (inclusive of salary increments, annual bonuses and other benefits) until he reached the pensionable age of 65. It is further contended that the plaintiff has suffered emotional stress and/or

psychological trauma caused by the embarrassment and financial hardship which he has endured as a result of his unlawful summary dismissal. All in all, the plaintiff's contractual and delictual claim for damages against the defendant comes to R10 367 094,00 made up of general damages for breach of contract as well as past and future loss of earnings.

[11] On the pleadings, the defendant avers that after his probation, the plaintiff was not appointed for a fixed term, but for an indeterminate period with a total annual remuneration package of R544 431,74, with no additional benefits. According to the defendant, the decision to approve the beneficiary funding for the grant to Thato for the festival was made by the distribution agency at the defendant's head office, and that there was nothing irregular about this.

[12] In the premises, it is denied that the plaintiff was instructed to *approve* the funding. All that happened, was, that in accordance with the distribution agency's prior approval of the music festival, Marais and Chuene *instructed* the plaintiff to administer the *processing* of the payment of the money for the festival. In the circumstances the defendant contends that the plaintiff's task was to *verify* on the computerised grant management system that all the necessary documents, conditions, requirements and signed approvals were in place for the festival project. Once this had been verified, the plaintiff was to refer the already approved application via the grant management system to the finance department to process the payment.

[13] It is the plaintiff, so it is argued, who breached the employment agreement by unlawfully refusing to carry out the instruction. In particular, the defendant denies on the pleadings that Hugow instructed the plaintiff not to approve a payment which already had the approval of the distribution agency.

[14] It is the defendant's case that it was in fact the plaintiff who repudiated his employment contract when he allegedly told one Fuzile (a reporter from the Daily Dispatch newspaper) that "*he had no intention of going back to Lotto*[2], thereby expressing an unequivocal intention to no longer be bound by his employment contract, which intention was communicated to the defendant via the newspaper. In the alternative, it is contended that the plaintiff's conduct, in making this statement, constituted a breach of a material and fundamental term of the contract which entitled the defendant to cancel and summarily terminate the contract.

[15] As a second alternative, the defendant pleads that the termination letter constituted lawful dismissal on the grounds of misconduct, in that the plaintiff's actions constituted such serious and material breaches of the employment contract that they warranted his summary dismissal. In the third alternative, the defendant pleads that the employment contract has no termination date and is an indefinite contract for an indeterminate period. The dismissal letter therefore merely draws the plaintiff's attention to the fact that his employment has been terminated in accordance with the plaintiff's statutory two weeks' notice period as provided for in s 37(1)(b) of the BCEA; alternatively, the plaintiff's contractually agreed two weeks' notice period is incorporated by reference to clause 3 of the employment contract, referred to above.

[16] In the light of the provisions of the employment contract, it is the defendant's case that the plaintiff:

a. refused to comply with a lawful instruction from his superiors (Marais and Chuene) to process and administer a grant payment in relation to the festival;

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[2] As reported in the Daily Dispatch of 10 February 2018

b. failed to protect the defendant's interests and to preserve its reputation by engaging with the media with regard to the defendant's internal affairs, in flagrant disregard of the defendant's media and communication policy, by conducting interviews for newspaper articles during which he falsely accused the defendant of corruption and mismanagement;

c. failed to be honest with the defendant by engaging with the media (without informing the defendant) about the defendant's internal affairs as described above;

d. during his suspension and whilst still in the defendant's employ (despite having been warned to refrain from so doing), disclosed confidential information to the public in relation to the defendant's business affairs, including beneficiary grant information, in contravention of regulation 8 of the 2001 regulations to the Lotteries Act 57 of 1977, which states the following:

'Regulation 8(1):-

Subject to the Constitution, the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000, and the Protected Disclosures Act 26 of 2000, no person may in any way –

(a) Disclose any information in connection with any grant application or the grant itself;

(b) Disclose the contents of the reports contemplated in regulation 6(1), or

(c) Publish any information obtained in contravention of paragraph (a) or (b); unless-

(i) ordered to do so by a court of law;

(ii) making a bona fide confidential disclosure or publication to the Minister, the Public Protector, Parliament or a committee designated by Parliament, a member of the South African Police Service or the National Prosecuting Authority;
(iii) the Juristic Person who made a grant application and the board consent thereto in writing prior to that disclosure or application; or as provided for in these regulations.

(3) Any person who contravenes sub regulation (1) and (2) shall be guilty of an offence and liable to a fine or imprisonment or both a fine and imprisonment.'

e. registered his own law firm on or about 1 December 2017 under the name "Makatse Attorneys" in circumstances where he failed to disclose this fact to the defendant, failed to obtain the defendant's prior written consent and failed to determine whether there would be a possible conflict of interests caused thereby.

[17] The defendant avers that these defences find support in the following clauses of the employment contract:

'6.3 The Employee shall comply with all reasonable and lawful orders and instructions from the Provincial Manager: Eastern Cape Provincial Office or the Employer.

6.6 The Employee shall devote the whole of the Employee's time and attention during the Employee's ordinary business hours, and such reasonable amount of additional time as may be necessary, having regard to the exigencies of the business of the Employer, to the business and affairs of the Employer.

6.7 The Employee shall use the Employee's utmost endeavours to protect and promote the business of the Employer and to preserve its reputation and goodwill.

6.8 The Employee shall be faithful to the Employer in all dealings and transactions whatsoever relating to its business interests.

6.10 The Employee shall not during the Employee's employment and thereafter in perpetuity, regardless of the reason for termination of the Employee's employment, communicate or divulge to any unauthorised person any confidential matter or information relating to the business affairs of the Employer.

15.1 The Employee shall not during the Employee's employment by the Employer, without the Employer's prior written consent, for reward, directly or indirectly be engaged or employed by any business, trade, undertaking or concern other than that of the Employer.

15.2 On commencement of employment and thereafter on an annual basis the Employee shall be required to make disclosure in writing of any interest that constitutes or could constitute a conflict of interest between the Employee and the Employer.

15.3 In the event of such a conflict of interest arising, the Employee hereby undertakes to disclose such interest to the Employer forthwith and seek written approval in this regard.'

[18] As I have said, the plaintiff referred the issues of unfair suspension and unfair dismissal arising from the above to the labour courts. The former issue was settled; the latter withdrawn. What has accordingly been referred to this court for determination is the question of breach of contract only. In this regard, the defendant contends that it was entitled to summarily dismiss the plaintiff because it was he who initiated the *lis* by repudiating the contract, and/or because he committed a series of acts of misconduct which justified his summary dismissal. However, even if it was not justified in taking this drastic step without affording the plaintiff a hearing, it is contended that the plaintiff is not entitled under the auspices of a claim for breach of contract, to claim delictual damages in addition.

This being the case, so it is argued, the plaintiff is only entitled, if successful, to the equivalent of two weeks' notice pay. To that end, the parties agreed at the commencement of the trial to a separation of issues in terms of rule 33(4), with the merits and the nature of the defendant's liability to be dealt with up front and distinctly from the issue of quantum.[3]

[19] A number of witnesses testified at the protracted trial which ensued. Their testimony was lengthy and detailed; in my view, often to the point of exasperation. I found it necessary to constantly remind the practitioners representing the parties of what the issues were. Having expressed this view, I intend to traverse only the evidence which I found to be relevant to the prosecution of and the defence to a claim for breach of contract.

[20] Within limits, contracting parties are free to determine the nature and content of the obligations that regulate their relationship. They do so by negotiating and agreeing upon the *terms* of their contract – that is, the provisions which set out the nature and the details of performances reciprocally owed by the parties. The mere fact that conduct constitutes a breach of contract does not necessarily mean that the conduct is wrongful for the purpose of imposing delictual liability. The conduct must infringe a right of the plaintiff that exists independently of the contract.[4]

[21] Ultimately, the plaintiff seeks an order declaring the defendant's summary termination of the contract to be in breach thereof and consequently unlawful, because, so the plaintiff claims, the termination amounts to a repudiation of the

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[3] The separation at the commencement of the trial was both practical and convenient, the purpose thereof being, that if I were to find that the plaintiff was entitled to notice pay at the end of the trial on the merits, the quantum of two weeks' severance pay was capable of easy and accurate determination without the necessity of a protracted trial.

[4] Dale Hutchison et al: The Law of Contract in South Africa: Oxford University Press 2ed 2014 at 8-9. *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA) at 633-4.

contract, which repudiation the plaintiff nevertheless accepts. Thus, to rely on cancellation in response to repudiation, the injured party (that is the plaintiff) must allege and prove:

a. repudiation of a fundamental term of the contract – that is, conduct that exhibits objectively a party's unequivocal intention not to be bound by the contract. In other words it is an intimation by or on behalf of the repudiating party by word or by conduct and *without lawful excuse*, that all or some of the obligations arising from the agreement will not be performed according to their tenor;
b. an election by the injured party to terminate;
c. communication of the election to the repudiating party.[5]

[22] Repudiation is 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 the agreement) will not be forthcoming. The inferred intention serves as the criterion for determining the nature of the threatened actual breach.[6]

[23] As mentioned, it is the plaintiff's case that the summary termination of the employment contract without a hearing is in breach of clauses 3 and 5.1 to 5.6.3 of the contract. The defendant admits that it terminated the contract on 12 February 2018 before finalising the first disciplinary hearing and prior to commencing the second. It claims that it did so lawfully in an act of acceptance with immediate effect of the plaintiff's repudiation of his employment contract on 10 February when the plaintiff expressed his intention to do so (as was reported

[5] See *Schlinkmann v Van der Walt* 1947 (2) SA 900 (E) page 919; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA)
[6] *Datacolor* above para. 16; *Braun Medical (Pty) Ltd v Ambasaam CC* 2015 (3) SA 22 (SCA)

in the Daily Dispatch newspaper of that date), by saying that "*he had no intention of going back to Lotto*". This, the defendant says, expressed an unequivocal intention to no longer be bound by his employment contract which constituted a repudiation thereof; alternatively, a breach of a material and fundamental term of the contract, which entitled the defendant to cancel and summarily terminate the contract. In the circumstances the plaintiff was lawfully dismissed; alternatively, the termination letter constituted the bringing to the plaintiff's attention of the termination of his employment in accordance with the statutory two week notice period as provided for in the BCEA; alternatively, his contractually agreed to notice period as reflected at clause 3 of the contract which states that the agreement is subject to the BCEA where there is a conflict between the BCEA and the contract, or, by implication, where the contract fails to provide for a notice period.

[24] Accordingly, what this court has before it on the pleadings, is the proverbial chicken and egg scenario. Both parties rely on cancellation in response to repudiation. The sequence of events is, in the premises, of material significance. On the pleadings and on the evidence for that matter, the plaintiff's refusal to obey what the defendant describes as a perfectly simple and lawful instruction from senior officials on 3 and 4 August 2017 seems to be the *fons et origo* of the dispute between the parties. I say this because it is common cause that the plaintiff refused to comply. On 4 August 2017 the respondent's commissioner, Ms Mampane wrote a letter of precautionary suspension to the plaintiff, who acknowledged receipt on the same day. It reads (verbatim) as follows:

1. The discussion between yourself, Mr Mzukisi Makatse and Ms Sara Hugow on Friday 4 August 2017 has reference.

2. With reference to this discussion, you have now been made aware, that there are serious allegations in relation to your conduct. These allegations include frequent complaints received from your colleagues in relation to your *general* attitude, behaviour and your *overall* ability to perform your duties.
3. In light of the nature of these allegations, we are of the view that these allegations are *serious*, and we are to immediately commence an investigation into these allegations. The purpose of the investigation is to establish the *veracity* of the allegations and to determine whether disciplinary action, should in the circumstances, be pursued against you.
4. The NLC is of the view that your continued presence in the workplace will be prejudicial to the investigation and is considering placing you on precautionary suspension pending the finalisation of the investigation and any potential disciplinary process.
5. For a full and proper investigation to take place and due to the nature of the allegations, we are further of the view that in order to ensure the integrity of the investigation and the intimidation of witnesses your suspension is in our view necessary.
6. You are hereby being provided with an opportunity to make written submissions why you should not be suspended. You are required to let me have your written representations by email, by no later than Monday 7 August 2017 at 12h00.
7. We believe that it would be appropriate for you to take time in which to properly prepare your written submissions and you are therefore not required to continue tendering your services today and come into the office until a decision has been taken with regard to your suspension. This does not however constitute a suspension as a sanction.
8. Should you fail to provide your written representations by the time set out above, the NLC will make a decision whether to suspend you, without the benefit of your representations.
9. A meeting will be arranged on Monday 7 August 2017 at 15h00 in order to advise you of the decision with regard to your possible suspension.

   Your co-operation is acknowledged in advance.[7]

[7] Emphasis added by the use of italics

[25] A defendant who is prima facie liable for damages resulting from a breach of the contract and wishes to rely on a contractual provision exonerating it from liability is, in effect, confessing and avoiding and accordingly bears the onus of establishing this defence.[8] It seems that the aforementioned "letter of precautionary suspension" was written as a result of the plaintiff's refusal to obey an instruction. Surprisingly however, it does not say so but beats about the bush using threatening terms such as "serious allegations" in combination with vague terms such as "general attitude" and "overall ability" to perform duties. How the writer concluded that the nature of allegations of a general attitude about an overall ability to perform duties, are serious, is anybody's guess. The entire tenor of the letter is vague and embarrassing. How the writer intended to forthwith commence an investigation into the veracity of these unmentionable and mysterious allegations is in itself, a mystery. I am not surprised that the plaintiff was of the view that he was unfairly suspended and that his referral of this conduct to the CCMA was ultimately settled.

[26] The plaintiff was finally suspended on 10 August and he referred the dispute to the CCMA on 15 August. He was eventually charged with misconduct and notified to attend a disciplinary hearing more than two months later, on 27 October 2017. In a nutshell, he was being charged with:

a. Gross insubordination, in that on 3 August 2017 he refused to comply with instructions from Marais, Chuene and Hugow to process payment approval on the annual music festival pro-active funding project.

b. Gross insolence, in that he sent disrespectful, condescending and rude emails to his superiors wherein he copied senior NLC staff and on one

[8] See *Strijdom Park Extension 6 (Pty) Ltd v Abcon (Pty) Ltd* 1998 (4) SA 844 (SCA)

occasion the Department of Trade and Industry. The examples cited are:

i. On 2 August 2017 he wrote an email to senior manager Moloko complaining about the staff restructuring process and demanding documentation explaining the rationale behind the process and demanding the minutes referring to the restructuring decision and the information relied on, as well as complaining that material terms of his employment contract had been unilaterally altered in the absence of consultation, and threatening to take legal action if a proper consultative process was not followed.

ii. On 7 August 2017 he sent an email to national commissioner Mampane with a copy to staff members of the Department of Trade and Industry, making serious allegations against senior NLC staff stating that his letter of provisional suspension was founded on spurious reasons, when the real reason was his refusal to approve payment he considered to have been irregular.

iii. In the same email he levelled serious allegations of irregular activity such as the executive giving union leaders highly paid jobs without having advertised them in the spirit of a fair and competitive process.

iv. In the same email he also made serious allegations against the NLC by alleging that it continues to fund projects that are effectively designed by agents whose purpose it is to "rip off" rightful beneficiaries, instead of protecting resources from being preyed on by these unscrupulous agents.

v. In forwarding a copy of the email to staff members of the Department of Trade and Industry, he contravened the defendant's information classification policy, in that information regarding the NLC and its systems is classified in order to protect the integrity, confidentiality and the availability of the NLC information and systems.

[27] This disciplinary hearing had already commenced when the plaintiff was slapped with a second hearing accusing him of further acts of serious misconduct which may be summarised as the following:

a. commenting on and/or divulging confidential information about the NLC's business affairs to a Sunday Times reporter without having been authorised to do so, which is in contravention of the defendant's media and public information policy, in contravention of the defendant's ethics and conduct policy, in breach of his employment contract, and in violation of the Lotteries Act 57 of 1997;

b. grossly violating the regulations pertaining to distributing agencies by disclosing information about a grant / beneficiary;

c. failing to disclose that he is a director of Makatse Attorneys, in breach of the conditions of his employment contract and in violation of the NLC's ethics and conduct policy.

[28] On 12 February 2018, before the second hearing could commence, and before the first one could be finalised, the plaintiff was summarily dismissed in

writing. The dismissal was with immediate effect. The termination letter (verbatim) reads as follows:

'SUBJECT: TERMINATION OF YOUR EMPLOYMENT CONTRACT

1. I refer to the CCMA Arbitration Hearing held at CCMA offices in East London on the 25th day of January 2018 under case number ECEL 3348-17 to which you are an applicant party in the matter between yourself and NLC whereby you publically testified that you conducted an interview with a Sunday Times journalist thus causing you to be in Breach of the Marketing and Communications: Media and Public Information policy by disclosing NLC's confidential information to third parties without being authorised to do so;

2. Breached the Marketing and Communications: Media and Public Information policy by failing in particular to observe clauses 8.1 and 8.3.2 of the policy by disclosing confidential information, in that when approached by the Sunday Times and Daily Dispatch Newspaper journalists, you commented on and/or divulged confidential NLC information to third parties without being authorised to do so;

3. You have further failed to disclose that you are directly or indirectly engaged with or employed by any business, trade, undertaking or concern other than that of the NLC, in that you have not disclosed that you are a director of Makatse Attorneys (see Annexure A) and by doing so you have breached your employment contract with specific reference to clause 15; and have further violated the NLC's Ethics and Conduct Policy;

4. You have on 20 March 2017, at 15h41 sent an email to an email address of a dawnb@dispatch.co.za wherein you attached a political opinion piece written in your personal capacity (see Annexure B). You have abused the employer's time and resources and further violated the NLC's Ethics and Conduct Policy;

5. Breached your employment contract – in that you have made available to third parties confidential information relating to the business affairs of the NLC, which is contrary to Clause 17 of your contract of employment dated 1 March 2017;

   a. Grossly violated section 7F(1)(a)(c)(d) of the Lotteries Act 57 of 1997 (as amended);
   b. Grossly violated the NLC's Ethics and Conduct Policy; and
   c. Grossly violated Section 8 (1) of the Regulations Relating to Distributing Agencies as per Government Gazette 7013 of 22 February 2001 – by disclosing information about a grant or beneficiary;

6. Your conduct caused a serious and imminent risk to the reputation of NLC;

7. *The employer had given you the platform to ventilate your issues in terms of its policies but you chose to disrespect the policies and procedures at your disposal;*[9]

8. It is upon the above captioned background and your comment on the Daily Dispatch Newspaper article published on Saturday, 10 February 2018 where you indicated that you "have no intention of going back to Lotto" that I bring to your attention the fact that the employment between yourself and the National Lotteries Commission is irretrievably broken down.

9. In light of the above actions which constitute serious misconduct you are therefore summarily dismissed with immediate effect.

Your Faithfully,
Mr Philemon Letwaba
Acting Commissioner: NLC
Date: 12/02/2018'

[9] Emphasis added

[29] In a nutshell, these are the four grounds upon which the defendant ultimately relied for its summary dismissal of the plaintiff. As I have mentioned, the defendant called a number of witnesses to prove the allegations set forth in the above termination letter, in order to justify its summary dismissal of the plaintiff without finalising the disciplinary hearings which were designed, I would imagine, to traverse the veracity of these very allegations. Not only were these witnesses called, but also a number of irrelevant witnesses who testified on aspects totally unrelated to these specified grounds for dismissal, inclusive of those called during the plaintiff's case.

[30] The plaintiff claims that the defendant unlawfully terminated the contract by not affording him a disciplinary hearing, and that this amounts to repudiation. He does not however claim specific performance. He has accepted the repudiation, and is claiming damages instead.

[31] This being the position, the issue which this court must decide is whether the defendant's conduct, in summarily dismissing the plaintiff in the absence of a disciplinary hearing, amounts to breach of contract. It is both unusual and unfortunate that the contract does not contain any breach and/or cancellation clauses.

[32] To my mind compliance with clause 5, which refers to dispute resolution and disciplinary procedure, is not peremptory. It is so that it deals with the steps to be taken once the employer is of the view that the employee has committed a serious act of misconduct which warrants a disciplinary hearing. It does not however define a serious act of misconduct.

[33] In the absence of such a definition, the contract itself advises the parties to resort to the BCEA, which has devoted an entire chapter to termination of employment. The relevant portion of s 37 thereof reads as follows:

'**Notice of termination of employment.** – (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than –

...

(b) two weeks, if the employee has been employed for more than six months but not more than one year;[10]

...

(6) Nothing in this section affects the right -

(a) of a dismissed employee to dispute the lawfulness or fairness of the dismissal in terms of Chapter VIII of the Labour Relations Act, 1995, or any other law[11]; and
(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.'

[34] In the circumstances the enquiry into the above is two-fold:

a. Did the plaintiff commit one or more of the acts referred to in the termination letter as "serious misconduct"?

b. If so, did the plaintiff have a cause recognised in law to terminate the employment contract without notice?

Interviews with the media

[35] It is not in dispute that the plaintiff was interviewed by the media in the form of inter alia the Sunday Times and the Daily Dispatch newspapers, and that he participated in these interviews without obtaining the requisite authority to do

[10] Which applies to the plaintiff, who was employed on 1 March 2017 and received his letter of termination on 12 February 2018.
[11] An avenue which the plaintiff pursued and then elected to abandon.

so. The defendant alleges that this amounts to disclosure of confidential information to third parties without having been authorised to do so, in breach of clauses 8.1 and 8.3.2 of the defendant's media and public information policy.

[36] Whether the plaintiff was justified in speaking to the media is, in my view, neither here nor there. Nor is his defence that it was the defendant who spoke to the media first. Clause 8.3.2 of the defendant's media and public information policy is clear. It states that staff members who are directly approached by a member of the media should not attempt to answer questions themselves. Instead they should refer the journalist to the marketing and communications manager for management of the response.

[37] It is common cause that the plaintiff did not do so. Clause 10 of the policy clearly provides that employees who do not adhere thereto shall be subjected to disciplinary measures in terms of the disciplinary procedures of the NLC.[12]

Non-disclosure of other interests

[38] It is further common cause that as at 6 February 2018 the plaintiff, a duly admitted attorney - was the sole proprietor of the firm Makatse Attorneys (a law firm which he registered in December 2017, four months after his suspension), was a registered member of the Cape Law Society, was in possession of a fidelity fund certificate for the year ending 31 December 2018, and by virtue of the aforegoing, was entitled to practise as an attorney. It is not in dispute that the plaintiff failed to disclose his interest in this business concern to the defendant.

[12] Which steps the defendant took in good faith on 5 February 2018 by giving the plaintiff notice to attend the second disciplinary hearing.

[39] According to the defendant, the plaintiff's business concern is an "incompatible activity" as defined in clause 15 of the employment contract which states that the plaintiff shall not, during his employment with the defendant, for reward, directly or indirectly be engaged with or employed by any business, trade, undertaking or concern other than that of the defendant, without the defendant's prior written consent. The defendant further avers that this is in gross violation of its ethics and conduct policy. Clause 7.1 of the policy states that employees shall avoid putting themselves in a position that could lead to perceived or actual conflict of interest. Clause 7.3 states that employees shall disclose any business or other interest that is likely to create a conflict of interest. Clause 7.4 states that all business or other interests that are likely to create a potential conflict of interest shall be disclosed, including all business interests, direct or indirect, in any other entity or business venture, membership to trade, business or other economic activities. Clause 7.7 states that the employer may institute disciplinary proceedings against any person who fails or refuses to comply with or who contravenes clause 7.[13] In terms of clause 7.8, the employer may, after considering whether such conflict or circumstances is likely to compromise the employee's impartiality, inform the employee of its decision which may include but is not limited to instituting a disciplinary enquiry to probe such conflict, *or* dismissing the employee from employment in accordance with relevant NLC policies and applicable legislation.

[40] The plaintiff explained that he registered this interest after Hugow had testified at his disciplinary hearing that there had been an irretrievable breakdown in the trust relationship between the plaintiff and the defendant, and that it would be preferable that he not be permitted to return. This was also reflected in an opinion (dated 25 August) given by attorneys whom the defendant had employed.

[13] Which is exactly what the defendant did on 5 February 2018 when it notified the plaintiff of the second disciplinary enquiry.

His purpose was to provide a form of potential income, in the event of the termination of his services. He was aware that policy and his employment contract dictated that he had to obtain the prior approval of the defendant, but did not do so because he was on suspension and not permitted to return to the workplace. He later admitted that he could have obtained consent by simply mailing or emailing the defendant.

[41] Much was made about whether he made his services available as a private lawyer in exchange for remuneration thereafter. To my mind, this is irrelevant. The defendant's ethics and conduct policy and its contract of employment with the plaintiff make it clear that this is a registrable interest which the plaintiff ought to have disclosed, and which he failed to do. The fact that he was on suspension at the time is no excuse.

Abuse of time and resources

[42] It is alleged (and not disputed) that on 20 March 2017, during working hours, the plaintiff transmitted a political opinion piece of which he was the author. In so doing, so it is contended, the plaintiff failed to devote the whole of his time and attention during ordinary business hours, to the defendant's business and affairs, thus contravening clause 8 of the defendant's ethics and conduct policy, which discourages employees from pursuing outside interests which might create or appear to create excessive demand upon their time, attention and energy, and which would deprive the NLC of their best efforts on the job or give rise to distractions which interfere or appear to interfere with the independent exercise of judgment in the NLC's best interests. Employees who do not adhere to this policy shall be subjected to disciplinary measures in terms of the NLC's disciplinary procedures.

[43] The plaintiff, when he testified on this aspect, went into detail about how he does publish opinion pieces on different media platforms like the City Press, the Daily Dispatch and Politicsweb, but that he does not get paid for these articles. Once again, the plaintiff is missing the point. The accusation is a simple one, viz that the plaintiff used the defendant's time and resources to email work-unrelated matter. This is not in dispute. The fact that other employees were also making personal use of the employer's time and facilities (as raised by the plaintiff in evidence), is once again, neither here nor there.

Disclosing information about a grant or beneficiary

[44] It is alleged that the plaintiff breached his employment contract by making available to third parties confidential information relating to the business affairs of the NLC (viz by disclosing information about a grant or a beneficiary) in contravention of clause 17 of his contract of employment as well as in violation of "s 2F(1)(a)(c)(d) of the Lotteries Act", the ethics and conduct policy, and s 8(1) of the regulations relating to distribution agencies, thereby causing "a serious and imminent risk" to the defendant's reputation. These violations appear to relate inter alia to his contribution to the publication of three newspaper articles: the first in the Sunday Times of 28 January 2018, the second in the Mail & Guardian of 9 February 2018, and the third in the Daily (Saturday) Dispatch of 10 February 2018. The following information was published in the Sunday Times:

> 'Tens of millions of rands of lottery funds intended for good causes are moving through the hands of "Lottopreneurs" who have cashed in on a change in the law: The 2015 amendment allows non-profit organisations to act as "conduits" to new or small organisations unable to meet stringent criteria for grants. The change also allows the National Lotteries Commission to be more proactive and channel

> funding to institutions when it believes there is an urgent need, such as drought or disaster relief.
>
> Annual reports from the commission only name the conduits, making it impossible to ascertain how many organisations have been funded this way – or to trace the grants they received.
>
> In one case discovered during an investigation by the Sunday Times a rural private school in Limpopo has received almost R30-million while acting as a conduit. … In a third example, the Buyel'Ekhaya Pan African Festival – an annual event in the Eastern Cape – was awarded R6-million late last year. It is unclear how the grant was channelled, as Buyel'Ekhaya was not eligible for funds in 2016.
>
> *Mzukisi Makatse, provincial monitoring and evaluation officer at the commission, has been suspended for "insubordination" after he refused to approve the grant because, he said, it did not meet requirements.*'[14]

[45] The plaintiff testified that he did not understand what he was being accused of as he was only commenting on information which had already been released by the defendant's senior officials to the public. In commenting on paragraph 6 of the termination letter, which states that his conduct "caused a serious and imminent risk to the reputation of NLC" he said the following:

> 'Well, as I said, without any substantiation of all these allegations and without any – I mean without an opportunity to have answer to these allegations, it cannot really be proven that I had caused harm to the reputation of the National Lotteries Commission."

[46] This reply demonstrates that the plaintiff has, once again, missed the point. He admitted during cross-examination that he made internal emails between him

[14] Emphasis added.

and the defendant available to the media. These emails contained direct information relating to a grant and a beneficiary. He admitted having participated in an interview with the Daily Dispatch reporter, and having shown him internal documentation. Indeed, he admitted having been the source of the information referring to internal administrative processes and a grant and a beneficiary, published in the Daily Dispatch newspaper of 10 February 2018, which reads thus:

Lotto dissenter gets boot over Buyel'Ekhaya 'funding'

'A Lotto dissenter who refused to approve a funding application for Buyel'Ekhaya Music Festival and an unknown charity organisation was suspended from his job.

National Lotteries Commission (NLC) employee Mzukisi Makatse, who says he exposed the alleged fronting in a Buyel'Ekhaya Music Festival funding application, claims he was given the boot after he called for action to be taken.

He was suspended by NLC commissioner Thabang Mampane a day after he reported his concerns to his provincial manager in the Eastern Cape.

Makatse said he was suspended for "asking all the right questions" about the non-profit organisation (NPO) Thato Community Crisis Centre's application, which stated that the R6-million Thato wanted from Lotto would be paid over to the Buyel'Ekhaya festival.

Makatse said that on August 3 last year, he was tasked by NLC provincial head, Sarah Hugow and ELsabe Marais to authorise the approval of payment for a project involving the Buyel'Ekhaya festival, held annually in the Eastern Cape.

Speaking to the Saturday Dispatch, Makatse said all the funding applications and processing for the event were done in Gauteng, which jarred.

"The grant agreement allocation letter and quality control was all done in Gauteng, not in the Eastern Cape as it was supposed to," he said.

"Payment is the end of the process after all those other steps were done.

"There was no way I would agree to approving payment for a project done by someone else in Gauteng instead of the Eastern Cape."

He felt he was being forced to approve an illegal payment.

"I declined to give such an illegal approval but I learned that my refusal didn't go well with some of my colleagues including those in our head office," he said.

The next day, August 4, Mampane sent him a notice of precautionary suspension.

The Saturday Dispatch has seen the letter, which accused him of "gross insubordination in that you acted in flagrant disregard of the authority of your employer by defying the lawful instructions of your superiors ... You refused to carry out the instruction to process payment approval on a pro-active funding project, Buyel'Ekhaya Annual Music Festival."

On August 7, Makatse said he was suspended on what he felt were spurious reasons. "I have no doubt that one of the real reasons for my suspension is my refusal to approve payment I consider irregular. The Buyel'Ekhaya application was fronting," said Makatse.

He has taken the NLC to the CCMA in East London.

The NLC confirmed that he is on suspension.

"For the record, we can confirm that he is on suspension with full pay and benefits, However, we have reliably learnt that he is a practising attorney, registered with the Cape Law Society and has been appearing in court attending to matters.

"This is in violation of his employment contract with the National Lotteries Commission and the Ethics and Conduct Policy of the NLC.

"Furthermore, we have reliably learnt that he in fact writes for your publication as well.

"We view this in a serious light and as an act of theft from the Commission as it is illegal for NLC employees to take up double employment."

Makatse said the NLC knew he had opened up his law firm after his suspension, and had no intentions of going back to Lotto.'[15]

[47] The Mail & Guardian article records the following:

'A National Lotteries Commission official in the Eastern Cape, Mzukisi Makatse, refused to process the funding. In emails, Makatse states that he cannot sign off a project flagged in Gauteng.

"This means whoever did all these processes must do payment approval because they know for sure it's a project to be paid. It can't come to me at the end of the process for payment. I will never be able to account for such a decision", the email reads.[16]

[48] It is clear from the above that the plaintiff persisted in making confidential information public, despite having been warned in writing by the defendant to desist. The following letter, written by the defendant's senior legal officer and dated 7 February 2018, is of relevance:

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[15] In relation to this article, the plaintiff testified that the only problem he had therewith is that he did not tell the reporter that he had no intention of returning to the NLC. All he said was, given the treatment he had received from the defendant and the utterances made by Hugow to the effect that the employer no longer wanted him as part of the organisation, it was clear that he would "get the boot" ie that he would be dismissed by the defendant "and not go back".

[16] During evidence the plaintiff admitted having furnished the reporter with these emails.

'Dear Mr Makatse,

1. You would have now received the charge sheet and bundle of documents served upon you on Friday, 02 February 2018 relating to the disciplinary enquiry that is scheduled for 14 and 15 February 2018;
2. We wish to remind you that you are obligated to comply with the terms and conditions of your employment contract as well as the NLC's policies, Lotteries Act and Regulations;
3. You are hereby instructed to desist from making any further comments and/or disclosing confidential information relating to the NLC, its beneficiaries and staff to any third party.
4. You are further instructed to ensure your compliance with our policies specifically the Marketing and Communications: Media and Public Information Policy as well as the NLC's Ethics and Conduct Policy. Should you be contacted by any third party requesting information relating to the NLC, its beneficiaries or staff, you are required to ensure you follow the NLC's protocol and comply with the aforementioned policies accordingly.'

[49] It goes without saying that the defendant made its best endeavours to process the plaintiff in terms of disciplinary action, and that it in fact commenced these proceedings in good faith, formulating and presenting the plaintiff with disciplinary charge sheets, commencing with the first hearing and setting down the second. Despite this, the plaintiff, by his own admission, preferred to ventilate his issues via the media platform, rather than embrace the disciplinary platform which the defendant had provided for him to "ventilate" his issues "in terms of its policies".[17]

[50] It is contended on the defendant's behalf that each of the aforementioned acts of misconduct are of a sufficiently serious nature to individually warrant the plaintiff's summary dismissal, regard being had to his duty of good faith and to

[17] As pointed out by the defendant in paragraph 7 of its termination letter referred to above.

act at all times in the interests of the employer. It is further contended that when these various acts of misconduct are cumulatively considered, the position could not be clearer. The plaintiff's conduct in making public pronouncements in the media, in flagrant disregard of a written warning and after having been served with a disciplinary charge sheet relating to these very activities, was in gross violation of his duty of good faith, and was, in my view, counter-productive, if he genuinely wished to have the full *audi alteram* benefit of the disciplinary enquires, which he now relies on as his only ground for bolstering his claim for breach of contract.

[51] Furthermore, as succinctly demonstrated by the defendant's counsel, causation is a necessary element in any damages claim. If this court accepts that the plaintiff's misconduct was sufficient to warrant his dismissal at common law, then it must follow that the plaintiff's damages claim must fail. This is so because the real and proximate cause of the plaintiff's dismissal is not the defendant's failure to complete the disciplinary process, but rather the fact of the plaintiff's persistent and continued misconduct. Differently stated, the plaintiff has not shown that the failure to finalise the disciplinary hearings caused his loss, rather than his own misconduct. The necessary element of causation which links the loss to the cause of the alleged damage is simply absent. I agree. I also agree with the defendant's submission that, had the plaintiff sought re-instatement based on the defendant's alleged breach of contract in failing to hold an enquiry, the position may have been different, because the problem of causation, whereby the loss suffered must be linked to the contractual breach, would not arise in those circumstances.

[52] Absence of causation is a complete defence on the merits of the plaintiff's damages claim. This being the case, it is not necessary to traverse the other defences (which admittedly have their own merits) raised by the defendant.

The principles of natural justice and public policy

[53] The plaintiff claims that the defendant breached the contract between the parties when it summarily terminated the contract without concluding the disciplinary hearings. The defendant has denied this and in particular has shown, successfully in my view, that the termination letter constituted the lawful dismissal of the plaintiff on *inter alia* grounds of his continuous misconduct. The defendant has, to my mind, shown that these acts of misconduct (the commission of which are not seriously disputed) cumulatively constitute a material breach of the employment contract which is sufficiently serious to warrant summary dismissal. As I have been at pains to point out, the BCEA provides for summary dismissal. The employment contract itself provides that it is subject to the BCEA. There is nothing extraordinary or unconstitutional about summary dismissal in appropriate circumstances. This is not a situation where the defendant has failed to act in accordance with the principles of natural justice or in a manner which offends public policy as suggested by the plaintiff. Nor is this a case where the employment contract itself is contended to be contra bones mores.[18] This is a simple case where the defendant, as the employer, has exercised its discretion, which it is entitled to do. It is only when the exercise of the employer's discretion is arbitrary and in conflict with the provisions of a perfectly fair contract, that the employee is entitled to complain. It is not the plaintiff's case that the terms of the contract are unfair and contrary to the Constitution. It is the plaintiff's case that the defendant failed to comply with the terms and conditions thereof. I have already found that this is not the case.

[54] In the premises the plaintiff's claim is dismissed with costs.

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[18] See the plaintiff's misplaced reliance on cases such as *Administrator of Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (AD)

pp J.

I.T. STRETCH

JUDGE OF THE HIGH COURT

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