HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Yes.
(2)	OF INTEREST TO OTHER JUDGES: Yes.
(3)	REVISED.
.....	.....
DATE	JUDGE P.A. MEYER

Appeal Case No: A5041/19

In the matter between:

OLD MUTUAL LIMITED First Appellant
OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED Second Appellant
TREVOR MANUEL Third Appellant
NON-EXECUTIVE DIRECTORS OF OLD MUTUAL LIMITED Fourth to Sixteenth Appellants

and

PETER MTHANDAZO MOYO First Respondent
NMT CAPITAL (PTY) LIMITED Second Respondent

***Case Summary*: Interim Interdict – Reinstatement of chief executive pending finalisation of action – Interpretation of employment contract: contract for fixed duration, but with right to terminate on six months' notice – contract affords employer right to decide whether or not to hold a disciplinary enquiry or pre-dismissal arbitration where allegations of misconduct have been raised – termination on six months' notice not shown to be unlawful despite allegations of conflict of interest and misconduct on the part of the chief executive.**
Specific performance – no realistic prospect of obtaining reinstatement where there is a breakdown of the special relationship of trust and confidence that should exist between the chief executive and the board.
First requisite for the granting of an interim interdict (a *prima facie* right, though open to some doubt) not established.

Appealability – interim interdict – an order in the form of an interim interdict which operates pending the outcome of an action mentioned in the order ordinarily not appealable, unless the interests of justice dictate that it be appealable – interim interdict should not have been granted in the first place and should be corrected forthwith before proceedings run their full course.

JUDGMENT

Meyer J (Matojane and Keightley JJ concurring)

[1] This appeal, with leave of the court *a quo* (Mashile J), arose as a result of the first appellant, Old Mutual Limited, terminating the written contract of employment of its chief executive officer, Mr Mthandazo Peter Moyo, who is the first respondent (Mr Moyo). It did so in terms of clause 24.1 thereof, which provides that it may be terminated '[b]y either party providing 6 (six) months' notice to this effect'. The court *a quo* granted an interim interdict reinstating Mr Moyo in the position of chief executive and restraining Old Mutual from appointing any other person in that position pending the finalisation of further legal proceedings to be instituted by him. In the further legal proceedings, Mr Moyo indicated that he would be claiming specific performance or damages *ex contractu*, and in the alternative 'delictual damages for patrimonial loss caused by the impairment of his dignity and/or reputation and/or a breach of the provisions of the Protected Disclosures Act 26 of 2000 read with s 159 of the Companies Act 71 of 2008'. The court *a quo* found that Mr Moyo had established the existence of a *prima facie* right to reinstatement, which, if not protected by the interim interdict, would cause him to suffer irreparable prejudice. It found that Old Mutual had repudiated the contract of employment by terminating it in terms of clause 24.1.1 and in not following the disciplinary enquiry or pre-dismissal arbitration procedure contemplated in clause 25.1.1 in circumstances where it had accused Mr Moyo of having had a conflict of interest and of having committed gross misconduct. Mr Moyo had elected not to accept the repudiation and instead, to claim specific performance. The other requirements for an interim interdict, the court *a quo* found, had also been met.

[2] I refer to Old Mutual Limited and the second appellant, Old Mutual Life Assurance Company (SA) Limited, individually and collectively as 'Old Mutual', as was often done in the interdict application papers. The third appellant, Mr Trevor

Manuel (Mr Manuel), is a non-executive director and the chairman of the Old Mutual board (the chairman), and the fourth to sixteenth appellants are its non-executive directors (the non-executive directors). The second respondent, NMT Capital (Pty) Ltd (NMT) is cited as an interested party and no relief was sought against it. It is necessary to set out the facts presented by the respective parties in the interdict application papers extensively.

[3] Old Mutual is one of the oldest companies in South Africa, having been established in 1845 as this country's first mutual life insurance company. It currently employs more than 30 000 people and operates in 13 countries across the African continent, and in China. Between 1997 and 2005, Mr Moyo was employed by Old Mutual in various positions, including that of deputy managing director. In June 2017, he was appointed as its chief executive. He is also a shareholder of Old Mutual.

[4] The position and scope of Mr Moyo's duties as the chief executive of Old Mutual are provided for in clause 3 of the employment contract, which in relevant parts provides that: his main duties and responsibilities shall be determined by the board (clause 3.2); he shall faithfully and diligently perform such duties and exercise such powers consistent with the position of chief executive or as may from time to time be reasonably assigned to or vested in him, and shall obey all reasonable and lawful directions of Old Mutual, in particular, his actions shall at all times be consistent with and further the interests of Old Mutual (clause 3.3); he acknowledged that because of the senior nature of his appointment it is essential that he, together with other executives, can work together as an effective and integrated team, and that as such, interpersonal compatibility forms an inherent requirement of his appointment (clause 3.6); and he acknowledged that, because of the senior nature of his appointment, it is also essential that his senior colleagues, the chairperson of the board and the board have confidence in his performance and that such confidence forms an inherent and essential requirement of his appointment and continued employment.

[5] Furthermore, in terms of clause 12, which is headed 'Inherent Requirements' Mr Moyo acknowledged that the employment relationship is one based on trust and mutual respect (clause 12.1) and agreed: at all times to act in the best interests of

Old Mutual and its stakeholders and not to engage in behaviour or work or other activities which may result in a conflict of interest arising between Old Mutual and its stakeholders and him (clause 12.2.3); to act in good faith towards Old Mutual, which requirement includes that he does not involve himself in an action that could be seen as directly or indirectly acting against the best interests of Old Mutual (clause 12.2.4); and to refrain from any action which may in any manner harm the good name or reputation of Old Mutual, or which may place it in an invidious or compromising situation (clause 12.2.8). He acknowledged that a breach of any of these requirements would warrant termination of his employment with or without notice (clause 12.2). Clause 14.1 provides that he shall immediately on becoming aware thereof disclose in writing to the chairperson any actual or potential conflict of interest which exists or which in future may arise and exist in relation to the business or affairs of him and Old Mutual. In terms of clause 23.1, he acknowledged that he was to be subject to Old Mutual's 'discipline, grievance and related procedures' in place from time to time.

[6] It was well-known to all the parties concerned at the time of Mr Moyo's appointment as the chief executive of Old Mutual, that he was a shareholder and director of NMT. It is an investment holding company in which he held 20% of its issued shares and an additional 6.666% via a company, STS Capital (Pty) Ltd, owned by his family trust. Old Mutual was also a 20% shareholder of NMT since 2005. Old Mutual provided equity and preference share funding to NMT and other entities in the NMT group of companies and it earns returns as an ordinary and preferred shareholder. Because of Mr Moyo's interest in NMT and that of Old Mutual, they concluded protocols which set out the way in which any potential conflict of interest that might arise would be dealt with. The protocols were incorporated into the employment contract (addendum A and addendum B).

[7] In terms of addendum A, Mr Moyo acknowledged and agreed that any conflict resulting from his position as a non-executive director of NMT would be dealt with by the chairperson of the Old Mutual board 'and/or in terms of clause 25.2' of the employment contract. He also acknowledged and agreed that the director/s appointed by Old Mutual to the NMT board shall be required to disclose to the chairperson of Old Mutual any conflict in respect of his position as a non-executive director of NMT. In terms of addendum B, he agreed that the best interests of Old

Mutual would always take precedence over his personal interests in NMT (clause 4.5). The parties further agreed that the 'Nominations and Governance Committee' (NGC) - a standing sub-committee of the Old Mutual board responsible for governance matters and consisting of the chairperson of each of the other board sub-committees - would have principal oversight over and responsibility for managing conflicts of interests (clause 5.1) and he was required, as soon as practicably possible after becoming aware of a conflict of interest or the perception of one arising between himself and Old Mutual as a result of the NMT interest, to advise both the chairperson of the Old Mutual board and the chairperson of the NGC about the matter, with sufficient particularity (clause 6.1).

[8] Clause 24 of the employment contract deals with its termination. It contemplates its automatic termination upon Mr Moyo reaching normal or agreed earlier retirement age and for either party to terminate it either on six months' notice as provided for in clause 24.1.1. or for other reasons enumerated in the clause. It reads:

'24.1. This contract of employment may be terminated as follows:

24.1.1. By either party providing 6 (six) months' notice to this effect, in writing, to the other party, subject to clause 24.3. Where such notice is provided:

24.1.1.1. The Employer may, at its sole discretion, elect whether the Executive should work during this period of notice. Notwithstanding this, the Employer shall pay the Executive for the 6 months' notice irrespective of whether the Employer has required him to work or not.

24.1.12. Should the Executive give notice in terms of clause 24.1.1 and request that the Employer waive the notice period, the Employer may exercise its discretion in this regard. Should the Employer agree to such waiver, the Executive shall be paid only up to and including his last day of actual work.

24.1.2. Upon the Executive reaching the normal retirement age as determined by the Employer, or at an agreed earlier retirement age, at which point this Agreement shall terminate and the Executive shall commence retirement.

24.1.3. By the Employer on the basis of the grounds regarded as valid in the Labour Relations Act Number 66 of 1995, with or without the notice period as set out in clause 24.1.

24.1.4. For any other lawful and fair reason.

24.2. Without limiting the provisions of clause 24.1 above (inclusive of clauses 24.1.1 to 24.1.4) the Employer may, at any time during the currency of this Agreement:

24.2.1. Summarily terminate this Agreement should the Executive be guilty of misconduct which would entitle the Employer, in law and/or equity, to summarily dismiss him;

24.2.2. Terminate this Agreement with notice should the Executive not meet the Employer's required performance standards;

24.2.3. Terminate this Agreement with notice on the basis of the Executive's incapacity on the basis of ill health or injury;

24.2.4. Terminate this Agreement on the basis of the Employer's and/or the Group's operational requirements;

24.2.5. Terminate this Agreement with or without notice on the basis of "FAIS" requirements as set out in clause 17, or a breach in terms of clause 18 of this Agreement (the FICA);

24.2.6 Terminate this Agreement summarily where the Executive has committed a material breach of contract and/or for reasons recognised and accepted in law and equity as justifying summary termination of employment;

24.2.5. Terminate this Agreement without notice if the Executive is in breach of any code or rules or guilty of any offence under or in respect of any financial services regulator (including, without limitation, the Financial Services Board ("FSB") or any successor body, including any prudential authority).'

[9] Clause 25.1 of the employment contract is also relevant. It deals with pre-dismissal arbitration and reads thus:

'25.1.1. Where allegations of misconduct or incapacity have been raised against the Executive, the Employer will be entitled, within its sole discretion, to decide whether or not to hold an internal disciplinary enquiry, or to proceed instead via the pre-dismissal arbitration procedure, contemplated in Section 188A of the Labour Relations Act number 66 of 1995, and subject to the Executive's remuneration at the time being equal to or above that stipulated in section 6(3) of the Basic Conditions of Employment Act, the Executive hereby consents to such pre-dismissal arbitration in terms of section 188A of the Labour Relations Act.

25.1.2. Should circumstances arise in respect of the Executive where the Employer chooses to invoke clause 25.1.1 and pre-dismissal arbitration proceedings must be arranged, the Employer shall decide in its sole discretion as to whether to utilise the services of the Commission for Conciliation, Mediation and Arbitration (the "CCMA") or an accredited agency.'

[10] In return for his services as the chief executive of Old Mutual, Mr Moyo was highly paid. He was, for instance, paid R35,5 million under his executive remuneration arrangements during the 2018 financial year. That included fixed remuneration and incentive payments. Old Mutual, on the other hand, as it rightly contends, is entitled to expect high standards of conduct and high levels of trust and engagement from a highly paid chief executive, such as Mr Moyo, who, in turn is to maintain the trust and confidence of the board. Given the strict regulatory context in which Old Mutual operates and the contractual obligations of its chief executive, Mr Moyo, and indeed any senor executive of Old Mutual, must adhere to the highest standards of governance and ethics. The position of a chief executive is a demanding role which comes with considerable responsibility to a range of stakeholders.

[11] NMT, Old Mutual, Mr Moyo and the other individual shareholders of NMT, concluded a preference share subscription agreement on 25 January 2005 (the preference share agreement), which provides *inter alia* that:

- '[t]he preference shares shall confer on the shareholder the right to receive out of the profits of the company a cumulative preferential dividend ("the preference dividend") which shall be calculated and determined in the manner [provided for in the preference share agreement], and which will rank in priority to any dividends which after the date of issue of the preference shares ("the issue date") may be declared in respect of any ordinary shares or other shares giving preferential rights in the company' and '[n]o dividends may be paid on ordinary shares before all arrear preference dividends have been paid' (clause 1.2 of Schedule 1);
- '[t]he preference dividends shall be declared in respect of six monthly periods ending 30 June and 31 December ("dividend date") and be payable on the next business day ("dividend payment date") to preference shareholders registered on the dividend date' (clause 1.3 of Schedule 1);
- [i]f any preference dividend is not paid on a dividend date ("the arrear preference dividend"), an additional preference dividend shall be paid which shall be calculated in accordance with the formula specified in [the preference share agreement] . . . from the date the arrear preference dividend was due in terms of this agreement to the date of payment of the arrear preference dividend in full ("the additional preference dividend") (clause 1.6 of Schedule 1);

- ‘[o]n the redemption date, the company shall redeem the preference shares at the redemption amount’ (clause 1.6 of Schedule 1); and
- ‘[t]he preference shares shall forthwith become redeemable and be redeemed’ if ‘any preference dividend on the preference shares is not declared and/or paid on due date and the company fails to declare the preference dividend and the additional preference dividend and/or pay it within 5 (five) business days after receipt of written notice from the shareholder requiring the declaration and/or payment of the preference dividend concerned’ (clause 1.12.4).

[12] Old Mutual agreed to the extension of the redemption dates of its NMT preference shares in 2010, 2013, and 2017. In January 2018, an addendum to the preference share subscription agreement was concluded between Old Mutual, NMT and the other shareholders in terms whereof the redemption date of Old Mutual’s preference shares was extended to 30 June 2018. Mr Moyo signed the addendum to the preference share agreement on 23 January 2018. At the end of February or early March 2018, NMT’s board approved the declaration of ordinary dividends in the amount of R10 million (the March 2018 dividend). It was declared, according to Old Mutual, when preference share dividends due to Old Mutual were in arrears.

[13] During 2018, NMT received payment of the proceeds of the sale of its BEE stake in Growthpoint. On 30 June 2018, the full amount of preference share funding to NMT became due and payable to Old Mutual in terms of the addendum to the preference share agreement. On 4 July 2018, four days later, Mr Moyo chaired a meeting of the NMT board at which it considered the declaration of a further ordinary dividend. The meeting was, amongst others, also attended by the Old Mutual nominated director, Mr Patel. The minutes of the NMT board meeting reflect that ‘[i]t was noted that all the Directors are conflicted on the dividends matter’. At that time, NMT’s current liability to Old Mutual under the preference share agreement was approximately R65.9 million, which amount was then due to Old Mutual. This was evident from the documents that served before the NMT board at the meeting. The NMT board decision, which Mr Moyo proposed and supported, was to declare an ordinary dividend in the amount of R105 million (the July 2018 dividend). Of this, an amount of R21 million was paid to Mr Moyo in his personal capacity and a further R7 million was paid to the company owned by his family trust.

[14] In the last week of August 2018, the chairman, Mr Thys du Toit, of the 'Related Party Transaction Committee' (RPTC) - a standing sub-committee of the Old Mutual board - requested information on Mr Moyo's interests in NMT. He raised questions about Mr Moyo's management of his conflict of interest at NMT, including whether any conflicting interest was being managed appropriately and in a manner consistent with sound governance. His queries were to be deferred to the NGC, the standing sub-committee responsible for governance matters. The request was actioned by Old Mutual's company secretary, Ms Elsabé Kirsten (the company secretary), who is also the main deponent to its answering affidavit in the interim interdict application.

[15] The company secretary instructed Old Mutual's chief legal officer on the matter, who in turn, during early September 2018, sought information from the corporate finance team. This coincided broadly in time with the receipt by Old Mutual of various requests from NMT, one being contained in a letter dated 4 September 2018, requesting an extension of the Old Mutual preference share redemption date from 30 June 2018 for a period of three years. According to the company secretary, following initial consideration of the requests from the RPTC chairperson by the chief legal officer, and the response of the corporate finance team, it became apparent that there were governance concerns around the matter. She and the chief legal officer discussed the matter with the Old Mutual board chairman, Mr Manuel, towards the end of 2018. Mr Manuel requested that the RPTC consider the matter and, if necessary, refer it to the NGC with a considered view, given the related party nature of the issue.

[16] A report to the RPTC, prepared during January 2019, identified potential concerns about governance within the NMT group, *inter alia* about the declaration of the March and July 2018 dividends by NMT in breach of its preference share obligations to Old Mutual and the potential risks associated with a request for Old Mutual to ratify a settlement agreement concluded between NMT and the Industrial Development Corporation (IDC). According to the report, this settlement agreement effectively removed what was identified at the time as being approximately R100 million in liabilities from the NMT balance sheet, at the expense of the IDC (at a time when NMT was in a position to settle with the IDC in full). At a meeting of the RPTC on 7 February 2019, it concluded that there were significant concerns regarding Old

Mutual's commercial relationship with NMT and Mr Moyo's management of his conflict of interest. These concerns were reported by the chair of the RPTC to the NGC at a meeting of the NGC on 6 March 2019. The NGC agreed with the RPTC's recommendations, *inter alia*, that further investigation be conducted by the RPTC, that external counsel be briefed to assist the RPTC in light of the risk of potential litigation, and that the RPTC be mandated to develop a course of action, including meeting with Mr Moyo and, depending on the legal advice it received, with NMT.

[17] Various attempts were then made by the RPTC, with the assistance of Old Mutual's legal advisers, to secure information from the NMT group that would place the RPTC in a position to assess the commercial merit of the various requests that NMT had directed to Old Mutual and to assess the merits of the concerns that had arisen on the limited information then available. Such attempts to secure information were unsuccessful. This led to a series of exchanges between Old Mutual's legal advisers (on behalf of the RPTC) and NMT. During early April 2019, members of the RPTC also sought Mr Moyo's intervention to ensure that NMT provided the requested information. None of the information that had been requested, however, was provided. The only additional information obtained by the RPTC was obtained from the archives of Old Mutual when NMT agreed that Old Mutual could have access to the records of the Old Mutual nominated director of NMT, who was previously employed by Old Mutual. This brought to the RPTC's attention, for the first time, a copy of the documents that had been placed before the NMT Board at the meeting that was chaired by Mr Moyo on 4 July 2018, when ordinary dividends of R105 million were declared.

[18] At the end of April 2019, the RPTC reported to the NGC, *inter alia*, that on the information available to it, NMT's relationship with Old Mutual was seriously flawed and it recommended that Old Mutual should disengage from the NMT group in an orderly manner by not extending Old Mutual's preference shares redemption date and to move towards disinvestment from the NMT group of companies. Furthermore, in the view of the RPTC, Mr Moyo, as the chief executive of Old Mutual and as recipient and beneficiary of the NMT ordinary dividends, was instrumental in the decision taken 'to engineer, declare and pay dividends out of a group of companies of which the solvency was questionable and which dividend payments were made in breach of Old Mutual's rights as preference shareholder in NMT'. The

RPTC concluded that Old Mutual should disengage from the NMT group on grounds of serious loss of confidence and that Mr Moyo had failed to comply with his obligations under the protocols, resulting in a serious loss of confidence in him.

[19] The RPTC's views were presented to and considered by the NGC at a meeting on 29 April 2019. The NGC also considered legal advice that had been obtained at the instance of the RPTC dealing with the rights of Old Mutual in relation to the NMT group and the rights and responsibilities of Old Mutual to engage appropriately and fairly with Mr Moyo in light of the serious concerns that had arisen regarding his conflict of interest. The NGC resolved that, subject to Old Mutual's board approval, a letter prepared by Old Mutual's legal advisors should be addressed to the NMT group, that the Old Mutual board chairman should meet with Mr Moyo informally to communicate certain key points arising from the RPTC investigation to him, and that the chairman should report on that engagement to the board.

[20] On 30 April 2019, and after he had been apprised of the conclusions reached by the RPTC and the NGC, Mr Moyo addressed an email to the Old Mutual board chairman. Therein, he referred to certain of his own interactions with members of the RPTC, and expressed his surprise that there was a view that he had not conducted himself in line with the terms of the protocols and that he had not acted in Old Mutual's best interests in his involvement as non-executive director of NMT in the declaration and distribution of ordinary dividends (the March 2018 and July 2018 NMT dividend declarations). He made it clear that he always had acted in the best interests of Old Mutual.

[21] At a meeting held on 1 May 2019, the Old Mutual board considered the report of the NGC and the email from Mr Moyo addressed to the chairman. After considering the issues, the board resolved to disengage in an orderly manner from the NMT group of companies and to establish an *ad hoc* sub-committee comprising the board chairman, the chairperson of the Remuneration Committee, Ms Nombulelo Moholi, a member of the Audit Committee and of the Risk Committee, Mr Paul Baloyi, and a member of the RPTC, Mr Stewart van Graan, to engage with Mr Moyo on the concerns that had arisen in relation to his management of the conflict of interest.

[22] A meeting between the *ad hoc* sub-committee and Mr Moyo took place on 2 May 2019. The concerns that had arisen were discussed at length. Following the meeting, emails and letters were exchanged between them, dated 8, 16 and 21 May 2019. In a letter from Mr Manuel on behalf of the sub-committee, Mr Moyo was advised, *inter alia*, that:

'Central to the matters being considered is the declaration and distribution of ordinary dividends by NMT Capital in March 2018 and July 2018. Both distributions occurred in breach of the preference share subscription agreement in place between NMT Capital and [Old Mutual], firstly by ignoring the arrears in preference share dividends at these respective distribution dates, and secondly, in July, also capital payments due to [Old Mutual].

These are the issues we, as a committee, placed before you in the meeting on 2 May 2019. In your responses to the issues raised, we listened carefully and made copious notes. We also gave you the benefit of the doubt, and accepted your representations during our discussions. This was our mandate from the Boards, because in its collective wisdom the Non-Executive Directors were of the view that these matters result in a significant conflict of interest and suggest a failure by you to discharge your fiduciary duties as a director of [Old Mutual]. The seriousness of the issue required that we sought verification by a detailed examination of the documents available to us.

These documents include, but are not limited to, correspondence, reports and minutes. In summary, there is clear evidence that Ordinary dividends were declared and paid without sufficiently providing for and servicing the [Old Mutual] Preference shares as required in terms of agreements with [Old Mutual]. There is also further information that this was done without the consent of [Old Mutual]. We are of the view that you have provided insufficient information to convince us that your actions at the time of these infringements would, under scrutiny, absolve you of responsibility.

At the conclusion of this examination, the Ad Hoc Committee remains of the view that you have breached the terms of your contract of employment, by giving preference to your own interests, above that of [Old Mutual]. We have been charged by the Board to evaluate whether by this conduct the interests of Old Mutual have been prejudiced, and whether your conduct suggests a conflict of interest between your benefits as a Non-Executive Director of NMT, and those of your responsibilities as the CEO and an Executive Director of Old Mutual Limited. Whilst we find the information that we have perused compelling, we would wish to afford you an opportunity to counter this with documents that we may not have been able to assess.'

[23] In his response dated 21 May 2019, Mr Moyo, *inter alia,* stated the following regarding the NMT dividends issue:

'The arrear preference dividends were always planned to be redeemed from the proceeds of the Growthpoint Distribution, given the amount outstanding. They were indeed paid out of the distribution. There can never be an impression created that I was working against Old Mutual regarding payments to Old Mutual. My own submission as CEO of NMT at the time and as Chairman of the meeting point to a willingness to make payment to Old Mutual. Exhibit 1 and 2 – Minutes of Board meetings March 2017 and July 2018 . . .

In the event of a balance still outstanding in the preference shares due by NMT to Old Mutual, the plan was to extend the redemption period. Old Mutual had always agreed in the past to extend the redemption period. There was nothing to suggest that, this would not be extended in 2018. Prior to this there had been extensions in 2010, 2013, and 2017. Exhibit 4 – Previous Extensions . . .

A question has been raised about the ten million dividends paid in March 2018. NMT was in the final stages of the Growthpoint realisation and a proposal was made by the executive, to pay Old Mutual one amount that would at least clear the arrear preference dividends following the receipt of the Growth point proceeds. It was on this understanding that the ten million rand (R10 million) dividends was approved. It is worth noting that the Old Mutual appointed director also supported this. Nothing was done without Old Mutual's knowledge.'

[24] On 21 May 2019, following receipt of Mr Moyo's letter, the NGC together with Mr Paul Baloyi, as a member of the *ad hoc* committee, met informally to discuss the response. They decided that the matter needed to be raised with the full board at its scheduled meeting on 23 May 2019. Following a detailed briefing of the Old Mutual board on the matter by the *ad hoc* committee at its meeting on 23 May 2019, the board remained concerned by Mr Moyo's response to the issues raised with him. Mr Moyo joined the board meeting and was invited to engage with the board on the matters of concern. Further detailed engagement took place between him and the board. After further deliberation the board concluded that there had been a breakdown in trust and confidence between the board and Mr Moyo, and that it was necessary and appropriate to separate.

[25] The main factors, according to Old Mutual, which led to the complete breakdown in the relationship of trust and confidence between Mr Moyo and the Old Mutual board, were his: (a) involvement as non-executive director of NMT in the declaration of the March 2018 dividend and approving the dividend distribution to ordinary shareholders without evidence that a proper solvency and liquidity analysis was conducted (no account, according to Old Mutual, was taken of NMT's contingent

liability to the IDC as required by the Companies Act, which materially affected its solvency analysis), and at a time when preference dividends due to Old Mutual were in arrears, and thus in breach of the preference share agreement and the protocols that formed part of the employment contract; (b) involvement as non-executive director of NMT in the declaration of the July 2018 dividend and approving the dividend distribution to ordinary shareholders, again without evidence that a proper solvency and liquidity analysis was conducted (disregarding the NMT contingent liability to the IDC), and when to his knowledge the full amount of R65.9 million was due to Old Mutual as a current liability under the preference share agreement, but with provision only made for payment of a part (R32 million) of the NMT current liability to Old Mutual, and thus in breach of the preference share agreement and the employment contract; and (c) his inability to provide an acceptable explanation for his actions.

[26] The resultant benefit to Mr Moyo, directly, and indirectly through his investment company, was R30.6 million. Mr Moyo, according to Old Mutual, did not take steps to ensure that arrear preference dividends were paid to Old Mutual or that the R65.9 million current liability to Old Mutual as at 30 June 2018 was treated as an amount in fact due to it. He did not at any stage during 2018 raise the matter with the Old Mutual board chairman nor with the sub-committee entrusted with oversight over the conflicting interest, the NGC. I refer hereinafter to this as 'the NMT matter'.

[27] The IDC made a substantial preference share investment in a wholly-owned subsidiary of NMT in order to enable that subsidiary to acquire shares in a listed company, Basil Read. NMT guaranteed the performance by the subsidiary of its preference share obligations. Following a catastrophic decline in the price of the Basil Read shares, the subsidiary was unable to fulfil its preference share obligations to the IDC, leaving NMT exposed to the IDC in terms of its guarantee. From the documents that served before the NMT board at its meeting on 4 July 2018 when the July dividend was declared, it appears that as at 4 July 2018 the exposure of NMT to the IDC in terms of its guarantee was R157 million. Of great concern to the Old Mutual board was a proposal on how the proceeds from the disposal by NMT of its Growthpoint shares in the aggregate amount of R311 million should be utilised. The proposal document was included in the board pack prepared for the 4 July 2018 NMT board meeting. It indicated no indebtedness to the IDC and the NMT board,

according to Old Mutual, proceeded to disburse the available cash, including by way of the dividend declaration and distribution to ordinary shareholders of R105 million, on the basis that it was not indebted to the IDC.

[28] According to Old Mutual, although there may then have been some progress in attempts to settle the indebtedness owed to the IDC, there was no conceivable basis for the debt to be disregarded and treated as settled. A settlement agreement was only concluded five months later, on 12 November 2018, and it is, according to Old Mutual, doubtful whether the indebtedness of NMT to the IDC was in fact settled as contemplated in the settlement agreement since it was subject to conditions precedent which do not appear to have been fulfilled. Furthermore, states Old Mutual, on the information available to it the settlement agreement was approved by the NMT board in contravention of s 75 of the Companies Act and could in those circumstances only be valid if subsequently ratified by ordinary resolution of the NMT shareholders. Old Mutual, as one of the shareholders, was provided with a draft shareholders' resolution, but has not approved it, and it appears doubtful to it that any such resolution has, to date, been validly passed. Information on this, including copies of shareholder and board resolutions relating to any approvals of the IDC settlement agreement, was requested by Old Mutual from NMT, but was not provided.

[29] Mr Moyo's reply in the interdict application papers to these allegations of Old Mutual relating to the IDC indebtedness, is this:

'The IDC issue is a red herring and is completely irrelevant hereto. Old Mutual was not only a party to but also a financial beneficiary of all the NMT decisions it now seeks to criticise. It happily pocketed the ordinary dividends, just like all the other shareholders.'

[30] It was further the view of the Old Mutual board that NMT's unsatisfactory financial position at the time of the declaration and distribution of the July 2018 dividend, was reflected in the 4 September 2018 NMT letter subsequently sent to Old Mutual, in which letter a three-year extension of the Old Mutual preference share redemption date was requested. Therein, NMT stated that if Old Mutual did not then agree to a further extension of the term of the preference share agreement (after 30 June 2018), 'the Preference Shares will be classified as a liability', which 'will directly affect the solvency of the company' resulting 'in NMT Capital being unable to use its balance sheet for funding purposes'. With effect from the date on which Old Mutual

‘agrees to extend the redemption period, NMT Capital will pay R20 m to settle all outstanding Preference Dividends and Arrear Preference Dividends that have accumulated since 2008’. NMT was thereafter in negotiations with Old Mutual about the deferment of its preference share redemption date. A decision not to agree to the extension was finally taken at an Old Mutual board meeting on 1 May 2019.

[31] Mr Moyo, on the other hand, did not concede or acknowledge any breach by the NMT board of the preference share agreement, or that any conflict of interest, or even potential conflict, had arisen between his own interests and those of Old Mutual in the NMT matter, or that he had acted in breach of the protocols and thus of the employment contract. It was, according to him, understood by all parties concerned that the repayment of arrear preference dividends would be significantly reduced upon the happening of a liquidity event over time. Such a liquidity event occurred in 2018, when NMT was paid the proceeds of the sale of its BEE stake in Growthpoint. The Old Mutual arrear preference dividends, according to him, were always planned to be redeemed from the proceeds of the Growthpoint distribution, and the extension or ‘roll-over’ of the redemption date of Old Mutual’s NMT preference shares was inevitable or a foregone conclusion. An extension of the redemption date, according to him, would not have prejudiced Old Mutual in any way. He considered that NMT’s board, therefore, was entitled to declare ordinary dividends. He also asserts that the members of the Old Mutual board and sub-committees that have dealt with the NMT matter have been driven by improper motives.

[32] Old Mutual, in turn, maintains that even though it had previously agreed to deferments of the redemption date of its NMT preference shares, the matter continued to be governed by the relevant contractual provisions. It is, according to Old Mutual, also apparent from the 4 September 2018 NMT letter that NMT itself did not consider that a further extension was simply an administrative matter, or ‘there for the taking’. The July 2018 dividend was also materially different in amount to any previous dividend. According to Old Mutual, it also cannot be suggested, as Mr Moyo does, that there is no financial prejudice when a material debt is not paid when it is due. Furthermore, it points out, that during April 2019 NMT Group wrote to Old Mutual, without any prior notice or explanation, requesting it to subordinate all its claims in order to restore the NMT group to solvency. Mr Moyo, so Old Mutual argues, should have been acutely aware of the importance of ensuring that his own

interests and those of NMT were not preferred over the interests of Old Mutual, and that NMT's contractual undertakings to Old Mutual were adhered to. The Old Mutual board has taken the position that Mr Moyo's conduct in managing the conflicting interest in the NMT matter is not the conduct it expects of its chief executive. Mr Moyo, it maintains, failed to act in Old Mutual's best interests in circumstances where it was manifestly incumbent on him, in terms of the protocols and other provisions of the employment contract, to protect those interests proactively.

[33] Old Mutual states in its answering affidavit that for various reasons, which included Mr Moyo's decision of his own accord to brief members of his executive team and thereby not making it possible any longer to contain and safeguard the confidentiality of the board's conclusion on his actions, it was considered appropriate by the board to suspend him. It was also necessary for Old Mutual Limited, under its listing obligations, to issue an announcement of the suspension on the SENS service of the JSE, and on other stock exchanges, which occurred the day following the board meeting on 23 May 2019. It says that it did so in measured terms that were appropriate, non-offensive and factually correct.

[34] The period of Mr Moyo's suspension, according to Old Mutual, was intended for engagements between him and Old Mutual on the terms of an agreed settlement. But in the days following his suspension he gave a number of public interviews to the print and broadcast media, criticising the Old Mutual board decision. It was, according to Old Mutual, inappropriate for him to engage in public discourse in the manner that he did, and, in doing so, he breached the Old Mutual media policy and failed to conduct himself according to the standard expected of the chief executive of Old Mutual, regardless of the fact that he had been suspended. His engagements with the media in the manner that he did, so states Old Mutual, caused it reputational harm. His conduct served as a further indication to the board of an irreparable breakdown in the relationship of trust and confidence.

[35] Mr Moyo, on the hand, states that the news of his suspension was devastating and humiliating to him. At his level and status of employment, the mere suggestion that he was guilty of a conflict of interest was instantly damaging to his reputation and good name in the business world and society in general. He was deeply hurt. He states that he conducted a few interviews at the behest of media

practitioners who were hounding him with the allegations of wrongdoing which were implied by Old Mutual. He felt the need to put the record straight 'somewhat', hence his agreement to be interviewed. According to him, nothing harmful was said in the interviews. He states that he merely defended his integrity, which was being ruined every day and every hour without any recourse. He also felt aggrieved by the fact that Old Mutual had seemingly breached its undertaking to protect his integrity, good name and confidentiality.

[36] According to Old Mutual, it became apparent that an agreed settlement would not be possible. The Old Mutual board considered that from the perspective of employment law, as regulated by the Labour Relations Act 55 of 1995 (the LRA), there was fair reason to terminate Mr Moyo's employment without notice, as contemplated in clause 24.1.3 of the employment contract, and that there was also a lawful and fair reason to terminate his employment as contemplated in clause 24.1.4. The board nevertheless resolved to terminate his employment on providing six months' notice to that effect, as provided for in clause 24.1.1. He was to be paid a gross amount of approximately R4 million in respect of his fixed remuneration for the six-month notice period.

[37] The Old Mutual board decision to terminate the employment contract on notice in terms of clause 24.1.1 thereof, was communicated to Mr Moyo in a letter dated 17 June 2019. The letter is headed 'NOTICE OF TERMINATION OF EMPLOYMENT' and its introductory paragraphs read thus:

'1. The purpose of this letter is to give you notice of a decision of the [the Old Mutual board] to terminate your employment in terms of the provisions of clause 24.1.1 of your contract of employment.
2. You will be paid for the notice period, but will not be required to perform any further work.'

The letter goes on to explain the reason for the decision, -

'. . . that there has been a complete breakdown in the relationship of trust between you and the Board. This breakdown in trust and confidence has its origin in what we have referred to in engagements with you as "the NMT matters", and the manner in which you have dealt with those matters both in your engagements with the Board prior to your suspension, and in your conduct following your suspension.'

It is explained that at the heart of the concerns that had led to a complete breakdown in the relationship of trust and confidence between Mr Moyo and the Old Mutual

board was his role in the declaration of ordinary dividends by NMT in breach of obligations owed to Old Mutual under preference share funding arrangements. The letter continues to set out the Old Mutual board's reasons for not having conducted further investigation or a formal inquiry into the matters raised, and its views that his conduct 'may properly be characterised as gross misconduct' and that there is reason to terminate his employment without notice, as contemplated in clauses 24.1.3 and 24.1.4 of the employment contract, but-

'[n]evertheless, to mitigate the adverse effect on you of the termination of your employment, the Board has resolved to terminate your employment on notice as provided in clause 24.1.1 of your contract of employment.'

[38] Mr Moyo believes that both his suspension and subsequent dismissal were not based on any genuine belief on the part of the chairman of the Old Mutual board and the non-executive directors that he had breached the protocols and thus his employment contract, but rather constituted 'unlawful reprisals' because of him performing his duties in raising some 'concerning improprieties on the part of Mr Trevor Manuel and the board of directors of Old Mutual, more specifically the non-executive directors'. Mr Moyo raises two matters that, according to him, constituted 'concerning improprieties' that he raised. The first occurred in March 2018 in the run-up to what was called Old Mutual's 'managed separation' and concerns what he refers to as the 'triple conflict of interest' of the chairman of the Old Mutual board, and the second at the meeting of the NGC that was held on 6 March 2019, relating to certain legal costs of the chairman that were paid by Old Mutual.

[39] The 'managed separation' was undertaken to separate the Old Mutual group, previously ultimately controlled by Old Mutual plc, a company listed in the United Kingdom, into four independent businesses. This included two unbundling transactions. In the first of these, on 25 June 2018, the Old Mutual Wealth business, now known as Quilter plc, was listed on the London Stock Exchange and the Johannesburg Stock Exchange (the JSE) and 86.6% of the total issued share capital of Quilter plc was distributed, through a dividend in specie, to shareholders of Old Mutual plc. This was followed, the next day, by the listing of Old Mutual Ltd on the JSE. This established a group domiciled and listed in South Africa, which became the holding company of the remaining components of the Old Mutual group. The Old Mutual plc shareholders received Old Mutual Ltd shares in exchange for their Old

Mutual plc shares and the latter company is now a wholly-owned subsidiary of Old Mutual Ltd. In the second unbundling transaction (the final step of the managed separation), 31.73% of Nedbank's total issued share capital, which had been held by Old Mutual Ltd, was distributed to the Old Mutual Ltd shareholders, again by way of a dividend in specie.

[40] In consequence of the managed separation, Old Mutual Ltd assumed a contingent liability of Old Mutual plc in the nature of a guarantee in favour of an American company. According to Mr Moyo, one of the companies that stood to gain materially by way of fees from the realisation of the managed separation, was Rothschild, one of the transaction advisers. Mr Manuel was a director of Old Mutual plc, the chairman of Old Mutual Ltd and the chairman of Rothschild, and, according to Mr Moyo, thus subject to three actual or potential conflicts between these entities. It is common cause that Mr Manuel's relationship with Rothschild pre-existed his joining any Old Mutual board, and the Rothschild mandate to advise Old Mutual plc on the managed separation process also predated him joining the Old Mutual plc board. These relationships were known and disclosed.

[41] Mr Moyo states that during or about March 2018 he raised with the Old Mutual board chairman, 'in good faith and for no personal gain', his genuine concerns around what he perceived as a 'triple conflict of interest' on the part of the chairman. He states that he openly voiced his objections to the board chairman about the impropriety of his participation in any discussions regarding Old Mutual's proposed assumption of the Old Mutual plc contingent liability. The board chairman, according to Mr Moyo, ignored and failed to act on his raising the alarm and continued to participate in the discussions of that matter and, from that point on, his attitude towards Mr Moyo deteriorated. Mr Moyo states that he tried to explain to the board chairman that it was nothing personal, but all in vain.

[42] Mr Manuel, on the other hand, particularly denies having had any discussions with Mr Moyo in which he voiced objections about the impropriety of his participation in discussions about the assumption of the contingent liability, or that he was involved in any such discussions. The RPTC, it is undisputed, was established in the build-up to the managed separation. It consists of three independent non-executive directors of the Old Mutual board. Matters of potential conflict of interest,

including the chairman's potential conflict of interest, were dealt with by the RPTC. It is further undisputed that the board chairman was, and is not now, a member of that board sub-committee. Old Mutual's version is that the board chairman had no direct involvement whatsoever in the way the assumption of the contingent liability issue was ultimately resolved. He was not part of the RPTC deliberations on the issue. Mr Moyo, on the other hand, was intimately involved. Both he and the company secretary were part of a teleconference meeting of the RTPC on 23 March 2018, when the RTPC approved the assumption of the contingent liability, subject to the required regulatory and exchange control approvals. Mr Moyo, it is undisputed, supported the resolution. The board chairman was not present. It is also similarly undisputed that Mr Moyo approved the subsequent resolution of the Old Mutual board, which authorised the conclusion of the guarantee. In that resolution, three of the directors of Old Mutual who were also directors of Old Mutual plc (one of whom the board chairman) formally and in writing declared their conflict of interest and took no part in the decision. Mr Moyo also approved the Old Mutual Ltd pre-listing statement that dealt specifically with the assumption of the Old Mutual plc contingent liability by Old Mutual Ltd.

[43] According to Mr Moyo, he told the board chairman during February/March 2019 that he intended to raise another objection with the board, via the NGC, regarding the 'improper non-disclosure' of a payment amounting to millions of rand, which was made by Old Mutual in respect of the board chairman's legal fees in a particular matter, which matter had 'absolutely nothing to do with Old Mutual'. It was, according to Mr Moyo, 'highly irregular and improper not to disclose it to the Old Mutual shareholders, who knew nothing about it'. He states that the board chairman tried to dissuade him from doing so. In March 2019, he nevertheless placed the matter on the NGC agenda, and the board chairman was asked to recuse himself, which he did. He states that the NGC 'once again resolved not to implement [his] proposal that the expenditure be disclosed, despite [his] motivation that it was compulsory to do so, *inter alia*, because it amounted to a form of remuneration in the hands of Mr Manuel'. Mr Moyo states that 'after that episode and as a result thereof, all hell broke loose and Mr Manuel treated [him] with open hostility'.

[44] The NGC meeting at which the legal costs issue was raised and discussed is the meeting on 6 March 2019, to which I have referred in paragraph 16 *supra* when

the NGC agreed with the recommendations of the RPTC about the way forward regarding the concerns relating to Mr Moyo's conduct in the NMT matter. It is undisputed, however, that Mr Moyo himself was involved in the decision in 2017 for Old Mutual to pay the legal costs of its board chairman, because the matter concerned the interests of Old Mutual. The decision for Old Mutual to pay the relevant legal costs and manage the legal strategy was not initiated by the board chairman. Mr Moyo personally instructed Old Mutual's chief legal officer, Mr Craig McLeod, to proceed, and payments for the legal fees were processed through Mr Moyo's office. The legal costs at Old Mutual's expense were approved only where it served the interests of Old Mutual and the costs of any litigation in which the board chairman was involved that did not concern Old Mutual's interests were not paid by Old Mutual.

[45] It is further undisputed that, at the NGC meeting on 6 March 2019, Mr Moyo informed the committee that he had approved the litigation in 2017, that this had been at the initiative of Old Mutual and not the board chairman, and he explained the reasons for the decision for Old Mutual to incur the liability. The NGC resolved that the proper authority for decisions of this kind should reside with the chief executive, Mr Moyo, where necessary in discussion with the chairman of the RPTC. This NGC decision relating to the board chairman's legal fees was subsequently approved by the full board at a meeting on 8 March 2019, again after a discussion from which the board chairman recused himself.

[46] At its meeting on 6 March 2019, the NGC also agreed that advice should be obtained on how those legal costs should be disclosed in the annual financial statements, if required. Following a discussion that the company secretary had with Mr Moyo after the meeting, she referred the matter to Old Mutual's auditors for advice, which advice, she states, was to the best of her knowledge applied. Mr Moyo did not raise the issue with her again, and he duly approved the annual financial statements of Old Mutual. Mr Moyo's allegations that 'all hell broke loose' and that the board chair treated him 'with open hostility' are denied and said to be 'devoid of any truth'.

[47] Mr Moyo states that towards the end of April 2019 it came to his attention that he was being accused by the board chairman of having allegedly breached the

protocols in respect of the Old Mutual/NMT relationship 'or the so-called NMT matter which is at the centre of this application'. He states that, in the totality of the circumstances, he felt victimised and arbitrarily discriminated against as a result of his 'various protected disclosure/s made in good faith' and in the execution of his duties'. Old Mutual, on the other hand, denies that Mr Moyo made any 'protected disclosures' or that he was discriminated against. According to Old Mutual, neither of the two matters relied upon by him (Mr Manuel's alleged participation in discussions relating to the assumption of liability and Old Mutual paying some of his legal fees) featured at any time in any deliberations of any of the three board sub-committees (the RTPC, NGC and *ad hoc* sub-committee) that considered Mr Moyo's position, or in deliberations of the board itself when it reached the conclusion that there has been a breakdown in trust and confidence in him; they were unrelated. These matters, Old Mutual maintains, 'were as a matter of fact completely irrelevant to any decision or discussion by the board on [Mr Moyo's] own position'.

[48] Mr Moyo further maintains that the non-executive directors of Old Mutual (the fourth to sixteenth appellants) have 'allowed themselves to be bullied and/or unduly, unnecessarily and/or recklessly cajoled into taking clearly unwarranted disciplinary action against [him]'. He had gained the impression 'that the chairman was determined to get rid of [him] using the NMT matter as an excuse and that he was putting undue pressure on other directors, who were unfortunately and improperly allowing themselves to be bullied and to which they ultimately clearly succumbed'. He indicates that he will therefore seek an order in the legal proceedings contemplated in part B of the notice motion that the board chairperson and the non-executive directors be declared delinquent directors in terms of s 162 of the Companies Act.

[49] Old Mutual's non-executive directors, on the other hand, take serious objection to such allegations and insinuations that they were incapable of exercising independent judgment on the NMT matter, or that they allowed themselves to be 'bullied' by the board chairman to reach the conclusion that there has been a breakdown in trust and confidence, and that each one of them is a delinquent director. They state that '[t]hese assertions, introduced without any proper factual basis, are scurrilous, and are deeply disrespectful' of each one of them, and that each one of them 'is a senior professional person of high integrity and experience in

business and leadership'. They say that discussions at board meetings, including meetings concerning Mr Moyo and the breakdown in trust and confidence in him, have been robust, as should be expected at meetings of a board of that calibre. Ultimately, however, the conclusion that there was a breakdown in trust and confidence, that a separation with Mr Moyo was necessary, and all related ancillary decisions were reached by clear consensus, with no material dissenting voice from any single member of the board present. Each one them, including the board chairman, was re-elected by shareholders of Old Mutual at its annual general meeting on 24 May 2019, the day following the suspension of Mr Moyo. Furthermore, they say that Mr Moyo's allegations regarding the non-executive directors being bullied and succumbing to pressure to oust him 'serves only to demonstrate the extent of the breakdown in the relationship between him and Old Mutual in circumstances where he effectively seeks reinstatement (pending an action in which he seeks an order declaring the non-executive directors delinquent)'.

[50] Old Mutual contends that even on his own version, the 'facts' advanced by Mr Moyo do not amount to a 'protected disclosure' as contemplated in the PDA, nor is there a causal nexus between the alleged disclosures and the decision by Old Mutual to suspend him and ultimately to give notice of the termination of the employment contract. It further contends that none of what Mr Moyo states in relation to the PDA or the Companies Act in any event supports his claim for an interim interdict. Those allegations are only pertinent to the main action contemplated in part B of the notice of motion. According to Old Mutual, 'the decision to suspend [Mr Moyo] and ultimately to give notice of the termination of his employment was indeed based on a genuine belief on the part of the board, based on firm factual grounds that emanated from the investigation and the engagements with Mr Moyo himself, that there had been a complete breakdown in trust and confidence in [him]'. Mr Moyo's stance, as stated by him, 'is simply that there was no objective basis for such breakdown' and 'that it was manufactured for ulterior motives'.

[51] Part B of the notice of motion sets out the causes of action to be advanced in the contemplated action and reads thus:

'An application and/or action, which must be instituted within 60 days of the outcome of Part A, for relief in the form of:

1. Specific performance of the employment contract (ie permanent reinstatement);
2. Alternatively, contractual damages arising out of breach of contract; and/or
3. Further alternatively, delictual damages for patrimonial loss caused by the impairment of the applicant's dignity and/or reputation and/or breach of the provisions of the Protected Disclosures Act 26 of 2000 read with section 159 of the Companies Act 71 of 2008;
4. Declaring the third to seventeenth respondents to be delinquent directors in terms of section 162 of the Companies Act;
5. Costs in the event of opposition'.

In his founding affidavit Mr Moyo states that '[a]lthough both [his] suspension and/or [his] dismissal were also unfair in terms of the Labour Relations Act 55 of 1995 ("the LRA"), [he] hereby specifically abandons [his] claim(s) based on [his] LRA rights and [has] made an election not to assert them in these proceedings'. We were informed from the bar that the action contemplated in part B of the notice of motion had in fact been instituted on 29 September 2019.

[52] It was within this factual context that the court *a quo* found that clause 25.1.1 of the employment contract afforded Mr Moyo the right to an internal disciplinary enquiry or pre-dismissal arbitration once allegations of a conflict of interest and of misconduct on his part had been raised. It found that Old Mutual was, in those circumstances, not legally entitled to invoke clause 24.1.1 and to terminate the employment contract by providing six months' notice, but instead was obliged to follow the disciplinary enquiry or pre-dismissal arbitration procedure contemplated in clause 25.1.1. The court *a quo* found that Old Mutual's termination of the employment contract in terms of clause 24.1 therefore constituted a repudiation thereof, which repudiation vested Mr Moyo with an election either to accept the breach of contract or repudiation and sue for damages or to enforce the contract. He had elected the latter.

[53] The court *a quo* found support for its construction of the relevant provisions of the employment contract in *Somi v Old Mutual Africa Holdings (Pty) Ltd* (2015) 36 ILJ 2370 (LC) and *Motale v The Citizen 1978 (Pty) Ltd and Others* [2017] 5 BLLR 511 (LC), and rejected a contention that it should follow *Gama v Transnet SOC Limited and Others* (J3701/18) Labour Court, Johannesburg (22 November 2018), as '[t]he facts that led the court in the *Gama* matter to decide as it did are radically dissimilar from the present case'. The court *a quo* rejected Old Mutual's contention

that this is a fitting case in which the trial court ultimately is not likely to give effect to Mr Moyo's choice to claim specific performance. Furthermore, the court *a quo* found that the PDA finds application and that Mr Moyo 'should be protected'.

[54] In granting the interim interdict the court a *quo* said, *inter alia*:

'Apart from being accused of having had a conflict of interest, the Applicant has also been accused of having committed a gross misconduct. Clause 25.1.1 is explicit on what ought to happen once an employee is accused of misconduct. Strangely, instead of dealing with the Applicant's misconduct as directed in Clause 25.1.1, the Respondents, probably disliking the procedure prescribed in Clause 25.1.1 or Addendum 'A', invoked clause 24.1.1. It is nonsensical and of course disingenuous to condemn a person of having a conflict of interest or committing a misconduct only to turn around and state, as the First Respondent's chairperson did in one of his letters, that same person had done nothing wrong.

. . .

Where a party chooses to furnish reasons for the dismissal, especially in those circumstances where such reasons may be devastating to the other party, such as the present, the invariably *audi alteram partem* rules ought to find application.

. . .

The dismissal of the Applicant, in my opinion, demonstrated that the Respondents no longer considered themselves bound by the terms of the contract. That act presented the Applicant with two choices – to accept the repudiation and sue for damages or to reject it and sue for specific performance. In this case, the Applicant has elected to sue for specific performance. Mindful that an act of repudiation must be assessed subjectively, there cannot be any other interpretation of the action of the Respondents, objectively and subjectively, it was a repudiation. In the result, I am satisfied that the Applicant has established the existence of his *prima facie* right, which if not protected he will suffer irreparable harm.'

[55] In finding that the PDA finds application and that Mr Moyo 'should be protected', the court *a quo* said this:

'The Respondents would let this Court believe that the issue concerning the Applicant's conflict of interest arose well before he made the disclosures. In short, this is factually misguided. The Respondents might have been holding meetings as early as January 2019 but it was not until retrieval of certain documents from archives of NMT during or at the end of April that they learnt of the alleged conflict. The discovery of the alleged conflict therefore came well after the disclosures. For this reason, the connection is apparent – disclosure followed by alleged conflict and the occupational detriment. On the understanding that causality was the only issue, I find that the Applicant should be protected.'

And in the court *a quo's* judgment granting leave to appeal it is said:

'The question pertaining to the PDA was the most insignificant part of this Court's judgment because the court had at that stage already concluded that the Applicants had repudiated the contract of employment by the dismissal of the first respondent. It is correct that the court confined itself to causation, which was only one aspect of the PDA issue but that was made clear in the judgment anyway. While the PDA issue could be perceived as a matter falling under Part "B", it was also relevant under Part "A". The First Respondent claimed reinstatement on the basis that dismissal, although branded as emanating from a conflict of interest, was in fact arising from the disclosures that he made about the chairperson.'

[56] I turn first to the court *a quo's* findings on the applicability of the PDA to the granting of the interim interdict reinstating Mr Moyo in the position as the chief executive of Old Mutual and restraining Old Mutual from appointing anyone else in that position. The PDA issue, to use the term used by the court *a quo*, was indeed, in my respectful view, only of relevance to the main action contemplated in part B of the notice of motion to which the interim interdict was made pending, and not to the interim interdict that was sought in terms of part A. The first requisite for an interim interdict is that a *prima facie* right must be established, even one that is open to some doubt. In order to succeed in obtaining the interim reinstatement order, Mr Moyo was required to show - on the facts established through the application of the principles set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 and read with the *caveat* in *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D-E – that, having regard to the claims set out in part B of the notice of motion, *prima facie*, although open to some doubt, he could obtain an order for specific performance (reinstatement) at a trial in due course.

[57] The provisions of the PDA are relevant to Mr Moyo's delictual claim contemplated in part B of the notice of motion (see Chowan *v Associated Motor Holdings and others* 2018 (4) SA 145 (GJ)), but not to his contractual claim either for specific performance or damages. There, his claim is based on a repudiation of the employment contract on the part of Old Mutual by its termination thereof in terms of clause 24.1.1, which gave rise to his right to claim specific performance. Therefore, the questions, as far as the contractual claim for specific performance or for damages is concerned, are whether Mr Moyo had the right, in terms of clause 25.1.1, to a disciplinary enquiry or pre-dismissal arbitration in circumstances where

allegations of misconduct and a conflict of interest in the NMT matter have been raised against him, and whether Old Mutual nevertheless had the right to terminate the employment contract in terms of clause 24.1.1. Those questions, in turn, call for the interpretation of the relevant contractual provisions.

[58] The interim interdict was not sought, nor could it have been granted, to protect Mr Moyo's right to reinstatement pending the institution of proceedings in which the remedies provided for in s 4(1) of the PDA is claimed, or proceedings in terms of s 159 of the Companies Act in which compensation in terms of s 159(5) is claimed. The objectives of the PDA include the provision of 'certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure' (s 2(1)(b)). Section 4(1) of the PDA provides that '[a]ny employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of s 3, may - (a) approach any court having jurisdiction, including the Labour Court . . . for appropriate relief; or (b) pursue any other process allowed or prescribed by any law'. Proceedings under the PDA or a claim for compensation in terms of s 159(5) of the Companies Act are not contemplated in part B of the notice of motion. The interim interdict was only sought to protect Mr Moyo's right to reinstatement pending the finalisation of an action in which a contractual, alternatively a delictual claim for pure economic loss, is claimed. It is, therefore, only Mr Moyo's contractual claim for specific performance that requires consideration.

[59] It seems to me, with respect, that despite Mr Moyo's express disavowal of any reliance on his rights under the LRA, the court *a quo* viewed the interdict application through a labour-law prism, i.e. the perceived unfairness of Old Mutual having raised allegations of a conflict of interest and misconduct on the part of Mr Moyo, and then proceeding instead to terminate the employment contract on notice in terms of clause 24.1.1 without first affording him a hearing before the termination. However, there is no such self-standing common-law right to fairness in employment contracts. A right to be treated fairly when a contract is terminated only exists if it is expressly or impliedly incorporated in the contract.

[60] In *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) paras 32-33 and 55-58, the Supreme Court of Appeal had occasion to consider a contract of employment which provided for termination on notice. Wallis AJA held

that a right to be treated fairly upon termination could only be held to exist if it is expressly or impliedly incorporated in the contract and that such a term should not be imported into a contract by developing the common law. It was held that the contract in question had been lawfully terminated on notice and there was no requirement for fairness, expressly or impliedly, incorporated into the contract.

[61] In *Transman (Pty) Ltd v Dick and another* 2009 (4) SA 22 (SCA) para 18, any reliance on the LRA was also abandoned. It was argued that the employee nevertheless was entitled to a hearing before the termination of his employment contract and that such entitlement arose from an implied term of the contract. But Jafta JA held that there was a duty on him 'not only to plead the contractual claim but also to prove facts from which the contended tacit term could be inferred', which 'he has failed to do and as a result there is no factual basis for importing into the employment agreement the term that he was entitled to a hearing before the board terminated his employment'. Accordingly, so it was held, 'the court below erred in assuming that his employment contract "was subject to an implied term that he would be afforded a fair hearing before he was dismissed"'.

[62] No implied term of fairness has been pleaded in Mr Moyo's founding affidavit. Had he intended to rely upon such a term, it was his duty not only to plead the contractual term, but also to establish facts from which such a term could be inferred. The court *a quo*, in my respectful view, erred insofar as it might have assumed that the contract of employment was subject to an implied term that Mr Moyo would be afforded a hearing before the employment contract was terminated by providing six months' notice to that effect. The questions whether Old Mutual was contractually entitled to invoke the no-fault termination on six months' notice provision of the employment contract (clause 24.1.1) as it did, and whether clause 25.1.1 expressly affords Mr Moyo a right to a prior internal disciplinary enquiry or a pre-dismissal arbitration before the invocation of the no-fault termination, as I have mentioned, depend on an interpretation of the employment contract, to which I now turn.

[63] Recently, in *Theron v Premier, Western Cape* [2019] ZASCA 6, Lewis ADP summarised the present-day approach to the interpretation of contracts, thus:

'[19] It is as well at this stage to refer to the principles dealing with the interpretation of contracts. It is now clear that interpretation is a unitary exercise, which starts with the text to be interpreted, and considers it within the contract as a whole, and in context. As put most

pithily by Unterhalter AJ in *Betterbridge (Pty) Ltd v Masilo & others NNO* 2015 (2) SA 396 (GNP) para 8 (referring to the decision of this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA)) 'the interpretation of language, including statutory language, is a unitary endeavor requiring the consideration of text, context and purpose'.

[20] Most recently, this court in *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176 (*Tshwane*) para 59, referred to the English approach set out by Lord Hodge in *Wood v Capital Insurance Ltd* [2017] UKSC 24 para 10: 'The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations.'

[21] Navsa ADP continued, in *Tshwane*, (para 61):

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

[64] Thus, a consideration of 'text, context and purpose' is required. The employment contract must be considered as a whole, and clauses 24.1, 24.2 and 25.1 read together. The employment contract was of limited duration (until retirement or agreed earlier retirement (clause 24.1.2)) but was terminable in terms of subclauses 24.1.1 (by either r party providing six months' notice in writing), 24.1.3 (by Old Mutual on the basis of the grounds regarded as valid in the LRA, with or without the notice period of six months), and 24.1.4 (for any other lawful and fair

reason). Subclause 24.1.4 does not state which party can terminate for any other lawful and fair reason or whether it would be on notice (I assume it was by either party and with or without notice, depending on the reason).

[65] Clauses 24.1 and 24.2 must also be examined with reference to each other. Importantly, the provisions of clause 24.2 expressly do not limit the provisions of clauses 24.1.1 to 24.1.4, and hence also the right afforded to both parties to terminate the employment contract by providing six months' notice. Clause 24.2 affords Old Mutual the right to summarily terminate the employment contract should Mr Moyo: be guilty of misconduct which would entitle Old Mutual, in law and/or equity, to summarily dismiss him (clause 24.2.1); commit a material breach of contract and/or for reasons recognised and accepted in law and equity as justifying summary termination of employment (clause 24.2.6); or be in breach of any code or rules or guilty of any offence under or in respect of any financial services regulator (clause 24.2.7). Thus, on a plain reading of clauses 24.1 and 24.2 with reference to each other, the right of either party to terminate on six months' notice (the no-fault provision) is expressly not limited by the separate right in clause 24.2.1 of Old Mutual to terminate the contract summarily in circumstances where Mr Moyo was guilty of misconduct.

[66] Clauses 24.1 and 24.2 must not only be examined with reference to each other but also with reference to clause 25.1. The latter clause is critical to Mr Moyo's case, and to the decision of the court *a quo*. Mr Moyo asserts that clause 25.1.1 establishes for him a contractual right to, and an obligation upon Old Mutual to hold, an internal disciplinary enquiry or a pre-dismissal arbitration in any circumstances where allegations of misconduct have been raised against him. It was Old Mutual's failure to comply with this contractual obligation which the court *a quo* held constituted a repudiation on its part. Clause 25.1.1 provides that where allegations of misconduct and incapacity have been raised against Mr Moyo, *Old Mutual will be entitled*, *within its sole discretion*, *to decide whether or not to hold* an internal disciplinary enquiry, *or* to proceed instead via the pre-dismissal arbitration procedure contemplated in s 188A of the LRA. The clear and unambiguous wording of this clause makes it plain that its purpose is to provide Old Mutual with a discretion (and not an obligation) as to the holding of an internal disciplinary enquiry or pre-dismissal arbitration where allegations of misconduct or incapacity have been raised. In its

nature, the provision is discretionary and not mandatory, and the decision whether or not any one of the two procedures should be followed, and if so which one, is that of Old Mutual alone. Nothing is stated in clause 25.1.1 about any right or entitlement on the part of Mr Moyo. That the right to invoke clause 25.1.1 is that of the employer, Old Mutual, alone, is further made plain by the wording of subclause 25.1.2 in providing that '[s]hould circumstances arise in respect of the Executive where *the Employer chooses to invoke clause 25.1.1*, and pre-dismissal arbitration proceedings must be arranged, the Employer shall decide in its sole discretion as to whether to utilise the Services of the Commission for Conciliation, Mediation and Arbitration (the "CCMA") or an accredited agency'. (My emphasis)

[67] Mr Moyo's interpretation that clause 25.1.1 affords him a contractual right to a disciplinary hearing also militates against the longstanding precept of interpretation that every word must be given a meaning. A court should not conclude, without good reason, that words in a single document are tautologous or superfluous. (See *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 99; *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) para 13.) In the present matter the words that I have italicised in the preceding paragraph are not meaningless or superfluous. Furthermore, Mr Moyo's interpretation would lead to the absurdity and unbusinesslike result that the employer would be obliged in every instance where allegations of misconduct have been raised against the executive, to hold either an internal disciplinary enquiry or pre-dismissal arbitration, even though the employer, for reasons of its own, does not wish to pursue the matter any further or to take disciplinary action.

[68] As I have already indicated, it is also clear from the wording of clause 24.1.1 and of clause 25.1.1 that a termination of the employment contract by providing six months' notice in terms of subclause 24.1.1 does not trigger the provisions of clause 25.1.1. Summary dismissal in circumstances where the executive is guilty of misconduct is a separate ground of termination provided for in clause 24.2.1, and does not limit the no-fault ground under clause 24.1.1. The finding of the court *a quo* further implies that the giving of reasons (conflict of interest and misconduct) when the employment contract is terminated by providing six months' notice in terms of clause 24.1.1, triggers the application of subclause 25.1.1. I respectfully disagree. There is also, as in the case of clause 25.1.1, nothing in the wording of clause 24.1.1

that even vaguely suggest that the employer may not invoke the no-fault termination by providing six months' notice where allegations of misconduct or incapacity have been raised or where reasons - in this instance the complete breakdown of trust and confidence in Mr Moyo as the chief executive of Old Mutual and allegations of misconduct on his part - have been given in terminating the employment contract on notice.

[69] Such an interpretation would lead to the absurdity and unbusinesslike result that only Mr Moyo would have the right to terminate the employment contract by providing six months' notice where allegations of misconduct or incapacity have been raised, and not Old Mutual. Furthermore, it is highly unlikely that the parties would have intended that Mr Moyo was entitled to terminate the employment contract at any time during the duration of the employment contract and under any circumstances by providing six months' notice, whereas Old Mutual only has that right in circumstances where no allegations of misconduct or incapacity have been raised. (Compare *Theron* paras 22-24.)

[70] Such interpretation would violate the objective meaning of the language which the parties have chosen to express their agreement and undermine the apparent purpose each provision was designed to achieve. The apparent purpose of clause 24.1.1 is to afford each party the right to terminate the employment contract by providing six months' notice at any time during the duration of the employment contract that would otherwise endure until Mr Moyo reaches normal or agreed earlier retirement age. Clause 25.1.1, on the other hand, has a different purpose, which is to confer on Old Mutual the right to decide, in its sole discretion, whether an internal disciplinary enquiry or pre-dismissal arbitration should be held in circumstances where allegations of misconduct or incapacity have been raised. It is not obliged to take any disciplinary action in such event.

[71] Nothing in the evidence regarding the factual matrix in which the employment contract was concluded and the subsequent conduct of the parties presented in the interdict application papers, detract from the objective meaning of the language used by them in the relevant contractual provisions in question, and the apparent purpose each provision was designed to achieve. As was said by Fourie AJA in *G4S Cash*

Solutions (SA) (Pty) Ltd v Zandspruit Cash & Carry (Pty) Ltd and another 2017 (2) SA 24 (SCA) para 13, -

'[w]hilst it is not for the court to prescribe to litigants whether or not, or to what extent, they should present evidence, it seems to me that a party bearing the onus in a dispute regarding the proper interpretation of a contract, should bear in mind that to simply rely on a linguistic interpretation alone may not suffice to discharge the onus. Therefore, if available, relevant evidence regarding the factual matrix in which the contract was concluded and the subsequent conduct of the parties, should be called in aid of the interpretative process.'

[72] The court *a quo* also held that

'Addendum "A" is very clear that any conflict resulting from the position of the Applicant as a non-executive director of NMT would be dealt with by the chairperson of the First Respondent and/or in terms of clause 25.2 of the contract. If the Applicant was indeed conflicted, the question is why was the matter not dealt with as described in Addendum "A"?'

[73] That provision of the protocols must also be read in context of the employment contract and of the protocols as a whole. The protocols provide that the NGC functions as a sub-committee of the Old Mutual board and shall have the principal oversight and responsibility for managing conflicts of interest and for applying and enforcing the protocols. Furthermore, Mr Moyo in terms of the protocols, undertook to adhere to any determinations made by the NGC from time to time as to the appropriate course of action in managing any conflict of interest. We know from the uncontradicted evidence presented in the interdict application that the chairman of the Old Mutual board dealt with Mr Moyo's alleged conflict of interest in the NMT matter together with the NGC and the board. Any interpretation that the provision in question requires that an issue related to conflict of interest on the part of Mr Moyo must be dealt with by employing the procedure contemplated in clause 25.2, which provides for arbitration by a private organisation, is at odds with the clear language of that provision, and is, in my respectful view, also incorrect.

[74] The use of the expression 'and/or' in that provision makes it clear that those words must in the context of that provision be read disjunctively and conjunctively. If that is done the clause envisages three options in the event of any conflict resulting from Mr Moyo's position as a non-executive director of NMT: (a) the Old Mutual board chairman could deal with such a conflict of interest, presumably in such a manner as he sees fit; (b) the conflict of interest could be dealt with by way of

arbitration by a private organisation in terms of clause 25.2; or (c) a combination of (a) and (b). (See *Brink V Premier, Free State* 2009 (4) SA 420 (SCA) para 12.)

[75] I now turn to the reliance of the court *a quo* on the *Somi* and *Motale* judgments and its view that the *Gama* judgment is distinguishable. In *Somi* the employment contract could be terminated by either party providing one month's notice to that effect or by the employer for certain reasons. It incorporated the employer's code of conduct, comprising its policies and guidelines. The policy required the holding of a 'performance enquiry' before an employee could be dismissed for poor work performance. The employer commenced a work performance enquiry as a result of the employee's alleged poor work performance, but then terminated the employment contract without notice prior to the completion of the enquiry. The essence of the employee's case was that her employment contract had been unlawfully terminated without notice and before the completion of her performance enquiry.

[76] Molahlehi J found that the employer, in terminating the employment contract in the manner it did, failed to comply with its obligations arising from the contract: It did not terminate the employment contract by providing one month's notice (the letter of termination issued by the employer terminated the employee's employment with immediate effect). Instead, the employer terminated the employment contract on the basis of the provision that permitted it to terminate the 'contract with notice should the employer not meet the employer's required performance standard' without completing the required enquiry before dismissing the employee on the ground of poor work performance, and thus in breach of the employment contract read with the policy. Molahlehi J accordingly found that the employer had repudiated the employment contract 'by terminating it without first issuing her with a written notice and by not affording her a proper and a full hearing prior to the termination of her employment'.

[77] The present case is distinguishable: Here Old Mutual expressly and unambiguously terminated the employment contract in terms of its clause 24.1.1 by providing six months' written notice, and elected not to terminate it in terms of either clause 24.1.3 or 24.1.4, notwithstanding its conclusion that there has been a complete breakdown in trust and confidence as a result of Mr Moyo's alleged conflict

of interest in the NMT matter and that Mr Moyo's conduct 'may properly be characterised as gross misconduct'. Furthermore, Mr Moyo in his founding papers in the interdict application does not rely on a breach by Old Mutual of any particular provision of its disciplinary code.

[78] In *Motale*, Gush J held the employer's termination of an employment contract based on an irretrievable breakdown of the employment relationship without convening a disciplinary hearing as required by the contract, was unlawful. There, the employer (a publisher) accused the employee (an editor of a newspaper) of publishing stories that had not been adequately cleared and generally acting in an untrustworthy manner and suspended him pending disciplinary action. The employee requested the matter to be determined at a disciplinary hearing chaired by an independent person, but the employer then summarily terminated the employment contract based on an irretrievable breakdown of the employment relationship. The employer's disciplinary code, which afforded the employee the 'right' to appear before a formal disciplinary inquiry if he was accused of misconduct, formed part of the employment contract.

[79] Gush J rejected the employer's contention that its decision to terminate the employment contract had nothing to do with misconduct but was because of the employer's view that the employment relationship had broken down and that the parties were incompatible. It was found on the facts of that case that the employer concluded, in the absence of an enquiry, that the employee was guilty of misconduct and, what had led to the conclusion of a breakdown of the trust relationship was the alleged misconduct of the employee. *Motale* was not concerned with a provision similar to clause 24.1.1 of the employment contract *in casu*, which affords either party the right to terminate the contract by providing six months' notice nor with a provision similar to clause 25.1.1, which affords the employer the right, within its sole discretion, to decide whether or not an internal disciplinary enquiry or pre-dismissal arbitration should be held where allegations of misconduct have been raised.

[80] *Gama*, a case which I consider more relevant to the present matter, was preceded by *Gama v Transnet SOC Limited and Others* (J3701/18) [2018] ZALCJHB (19 October 2018) (2018 JDR 1811 (LC)). There, in terms of his contract of employment, which incorporated Transnet's disciplinary code, the employee was

appointed as the group chief executive of Transnet. The Transnet board, through its chairperson, served its then group chief executive with a notice to suspend him from duty and he, through his appointed attorney, made representations why he should not be placed on suspension. He was not suspended, but instead served with a notice advising him to show cause why his employment contract should not be terminated in terms of a provision similar to clause 24.1.1 of the employment contract *in casu* (clause 15), and that it would be terminated if no cause was shown. Aggrieved by the threat of imminent termination of his employment, he approached the labour court, Johannesburg, seeking declaratory relief, a final interdict and ancillary relief. Because the parties agreed in terms of the employment contract that any dispute thereunder shall be decided by arbitration, Moshoana J stayed the application pending a referral to arbitration.

[81] In the interim, the Transnet board invoked the termination on notice provision of the employment contract and terminated it on six months' notice due to a breakdown of trust and confidence. His salary was to be paid in lieu of notice as he was not expected to work out his notice period. Its then group chief executive officer again approached the labour court, Johannesburg, seeking, *inter alia*, an interim interdict reinstating him in the position of group chief executive of Transnet pending the outcome of the arbitration proceedings, contending that the Transnet disciplinary code formed part of his contract of employment, and, in terms thereof, allegations of misconduct must be investigated and the matter must be referred to a disciplinary hearing. As the allegations of misconduct raised against him were not referred to a disciplinary hearing, he contended, there was a breach of his employment contract, which breach he rejected and specifically asked for specific performance.

[82] The labour court (Prinsloo J) found that, in order to establish a *prima facie* right for an interim interdict, the then group chief executive was required to show that the notice of termination was unlawful and that an arbitrator will grant specific performance by reinstating him in his post, which he had failed to do. It was found that Transnet's disciplinary code regulated dismissal for misconduct, not termination on six months' notice for a breakdown of trust and confidence in the employee in his capacity as the group chief executive of Transnet. Termination on notice was permitted in terms of clause 15 of the contract of employment. The termination of the employment contract, therefore, was not shown to be unlawful.

[83] Old Mutual's written notification of termination on six months' notice did not require any justification. There is no restriction placed on the grounds upon which the employment contract could be terminated in terms of clause 24.1.1. (See *Lottering* para 17.) The fact that Old Mutual furnished its motivation or reasons for terminating it in terms of clause 24.1.1, in my view, did not contaminate the termination or the notification thereof. On a proper interpretation of the written notice, it clearly and unambiguously conveyed to Mr Moyo that the contract of employment was terminated in terms of clause 24.1.1 upon six months' notice. The notice, therefore, complied with the requirement of the employment contract. The motivation or reasons furnished were superfluous.

[84] In the circumstances I therefore respectfully disagree with the court *a quo's* conclusion that Mr Moyo has established that Old Mutual repudiated the contract when terminating it by providing him with six months' written notice to that effect. A party to a contract repudiates a contract where it 'without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract': *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 16. Mr Moyo has not shown a *prima facie* right to a prior hearing in circumstances where his employment contract was terminated upon the provision of six months' notice in terms of clause 24.1.1 thereof. An act of termination in terms of clause 24.1.1 is a unilateral act permitted by the employment contract and does not constitute a breach or repudiation thereof, but an exercise of a right conferred by the contract. (See *McKenzie*; *Gama* para 42; *Joni v Kei Fresh Produce Market* (2018) 39 ILJ 2405 (ECM) para 11; *Lottering & others v Stellenbosch Municipality* (2010) 31 ILJ 2923 (LC) para 19.)

[85] Bearing in mind the special relationship of trust and confidence that should exist between the chief executive of Old Mutual and its board, this case, in my view, is also not a case where it has been demonstrated on the interdict application papers that Mr Moyo has a realistic prospect of obtaining specific performance (reinstatement) in due course. In our law, specific performance is a primary and not a supplementary remedy: *Santos Professional Football Club (Pty) Ltd v Igesund & another* 2003 (5) SA 73 (C). It is an ordinary remedy to which in a proper case a plaintiff is entitled. The court will as far as possible give effect to a plaintiff's choice to claim specific performance but has the discretion in a fitting case to refuse and to

leave it to the plaintiff to claim damages. Each case must be judged in the light of its own circumstances. (See *Haynes v King Williams Town Municipality* 1951 (2) SA 371 (A) at 378-379.)

[86] The practice adopted by our courts in the past was not to enforce employment contracts by way of an order for specific performance. In cases of unlawful dismissal, an employee's common law remedy was traditionally confined to a claim for damages. The reason for adopting that practice, according to Innes CJ in *Schierhout v Minister of Justice* 1926 AD 99 at 107, was probably the same as the reason why English courts did not decree specific performance in such cases, which was-

'. . . the inadvisability of compelling one person to employ another whom he does not trust in a position that imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently.'

[87] In *Gründling v Beyers and Others* 1967 (2) SA 146 (W) at 146F-G, Trollip J cited the following passage by Knight Bruce L.J. in *Johnson v Shrewsbury and Birmingham Railway Company,* (1853) 43 E.R. 358, as 'most apposite' to the facts of that case:

'We are asked to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done.'

In *Gründling*, the general secretary of the Mine Workers' Union had been summarily dismissed for alleged inefficiency. There was considerable bad blood between him and the union's executive. He also made various allegations of bad faith and malice against the executive committee. In those circumstances, Trollip J held that, even if specific performance was available as a remedy in principle, that was a clear case where it should not be granted.

[88] In *National Union of Textile Workers & others v Stag Packings (Pty) Ltd & another* 1982 (4) SA 151 (T), a full-court held that the practice of the court in allowing only the particular remedy of damages to the wrongfully dismissed employee had not been elevated to a rule of law to the effect that such contracts could be unilaterally terminated so that under no circumstances could they be specifically enforced. The

considerations referred to in *Schierhout* 'are practical considerations and not legal principles'. It was further held that-

'. . . the approach to the application of the discretion in respect of specific performance laid down in *Hayne's* case is equally applicable to the case of the wrongful dismissal of an ordinary servant.

This does not mean that the considerations mentioned in *Schierhout's* case why in such case an order for specific performance should generally speaking not be granted, should be disregarded. They are weighty indeed and in the normal case they might well be conclusive. But that is a far cry from saying that the court should therefore close its eyes to other material factors and refuse to evaluate them.'

[89] MSM Brassey '*Specific Performance – A New Stage for Labour's Lost Love*' 1981 (2) ILJ 57 at 62, points out that modern employment relationships are not necessarily characterised by closeness or confidentiality so that, on proper facts, reinstatement might be appropriate: 'To talk of a confidential relationship between a corporate conglomerate and its workmen on the shop floor is largely meaningless.'

[90] Examples of cases where orders for specific performance of contracts of employment will, in the exercise of the court's discretion, not normally be granted are *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC), *Moyane v Ramaphosa* [2019] 1 All SA 718 (GP) and *Gama v Transnet SOC Limited* ((J370/18) 22 November 2018). In *Masetlha*, the head of the National Intelligence Agency had been dismissed by the President. Moseneke DCJ said this (para 88):

'In my view, even if the contract of employment were terminated unlawfully, Mr Masetlha would not be entitled to reinstatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded here because of the special relationship of trust that should exist between the head of the Agency and the President.'

[91] In *Moyane*, the President terminated the employment of the then Commissioner for the South African Revenue Service. In dismissing the application in which the then Commissioner of SARS essentially sought interim reinstatement, Fabricius J said the following (para 36):

'The primary relief that applicant seeks is reinstatement. He has not demonstrated and cannot demonstrate such a right. It is a discretionary remedy even in Employment Law, which does not even apply on the present facts. However, even if applicant was able to demonstrate that his contract of employment was terminated unlawfully, an order for

reinstatement would not automatically follow in instances where it is firstly discretionary, and secondly, where a special relationship of trust exists between the employer and employee. In the present matter a special relationship of trust must exist between the President and the Commissioner of SARS. The President must implicitly trust the particular Commissioner that he will properly, conscientiously and lawfully carry out the functions assigned to him under the provisions of section 9 of the SARS Act. It is clear in the present instance, that this relationship has broken down irretrievably.'

[92] In *Gama*, as I have mentioned, the Transnet board terminated the employment contract of its group chief executive on six months' notice due to a breakdown of trust and confidence between him and the board. Prinsloo J said this (para 47):

'In my view specific performance in the form of re-instatement is not appropriate in circumstances where there is a breakdown of trust between an executive manager of a company and its Board. Contractual damages or alternative remedies are more appropriate in those circumstances.'

[93] Mr Moyo's position as chief executive of Old Mutual requires that a special relationship of trust and confidence exists between him, the chairperson and the board, that they are able to work together as an effective and integrated team, and that interpersonal compatibility forms an inherent requirement of his appointment as the chief executive. These requirements were expressly recorded in the contract of employment. (See clauses 3 and 12 referred to in paras 4 and 5 *supra*.) The requisite relationship of trust and confidence, objectively, no longer exists between the Old Mutual board and Mr Moyo, to which he was required to report, irrespective of who is to blame for its breakdown. That is but one of the issues for the trial court to decide in the fullness of time.

[94] The board maintains that it lost trust and confidence in Mr Moyo because of the conflict of interest it maintains he had in the NMT matter and his failure to disclose the conflict of interest to the Old Mutual board chairperson in breach of clause 14.1 of the employment contract and the protocols, or to the NGC in terms of the protocols. It also maintains that Mr Moyo acted against the interests of Old Mutual in the media statements he made after his suspension, and that such statements brought Old Mutual into disrepute. Mr Moyo, on the other hand, has lost trust and confidence in the Old Mutual board chairman and non-executive directors.

He accuses them of victimisation and 'unlawful reprisals' against him, of having acted with ulterior motives in their handling of the NMT matter, and the board chairperson of having committed 'concerning improprieties'. He accuses the non-executive directors of having been incapable of exercising independent judgment on the matter concerning himself, of having allowed themselves to be 'bullied' by the chairperson to reach the conclusion that there has been a breakdown in trust and confidence and he seeks the chairman and non-executive directors to be declared delinquent directors in terms of s 162 of the Companies Act. There is now ongoing litigation between the parties.

[95] Mr Moyo, in his application for an interim interdict, therefore, has failed to establish the first requisite for an interim interdict; a *prima facie* right to reinstatement that requires protection pending the finalisation of the action in which he claims reinstatement as a contractual remedy. The court *a quo* should not have granted the interim interdict reinstating him in the position of chief executive of Old Mutual and restraining Old Mutual from appointing any other person to that position.

[96] Mr Moyo contends that the decision of the court *a quo* is not appealable. The issue whether its 'decision' could have been appealed irrespective of the leave granted is a preliminary question in any appeal but it is one in the context of this case and in the light of my conclusion that can best be discussed at this late juncture. In *Cronshaw and another v Fidelity Guards Holdings (Pty) Ltd* 1996 (3) SA 686 (A) at 689B-D, Schutz JA said that-

'[t]he purpose of leave is to limit appeals to those that have reasonable prospects of success: *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561D-E. In itself the grant of leave does not prejudge the appeal. Where appealability is the issue on appeal (as it was in this case) the same applies. Therefore, to say what is trite, the fact that leave has been granted on a question of appealability (even by this Court) does not mean that the decision in respect of which leave is given is indeed appealable. Leave is entirely extraneous to the enquiry now before us, which is whether the grant of an interim interdict is appealable.'

The fact that the court *a quo* granted leave to appeal does not dispose of the question of appealability. (Also see *FirstRand Bank Ltd t/a First National Bank v Makaleng* [2016] ZASCA 169 para 15.)

[97] Although the interlocutory order made by the court *a quo* does not meet the requirements for appealability laid down by the Supreme Court of Appeal in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) - the order must be final in effect and not susceptible to alteration; it must be definitive of the rights of the parties, granting definite and distinct relief; and it must dispose of at least a substantial portion of the relief claimed - those requirements, as Hefer JA said in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F, do 'not purport to be exhaustive or to cast the relevant principles in stone.' And in *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2018 (6) SA 440 (SCA) para 37, Gorven AJA referred to the *Zweni* requirements for appealability and said that 'those three requirements do not constitute a closed list. This was made plain by the use of the words 'as a general principle''.

[98] The approach to the appealability of interlocutory orders that has been taken by our appellate courts for years now has been increasingly flexible and pragmatic. (See for example *S v Western Areas* 2005 (5) SA 214 (SCA) paras 25-26; *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) paras 50-51; *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA) para 2; *Government of the RSA v Von Abo* 2011 (5) SA 262 (SCA) para 17; *Phillips v Reserve Bank and others* 2013 (6) SA 450 (SCA) para 28; *Nova Property Group Holdings Ltd and others v Cobbett* 2016 (4) SA 317 (SCA) paras 8-11; *Celliers NO and Others v Ellis and Another* [2017] ZASCA 13 para 20.) But an order that is in the form of an interim interdict which operates pending the outcome of an action mentioned in the order itself, as in this case, is ordinarily not appealable. (*African Wanderers Football Club (Pty) Ltd Wanderers Football Club* 1977 (2) SA 38 (A); *Cronshaw* at 690B and 690H-691G; *Cipla* para 37; *S v S and Another* 2019 (6) SA 1 (CC) paras 46-47.)

[99] The ratio for the general rule against the appealability of interim interdicts was concisely stated by Gorven AJA in *Cipla* (para 37) to be the following:

'[45] The need to develop a policy position arises from the nature of interim interdicts. They are temporary measures designed to protect rights before a final determination can be made. Since most of these are granted by way of application, it is not ordinarily possible to resolve the competing contentions. Thus 'a necessary imperfect procedure' developed. This requires the establishment of a prima facie right, although open to some doubt, as opposed to a clear right. It also attempts to factor in the likely resultant prejudice in

assessing the balance of convenience. The stronger the prospects of ultimate success, the less the balance of convenience counts. It also allows for a reconsideration of the interdict if circumstances warrant it. As soon as the court makes a final determination, the interim interdict is discharged. This is also why a fresh application for an interim interdict pending an appeal can ordinarily be brought. In *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996 (4) SA 348 (A) ([1996] 3 All SA 669; [1996] ZASCA 58) at 360A-B] EM Grosskopf JA referred to the practical difficulty raised in *Cronshaw* that an appeal against the grant of an interim interdict would often be inconsistent with the very purpose of the remedy.

[46] Prejudice which does not affect the issues in the suit is dealt with under the rubric of the balance of convenience in an application for an interim interdict. *Cronshaw* referred to a court's discretion to impose reasonable conditions such as an undertaking to be liable in damages if it emerges that the interdict should not have been granted.'

(Footnotes omitted.)

[100] The assessment of the requisite balance of convenience – the extent of the interim harm to the applicant, if final relief is in due course granted, weighed against the interim harm to the respondent, if final relief is refused – lies within the discretion of the court from which the interim interdict is sought and is on the authorities rarely appealable. In *Cronshaw* at 691B-F, Schutz JA said this:

'There is a further explanation of a rule that allows such prejudice [the prejudice that is suffered by the subject of an interim interdict] without prompt appeal. It is that the prospective harm is one of the factors that must be judged by the court of first instance in weighing the balance of convenience: see *African Wanderers* (*supra* at 48H). This is a responsible and often difficult balancing, premised as it is on the distinct possibility that the order be wrongly granted, because of the incomplete information available to the Judge, and sometimes the haste with which such matters have to be dealt with. If the grant of an interim interdict were appealable and leave were to be granted (the test being reasonable prospects of success) the interim order would be stayed. Such a stay would be destructive of the main object of an interim interdict – to maintain the *status quo* pending the final determination of the main case.

The stay may in its turn lead to what is called an application for leave to execute (to put the order in operation again) where considerations similar to those already weighed under the balance of convenience would have to be re-assessed. The court of first instance would then be required to reach a decision, on imperfect information, a second time, all with regard to the interim situation. If it be postulated that leave to appeal can and has been granted, the appeal court would have to reconsider that situation without being in a position to reach a final decision. From a practical point of view it seems preferable that the merits of the

interdict be left for final determination at the trial, and that the interim relief, to which the balance of convenience is relevant, be considered once only.
The net effect of a contrary rule, allowing an appeal against the grant of interim orders, could be the undermining of a necessarily imperfect procedure, which is nonetheless usually best designed to achieve justice.'

[101] Both *Cronshaw* and *Cipla*, on which much reliance is placed by Mr Moyo, were concerned with the question whether an interim interdict (in *Cronshaw* in support of a two-year restraint of trade and in *Cipla* in support of patent infringement), although interim in form, was final in effect since the restraint period in *Cronshaw* will have run its course and the patent in *Cipla* will have expired by the time the main action comes to be considered. The Supreme Court of Appeal in each instance rejected the argument and held that 'final in effect' means that an issue in the suit has been affected by the order such that the issue cannot be revisited either by the court of first instance or by the court hearing the action. (*Cronshaw* at 690B and 690H-691G and *Cipla* para 47.)

[102] The present appeal does not raise the question of what is meant by 'final in effect' in distinguishing between interlocutory and final interdicts, as was the case in *Cronshaw* and *Cipla*. Old Mutual accepts that the interim interdict does not meet the requirements laid down in *Zweni*. It contends, however, that it is in the interests of justice that the interim order reinstating Mr Moyo in his position as the chief executive of Old Mutual and restraining Old Mutual from appointing anyone else in that position pending the determination of the main action, be appealable.

[103] Although it is generally considered not in the interests of justice to permit an appeal against an interim interdict since it will defeat the interim nature of the order and undermine 'a necessarily imperfect procedure, which is nevertheless usually best designed to achieve justice', it is now settled that there are limited circumstances where the interests of justice dictate that an interim interdict be appealable. (See for example *Cipla* para 37, *Department of Home Affairs and another v Islam and others* [2018] ZASCA 48 para 10 and *Velocity Trade Capital (Pty) Ltd v Quicktrade (Pty) Ltd and others* [2019] 4 All SA 986 (WCC), para 30 *et seq*. Also see the Constitutional Court judgments in cases such as *S v S* paras 46-47, *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) para 40, *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA

620 (CC) para 16 and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 25, although it should be borne in mind that the operative standard for determining whether leave to appeal should be granted by the Constitutional Court is the interests of justice.) In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. (*Member of the Executive Council for Development and Planning and Local Government, Gauteng v Democratic Party and others* 1998 (4) SA 1157 (CC), para 32.) In other words, it is a fact-specific enquiry. (*S v S* para 47.)

[104] I am of the view that the present matter is one of those exceptional cases where the interests of justice demand that the interim interdict be appealable. The fact that it is not definitive of the rights about which the parties are contending in the main action and does not dispose of any relief claimed in respect thereof, although a relevant and important consideration, cannot be decisive and the determining factor in this instance. The interim interdict should not have been granted in the first place by reason of a failure to meet the first requirement for the granting of an interim interdict. (*Tshwane City* para 41; *Phillips*, para 28.) The interdict, although interim, has an immediate and substantial effect. The irreparable harm which Old Mutual – one of the oldest and largest companies in our country with more than 30 000 employees - its shareholders, employees and other stakeholders stand to suffer if the interim interdict is allowed to stand, requires no imagination or elucidation. The reality of the order is that Old Mutual is forced to live with its adverse effects as long as the main action is pending or remains inconclusive by reason of appellate processes. It is forced to be governed by a chief executive and a board, to whom the chief executive is supposed to report and obliged to maintain its ongoing trust and confidence, who have lost complete trust and confidence in one another and who are involved in ongoing litigation. The interests of justice in the particular circumstances of this case demand that the order should be corrected forthwith before the proceedings have run their full course and before it has any further adverse consequences.

[105] In the result, the following order is made:

(a) The appeal is upheld with costs, including those of two counsel for the first and second appellants and of two counsel for the third to sixteenth appellants.

(b) The order of the court *a quo* is set aside and substituted with the following order:

The application is dismissed with costs, including those of two counsel.

P.A. Meyer
Judge of the High Court

I agree.

K.E. Matojane
Judge of the High Court

I agree.

R.M. Keightley
Judge of the High Court

Heard: 4-5 December 2019
Judgment: 14 January 2020

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